

International trade agreements challenge tobacco and alcohol control policies

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Abstract

*This report reviews aspects of trade agreements that challenge tobacco and alcohol control policies. Trade agreements reduce barriers, increase competition, lower prices and promote consumption. Conversely, tobacco and alcohol control measures seek to reduce access and consumption, raise prices and restrict advertising and promotion in order to reduce health and social problems. However, under current and pending international agreements, negotiated by trade experts without public health input, governments and corporations may challenge these protections as constraints on trade. Advocates must recognise the inherent conflicts between free trade and public health and work to exclude alcohol and tobacco from trade agreements. The Framework Convention on Tobacco Control has potential to protect tobacco policies and serve as a model for alcohol control. [Zeigler DW. International trade agreements challenge tobacco and alcohol control policies. *Drug Alcohol Rev* 2006;25:567–579]*

Key words: alcohol and tobacco control policy, trade, trade agreement.

Introduction

Public health measures seek to control and reduce the health and social consequences of tobacco and alcohol consumption through reduced access, limiting promotion and increasing product prices. Free trade policies have objectives that are fundamentally incompatible to these measures [1–3]. Liberalisation of alcohol and tobacco trade increases availability and access, lowers prices through reduced taxation and tariffs and increases promotion and advertising of tobacco and alcohol [4]. More challenges and uncertainty loom as business interests press through trade agreements to do what these agreements are intended to do, i.e. to ensure and maximise free movement of investments, services and goods [4–9]. Trade agreements treat alcohol and tobacco as conventional ‘goods’ and on the principle that expanding commerce in these products is beneficial and challenges, policies to control these ‘goods’ ‘appear to be well grounded in reasonable interpretations of trade agreements’ [10–12]. This paper reviews the major literature on international trade agreements as they relate to alcohol and tobacco control policies,

makes recommendations for research, and suggests policies to protect public health.

Alcohol and tobacco are not ordinary trade commodities

Alcohol use is deeply embedded in many societies. Overall, 4% of the global burden of disease is attributable to alcohol, which accounts for about as much death and disability globally as tobacco or hypertension [6]. World-wide, approximately 2 billion people drink alcohol, of whom about 76.3 million have alcohol use disorders. Alcohol, globally, contributes to 1.8 million deaths and widespread social, mental and emotional consequences [1]. Tobacco is the leading preventable cause of death and disease in the world. By 2030 it is expected to kill 10 million people each year, an epidemic particularly affecting developing countries where most of the world’s smokers live [13].

Alcohol cannot be considered an ordinary beverage or consumer commodity because it is a drug that causes substantial medical, psychological and social harm by means of physical toxicity, intoxication and dependence

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Received 13 November 2005; accepted for publication 24 May 2006.

[7,14–17]. Because tobacco products are highly addictive and lethal when consumed in a ‘normal’ way, they should be treated as an exception in trade negotiations [4,8,18,19].

Background to trade agreements

According to the World Trade Organisation (WTO), liberalising trade promotes competition and efficiency, provides lower prices, better quality and wider consumer choice and increases domestic and foreign investment—all of which lead to economic growth and raises standards of living [4,20]. However, many critics see free trade agreements as ‘unhealthy and inappropriate public policy’ [3,6,12,21,22].

International trade agreements are treaties establishing rules for trade among signatory countries. In 1948, 23 nations formed the General Agreement on Tariffs and Trade (GATT) to reduce tariffs and increase trade in *goods* and products. Subsequently, trade talks led to the 1994 Uruguay Round and formation of the World Trade Organisation in 1995. The WTO Agreement includes the General Agreement on Trades and Tariffs (GATT 1994), the Technical Barriers to Trade Agreement (TBT), the General Agreement on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS). Underpinning these are dispute settlement mechanisms and trade policy reviews [20].

Nations wishing to join the WTO must describe all aspects of their trade and economic policies that have a bearing on WTO agreements [20]. A recent report for the World Bank indicated that the price of accession is rising and represents possible one-sided power plays as current WTO members ‘wring commercial advantage out of weaker economic partners’ [23]. These concessions often involve tobacco or alcohol. For example, Taiwan adopted a new tobacco and alcohol management and tax system as a condition for accession [24] and Algeria lifted a ban on alcohol imports to help negotiations for WTO membership [25].

Parties to the WTO Agreement accept it as a whole, except for the regional and bilateral agreements into which countries may enter separately. Each of the 148 WTO member countries must comply with certain requirements or ‘General Obligations’ which include:

- Most-Favored-Nation (MFN) Treatment: each country must treat products and service suppliers from all other WTO member countries equally.
- National Treatment: the country must treat foreign suppliers no less favorably than domestic suppliers.

These policies are axioms of international trade policy that mirror goals of some, if not all, developed nations

(and surely the tobacco and alcohol industries that we are addressing) to: reduce the role of government in general; restrict a government’s ability to regulate; privatise ownership and production of services and goods; reduce public funding generally and, particularly, subsidies to private corporations; and decentralise administrative and financial procedures to the state at the local level [26]. ‘Liberalisation’ is the term for removing government restrictions on cross-border commerce through trade agreements. Liberalisation opens competition, leads to decreases in prices and results in higher consumption of tobacco products [9]. Experts predict the same with alcohol products [27].

Technical Barriers to Trade Agreement (TBT)

Regulations, standards, testing and certification procedures may be considered technical barriers to trade [20]. The TBT sets a code of practice by central and local governments and non-governmental bodies related to products and processes so that barriers to trade do not occur [12]. This agreement may also cover health, safety, environmental and consumer regulations [11]. While TBT has not yet involved tobacco-related controversy among WTO members, the agreement could affect product requirements, ingredient disclosure and package labelling [10]. Philip Morris used TBT arguments to contest a Canadian ban on use of the terms ‘mild’ and ‘light’ in cigarette promotion, because the corporation said that a ban was not the least trade restrictive alternative to reduce tobacco-related problems. The same argument can affect plain packaging and labelling requirements. Indoor air smoking regulations must also comply with TBT, which forbids exceeding international standards [4,8]—depending on which standards are selected. The 2005 Secretariat of the Pacific Countries report on trade included other tobacco control measures which may fall within the scope of and could be deemed more trade restrictive than necessary by TBT: rules on tobacco product ingredients; emissions from products; ingredient disclosure on packages; information on methods of production; differential taxation; protection of health and the environment surrounding tobacco growing and processing [4]. TBT might also affect public health measures relating to alcohol production and sale, alcohol licensing restrictions and sales in stadiums or other venues [5].

Tariffs and taxation

Under GATT, from the 1940s to the formation of the WTO, trade agreements focused on trade in *goods* and, specifically, reducing tariffs and taxes [28]. In the 1990s, the EU Commission challenged the high tax policies of Britain, Ireland and Nordic countries and lower tariffs

on alcohol exports by seeking harmonisation of alcohol taxes with pressure to lower and not raise taxes [29,30]. Canada and the United States used GATT arguments to attack each other's alcohol control systems. Following a US challenge, Canada lowered minimum prices and allowed access for cheaper US-produced beer to Ontario's monopoly beer retail system [31].

- The United States, Canada, and the European Union used the leverage of national treatment rules to eliminate Japan's high taxes on imported spirits (based on alcohol concentration, ingredients and processing) versus the traditional liquor *shochu*—resulting in a drop in the price of spirits [4]. Japan thus opened its market in 1996 not only to vodka (deemed 'like' *shochu*) but also to gin, rum, brandy, whiskey and other imported spirits [32].
- Subsequently, developed countries filed complaints that the taxes in Chile and South Korea discriminated in favour of their indigenous versus imported spirits. In a 1998 Chilean case, the WTO panel ruled that spirits with a higher alcohol content could not be taxed at a higher rate because this afforded protection to the Chilean liquor *pingo* against imported spirits with higher alcohol content. Chile expressed candid exasperation and surprise in the dispute documents over WTO pressure to change its domestic regulation. 'Chile further maintains that it is likewise inconceivable that members of the WTO, particularly developing country members, thought or think that, in joining the WTO and accepting thereby the obligations of Article III:2, they were foregoing the right to use fiscal policy tools such as luxury taxes or exemptions or reduced taxes for goods purchased primarily by poor consumers, even if such policies result in higher taxes on many imports than on many like or directly competitive products' [33].

While US President Clinton's administration generally kept a promise to cease using trade threats to force open tobacco markets, the 1992 US–China bilateral market opening agreement required China to slash tariffs on imported cigarettes [8,10]. Similarly, the recently ratified US–Central American–Dominican Republic Free Trade Agreement reduced tobacco and alcohol tariffs, which the Distilled Spirits Council of the United States said 'will have a direct and immediate impact on the sale of U.S. made spirits products' [34].

The WTO conducts Trade Policy Reviews of member nations' trade which pressure for homogenisation and liberalisation of policies. For example, the 2004 report on Norway pointed out areas inconsistent with WTO goals. In recent years, cross-boarder shopping to Sweden increased due to Norway's higher

food prices and its high levels of excise duties on alcohol and tobacco. A further decrease in excise duties in Sweden, triggered by European Community rules on imports of alcohol for personal use, could further increase downward pressure on Norwegian excise duties [33].

Tariffs are one form of 'discrimination' allowed under WTO if applied fairly and uniformly. However, regional and bilateral agreements apply pressure to remove them [10]. The 2005 Secretariat of Pacific Countries trade report indicated that import tariffs tend to lessen demand and consumption in several ways: by increasing the price of imported products, may depress prices of domestic products which have less competition, may reduce the need for aggressive marketing and promotion of domestic products and, with less outside competition, producers may not be pressured to improve the quantity and variety of products. Elimination of import tariffs on tobacco and alcohol products could change the market dynamic and significantly undermine government efforts to reduce consumption levels and related harms. However, merely increasing taxes on all foreign and domestic products will not necessarily address all the market effects that come from tariff reduction. Moreover, the Pacific Countries' report expressed regret that differential taxes that might favour domestic brands with weaker strengths or ingredients that are less harmful will be challenged under national treatment provisions of trade agreements [4].

National treatment

National treatment means that each country must treat services and suppliers from other WTO countries equally. This 'golden rule of international trade law' extends the best treatment given domestically to foreign trading partners [5]. According to GATT, tax and regulatory measures apply equally. GATT applies national treatment to *services* while the North American Free Trade Agreement (NAFTA) applies it to goods, services and *investments*. However, as equal treatment may still be insufficient to achieve substantive national treatment other more favourable provisions may be required to ensure that imported products are treated no less favourably. A 1989 GATT panel required 'effective *equality of opportunities* for imported products' [emphasis added]. This 'clearly constrains government measures taken to control alcohol as a good'. For example, alcohol control strategies might seek to limit exposure to the product lest the public acquire a taste for new types of products, especially with higher alcohol content. However, what may be good health policy, from a GATT perspective, is illegal protectionism and discrimination against foreign competitors [5].

Many international taxation disputes have been based on the national treatment rule, i.e. the country must

treat foreign suppliers no less favourably than domestic interests. Disputes over what constitutes a ‘like’ or ‘substitutable’ product have been pivotal. For example, Denmark’s excise duty on spirits was attacked successfully under the European Economic Community Treaty because the domestically produced *aquavit* was deemed ‘like’ the higher taxed imported spirits. In 1983 there was a successful challenge to the United Kingdom’s duties on wine and beer on the grounds that they favoured a domestic product over wine, an imported product [5].

Similarly, in 1999, the European Union was able to overturn Korea’s tax system for spirits because imported spirits and the domestic *soju* were ‘like’ products and the differential tax violated national treatment GATT rules on internal taxation and regulation. South Korea then moved to equalise taxes on *soju* (an indigenous 25% ethanol spirit) and imported whisky (usually 40–43% ethanol) and was ordered to change its law, pay compensation or face retaliation [5].

In the 1980s the United States, supported by the European Community, seeking to open Asian markets to tobacco, filed a complaint against Thailand under GATT. Thailand had imposed a ban on imported cigarettes contending that they contained additives and chemicals that made foreign products more harmful than domestic cigarettes. Unable to prove justification for a ban on imports as part of a comprehensive tobacco policy, Thailand had to lift its import ban and to reduce tobacco excise duties [11,28]. The trade tribunal declared these measures to be unjustified based on national treatment because countries have acceptable alternatives to a ban, e.g. labelling rules, a tobacco advertising ban and domestic monopolies, as long as they did not discriminate against foreign enterprises [26]. Moreover, cigarette ingredients could be controlled by requiring ingredient disclosure and banning unhealthy substances [4,19].

The decision showed that the GATT public health exception had some meaning and could be invoked to defend some public health regulations. But it demonstrated, too, that the exception would be narrowly framed, i.e. ‘necessary’ was interpreted narrowly with a bias against rules that discriminate against foreign investors. Moreover, the trade panel ignored health input and dismissed arguments in support of Thailand by the WHO. Lastly, this case may not be a binding precedent because WTO rules do not require dispute panels to follow precedent [11]. While some may view the Thai case as a victory [19], the net result has been an increase in tobacco consumption in Asia [9]. Moreover, the Thai decision predates the GATS and with the overlapping authority of GATT and GATS, it is uncertain if the Thai ban on advertising could survive challenges now under GATS (see below) [2].

The General Agreement on Trade in Services (GATS)

GATS is the first and only set of multi-lateral rules governing international trade in services. The 148 WTO members account for over 90% of all world trade in services under GATS and no government action, whatever its purpose is in principle beyond the scrutiny and challenge of the GATS [35]. GATS covers all government measures taken by ‘central, regional or local governments and authorities; and non-governmental bodies’ in the exercise of government-related powers’.

GATS covers a broad range of service sectors: professional, health-related, educational and environmental services; research and development on natural sciences; and production, marketing, distribution and sales of products, including alcohol and tobacco [4]. For example, services might include the production, transportation of grain to the brewery or distillery, alcohol production, bottling, distribution, marketing, advertising and serving of alcohol [36].

GATS provides a framework for negotiations. A participating country can choose to open specific service sectors, specify conditions on the trade and can also request other participating countries to open trade in their service sectors.

Member countries declare their Schedules of Commitments of areas where specific foreign products or service providers will have access to their markets [4]. For GATT, these take the form of binding commitments on tariffs on *goods*. Under GATS the commitments state how much access foreign *service* providers are allowed [20]. If a country chooses to open a service sector to trade, there are ‘Specific Commitments’:

- Market access: the country must provide full market access. The country may not have laws, rules or regulations that restrict the *number* of service providers.
- National treatment: the country must treat foreign service suppliers no less favorably than domestic suppliers.
- Domestic regulation: if a country opens trade in a service, the country ensures that its regulations are administered objectively and impartially.

Each country can specify the level of market access and national treatment it will allow for each service sector it opens to trade. The European Union and United States seek market access on tobacco and alcohol in all countries, while Canada will not make commitments on alcohol.

GATS recognises the need for many services to remain carefully regulated to serve the public interest. The GATS distinguishes between regulations that act

as trade barriers, which distort competition and restrict access by service providers, and regulations that are necessary but not more burdensome than necessary to ensure the quality of service and protect the public interest. This vague standard invites WTO panels to review, from a strictly commercial perspective, domestic regulations that affect services [2]. Once governments agree to have a service fully governed by GATS (full market access commitment) they can no longer place limits on it. Because GATS defines trade as covering supply of services between and within countries, limits on potentially any type of advertising may be threatened [37].

Even though GATS provides governments with a certain degree of flexibility, there are serious limits which trade proponents may understate. GATS does enable governments to withdraw from previously made commitments as long as they are prepared to compensate other governments whose suppliers are allegedly adversely affected. Because GATS also covers investments, services provided through commercial presence, the Agreement goes beyond previous GATT rules [35].

Experts claim that GATS may be used to challenge government attempts to regulate cigarette advertising, impose licensing requirements for tobacco wholesalers and retailers, to ban sales to children and to require minimum package sizes. Because service sectors overlap, it may not be possible to insulate tobacco control from challenges, e.g. tobacco-branded services like Benson & Hedges Cafes or Salem Cool Planet may fit within classifications of advertising, retail, entertainment or food services. GATS could affect banning smoking in public places such as restaurants and bars and restrictions on distribution outlets for tobacco products [2,11].

Quantitative restrictions

GATS Article XVI (market access) prohibits limitations on the number of service suppliers. Consequently, signatories to GATS with commitments under 'distribution services' will probably have restrictions on regulatory measures to limit alcohol supply and limiting retail outlets, total volume or total sales. GATS completely prohibits these 'quantity-based restrictions' even when they are applied equally to domestic and foreign products [5,36].

Germany had minimum alcohol content rules designed to prevent proliferation of beverages with low alcohol content. This was challenged successfully under Article 30 of the 1979 European Economic Community Treaty. Quantitative restriction considerations were also used against the Netherlands' minimum prices for gin, and in 1987 against Germany's prohibition of sale of beers not in compliance with the country's purity requirements [5].

Antigua challenged the US prohibition on cross-border (internet) gambling. The WTO Appellate Body found that the United States violated GATS market access with a quantitative restriction, its zero quota. Regardless of the US intention not to include gambling as a service, the WTO panel said that gambling came under 'recreational services' which the United States had committed to open trade. Now an array of US gambling regulations are subject to challenge under GATS, e.g. number of casinos or state monopoly lotteries. According to Lori Wallach's testimony at the EU Parliament's Committee on International Trade, this decision has significant implications for domestic policies, even those with flat bans on certain 'pernicious' activities or 'undesirable behaviors' in covered sectors of trade agreements [38,39].

WTO Director-General in 1998, Renato Ruggiero, predicted controversy. '[T]he GATS provides guarantees over a much wider field of regulation and law than the GATT; . . . in all relevant areas of domestic regulation . . . into areas never before recognized as trade policy. I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments' [35].

Impact on state monopolies

There has been a world-wide shift towards privatisation of state-owned enterprises, opening markets to global competition and consolidation by multi-national corporations [28]. Proponents of WTO agreements state that government services are carved out and that nothing in GATS forces privatisation of publicly held companies. However, critics see great pressure in trade agreements to privatise government and other not-for-profit monopolies as incompatible with national treatment and market access principles of GATS [4,10,35]. The alcohol monopoly systems in Finland, Norway, Sweden and Canada are based on a common objective to reduce individual and social harm as a result of alcohol consumption by reducing opportunities for private enterprises [40]. European integration led to unprecedented and sustained pressure against off-premise retail monopolies, greater scrutiny of the import, export and wholesale monopoly functions and broad challenges to the price and taxation systems. While allowed under trade agreements, the EU forced privatisation of wholesale and product monopolies [27] which deprived governments of revenue while raising problems associated with increased consumption [5].

Finland joined the European Economic Area Agreement and applied for European Union membership in 1992. Subsequently, a 1994 European free trade agreement ruling favoured market considerations over alcohol policy restrictions and the entire Nordic alcohol control model has had to change dramatically [5,31]. Consistent

with a common liberalisation theme in WTO Trade Policy Reviews, the report on Norway and the status of its trade barriers indicated that 'Arcus Produkter had the exclusive right to produce spirituous beverages and to sell and distribute spirits for technical and medical purposes in Norway. The company was privatized between 2001 and 2003, and the monopoly for the production of spirits in Norway was abolished' in 2002 [41].

According to the European Union (EU) request of Canada, 'EU equates the Canadian Liquor Boards with monopolies, and perceives these monopolies as imposing restrictions on European imports' [42]. The 2003 WTO Trade Policy Review pressured Canada to liberalise by pointing out that '[f]ederal and provincial government-owned enterprises with special or exclusive privileges are involved in alcoholic beverages and wheat trade' [43]. There has also been pressure on China and Taiwan during negotiations to join WTO to privatise their state tobacco monopolies [2].

Thirty years ago, state-owned tobacco companies were common throughout Latin America, Asia and Europe. Most have been privatised (for economic and not health reasons). However, from a public health perspective, the goal should be to utilise all policy options to reduce tobacco use. These measures include maintaining state-owned tobacco companies or alcohol distribution networks if doing so is likely to lower rates of consumption [28,44].

Finally, pertinent to GATS, negotiations to open specific service sectors to trade are ongoing under the WTO with a unofficial deadline of January, 2007 [38]. The final Declaration of the December 2005 WTO Hong Kong Ministerial meeting indicated that members 'must intensify their efforts to conclude the negotiations on rule-making' under GATS. 'Members shall consider proposals and the illustrative list of possible elements' referred to in a single footnote referring to the November, 2005 Report of the Working Party on Domestic Regulation. The new trade 'disciplines' on domestic regulation would require governments to take the least-burdensome approach when regulating services and constrain both the content and process for democratic lawmaking. Secondly, the 'disciplines' would limit the range of legitimate objectives to ensure the quality of a service. Proposing 'use of relevant international standards' would empower national governments to preempt local standards and would increase the threat of trade disputes if national and sub-national standards are more burdensome than international standards [45–49].

Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS was the first multi-lateral agreement on intellectual property rights. Relevant to alcohol and

tobacco, portions of TRIPS cover trademarks, product logos, brand names, trade secrets and geographic indications with special provisions for wines and spirits, e.g. Champagne and Scotch protect their geographic designations [20]. TRIPS could affect trademark protection and disclosure of product information considered confidential by producers [4,10,12].

Tobacco companies invoked intellectual property arguments to challenge Canada, Brazil and Thailand, which require plain cigarette packaging and larger health warnings, alleging that these measures encumbered use and function of their valuable and well-known trademarks [11]. Moreover, Thailand and others violated intellectual property agreements by requiring listing of cigarette ingredients. However, the Australian and South African large health warnings have not yet been challenged [9].

McGrady's recent review of TRIPS and trademark issues related to tobacco called for renegotiation of the agreement in order to clarify its scope and principles [50].

General Agreement on Agriculture

The WHO/WTO joint report on trade and health cautioned that the Agreement on Agriculture could affect government support for tobacco products [12]. The Agriculture Agreement might also undercut national government programmes to provide incentives for tobacco growers and related businesses to diversify away from tobacco [4]. This reviewer believes that in the context of current disputes between developed and developing countries over agricultural subsidies, issues could also arise over government assistance to wine producers.

International trade agreements procedure and process

Trade agreements are negotiated by government representatives. For example, the US Trade Representative is authorised to negotiate trade agreements on behalf of the United States.

Negotiations on trade agreements are not open to the public or the press. However, many countries, including the United States, publish their initial positions, and some publish their ongoing negotiating 'offers' and 'requests' on trade issues. Requests from some countries are not disclosed to the public. As a general rule, even less information is publicly available on the positions and negotiations of regional and bilateral agreements [51].

Federal law requires the US government to consult with the private sector in the development of trade negotiation proposals. Both the Department of Commerce and the US Trade Representative have

established formal private sector advisory committees. The US trade advisory committees have no public health representation and are, instead, led by industry representatives, e.g. tobacco, alcohol, fast-food and pharmaceutical interests. Texts of the trade agreements are published for public comment *following* completion of negotiations. Agreements require ‘fast-track’ Congressional approval, which means voting on each final agreement as a whole, without opportunity for amendment [51].

Enforcement of trade agreements

Trade agreements are made and enforced and bind national governments but not corporations [36]. Previously, only national governments could bring legal actions to enforce the provisions of trade agreements but under recent regional treaties investors can bring suit against a government. While trading members are urged to resolve disputes through consultation, WTO rules establishes tribunals (panels) of trade experts who have no background in public health to decide controversy [10,11,51]. If found contrary to WTO rules, a government must either change its laws or face trade sanctions or fines equal to the amount of harm to other countries based on lost market opportunities [11].

GATS, signed in 1995, has far-reaching implications for alcohol policy. Relating to trade in all services, GATS is also ‘the world’s first multilateral agreement on investments and covers cross-border trade and every possible means of supplying a service, including the right to set up commercial presence in the export market’ [52].

Because the purpose of trade agreements is expansion of trade, agreements can only constrain or proscribe—rather than strengthen—government regulation of alcohol advertising and, in the past decade, targets even even-handed non-discriminatory policies [37].

One of the most significant features of GATS is to develop new restrictions on ‘domestic regulation’. When challenged, a government must demonstrate that even non-discriminatory regulations are ‘necessary’ and that no less commercially restrictive alternative measure was possible. This is a potent provision affecting potentially all public regulations.

Regional and bilateral free trade agreements

There is a growing trend, due largely to the European Union and United States, for nations to negotiate regional and bilateral free trade agreements. There will be approximately 300 regional and bilateral trade agreements world-wide by the end of 2005, a sixfold rise in two decades. Bypassing the WTO, these offer flexibility to pursue ‘trade-expanding policies not addressed well in global trading rules’ [53]. Bilateral

and regional agreements can only be stronger than WTO rules which imposes minimum obligations on all members. Therefore, these bilateral and regionals may cut tariffs below but not above WTO levels, have stronger intellectual property or investment provisions but not weaker. The United States hopes to have so many of these agreements covering enough of the globe to have changed international norms [11]. The US–Singapore trade agreement eliminated tobacco tariffs and contained provisions that investors can challenge government regulations.

Investment protection

While WTO rules have relatively weak protections for investors, new regional agreements contain greater enforcement provisions [26]. The North American Free Trade Agreement (NAFTA), between Canada, United States and Mexico, included the first investor rights clause in regional trade agreements and contains very strong investment provisions [11].

NAFTA has a broad definitions of ‘investment’, ‘investor’ and ‘enterprise’ and makes no distinction between socially beneficial and socially harmful investments. Moreover, it has a broad meaning for expropriation with mandatory compensation at fair market value. Determining expropriation and compensation are appropriate roles for government. However, NAFTA prohibits not only direct but indirect expropriation and ‘measure[s] tantamount to... expropriation’. In one of the first NAFTA investor vs. state disputes, US-based Ethyl Corporation challenged Canadian pollution control legislation that banned a gasoline additive from import and inter-provincial trade. Ethyl Corporation alleged that the legislation was ‘tantamount to expropriation’. Assuming defeat, Canada paid Ethyl \$US13 million, issued an apology, and rescinded the ban on the gasoline additive.

Rather than basing compensation on ‘out-of-pocket expenses’ NAFTA uses ‘fair market value’, which enables compensation for loss of *anticipated* profits from non-discriminatory regulatory measures. In 1999, US-based Sun Belt Water submitted a claim against Canada for ‘permanent lost business opportunity’ of \$US 1.5–10.5 billion for action by the Province of British Columbia action to end removal of bulk water by tankers [36].

Most trade agreements enable only governments to bring challenges against other governments (state-to-state) [11]. However, an important feature of several current trade agreements is to allow foreign investors to directly challenge a government for alleged breaches of the treaty [9]. The investor–state dispute mechanism bypasses domestic laws and juridical authority and short-cuts ways that governments normally resolve disputes between themselves. Investor rights provisions

have been proposed or adopted in US bilateral or regional agreements [35].

Tobacco companies used NAFTA, not TRIPS, which does not allow investor standing, to challenge Canada's regulations requiring plain cigarette packaging as expropriation of intellectual property—even though the packaging requirement was to apply equally to domestic and foreign products. US firms contended that these tobacco control measures constituted an expropriation of property rights requiring compensation of hundreds of millions of dollars. The threat of an investor vs. state dispute from US tobacco interests convinced Canada to back down from instituting plain packaging with health warnings for cigarettes [11,26,37].

A number of NAFTA panel decisions suggest that companies may have exaggerated claims of property loss. Nevertheless, the treaty expropriation provision creates uncertainty, has a chilling effect on health legislation, and contributes to a rise in investor nuisance complaints [37].

A small Canadian tobacco firm, Grand River Enterprises Six Nations, is using NAFTA to challenge the 1998 Master Settlement Agreement between 46 States and four major tobacco firms in the United States. As part of the settlement, States decided to make the provisions of the agreement applicable to *all* tobacco companies, including non-defendant companies, such as Grand River, which must contribute a percentage of their sales to escrow accounts set up in each State [54].

Grand River filed an investor-state claim in 2004, seeking US\$ 340 million in compensation for alleged violations of NAFTA Chapter 11. Specifically, the petitioners are arguing that the requirement to make payments into State escrow accounts constitutes an expropriation in violation of NAFTA because their cigarettes cannot be sold in states where the firm does not comply with state escrow laws. Grand River also argues that it is being discriminated against in violation of NAFTA because domestic firms that participated in the settlement are operating in the United States without contributing to an escrow fund. Lastly, Grand River claims that the United States has violated most favoured nation provision because other non-tobacco foreign firms are not required to maintain an escrow account while doing business in the United States [54].

The 46 affected American States have no standing in NAFTA investor-state disputes and depend on the US Trade Representative to defend their interests. A tribunal decision in favour of Grand River would give Mexican and Canadian tobacco firms a back door out of the 1998 master agreement and undermine the entire multi-billion dollar settlement [26,53,55]. This case is before the NAFTA tribunal.

Not only are many non-governmental, public health and anti-globalisation groups concerned about the

rapid development of and innovations in regional and bilateral agreements. The World Trade Organisation itself set up a special Committee on Regional Trade Agreements as early as 1996 to monitor and assess whether regional trade agreements help or hinder the overall WTO [20]. A 2005 WTO Discussion Paper (no. 8) reviewed what were perceived as challenges to WTO members and the entire multi-lateral trading system from the 'irreversible' changing landscape of RTAs. Of concern were the 'regulatory regimes which increasingly touch upon policy areas uncharted by multilateral trade agreements [which] may place developing countries, in particular, in a weaker position than under the multilateral [i.e. WTO] framework'. As for the entire multi-lateral trading system, the proliferation of RTAs is 'already undermining transparency and predictability in international trade relations, which are the pillars of the WTO system'. The report's tone was very negative about exercising 'better control of RTAs dynamics', minimising 'the risks related to the proliferation of RTAs' or dealing with 'troublesome discrepancies between existing WTO rules and those contained in some existing RTAs'. The report ended with hope but not much confidence that WTO Members can address these thorny issues [56].

Advertising restrictions

Restrictions on advertising are important components of tobacco and alcohol policy. There have been several examples of advertising bans being upheld by trade panels. One is the 1980s Thai challenge by the United States, in which the GATT tribunal declared that Thailand could ban tobacco advertising because it was non-discriminatory [19]. More recently, the European Court ruled that even though the French Loi Evin alcohol advertising ban constituted a restriction on services, it was justified to protect public health [57]. There may be an interesting dual jeopardy—advertising is a good under GATT and a service under GATS. Because a prohibition on advertising is the strictest possible limitation on trade in advertising services, it would be the hardest to justify as 'necessary'. Probably, a local ban on outdoor alcohol advertising could be countered by industry self-regulation as a suitable alternative. Alcohol awareness or media 'drink responsibly' campaigns could be ruled reasonable alternatives to total advertising bans [33,37].

While advertising challenges have not come to the WTO, a Swedish court applying EU law ruled against a Swedish alcohol advertising ban brought by the European Commission after a complaint by a Swedish food magazine. The court ruled that the ban discriminates against imports because domestic brands are *already familiar to the public*, i.e. that it was *de facto* discrimination [37]—a possible precedent for other

advertising regulations on health issues or professional services. Due to potential threats of a WTO challenge using new provisions in the GATS [12], it will become much harder for consumer groups to convince regulators that outright bans or strong restrictions are the approach to take [30,58]. Not surprisingly, the World Spirits Alliance sees opportunities in trade agreements to liberalise restrictions on distribution and advertising [37].

Anti-smuggling measures

Smuggling has been an issue in tobacco control and measures to deal with it are incorporated into the Framework Convention on Tobacco Control. However, a 2004 WTO panel, basing its decision on GATT national treatment rules, found that measures which the Dominican Republic imposed to restrict cigarette smuggling had the effect of modifying conditions of competition to the detriment of imports, even though the measures applied equally to domestic and foreign cigarettes [4,9].

Agreement on the application of Sanitary and Phytosanitary Measures (SPS)

SPS is a separate WTO agreement on food safety and animal and plant health standards. While alcohol beverage disputes have come out of provisions in GATT, TRIPS and TBT agreements, the SPS agreement could affect issues related to additives, contaminants or toxins in beverages in future disputes. This is problematic, as SPS takes precedence over weak health exemptions in GATT [4].

Health exemptions

The preponderance of researchers on trade and public health are very sceptical about the exemptions in trade agreements and whether they are adequate or weak, at best [8,10,26,32]. However, Bettcher and Shapiro [18,19] expressed less concern, arguing that health exemptions present governments with significant protection and flexibility. Shapiro contends that the problem is not the WTO rules but rather the lethal tobacco product and that governments can implement comprehensive tobacco control measures [18].

Both the 1994 General Agreement on Tariffs and Trade (GATT Article XX-b) and the General Agreement on Trade in Services (GATS Article XIV-b) provide a limited exception to trade rules in order to protect human, animal or plant life or health. However, this exception is subject to several tests which have been difficult to meet. To withstand a challenge, a government measure that protects life or health must be neither 'arbitrary or unjustifiable discrimination', a

disguised restriction on trade in service, or more trade-restrictive than 'necessary'—'formidable hurdles' [26,35]. To establish that a measure is 'necessary', a nation must also show that it is effective and that no other alternative policy is available that would be less restrictive to trade [10,12]. Moreover, GATS Article VI.4 requires that a measure must be 'actually necessary to achieve the *specified legitimate objective*' [emphasis added]. Because there is almost always an alternative to a policy, regardless of whether the alternative is effective or politically and financially feasible, necessity has been difficult to prove conclusively. Consequently, Article XX is an ineffective exclusion [11,36].

Only one regulatory measure has ever been saved based on GATT Article XX—a French ban on asbestos products in a case brought by a Canadian company. France won the dispute because its ban prevents catastrophic rates of death from asbestos exposure [4,8]. The WTO Appellate Body ruled that a regulation that violates trade commitments and severely restricts trade is justifiable *if* the 'value pursued is both vital and important in the highest degree' [30].

Such reservations are interpreted narrowly under international law and apply only once, i.e. they protect existing measures against specific provisions of a particular agreement and do not create binding precedent [10]. Thus limited, reservations do not assure future policy flexibility. Moreover, NAFTA includes a preemption 'standstill' which prohibits introduction of new or more restrictive measures or exceptions. Many agreements also require a 'rollback' to reduce or eliminate non-conforming measures. Therefore, the only way to permanently protect measures to protect public health is for treaties to explicitly protect them from challenge [32].

GATS Article XIV has not been involved in WTO disputes but is likely to provide problems because its language is more narrow than GATT Article XX, which only reliably makes exception for national security measures [35]. Moreover, the health exception in TRIPS is largely negated by the qualification that public health and nutrition measures 'be consistent with the agreement' [2].

While countries can limit market access to 'sensitive products', the European Community seeks to eliminate alcohol and tobacco, exempting only arms, ammunition and explosives, and thus making health claims even more difficult to withstand challenge [30,42].

Framework Convention on Tobacco Control (FCTC)

The WHO endorsed the first global health treaty, the FCTC, in 2003 [59], to facilitate international co-operation and action to reduce tobacco supply and

demand. Its preamble declares that parties are '[d]etermined to give priority to their right to protect public health' [60]. The FCTC became international law in February 2005.

Even though advocates were unable to include language in the final treaty giving priority of the FCTC over trade agreements [10,26], the Convention provides encouragement for positive and proactive tobacco control measures and serves as a counterweight and an alternative to trade agreements [10]. Provisions of the FCTC will provide more latitude for countries to protect health than without the treaty. Packaging and labelling rules of FCTC strengthen the defence against intellectual property claims [11]. Moreover, the FCTC may be able to take advantage of the Technical Barriers of Trade which permits countries to enact technical regulations to protect human health provided, in part, the international standards exist now or soon will be adopted. The FCTC should establish a body to set minimum standards without serving as a ceiling [10]. Moreover, Article 2 encourages Parties to 'implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements' [59].

Will the FCTC take precedent over other treaties? Standard rules of treaty interpretation usually dictate that the most recent treaty prevails in the event of a conflict. While the FCTC is a recent treaty, others are being adopted and will then be 'later in time'. A factor in favour of the Convention is that treaty interpretation suggests that the more specific agreements prevail in a conflict. However, the TRIPS agreement may be considered more specific than FCTC on trademark protection [11]. Consequently, significant uncertainty will continue to create a chilling effect as disputes will probably be interpreted in light of trade and not sound health policy [26].

The Secretariat of Pacific Countries suggests that the principles of the FCTC should guide signatories in trade negotiations but that they should not assume that the FCTC will legally protect from consequences of breaching trade obligations. Therefore, they should avoid entering into agreements that restrict nations' ability to pursue the objectives of the FCTC. Similarly the Pacific Islands recommended that all work to assure that trade agreements do not limit nations' capacities to 'utilize taxation or other policy measures to prevent the public health and social disorder consequences of alcohol' [4].

General recommendations

Nations should adopt trade policies to reduce tobacco and alcohol use or, which based on evaluation by public health and economic experts, will not stimulate consumption [28]. The joint WHO/WTO trade report

advised addressing potential conflicts between WTO, regional trade rules and the FCTC. Because trade agreements are reviewed regularly, governments should involve health professionals to assure that national and international health objectives are taken into account in any changes [12]. The expropriation provision should be removed from NAFTA and other trade agreements and nations should make no advertising commitments [37]. There needs to be coherence between health and trade policies, an example of which is the Canadian government's collaboration between health and trade ministries. According to the Center for Policy Analysis on Trade and Health (CPATH), the situation is very different in the United States, where the US Trade Representative has no public health (and only corporate) representation on its advisory committees. Instead, health experts should be named to trade teams, e.g. the US Trade Representative should appoint a deputy director for public health [51].

Exclude tobacco and alcohol from trade agreements

The international community would achieve the greatest health benefit and avoid trade disputes by merely excluding tobacco and alcohol products and related services from trade agreements.

Weissman suggested a simple solution: 'tobacco products should be excluded from their purview' or 'nothing in the Agreement shall be construed to apply in any way to tobacco products' [11]. If these were excluded, governments would not need to ensure that health measures are consistent with trade rules and tobacco companies could not sue over government control policies that contravene investment guarantees. Countries could raise tariffs and restrict market competition and implement the Framework Convention on Tobacco Control [4]. Precedent exists for surgical, diagnostic and therapeutic methods, military products and fissionable materials [10]. Moreover, the US-Vietnam and US-Jordan free trade agreements excluded tobacco from tariff regulation.

The recently adopted World Medical Association Statement on Reducing the Global Impact of Alcohol on Health and Society, introduced by the American Medical Association, calls for excluding alcohol from trade agreements. In order to protect current and future alcohol control measures, the statement urges national medical associations to advocate for consideration of alcohol as an extra-ordinary commodity and that measures affecting the supply, distribution, sale, advertising, promotion or investment in alcoholic beverages be excluded from international trade agreements [16].

The Secretariat of Pacific Countries recommends that if Pacific countries do not exclude tobacco and alcohol

from trade agreements, they should use domestic taxes to ensure that tobacco and alcohol prices do not fall when tariffs are reduced or eliminated. It is also essential to intensify efforts to exercise additional forms of regulatory control in a targeted manner to counteract the negative public health effects of liberal trade [4]. According to the joint WHO/WTO 2002 report, even though trade agreements seek to reduce tariffs and non-tariff barriers to trade, governments can still apply non-discriminatory internal taxes and certain other measures to protect health [12]. And while disagreeing on the impact of trade agreements, in the 2001 debate in the journal *Tobacco Control* [8,19], both sides agreed on excluding tobacco from trade treaties.

Framework Convention on Alcohol Control

Increasingly, health policy advocates are calling for a global Framework Convention on Alcohol Control based on the model of the Framework Convention on Tobacco Control. A Framework Convention (or treaty) on Alcohol Control could be an international legal instrument to reduce the global spread of harm done by alcohol and help protect national and local measures. Article XIX of the WHO constitution allows for such a convention [6,7,16,37,57,61].

Final remarks

Trade agreements are indeed complex and have macro-level ramifications on health policy, not the least of which relate to tobacco and alcohol control [62]. The Finnish researcher Mika Alavaikko observed that 'trade policy occupies the heart of day-to-day nation-state-level policy-making. The social and health policy aspects of public policy making are the passive, defensive factors in the process' [4,10]. This must change or many of our public health labors will have been in vain, as trade negotiations and liberalisation of policies will probably continue in some form. This reviewer has great concern about the potential negative impacts of trade agreements and calls on tobacco and alcohol control advocates to vigorously maintain the right to health and the 'ascendancy of health over trade' [26]. Medical and other non-governmental organisations need to advocate for health impact assessments of trade and trade impact assessments of health regulations in advance of their nations' concluding treaties. If in doubt, make sure that trade negotiators have input from public health experts and take actions least likely to stimulate alcohol or tobacco use. We must have research on the developing Framework Convention on Tobacco Control and its relationship to trade agreements. Ultimately, we need to exclude alcohol and tobacco from trade agreements and have functioning Framework Conventions to deal with these important

health issues. Hopefully, too, the report called for by the 2005 World Health Assembly resolution will address alcohol and trade agreements and provide a background for a Framework Convention on Alcohol Control [63].

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