

Public Health, International

Trade

and the

Framework

Convention

on Tobacco

Control



Campaign for Tobacco-Free Kids

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Preface

This paper was produced with financial support from the American Cancer Society and the Campaign for Tobacco-Free Kids and was written to help facilitate discussion of international trade and tobacco control issues at a Roundtable Meeting held on February 13, 2001, in Washington, DC.

This paper draws heavily on existing literature. The author extends special thanks to Physicians for a Smoke-Free Canada for sharing advance drafts of its upcoming publication “International Trade Agreements and Their Impact on Public Measures to Reduce Smoking,” which covers many of the same issues in more detail than was possible here. Robert Weissman, Frank Chaloupka, Cynthia Callard, Neil Collishaw, Claudia Saladin and Carlos Correa also provided invaluable materials for this paper.

John Bloom, J.D.
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Executive Summary

The case for applying special rules to international trade in tobacco products rests on four widely accepted propositions:

- **Tobacco products harm public health and the global economy.** There is now a substantial body of evidence demonstrating the enormous health and economic damage tobacco use inflicts on individual nations and on the global economy.
- **Liberalization of trade in tobacco products stimulates tobacco consumption and harms public health.** This is supported by economic theory, econometric research, surveys and other data. Data are especially strong with respect to developing nations, where one econometric study found a 10 percent boost in cigarette demand in response to market liberalization in Taiwan, South Korea, Japan and Thailand.
- **Major multilateral trade agreements do not adequately protect tobacco control measures from trade-based challenges.** A review of the General Agreement on Tariffs and Trade (GATT), Agreement on Technical Barriers to Trade (TBT), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and General Agreement on Trade in Services (GATS) suggests that public health-based

exceptions to these agreements impose difficult burdens of proof and that the exceptions are narrowly construed to effectively create a presumption in favor of free trade and against trade-restrictive tobacco control measures.

- **There is ample precedent in many other international agreements for provisions to restrict trade in particularly harmful products such as tobacco.** Examples of products for which special rules have been developed include ozone-depleting chemicals such as CFCs, persistent organic pollutants such as DDT, endangered species and antipersonnel landmines. Trade in these items has been restricted under specific agreements developed outside of the World Trade Organization framework.

Each of these propositions is well supported by the available evidence. As consensus has grown within the public health community about the need to develop special rules to address tobacco trade issues, discussion has turned to whether, and to what extent, trade-related provisions should be included in the Framework Convention on Tobacco Control (FCTC).

Potential trade-related FCTC provisions would only directly govern the behavior of nations that adopt the

FCTC (“FCTC Parties”) and will not directly alter the provisions of other international agreements. However, FCTC provisions could serve as a positive influence on the views and behavior of other nations and multilateral bodies such as the WTO. This influence would be especially strong if the FCTC is widely embraced and therefore properly regarded by the international community as reflective of international tobacco control norms.

Provisions that could be considered include:

- **Measures to reinforce the primacy of public health concerns over commercial interests in tobacco trade.** These include measures to ensure that the FCTC is not subordinate to international trade agreements and measures to implement a version of the precautionary principle adapted to the tobacco control context. The precautionary principle, adopted in a number of environmental treaties, essentially places the burden or proof on a party that wishes to liberalize trade in a potentially harmful product and allows nations to take protective action in the face of scientific uncertainty.
- **Measures to prevent Parties from using trade rules in ways that con-**

flict with FCTC principles and objectives. Options in this area include measures to prevent Parties from promoting tobacco use or tobacco exports in other nations, measures to ensure that Parties promote FCTC objectives in other international agreements and an agreement among Parties to defer to health and health policy experts on questions relating to tobacco trade and health.

- **Measures to strengthen the ability of states to defend domestic tobacco control measures against challenges based on international trade agreements.** These include FCTC measures specifically supporting strong tobacco control measures, language to reduce the likelihood that regulatory floors set by the FCTC are not misinterpreted as ceilings by WTO and other measures.

These potential provisions are certain to stimulate debate and some tension between the trade policy and public health communities. Which of these measures, if any, ultimately are promoted and adopted within the FCTC process depends on complex questions of political feasibility, strategy and priority-setting that are beyond the scope of this paper.

I.

Background

The rapid globalization of commerce has contributed enormously to rising incomes, increasing economic efficiency and increased production and consumption of many products throughout much of the world. While the benefits of globalization in terms of net economic growth are beyond debate, concerns are mounting about the impact trade liberalization may have on certain areas, including tobacco control, the environment and food safety.

As consensus grows about the dangers of unrestricted trade in some products, international agreements are being negotiated to apply appropriate product-specific rules. International agreements are already in place to address specific concerns about hundreds of products including small arms, landmines, other weapons, narcotic drugs and psychotropic substances, ozone-depleting chemicals, hazardous waste, genetically modified organisms, persistent organic pollutants (POPs) and endangered species. In the environmental field alone, more than 20 multilateral treaties include trade-related provisions.

Against this backdrop, virtually all trade liberalization agreements promote trade in tobacco products without consideration of public health concerns. This is remarkable in light

of the powerfully addictive and harmful nature of tobacco products and the magnitude of the global public health disaster they are causing. Several facts about this growing epidemic may help put the problem into perspective:

- Smoking is growing in popularity on a global basis, fueled by 80,000–100,000 young people who become regular smokers every day.¹ The vast majority of smokers become addicted to nicotine as children or teenagers.
- About half of all long-term smokers die of diseases caused by their smoking.²
- Unless decisive action is taken to change current trends, about 250 million children alive today eventually will die from smoking. In all, about half a billion people alive today will die from smoking, based on current patterns.³
- The burden of death and disease caused by tobacco is shifting rapidly

¹ World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (Washington: World Bank, 1999); <http://www1.worldbank.org/tobacco/reports.htm>.

² Peto, R, et al. *Mortality from Smoking in Developed Countries, 1950–2000*. New York, NY: Oxford University Press, 1994.

³ Murray, CJ, Lopez, AD, eds. *The Global Burden of Disease: A Comprehensive Assessment of Mortality and Disability from Disease, Injuries and Risk Factors in 1990 and Projected to 2020* (Cambridge, MA: Harvard School of Public Health, 1996).

from wealthy nations to low-income nations. By 2020, 70 percent of all tobacco-caused deaths will occur in the developing world, compared to about 50 percent today.⁴ This shift is due to low awareness of the health risks of smoking in these nations, the inadequacy of public health measures to combat the epidemic and aggressive expansion by multinational tobacco companies of their marketing and other operations in the developing world.

- A World Bank economist, using conservative assumptions and data from the early 1990s, concluded that each 1,000 tons of tobacco smoked produces a net global loss of US\$27 million, and that tobacco produces a total annual net loss to the world economy of about US\$200 billion, taking into account health care, lost productivity and other costs.⁵

These facts suggest that tobacco products are harmful and that actions that promote trade in these products are likely to compound the unfolding tragedy. Relatively small changes in consumption will have a dramatic effect in terms of human suffering and mortality. For example, based on current estimates, elevating global tobacco consumption by a single additional percent among today's population would result in approximately five million additional deaths over time.

Given these facts, why have special trade rules not been developed for

tobacco products as they have for so many other products? Among many possible reasons, four stand out:

- The public health community, unlike the environmental movement, has not been significantly engaged in international trade issues; there is relatively little funding, organizational infrastructure, research or expertise devoted to this area. This is true within government health and trade ministries and non-governmental organizations. The result is that the public health community has not, until now, made a compelling enough case, politically, for special consideration of tobacco products in international trade.
- The tobacco industry, in contrast, is one of the most politically and economically powerful entities in the world. It has been fully engaged in the trade community at the national and multinational levels for decades and has made liberalization of trade in tobacco products a top priority. It also has effectively promoted a greatly exaggerated view of the economic importance of the tobacco sector to the economies of tobacco-producing nations and to the world economy.
- The principles of free trade are deeply held within the trade community and the burden of proof on a proposal for special treatment of any product is formidable.
- Most nations have not yet begun to regulate tobacco products effectively domestically. The United States, for example, exempts tobacco products from every major health and safety law and regulates the production and marketing of nicotine patches and other cessation products much more

⁴ *World Health Report 1999*, World Health Organization (Geneva: WHO, 1999); <http://www.who.int/whr/1999/en/report.htm>.

⁵ Barnum, H. "The Economic Burden of the Global Trade in Tobacco," *Tobacco Control*, 1994;3:358-361.

stringently than it does cigarettes. To a large extent, this permissive treatment of tobacco products at the national level carries through to the international level. Nations that do not effectively regulate tobacco products domestically are unlikely to champion special rules for tobacco products internationally.

Together these factors have made it difficult for the public health community to make significant progress in addressing trade-related concerns. However, in recent years there has been dramatic change affecting each of these factors in ways that may substantially increase the willingness of governments to consider special trade rules relating to tobacco products. Specific positive changes include:

- Rapid globalization of the tobacco control movement in connection with the negotiation of the Framework Convention on Tobacco Control.
- Compelling recent research finding that trade liberalization in tobacco products has had a substantial negative public health impact.

- Reduced influence by the tobacco industry in response to media scrutiny, litigation and public disclosure of internal documents revealing deliberate efforts to market to children, undermine public health initiatives and deceive the public about the addictive and lethal nature of its products.
- Growing dissatisfaction and public protest over current global trade rules, leading to greater interest by trade officials in addressing negative effects of international trade.
- Movement by the European Union, Thailand, Canada, South Africa, Australia and New Zealand toward strict national regulation of the manufacturing, marketing and sale of tobacco products, making these nations more likely to support regulation of tobacco products internationally.

Given the relatively fast pace of change in each of these areas, it is possible that special rules governing trade in tobacco products may be politically feasible now or at some point in the not-too-distant future.

II.

Does Liberalization of Trade in Tobacco Products Harm Public Health?

Several economists and epidemiologists have assessed the effects of trade liberalization on public health by applying economic theory, measuring smoking behavior and conducting econometric analyses of data from affected nations.⁶ Each of these approaches points toward the same conclusion: Trade liberalization in tobacco products has a significant negative impact on public health in low and middle-income nations.

According to settled economic theory, free trade generally leads to lower prices, greater competition, more vigorous marketing and greater economic efficiency. All of these factors, in turn, lead to increased production and consumption of the traded product. Increased production and consumption of beneficial products—“goods” in a literal sense—is the ultimate goal of free trade and provides the justification for free trade policies.

The problem with tobacco, of course, is that it is not a beneficial product. Each additional unit of consumption has been shown to cause additional suffering and death, as well as a net economic loss to the economy of the

nation in which it is consumed and to the global economy.⁷ This distinction between a beneficial product and a harmful one essentially turns the traditional presumption in favor of free trade on its head with respect to tobacco. Logically, if the use of a product is uniformly harmful, the presumption should be against promoting increased trade in the product.

Another approach to assessing the effect of market liberalization is to measure, to the extent possible, smoking behavior before and after liberalization. This approach is imperfect and subject to confounding factors and difficulties in survey timing, sample size, standardization of questions, etc. For this reason, any single survey is of limited use. However, it is noteworthy that surveys taken in different countries, over different time periods, using different sampling techniques and questions consistently show a positive correlation between market liberalization and increased tobacco consumption.⁸ Tobacco industry consultants have reported findings similar to those

⁶ For an excellent overview of research in this field to date, see Taylor A, Chaloupka FJ, Guindon E, Corbett M. “The impact of trade liberalization on tobacco consumption.” Chapter 14 in: Jha P, Chaloupka FJ, editors. *Tobacco Control in Developing Countries*. Oxford: Oxford University Press, 2000.

⁷ See Barnum, *supra*, n. 5.

⁸ See, e.g., “Trade and Health Issues: Dichotomy Between U.S. Tobacco Export Policy and Anti-smoking Initiatives,” Government Accounting Office, May 1990 (GAO/NSAID-90-190), citing surveys showing sharp increases in smoking by teenage males and females in South Korea between 1988 and 1989 (p. 31).

found by governments and public health professionals.⁹

In recent years there has been significant econometric work on this question. Chaloupka and Laixuthai constructed a fixed-effect model to measure the relationship between cigarette consumption and a country's openness to cigarette trade, focusing on the four nations forced by U.S. trade action to open their markets to cigarette imports: Japan, South Korea, Taiwan and Thailand. The study demonstrated an overall increase in cigarette demand of about 10 percent attributable solely to trade liberalization in these nations.¹⁰ More recently, the World Bank and World Health Organization conducted a joint study of the relationship between cigarette consumption and global trade, considering data from a larger number of countries. The estimates showed that "reduced trade barriers had a large and significant impact on cigarette consumption in low-income countries, a small but significant impact in middle-income countries and no significant impact on high-income countries."¹¹

The tobacco industry and its defenders have several responses to this line of economic reasoning. They say that tobacco is a beneficial product because it gives pleasure to smokers and creates measurable economic benefits in the

form of jobs, profits and taxes. However, proper economic impact and social cost analyses of smoking measure both the positive and negative aspects of tobacco use, taking into account how tobacco-related spending would be redirected toward less harmful goods and services if tobacco use were reduced or eliminated.¹² Industry-funded analyses consistently fail to do this. The consensus of independent economists who have studied the question remains that tobacco remains a net economic drain on the global economy, as well as a direct cause of immense suffering and premature death.

The industry and its defenders also assert that free trade in tobacco products does not increase smoking rates, but merely "levels the playing field" by allowing consumers in another nation "who choose to smoke" to smoke an imported brand instead of a domestic one.¹³ While this may be an effective statement for public relations purposes, economic theory or the empirical data show that trade liberalization actually results in market expansion as well as brand switching, and that traditionally nonsmoking women and young people are disproportionately attracted to Western brands.

In conclusion, the combination of empirical, theoretical and anecdotal evidence that market liberalization significantly boosts smoking rates is compelling with respect to low- and moderate-income nations.

⁹ See, e.g., E.R.C. Statistics' 1988 profile of the Taiwanese cigarette market, which notes (p.1) that "the lowering of trade barriers to U.S. cigarettes in 1987, which produced a flood of U.S. imports onto the market, resulted in a major upswing in consumption in 1987."

¹⁰ Chaloupka FJ, Laixuthai A. "U.S. Trade Policy and Cigarette Smoking in Asia." National Bureau of Economic Research Working Paper No. 5543, 1996.

¹¹ Bettcher DW, Yach D, Guindon E. "Global trade and health: key linkages and future challenges." *Bulletin of the World Health Organ.* 2000;78(4):521-34. Review.

¹² Warner KE, Fulton GA, Ncolas P, and Grimes DR. "Employment implications of declining tobacco product sales in a nontobacco state," *Journal of the American Medical Association*, 271:771-6.

¹³ See, e.g., U.S. Cigarette Export Association (USCEA), "Global tobacco trade, US policy and American cigarettes." Executive summary, January 4, 1996; USCEA, "U.S. trade policy regarding tobacco exports," May 1994.

III.

Do International Trade Agreements Adequately Address Public Health Concerns About Trade in Tobacco Products?

To make a case for special tobacco-specific trade rules it is essential to assess the adequacy of existing rules to address public health concerns.

Existing rules affecting international trade in tobacco products include four major agreements under the jurisdiction of the World Trade Organization (WTO). An overview of each of these is provided below. Other international policies affecting international trade in tobacco are discussed briefly. They include regional and bilateral agreements, policies of multilateral agencies such as the World Bank and IMF, and national trade policies such as those of the United States, United Kingdom and other major tobacco product exporting nations.

A. Trade Agreements Under World Trade Organization (WTO) Authority

The WTO was launched in 1995 to administer a comprehensive global trading regime including numerous multilateral agreements and a stringent dispute resolution process. Agreements under WTO authority that may affect trade in tobacco products include:

- The General Agreement on Tariffs and Trade (GATT), a broad agreement launched in 1947 and expanded on several occasions,

most recently 1994, when it was incorporated into the WTO structure;

- The Agreement on Technical Barriers to Trade (TBT), which encourages the use of international standards as a basis for technical regulations that affect trade;
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and
- The General Agreement on Trade in Services (GATS), which governs measures “affecting trade in services.”

In addition, the Agreement on Sanitary and Phytosanitary Measures (SPS) governs important issues relating to the leaf tobacco trade, which is outside the scope of this analysis.

1. The General Agreement on Tariffs and Trade (GATT)

The GATT is the centerpiece of the WTO framework of agreements. It imposes broad obligations on the 135 contracting nations to provide “national treatment” for all covered products, subject to limited exceptions. National treatment essentially forbids implicit or explicit discrimination between similar foreign and domestic products. A related obligation of all WTO members is to provide all fellow-members with equal trade advantages, known as most-favored nation (MFN) status.

While these general principles have proven effective in promoting trade, strict implementation of them is not without controversy and hardship in practice. For example, to protect against the many forms that protectionist measures may assume, the GATT looks well beyond the words of a disputed law or regulation to ensure that there is no *intent* to discriminate against foreign products, and that the *effect* of a law does not put a foreign product at a disadvantage.

a. The Article XX(b) Public Health Exception to GATT

GATT Article XX provides a limited exception to otherwise applicable trade rules in order to protect environmental, public health and other values that sometimes conflict with goals of trade liberalization. The public health exception, Article XX(b), merits special scrutiny both because of the central role of GATT among trade agreements, and because Article XX is the basis for most public health exceptions in other trade agreements, with some variations. Article XX states, in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures;

...

(b) necessary to protect human, animal or plant life or health

There is considerable jurisprudence interpreting and applying Article XX(b), including one prominent case requiring Thailand to open its market to foreign cigarettes.¹⁴ Conclusions that may be drawn from this extensive record include the following:

- Article XX(b) is narrowly construed, and ambiguity or uncertainty is generally resolved in favor of free trade. There is only one instance in which a party has successfully defended a measure under Article XX(b). In that case, a panel and the WTO appellate body upheld a French ban on chrysolite asbestos against a Canadian challenge, finding the ban to be “necessary” based on international safety standards.¹⁵
- The burden is on the nation attempting to implement a public health measure to prove that Article XX(b) is applicable. This creates a presumption in favor of free trade.
- The first hurdle in defending a measure on public health grounds is to prove that the measure is “necessary” to protect public health. Necessity is defined strictly to require a showing not only that the measure is effective, but also that no less trade-restrictive measures are available that could be used to achieve the same public health

¹⁴Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, 7 Nov. 1990, BISD 37S/200. The panel found that an import ban was not necessary because it was not the least trade restrictive means available for Thailand to meet its tobacco control objectives. The panel found that Thailand’s advertising ban and other restrictions might be discriminatory, but if so, are nevertheless justified under Article XX(b). Future panels would not necessarily decide a similar case the same way. GATT and WTO rulings do not create binding precedent.

¹⁵EC—Measure Affecting Asbestos and Products Containing Asbestos: (WT/DS135R), 2000.

objective. In practice, panels have not considered whether alternate measures are socially and politically feasible as a practical matter, only whether they are theoretically available.¹⁶ As one commentator has noted, this “may set a very high hurdle for public health policies, because measures that intrude less on trade are almost always conceivable and therefore in some sense ‘available.’”¹⁷

- If a party is able to establish necessity, the inquiry goes on to ensure that the proposed public health measure does not constitute a “disguised restriction on international trade” or “arbitrary or unjustifiable discrimination.” These two standards from the top portion, known as the “chapeau,” of Article XX, are designed to prevent any abuse of the exception. Both of these standards invite scrutiny of the motives and intentions of the nation defending a health measure. Where there are mixed motives—as there often are—these standards allow a measure to be rejected even if it is shown to be “necessary” to protect public health. This reflects the strong desire by the trade community to prevent and reject possible abuses of Article XX.

¹⁶For example, U.S. restrictions on tuna caught using methods associated with a high incidence of dolphin mortality were rejected because a GATT panel ruled that a less trade-restrictive option available to the United States was to work toward international agreement in fishing practices and that the U.S. had not yet exhausted that approach. The panel did not find the practical political difficulties and the amount of time required to achieve such an agreement to outweigh the fact that it was a less restrictive available option. *US Restrictions on Imports of Tuna*, 3 September 1991, BISD 39S/155.

¹⁷Correa, CM. *Implementing National Public Health Policies in the Framework of WTO Agreements*. Draft Working Paper No. 3, April 2000.

- Panels empowered to decide disputes involving public health need not include, or consult with, public health experts in reaching their conclusions, although it is within their discretion to do so. Panelists typically are drawn from the community of trade experts serving government ministries of trade and commerce. Panel proceedings are held in secret, usually in Geneva.

This review suggests that Article XX(b), as it has been interpreted, imposes strict scrutiny and a high burden of proof on health measures challenged under GATT rules. In practice, Article XX(b) appears to assign a higher priority to preventing possible abuses than to protecting public health.

2. The Agreement on Technical Barriers to Trade (TBT)

The TBT Agreement establishes a framework for dealing with thorny issues surrounding technical regulations imposed by national and subnational governments on a variety of goods, including tobacco products. Not all tobacco regulations would fall under TBT jurisdiction. Those that involve technical specifications, measurement, testing, evaluation and other requirements almost certainly would, as might some ETS regulations and some package labeling and ingredient disclosure requirements.

Relevant highlights of the TBT framework include:

- Familiar language from the chapeau of GATT Article XX is incorporated into the Sixth Recital of the TBT Agreement, allowing nations to impose public health (and other) measures:

subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

This language carries with it the same interpretations and concerns as in GATT Article XX. It also imposes the additional burden of demonstrating that the practices in question “are otherwise in accordance with the provisions of this agreement.”

- Technical standards imposed and implemented by a party that are consistent with accepted international standards are entitled to a presumption that they are not unduly trade-restrictive. (Article 2.5.) This presumption can be overcome by evidence, but the burden in that case is on the complaining party to establish that the measure is more burdensome on trade than is necessary to fulfill a legitimate purpose.
- Where international standards exist,¹⁸ Parties are obligated to base their regulations on them unless they can meet a narrowly construed exception by showing that the international standard “would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for

¹⁸The TBT Agreement only recognizes standards produced by a recognized standard-setting body such as the International Standards Organization (ISO). (TBT Agreement, Annex 1.) Standards or norms established by the FCTC therefore would not be recognized by the TBT Agreement unless the FCTC establishes a recognized standard-setting body. This option may be worth considering as a means of countering tobacco industry influence over existing standard-setting bodies.

instance because of fundamental climatic or geographical factors or fundamental technological problems.” (Article 2.4.) Additionally, member states that adopt technical standards that are outside of existing relevant international standards are required to provide advance notice to the WTO and may be required to prove that the nonconforming standards are the least trade restrictive option available. As discussed in the GATT Article XX context, this can be an extremely difficult standard to meet.

- Unlike the SPS and some other agreements, the TBT Agreement does not require that measures be “scientifically justified.” This is important because strict application of a requirement of scientific justification imposes a significant and narrowly framed burden on a party who wishes to apply the precautionary principle. (See discussion of the precautionary principle, section V(a)(2) below.) Under Article 2.2 of the TBT Agreement, domestic measures may be based on a variety of legitimate goals such as national security and preventing deceptive practices. Scientific information is only one of the relevant elements to be considered.

On balance, the TBT Agreement appears to offer some potential advantages and disadvantages for tobacco control measures over GATT’s Article XX(b). The primary benefit is that if certain tobacco control measures become recognized as international standards, as may happen eventually through the FCTC process, these measures would enjoy the rebuttable presumption that they are “necessary” and “least trade restrictive” under the TBT Agreement. Where no applicable

standards exist, tobacco control measures would remain subject to challenge under unfavorable standards comparable to Article XX(b) of GATT. However, an issue of special concern is that where international standards exist, and a nation chooses to exceed them, the TBT Agreement appears to impose an even greater burden of proof than Article XX(b).

3. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS provides a global framework for protection of intellectual property, including patents, copyrights and trademarks. The objective of TRIPS, as stated in Article VII, is that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

TRIPS provides a limited public health exception in Article 8.2:

1. Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this agreement.

This exception includes the familiar “necessity” test, which includes the implicit requirement that a measure be the least trade-restrictive option available to achieve a legitimate goal. As discussed in the Article XX(b) context, the burden established by this test has proven to be extremely difficult to meet.

TRIPS takes the additional step of adding language requiring that health-related actions also must be “consistent with the provisions of this agreement.” By including this “compatibility test,” the Agreement seems to be asserting the opposite of an exception: if health provisions are not consistent with the Agreement, they must be rejected even if they are “necessary.”

4. The General Agreement on Trade in Services

The GATS, signed in 1994 and launched with the WTO in 1995, brings the service sector into the global trading system for the first time. This is a significant development because services account for a large and rapidly growing percentage of international commercial transactions. GATS could affect tobacco control by protecting the interests of tobacco industry consultants and employees engaged in tobacco advertising, lobbying, consumer research, etc. across national borders.

Article VI(4) of GATS empowers the Council on Trade in Services (the administrative body established to implement GATS) to develop methods to ensure that “measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services,” and that such measures “are not more burdensome

than necessary to ensure the quality of the service.”

This language raises two concerns from a public health perspective. First, it invokes the “necessity” test and the related “least trade-restrictive” requirement that also are included in the GATT, TBT and TRIPS agreements. Second, it extends WTO authority to consider whether internal *nondiscriminatory* health and safety regulations of a nation may nevertheless violate GATS if they are found to be more burdensome on trade than is deemed necessary by a dispute resolution panel.

GATS interpretation is unsettled, and the existing agreement is under renegotiation, making any analysis subject to uncertainty.

5. Other Trade-Related Agreements and Policies that May Impact Tobacco Use and Tobacco Control Measures

WTO principles and standards are incorporated into a wide range of other trade-related agreements and policies. These include:

- **Regional and bilateral trade agreements.** Nearly every nation of the world is subject to one or more regional alliances and to many bilateral agreements designed to promote free trade. These agreements generally follow the pattern set by WTO in that tobacco products are treated as if they were beneficial products whose trade should be promoted. Health concerns generally are handled under narrowly construed rules modeled on GATT Article XX(b). Because these agreements typically extend beyond the areas of trade governed by WTO agreements, they add an additional

layer of complexity in determining whether tobacco control measures may be subject to trade challenges. For example, the North American Free Trade Agreement among Canada, Mexico and the United States (NAFTA) extends protections to foreign investors and service-providers that the tobacco industry has claimed would be triggered by legitimate tobacco control measures such as plain packaging requirements.¹⁹

- **Trade-related policies of governments and multilateral agencies.** Policies adopted by individual governments and multilateral agencies also may have a profound effect on tobacco use and tobacco control measures internationally. For example, the U.S. government adopted a policy in the 1980s of using the full weight of its trade leverage to force open closed cigarette markets in Asia.²⁰ More recently, in contrast, the Clinton Administration issued an Executive Order²¹ prohibiting U.S. officials from promoting tobacco exports or undermining nondiscriminatory tobacco control laws in other nations. The U.S. policy also requires that health experts be consulted in connection with

¹⁹See, Physicians for a Smoke-Free Canada, “An Introduction to International Trade Agreements and their Impact on Public Measures to Reduce Smoking.” Working Draft, February 2001, p. 41–42.

²⁰For detailed investigative reporting on U.S. government cooperation with the tobacco industry during this era, see Frankel, G, “U.S. Aided Cigarette Firms in Conquests Across Asia,” *The Washington Post*, Nov. 17, 1996; Sesser, S. “Opium War Redux,” *The New Yorker*, 1993; 69:78–89.

²¹“Federal Leadership on Global Tobacco Control and Prevention,” *Executive Order*, The White House, 18 January 2001.

any tobacco-related trade actions. Both the United States and the United Kingdom governments have officially encouraged diplomatic personnel to help promote tobacco control measures overseas.

Multilateral agencies also have been developing policies to address health concerns about trade in tobacco products. The World Bank played an important role by adopting a policy in 1991 prohibiting lending for tobacco-related projects, citing evidence that such investments created a net harm to the global economy.²² The International Monetary Fund has consistently pressured developing nations to privatize tobacco monopolies. When asked to consider the health implications that such dramatic changes might have on tobacco consumption, IMF officials have declined to study the issue or to acknowledge that increased tobacco consumption might occur as a result of their policy.²³

B. Potential Impact of International Trade Agreements on Selected Tobacco Control Measures²⁴

Examples of specific tobacco control measures that have been, or may be, undermined by the agreements discussed above include:

- **Maintaining a market closed to foreign tobacco brands.** Thailand and other developing nations have

argued, with strong support from the public health community, that they should not be forced to open their market to foreign tobacco products because a closed market is the most certain way to maintain control over the industry, to prevent the marketing and pricing competition that accompany liberalization, to keep out brands with demonstrated appeal to traditionally nonsmoking women and children, etc. The Thai government also argued that imported cigarettes were highly processed, contained many unknown additives, and were fundamentally different from domestic cigarettes. All of these arguments were rejected by a GATT dispute resolution panel in 1990,²⁵ signaling an end to closed tobacco markets by any nation that is, or wishes to be, a member of the WTO. China, home to approximately one-third of the world's smokers, negotiated a market opening agreement with the United States in 1992 that included cigarettes, and has taken additional steps since then to open its tobacco markets under trade pressure from the U.S. and other tobacco-exporting nations in the context of WTO accession talks.²⁶

- **Maintaining a government-controlled tobacco monopoly.**

Health advocates have asserted that tobacco monopolies are just what the doctor ordered: bureaucratic,

²²See, World Bank, *Curbing the Epidemic*, *supra*, p.85.

²³See, Physicians for a Smoke-Free Canada, "An Introduction to International Trade Agreements and their Impact on Public Measures to Reduce Smoking." Working Draft, February 2001, p. 24–25.

²⁴On this subject generally, see the extensive discussion and analysis by Physicians for a Smoke-Free Canada, *supra*, p. 38–45.

²⁵See *supra*, n. 11.

²⁶For background on tariff reductions in conjunction with China's WTO accession see, e.g., "Campaign Disappointed by Tobacco Provisions in China Trade Bill," Campaign for Tobacco-Free Kids, April 28, 2000; for a more general discussion of multinational efforts in China, see Walsh, B. and Chapman, S, "Eyes on the Prize: Transnational Tobacco Companies in China 1976–1997," University of Sydney, NSW, Australia, 2000.

inefficient, poor marketers of low quality products, and generally responsive to government oversight. While members may maintain state monopolies under GATT/WTO law, the IMF consistently has required privatization of such monopolies as a condition for loans. Because most remaining monopolies have been in financially distressed nations of the world, this IMF policy has been extremely effective in pushing nations toward tobacco industry privatization.

- **High tariffs on imported tobacco products.** Tariffs raise the price of affected tobacco products, thereby reducing their consumption. In developing nations, where imported tobacco products may be especially appealing to traditionally nonsmoking women and children, and where the availability of such products has been shown to boost smoking rates, high tariffs may act as a middle ground between an open and a closed tobacco market. Tobacco tariffs also may be politically feasible and enforceable in nations in which other measures, such as product regulations and effective advertising bans, are not politically possible for a variety of reasons. Tariffs are one form of “discrimination” allowed under WTO law. However, they are the subject of intense negotiation in regional and bilateral trade agreements. In addition, nations wishing to join the WTO, such as China, have been compelled by the United States and other WTO members to reduce tariffs on tobacco and other products as a condition for WTO accession.
- **Maintaining a comprehensive ban on tobacco advertising, promotion and sponsorship.** Many nations already impose comprehensive tobacco marketing bans, and thus far none have been found to be illegal under international agreements. The GATT panel in the Thai case considered arguments that Thailand’s advertising ban violated GATT rules and found the ban to be permissible under Article XX(b). That is not a guarantee that another panel would reach the same conclusion in another case. It is possible, though far from certain, that a marketing ban could be found to violate GATS, because advertising is a service covered by that agreement. It is also possible that tobacco companies could make plausible arguments that bans on Internet tobacco advertising or sales violate their rights under existing or future agreements encouraging freedom of electronic commerce.
- **Requiring generic packaging for tobacco products.** Research strongly supports the view that children would be less attracted to tobacco products if tobacco packaging were made less visually appealing. Proposals to mandate so-called “generic packaging” in Canada were rejected, however, after tobacco companies argued that such regulations would violate numerous rights under TRIPS and NAFTA. Among other things, the companies asserted that they would be entitled to massive damages for expropriation of their trademark property

under NAFTA's investment protection provisions.²⁷

- **Requiring brand-specific ingredient disclosure.** Health authorities in Thailand, the Canadian province of British Columbia, the U.S. Commonwealth of Massachusetts and other jurisdictions have asserted their right, and the right of consumers, to know what additives are in cigarettes on a brand-specific basis. Tobacco companies have argued that such information is protected from disclosure to consumers by TRIPS and other international agreements, even though similar information is routinely provided to consumers by manufacturers of food products and other consumables.

This is certainly not an exhaustive list of claims that might be raised under current or future trade agreements. Other possibly vulnerable tobacco control measures include economic transition assistance programs for tobacco farmers; large pictorial health warning labels such as those adopted by Canada; and methods of tobacco taxation that may have a disproportionate impact on foreign brands. It is not clear how any of these issues would be resolved should they be brought before a dispute resolution panel. However, even if the tobacco control measures ultimately would be allowed, the threat of an international dispute creates a chilling effect on governments engaged in tobacco control that is likely to grow

over time as more aggressive tobacco control measures are developed and as more comprehensive trade agreements are negotiated.

C. Conclusions Regarding Adequacy of Current Rules

At the risk of stating the obvious, the trade agreements reviewed above are focused on promoting and expanding trade in covered products. While health promotion, environmental protection and other values are intended to be reflected in the agreements to some extent, it is not surprising that there is a general bias toward trade promotion and a heavy burden placed on measures that might restrain trade. This is partly due to the fact that the parties involved in drafting, negotiating, administering, interpreting and resolving disputes about these trade agreements are part of the trade policy community. Understandably, very few of these people have expertise in public health or tobacco control. There is no requirement in any trade-related agreement that experts in those subjects be consulted, much less deferred to, in resolving health-related questions about trade in tobacco products, although it is generally within the discretion of dispute resolution panels to do so.

Because these agreements treat tobacco as a conventional "good," they incorporate an inaccurate presumption that expanding commerce in tobacco products is beneficial. This structural bias seems likely to affect the mindset of trade officials dealing with tobacco-related issues. For example, history shows a tendency by trade officials to rely on affected industries for information and to regard them in

²⁷ See, Physicians for a Smoke-Free Canada, "An Introduction to International Trade Agreements and their Impact on Public Measures to Reduce Smoking." Working Draft, February 2001, p. 24-25.

some respects as clients in negotiating trade agreements.

The complexity and relatively unsettled nature of international trade law, and the overlapping jurisdiction of many different agreements gives rise to legal uncertainty, which plays into the hands of the tobacco industry.

The industry and its lawyers have constructed creative arguments against a wide variety of tobacco control measures on the basis of international law.

The industry's legal theories are rarely tested because ministries of health and health groups, especially those in developing nations, typically lack the expertise, resources and political clout to challenge the industry in the international fora that decide these matters.

For all of these reasons, existing trade rules do not adequately address legitimate public health concerns regarding trade in tobacco products.

IV.

How Are Other Harmful Products Treated in International Trade?

There are substantial precedents for special rules to govern trade in specific harmful products. The existence of such rules demonstrates widespread agreement that existing trade rules do not offer adequate protection against the harms caused by some products. In the environmental field alone, there are at least 20 multilateral treaties that contain trade-related provisions.²⁸

A. Products Excluded from WTO Agreements

Trade in weapons has been excluded from GATT and WTO jurisdiction since 1947. Narcotics and psychotropic substances, while not specifically excluded from WTO agreements, have, in practice, been dealt with internationally exclusively under narcotics and psychotropic substances conventions of 1961, 1971 and 1988. Trade in these products and substances and in related goods is subject to extremely strict and elaborate international controls and bilateral agreements, including strict import and export requirements to prevent diversion into illegal markets.

Among weapon classes, antipersonnel landmines have been singled out for special treatment in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines and on Their Destruction. This treaty takes the ultimate step of totally prohibiting any trade at all in a previously legal product. The agreement affects both parties and nonparties to the agreement due to the requirement that parties avoid taking any action to assist any other party engaged in prohibited landmine-related activities. (Article 1.)

B. Multilateral Environmental Agreements Restricting Trade in Harmful Products

Among the many environmental treaties that affect international trade, four stand out.

- **Ozone-depleting chemicals.** The Montreal Protocol on Substances that Deplete the Ozone Layer (1987) is analogous in some respects to the Landmine Treaty. It establishes a timetable to phase out production and consumption of ozone-depleting substances such as chlorofluorocarbons (CFCs). It also imposes on its 173 members an obligation to restrict their trade activities in ozone-depleting chemicals with non-parties to the Convention.

²⁸“Trade Measures and Multilateral Environmental Agreements: Resolving Uncertainty and Removing the WTO Chill Factor.” World Wildlife Federation, WWF International Discussion Paper, November 1999.

- **Persistent organic pollutants (POPs).** The POPs Convention was agreed to by the negotiating parties in December, 2000 and is scheduled to come into force in 2001. It governs the production, use and trade in PCBs, DDT and other pollutants that accumulate in the environment and pose a substantial threat to human, animal and plant life. The Convention divides POPs into several categories, with one category to be phased out of production and use entirely, another category subject to strict production, use and transportation restrictions, etc. The Convention includes obligations for parties to the convention not to trade in POPs with non-parties to the Convention.
- **Hazardous waste.** The Basel Convention on Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989) governs production, transportation, storage, management and disposal of hazardous waste. It includes prohibitions on the import or export of hazardous wastes to or from non-parties (Article 4.5), and obligates parties to prohibit export of wastes if the wastes will not be managed “in an environmentally sound manner” (Article 4.8).
- **Endangered species.** The Convention in International Trade in Endangered Species of Wild Fauna and Flora (1972) (CITES) imposes strict controls on trade in covered species, including a complete prohibition on trade in the most threatened species.

Each of these agreements provides for restrictions in trade, including a form of “discrimination” against countries that do not adopt relevant envi-

ronmental agreements. Establishing special rules affecting trade in tobacco products would seem to be a logical extension of this precedent.

C. How Are Potential Conflicts Between the Product-Specific Rules and WTO Rules Addressed?

There are several readily available methods for resolving potential conflicts between product-specific rules, such as those that might be adopted in the FCTC, and obligations under broader trade agreements.²⁹ They include:

1. Where both parties to a dispute are also parties to the FCTC, FCTC rules and procedures should be followed to resolve any dispute. This follows the general rule of treaty construction that rules of greater specificity should take precedence over more general rules. This outcome also should be specifically provided for in the FCTC.
2. Even in the absence of a specific provision in the FCTC, international law provides that where there is a conflict between two treaties, the later in time prevails.³⁰ This rule would protect the FCTC from being overridden by trade-related agreements for some period of time,

²⁹On this issue generally, see Saladin, C. and Van Dyke, B. “International Trading Rules and the POPs Convention,” Center for International Environmental Law, November 1999.

³⁰Vienna Convention of the Law of Treaties, Article 30, Paragraph 3 provides that “[w]hen all the parties to the earlier treaty are parties also to the later treaty...the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.” Cited in Taylor A, Chaloupka FJ, Guindon E, Corbett M. “The impact of trade liberalization on tobacco consumption,” In: Jha P, Chaloupka FJ, editors. *Tobacco Control in Developing Countries*, Chapter 14, Oxford: Oxford University Press, 2000.

although it may work against the treaty later on. The effect of this rule is limited to cases in which parties to a dispute are also parties to the FCTC.

3. Where one or more parties to a dispute are not parties to the FCTC, there is no way under international law for the non-FCTC parties to be directly bound to FCTC rules or procedures. A tobacco trade-related dispute involving non-parties probably would be addressed by a trade-related body such as the WTO, and WTO rules and procedures would be applied. Even in this scenario,

however, FCTC provisions could carry great weight. WTO officials and dispute resolution panels could, and should, see the FCTC as reflective of international norms regarding tobacco control, and should presume that tobacco control measures called for in the FCTC are justified on public health grounds. While this degree of deference is not required (except in the limited instance of regulations adopted in conformance with a technical standard recognized under the TBT Agreement), it is quite possible that it would develop in practice.

V.

Evaluating Potential Trade-Related FCTC Provisions

FCTC measures could have a positive influence on international trade in tobacco products in three ways:

1. By reinforcing the primacy of public health concerns in tobacco trade. This can be accomplished by clarifying that the FCTC is not subordinate to international trade agreements and by establishing that (a) tobacco control measures may be justified even when there is scientific uncertainty regarding the necessity or effectiveness of a given measure; and (b) the burden of proof should rest with those who seek to invalidate tobacco control measures, rather than on those who seek to implement them. These measures are described in greater detail in sub-section (a) below.
2. By securing specific agreement by FCTC Parties not to take tobacco trade-related actions—such as promoting tobacco product exports or challenging tobacco control measures in other nations—that conflict with FCTC goals. These measures are discussed in sub-section (b) below.
3. By including language in the FCTC embracing, to the extent possible, strong tobacco control measures. This will strengthen the ability of states to defend tobacco control measures against challenges brought under international trade

agreements. These measures are discussed in sub-section (c) below.

A. Measures to Reinforce the Primacy of Public Health Concerns Regarding Tobacco

1. Ensuring that the FCTC Takes Precedence over Other International Agreements

As discussed above, FCTC provisions cannot directly alter conflicting provisions in WTO or other agreements. However, the FCTC can include language to ensure that its provisions will prevail among Parties to the Agreement. Such language could be worded as follows:

In the event of a conflict between this Convention or any of its Protocols and another international agreement, this Convention and its Protocols shall take precedence.

An alternative approach that might be more consistent with earlier agreements would be to declare that the FCTC is not subordinate to other international agreements. Straightforward language has been proposed to accomplish this:³¹

³¹This language is adapted from Physicians for a Smoke-Free Canada, “Trade Agreements and Tobacco Use,” submission to WHO, August 2000, p. 4.

This Convention and its Protocols shall not be subordinate to other international agreements.

Such an approach would clearly reflect a compromise position to those who believe that, with respect to tobacco-related issues, and as among FCTC Parties, the FCTC should be the supreme authority. However, there is precedent in multilateral trade agreements for including this “nonsubordination” provision.³²

2. Promoting Precautionary Language

A recurring concern about international trade agreements has been that they impose difficult standards of proof on proponents of measures that would burden or restrict international trade on public health or other grounds. While such standards may or may not be appropriate when applied to beneficial products, they are not appropriate when applied to tobacco products, which are uniquely harmful when used as intended.

The environmental community has developed what it calls the “precautionary principle” or “precautionary approach” to deal with analogous con-

cerns about products that are harmful, or potentially harmful, to the environment. To a great extent, the precautionary principle may be thought of as operationalizing the principle of primacy for public health concerns over commercial interests when the two are in conflict. In the environmental context, the precautionary principle has been applied where there is a risk of “serious or irreversible”³³ environmental damage. Core elements of the precautionary principle, according to one commentator,³⁴ include:

- Taking precautionary measures even if not all cause-and-effect relationships are fully understood;
- Shifting the burden of proving safety onto the proponent of a potentially harmful activity;
- Making environmental and public health decisions in an open, informed and democratic way;
- Examining the full range of alternatives to a particular activity; and
- Relying on a weight-of-the-evidence approach rather than waiting for absolute certainty.

The precautionary principle has varied in its specific wording depending on context. It has been incorporated into a variety of environmental treaties with support from the European Union, many developing nations and NGOs.

As supporters of the precautionary principle have sought to broaden its applicability, it has become a lightning rod for conflict in trade negotiations.

³² See, e.g., the following language from the Preamble to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity:

Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development....

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements, Have agreed as follows:....

³³ Rio Declaration on environment and Development, Principle 15, June 14, 1992, U.N. Doc. A/Conf. 151/5/Rev. 1(1992).

³⁴ Saladin, C, “The Precautionary Principle in International Law,” *International Journal of Occupational and Environmental Health*, Vol. 6, No. 4, pp. 270–80. Oct./Dec. 2000.

Several major trading nations led by the United States, Canada, Japan and New Zealand, favor a more restrictive approach to risk assessment and analysis and have taken a hard line against the precautionary principle.

Critics of the precautionary principle are especially concerned that it may be used to create a presumption against trade in products, such as genetically modified agricultural products, that offer potentially enormous benefits to humankind, in addition to risks of unintended consequences.

Despite likely stiff opposition from the U.S. and other nations, the precautionary principle seems especially well-suited to the tobacco control context. One reason for this is that the harm associated with tobacco use, and with liberalization in tobacco trade, is now well documented. Thus, unlike the situation with genetically modified agricultural products, there is little downside to applying the precautionary principle to tobacco trade. Applying the principle also seems appropriate because of the enormous magnitude of harm and risk posed by tobacco use, the persistence of addiction once established, and a degree of scientific uncertainty regarding which tobacco control measures are most effective.

Historically, the tobacco industry has thoroughly exploited scientific uncertainty about the magnitude of risk posed by, e.g., active smoking, passive smoking, tobacco advertising, addiction, etc. The industry has demanded that scientific near-certainty be achieved, both about those issues and about the effectiveness of proposed remedies, before protective action is taken. In theory, adoption of the precautionary principle would put an end to this absurd but successful tobacco industry strategy.

The following formulation of the precautionary principle could serve as a basis for further discussion of this issue:

It is scientifically certain that tobacco use causes needless suffering and death in a high proportion of users. Lack of scientific certainty regarding related issues, including the efficacy of specific tobacco control measures, shall not be used as a reason for postponing such measures or for challenging tobacco control measures taken by other States.³⁵

This language avoids using the words “precautionary principle,” while capturing the essence of the concept. This approach may be less provocative to those nations that are generally opposed to precautionary language.

The precautionary principle has been limited in various ways in other treaties, and so it is predictable that similar limitations will be proposed in the FCTC context. Such proposals could include:

- **Cost effectiveness.** The Rio Declaration specifies that only “cost effective” measures shall be taken under the precautionary principle. While reasonable on its face, such a term is subject to widely varying interpretation of what constitutes cost effectiveness based on such thorny questions as how best to calculate the social cost of tobacco use, how to correctly value human life, etc. Therefore, from a public health perspective, whether a tobacco control measure is cost-effective seems best determined by the national government involved.

³⁵This language is adapted from Physicians for a Smoke-Free Canada, “Trade Agreements and Tobacco Use,” submission to WHO, August 2000, p. 4.

• **Time limitation.** Nations favoring a more limited precautionary principle have urged that precautionary actions should only be allowed to stand “for a reasonable time” while scientific uncertainty is resolved. Under this approach, which is reflected in the SPS Agreement,³⁶ nations invoking the precautionary principle are obligated to work persistently to resolve the scientific uncertainty. Like the “cost-effectiveness” limitation, this proposal sounds reasonable but has troubling implications. It appears to place a burden on the nation invoking the precautionary principle to play a significant role in resolving the scientific uncertainty regardless of whether that nation has the expertise, resources or incentive to do so. The better approach would appear to be to allow measures taken under the precautionary approach to remain in force until the scientific uncertainty is resolved by whatever means. At that time, the precautionary principle will no longer be available to any party.

In conclusion, the precautionary principle has the potential to accomplish much of what many tobacco control experts have recommended. As among Parties, it could effectively reverse the prevailing presumption, in both domestic and international trade, in favor of expanding commerce in tobacco products. Although there would be little or no direct effect of this provision on international trade agreements, adoption of the principle within the FCTC could positively influence the way other nations and

international trade officials approach tobacco control issues.

3. Avoiding Provisions that Could Undermine the Primacy of Health Concerns

Another aspect of reinforcing the primacy of health concerns is to ensure that the FCTC text does not include language that conflicts with the principle of primacy for health concerns. In reviewing the Chair’s Text, Articles D(5) and I(2) bear close scrutiny on this score.

Article D(5) provides, as a guiding principle, that “tobacco control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade.” This phrase, which originated in Article XX of GATT, appears eminently reasonable on its face. We may all agree that nations should only discriminate against one-another’s products when they are justified in doing so. Moreover, it appears that potentially more troublesome language from Article XX has been deliberately avoided. Specifically, the requirements that a measure be found “necessary” to protect health and to not “constitute a disguised restriction on international trade” have been avoided. These provisions have been interpreted to require that there be no less trade-restrictive alternative available, and to require a complicated inquiry into the intent behind the measure, rather than focusing on its public health effect.

Despite these encouraging features, this phrase could cause mischief and does not appear to advance a public health interest. In the absence of clarifying language, it might still be interpreted by a WTO panel to require a broader Article XX-like analysis,

³⁶Correa, CM. *Implementing National Public Health Policies in the Framework of WTO Agreements*. Draft Working Paper No. 3, April 2000 at 15.

including the “least trade restrictive alternative” requirement. It also could be interpreted, consistent with Article XX, to place the burden of proving that a measure is justified on the party trying to implement a tobacco control measure, rather than imposing the opposite burden on the complainant. This would effectively turn the precautionary language discussed in the section above on its head.

The ideal outcome from a public health perspective would be to delete this provision as both unnecessary and in conflict with the precautionary principle. Because the principle of nondiscrimination is deeply held within the international trade community, a proposal to delete this language should be expected to provoke opposition from some major trading nations. Should it prove politically impossible or unwise to delete the language entirely, the public health community should consider whether it is possible to alter this provision to make it more consistent with the precautionary principle. This might be done, for example, by clarifying that the burden of proof is on the complainant and that the applicable standard of review requires only a “rational basis” for the regulation, rather than the “least trade restrictive” test that GATT Article XX would impose. Consider, for example, the potential effect if the following text were added to the existing Article D(5):

A tobacco control measure shall be considered justifiable and not arbitrary unless it is shown that it bears no rational relationship to reducing tobacco use or to reducing the harms caused by tobacco use.

Article I(2), one of the provisions regarding illicit trade in tobacco products, provides that:

The Parties agree that measures to this end [eliminating smuggling and counterfeiting] shall be transparent, non-discriminatory and implemented in accordance with their international obligations.

This provision appears intended to provide reassurance that FCTC anti-smuggling provisions will not override the Parties’ existing obligations under international customs conventions and other trade agreements. It is not clear what the impact might be of adding “non-discriminatory” in this context. Conceivably, the term could have unintended consequences. Antismuggling policy experts should be consulted to assess the potential impact of this language and to discuss alternatives.

B. Measures to Prevent Parties from Using Trade Rules in Ways that Conflict with FCTC Principles and Goals

As discussed, FCTC Parties have the ability to challenge and undermine effective tobacco control measures in other nations under a wide range of international agreements, including those governed by the WTO. While the FCTC cannot directly change provisions of these other agreements, Parties to the FCTC may voluntarily agree to foreclose taking some actions that otherwise would be available to them. This restraint by FCTC Parties is important because it would obligate them not to challenge tobacco control measures in any country, not just those that are Parties to the FCTC. This restraint would be especially important if major tobacco-producing

and exporting nations were Parties to the FCTC.

Provisions that could be included along these lines include the following:

1. Preventing Parties from Undermining Tobacco Control Measures and Promoting Tobacco Exports in Other Nations

The Parties agree to take all necessary measures to ensure that no person acting on their behalf shall attempt to (a) remove, weaken, undermine or otherwise interfere with tobacco control measures in force or under consideration in another State or (b) promote tobacco product exports or tobacco use in another State.

This draft language is modeled after a provision in U.S. law known as the Doggett Amendment, and after a similar Executive Order issued by then President Clinton on January 18, 2001. These U.S. policies include the following language that is omitted above: "...provided that such restrictions are applied equally to all tobacco or tobacco products of the same type." Parties who wish to see the FCTC include nondiscrimination provisions will argue that this limitation, or something similar to it, should be included. Others will argue that adding nondiscrimination language is unnecessarily restrictive in the case of tobacco products.

2. Measures Defining Parties' Obligation to Adopt Positions in Other International Agreements Consistent with FCTC Principles and Goals

Many tobacco control advocates have urged that tobacco products be excluded from trade liberalization agree-

ments. This cannot be accomplished directly through the FCTC. However, Parties to the FCTC could embrace that goal and agree to work toward it. It is unclear at this point whether this goal has significant support among the Parties. If such support is not forthcoming, an alternative approach would be to encourage Parties to treat tobacco products separately from all other products in trade agreements to ensure that public health concerns are addressed. Finally Parties may wish to agree to review existing agreements and to bring them into harmony with the FCTC to the extent possible. This could be especially important for nations such as the United States, United Kingdom, Germany and Japan, which are party to many market opening and tariff reduction agreements with developing nations that deal specifically with cigarettes.

This latter point is touched on by Article E(7) of the Chair's Text:

The provisions of the Convention shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to this Convention, provided that such agreements are compatible therewith. Copies of such agreements shall be communicated to the secretariat of the Convention by the Parties concerned.

This text appears to do a good job of requiring Parties to avoid entering into agreements that are incompatible with the FCTC. This is helpful, although more specifics regarding how *pre-existing* agreements should be addressed, and regarding how "compatibility" should be assessed, would be helpful.

The following draft provisions on these points may serve as a basis for discussion:

The Parties agree to use their best efforts to seek the exclusion of tobacco products from the terms of current and future bilateral, regional or other trade liberalization agreements to which they are, or may become, a party.

[and/or]

Where it is not feasible or appropriate to exclude tobacco products entirely from the terms of a trade liberalization agreement, the Parties agree to use their best efforts to ensure that tobacco products are considered separately from other products within such agreements, and that other appropriate measures are taken to address the unique public health concerns related to trade in tobacco products.

The Parties agree to review international agreements to which they are a party, and which affect trade in tobacco products, and to take appropriate steps to ensure that such agreements are consistent with this agreement.

While these provisions are a logical extension of FCTC principles, they do not appear to have significant precedent in other international agreements and therefore should be subject to a more detailed review before any action is taken on them.

3. Agreement to Defer to Health Experts on Health Questions

Another criticism of international trade agreements is that they do not promote deference to public health experts on crucial questions of health

and health policy. Again, the FCTC cannot directly change how other agreements address this question. However, the agreement can set an example of how such issues should be addressed by encouraging FCTC Parties to defer to appropriate health and health policy experts on issues of fact in tobacco-related disputes.

It may not be politically possible to require Parties to defer to independent public health experts, although this approach should be explored. Some nations may prefer to rely on their own domestic public health agencies for expertise on tobacco control questions, and may claim that questions of sovereignty are involved. The answer to these claims is that such deference would be voluntary, and would be analogous to compulsory arbitration agreements that are relatively common in international agreements.

If it proves impossible to require deference to public health authorities, there should be little serious objection to a requirement that Parties seriously consider input from leading independent internationally recognized experts on factual questions in dispute. Such experts could be appointed on an ad hoc basis by the Secretariat or the Director General of WHO. Panels providing such input should consist of independent experts acting in their individual capacity, rather than State-controlled experts. The findings of such panels, even if they are not binding on the Parties, could be decisive in resolving questions of fact.

The following language may help focus discussion on this point:

The Parties agree that in any dispute with another State regarding tobacco-related issues, they will defer to [or

seriously consider] findings made by experts identified by the Secretariat of this Convention and/or the Director General of the World Health Organization on questions relating to: (a) epidemiological issues and the health effects of tobacco use; (b) the costs, benefits and effectiveness of tobacco control measures; and (c) interpretation of FCTC provisions.

4. Measures to Reduce or Eliminate Double Standards Between Tobacco Products Produced for Domestic and Foreign Markets

Section E(3) of the Chair's Text reads:

The Parties shall undertake to adopt legislative, executive and administrative measures to regulate and to prohibit the export of tobacco products that do not conform to the exporting country's own domestic standards.

This language obligates Parties to apply similar health-related standards to tobacco product exports as to domestically sold tobacco products. The main beneficiary of such a policy would be developing nations with inadequate tobacco control product regulations in place. It is not clear whether "nonconforming" exports may simply be regulated, or whether they must ultimately be prohibited, based on this text.

This provision seems likely to be the subject of debate. Some will argue that the existing wording is entirely too lax because a Party could claim that some *de minimus* regulation of tobacco exports, perhaps requiring a weak warning label, would be sufficient for compliance. This appears to be a valid concern. Alternative wording modeled on

U.S. Food and Drug law³⁷ may be worth considering:

The Parties shall undertake to adopt legislative, executive and administrative measures to prohibit the export of tobacco products that do not conform to the exporting country's own domestic standards, unless national health authorities of the exporting nation determine in good faith that such exportation is not contrary to public health and has the informed consent of the country to which it is intended for export.

This language would allow health authorities to consider the likely impact of an export on a particular market. Exports could continue, for example, if the product does not conform to domestic standards solely because it is compliant with conflicting standards in the market for which it is destined, or if other considerations lead to the conclusion that the export will not worsen the tobacco epidemic in the country of destination.

Some Parties will argue that any export restrictions will place the exporting companies at an unfair competitive disadvantage and will encourage those companies to move production to countries with low product regulation standards. These concerns, too, appear to have some validity, particularly if the domestic tobacco product standards are very strict. It is this aspect that may make this provision politically difficult to attain. Responses to these concerns include:

- applying minimum health standards to exports upholds the important

³⁷U.S. Food, Drug and Cosmetic Act, Section 801(e), 21 U.S.C. § 381(e).

principle that nations should not knowingly exploit for commercial advantage the inadequate public health protections that prevail in some low-income nations;

- it does not serve the broader interests of a nation to be seen by the international community as exploiting lax public health rules in other nations by exporting tobacco products that would not be legal to sell domestically;
- the proposal allows for continued tobacco product exports under reasonable conditions; and
- applying domestic health standards to exports may provide a strong incentive for major tobacco manufacturers who rely on exports to promote, rather than oppose, higher product standards in many countries so that their exports will not be at a competitive disadvantage in those markets.

While these and other responses are not definitive, they may be persuasive to many.

5. Restraints on Tobacco Company Behavior Abroad

The Chair's Text suggests a principle that double-standards should be reduced or eliminated between cigarettes produced for domestic consumption and those produced for export. A logical extension of this principle is that FCTC Parties could agree to impose minimum standards of conduct on the marketing, lobbying and other behaviors of tobacco companies operating overseas but subject to their limited jurisdiction. While this general approach has appeal, it would be controversial, and would be subject to the usual arguments against extraterritorial jurisdiction, including the argument

that such provisions are difficult to enforce. Perhaps the best precedent for including such measures is the Convention on Bribery of Foreign Public Officials in International Business Transactions, adopted in Paris in 1997, which imposes on parties to the Convention obligations to prevent corrupt practices by their corporations and nationals operating abroad.

C. Measures to Strengthen the Ability of States to Defend Tobacco Control Measures Against Challenges Brought Under International Trade Agreements

There are several ways in which the FCTC may help strengthen the ability of Parties to defend effective tobacco control measures against challenges brought under international trade agreements.

1. Including Explicit FCTC Support for Strong Tobacco Control Provisions

One strategy is to maximize the likelihood that strong tobacco control measures will be regarded as international standards or norms by national governments, WTO panels and other international trade decision-makers. The best way to accomplish this is for the FCTC to encourage or support adoption of specific tobacco control measures that may be subject to international challenge such as complete advertising bans, generic packaging, ingredient disclosure, smokefree indoor air and other measures. Under GATT, TBT, TRIPS, GATS and other agreements, it would be extremely helpful for a Party to be able to cite an unambiguous FCTC provision to support the proposition that a tobacco control measure is justified on public

health grounds and is consistent with international tobacco control norms.

2. Ensuring that Regulatory Floors Are Not Treated as Ceilings

In all drafting related to the FCTC, it is important to assume that any standard or norm established will be interpreted by the WTO and other trade-related bodies as a ceiling in the absence of specific language to the contrary. Where appropriate, therefore, the FCTC should frame standards without an upper limit. For example, in the Chair's Text, a minimum age of 18 is established to purchase tobacco products. In order to protect the interests of Parties who may wish to establish age 19, 20 or 21 as a minimum age, the FCTC should explicitly state that "Parties shall establish a minimum age for the purchase of tobacco products that is at least age 18, and may be higher." The Chair's Text provides helpful language as Guiding Principle 8:

The provisions of this Convention should be recognized as minimum standards, and Parties are encouraged to implement measures beyond those required by the Convention.

This language, combined with care in drafting specific provisions, may help reduce but will not eliminate the likelihood that regulatory floors will be treated as ceilings. This is one of many areas where additional study and new ideas are needed.

3. Providing an Effective Dispute Settlement Mechanism Under the FCTC

One of the best ways to assure that disputes among FCTC Parties are settled in accordance with the letter

and spirit of the FCTC is to provide an efficient and effective dispute resolution mechanism within the agreement.³⁸ In the absence of such a mechanism, tobacco-related disputes inevitably will be resolved by the WTO and other bodies that may apply different legal provisions and interpretations, and that may lack the appropriate expertise and sensitivity to tobacco control issues.

The Chair's Text, in Section R, provides for nonbinding negotiation, mediation and conciliation of disputes. Parties may agree to submit to compulsory arbitration, but are not required to do so as a prerequisite to ratifying or acceding to the FCTC. It is unclear why a Party would agree in advance to compulsory arbitration under these conditions. Therefore, if at all possible, the arbitration provision should be strengthened to provide for arbitration of all disputes that are not resolved through negotiation.

This discussion by no means exhausts the range of potential trade-related FCTC measures. For example, it may be possible to develop trade rules that would provide a strong incentive for nations to become parties to the FCTC, or that would discourage non-parties from allowing tobacco advertising to be transmitted from their territories into other nations via satellite and Internet broadcasts. Additional research into possibilities such as these are needed.

³⁸ See, e.g., "United Nations Ad Hoc Interagency Task Force on Tobacco Control, Report of the Third Session, Friday 8 December 2000," p. 12, in which a representative of WTO, speaking in her personal capacity, makes this point.

VI. Conclusion

At one level, tobacco trade policy issues are complex, involving countless multilateral, regional and bilateral trade agreements and national policies. At another level, what at first appear to be many issues turn out to be the same ones appearing over and over again in different contexts.

Everything tobacco control advocates seek in the trade policy arena appears to flow from several core understandings:

- Tobacco products are uniquely and inescapably harmful when used as intended.
- Promoting or expanding trade in tobacco products harms public health and the global economy.
- Public health concerns should take precedence over commercial interests in tobacco trade policy rules and decisions.

These insights do not appear to be widely understood or shared within the international trade community. Trade agreements administered by the WTO reflect a worldview in which tobacco products are considered economic “goods”; expanding trade in tobacco products is presumed to benefit the global economy; and commercial interests typically take precedence in policy decisions.

This paper has reviewed a wide range of potential FCTC provisions that are consistent with the public health perspective. Which of these provisions should be pursued, and how high a priority they should be given, depend on assessments of feasibility and strategy that are beyond the scope of this paper.



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