

# INTERNATIONAL TRADE AGREEMENTS AND TOBACCO CONTROL

## GLOBAL TRADING RULES AND THE TRADE AGREEMENT LANDSCAPE

***The World Trade Organization:*** The World Trade Organization (WTO) is a global organization with more than 140 members, including all of the world's significant economies other than Russia. The WTO administers more than a dozen trade agreements. These cover tariffs for industrial and agricultural products, and also a host of non-tariff issues, including plant and animal safety rules, "technical barriers to trade" -- meaning various product-related regulations, rules and regulations covering services, government procurement, investment rules and intellectual property. WTO rules apply both to federal and subfederal governments (states, provinces, counties and cities).

Unlike many other international agreements, the WTO is backed up by a very strong enforcement mechanism. Countries that violate WTO rules face significant penalties in the form of trade sanctions.

***Other Trade Agreements – Existing and Under Negotiation:*** Also on the trade system landscape are a series of bilateral and regional agreements, the most prominent of which is the North American Free Trade Agreement (NAFTA). These agreements cover most of the same substantive areas as the WTO, impose similar obligations on member countries and feature similar enforcement mechanisms.

In addition to NAFTA, the United States maintains free trade agreements with Israel, Jordan, Vietnam, Singapore and Chile, and is now negotiating agreements with Australia, Morocco, the Central American countries, the Southern African Customs Union (South Africa, Namibia, Botswana, Lesotho, Swaziland) and the entirety of the Western Hemisphere except for Cuba (the Free Trade Area of the Americas, FTAA). Plans to commence negotiations with Thailand have just been announced, with more such announcements involving other countries expected soon.

***The Chilling Effect:*** Trade agreements may stifle public health regulation both through enabling direct challenges to tobacco control rules, but also through the chilling effect. Countries routinely choose not to enact legislation of various kinds because of concern that proposed laws would conflict with their international trade obligations, even when those concerns are misplaced.

## MARKET ACCESS, TARIFFS AND TOBACCO

**What Trade Agreements Do:** The historic and still core feature of trade agreements is a commitment by signatories to reduce tariffs on imported goods. Tariff reduction agreements typically include cigarettes and tobacco products.

***Impact On Public Health and Tobacco Control:*** Opening domestic markets to tobacco product imports increases smoking rates and consumption. The market opening leads to enhanced price and product competition and intensified marketing efforts.

"Reductions in the barriers to tobacco-related trade will likely lead to greater competition in the markets for tobacco and tobacco products [and] reductions in the prices for tobacco products," according to a World Bank report. "As a result, the death and disease from tobacco use will also increase."

After the United States exerted trade pressure to open Asian tobacco markets in the 1980s, tobacco consumption rose 10 percent. In the single year after South Korea opened its market, smoking rates among teenage girls more than quintupled, from 1.6 percent to 8.7 percent.

## **INTELLECTUAL PROPERTY PROTECTIONS**

***What Trade Agreements Do:*** The WTO and most bilateral and regional trade agreements require member countries to provide strong protections for intellectual property -- patents, copyright, trademark and trade secrets.

***Impact On Public Health and Tobacco Control:*** In Canada, Brazil, Thailand and elsewhere, tobacco companies have argued that large health warnings, plain packaging rules and bans on the use of misleading descriptors ("light," "mild" and "low") violate their trademark rights under trade agreements. They have argued that ingredient disclosure rules violate their trade secret rights.

## **TECHNICAL BARRIERS TO TRADE**

***What Trade Agreements Do:*** Technical Barriers to Trade (TBT) Agreements establish international rules relating to how, under what circumstances, and with what restrictions countries can establish technical regulations concerning products or processes related to products. Technical regulations may cover such matters as health and safety, environmental and consumer regulations.

Under trade agreement rules, technical regulations must not be more trade restrictive than necessary to achieve a public health or other objective. Second, where international standards exist, or their adoption is imminent, countries must use them, unless they can meet very stringent tests.

***Impact On Public Health and Tobacco Control:*** Philip Morris has argued that a ban on the use of the terms "mild" and "light" violates technical barriers to trade rules (on the grounds that there are less trade restrictive ways to stop consumers from being misled by the terms). Companies would almost certainly argue that any product content regulation violated TBT rules. They might also claim that smokefree air mandates violate TBT rules (on the grounds that ventilation is a less trade restrictive alternative, or that smokefree rules violate international standards).

## **SERVICES**

***What Trade Agreements Do:*** Service agreements require countries to permit foreign companies to provide services (non-technical definition: a commercially traded thing that you can drop on your foot is a good; the rest are services) on terms that are no different than for domestic firms.

***Impact On Public Health and Tobacco Control:*** Tobacco companies may use such agreements, still mostly under negotiation, to challenge national advertising bans or restrictions, particularly restrictions that apply to certain forms of advertising but not others, or efforts to restrict distribution outlets for tobacco products, among other potential sources of challenge.

## **INVESTMENT PROTECTIONS**

***What Trade Agreements Do:*** NAFTA contains very strong investment protections (known as "Chapter 11"), and similar protections are being negotiated into new bilateral and regional agreements. These protections bar "expropriation," or actions "tantamount" to expropriation, except for public purpose and with fair market value compensation. "Expropriation" in NAFTA terms is roughly equivalent to the U.S. constitutional concept of "takings," and is inclusive of an extremely broad definition of regulatory takings. The investment protections also permit investors directly to bring suit against, and seek compensation from, governments that have infringed on their investment rights. (Other provisions of NAFTA and most trade agreements enable only countries to bring challenges against other countries.)

***Impact On Public Health and Tobacco Control:*** NAFTA Chapter 11 has provided the basis for a number of eyebrow-raising cases. In the largest Chapter 11 suit yet brought against the United States, the Canadian corporation Methanex in 1999 sued the U.S. government for \$970 million because of a California executive order phasing out the sale of MTBE, a gasoline additive, on the grounds that the California environmental policy limits the corporation's ability to sell MTBE. This case is pending. In another pending case, the U.S.-based United Parcel Service (UPS) is pursuing a NAFTA Chapter 11 case against Canada for \$100 million, arguing that the Canadian postal service's involvement in the courier business infringes upon the profitability of UPS operations in Canada. UPS claims that by integrating the delivery of letter, package and courier services, Canada Post has cross-subsidized its courier business in breach of NAFTA rules.

Applied in the context of the tobacco industry, investment protections are obviously quite worrisome. They give Philip Morris, BAT and the rest of the industry direct standing to invoke trade agreements to challenge national law, overcoming the political reluctance of most governments to advocate aggressively on behalf of cigarette companies.

The substantive provisions of the agreements provide considerable fodder for the industry. For example, each of the potential intellectual property claims of the industry -- on warning labels, bans on "light," "mild" and "low," on ingredient disclosure -- can be recast as an expropriation. (Philip Morris has already made such an argument in Canada, though it has not filed suit.) Distribution networks favoring national producers, especially state-affiliated companies that are not available to foreign companies may be characterized as violations of national treatment obligations.

## **HEALTH EXCEPTIONS AND THE FRAMEWORK CONVENTION**

The trade agreements contain only very narrow exceptions for public health regulations that conflict with the agreements' overarching rules. Such public health measures must be "necessary." A regulation qualifies as necessary only if there is no less trade restrictive means to accomplish a desired end, even if the alternative may not be politically or financially feasible.

An important 1990 case at the predecessor to the WTO interpreted the term in a dispute involving Thai tobacco control measures under challenge from the United States. Ignoring recommendations from the World Health Organization that were filed in the case, the decision required Thailand to open their market to U.S. cigarettes. The decision did say that Thailand could maintain its ban on marketing.

The health exception in the Technical Barriers to Trade agreements are even narrower than the general exception. And there are *effectively no* public health exceptions in the intellectual property and investment agreements.

The Framework Convention on Tobacco Control will provide more latitude to countries than they would have in its absence, but it does not provide an absolute guarantee for countries, and certainly offers no safe haven in areas where its recommendations are not precise.

### **CONCLUSION: EXCLUDING TOBACCO FROM TRADE AGREEMENTS**

There is a simple solution to the problems posed by trade agreements to tobacco control: tobacco products should be excluded from their purview.

There is no legitimate purpose for inclusion of tobacco products in trade agreements, which are designed to facilitate trade and remove tariff and nontariff barriers to commercial transactions -- an inappropriate goal for tobacco products, consumption of which is harmful.

If tobacco products were excluded, countries would not need to ensure their rules were consistent with trade rules. Governments would not be chilled by threats trade challenges.

There is precedent for excluding certain products from trade agreements. For example, military products are not covered by the WTO agreements. The WTO's intellectual property rules exempt surgical methods. And the U.S.-Vietnam free trade agreement excludes tobacco from its tariff regulation and reduction scheme.

There is no technical difficulty in exempting tobacco from trade agreements -- a simple declaration that the agreement does not apply to tobacco products, in words no more complicated than those, would be sufficient.

All that is required is the political will.

While other countries could lead by example, it is the United States that establishes the framework for global trade policy. This is particularly true in the case of bilateral and regional agreements, since the United States is initiator and party to more of these agreements than any other country.

If the U.S. government adopts a position of excluding tobacco from trade agreements, such a policy will quickly become the global norm. There are few trading partners who would object, and a majority who would warmly welcome such a move by the United States.

Most countries, however, do not have a good record of prioritizing health concerns in trade negotiations. Countries that support excluding tobacco are not likely to advocate such a position if it will cost them other trade benefits. And even those countries willing to advance such a position are unlikely to defend it strongly if doing so will cost them other advantages.

The key to movement on this issue therefore rests with the U.S. public health community, which is uniquely positioned to defend and advance health principles in the U.S. political arena.

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