



Trade Agreements and Tobacco Control

How WTO Agreements may stand in the way of reducing tobacco use

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The globalization of tobacco

As smoking rates decline in wealthy nations, the tobacco pandemic has moved to the developing world. Current projections of increased smoking point to a four-fold increase in tobacco-caused deaths in the developing world between 1990 and 2020 (Jha and Chaloupka 2000:32).

Tobacco use is not only a global problem, it is a problem of globalization. Much of the increased spread of tobacco use can be traced to the vectors of liberalized trade, more active multinational corporations (MNCs) and increased westernization (Jha and Chaloupka 2000:343).

In this newly global market, multinational cigarette companies have moved aggressively to establish markets. A decade ago, only 50% of the world's market was available to international companies; today they have access to almost the whole world (World Tobacco File 1998:15). Smoking rates increased after the introduction of western brands in Asia (Chaloupka and Laixuthai, 1996), and smokers around the world are abandoning traditional cigarettes in favour of U.S. brands (World Tobacco File 1998:988).

This globalization of tobacco has been fostered by the policies of the International Monetary Fund (IMF) and World Bank to encourage the sale of state monopoly tobacco companies. Such acquisitions together with mergers have helped create a global tobacco oligopoly: today more than two-thirds of the

world's cigarette market is controlled by only four companies (World Tobacco File 1998:1059).

Trade liberalization and public health are in structural conflict. The benefits of liberalized trade (increased access to improved, more accessible and cheaper consumer products) apply in reverse to cigarettes. Public health is harmed when cigarettes are made more efficiently and inexpensively, more glamorously promoted, more attractively packaged and more available. Resolving this conflict may be made more difficult in light of the powerful new WTO agreements through which global commercial activity — including the commerce of cigarettes — is governed.

The WTO agreements

The WTO was founded in 1994 after an extensive "Uruguay Round" of trade negotiations, and now has 140 member countries. Unlike its predecessor, the General Agreement on Tariffs and Trade, the WTO regime expands its reach beyond tariffs and trade in goods and into non-tariff matters including standard-setting for public protections, intellectual property laws, corporate investment rights, and trade in services. WTO rules are accompanied by an effective enforcement mechanism, the dispute settlement process. The members of WTO must agree to abide by the rules of general agreements regulating goods (General Agreement on Tariffs and

Trade, GATT 1994 and twelve additional agreements, including those on agriculture, textiles and clothing, domestic standards, food and plant safety), services (the General Agreement on Trade in Services, GATS) and intellectual property (the Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS). Very few products or substances are untouched by WTO agreements (armaments are a notable exception).

Agreements of particular interest to tobacco control include:

The Agreement on Technical Barriers to Trade (TBT) sets the terms under which government measures can be used to protect human, animal or plant life, health or the environment. If such measures are challenged as

a restraint of trade, the burden of proof is on governments to show that they are “necessary” to protect life, and that there was not a less trade-restrictive option.

The Agreement on Sanitary and Phytosanitary Measures (SPS) governs the use of food safety and animal and plant regulations. It requires that government regulations be necessary for health protection, be science-based, be transparent and not be a disguised restriction on trade. The SPS encourages harmonization with international standards. No WTO panel has yet upheld a health regulation against an SPS challenge.

The General Exception (Article XX (b)) allows governments to protect “human, animal or plant life or health” provided they do

Key Elements of Trade Agreements

The key provisions and principles of international trade agreements include:

National treatment (NT)

This principle requires that foreign goods, once they have been imported, must receive treatment equal to that accorded domestic goods, and more broadly, requires that governments give to trading partners treatment equal to that given to domestic producers, or even more favourable treatment if that is required to provide, “effective equality of opportunities for imported products.”

Most-favoured nation (MFN)

This requirement ensures that any trade advantage (such as tariff reductions) that is provided to one trading partner must be provided to all trading partners.

Prohibition on Quotas

The prohibition on “quantitative restrictions” in GATT Article XI means that countries cannot use quotas to restrict imports or exports of products, such as might be useful to restrict foreign-made tobacco to a limited share of a market.

“Like Products”

WTO panels have consistently applied these principles to require that products which are used in similar ways must be treated equally as “like” products. This has removed the ability for governments to make distinctions between goods on the environmental or social consequences of their manufacture and marketing. The “like-product” requirement forced Thailand to remove a ban on imported cigarettes and required Japan and other countries to abandon high-tax policies designed to discourage consumption of whiskey and other imported alcohols.

Least-trade restrictive

A general application of the principles of national treatment and most favoured nation is the requirement that countries use the least trade-restrictive means of achieving their policy goals. Alternatives which are least harmful to international commerce can be required if they are feasible (even if they are more difficult to achieve or maintain). A U.S. ban on tuna caught with nets harmful to dolphins, for example, was struck down when GATT ruled that a less trade-restrictive option available to the United States was working towards international cooperation in fishing practices (WTO 1999).

not constitute disguised restrictions on trade in goods. The exception has been interpreted narrowly and has been rejected as a defence in all but one of the disputes in which it has been invoked. (WTO 1999:27-32). A recent decision against Canada in its challenge against a French ban on chrysotile asbestos was the first example of a positive application of GATT Article XX(b). (WTO 2000).

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) is unlike other WTO agreements in that its purpose is not to liberalize trade but to confer U.S.-style property rights for owners of intellectual property. TRIPS increased global protection for many forms of intellectual property, including trademarks and patents, and is one of the most controversial of the WTO agreements. The TRIPS provides that members may take measures to protect public health and nutrition but the requirement that such measures “be consistent with the agreement” (TRIPS Article 8) means there is no general exception to TRIPS obligations.

The General Agreement on Trade in Services (GATS) is a framework agreement adopted in 1994, and currently the subject of negotiations aimed at increased liberalization for trade in services. The GATS covers all measures “affecting trade in services” (GATS, Article I). Governments are currently engaged in negotiating further liberalization in service sectors.

The GATS prohibits governments from placing “limitations on the number of service suppliers” (GATS Article XVI) or “limitations on the total number of service operations” (GATS XVI:2(c)). Among other things, this could prohibit limits on tobacco retailing or marketing.

Under GATS countries must ensure their domestic regulations (including those controlling tobacco) are “not more burdensome than necessary to ensure the quality of the service.” (GATS, Article VI). This vague standard invites WTO trade panelists to review,

from a strictly commercial perspective, domestic regulations which affect services.

In addition to the WTO agreements, there are regional agreements like the North American Free Trade Agreement (NAFTA) and the Association of South East Asian Nations (ASEAN) which further increase trade liberalization by extending investment protection and by accelerating tariff reduction, among other things.

Implications for key tobacco control policies

Public policy measures to reduce tobacco use have been pioneered, implemented, tested and proven over the past three decades. World Health Organization (WHO) member states have unanimously supported 18 resolutions to reduce tobacco use since 1970 (WHO 1998:128). In 2000, both the World Health Assembly (WHA 2000) and the Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control (INB 2000) approved draft elements for a WHO Framework Convention on Tobacco Control.

These WHO recommendations provide a roadmap for comprehensive tobacco control programs. Yet the WTO agreements make it possible for the measures endorsed through one international agency (WHO), to be undermined by those of another (the WTO), either through direct challenge or by the chilling effect of threats of trade action.

Ending tobacco advertising and marketing

Governments which try to ban or restrict cigarette advertising may find that they run against WTO agreements on services, technical barriers to trade, and intellectual property. The GATS may be used to challenge government attempts to regulate cigarette advertising, to impose licensing requirements for tobacco wholesalers and retailers, to ban sales to children, to require minimum package sizes

if these activities are in sectors which are in the schedule of sectors where national treatment and market access provisions apply. Because so many service sectors overlap, it may not be possible to insulate tobacco control measures from challenge by not including such sectors in GATS. For example, tobacco-branded services like Benson & Hedges Cafes or Salem Cool Planet (now operating in Malaysia and some other Asian markets) may fit within classifications of advertising, retail, entertainment or food services, and may be challenged under these classifications.

TRIPS may be used to challenge restraints on tobacco marketing as unjustified restrictions on the use of trademarks. The 1990 GATT decision upholding Thailand's ban on cigarette advertising gave comfort to some that future WTO panels would support bans on cigarette advertising (Jha and Chaloupka 2000:349). This GATT ruling, however, predated the GATS. The overlapping authorities of GATS and GATT may result in unexpected vulnerabilities to trade challenge, and it is not clear whether Thailand's ban on advertising would survive new challenges under GATS.

Health warnings and packaging requirements

Intellectual property and investment agreements can provide limits to intended governmental controls on tobacco packaging as Canada learned when the federal government considered requiring plain (generic) packaging of cigarettes.

The tobacco industry commissioned and delivered a legal opinion from former US Trade Representative Carla Hills to Canadian parliamentarians. Ms Hills opinion stated that requiring generic packaging would deprive the owners of their entitlements under NAFTA and WTO. Trademarks would be "encumbered" by "special requirements" on their use. She argued that plain packaging would thus entitle the cigarette company to

pursue sanctions through a WTO trade panel at the behest of its government, the United States. (She also warned that the tobacco companies could launch an independent challenge under NAFTA, which provides for direct lawsuits by investors against governments in a number of circumstances). The initiative regarding plain packaging was dropped, though research showed the clear benefit to public health.

"Standards" for tobacco products and exposure to them.

Many proposals have recently been made on ways to reduce the harm of cigarettes by setting maximum levels of tar, nitrosamines or nicotine or by requiring that cigarettes be self-extinguishing and thus "fire-safe." These and other proposals will be challengeable under WTO. Fire-safe cigarettes and regular cigarettes, for example, would likely be viewed as "like" products by WTO panels, who could then insist on the least-trade-restrictive measure of reducing cigarette-harm. Consumer warnings might be required as a substitute for product regulation as they are less trade restrictive.

Similarly, banning smoking in public places like restaurants or buses affects services under the jurisdiction of the GATS. These public health protections can be challenged as "non-tariff barriers to trade."

Raising prices through taxation of tobacco products

The Thai cigarette case (see box) upheld the right of countries to impose taxes on tobacco products, but did not allow different types of cigarettes to be taxed differently. In some countries, taxes are currently applied differently to different tobacco products for historic and political reasons (Indian bidis, for example, are not taxed by the national government, while manufactured cigarettes are). If challenged, India could be forced to harmonize taxes between bidis and western ciga-

rettes — even though the political and economic realities would result in cheaper cigarettes, not more expensive bidis. In numerous WTO cases involving alcohol products, similar tax differentials have been consistently struck down and quite different types of alcohol have been found to be “like” products for trade purposes (Grieshaber-Otto et al, 2000).

Banning imports of foreign tobacco products

Health authorities may correctly identify that foreign brands pose a different level of public health risk than less attractive domestic brands. They may even have some evidence that local cigarettes are less likely to be smoked, are less addictive or otherwise less harmful. Banning the import of foreign cigarettes could be a reasonable health measure in such circumstances. The decision on the Thai cigarette case (see box) demonstrates that this option is not available under the WTO regime.

State monopolies

The GATT requires that monopolies and state enterprises conduct purchases and sales without discrimination affecting private sector importers and exporters (GATT XVII) and that they buy and sell on a commercial basis (GATT XVII(1b)). It also restricts use of “mark-ups” on imported products to protect domestic producers (GATT II(4)). These re-

strictions limit the options for countries which may wish to use state monopolies to restrict market penetration by the large tobacco companies, with their accompanying advertising and price-lowering advantages (Grieshaber-Otto et al, 2000). The pressure put on countries wishing to join the WTO to privatize their state tobacco monopolies (as is currently happening with China and Taiwan) further reduces public control of the tobacco market.

Economic alternatives

Governments may wish to implement measures to encourage tobacco farmers to move to other lines of work. If these measures give preference to domestic enterprises over foreign enterprises, they could be subject to a trade challenge. For example, Canada provided subsidies to tobacco farmers to engage in alternate economic enterprises in the late 1980s. Other payments were made to encourage some tobacco farmers to leave the tobacco growing business. (Agriculture Canada, 1990). In the 1980s, neither of these measures was challenged as contrary to international trade agreements. Were similar measures to be implemented in the 21st century, they could well be subject to challenges under regional and global trade agreements.

Conclusion

Although the launch of a comprehensive round of expanded negotiations of the WTO,

GATT and the Thai ban on cigarette imports

In the late 1980s, the U.S. government began to pressure Japan, South Korea, Taiwan and Thailand to reduce barriers to importing cigarettes, threatening trade sanctions under U.S. law. Japan, South Korea and Taiwan bowed to U.S. demands, but Thailand held firm. The U.S. challenged both Thailand’s refusal to allow cigarette imports and its ban on cigarette advertising at GATT. Thailand defended its ban by appealing to the GATT exception for measures which are necessary to protect human health (Arti-

cle XX(b)). The panel rejected Thailand’s argument and ruled that imports of U.S. cigarettes should be allowed. The panel did uphold Thailand’s right to ban advertising, and impose taxes, price restrictions, and labelling requirements (GATT 1990). Per-capita consumption of cigarettes in the four Asian countries targeted by the U.S. trade department was later estimated to be nearly 10% higher than had the markets remained closed to U.S. cigarettes (Chaloupka and Laixuthai, 1996).

planned for Seattle in December, 1999, did not occur, the “built-in” agenda of the WTO mandated on going negotiations of agriculture and services trade, and these are now in preparation. Concurrent negotiations for increased trade liberalization through regional agreements (such as the proposed Free Trade Area of the Americas and recent trade liberalization agreements in ASEAN countries) suggest that trade agreements will play an increasingly important role in the setting of public policy.

Given the broad reach of the trade agreements, and the variety of potential barriers they pose to tobacco control policies, it is essential that those charged with negotiating international instruments resolve the current conflict between tobacco control and trade liberalization by ensuring that national and international measures to curb tobacco are not undermined by obligations under commercial trade agreements. Treaty and trade negotiators should safeguard the ability to implement public health measures under all international obligations. Current negotiations for a new WTO services agreement and a WHO Framework Convention on Tobacco provide these powerful negotiators with opportunities and responsibilities to ensure this is done.

References

Agriculture Canada 1990, *Evaluation of the Tobacco Diversification Plan*. Ottawa.

Chaloupka, F and A. Laixuthai, 1996, *U.S. Trade Policy and Cigarette Smoking in Asia*, Working Paper 5543, National Bureau of Economic Research, Washington, D.C.

Grieshaber-Otto, J., S. Sinclair and N. Schacter 2000, *Impacts of international trade, services and investment treaties on alcohol regulation*, *Addiction*, Vol. 95, No. 12, Supplement 4.

International Negotiating Body on the WHO Framework Convention on Tobacco Control (INB), *Proposed Draft elements for WHO framework convention on tobacco control: provisional texts with comments from the working group*, World Health Organization, Geneva.

Jha, Prabhat and F. Chaloupka 2000, *Tobacco Control in Developing Countries*, Oxford University Press, Oxford.

Market Tracking International Ltd 1998, *World Tobacco File 1998*, DGM Business Media, London.

World Health Assembly (WHA) 2000, *Resolution WHA53.16. Framework convention on Tobacco Control*, World Health Organization, Geneva.

World Health Organization (WHO) 1998, *Guidelines for Controlling and Monitoring the Tobacco Epidemic*. World Health Organization, Geneva.

World Trade Organization (WTO) 1994, *The Uruguay Round Final Act; General Agreement on Tariffs and Trade; General Agreement on Trade in Services; Agreement on Trade Related Aspects of Intellectual Property Rights; Agreement on Technical Barriers to Trade; Agreement on Sanitary and Phytosanitary Measures*, World Trade Organization, Geneva.

World Trade Organization (WTO) 1999, *Trade and Environment Division High Level Symposium on Trade and Environment Background Document*, World Trade Organization, Geneva

World Trade Organization (WTO) Decision 2000. *EC-Measures Affecting Asbestos and Products Containing Asbestos*, World Trade Organization, Geneva.

General Agreement on Tariffs and Trade Decision 1990, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200, World Trade Organization, Geneva.

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