



Tobacco & International Trade

For over 400 years, international trade has played an important part in the global spread of tobacco. But the rapid acceleration of globalization and open markets in the past 20 years poses unique challenges to efforts to control the tobacco epidemic.

Background

The impact of trade rules on global public health was highlighted during the mid-1980s, when the United States government began to pressure countries in Asia to open up their markets to U.S. cigarette exports or face harsh retaliatory trade sanctions. Japan, South Korea, Taiwan and Thailand all had prohibitive tariffs on imported cigarettes or had banned cigarette imports altogether. All but Thailand eventually complied with U.S. demands, and the result was a public health tragedy.¹

- Through slick marketing and effective appeals to women and children, the U.S. companies were able not only to gain market share from domestic firms but to actually increase the number of smokers. After the entry of U.S. firms into South Korea, for example, smoking rates among teenage boys went from 18% to 29% in a single year, while the rate for girls nearly quintupled, rising from 1.8% to nearly 8.7%.² Overall, smoking rates in the countries that acceded to U.S. demands rose by 10%.³

Thailand however challenged the United States' use of trade sanctions at the General Agreement on Tariffs and Trade (GATT), arguing that its restriction on foreign tobacco imports was necessary to control the supply of cigarettes and to prevent the importation of cigarettes which contained dangerous additives. Although a GATT panel rejected the import ban as discriminatory, it upheld Thailand's far-reaching ban on tobacco advertising and marketing as long as those restrictions were applied equally to foreign and domestic producers.⁴

- Although the Clinton Administration has committed itself to ending these kinds of trade pressures on behalf of the tobacco industry, market opening efforts continue. The U.S.-China bilateral agreement, signed in November 1999, requires China to slash tariffs on cigarettes from a base rate of 65% to 25% by 1 January 2004, a tariff reduction that is likely to give multinational tobacco companies the opportunity to invest more heavily in advertising, promotion and political influence.⁵

The New Trade Rules And Tobacco Control

The World Trade Organization (WTO) was founded in 1995 as the successor to the GATT. WTO rules consist of an evolving body of international trade rules backed by the threat of trade sanctions or fines

against countries found in violation of the rules. WTO cases are argued before dispute settlement panels, which are made up of un-elected trade experts who generally have little or no public health expertise. Hearings are conducted in secret and the rulings are binding, not subject to appeal. WTO member countries can only overturn a WTO appellate body ruling by consensus -- including the agreement of the prevailing party in the dispute. Meanwhile the losing country in a WTO case must change its laws or regulations to comply with the panel's ruling or face WTO-authorized trade sanctions. In fact, the fear of being taken to the WTO or being hit with WTO-authorized penalties is often enough to dissuade countries from adopting new regulations or encourage them to rescind existing ones.⁶

The scope of the WTO also extends beyond the traditional concern with lowering tariffs to include the gradual elimination of so called "non-tariff trade barriers" which can include domestic laws that discriminate against foreign imports, even if they are applied equally to foreign and domestic goods. The WTO agreements do contain a public health exception, permitting measures which violate general trade rules if they are "necessary" to advance public health. So far, this exception has been treated very narrowly, covering regulatory measures only if they are deemed the "least trade-restrictive" way to accomplish a particular public health goal.

Possible Conflicts Between Trade and Public Health

The GATT's decision in the Thai case was not binding on future trade panels, and there are no guarantees on how its successor, the WTO, will resolve future challenges to tobacco control measures. Existing and proposed WTO agreements reach into areas that may pose problems for effective tobacco control and regional trade agreements may pose similar problems. These areas include:

Intellectual Property Protections:

The "Trade-Related Aspects of Intellectual Property Agreement" of the WTO provides strong protections for copyright, trademark and trade secrets. Tobacco companies may argue that labeling, packaging or advertising restrictions that interfere with their ability to display their logos and designs violate their copyright and trademark rights. They may also argue that ingredient disclosure laws violate the trade secret protections guaranteed by the WTO.

Electronic Commerce: The United States has led the call for a special WTO agreement covering electronic commerce that would restrict governments' ability to regulate e-commerce. Such an agreement could interfere with efforts to regulate tobacco advertising on the internet or restrict youth access to tobacco sites on the internet, and could undermine national consumer protection measures (including the right to sue manufacturers) by giving manufacturers some power to choose the national law to which they are subject.

Technical Barriers To Trade (TBT):

The WTO's TBT agreement establishes the general principle that, with very limited exceptions, countries cannot impose consumer, public health, environmental or other regulations that are more strict than international standards require, where such international standards exist. If a Framework Convention on Tobacco Control (FCTC) is adopted, for example, tobacco companies may argue that under WTO rules the Framework Convention establishes a ceiling, preventing countries from adopting more stringent tobacco control regulations.

Trade In Services: The General Agreement on Trade in Services (GATS) of the WTO provides some protections for service industries, while a much stronger version is being negotiated. A strong GATS might give protections to foreign advertising companies or tobacco lawyers that may interfere with tobacco control objectives. For example, marketing restrictions could conceivably be considered discriminatory against foreign advertising companies.

Investment: In 1999, a grouping of developed countries abandoned an effort to draft a Multilateral Agreement on Investment (MAI). The proposed MAI would have covered investments as opposed to trade in goods. It included many of the same features as the WTO agreements, with two important distinctions. First, it would have permitted corporations and other investors to sue governments directly for violation of MAI commitments, in contrast to WTO rules which only allow governments to sue governments. Second, it did not contain the public health exception that saved Thailand's advertis-

ing ban in the GATT case. Although it does not appear that the MAI will be resuscitated soon, there are efforts to include similar investment protections in the WTO and in a Free Trade of the Americas Agreement (such a provision is already part of the North America Free Trade Agreement, NAFTA).

The WTO and The Framework Convention For Tobacco Control

The negotiations over a Framework Convention for Tobacco Control (FCTC) may run up against a series of tobacco industry objections based on international trade and investment rules.

- The tobacco industry may argue that FCTC negotiators should be constrained by measures already negotiated or under negotiation at the WTO. In comments submitted to the U.S. government in March 2000, Brown & Williamson argued that the FCTC will "create a morass of legal conflict" with existing WTO agreements and WTO negotiations.⁷
- The tobacco industry is likely to argue that tobacco control measures which disproportionately affect, or are targeted at, "international brands" (such as Marlboro, 555 or Salem) are impermissibly discriminatory under WTO rules. In its March 2000 comments to the U.S. government, Philip Morris expressed concern that the FCTC is "singling out multinational tobacco companies" and their products while ignoring state-owned tobacco companies and smaller manufacturers.⁸

- If the FCTC is approved, the tobacco companies may seek to encourage countries to challenge the WTO-legality of other countries' regulations designed to implement the FCTC and related protocols. Or, if they are able to gain standing through investment agreements, the multinational companies may directly sue countries on their own behalf.

Resources on the World Wide Web

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Frank Chalopuka and Adit Laixuthai, "Cigarette Smoking in Pacific Rim Countries: The Impact of U.S. Trade Policy," National Bureau for Economic Research, Working Paper No. 5543, April 1996; <http://www.uic.edu/~fjc/Presentations/Papers/w5543.pdf>

Physicians For A Smoke-Free Canada, "The Danger of International Investment Agreements for Tobacco Control in Canada," Submission to the Federal Standing Committee on Foreign Affairs and International Trade, April 1999
<http://www.smoke-free.ca/pdf/1/wtosubmission.pdf>

"Tobacco: Guidance for U.S. Diplomatic Posts on Health, Trade, and Commercial Issues," Fact Sheet released by the Bureau of Economic and Business Affairs U.S. Department of State, 16 August 1999
http://www.state.gov/www/issues/economic/fs_990816_tobacco.html

¹ Glenn Frankel, "U.S. Aided Cigarette Firms in Conquests Across Asia," *Washington Post*, 17 November 1996; <http://www.washingtonpost.com/wp-srv/national/longterm/tobacco/stories/asia.htm>

² United States General Accounting Office, *Advertising and Promoting US Cigarettes in Selected Asian Countries*, (1992).

³ Frank Chalopuka and Adit Laixuthai, "Cigarette Smoking in Pacific Rim Countries: The Impact of U.S. Trade Policy," National Bureau for Economic Research, Inc., Working Paper No. 5543, April 1996; <http://www.uic.edu/~fjc/Presentations/Papers/w5543.pdf>

⁴ Glenn Frankel, "Thailand Resists U.S. Brand Assault," *Washington Post*, 18 November 1996; <http://www.washingtonpost.com/wp-srv/national/longterm/tobacco/stories/global2.htm>

⁵ John Hall, "Trade Deal Helps Leaf Firms," *Richmond Times-Dispatch*, 19 March 2000; <http://www.timesdispatch.com/special/tobacco/tobac03191.shtml>

⁶ Lori Wallach and Michelle Sforza, *Whose Trade Organization?* (Washington: Public Citizen, 1999).

⁷ Brown & Williamson Tobacco Corporation, "Comments On The World Health Organization Framework Convention On Tobacco Control," before the Department of Health and Human Services, 29 March 2000; <http://outside.cdc.gov/BASIS/ncctrc/web/comment/ODD/119.pdf>

⁸ Philip Morris International Inc., "Response to Request for Public Comment On the Framework Convention on Tobacco Control Requested by the United States Departments of Commerce and Health and Human Services," 17 March 2000; <http://outside.cdc.gov/BASIS/ncctrc/web/comment/DDD/94.pdf>