Confronting the Tobacco Epidemic in an Era of Trade Liberalization

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<td>BAT</td>
<td>British American Tobacco</td>
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<td>BMP</td>
<td>black market premium</td>
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<td>DSU</td>
<td>Dispute Settlement Understanding (of WTO)</td>
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<td>ETS</td>
<td>environmental tobacco smoke</td>
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<td>EU</td>
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<td>FCTC</td>
<td>Framework Convention on Tobacco Control (of WHO)</td>
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<td>foreign direct investment</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services (WTO)</td>
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<td>GATT</td>
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<td>INB</td>
<td>Intergovernmental Negotiating Body</td>
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<td>ISP</td>
<td>Internet service provider</td>
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<td>MFN</td>
<td>most-favoured-nation</td>
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<td>NAFTA</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>PH</td>
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<td>SCM (Agreement)</td>
<td>Subsidies and Countervailing Measures (WTO Agreement)</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UR</td>
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14 من شأن التوسيع التكنولوجي الذي يحدث بصورة ت sve، على سبيل المثال، أن يجعل من مخططات التنظيم الذاتي الطوعي أمرًا غير مفيد.


16 بما في ذلك، بين أمور أخرى، الاتفاقي بشأن الحوافز التقنية (التعليم والتعزيز)، والاتفاق بشأن الزراعة (الحد من الدعم الحكومي لإنتاج النبع)، الاتفاق العام بشأن التجارة في الخدمات (العمال) (القيود المفروضة على الإعلان)، والاتفاق العام بشأن التعريفات الجمركية والتجارة (الغات) (الضرائب، وأنواع الحظر والاستثناءات المصلحة بالصحة البشرية من قواعد اتفاق الغات).

17 الدول الأعضاء هي: أستراليا، بلغاريا، كوستاريكا، السلفادور، غواتيمالا، هنغاريا، ماليزيا، بولندا، رومانيا، جنوب أفريقيا، تايلاند، الولايات المتحدة الأمريكية.
منظمة التجارة العالمية كما قضية السجاير التاليدية لعام 1990 وقضية الأسبستوس لعام 2001، تبتّن كيف تم تطبيق قواعد منظمة التجارة العالمية على مسائل تتعلق بصحة الإنسان. والجانب الآخر في قضية عام 2001 أن هيئة النقض أكّدت أن الدول الأعضاء في منظمة التجارة العالمية تتبع بحث لا تزال فيه في تحديد مستوى الحرمان الصحي الذي يتمتع به، وهو لا يوجد أي يُغلق بتحكيم "اللغة" عام 1994 بتحديد حجم الخطر الذي يهدد حياة الإنسان أو صحته، وأن الصحة البشرية تتبع "بأقصى درجة ممكنة من الحيوية والllumه".

وتعد مهمة التحكم في المخدرة السريعة لاستهداف التبغ في تصور الحرمان التجارية مهمة هائلة للأعمال. وينظر إلى عدم وجود أي أنشطة وطنية ودولية راسخة لمقاومة التبغ، فإن المواقف الطويلة الأمد المترتبة على تراجع التجارة والاستثمار المترتب عنة إزاء عديد عجز الوافدين والأموال الناجمة عن التبغ تزداد كبيرة، ولا يمكن في البلدان النامية، وربما يمكن تحقيق الإمكانات الوقائية لسياسات مكافحة التبغ العالمية الفعالة من خلال الاتجاه الإطاري بشأن مكافحة التبغ دون مناصب بالتجارة الدولية.

وفي عالم ما بعد جولة أوروجواي، تسحق الأثر السلبي المترتبة على تراجع التجارة، مثل الزيادة في معدلات فيظة التبغ، إلا أنها متعددة. فيما يلي بعض الحقائق المتعلقة بالأرضية السياسية والاقتصادية في مرحلة ما بعد جولة أوروجواي:

- تظل الفترة المناخية المفتوحة.
- لا يمكن وزن الاعتبارات الصحية الأساسية والأولويات القطبية بنفس السباق الذي توزّن به الإسهامات العالمية، والكلية، وسلاسل العمليات. وتشمل الاتجاهات الإطارية ب дальة مكافحة التبغ تضطلع منظمة الصحة العالمية بدور رئيسي وبولاية مكملة من ضمان دراسة الاعتبارات الصحية دراسة وافية.
- تحتاج البلدان المتقدمة إلى الاعتراف بأن المخدرة تشمل عlemen المسؤليات والحقوق أيضا.

وتؤثر الاتجاه الإطارية كجهد يرمي إلى متهد هذا الفشل.

العام بشأن التجارة في الخدمات (إغاثة) التجارة في كافة الخدمات تقريبا، ويبطّل من كل دولة عضو فيه تقديم ما يسمى بعدم التأزم المحدد، يتضمن قائمته بقطاعات الخدمات التي يكون مستعداً لمنح سبيل الوصول إلى الأسوأ والعاملة الوطنية لها، وفق للدول المدعومة. بموجب المادة الرابعة عشرة (ب) من ذلك الاتفاق،

يرعني بأي التزام من تنازلتها، عند الضرورة، لحماية حياة أو صحة البشر أو الحيوان أو النبات.

وت(certify) الأسواق ونماذج المنتجات في الاستخدام لتقييم الامتثال لهذه المواصفات في شمال التجارية لا داعي لها، وعملاً بشروط الاتفاق، يجوز لكافة الدول الأعضاء إرسال مثل هذه الأتفاقيات على المستوى الذي تراه مناسباً، ولا يجوز لأي بلد فرض مواصفات أو شروط أخرى أشد صرامة على المنتجات المستوردة من تلك التي تطبقها على المنتجات المماثلة التي يتم إنتاجها محلياً أو وفرها من منتجات مستوردة من стран، ولكن ليس في جميع هذه المنتجات المماثلة التي يتم إنتاجها محلياً، أو وفرها من منتجات مستوردة من стран، ولكن ليس في جميع هذه المنتجات المماثلة التي يتم إنتاجها محلياً، أو وفرها من منتجات مستوردة من стран، ولكن ليس في جميع هذه المنتجات المماثلة التي يتم إنتاجها محلياً، أو وفرها من منتجات مستوردة من стран، ولكن ليس في جميع هذه المنتجات المماثلة التي يتم إنتاجها محلياً، أو وفرها من منتجات مستوردة من стран، ولكن ليس في جميع هذه المنتجات المماثلة التي يتم إنتاجها محلياً، أو وفرها من منتجات مستوردة من стран، ولكن ليس في جميع هذه المنتجات المماثلة التي يتم إنتاجها محلياً، أو وفرها من منتجات مستوردة من стран، ولكن ليس في جميع هذه المنتجات المماثلة التي يتم إنتاجها محلياً، أو وفرها من منتجات مستوردة من страны.

ولذا، لا تكون أبدًا تقيدًا للتبديل التجاري مما هو مطلوب لبلوغ غاية مشروعة. ويوجّه هذا "الاتفاق"، يجوز وضع لوائح تقييد لأحد أو أكثر من yağمات المشروعة، بما في ذلك حماية صحة أو سلامة البشر ومنع الممارسات الضالة، ولكنها يجب تقييد على ذلك. وكانت تلك أساسية لمن بين جميع اللوائح المتعلقة باتفاق الحناية التجارية أمام التجارة التي أبلغت إلى منظمة التجارة العالمية عام 1950، أكثر اللوائح شيوعًا. كما تم الإبلاغ عن عدة شروط تصل إلى مواد تقوم بالتعريف بالسحارة.

ويتناول "الاتفاق بشأن الرعارة" سبل الدفع إلى الأسواق، والدعم المحلي، وإعانات التصديرية للمتناجات الزراعية، بما فيها التبديل، وتزود كل دولة عضو تلوّح الدعم للراعية من خلال تداول الإعانات المباشرة بخفض المدة القناعية الإجمالية لمنع هذه الاستشارات عندما تزيد عن 5% (أو 10% بالنسبة للفلاح الناهض) عن قيمة الإنتاج السنوي للدولة المعنية. ويدل "الاتفاق" حظراً على استخدام إعانات التصدير لأي من المنتجات الزراعية غير الخاضعة لاتفاقيات التخفيف أو تلك الخاضعة لمعمارية خاصة بالفلاح الناهض.

وقد استخدمت حتى الآن 12 دولة عضوًا "الاتفاق الخاص بالراعية" لائحة حراز وصول التباد إلى الأسواق.

ويتناول الاتفاقي بشأن جوانب حقوق الملكية الفكرية المتصلة بالتجارة (TRIPS) حماية العلاقات التجارية، وإحالة براءات الاختراع في كافة المباني التكنولوجية عملاً. ومع ذلك فإن "الاتفاق" ينص على حماية الدول الأعضاء في رفض توفير المزايا التي يتضمنها براءات الاختراع للاختراقات، والتي يعيش منها الاستفادة التجارية لها، أي جمعة أموال، أو جمعة صحة. ويجعل للبلدان أن ترسّب أو تطلب منك تموّل توسّع العلامات التجارية التي تتعارض مع الأفكار أو النظام العام، وتحمل هذه النظرية يمكن أن تصل عامة الناس، ويوجّه على الدول الأعضاء إتخاذ التدابير لتطبيق الإجراءات الثانية في حالة تواجد حقوقي الملكية الفكرية، وخاصة في حالة ترويج العلامات التجارية المتعددة. وما ينتمي إلى الأمثلة بالنسبة للاتجاه غير المشروع بالتبادل أن هذا الاتفاق ينص على وجوب انتصاف العقوبات بقدر من الصراحة يجعل من قواعد.$$\text{بالطبع، تجاوزت هذه القواعد}}$

ويتناول "الاتفاق بشأن الإعانات والتدابير التعرفيная" ضوابط المتداعية الأطراف التي تنظيم تدابير الإعانات المالية واستخدام التدابير التعرفيية لجبر الأضرار الناجمة عن الورادات المدعومة. ويؤدي نظام الاتصالات المتعدد الأطراف للدول الأعضاء بالاعتراف على الإعانات المالية التي تترتب عليها أثار ضارة.

أما دلالة المتنازعات التالية لمبادرة التجارة العالمية، والواردة في منشأة الثانوية بشأن القواعد والإجراءات التي تحمي تموّل المتنازعات، أو "مذكرة التفاهم لясь المنازعات"، فتتطابق على تعريف كافة المتنازعات بموجب جميع اتفاقيات منظمة التجارة العالمية، وليست وضعاً يمتد إلى من قبل الدول الأعضاء في منظمة التجارة العالمية. عندما تجد أي أمة ما تصل حقوقة شرعية لها بصورة مباشرة أو غير مباشرة بحكم أي اتفاق من الاتفاقيات قد تعرضت لضرر نتيجة تدابير إختراعها الدول الأعضاء الأخرى.

ومن هنا نشأز من النزاعات ذات الطابع الصحي يتعلق بالأعمال تجارة تمت تسويةهما بواسطة أحكام الغالبية.
الوطنية والدولية على السواء، وثمة إمكانية لاتخاذ مسارات مرتبطة بها لإدراجها في الاتفاقيات الأساسية في بروتوكولات الامم المتحدة بشأن مكافحة التبغ.

التجارة عبر الإنترنت والتجارة غير المشروعة بالتغ في البلدان، وبناءً على القضايا المتعلقة بالتغ والتي تقضي بـ "جهود وطنية وعالمية متسقة".

وتعم أوضاع التكنولوجيا الحالية من المخططات لتنظيم الإنترنت، تتوافق بين التنظيم الحكومي الصارم والتنظيم الذاتي من جانب الصناعة ذات الصلاصة والتشغيل التنظيمي للوقائع المبينة للدول والأحزاب التي تمتلك مكافحة التبغ.

البحث الذي يجري النظر في إدراجها في الاتفاقيات الإطارية والبروتوكولات الملحقة بها، يشير بالنسبة لوزرائها للإمكانيات التجارية العالمية الممولة، ويدعى إن التفاوت المتدفع للضغط، وهو أيضاً بساقية يلتزم بالاستثناءات في تأسيس استراتيجيات ناجحة لخفض معدل الطلب في مدارك مكافحة التبغ، ويبن هذا منع المكافحة العالمية من التدفق.

للقانون التجاري الدولي، فانها تقوم بذلك التجارة الإلكترونية تتجاوز فهماً ضيقاً واسعاً من القضايا القانونية المدرجة ضمن الرقابة الدولية لتجارة التبغ من خلال الإنترنت.

كما يعتبر التهريب التبغ مشكلة أخرى عالمية. ففي تدف علامات تجارية دولية تنتجها الشركات المتعددة في الدول، وتوزعها المنظمات التجارية الدولية. إذ إن كميات كبيرة من الحشيش التي لا تصل لل/=الضابط عليها تخفي خلاف عمليات اللزمة الدولية، وتقوم بذلك ضمان مهيئة. وتستخدم التهم بـ "تغريب" 20٪ من النسج في الصناعة الدولية، وهي نسبة أعلى بكثير من معظم السلع الاستهلاكية المتاحة بـ في المساوة الدولية. وتعتبر التجارية أحد أشد التماثيل عالية في الحد من استهلاك التبغ، وحتى في مواجهة معدلات تهريب متزايدة، فإن زيادة التضرابات تعود بالمزيد من الإجراءات وتحدد من استهلاك السجائر.

الاتفاقية الإطارية بشأن مكافحة التبغ واتفاقيات التبغ/منظمة التجارة العالمية

قد تتطلب على الأحكام التي يجري النظر في إدراجها في الاتفاقيات الإطارية والبروتوكولات الملحقة بها، إنها بالنسبة لوزرائها للإمكانيات التجارية العالمية الممولة، ويدعى إن التفاوت المتدفع للضغط، وهو أيضاً بساقية يلتزم بالاستثناءات في تأسيس استراتيجيات ناجحة لخفض معدل الطلب في مدارك مكافحة التبغ، ويبن هذا منع المكافحة العالمية من التدفق.

ويتضمن في الدول الأخرى أيضًا "السماوة في شروط المنافسة" بين المنتجات "المثلى" أو المتاحة تنافسية، وعملاً باختيارات "اللغات" المحتملة للاستخدام في النظام، يجدر بـ "اللغة" للسماوة في "اللغة" في نظام تسيير النظام "اللغة" في "اللغة" في نظام "اللغة"، وبدلاً من ذلك، إذا كان التعبير "الغذاء" ي🎶 موسيقى في مدارك مكافحة التبغ، يتم استخدام عملية متوازنة ومقدمة للغة فيما إذا كانت القواعد موضوع اعتراضاً تقليداً مع قوانين منظمة التجارة العالمية (أو/لا)، وذلك بواسطة "اللغة" أو "اللغة" أو "اللغة" أو "اللغة" أو "اللغة"، في تقيد التدفق إضافي إلى الأهمية بالنسبة للصالح، في المنشورات التي تأتي إلى تداولها، ولذا عادة لـ "اللغة"، فـ "اللغة" تصبح "اللغة" باللغة البشرية تمثل بأفكار زمنية من الأهمية.

ويغير الخدمات أولاً وثيق الصلاحة بكافة الأنظمة الاقتصادية تقريباً، كنائي ما يكون طاقم الإنتاج. فهي تستخدم كمداخل مباشرة في عملية الإنتاج وربط بين المنتجات والموردين والمستهلكين. ولعل خدمات من قبل الإعلان والنقل والمعلومات والتسويق تتضمن بأهمية خاصة بالنسبة لمصنعي المنتجات الاستهلاكية العالمية. ويعطي الاتفاقية الإدارية والتجارية العالمية أهمية بـ "اللغة".
وتؤيد بحوث الاقتصاد السياسي النظرية القائلة بأن الاتفاق التجاري يؤدي إلى تزايد تعاطي التبغ. غير أن البحوث التجريبية بشأن تأثير تحرير الاستثمارات على تعاطي التبغ نادر جدا. وفي محاولة لاختبار الفرضية القائلة بأن تحرير التجارة يؤدي إلى تزايد تعاطي التبغ، استخدم في هذه الدراسة نموذج يعتمد على أنفسه، ولكن بالاستناد إلى قاعدة بيانات أوم نطاقة تشتمل أكثر من 80 بلدًا خلال الأعوام 1970-1997، كما أنه يستخدم فيها ثلاثة مقياسات للفحص التجاري يشيع بعد تطبيقها في مفاوضات التجارة مع بلدان منظمة التعاون والتنمية في الميدان الاقتصادي من الناحيت المحلي الإقليمي الإجباري؛ حصة التجارة مع بلدان منظمة التعاون والتنمية في الميدان الاقتصادي من الناحيت المحلي الإجباري.

وستستخدم، من أجل اختبار الفرضية القائلة بأن تحرير الاستثمارات يزيد من تعاطي التبغ، فحوصات الانتفاضة على الاستثمارات التي استخدمها على نطاق واسع، ويعد الاستثمارات الأخرى في مجموعة تتضمن 50 دولة نموذجية ومنظمة تجارية. واستندت بها مؤشرات درجة الأنتفاضة على استثمارات الإجباري المثير للهواجس، ووضعتها من التقدير السنوي عن ترتيبات وقيود أسعار الصف، الصادار عن صندوق النقد الدولي، بالإضافة إلى قياس لتشوهات أسعار التبغ، التي يسمى علاوات السوق المواد.

وتبين أن مدى تقليل الارتباطات بساهم في ارتفاع مستويات استهلاك التبغ في البلدان المختبرة المتساوية. كما تبين عندما تخفق على نطاق واسع المواد، يزيد الاستهلاك، والإجراءات، وأن إدارة مسعوديات الاستثمارات الأخرى تؤثر أيضاً في ارتفاع معدلات استهلاك التبغ. وتشير هذه النتائج بنمط وردي على أساس أن تكون نموذجية ومتوازنة على البلدان المختبرة. النمط، وأيضاً أقل شأنًا، وإن كان هناك بانسبة قليلة متساوية. ويتوافق هذا النتائج مع وجه التعليمات المستحالة حقاً، كما هو الحال بالنسبة للاجباريات المتبقية. وجود التعليمات مكونة ارتفاع حصة التجارة مع بلدان منظمة التعاون والتنمية في الميدان الاقتصادي من الناحيت المحلي الإجباري المثير للاستثمار.

توافق علامة تقاوم نوع ما.

الاتفاقية الإطارية بشأن مكافحة التبغ

أدت الخشية من تزايد أوجه عدم الاستقرار في الأسواق العالمية إلى إيلاء المزيد من الاهتمام لـ "المواءمة العالمية"، من قبل التبغ، الذي من شأنه أن تزيد أوجه عدم الاستقرار هذه تفاوت.

وتهدف الاتفاقية الإطارية لمنظمة الصحة العالمية إلى معالجة الاعتداء المحتددة عبر الوطنية التي تساهم في تطابق حالة التبغ. ويُعتبر نهج المعاهدات القائمة على الحقائق، المبرر الأول، التي تتعلق فيها منظمة الصحة العالمية المعاهدات على معدهات والتي تشارك فيها 191 دولة عضوًا، وبموجب المادة 16 من دستورها. تشكل الاتفاقية الإطارية بشأن مكافحة التبغ والبروتوكولات المتعلقة بها تكلفة عالمية - ليس دبلومات الإجراءات مكافحة التبغ الوطنية والموحدة. وستكون الاتفاقية والبروتوكولات ملزمة، كما هو الحال بالنسبة للقانون الدولي، الذي تلت هذه الاتفاقات، وتعتمد على حالات مكافحة التبغ المؤقتة. وتحتفذ المعاهدات حوار الاتفاقية الإطارية بشأن مكافحة التبغ خطوة أخرى إدارية، في كانون الثاني/يناير 2001، بناءً على مرسى الرئيس، الذي كان أمر مشروع الاتفاقية الإطارية، ويبني هذا النص الإفرازات الموضوعية والإجبارية المفترضة بموجب الاتفاقية. كما أنه يدعو إلى التفاوض بشأن البروتوكولات الأولي في عدد من المفاوضات ذات الأهمية العليا من أجل مكافحة التبغ على الصعيد العالمي، مثل الإعلان والترويج والرعاية والتجارة لمجتمعات التبغ وقواتها، والانضمام للمشروع بها. وتوفير الاتفاقية الإطارية، أساساً، رافد لسياسات هجوم مكافحة التبغ الحكومية الدولية. غير أنه مازالت هناك ضرورة للفواتح حول التزامات جوهيرية وإرسالها في البروتوكولات المرتبطة بالاتفاقية. فتجارة التبغ العالمية تطرح تحديات تنظيمية تواجه كل من النظام التنظيمي.
موجز

هذا الدليل متزايد على وجود صلة بين ازدياد استخدام التبغ وبين التجارة الحرة والاستثمار الأجنبي المباشر في السوق العالمية. ومع ذلك فإن المراجع أن تطبيق خطر زيادة الأضرار من التجارة الحرة يستدعي التدخل المبكر في السوق العالمية.

بنتيجات الأبحاث العالم لندوة زيادة تجارب التجارة والاستثمار المبكر، وما يعد الفاعل هذا الخطوة الابتكارية العالمية في إقامة اقتصادات الأسواق داخل舒وى على الحدود الدولية للاستثمار والتجارة غير المشروع بمنتجات التبغ. بيد أن الأفكار التنظيمية القائمة لم تتخلف لهذه التحديات. وبالتالي فإن هناك حاجة لملحة لجمع بين الاستراتيجيات التنظيمية العالمية والوطنية.

الوباحة لمحاكاة تلك الجائحة المتداولة من الأعراض والوفيات المتصلة بالتبغ.

وقد تكون هذه القوة من نشاطات التبغ، بما في ذلك من البيان الصادرة عن شركة التبغ، فيليب موريس، الذي يبين أن "ال턴 خالصة [التجاربة] ستكون中央ا، مما سيقدم رصيدة أكبر في الأسواق. واعتماد هذه الشركات نتيجة ذلك استراتيجيات ضارية لتوسيع نطاق نجاحها العالمية واستحقاق أسواق البلدان النامية واقتصادات البلدان الساحلية الأكثر فقاعة، أو في عدد السكان، أسواق أفريقيا والصين وأوروبا الشرقية، على ذلك، أن باع التبغ بالجزء الأخير من القرن الماضي. وتقسم الاستثمارات المختلفة في آسيا في عدد الثمانينات، وفي فترة لاحقة، أن عدد السكان، أسواق أفريقيا والصين وأوروبا الشرقية.

وقد ترأس التدخين السحري في البلدان النامية، ومع ذلك الدعاء وتوضيح المنتجات ويعدهم.

لقد شهدت تجارب منتجات التبغ المصىة، مثل السجائر، توسعاً سريعاً منذ منتصف الثمانينات. ومن المرجح أن يستمر هذا الإتجاه في تخفيض الحوادث التجارية أمام التبغ، مما يؤدي إلى إزداد الحوادث والانتعاش الإرسال أيضًا. هذا الاتفاق على الدعاء والإعلان، في حين يمكن أن يزيد التفاوت الأساسي في التجارة الحرة في الهضبة التبغ أكثر من ذي قبل. ومن المتوقع أن يكون أثر الاستثمار الأجنبي المباشر ذو الحالة بالتبغ مزاياً لأثر تعاطي التبغ على أقل تكلفة، وخصوصاً لأنه ينبع من الشركات التبغ عبر الوطنية ودرجة حملها في تسهيل عليها حذف الرسوم الرسوم الحزامين، وعليه فإن تجارب التجارة والاستثمار سيطر على ارتفاع معدلات الوفيات والمرض المتصل بالتبغ.
执行纪要

越来越多的迹象表明，在烟草消费的增长与自由贸易和与烟草有关的外国直接投资之间存在着联系。从而，全球烟草市场与公众健康的威胁将由于全球贸易自由化和外直接投资（FDI）的增强趋势而有所增加。这种威胁因跨国烟草公司进入新兴市场经济的战略以及诸如烟草制品的因特网交易和非法贸易等新的跨国经济挑战而有所加剧。然而，现有管理机制尚未解决这些问题。因此急需将有力的全球和国家管理战略结合为一体，以便遏制与烟草有关疾病和死亡的日益增长。世界卫生组织提出的烟草控制框架公约是朝这一方向跨出的一大步。

目前人们广泛承认，烟草消费造成高死亡率和发病率。与烟草有关的疾病是全世界可预防的死亡的唯一最重大原因。吸烟和被动吸烟是造成20多种致命和致残疾病的原因，其中包括肺癌和其它癌症、缺血性心脏病、慢吸呼吸系统疾病和结核3。到2020年时，烟草使用预计将造成840万例死亡，其中的70%将发生在发展中国家4。随着烟草使用在妇女、青年和儿童中的增加，这些人群组将越来越多地承担与烟草有关的发病率和死亡率的负担。

工业界充分意识到贸易自由化对开发发展中国家烟草贸易市场的强大力量。正如烟草公司——Philip Morris 在一项发言中所述“消除贸易壁垒将向我们提供扩大市场的机会”5。因此，这些公司已经采取积极战略扩大全球贸易并在发展中国家和新兴市场经济中实现市场渗透。它们在20世纪60年代进入了拉丁美洲市场，在80年代进入了亚洲新型工业化国家，并于最近，在90年代进入了非洲、中国和中东的市场。青年和妇女是烟草工业市场扩大的主要目标。此外，烟草零售商和越来越越多地使用因特网进行电子交易，其中包括刊登广告、推销产品和销售。

作为国内生产总值（GDP）一部分的世界贸易自第二次世界大战英国直接投资达到最高水平以来一直稳步上升6。很多多边和双边协议，特别是世界贸易组织（WTO）的协议规定对贸易减少关税和非关税壁垒，以便进一步扩大全球贸易。更自由的贸易预期将减少生活费用，提供更多选择和质量更好的产品，提高收入并刺激经济增长7。然而，预期它也可导致香烟消费在低收入和中等收入国家中的增加。

贸易开放、外国直接投资和烟草消费的增加

自20世纪80年代中叶，烟草制品，例如香烟的贸易有了迅速增长。随着对烟草贸易壁垒的减少，这种趋势有可能继续，导致供应的增加和更低的价格。此外，贸易自由化带来更激烈的竞争，还带来更低的价格和广告费用的上升，而品种的增多可进一步扩大市场规模。所有这些因素均可能促进烟草消费的进一步增长。
与烟草有关的外国直接投资预期对烟草的使用至少可产生类似的影响，特别是它可使跨国烟草公司在地方上占稳脚根，这有助于游说政府官员。从而，贸易和投资自由化对健康造成的可能后果是与烟草有关的死亡率和致残率的上升。

经济计量学研究支持这些假设，即贸易开放导致更高的烟草消费。然而，进行了少量关于投资自由化对烟草使用影响的经验研究。为了验证有关贸易自由化导致烟草消费增长的假设，本文采用了与 Taylor 等所使用的相似模式，但是使用了覆盖 80 多个国家 1970–1997 年的更多资料，它还采用了通常在宏观经济模式中采用的下述三项衡量贸易开放的标准：(i) 进口渗透；(ii)国内生产总值中的贸易份额；以及(iii)国内生产总值中与经合组织国家进行贸易的份额。

为了验证关于投资自由化增加香烟消费的假说，在固定样本数据中采用了 Gastanaga 等制定的投资开放衡量方法。 Gastanaga 等研究了在 55 个发展中国家/地区中各种政策对外国直接投资的影响。它们采用了货币基金组织关于兑换率安排和限制年度报告中所确定的进口外国直接投资开放程度的定性指标，以及对兑换率扭曲的一种衡量方法，它们将兑换率扭曲称为黑市贴水 (BMP)。

进口渗透能促进低收入和中等收入国家更多的香烟消费。此外还发现，当黑市贴水降低时香烟消费增加，而且外国直接投资水平的增长也导致香烟消费的增长。这些结果与 Taylor 等的观点相符，他们认为，进口渗透对低收入国家产生巨大影响，对中等收入国家产生较小、但仍然重要的影响。利用贸易在国内生产总值中所占的份额衡量开放程度获得大致相似的结果。与经合组织国家的贸易在国内生产总值中所占的份额以及各种定性投资产生相当不稳定的结果。

烟草控制框架公约

由于担心全球市场中越来越多的不稳定因素，人们逐渐对全球诸如烟草等“对公众有害的货物”加以重视，这些货物有可能加剧这些不稳定因素 12。

世界卫生组织的框架公约旨在解决促使烟草流行的跨国决定因素。这项以证据为依据的条约过程是世界卫生组织根据其《组织法》第 19 条首次发起的由其 191 个会员国参加的条约谈判。烟草控制框架公约及有关议定书将作为对国家和地方烟草控制行动的一份全球性补充文件，而不是一份替代文件 13。它们将作为国际法律对通过和认可这些协议的会员国发挥约束作用。2001 年 1 月，烟草控制框架公约谈判取得了巨大进展，发表了作为烟草控制框架公约第一份草案的主席的文本。该文本阐明了烟草控制框架公约拟议的实质性和程序性义务。它还要求对全球烟草控制的一些高度优先领域的初期议定书进行谈判，这些领域例如烟草制品的广告、促销、赞助和非法交易。框架公约基本上为政府间烟草控制的众
多领域提供了样板。然而，在有关议定书中并未对大量义务进行谈判和确定。烟草的全球贸易为国家和国际管理机构提出了管理方面的众多挑战；可选择有关问题列入烟草控制框架公约议定书的实质性协议中。

通过因特网和烟草中的非法贸易进行交易使消费者更有可能以低于市场的价格获得跨国烟草。对烟草控制的这些威胁均有可能因各国管理方面的薄弱环节而出现，因此要求国家和全球作出一致的努力。

当今的技术状况有利于一系列因特网管理机制，从大量的政府管理到工业界的自我管理，以至个人筛选攻击性的网址。管理机制，特别是那些对内容的管理通常涉及几种技术并需要所有有关方面进行友好的合作14。联合国国际贸易法委员会 (UNCITRAL) 提出了关于电子商业的法律样板，它将解决涉及国际控制利用因特网进行烟草贸易的众多法律问题15。

烟草走私是另一个全球性的问题，涉及由多间公司生产并由国际犯罪组织经销的国际品牌。大量免税香烟在国际运输中“消失”，而仅在走私货物中重新出现。大约有30%的国际出口香烟丢失后被用于走私，这一百分比较大多数进行国际贸易的消费品要高得多。征税是降低烟草消费的有效措施之一。即便在走私发生率很高的情况下，提高税率也将增加收入并减少烟草消费。

烟草控制框架公约和关税及贸易总协定/世界贸易组织协定

正在考虑列入烟草控制框架公约及其相关议定书的条款有可能对世界贸易组织的一整套贸易协定产生影响16。因此，要实现烟草控制领域有效的减少需求战略，多部门协作至关重要。正在制定的为遏制烟草流行而提供一种国际管理途径的烟草控制框架公约草案充分考虑到了世界贸易组织的贸易协定，其中的一些协定关系到烟草和烟草制品的贸易。

关税及贸易总协定/世界贸易组织组合含有减少壁垒的各种条列。成员国必须在“类似产品”或直接竞争产品之间确保“竞争条件的平等”。根据关税及贸易总协定，成员国具有不可争议的权利争取实现它们认为适宜的健康保护水平。在确定一项措施是否是为实现正当的卫生保护目标所“必要”时，要采用斟酌和比较过程，结合其有效性和贸易限制结果以及它所针对的共同利益或价值的相关重要性来确定有关条例是否与世界贸易组织相容（在免责条款之下）。共同价值越重要，该项措施越容易被作为“必要”而被接受。人类健康被认为具有最高的重要性。

服务实际上涉及到所有的经济活动，无论是生产的哪一部分。它们被作为生产过
程的直接投入并将制造者与供应者和消费者联系在一起。对于最终消费品制造商特别具有重要意义的可能是诸如广告、运输、通融资金和销售等项服务。服务贸易总协定（GATS）涵盖几乎所有服务方面的贸易。每个成员国必须提交一份所谓的明确承诺计划，列示它愿意授予市场准入和国家待遇的服务部门。根据服务贸易总协定 X14(b) 条，成员国拥有权在必要情况下退出它们的任何义务，以保护人类、动物或植物的生命或健康。

技术性贸易壁垒协议（TBT）旨在确保用于评估是否与规格相符的产品说明和程序不会对贸易产生不必要的障碍。根据该协议的条件，所有成员国可就它们认为适宜的水平提出这类要求。任何国家不能对进口产品施加较其国内生产的同类产品更为严格的规范或检测要求，或对进口产品不是全部接受而是加以选择。此外，任何技术管制必须符合该协议中所述的一项合法目标而不应施加超出实现该项合法目标所必要的更多贸易限制。根据这项协议，可为一项或多项“合法”目标制定技术条件，其中包括但不限于保护人类健康或安全及预防欺诈行径。2000 年向世界贸易组织通报的所有技术性贸易壁垒协议条款中最为共同的目标是人类健康或安全，也通报了几项关于香烟标签的要求。

农业协议涉及市场准入、国内支持，以及包括烟草在内的农产品的出口补贴。通过直接补贴措施支持农业的每一个成员国在这类措施超过成员国年生产价值的 5%（对发展中国家或为 10%）时必须降低这类措施的总体货币价值。该项协议包括禁止向任何不明确承诺减少货币价值或不对发展中国家采取特殊待遇的任何农产品给以出口补贴。迄今为止已有 12 个成员国利用该项农业协议为香烟打开市场准入机会。

涉贸知识产权问题协议（TRIPS）要求保护商标和几乎所有技术领域的专利可得性。然而，涉贸知识产权问题协议规定成员国可以拒绝对发明的专利保护，防止商业剥削，这点对保护人类生活与健康尤其必要。国家有权拒绝或否定违背伦理道德或公共秩序，特别是欺诈公众的商标的注册。成员国必须规定有关损害知识产权，特别是有意假冒商标方面的刑事诉讼程序。对于非法烟草贸易具有重要意义的是制裁必须严厉得足以制止这种行为。

补贴和补偿措施协议（SCM）提出了管理提供补贴和利用补偿措施抵消因补贴进口而造成损害的多边准则。这项多边纠正方法能使成员国解决产生不利效果的补贴问题。

列于管辖争端解决条例和程序谅解备忘录中的世界贸易组织争端解决机制或争端解决谅解备忘录（DSU）适用于解决世界贸易组织所有协议的一切争端。它只有由世界贸易组织成员在认为它们直接或间接从任何协议所获得的任何益
处因其它成员国采取的措施而受到损害时可以启用。由关税及贸易总协定/世界贸易组织解决的两起与卫生争端相关的贸易争端，即 1990 年泰国香烟争端和 2001 年石棉争端显示世界贸易组织的条例如何应用于与人类健康有关的事宜。重要的是，2001 年受理上述争端的机构确认，世界贸易组织成员国具有无可争议的权利明确它们认为适当的健康保护水平。1994 年关税及贸易总协定没有要求对人类的生命或健康的风险给予定量，人类健康具有 “最高程度的必要性”和重要性”。

在一个贸易自由化的时代控制烟草消费的迅速全球化是艰难的。在缺乏国家和国际的确实可行的烟草控制活动的情况下，与烟草有关的贸易和投资的自由化造成的长期结果将大大提高烟草带来的死亡和疾病负担，特别是在发展中国家。全球主要烟草控制政策产生预防性效果的潜在性可通过对国际贸易不加歧视的烟草控制框架公约得以实现。

在乌拉圭回合之后，应对贸易自由化对全球产生的负面影响，例如烟草使用的增长给以注意。乌拉圭回合后的政治和经济领域的一些实际情况如下：

- 发展中国家的交易能力有限。
- 不能以电信和消费者持久性的相同标准权衡国家主要卫生问题和重点。世界卫生组织可利用烟草控制框架公约在确保对卫生影响给以充分考虑方面发挥领导和指导作用。
- 发达国家必须承认全球化包括责任和权力的全球化。

框架公约是为填补这一空白作出的一项努力。

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EXECUTIVE SUMMARY

There is growing evidence that suggests a link between increased tobacco consumption and free trade and tobacco-related FDI. Thus the threat to public health posed by the global tobacco market is likely to increase as a result of the global trend towards greater liberalization of trade and foreign direct investment (FDI). This threat is exacerbated by the transnational tobacco company strategies to enter emerging-market economies as well as by new cross-border challenges such as Internet commerce and the illicit trade in tobacco products. However, existing regulatory mechanisms have not yet addressed these challenges. A combination of strong global and national regulatory strategies is therefore urgently required to tackle the growing pandemic of tobacco-related disease and death. The WHO’s proposed Framework Convention on Tobacco Control is a major step in this direction.

It is now generally recognized that tobacco consumption results in high mortality and morbidity. Tobacco-related diseases are the single most important cause of preventable deaths in the world. Smoking and passive smoking cause over 20 major categories of fatal and disabling disease, including lung and other cancers, ischaemic heart disease, chronic respiratory diseases and tuberculosis.1 Tobacco use is projected to cause 8.4 million deaths by 2020, 70% of which will occur in developing countries.2 Women, youth and children will increasingly bear the burden of tobacco-related morbidity and mortality as prevalence of tobacco use rises in these groups.

The industry is well aware of the power of trade liberalization to open up developing-country markets to tobacco trade, as reflected in a statement by the tobacco company, Philip Morris, “Removal of [trade] barriers will provide us with expanded market opportunities.”3 As a result, these companies have adopted aggressive strategies to expand their global trade and achieve market penetration in developing countries and emerging-market economies. They entered Latin American markets in the 1960s, those of the newly industrializing economies of Asia in the 1980s, and more recently, in the 1990s, the markets of Africa, China and Eastern Europe. Youth and women are prime targets for the tobacco industry’s campaigns for market expansion. Furthermore, tobacco retailers increasingly make use of the Internet for e-commerce, including advertising, product marketing and sales.

World trade as a share of gross domestic product (GDP) has been steadily increasing since the Second World War while FDI has reached record levels.4 A number of multilateral and bilateral agreements, notably those of the World Trade Organization (WTO), provide for reductions in tariff and non-tariff barriers to trade that will facilitate further expansion of global trade. Freer trade is expected to reduce costs of living, provide more choice and better quality products, raise incomes and stimulate economic growth.5 However, it is also expected to lead to an increase in cigarette consumption in low- and middle-income countries.6

Trade openness, foreign direct investment and higher tobacco consumption

Trade in manufactured tobacco products, such as cigarettes, has been increasing rapidly since the mid-1980s. This trend is likely to continue with the lowering of trade barriers to tobacco, resulting in increased supply and lower prices. Furthermore, trade liberalization is associated with increased competition that also leads to lower prices and an increase in advertising expenditures, while brand proliferation can further increase the size of the market. All these factors are likely to contribute to a further increase in tobacco consumption. Tobacco-related FDI is expected to have at least a comparable effect on tobacco use, particularly as it may
provide transnational tobacco companies with a strong local presence that facilitates lobbying of government officials. The potential health consequences of trade and investment liberalization are, therefore, higher rates of tobacco-related deaths and disability.

Econometric research supports the premise that trade openness leads to higher tobacco consumption. However, there is a paucity of empirical research on the impact of investment liberalization on tobacco use. In order to test the hypothesis that trade liberalization leads to an increase in tobacco consumption, this paper uses a model similar to the one used by Taylor et al. but with a larger dataset covering more than 80 countries for the years 1970-1997. It also uses three measures of trade openness commonly utilized in macroeconomic models: (i) Import penetration; (ii) Share of trade in GDP; and (iii) Share of trade with OECD countries in GDP.

In order to test the hypothesis that investment liberalization increases cigarette consumption, investment openness measures developed by Gastanaga et al. are used in the panel data model. Gastanaga et al. examined the effects of various policies on FDI flows in a group of 55 developing countries/provinces. They used a qualitative index of the degree of openness to inward FDI constructed from the IMF’s Annual Report on Exchange Rate Arrangements and Restrictions, as well as a measure for exchange rate distortion, which they call the black market premium (BMP).

Import penetration was found to contribute to higher levels of cigarette consumption in low- and middle-income countries. In addition, it was found that when the BMP decreases, cigarette consumption increases and that increased levels of FDI also lead to higher rates of cigarette consumption. These results are in agreement with Taylor et al., who found that import penetration had a large and significant impact in low-income countries, and a smaller but still important effect in middle-income countries. Generally similar results were obtained using share of trade in GDP as a measure of openness. Share of trade with OECD countries in GDP and the qualitative investment variable yielded fairly unstable results.

**Framework Convention on Tobacco Control**

With the fear of growing instabilities in the global marketplace, increasing attention is being paid to global “public bads”, such as tobacco, which are likely to exacerbate these instabilities.

WHO’s Framework Convention aims to address the transnational determinants that contribute to a worsening of the tobacco epidemic. This evidence-based treaty approach is the first time WHO has launched treaty negotiations, in which its 191 Member States are participating, under Article 19 of its Constitution. The FCTC and related protocols will act as a global complement to — and not a replacement for — national and local tobacco control actions. They will be binding, as international law, on those States that adopt and ratify these agreements. In January 2001, the FCTC negotiations took a major step forward with the release of the Chair’s Text, which was the first draft of the FCTC. The text sets forth proposed substantive and procedural obligations under the FCTC. It also calls for the negotiation of early protocols in a number of high priority areas for global tobacco control, such as advertising, promotion, sponsorship and illicit traffic in tobacco products. The Framework Convention essentially provides the template for areas of intergovernmental tobacco control. However, substantive obligations have yet to be negotiated and established in the associated protocols. The global trade in tobacco poses regulatory challenges for both
national and international regulatory regimes; related issues could potentially be selected for inclusion in the substantive agreements of the FCTC protocols.

Commerce through the Internet and illicit trade in tobacco increase the transnational availability of tobacco to consumers below market price. Both these threats to tobacco control may fall between the regulatory cracks of countries, and therefore are examples of trade-related issues that demand concerted national and global efforts.

The current state of technology supports a spectrum of Internet regulatory schemes, from heavy government regulation, to industry self-regulation, to individual filtering of offensive websites. Regulatory schemes, particularly those for content regulation, often involve several technologies and require that all involved parties cooperate in good faith.14 The United Nations Commission on International Trade Law (UNCITRAL) has proposed a model law on electronic commerce that would address the myriad legal issues involved in international control of trade in tobacco through the Internet.15

Tobacco smuggling is another global problem, involving international brands produced by multinational companies and distributed by international criminal organizations. Large amounts of tax-free cigarettes “disappear” during international transport, only to reappear as smuggled goods. Some 30% of internationally exported cigarettes are lost to smuggling, a far higher percentage than most internationally traded consumer goods. Taxation is one of the most effective measures for reducing tobacco consumption. Even in the face of high rates of smuggling, tax increases bring increased revenues and reduce cigarette consumption.

The FCTC and GATT/WTO Agreements

Provisions being considered for inclusion in the FCTC and related protocols might have ramifications for the WTO single package of trade agreements.16 Multi-sectoral collaboration is therefore important to achieve effective demand reduction strategies in the area of tobacco control. The proposed FCTC, which provides an international regulatory approach to stem the tobacco epidemic, is being developed with due consideration to WTO trade agreements, several of which are relevant to trade in tobacco and tobacco products.

The GATT/WTO contains various rules to reduce barriers to trade. Members must ensure "equality in the conditions of competition" between "like" or directly competing products. Pursuant to the GATT, Members have an undisputed right to aim for the level of health protection they deem appropriate. In determining whether a measure is "necessary" to achieve the legitimate aim of health protection, a weighing and balancing process is used to determine whether the challenged regulation may be WTO compatible (falling under the exception provisions) taking into account its effectiveness and trade restrictive effect as well as the relative importance of the common interests or values it aims to address. The more vital the common values, the more easily the measure will be accepted as being "necessary". Human health has been recognized as 'having the highest degree of importance. Services are relevant for virtually all economic activities, in whatever sector of production. They are used as direct inputs into the production process and link producers with suppliers and customers. Of particular significance for manufacturers of final consumer products might be services such as advertising, transport, finance and distribution. The General Agreement on Trade in Services (GATS) covers trade in virtually all services. Each Member must submit a so-called schedule of specific commitments, listing the service sectors in which it is willing
to grant market access and national treatment. Under Article XIV(b) of GATS, Members are entitled to depart from any of their obligations, if necessary, to protect human, animal or plant life or health.

The Agreement on Technical Barriers to Trade (TBT) aims to ensure that product specifications and procedures used to assess compliance with specifications do not create unnecessary obstacles to trade. Pursuant to the conditions of the Agreement, all Members may put such requirements in place at what they consider an appropriate level. A country cannot impose more stringent specifications or testing requirements on imported products than it does on like products that are domestically produced, or impose them on select, but not all, imported products. Further, any technical regulation must meet one of the legitimate objectives delineated in the Agreement and not be more trade restrictive than necessary to achieve the legitimate objective. Under this Agreement, technical regulations may be developed for one or more of the “legitimate” objectives, including, but not limited to, the protection of human health or safety and the prevention of deceptive practices. Of all TBT regulations notified to the WTO in 2000, the most common objective was human health or safety. Several cigarette labelling requirements have also been notified.

The Agreement on Agriculture deals with market access, domestic support, and export subsidies for agricultural products, including tobacco. Each Member that supports agriculture through direct subsidy measures must reduce the aggregate monetary value of such measures when it exceeds 5% (or 10% for developing countries) of the value of the annual production of that Member. The Agreement includes a prohibition on the use of export subsidies on any agricultural product that is not subject to specific reduction commitments or subject to special treatment for developing countries. To date, 12 Members have used the Agreement on Agriculture to open market access opportunities for tobacco.17

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires the protection of trademarks and the availability of patents in virtually all areas of technology. Yet TRIPS provides that Members may refuse patent protection to inventions, the prevention of the commercial exploitation of which is necessary to protect, inter alia, human life or health. Countries have a right to deny or invalidate the registration of trademarks that are contrary to morality or public order, and, in particular, those which can deceive the public. Members must provide for criminal procedures in case of infringements of intellectual property rights, in particular in the case of willful trademark counterfeiting. Significant for the illicit tobacco trade, sanctions must be severe enough to act as a deterrent.

The Agreement on Subsidies and Countervailing Measures (SCM) addresses multilateral disciplines regulating the provision of subsidies and the use of countervailing measures to offset injury caused by subsidized imports. This system of multilateral remedies allows Members to challenge subsidies which give rise to adverse effects.

The dispute settlement mechanism of the WTO, contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes, or Dispute Settlement Understanding (DSU), governs the settlement of all disputes under all WTO agreements. It can be initiated only by WTO Members when they consider that any benefits accruing to them directly or indirectly under any agreement are impaired by measures taken by other Members. Two trade-related health disputes settled by GATT/WTO. The 1990 Thai Cigarette Dispute and the 2001 Asbestos Dispute, demonstrate how WTO rules have been applied to matters pertaining to human health. Importantly, in 2001, the Appellate Body confirmed that WTO
Members had the undisputed right to determine the level of health protection they deemed appropriate, that there was no requirement under GATT 1994 to quantify risk to human life or health, and that human health was “vital and important in the highest degree.”

Controlling the rapid globalization of tobacco consumption in an era of trade liberalization is daunting. In the absence of strong national and international tobacco control activities, the long-term consequences of the liberalization of tobacco-related trade and investment will be a significant increase in the burden of death and disease caused by tobacco, particularly in developing countries. The preventive potential of key global tobacco control policies may be realized through the FCTC without discrimination to international trade.

In the post-Uruguay Round world, the negative implications of trade liberalization, such as an increase in tobacco use, deserve attention. Some of the realities of this post-Uruguay political and economic terrain are as follows:

- Developing countries’ bargaining power remains limited.
- Primary health considerations and priorities of countries cannot be weighed on the same scales as telecommunications and consumer durables. With the FCTC, the WHO takes a lead role and mandate in ensuring that health implications are fully considered.
- Developed countries need to acknowledge that globalization includes a globalization of responsibilities as well as of rights.

The Framework Convention is an effort to fill this void.

14 Bad faith metatagging, for example, would make voluntary self-regulatory schemes futile.
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16 Including, *inter alia*, the Agreement on Technical Barriers to Trade (TBT) (packaging and labelling), the Agreement on Agriculture (reduction of government support to tobacco production), the General Agreement on Trade in Services (GATS) (restrictions on advertising), and the General Agreement on Tariffs and Trade (GATT) (taxes, prohibitions and human-health related exceptions to GATT rules).

17 The Members are Australia, Bulgaria, Costa Rica, El Salvador, Guatemala, Hungary, Malaysia, Poland, Romania, South Africa, Thailand and the United States.
RESUME D’ORIENTATION

Des éléments de plus en plus nombreux tendent à prouver qu’il existe un lien entre la consommation accrue de tabac et le libre-échange et les investissements étrangers directs liés au tabac. Si tel est le cas, la menace que représente le marché mondial du tabac pour la santé publique risque de s’accentuer compte tenu de la tendance actuelle à la libéralisation des échanges et à l’augmentation des investissements étrangers directs. Cette menace est encore accrue par les stratégies élaborées par les sociétés transnationales productrices de tabac pour pénétrer sur les économies de marché émergentes et par les nouvelles difficultés transfrontières que posent, par exemple, le commerce via Internet et le commerce illicite des produits du tabac. Cependant, les mécanismes de réglementation existants ne se sont pas encore penché sur ces problèmes. Il est donc urgent d’élaborer un ensemble de stratégies de réglementation rigoureuse à l’échelle mondiale et nationale pour combattre la pandémie croissante de morbidité et de mortalité liée au tabac. Le projet de convention-cadre de l’OMS pour la lutte antitabac constitue un pas décisif dans ce sens.

Aujourd’hui, il est généralement admis que la consommation de tabac se traduit par une mortalité et une morbidité importantes. Les maladies liées au tabac constituent à elles seules la plus importante cause de décès évitables dans le monde. Le tabagisme et le tabagisme passif provoquent plus d’une vingtaine de maladies mortelles et invalidantes, parmi lesquelles divers cancers, et notamment le cancer du poumon, les cardiopathies ischémiques, les affections respiratoires chroniques et la tuberculose. On prévoit 8,4 millions de décès dus au tabagisme d’ici à 2020, dont 70 % surviendront dans les pays en développement. Les femmes, les adolescents et les enfants seront de plus en plus touchés par la morbidité et la mortalité liées au tabac, compte tenu de la prévalence croissante du tabagisme dans ces groupes.

Les fabricants de tabac savent parfaitement que la libéralisation des échanges peut ouvrir les marchés de pays en développement au commerce du tabac, comme en témoigne une déclaration de la société Philip Morris : « La disparition des entraves [au commerce] nous permettra d’élargir nos débouchés. ». En conséquence, ces sociétés ont adopté des stratégies offensives pour développer leur commerce mondial et pénétrer sur les marchés des pays en développement et les économies de marché émergentes. Elles ont mis pied dans les marchés d’Amérique latine dans les années 60, dans ceux des nouvelles économies industrielles d’Asie dans les années 80 et, plus récemment, dans les années 90, dans les marchés d’Afrique, de Chine et d’Europe orientale. Les jeunes et les femmes sont les cibles de choix des campagnes menées par l’industrie du tabac pour étendre ses marchés. En outre, les détaillants pratiquent de plus en plus le commerce électronique sur Internet, notamment pour la publicité, la commercialisation et la vente des produits.

La part du produit intérieur brut (PIB) que représentent les échanges mondiaux a progressé régulièrement depuis la Deuxième Guerre mondiale. De leur côté, les investissements étrangers directs ont atteint des sommets. Un certain nombre d’accords multilatéraux et bilatéraux, en particulier ceux de l’Organisation mondiale du Commerce (OMC), prévoient des réductions des obstacles tarifaires et non tarifaires au commerce qui faciliteront encore le développement du commerce mondial. La libéralisation des échanges devrait réduire le coût de la vie, élargir le choix et améliorer la qualité des produits, augmenter les revenus et stimuler la croissance économique. Cependant, on s’attend aussi à ce qu’elle se traduise par une consommation de cigarettes accrue dans les pays à revenu faible ou intermédiaire.

Ouverture aux échanges, investissements étrangers directs et augmentation de la consommation de tabac

Le commerce des produits manufacturés du tabac, comme les cigarettes, augmente rapidement depuis le milieu des années 80. Il est probable que cette tendance se maintiendra du fait de la réduction des obstacles au commerce du tabac, et de l’augmentation de l’offre et de la baisse des prix qui s’ensuivent. De plus, la libéralisation des échanges s’accompagne d’un accroissement de la concurrence, qui fait également baisser les prix et d’une augmentation des dépenses de publicité, tandis que la prolifération des marques peut accroître encore l’étendue du marché. Tous ces facteurs contribueront vraisemblablement à faire augmenter davantage la consommation de tabac. On s’attend à ce que les investissements étrangers directs liés au tabac aient au moins un effet comparable sur le tabagisme, en particulier dans la mesure où ils peuvent assurer aux sociétés transnationales productrices de tabac une forte présence locale et leur permettre de faire plus facilement pression...
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sur les responsables gouvernementaux. La libéralisation des échanges et des investissements pourrait donc entraîner une augmentation des taux de mortalité et de morbidité liées au tabagisme.

La recherche économétrique confirme l’hypothèse selon laquelle l’ouverture du marché conduit à un accroissement de la consommation de tabac. Cependant, les recherches empiriques sur l’incidence de la libéralisation des investissements sur le tabagisme font défaut. Pour vérifier l’hypothèse selon laquelle la libéralisation des échanges entraîne une augmentation de la consommation de tabac, on utilise ici un modèle comparable à celui de Taylor et al., mais basé sur un ensemble de données concernant plus de 80 pays pour les années 1970-1997. On recourt également à trois instruments couramment utilisés dans les modèles macroéconomiques pour mesurer l’ouverture du marché, à savoir : i) la pénétration des importations ; ii) la part des échanges dans le PIB ; et iii) la part des échanges avec les pays de l’OCDE dans le PIB.

Pour vérifier l’hypothèse selon laquelle la libéralisation des investissements augmente la consommation de cigarettes, on utilise les méthodes de mesure de la perméabilité aux investissements mises au point par Gastanaga et al. dans le modèle des données de panel. Gastanaga et al. ont examiné les effets de diverses politiques sur les flux d’investissements étrangers directs dans un groupe de 55 pays/provinces en développement. Ils se sont servis d’un indice qualitatif du degré d’ouverture aux investissements directs en provenance de l’étranger établi à partir du Rapport annuel du FMI sur les régimes et les restrictions de change, ainsi que d’un instrument de mesure de la distorsion des taux de change, qu’ils appellent la « prime du marché noir ».

Il est apparu que la pénétration des importations favorisait l’accroissement de la consommation de cigarettes dans les pays à revenu faible ou intermédiaire. En outre, on a constaté qu’un biais de la prime du marché noir s’accompagne d’une augmentation de la consommation de cigarettes et que des investissements étrangers directs accrues entraînent aussi une augmentation de la consommation de cigarettes. Ces résultats concordent avec ceux de Taylor et al. qui ont observé que la pénétration des importations avait des effets étendus et marqués dans les pays à revenu faible et des effets moindres mais néanmoins importants dans les pays à revenu intermédiaire. Dans l’ensemble, on a obtenu des résultats comparables en mesurant l’ouverture d’après le PIB comme instrument de mesure de la perméabilité. Les mesures fondées sur la part des échanges avec les pays de l’OCDE dans le PIB et sur la variable qualitative des investissements ont donné des résultats assez irréguliers.

Convention-cadre pour la lutte antitabac

La crainte de l’instabilité croissante du marché mondial suscite un regain d’attention pour les « mauvais publics » mondiaux, comme le tabac, qui sont susceptibles d’exacerber cette instabilité.

La convention-cadre de l’OMS vise à régler la question des déterminants transnationaux qui contribuent à aggraver l’épidémie de tabagisme. Pour la première fois, l’OMS a entamé, conformément à l’article 19 de sa Constitution, des négociations auxquelles participent ses 191 Etats Membres, en vue d’élaborer un traité fondé sur des données factuelles. Cette convention et les protocoles y relatifs complèteront à l’échelle mondiale les mesures nationales et locales de lutte antitabac – mais ne s’y substitueront pas. En tant qu’instruments de droit international, ces accords seront contraignants pour les États qui les auront adoptés et ratifiés. En janvier 2001, les négociations ont fait un grand pas en avant grâce à la diffusion du texte du Président qui constituait le premier projet de la Convention. Ce texte énonce les obligations de fond et de procédure qui sont proposées au titre de la convention et préconise la négociation d’une série de protocoles dans un certain nombre de domaines hautement prioritaires pour la lutte mondiale antitabac, comme la publicité, la promotion, le parrainage et le trafic illicite de produits du tabac. La convention-cadre constitue essentiellement le modèle pour les différents domaines de la lutte antitabac au niveau intergouvernemental. Les obligations de fond restent cependant à négocier et à établir dans les protocoles. Le commerce mondial du tabac soulève des difficultés sur le plan réglementaire, tant au niveau national qu’au niveau international ; il pourrait être utile de traiter des aspects connexes dans les protocoles fondamentaux.

Le commerce via Internet et le commerce illicite accroissent l’accès transnational au tabac pour le consommateur, au-dessous du prix du marché. Ces menaces pour la lutte antitabac peuvent ne pas toujours être...
 envisagées par la législation nationale et font partie, à ce titre, des problèmes liés au commerce qui demandent des efforts concertés aux niveau national et mondial.

L'état actuel de la technologie permet un éventail de mécanismes de réglementation d'Internet, qui vont des mécanismes officiels lourds, à l'autoréglementation, en passant par le filtrage individuel des sites indésirables. Ces mécanismes de réglementation, en particulier ceux visant le contenu, font souvent appel à plusieurs technologies ; la coopération de toutes les parties concernées fondée sur la bonne foi est donc indispensable.14 La Commission des Nations Unies pour le Droit commercial international (CNUDCI) a proposé une loi type sur le commerce électronique qui envisagerait les multiples questions juridiques soulevées par le contrôle international du commerce du tabac via Internet.15

La contrebande du tabac est un autre problème mondial : il s'agit de la distribution par des organisations internationales criminelles de produits de marques internationales fabriqués par des entreprises multinationales. De grandes quantités de cigarettes hors taxe « disparaisse » au cours de transports internationaux et ne réapparaissent que sur le marché noir. Quelque 30 % des cigarettes exportées sur le marché international sont écoulées en contrebande, une proportion très nettement supérieure à celle de la plupart des biens de consommation faisant l’objet d’échanges internationaux. Les taxes sur les produits du tabac constituent une des mesures les plus efficaces pour en réduire la consommation. Malgré l’ampleur de la contrebande, l’augmentation des taxes génère des recettes croissantes et réduit la consommation de cigarettes.

**La convention-cadre et les accords GATT/OMC**

Les dispositions envisagées de la convention-cadre et des protocoles pourraient avoir une incidence sur les accords commerciaux de l’OMC qui fonctionnent comme un tout.16 Aussi est-il important de mettre en place des stratégies efficaces de réduction de la demande pour la lutte antitabac. Le projet de convention, qui fournit un cadre réglementaire international pour éradiquer l’épidémie du tabagisme, est élaboré en tenant compte des accords commerciaux de l’OMC, dont plusieurs s’appliquent au commerce du tabac et des produits du tabac.

Les Accords GATT/OMC contiennent diverses règles concernant la réduction des obstacles au commerce. Les Membres doivent veiller à « l’égalité de traitement dans les conditions de concurrence » entre les produits « similaires » ou en concurrence directe. Selon le GATT, les Membres ont un droit incontesté à garantir le niveau de protection sanitaire qu’ils jugent approprié. Pour déterminer si une mesure est « nécessaire » pour assurer l’objectif légitime de protection sanitaire, on vérifie si cette mesure est compatible avec les règles de l’OMC (si elle relève des exceptions), autrement dit, on compare son efficacité avec ses effets restrictifs sur les échanges, tout en tenant compte de l’importance relative des intérêts communs que cette mesure vise à défendre. Plus les intérêts communs sont essentiels, plus la mesure a de chances d’être acceptée comme « nécessaire ». La santé a été reconnue comme revêtant la plus haute importance.

Les services interviennent dans pratiquement toutes les activités économiques, quel que soit le secteur de production. Les services servent de facteurs de production directs, et établissent le lien entre les producteurs et les fournisseurs d’une part et les producteurs et les consommateurs de l’autre. Les services de publicité, de transport, de financement et de distribution ont une importance particulière pour les fabricants de produits finals. L’Accord général sur le Commerce des Services (AGCS) régit le commerce de pratiquement tous les services. Chaque membre doit soumettre ce que l’on appelle une liste d’engagements spécifiques, dans laquelle il indique dans quels secteurs il souhaite accorder l’accès au marché et le traitement national. Au titre de l’article XIV(b) de l’AGCS, les membres en question sont habilités à déroger à leurs obligations, si c’est nécessaire, pour protéger la vie ou la santé des personnes ou des animaux, ou pour préserver les végétaux.

Pour sa part l’Accord sur les Obstacles techniques au Commerce (OTC) vise à garantir que les procédures de vérification de la conformité des produits avec les spécifications n’aient pas pour effet de créer des obstacles non nécessaires au commerce. Conformément aux termes de l’Accord, tous les Membres peuvent fixer ces normes au niveau qu’ils jugent approprié. Un pays ne peut pas imposer de règles plus strictes en matière de spécification et de vérification aux produits importés qu’aux produits similaires d’origine nationale, ou ne les imposer qu’à un nombre restreint de produits importés. En outre, tout règlement technique doit répondre à l’un des objectifs
légittimes énoncées dans l’Accord et ne pas être plus restrictif pour le commerce qu’il n’est nécessaire pour réaliser l’objectif. Au titre de cet Accord, il est possible d’élaborder des règlements techniques pour réaliser un ou plusieurs objectifs « légitimes », notamment, mais pas seulement, la protection de la santé ou de la sécurité des personnes et la prévention de pratiques de nature à induire en erreur. Pour les règlements notifiés à l’OMC en 2000 concernant l’Accord OTC, l’objectif le plus communément visé était la santé ou la sécurité des personnes. Un certain nombre de prescriptions en matière d’étiquetage des cigarettes ont également été notifiées.

L’Accord sur l’Agriculture réglemente l’accès au marché, le soutien interne et les subventions à l’exportation des produits agricoles, y compris le tabac. Il prévoit que chaque Etat soutenant son secteur agricole au moyen de subventions directes doit les réduire lorsqu’elles correspondent globalement, en valeur réelle, à plus de 5 % (10 % pour les pays en développement) de sa production annuelle. Il interdit en outre les subventions à l’exportation de tout produit qui ne fait pas l’objet d’engagements de réduction spécifique ou d’un traitement spécial pour les pays en développement. A ce jour, 12 Etats Membres ont utilisé cet Accord pour faciliter l’accès au marché du tabac.

L’Accord sur les Aspects de Droits de Propriété intellectuelle qui touchent au Commerce (ADPIC) prévoit la protection des marques de fabrique et de commerce et l’accès aux brevets dans pratiquement tous les domaines techniques. Il laisse cependant aux Etats Membres de l’OMC la possibilité de refuser de protéger des inventions par des brevets, s’il est nécessaire d’en empêcher l’exploitation commerciale pour protéger, entre autres, la santé ou la vie des personnes. Les pays ont le droit de refuser ou d’annuler le dépôt de marques de fabrique ou de commerce qui sont contraires à la morale ou à l’ordre public et, en particulier, qui pourraient avoir un caractère trompeur. Ils ont par ailleurs le devoir de prévoir des poursuites pénales en cas d’atteintes aux droits de propriété intellectuelle, en particulier pour les actes délibérés de contrefaçon de marques de fabrique ou de commerce. Compte tenu de l’importance de ces procédures en ce qui concerne le commerce illicite du tabac, il faut que les sanctions soient assez sévères pour être dissuasives.

L’Accord sur les Subventions et les Mesures compensatoires (SMC) a trait aux disciplines multilatérales qui réglementent l’octroi de subventions et l’utilisation de mesures compensatoires destinées à atténuer le dommage causé par les importations subventionnées. Ce système de recours multilatéral permet aux Etats Membres de se protéger contre les subventions qui produisent des effets indésirables.

Enfin, le mécanisme de règlement des différends de l’OMC, qui figure dans le Mémorandum d’accord sur les règles et procédures régissant le règlement des différends ou Mémorandum d’accord sur le règlement des différends, régit le règlement de tous les différends relevant d’accords de l’OMC. Ce mécanisme ne peut être déclenché que par des membres, lorsqu’ils estiment que des mesures prises par d’autres membres portent atteinte à des avantages dont ils devraient profiter directement ou indirectement au titre d’un accord quelconque. Deux différends commerciaux intéressant la santé, à savoir l’affaire des cigarettes thaïlandaises de 1990 et l’affaire de l’amiance de 2001, réglées respectivement par le GATT et l’OMC, montrent comment les règles de l’OMC sont appliquées à des questions concernant la santé. En 2001, l’Organe d’appel a confirmé que les Membres de l’OMC avaient incontestablement le droit de déterminer le niveau de protection sanitaire qu’ils jugeaient approprié, qu’il n’existaît aucune disposition du GATT de 1994 concernant la nécessité de quantifier le risque pour la vie ou la santé des personnes et que la santé humaine était « vitale et de la plus haute importance ».

La lutte contre la rapide mondialisation de la consommation du tabac dans un contexte de libéralisation des échanges est une tâche colossale. S’il n’y a pas de véritables activités de lutte contre le tabagisme aux niveaux national et international, la libéralisation du commerce et des investissements liés au tabac se traduirait, à terme, par une augmentation considérable de la charge de mortalité et de morbidité liée au tabagisme, en particulier dans les pays en développement. Les politiques mondiales fondamentales de lutte antitabac pourraient avoir l’effet préventif souhaité grâce à la Convention-cadre de l’OMS sans introduire de discrimination en matière de commerce international.

Dans le monde de l’après-Cycle d’Uruguay, les conséquences négatives de la libéralisation des échanges, comme la consommation accrue de tabac, réclament notre attention. Parmi les réalités de la scène politique et économique de cet après-Cycle d’Uruguay, on constate que :
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- le pouvoir de négociation des pays en développement reste limité ;
- les questions de santé primaire et les priorités des pays en la matière ne peuvent être mesurées selon les mêmes critères que les télécommunications et les biens de consommation durables ; avec la convention-cadre, l'OMS adopte une position de chef de file et se fixe pour mission de faire en sorte que les implications pour la santé soient pleinement prises en compte ;
- les pays développés doivent admettre que la mondialisation implique une mondialisation des responsabilités autant que des droits.

La convention-cadre s'efforce de traiter ces questions.


14 Si le métamarquage, par exemple, était fait de mauvaise foi, les mécanismes d’autoréglementation seraient sans effet.


РЕЗЮМЕ

Имеется все больше данных, предполагающих наличие связи между возрастным потреблением табака, свободной торговлей и иностранными прямыми инвестициями (ИПИ), связанными с табаком. Таким образом, угроза для общественного здравоохранения, которую представляет глобальный рынок табака, может возрасти в результате глобальной тенденции, направленной на большую либерализацию торговли и ИПИ. Эта угроза усугубляется стратегиями транснациональных табачных компаний по внедрению в возникающие рыночные экономики, а также новыми трансграничными проблемами, такими как торговля через Интернет и нелегальная торговля табачными изделиями. Однако существующие регулирующие механизмы еще не рассматривали эти проблемы. Поэтому срочно требуется комбинация мощных глобальных и национальных регулирующих стратегий для решения проблемы, связанной с возрастающей пандемией болезней и смертности, связанных с табаком. Предложенная Рамочная конвенция ВОЗ по борьбе против табака является важным шагом в этом направлении.

В настоящее время в целом признается, что потребление табака является причиной высокой смертности и заболеваемости. Болезни, связанные с табаком, являются в мире наиболее серьезной отдельной причиной смерти, которую можно предотвратить. Куранье и пассивное курение вызывают свыше 20 основных категорий летальных и инвалидизирующих заболеваний, включая рак легких и другие виды рака, ишемическую болезнь сердца, хронические респираторные заболевания и туберкулез. Предполагается, что потребление табака вызовет 8,4 миллиона смертей к 2020 г., 70% из которых - в развивающихся странах. Женщины, молодежь и дети во всех возрастных группах несут бремя заболеваемости и смертности, связанных с табаком, так как распространенность потребления табака возрастает именно в этих группах.

Промышленность хорошо осознает силу либерализации торговли, которая откроет рынки развивающихся стран для торговли табаком, как это отражено в заявлении, сделанном табачной компанией "Филип Моррис": "Снятие [торговых] барьеров предоставит нам расширенные рыночные возможности". В результате эти компании приняли агрессивные стратегии, направленные на расширение их глобальной торговли и достижение цели проникновения на рынки в развивающихся странах и странах с возникающей рыночной экономикой. Они внедрились в латиноамериканские рынки в 1960-х годах, в недавно ставшие промышленно развитыми страны Азии в 1980-х годах, и совсем недавно, в 1990-х годах, на рынки Африки, Китая и Восточной Европы. Молодежь и женщины являются основными целевыми группами для проводимых табачной промышленностью кампаний по расширению рынка. Более того, розничные торговцы табачной продукцией во все возрастные группы используют Интернет для электронной торговли, включая рекламу, маркетинг продукции и продажу.

Мировая торговля в качестве доли валового внутреннего продукта (ВВП) устойчиво росла со времен Второй мировой войны, при этом ИПИ достигли рекордных уровней. Ряд многосторонних и двусторонних соглашений, особенно в рамках Всемирной торговой организации (ВТО), предусматривают снижение тарифных и нетарифных барьеров в торговле, что обеспечит дальнейшее расширение глобальной торговли. Более свободная торговля предполагает снижение стоимости жизни, предоставляет больший выбор и продукты более высокого качества, поднимет доходы и стимулирует экономический рост.
Однако также предполагается, что это приведет к увеличению потребления сигарет в странах с низким и средним доходом.

**Открытость торговли, иностранные прямые инвестиции и более высокое потребление табака**

Торговля готовыми табачными изделиями, такими как сигареты, быстро росла с середины 1980-х годов. Эта тенденция скорее всего продолжится по мере снижения торговых барьеров для табака, в результате чего поставки увеличатся и цены снизятся. Более того, либерализация торговли связывается с усилением конкуренции, которая также ведет к более низким ценам и увеличению расходов на рекламу, в то время как расширение ассортимента может и дальше увеличивать объемы рынка. Все эти факторы могут внести вклад в дальнейшее увеличение потребления табака. Предполагается, что связанные с табаком ИПИ имеют по крайней мере сравнимое воздействие на употребление табака, особенно в связи с тем, что они могут обеспечить транснациональным табачным компаниям сильное местное присутствие, обеспечиваемое лоббирование правительственных чиновников. Поэтому потенциальными последствиями для здоровья, торговли и либерализации инвестиций станут более высокие уровни смертности и инвалидности, связанные с табаком.

Эконометрические исследования подтверждают предположение о том, что открытость торговли ведет к более высокому потреблению табака. Однако имеется мало эмпирических исследований в отношении воздействия либерализации инвестиций на использование табака. С целью проверки гипотезы о том, что либерализация торговли ведет к увеличению потребления табака, в данном документе используется модель, подобная модели, использованной Taylor и др., но с большим объемом данных, охватывающих более 80 стран на протяжении 1970 - 1997 годов. Эта модель также использует три параметра открытости торговли, обычно применяемые в макроэкономических моделях: (i) проникновение импорта; (ii) доля торговли в ВВП; и (iii) доля торговли со странами ОЭСР в ВВП.

Для проверки гипотезы, что либерализация инвестиций повышает потребление сигарет, параметры открытости инвестиций, разработанные Gastanaga и др., используются в модели групповых данных. Gastanaga и др. изучили воздействие различных политики на потоки ИПИ в группе, состоящей из 55 развивающихся стран/провинций. Они использовали качественный индекс степени открытости для внутренних ИПИ, построенный на основе Ежегодного отчета МВФ о систематизации курсов обмена и ограничений, а также показателя для искажения обменного курса, который они называют надбавкой черного рынка (НЧР).

Выведено, что проникновение импорта также способствует более высоким уровням потребления сигарет в странах с низким и средним доходом. Кроме того, обнаружилось, что по мере снижения НЧР потребление сигарет увеличивается и что возросшие уровни ИПИ также приводят к более высоким уровням потребления сигарет. Эти результаты согласуются с результатами Taylor и др., которые выяснили, что проникновение импорта имело большое и значительное воздействие в странах с низким доходом, и меньший, но по-прежнему значительный эффект в странах со средним доходом.
В целом аналогичные результаты были получены, используя долю торговли в ВВП в качестве параметра открытости рынка. Доля торговли со странами ОЭСР в ВВП и качественная величина инвестиций дали довольно нестабильные результаты.

Рамочная конвенция по борьбе против табака

Учитывая страх возрастающей нестабильности на мировом рынке, все большее внимание уделяется глобальному "общественному злу", такому, как табак, который может усугубить эту нестабильность 12.

Рамочная конвенция ВОЗ имеет своей целью рассмотреть транснациональные детерминанты, способствующие расширению табачной эпидемии. С помощью основанного на фактических данных подхода при ведении переговоров ВОЗ впервые начала переговоры, в которых в соответствии со Статьей 19 ее Устава принимают участие 191 государство-член. РКБТ и соответствующие протоколы будут действовать в качестве глобального дополнения, а не замены действий по борьбе против табака на национальном и местном уровнях 13. Они будут обязательными в качестве международного правового акта для тех стран, которые примут и ратифицируют эти соглашения. В январе 2001 г. на переговорах в отношении РКБТ был сделан первый важный шаг вперед в результате составления текста Председателя, который стал первым проектом РКБТ. В тексте сформулированы предлагаемые обязательства по существу и процедурные обязательства в рамках РКБТ. Текст также призывает к ведению переговоров в отношении ранних протоколов в ряде высокоприоритетных областей, касающихся глобальной борьбы против табака, таких, как реклама, продвижение на рынок, спонсорство и нелегальные перевозки табачных изделий. Рамочная конвенция по существу обеспечивает модель для борьбы против табака на межправительственном уровне. Однако обязательства по существу еще предстоит обсудить и включить их в соответствующие протоколы. Глобальная торговля табаком выдвигает проблемы регулирования как для национальных, так и международных режимов регулирования; связанные с этим вопросы могли бы быть обседованы для включения в основные соглашения протоколов РКБТ. Например, торговля через Интернет или незаконная торговля табаком увеличивает транснациональную доступность табака потребителям по ценам ниже рыночных. Обе эти опасности для борьбы против табака могут оказаться вне регулирующих механизмов стран, и поэтому являются примерами связанных с торговлей вопросов, которые требуют согласованных национальных и глобальных усилий.

Нынешнее состояние технологии содействует разнообразным схемам регулирования Интернет - от тяжеловесного правительственного регулирования до саморегулирования промышленностью и индивидуальной фильтрации оскорбительных веб-сайтов. Регламентирующие схемы, особенно в отношении регламентации содержания, часто используют несколько технологий и требуют, чтобы все вовлеченные стороны сотрудничали добросовестно 14. Комиссия Организации Объединенных Наций по праву международной торговли (ЮНИСИТРАЛ) предложила образец закона в отношении электронной торговли, в котором будет рассмотрено огромное число юридических вопросов в сфере международного контроля торговли табаком через Интернет 15.

Контрабанда табака является еще одной глобальной проблемой, охватывающей международные рынки, производимые многонациональными компаниями и распределяемые международными криминальными организациями. Большие объемы
беспошлинных сигарет "исчезают" во время международной транспортировки только затем, чтобы вновь появиться в качестве контрабандных товаров. Примерно 30% экспортных сигарет на международном уровне утрачиваются для последующей контрабанды, в процентном отношении это значительно больше, чем большинство потребительских товаров, участвующих в международной торговле. Налогообложение является одной из самых эффективных мер снижения потребления табака. Даже в условиях высоких уровней контрабанды повышение налогов обеспечивает увеличение государственных доходов и снижает потребление сигарет.

Рамочная конвенция по борьбе против табака и соглашения ГАТТ/ВТО

В настоящее время рассматриваемые положения с целью включения в РКБТ и соответствующие протоколы могут иметь последствия для единого пакета торговых соглашений ВТО. Поэтому межсекторальное сотрудничество является важным для достижения эффективных стратегий снижения спроса в области борьбы против табака. Предлагаемая рамочная конвенция по борьбе против табака, которая обеспечивает международный регулирующий подход, чтобы остановить табачную эпидемию, разрабатывается с надлежащим учитом торговых соглашений ВТО, ряд которых относится к торговле табаком и табачными изделиями.

ГАТТ/ВТО имеют разнообразные правила, касающиеся снижения барьеров для торговли. Члены соглашений должны обеспечивать "равенство в условиях конкуренции" между "аналогичными" или прямо конкурирующими продуктами. В соответствии с ГАТТ страны-члены обладают неоспоримым правом ставить своей целью достижение такого уровня охраны здоровья, который они считают целесообразным. При решении вопроса о том, является ли та или иная мера "необходимой" для достижения законной цели защиты здоровья, используется процесс "взвешивания" и "балансировки" для определения, может ли оспариваемое положение быть совместимым с требованиями ВТО (подпадающим под положения об исключении), учитывая его эффективность и ограничительное для торговли воздействие, а также относительное значение общих интересов или ценностей, на обеспечение которых оно направлено. Чем более важными являются общие ценности, тем более легко та или иная мера будет принята в качестве "необходимой". Здоровье человека признано как имеющее наивысшую степень важности.

Услуги имеют отношение практически ко всем видам экономической деятельности, независимо от сектора производства. Они используются как непосредственный вклад в производственный процесс и связывают производителей с поставщиками и покупателями. Особое значение для производителей готовых потребительских товаров могут иметь такие услуги, как реклама, транспорт, финансы и распределение. Генеральное соглашение по торговле услугами (GATS) охватывает торговлю практически всеми услугами. Каждая страна-член должна представить так называемый календарь конкретных обязательств, указывающий секторы обслуживания, в которых оно желает получить доступ на рынок и национальный режим. В соответствии со статьей XIV(b) GATS, Члены имеют право отказаться от любого из своих обязательств, если это необходимо для защиты жизни или здоровья человека, животного или растения.

Соглашение о технических барьерах в торговле (ТБТ) имеет целью обеспечить, чтобы спецификации продукта и процедуры, примененные для оценки соответствия спецификациям, не создавали ненужных препятствий для торговли. В соответствии с
Соглашение о сельском хозяйстве касается вопросов доступа на рынок, поддержки местной продукции и экспортных субсидий для сельскохозяйственных продуктов, включая табак. Каждая страна-член, поддерживаемая сельское хозяйство с помощью прямых дотаций, должна снизить совокупную денежную стоимость подобных мер, если она превышает 5% (или 10% для развивающихся стран) стоимости ежегодного производства этой страны. Соглашение включает запрет на использование экспортных субсидий на любой сельскохозяйственный продукт, который не подпадает под конкретные обязательства по снижению или подлежит специальному режиму для развивающихся стран. На сегодняшний день 12 стран-членов используют Соглашение о сельском хозяйстве для предоставления возможности доступа на рынок для табака.

Соглашение об аспектах интеллектуальной собственности, связанных с торговлей (TRIPS), требует защиты торговых марок и наличия патентов фактически во всех областях технологий. Однако TRIPS предусматривает, что страны-члены могут отказаться от патентной защиты изобретений, предусмотрения коммерческой эксплуатации, которые необходимы для защиты, в частности, жизни и здоровья человека. Страны имеют право отказаться или лишить законной силы регистрацию торговых марок, которые противоречат морали или общественному порядку, и в частности, тех из них, которые могут вводить в заблуждение население. Страны-члены должны предусмотреть уголовные процедуры в отношении нарушения прав интеллектуальной собственности, в частности в случае преднамеренной подделки торговой марки. Особенно важно для борьбы с незаконной торговой табаком, чтобы санкции были достаточно суровыми и действовали в качестве фактора устрашения.

Соглашение о субсидиях и компенсационных мерах (SCM) рассматривает многосторонние дисциплины, регулирующие предоставление субсидий и применение мер для компенсации ущерба, причиненного субсидированным импортом. Данная система многосторонних мер позволяет странам-членам оспаривать субсидии, которые вызывают неблагоприятные последствия.

Механизм ВТО для урегулирования споров, содержащийся в Соглашении о правилах и процедурах урегулирования споров или Соглашении об урегулировании споров (DSU), определяет урегулирование всех спорных вопросов по всем соглашениям ВТО. Процесс урегулирования может быть инициирован только странами-членами ВТО, когда они считают, что меры, принятые другими странами-членами, причиняют ущерб любым
полагающимся им прямым или косвенным преимуществам в рамках любого соглашения. Два спора, касающиеся вопросов здоровья и торговли, урегулированные ГАТТ/ВТО, а именно спор 1990 г. в отношении танзанийских сигарет и спор 2001 г. в отношении асбеста, показывают, как правила ВТО применялись в отношении вопросов, касающихся здоровья человека. Важным фактом является то, что в 2001 г. Английский орган подтвердил, что страны-члены ВТО обладают неоспоримым правом определять уровень защиты здоровья, который они считают целесообразным, что ГАТТ 1994 г. не содержал требований в отношении определения степени риска для жизни или здоровья человека и что здоровье человека являлось "существенным и важным в наивысшей степени".

Контроль быстрой глобализации потребления табака в эпоху либерализации торговли обескураживает. В отсутствие силовых мер по борьбе против табака на национальном и международном уровнях долгосрочные последствия либерализации торговли и инвестиций, связанных с табаком, вызовут значительное увеличение бремени смерти и болезней, вызываемых табаком, особенно в развивающихся странах. Превентивный потенциал ключевой глобальной политики в области борьбы против табака может быть реализован через Рамочную конвенцию по борьбе против табака без дискриминации международной торговли.

В мире после Уругвайского раунда отрицательные последствия либерализации торговли, такие как увеличение потребления табака, заслуживают особого внимания. Некоторые реальности, сложившиеся в политических и экономических условиях после Уругвайского раунда, являются следующими:

- Возможности развивающихся стран торговать продолжают оставаться ограниченными.
- Основные связанные со здравоохранением проблемы и приоритеты стран не могут быть измерены по той же шкале, что и телекоммуникации и потребительские товары длительного пользования. С помощью РКБТ ВОЗ берет на себя лидирующую роль и полночомоч по обеспечению полного учета последствий для здоровья.
- Развитым странам необходимо осознать, что глобализация включает глобализацию как обязанностей, так и прав.

Рамочная конвенция является одной из попыток заполнить этот вакуум.

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14 Например, недобросовестная маркировка делает системы добровольного саморегулирования бесполезными.


16 Включая, в частности, Соглашение о технических барьерах в торговле (ТВТ) (упаковка и маркировка), Соглашение о сельском хозяйстве (снижение правительственной поддержки табачному производству), Генеральное соглашение о торговле услугами (ГАТС) (ограничения в области рекламы) и Генеральное соглашение по тарифам и торговле (ГАТТ) (налоги, запрещения и связанные со здоровьем человека исключения из правил ГАТТ).

17 Членами являются: Австралия, Болгария, Коста-Рика, Сальвадор, Гватемала, Венгрия, Малайзия, Польша, Румыния, Южная Африка, Таиланд и Соединенные Штаты Америки.
SINOPSIS

Hay indicios crecientes de que existe una relación entre el aumento del consumo de tabaco y el libre comercio y la inversión extranjera directa relacionada con el tabaco. Es probable, pues, que la amenaza para la salud pública que supone el mercado mundial del tabaco se incremente como consecuencia de la tendencia general hacia una mayor liberalización del comercio y la inversión extranjera directa (IED). Esta amenaza se ve agravada por las estrategias de la industria tabaquera transnacional para entrar en las economías de mercado emergente así como por los nuevos problemas transfronterizos como el comercio por Internet y el comercio ilícito de productos del tabaco. Ahora bien, los mecanismos reglamentarios vigentes aún no han abordado estos problemas. Por lo tanto, se necesita con urgencia una combinación de firmes estrategias de reglamentación mundiales y nacionales para hacer frente a la creciente pandemia de enfermedades y muerte relacionadas con el tabaco. El propuesto Convenio marco de la OMS para la lucha antitabáquica es un gran paso en esa dirección.

Se reconoce hoy ampliamente que el consumo de tabaco provoca una alta mortalidad y morbilidad. Las enfermedades relacionadas con el tabaco son la causa más importante de defunciones preventibles en el mundo entero. El tabaquismo, activo y pasivo, es causa de más de 20 de las principales enfermedades mortales e incapacitantes, en particular el cáncer de pulmón y otros cánceres, la enfermedad isquémica del corazón, las enfermedades respiratorias crónicas y la tuberculosis. Según las proyecciones, el consumo de tabaco provocará 8,4 millones de defunciones de aquí al año 2020, el 70% de las cuales en países en desarrollo. La carga de morbilidad y mortalidad relacionada con el tabaco recaerá cada vez más en las mujeres, los jóvenes y los niños, pues la prevalencia del consumo de tabaco aumenta en esos grupos.

La industria conoce bien el poder de la liberalización del comercio para abrir los mercados de los países en desarrollo al comercio del tabaco, como se refleja en una declaración de la tabaquera Philip Morris: «La remoción de los obstáculos [comerciales] ampliará nuestras oportunidades de mercado». En consecuencia, estas empresas han adoptado combativas estrategias para ampliar su comercio mundial y conseguir penetrar el mercado de los países en desarrollo y las economías de mercado emergente. En el decenio de 1960 entraron en los mercados latinoamericanos, en el decenio de 1980 en los mercados de las economías de reciente industrialización de Asia, y últimamente, en el decenio de 1990, en los de África, China y Europa Oriental. Los jóvenes y las mujeres son los primeros objetivos de las campañas de expansión del mercado de la industria tabaquera. Además, los comerciantes minoristas de tabaco utilizan cada vez más las posibilidades de comercio electrónico que ofrece la Internet, incluidas la publicidad, la comercialización y la venta de productos.

El comercio mundial como parte del producto interno bruto (PIB) ha crecido constantemente desde la Segunda Guerra Mundial, mientras que la IED ha alcanzado niveles sin precedentes. Varios acuerdos multilaterales y bilaterales, particularmente los de la Organización Mundial del Comercio (OMC), prevén reducciones de los obstáculos arancelarios y no arancelarios al comercio que facilitarán aún más la expansión del comercio mundial. Se prevé que un comercio más libre permitirá reducir el costo de vida, proporcionará productos más selectos y de mejor calidad, hará aumentar los ingresos y estimulará el crecimiento económico. Sin embargo, también se prevé que provoque un aumento del consumo de cigarillos en los países de bajos y medianos ingresos.

Apertura del comercio, inversión extranjera directa y mayor consumo de tabaco

El comercio de manufacturas del tabaco, como los cigarillos, ha crecido rápidamente desde mediados del decenio de 1980. Es probable que al disminuir los obstáculos al comercio del tabaco 2001_354.sp
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Esta tendencia se mantenga, y resulte en una mayor oferta y precios más bajos. Además, la liberalización del comercio está asociada al aumento de la competencia, que también conduce al descenso de los precios y el incremento de los gastos en publicidad, al tiempo que la proliferación de marcas también puede acrecentar aún más el tamaño del mercado. Es probable que todos estos factores favorezcan un nuevo incremento del consumo de tabaco. Se prevé que la IED relacionada con el tabaco surta un efecto cuando menos comparable en el consumo de tabaco, particularmente si se tiene en cuenta que podrá dar a las empresas tabaqueras transnacionales una fuerte presencia local que facilite la promoción de sus intereses en las esferas oficiales. Las posibles consecuencias sanitarias de la liberalización del comercio y las inversiones se pueden resumir, pues, en el aumento de las tasas de defunción e incapacidad relacionadas con el tabaco.

La investigación econométrica apoya la premisa de que la apertura del comercio conduce a un mayor consumo de tabaco. Sin embargo, son escasas las investigaciones empíricas sobre las repercusiones de la liberalización de las inversiones en el consumo de tabaco. Para comprobar la hipótesis de que la liberalización del comercio conduce a un aumento del consumo de tabaco, en este documento se utiliza un modelo similar al empleado por Taylor y col., pero con un conjunto de datos más amplio que abarca más de 80 países y se refiere al periodo comprendido entre 1970 y 1997. También se utilizan tres medidas de la apertura del comercio comúnmente usadas en los modelos macroeconómicos: i) penetración de las importaciones; ii) parte del comercio en el PIB, y iii) parte del comercio con los países de la OCDE en el PIB.

Para comprobar la hipótesis de que la liberalización de las inversiones favorece el aumento del consumo de cigarillos, en el modelo de datos de panel se utilizan las medidas de la apertura de las inversiones elaboradas por Gastanaga y col. Gastanaga y col. examinaron los efectos de distintas políticas en las corrientes de IED en un grupo de 55 países/provincias en desarrollo. Utilizaron un índice cualitativo del grado de apertura a la afluencia de IED basado en el Annual Report on Exchange Rate Arrangements and Restrictions del FMI, así como una medida de la distorsión del tipo de cambio, que los autores han dado en llamar prima de mercado negro (PMG).

Se observó que la penetración de las importaciones contribuía a elevar los niveles de consumo de cigarillos en países de ingresos bajos y medianos. Se constató además que al disminuir la PMG, el consumo de cigarillos aumentaba y que los mayores niveles de IED también favorecían el aumento de los índices de consumo de cigarillos. Estos resultados son conformes a lo que sostienen Taylor y col., quienes observaron que la penetración de las importaciones tenía grandes y significativas consecuencias en los países de bajos ingresos y un efecto algo menor pero importante en los países de ingresos medianos. Por lo general, se obtuvieron resultados análogos utilizando como medida de la apertura la parte correspondiente al comercio en el PIB. La utilización de la parte del comercio con los países de la OCDE en el PIB y la variable de inversión cualitativa arrojó resultados bastante inestables.

Convenio marco para la lucha antitabáquica

Ante el temor del crecimiento de las inestabilidades en el mercado mundial, se presta cada vez más atención a los «males públicos» mundiales, como el tabaco, que es probable que acentúen esas inestabilidades. El Convenio marco de la OMS tiene por objeto abordar los determinantes transnacionales que coadyuvan a empeorar la epidemia de tabaco. Ésta es la primera vez que la OMS, utilizando un enfoque basado en pruebas científicas, pone en marcha negociaciones para la elaboración de un tratado conforme al Artículo 19 de su Constitución, en las que participan 191 Estados Miembros. El Convenio marco y los protocolos conexos serán un complemento mundial, que no una sustitución, de las medidas de lucha antitabáquica nacionales y locales. Esos acuerdos tendrán carácter vinculante, como todo tratado internacional, para aquellos Estados que los adopten y
ratifiquen. En enero de 2001 se dio un gran paso adelante en las negociaciones del Convenio marco con la comunicación del texto preparado por el Presidente, que fue el primer proyecto del instrumento. En el texto se enuncian las obligaciones sustantivas y de procedimiento propuestas para el Convenio. También se pide la negociación temprana de protocolos sobre una serie de cuestiones de elevada prioridad en la lucha antitabáquica mundial, como son la publicidad, la promoción, el patrocinio y el tráfico ilícito de productos del tabaco. El Convenio marco es fundamentalmente el patrón para el ámbito de la lucha antitabáquica intergubernamental. No obstante, aún quedan por negociar las obligaciones sustantivas que se han de establecer en los protocolos conexos. El comercio mundial del tabaco plantea problemas de reglamentación que afectan a los regímenes reglamentarios tanto nacionales como internacional; podrían seleccionarse tal vez asuntos conexos para su inclusión en los acuerdos sustantivos de los protocolos del Convenio.

El comercio por Internet y el comercio ilícito del tabaco aumentan la oferta transnacional de tabaco a los consumidores a precios inferiores al del mercado. Estas amenazas a la lucha antitabáquica podrían escurrirse por las fisuras de las reglamentaciones nacionales, y son un ejemplo de las cuestiones de índole comercial que exigen una acción nacional y mundial concertada.

El estado actual de la tecnología permite aplicar un espectro de sistemas reglamentarios en Internet, desde la estricta reglamentación pública hasta el filtraje privado de los sitios web ofensivos, pasando por la autorregulación de la industria. Los sistemas de reglamentación, particularmente los relativos al contenido, suponen a menudo el uso de varias tecnologías y requieren que todas las partes interesadas cooperen de buena fe.14 La Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI) ha propuesto una ley modelo sobre comercio electrónico que se ocupará del sinfín de cuestiones jurídicas que implica el control internacional del comercio del tabaco por Internet.15

El contrabando de tabaco es otro problema mundial, que afecta a las marcas internacionales producidas por empresas multinacionales y distribuidas por organizaciones delictivas internacionales. Grandes cantidades de cigarrillos exentos de impuestos «desaparecen» durante su transporte internacional, y luego reaparecen sólo como mercancías de contrabando. Alrededor del 30% de los cigarrillos de exportación internacional son objeto de contrabando, porcentaje éste muy superior al de la mayoría de los bienes de consumo que se comercializan internacionalmente. La imposición es uno de los medios más eficaces para reducir el consumo de tabaco. Incluso ante elevados índices de contrabando, la subida de los impuestos contribuye a aumentar los ingresos y a reducir el consumo de cigarrillos.

**El Convenio marco para la lucha antitabáquica y los acuerdos del GATT/OMC**

Las disposiciones que se examinan para su posible inclusión en el Convenio marco y los protocolos conexos podrían tener ramificaciones en relación con el conjunto de acuerdos comerciales de la OMC.16 La colaboración multisectorial es importante, pues, para establecer estrategias eficaces de reducción de la demanda en la esfera de la lucha antitabáquica. El Convenio marco propuesto, que ofrece un criterio de reglamentación internacional para poner coto a la epidemia de tabaco, se está elaborando teniendo debidamente en cuenta los acuerdos comerciales de la OMC, varios de los cuales interesan al comercio del tabaco y sus productos.

El GATT/OMC tiene diversas normas para reducir los obstáculos al comercio. Los miembros deben velar por la «igualdad de condiciones en la competencia» entre productos «similares» o directamente competidores. De acuerdo con el GATT, los miembros tienen el derecho incontestable de procurar el nivel de protección sanitaria que juzguen apropiado. Cuando se considera si una medida es «necesaria» o no para alcanzar la meta legítima de proteger la salud, se
utiliza un proceso de ponderación y equilibrios a fin de determinar si la reglamentación impugnada puede ser compatible con la OMC (es decir, si está contemplada en las disposiciones relativas a las excepciones) teniendo en cuenta su eficacia y sus efectos restrictivos del comercio así como la importancia relativa de los intereses o valores comunes que tiene por objeto defender. Cuanto más importantes sean los valores comunes, más fácil resultará aceptar que la medida es «necesaria». Se ha reconocido que la salud humana tiene el más alto grado de importancia.

Los servicios guardan relación con prácticamente todas las actividades económicas, cualquiera sea el sector de producción. Se utilizan como insumos directos en el proceso de producción y vinculan a los productores con los proveedores y consumidores. Para los fabricantes de productos acabados para consumo pueden revestir particular importancia servicios tales como los de publicidad, transporte, finanzas y distribución. El Acuerdo General sobre el Comercio de Servicios (AGCS) abarca el comercio de prácticamente todos los servicios. Cada miembro tiene que presentar una lista de compromisos concretos, en la que se enumeran los sectores de servicios en los que está dispuesto a otorgar acceso al mercado y trato nacional. En virtud del artículo XIV(b) del AGCS, los miembros tienen derecho a apartarse de cualquiera de sus obligaciones, de ser necesario, para proteger la vida y la salud de las personas y de los animales o para preservar los vegetales.

El Acuerdo sobre Obstáculos Técnicos al Comercio (OTC) tiene por objeto evitar que las especificaciones de los productos y los procedimientos utilizados para evaluar su conformidad con esas especificaciones creen obstáculos innecesarios al comercio internacional. Según los términos del Acuerdo, todos los miembros pueden establecer prescripciones de este tipo en el nivel que consideren apropiado. Ningún país puede imponer a los productos importados especificaciones o requisitos de prueba más restrictivos que los que impone a los productos similares de producción nacional, ni imponerlos a determinados productos importados en vez de a todos. Además, todo reglamento técnico debe ajustarse a uno de los objetivos legítimos enunciados en el Acuerdo, y no debe exceder más restricciones comerciales que las necesarias para lograr ese objetivo legítimo. En virtud de este Acuerdo, podrán elaborarse reglamentos técnicos respecto de uno o más de los objetivos «legítimos», incluidos los de protección de la salud y la seguridad de las personas y la prevención de prácticas que puedan inducir a error. El objetivo más común a que hacen referencia los reglamentos sobre obstáculos técnicos al comercio notificados a la OMC en 2000, era la salud o la seguridad humana. Se notificaron también varias prescripciones en materia de etiquetado de cigarrillos.

El Acuerdo sobre la Agricultura trata del acceso al mercado, la ayuda interna, y las subvenciones a la exportación de productos agrícolas, incluido el tabaco. El Estado miembro que presta ayuda a la agricultura mediante subvenciones directas debe reducir el valor monetario global de esa ayuda cuando excede del 5% (o el 10% para los países en desarrollo) del valor de la producción anual de ese miembro. El Acuerdo prohíbe la concesión de subvenciones a la exportación de todo producto agrícola que no esté sujeto a compromisos de reducción concretos o a trato especial, tratándose de países en desarrollo. Hasta la fecha, 12 miembros han utilizado el Acuerdo sobre la Agricultura para dar oportunidades de acceso al mercado al tabaco.\textsuperscript{17}

El Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (ADPIC) prescribe la protección de las marcas de fábrica o de comercio y la disponibilidad de patentes en prácticamente todas las esferas de la tecnología. No obstante, el Acuerdo sobre los ADPIC prevé la posibilidad de que los miembros rechacen la protección mediante patente de invenciones cuya explotación comercial sea necesario impedir para proteger, entre otras cosas, la vida o la salud humana. Los países tienen derecho a negar o invalidar el registro de marcas de fábrica o de comercio que sean contrarias a la moralidad o el orden público, y, en particular, de las que puedan inducir al público a error. Los miembros deben prever procedimientos penales en caso de violaciones de los derechos de propiedad intelectual, particularmente en el caso de la falsificación deliberada de marcas de fábrica o de comercio. Un
aspecto importante para el comercio ilícito del tabaco es que las sanciones, por su severidad, han de ser un elemento de disuasión.

El Acuerdo sobre Subvenciones y Medidas Compensatorias (SMC) abarca las disciplinas multilaterales que regulan la concesión de subvenciones y la utilización de medidas compensatorias para compensar el daño causado por importaciones subvencionadas. Este sistema de acciones multilaterales permite a los miembros impugnar las subvenciones que dan lugar a efectos adversos.

El mecanismo de solución de diferencias de la OMC, recogido en el Entendimiento relativo a las normas y procedimientos por los que se rige la solución de diferencias, o Entendimiento sobre Solución de Diferencias (ESD), rige la solución de todas las controversias relativas a cualquiera de los acuerdos de la OMC. Puede ser puesto en marcha sólo por los Estados miembros de la OMC cuando entienden que un beneficio que se derive directa o indirectamente para ellos de cualquier acuerdo resulta menoscabado por las medidas adoptadas por otros miembros. Dos controversias sobre cuestiones de salud relacionadas con el comercio resueltas por el GATT/OMC, a saber, la diferencia sobre los cigarrillos tailandeses de 1990 y la diferencia sobre el asbesto de 2001, demuestran cómo se han aplicado las normas de la OMC a asuntos relativos a la salud humana. Es importante destacar que en 2001, el Órgano de Apelación confirmó que los miembros de la OMC tenían el derecho incontestable de determinar el nivel de protección sanitaria que juzgaran apropiado, que no había en el GATT de 1994 ninguna disposición que exigiera cuantificar los riesgos para la vida o la salud humana, y que la salud humana era vital e importante en sumo grado.

Controlar la rápida mundialización del consumo de tabaco en una era de liberalización del comercio es una tarea de enormes proporciones. A falta de intensas actividades nacionales e internacionales de lucha contra el tabaco, la consecuencia a largo plazo de la liberalización del comercio y las inversiones relacionadas con el tabaco será un incremento significativo de la carga de mortalidad y morbilidad causadas por el tabaco, particularmente en los países en desarrollo. El potencial preventivo de las políticas fundamentales de lucha antitabáquica a nivel mundial puede hacerse efectivo mediante el Convenio marco sin perjuicio del comercio internacional.

En el mundo subsiguiente a la Ronda Uruguay hay que prestar atención a las repercusiones negativas de la liberalización del comercio, como el aumento del consumo de tabaco. Entre las circunstancias reales de este escenario político y económico post-Uruguay cabe citar los hechos siguientes:

1. El poder de negociación de los países en desarrollo sigue siendo limitado.
2. Las consideraciones y prioridades sanitarias básicas de los países no pueden ponderarse con la misma escala que las telecomunicaciones o los bienes de consumo duraderos. Con el CMLA, la OMS asume el mandato de velar por que se tengan plenamente en cuenta las repercusiones sanitarias, y asume también un papel directivo a ese respecto.
3. Los países desarrollados tienen que reconocer que la mundialización comprende asimismo la mundialización de las responsabilidades, además de la de los derechos.

El Convenio marco es un esfuerzo encaminado a llenar ese vacío.

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Confronting the Tobacco Epidemic in an Era of Trade Liberalization


5 Organización Mundial del Comercio. Diez ventajas del sistema de comercio de la OMC. Ginebra, OMC, 2001 (comunicación Internet, 22 de junio de 2001 en http://www.wto.int/spanish/thewto_s/whatis_s/10ben_s/10ben_s.htm).


14 El metaetiquetado de mala fe, por ejemplo, desvalorizaría los planes de autorregulación voluntaria.


16 Entre esos instrumentos cabe citar el Acuerdo sobre Obstáculos Técnicos al Comercio (AOTC) (envasado y etiquetado), el Acuerdo sobre la Agricultura (reducción de la ayuda oficial a la producción de tabaco), el Acuerdo General sobre el Comercio de Servicios (AGCS) (restricciones de la publicidad), y el Acuerdo General sobre Aranceles Aduaneros y Comercio (GATT) (impuestos, prohibiciones y excepciones a las normas del GATT relacionadas con la salud humana).

17 Los miembros son Australia, Bulgaria, Costa Rica, El Salvador, Estados Unidos de América, Guatemala, Hungría, Malasia, Polonia, Rumanía, Sudáfrica y Tailandia.
I. INTRODUCTION

It is widely recognized that tobacco is one of the major public health disasters of the 20th century, and that spiralling rates of tobacco consumption worldwide harm global health on an unprecedented scale. Scientific evidence has unequivocally established that tobacco use has devastating health consequences for the users and for those exposed to tobacco smoke. The extraordinary public health implications of tobacco use, long apparent in industrialized societies, are now accepted worldwide. However, in contrast to the concrete agreement on the health consequences of tobacco, debate persists regarding the links between international trade liberalization and global tobacco consumption as well as appropriate remedies.

In recent studies, global trade liberalization and market penetration have been linked to a risk of increased tobacco consumption, particularly in low- and middle-income countries. A recent World Bank-commissioned study by Taylor et al. entitled, The impacts of trade liberalization on tobacco consumption, empirically examined the relationship between cigarette consumption and the global trade in tobacco products. Estimates from that study indicated that the impact of lower trade barriers was significant in terms of an increase in cigarette consumption in low-income countries and a smaller, but still significant, increase in middle-income countries.

This paper builds on the foundation of the World Bank-commissioned study. Specifically, we examine further the links between international trade liberalization and tobacco consumption; explore new horizons for econometric and other economic research focusing on trade, investment and tobacco; and consider the legal and political issues involved in proposed efforts to address the liberalization of trade in tobacco within the World Health Organization’s (WHO) Framework Convention on Tobacco Control (FCTC).

Part II of this paper reviews the epidemiological evidence of the tobacco epidemic's links to international trade liberalization. It also reviews the political economy of the global trade in tobacco, effective demand reduction strategies, and the implications for controlling the tobacco epidemic in the globalized economy. Analysis of the tobacco industry’s views on trade liberalization and new market access, ascertained from over 35 million pages of industry documents disclosed in recent United States tobacco litigation, presents a public health perspective on the globalization of the tobacco epidemic. Finally, an analysis of a new transnational challenge to tobacco control, namely Internet commerce and advertising, is offered.

Part III further explores the links between trade liberalization and tobacco consumption by proposing new avenues of economic research and defining links between trade liberalization and tobacco trade, such as foreign direct investment (FDI). In summary, this section:

- Outlines the beneficial impacts of trade liberalization and FDI;
- Summarizes the negative externalities associated with tobacco;
- Reviews empirical evidence linking trade liberalization and tobacco consumption; and
- Summarizes new econometric research commissioned for this paper.

Within the context of tobacco as a global public health "bad", part IV begins with particular attention to a variety of multilateral trade agreements concluded during the Uruguay Round of the General Agreements on Tariffs and Trade (GATT) in 1994, which link to possible elements of the proposed FCTC. Next, we provide an overview of the negotiations of the FCTC, a regulatory strategy aimed at addressing transnational determinants that contribute to a worsening of the tobacco epidemic. This evidence-based treaty approach
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represents the first time the WHO has launched treaty negotiations under Article 19 of its Constitution in which its 191 Member States are participating. Two trade-related regulatory challenges — e-commerce through the Internet and the illicit trade in tobacco — provide examples of licit and illicit transnational threats to tobacco control, which could be proposed, for inclusion in the FCTC protocols. Finally, contributing authors from the World Trade Organization (WTO) examine relevant WTO agreements for the Framework Convention negotiations.

The conclusion addresses the global policy implications of the link between the tobacco trade and trade liberalization. While tensions exist between the aims of tobacco control and trade liberalization, preventive strategies such as the Framework Convention have the potential to counter the negative public health effects associated with the liberalization of the tobacco trade.

II. THE TOBACCO EPIDEMIC, TRADE LIBERALIZATION AND INDUSTRY STRATEGIES

A. Current epidemiological situation

In the early 1990s, an estimated 1.1 billion individuals used tobacco worldwide. This figure increased to almost 1.25 billion by 1998. Table 1 summarizes gender-specific smoking prevalence by WHO region in 1998.2

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<th>Table 1. Gender-specific smoking prevalence by WHO Region, 1998</th>
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Sources: American Cancer Society and World Health Organization, TCCP database

The death toll from tobacco use is expected to reach 8.4 million by 2020, 70% of which will occur in developing countries.3 Of the 100 million projected tobacco-related deaths over the next 20 years, about half will occur during the productive ages of 35-69 years.4 In China alone, 1 million individuals were projected to die in the year 2000 because of tobacco use. Further, at current rates of smoking uptake, tobacco use will kill about 100 million of 300 million Chinese males under 29 years of age.5 Like epidemics due to communicable diseases, the tobacco epidemic is characterized by known exposure, a time lag and pathology.

Tobacco-related diseases are the single most important cause of preventable deaths in the world. Smoking causes over 20 major categories of fatal and disabling disease, including lung and other cancers, ischaemic heart disease and chronic respiratory diseases.6 Epidemiological studies indicate that maternal smoking accounts for the majority of sudden infant death syndrome (SIDS) cases and also causes low birth weight and acute respiratory infections (see Appendix 1 for a summary of conclusions from earlier health agency reports on environmental tobacco smoke and child health).7 Among post-menopausal women, smokers have lower bone density than non-smokers and face increased risk of hip fracture.8

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Recent studies report massive impacts of tobacco on adult mortality in China and India. In these studies, the range of outcomes attributable to tobacco include cancers and heart and lung disease, categories previously described only in developed countries. The recent studies also underscore the use of tobacco as an important cause of death from tuberculosis. Epidemiological studies in China, for example, show a significant increase in the risk of contracting tuberculosis from smoking. Moreover, in different regions of the world, the tobacco epidemic has taken on different profiles. In India, for example, the widespread use of bidis (cheap cigarettes made with unprocessed tobacco) is associated with a very high rate of oral cancer.

Further evidence indicates a range of health problems in adults attributable to passive smoking. Specifically, these problems include pneumococcal pneumonia, stroke, lung cancer and ischaemic heart disease. Women and children are most at risk from the effects of passive smoking in their homes. The ill effects of passive smoking are also apparent in the workplace, where the majority of the world’s smokers are not protected from involuntary exposure to tobacco smoke by workplace health and safety regulations.

Trends in tobacco use among women and youth are also of concern, since tobacco companies increasingly target this potentially lucrative market. In general, 9% of women in developing countries and about 22% in developed countries currently smoke cigarettes, and women in India and several other countries chew tobacco. Unless innovative, robust and sustained initiatives are adopted, these figures are expected to rise, with today’s 250 million women smokers rising to 340 million by 2020.

Similarly, trends in tobacco use by children and teenagers are cause for alarm. Studies in developed countries show that most people start using tobacco before the age of 18 years. Recent trends show an earlier age of initiation and rising smoking prevalence rates among children and adolescents. A study of current cigarette use by students aged 13 to 15 years across 31 countries indicated that about 30% were current smokers in the urban areas of Poland, the Russian Federation and Ukraine.

Though the purpose of this paper is not to review the evidence base for tobacco control interventions, the above points demonstrate the public health risks associated with tobacco consumption. In this regard, the possibility that trade liberalization leads to increased tobacco consumption is of grave concern.

B. Implementing effective demand reduction strategies in an era of trade liberalization

A World Bank Study aptly summarizes the debate that has emerged regarding the compatibility of trade liberalization and tobacco control:

*While the arguments in favor of free trade in general, then, are robust, tobacco is clearly more harmful to health than most other traded consumer goods. The key issue for policymakers is to decide how to control tobacco without jeopardizing the otherwise beneficial consequences of free trade.*

A significant contributor to the increased consumption of cigarettes is the globalization of the tobacco epidemic, as will be documented empirically in Part III. Tobacco companies have expanded their global trade and achieved market penetration in developing countries and transnational market economies. They moved into Latin American markets in the 1960s, into Japan and the newly industrializing economies of Asia (the Republic of Korea, Taiwan (China), and Thailand) in the 1980s and 1990s, and, most recently, into Africa, China and Eastern Europe.

The GATT Uruguay Round facilitated penetration of the world’s tobacco markets by the transnational tobacco companies and, for the first time, included agreements to liberalize trade in unmanufactured tobacco. The entire package of WTO agreements has facilitated the expansion of global trade in tobacco products through significant reductions in tariff and non-tariff barriers to trade. Other regional trade agreements and/or groupings, such as the North American Free Trade Agreement (NAFTA), the European Union (EU), the Association of South-East Asian Nations (ASEAN), the Common Market of East and Southern Africa
(COMESA), the Economic Community of West African States (ECOWAS), the Common Market of the Southern Cone (MERCOSUR), and the Organization of American States (OAS), acted in synergy with global agreements by mandating further regional level trade liberalization in goods and services, including tobacco. Bilateral agreements also facilitated the penetration of potential growth markets. Examples include those negotiated by the United States Trade Representative (USTR) under Section 301 of the revised 1974 United States Trade Act, with Japan, the Republic of Korea, and Thailand in the 1980s. In 2001, the Bush administration resorted to use of the USTR to negotiate on behalf of United States tobacco industry interests against what it considered unfair trade practices by the Republic of Korea. Specifically, the USTR requested lower tariffs on cigarette imports after the Republic of Korea announced it would introduce a 40% tax on imported cigarettes.

As early as 1970, the World Health Assembly (WHA) acknowledged the threats to tobacco control posed by free trade and investment. A 1978 WHA resolution noted the Assembly’s serious concern at “the alarming increase in production and consumption of cigarettes during the last two decades in...developing countries, in which it was previously not widespread, and at the extensive promotional drive for the sale of cigarettes being carried out [in]...news media, and through association with sporting and cultural events, often inducing young people to smoke tobacco.”

Given an evidence-based estimate of 10 million tobacco-related deaths per year by 2030 and the demonstrated effectiveness of tobacco control, the 1990 World Health Assembly (WHA) urgently pressed Member States to undertake a comprehensive tobacco control strategy. The WHA resolutions address all aspects of a comprehensive tobacco control programme, including the following measures:

<table>
<thead>
<tr>
<th>Measures to reduce demand for tobacco</th>
<th>World Health Assembly Resolutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Raising cigarette taxes</td>
<td>WHA 31.56, WHA 43.16</td>
</tr>
<tr>
<td>Publicizing findings of research on the health effects of smoking</td>
<td>WHA 29.55, WHA 31.56, WHA 39.14</td>
</tr>
<tr>
<td>Consumer information via warning labels</td>
<td>WHA 39.14, WHA 48.11</td>
</tr>
<tr>
<td>Consumer information based on mass media counter-advertising</td>
<td>WHA 24.48, WHA 29.55, WHA 31.56, WHA 40.38, WHA 42.19</td>
</tr>
<tr>
<td>Bans on advertising and promotion</td>
<td>WHA 31.56, WHA 33.35, WHA 42.19, WHA 43.16</td>
</tr>
<tr>
<td>School anti-smoking educational programmes</td>
<td>WHA 23.32, WHA 24.48, WHA 29.55, WHA 31.56, WHA 33.35, WHA 39.14</td>
</tr>
<tr>
<td>Restrictions on smoking in public areas and workplaces</td>
<td>WHA 29.55, WHA 31.56, WHA 39.14, WHA 43.16, WHA 44.26, WHA 46.8</td>
</tr>
<tr>
<td>Nicotine replacement therapy and other cessation interventions</td>
<td>WHA 29.55, WHA 39.14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Measures to reduce supply of tobacco</th>
<th>World Health Assembly Resolutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restrictions on youth access to tobacco</td>
<td>WHA 39.14</td>
</tr>
<tr>
<td>Crop substitution and diversification</td>
<td>WHA 23.32, WHA 24.48, WHA 29.55, WHA 31.56, WHA 33.35, WHA 42.19</td>
</tr>
<tr>
<td>Reducing and eliminating price supports and subsidies on tobacco production</td>
<td>WHA 42.19, WHA 45.20</td>
</tr>
<tr>
<td>Elimination of smuggling</td>
<td>WHA 49.17</td>
</tr>
</tbody>
</table>

Table 2. WHA Resolutions on Tobacco Control
Additionally, the WHA underscored the need for progressive financial measures to discourage tobacco use and for progressive restrictions and concerted action to eliminate all direct and indirect advertising, promotion, and sponsorship of tobacco.38

Similarly, Jha and Chaloupka of the World Bank39 provide definitive empirical evidence of the effectiveness of the following tobacco control actions:

- Tax increases, which represent a win-win situation: in all studies examined, tax increases on tobacco products resulted in net increases in national tax revenues and a reduction in consumption.

- Non-price measures, including advertising bans, mass counter-advertising campaigns, warning labels, publicized findings of research on the health effects of smoking, and restrictions of smoking in public places and workplaces represent effective demand reduction strategies. The authors estimate that a package of such non-price measures implemented worldwide could cause about 23 million people to quit smoking (amongst those who smoked in 1995), and avert 5 million tobacco-related deaths.

- Nicotine replacement and other cessation therapies, which, if used by 25% of the world’s smokers, would enable 29 million smokers alive in 1995 to quit and would avert 7 million deaths.

- Global action to counteract smuggling is recommended as a supply-side intervention.

Despite the plans cited above to harmonize tobacco control and trade liberalization, the task is daunting in the context of the tobacco industry’s global economic strategies.

C. Targeting developing country markets: Inside view from tobacco industry documents

Tobacco industry documents available on the Internet give an idea of past global strategies of the tobacco industry to protect its economic interests. Notably, these documents revealed that seven major tobacco companies in 1977 established and later implemented Operation Berkshire, a conspiracy to protect the industry’s commercial interests by creating and promoting a smoking and disease controversy and adopting strategies directed at reassuring smokers.42 Further, in 1988, top officials of Philip Morris (PM) developed the Boca Raton Action Plan and then devised a set of “redirection/containment strategies,” with the aim of undermining anti-smoking efforts and other threats to the industry, including international health agencies like the World Health Organization.41 Also, the tobacco industry has been charged with fixing prices and market shares in legal and DNP (duty not paid, or smuggled) markets, in as many as 23 countries in the late 1980s and early 1990s.42

The tobacco industry is well aware of the power of free trade to open developing country markets to tobacco products. Philip Morris summarizes: “[r]emoval of [trade] barriers would provide us with expanded market opportunities.” 43 Trade in developing markets will compensate for decreased tobacco consumption in the United States and Western Europe. A British American Tobacco industry executive stated:

*We should not be depressed simply because the total free world markets appears to be declining. Within the total market, there are areas of strong growth, particularly in Asia and Africa; there are new markets opening up for our exports, such as Indo-China and the Comecon countries; and there are great opportunities to increase our market share in areas like Europe...It is consistently profitable. And there are opportunities to increase that profitability still further.*44
In fact, the cigarette industry has long been developing its strategy to reach new markets in Asia, Africa, Latin America, the Commonwealth of independent States (CIS) and the Russian Federation. "Until recently, perhaps forty per cent of the world's smokers were locked behind ideological walls. We've been itching to get at them...That's where our growth will come from." Support from free trade and multilateral trade agreements is at the core of this strategy. Philip Morris admits to having a large stake in market access negotiations. As foreign barriers to imports are lowered, the company stands to increase its exports significantly.

Philip Morris believes that the NAFTA will remove virtually all barriers to trade in consumer products between Canada, Mexico, and the United States, allowing the company to move to a North American sourcing strategy. Consequently, the company expects that its costs will decline and its efficiency will increase. In Latin America, the enlargement of NAFTA will eliminate non-tariff import barriers "that hinder our ability to enter markets" like Chile.

China is a particularly attractive new market for the tobacco industry. Robert Fletcher, Rothmans' Regional Public Affairs Manager, said, "[t]hinking about Chinese smoking statistics is like trying to think about the limits of space." Phillip Morris also notes, "China ...is the largest market in the world. As it continues to move toward a market-oriented economy and incomes rise, it offers great potential for...cigarettes." Yet, "[e]xtremely high import duties and local taxes... severely limit our ability to export cigarettes to China." The reduction of trade barriers "will be beneficial to PM." A 1996 British American Tobacco (BAT) bulletin stated that, "[f]or BAT, China is an important challenge for the future. It is the world's largest market for tobacco products." Notably, Martin Broughton, British American Tobacco's Chief Executive Officer, is the Chairman of the Chatham House Task Force, a foreign policy group which aims to facilitate free trade in China.

The industry has also set its sights on Africa. Rothmans' Public Affairs Manager said:

\[
\text{It would be stupid to ignore a growing market. ...We are in the business of pleasing our shareholders. We have a very strong feeling that if no one had heard of cigarettes in Timbuktu, than a Rothmans billboard would not mean anything. All we are doing is responding to a demand.}\]

Formerly, the United States Trade Representative (USTR) negotiated for tobacco when opening markets, though former United States, President Clinton changed this policy and entirely barred United States embassies from publicly associating with tobacco interests. The United States Congress attempted to circumscribe the role of the USTR in promoting tobacco industry interests abroad with the Doggett amendment. This amendment seeks to prevent government officials overseas from promoting tobacco interests or opposing control legislation, though the extent of its implementation is questionable. Phillip Morris reacted to this change, stating:

\[
\text{In view of the growing demand for premium cigarettes as a result of the rapid economic growth, we must prepare ourselves to capitalize on any relaxation of rules and regulations... We cannot rely on the USTR to liberalize the cigarette market; local production is essential for expanding our volume.}\]

The use of the USTR in 2001 to effectively promote tobacco industry interests in the Republic of Korea again brings the role of the USTR in opening markets into question. However, notwithstanding the USTR's role in directly promoting tobacco industry interests, the industry has enjoyed strong political support for its trade liberalization tactics in new markets. In 1986, one powerful and still current United States Senator made his position clear in a letter to the Prime Minister of Japan:

\[
\text{Your friends in Congress will have a better chance to stem the tide of anti-Japanese trade sentiment if and when they can cite tangible examples of your doors being opened to American products. I urge that you make a commitment to establish a timetable for allowing U.S. cigarettes a specific share of your market. May I suggest a goal of 20 percent within the next 18 months.}\]
D. New challenges of open trade: Internet trade/e-commerce

The Internet is automatic, non-centralized and uncontrolled by geographical boundaries. Tobacco retailers increasingly make use of this versatile medium to market and sell their products. The United States cigarette industry reported spending $850,000 on Internet advertising in 1999, a dramatic increase in industry spending on Internet advertising over the previous two years. In 1997, online cigarette advertising cost $215,000, representing less than 0.01% of all advertising and promotional expenditures for the year. Similar to changes seen in the cigarette industry, cigar industry expenditures on Internet advertising increased by 180% from 1996 to 1997. Only the United States smokeless tobacco industry reported no spending on Internet advertising or promotion between 1996 and 1999.

Tobacco manufacturers and retailers use a variety of formats to market their products on the Internet. Company or product home pages introduce the viewer to a company's products and services. While tobacco manufacturers' homepages do not sell tobacco products, these websites are interactive and entertaining to the user. For example, Brown and Williamson Tobacco's site is set up like a small town, providing the user with different "spaces" in which to access information. Websites collectively provide a forum for the tobacco industry to advertise persuasively to a select group of consumers. Further, Internet formats permit the advertiser to gain information about the user through "cookies" and to better target direct marketing campaigns through individual e-mails from the company.

Advertising banners are the most common form of advertising on the Internet. Banners are unsolicited advertising messages, text and images that appear on the user's screen while viewing a website. Often banners hyperlink to websites where the user may obtain information related to the banner. Tobacco sites link extensively to other tobacco sites, helping to build a sense of community and encouraging visitors to spend more time on smoking-related sites. Many tobacco websites also attempt to build a pro-smoking community by focusing on the lifestyle and culture of smoking and by including chat rooms or message boards for users to interact with one another.

Online advertisers use innovative ways to access potential customers. Some companies make use of "intermercials": short, animated segments that appear on the user's screen. "Intermercials" function as the Internet's equivalent of television commercial breaks. Interactive characters, which "live" on a user's computer but receive animating instructions over the Internet from an outside source, are also used as a mechanism for advertising. "Advertisement," computer advertisements that combine games and movie clips with product promotion, is yet another means of getting viewers to spend time on a site.

Tobacco products are often available for sale from tobacco promotional or advertising websites, either directly from the site or from links located on the sites. While most websites require consumers to make purchases with a credit card, tobacco products may also be purchased via a printable mail-in order form and payment by check or money order. Other sites list a toll-free telephone number for offline orders of tobacco products. Tobacco Internet sales may supplement or replace sales through traditional methods: in 2000, R.J. Reynolds Tobacco Company began marketing Eclipse cigarettes only through the Internet.

Internet advertising and sales promotion are targeted to meet the interests of users of all ages. Among young people, the Internet has proved to be a popular channel for shopping. The most active online users are 18 to 34 years old, 54% of whom report using the Internet to gather information about products and services. In China, a country with a rapid upsurge of young people who are starting to use the Internet, the typical Internet user is 30 years old, male, wealthy and university-educated; in 2000, 12.3 million Chinese were online. Nevertheless, the United States has the highest number of Internet users. The online population will soon closely resemble the ageing demographics of the overall United States population: adults aged 55 and over represent the fastest growing group of Internet users and account for 20% of all new users.
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Targeted tobacco advertising is a profitable venture for tobacco retailers. By 2005, it is estimated that consumers will spend five billion dollars on tobacco products purchased online. Web-based tobacco sales continue to thrive, even after the April 2000 market shakeout that resulted in the closure of many online retailers.

Internet tobacco trade thus represents a transnational threat to tobacco control. Potential regulatory strategies that address this emerging threat are considered below in Section IV.

III. TRADE, INVESTMENT AND TOBACCO: EXISTING EVIDENCE AND NEW RESEARCH.

A. Background

In recent years, the movement of goods, services and capital across national boundaries has been a widely discussed topic. World trade as a share of GDP has been steadily increasing since the Second World War while FDI has been reaching record levels; it stood at US$ 865 billion in 1999. Traditionally, FDI has received less attention in globalization circles despite the fact that the value of world production by affiliates exceeds the value of world trade.

The economic benefits from the liberalization of trade are founded on the theory of comparative advantage. As long as there are differences in the ability to produce goods and services (i.e. different relative production costs), there will always be opportunities for trade, even if one country can produce everything more cheaply than the others. Differences in the cost of production can arise because of such disparities as natural resource endowments, labour force characteristics and technology. Freer trade is expected to cut costs of living, provide more choice of products and qualities, raise incomes and stimulate economic growth.

Investment liberalization brings economic benefits through easier transfers of capital, technology and know-how achieved through increased FDI. Foreign direct investment also adds to gross capital formation and has a positive impact on a country’s balance of payments without the risks associated with raising additional loans. In addition, it increases competition and can produce spillovers such as improved management and better technology. Other expected benefits of a freer investment environment are higher wages and productivity through technology transfers and improved managerial skills.

However, critics argue that freer trade, because of lower wages in poor countries, leads to lower employment in rich countries. They suggest that FDI leads to a transfer of control from the poor to the rich countries, which contributes to the exploitation of workers and of natural resources in poor countries. Moreover, they argue that FDI inflows can crowd out domestic investments and that foreign exchange transactions can lead to financial instability.

It is worth pointing out that according to some economists, the benefits from trade and investment liberalization reside in importing rather than exporting. The trade theorist James Mill wrote in 1821:

The benefit which is derived from exchanging one commodity for another, arises, in all cases from the commodity received, not the commodity given.

The aforementioned statement raises important issues when the commodity received is associated with negative externalities. Tobacco, which has been described by the Director-General of WHO as "the only legal consumer product that kills half of its regular users", clearly fits into this category.
B. Liberalization and tobacco use: Theory and existing evidence

1. Theory

International trade in manufactured tobacco products such as cigarettes has been increasing rapidly since the mid-1980s. Several reasons for this have been proposed. First, the inability of a specific country to produce tobacco products in sufficient quantity or "quality" to satisfy domestic demand may lead to increased imports. Secondly, tobacco products' price differentials between countries may create an incentive to export and import. Thirdly, for a few developing countries, tobacco products can be an important source of foreign currency, thereby providing a strong incentive to trade. Finally, reduced trade barriers, such as import bans, tariffs, quotas and domestic content requirements, almost certainly have encouraged trade in tobacco products.

However, this recent upsurge in tobacco trade entails potential health consequences. It has been argued that an increase in the tobacco trade may lead to greater consumption of tobacco products, resulting in higher rates of death and disability. There are many reasons for this. First, the lowering of barriers to trade in tobacco usually leads to an increase in its supply and lower prices, which in turn will probably lead to an increase in the use of tobacco, given the well established relationship between prices and tobacco use. Secondly, the removal of trade barriers is usually associated with enhanced competition and hence lower prices and an increase in advertising expenditures. This can be particularly important in markets that are dominated by a government-owned monopoly, which may not advertise vigorously and may be a less efficient producer. For example, certain market segments, such as women and minorities, are often untapped in emerging-market economies. In addition, increased advertising expenditures by new entrants can lead to increases in advertising expenditures by existing firms, and brand proliferation (i.e. an increase in the number of brands available to consumers) can further increase the size of a market.

For similar reasons, it can be expected that tobacco-related FDI will have at least a comparable effect on tobacco use. Moreover, tobacco-related FDI may provide transnational tobacco companies with a strong local presence that allows intensive lobbying of government officials.

2. Existing evidence

Few econometric studies have tried to measure the effects of trade liberalization on tobacco consumption. However, to the authors' knowledge, no attempts have been made to empirically examine the impact of investment liberalization on tobacco use. The different models reviewed below and outlined in Appendix 2 examine this topic and conclude, with their different approaches, that trade openness does lead to an increase in tobacco consumption.

Chaloupka and Laixuthai studied the impact of Section 301 of the 1974 United States Trade Act on cigarette consumption in 10 Asian countries. Section 301 calls for the imposition of retaliatory trade sanctions on countries that fail to eliminate "unfair trade". During the 1980s and early 1990s, the United States used this section to force three Asian countries and one Asian province (Japan, the Republic of Korea, Thailand and Taiwan (China)) to open up their cigarette markets.

Chaloupka and Laixuthai worked on annual data for the period, 1970 - 1991, in the four markets mentioned above and in 6 other Asian countries: China, India, Indonesia, Malaysia, Pakistan and the Philippines. They built models where the dependent variable was either the cigarette per capita consumption or the market share of United States cigarettes. The explanatory variables considered were a dummy variable for Section 301 provisions, taking value one for the years starting from when the markets were open to United States cigarettes, and zero otherwise, the GNP and a dummy variable, called GNP missing defined as one when GNP data was missing, and zero otherwise. Three models were defined. The first model estimated the impact of Section 301 provisions on the natural log of consumption in the 10 countries, the second model considered only the four markets affected by the agreements, and the third model studied the impact of Section 301 provisions on the natural log of the market share of United States cigarettes in those same four markets. The regression model used a fixed-effect model, controlling for country- and time-specific determinants of cigarette consumption. The results showed that in model 3, Section 301 provisions had a significantly positive effect on the market share of United States cigarettes. Models 1 and 2 also showed
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them as leading to an increase in cigarette demand. The opening of a once closed Asian market had a positive and significant effect on cigarette consumption. The estimates implied that cigarette consumption was almost 10% higher than it would have been if the Asian markets had remained closed to United States cigarettes.

Two explanations were offered: first, that the opening to United States markets resulted in increased competition and a price reduction, which led to higher cigarette demand and consumption; second, that the substantial increase in advertising and promotion of United States cigarettes — and in some countries, of domestic cigarettes — led to an increase in market share of United States cigarettes and to overall consumption.

Hsieh, Hu and Lin concentrated their work on Taiwan, China. They included in their model the price of cigarettes, income, lagged cigarette consumption, measures related to health information, low tar, warning labels, imports (the percentage market share of imported cigarettes) and the participation rate of females in the labour force as the determinants of cigarette consumption. They also built a more disaggregated model by separating domestic cigarette consumption and imported cigarette consumption in two equations, each depending on both domestic and imported cigarette prices. They used different methods for the estimation of the first model, a first order auto regressive (AR(1)) residual correction, a two-stage least squares (2SLS) and a two-stage least squares with the addition of the lagged consumption variable. For the disaggregated model, they used a seemingly unrelated regression (SUR) estimation. Conclusions remained globally the same for the different estimation approaches. For the aggregate model, the researchers found that prices had a positive and significant effect on consumption. Price elasticity showed that a 10% increase in cigarette prices caused a 5%-6% decrease in consumption. The import share variable had a positive and significant coefficient. Estimates showed that an 811% growth in the market share of imported cigarettes led to a 20% increase in per capita cigarette consumption in 1987. And finally, the lagged consumption variable did not have a significant effect.

In the disaggregated model, cross price effects in both equations (domestic and imported consumption) were positive, which means that domestic and imported cigarettes are substitutes. The market share of imported cigarettes had a significantly negative impact on domestic consumption. A 10% increase in market share resulted in a 0.8% decrease in domestic consumption. The results of the two models lead to the conclusion that the increase in market share of imported cigarettes has induced smokers to switch from domestic to imported cigarettes and that it has increased overall cigarette consumption.

Unlike other studies, Depken used the real price of cigarettes as the dependent variable in an attempt to study the effect of advertising restrictions on the prices of cigarettes in countries of the Organisation for Economic Co-operation and Development (OECD). The model proposed studied the real price of cigarettes as a function of consumption, employment, percentage of the female workforce, GDP, openness (the share of trade in GDP), population, time, time squared, and a variable that attempted to measure tobacco advertising restrictions. A log-log model was defined with a fixed effect panel data estimator. Two measures were used independently: a dummy variable for whether advertising was completely banned from the country or not, and a scale variable developed by Laugesen and Meads that attempts to measure the degree of restrictions on advertising. The results indicate that trade openness is associated with lower prices of cigarettes. By association, one could conclude that, as openness to trade increases, cigarette prices will decrease, which will lead to higher consumption.

Taylor et al. examined the impact of trade openness as measured by import penetration (i.e. the share of total imports in GDP) on cigarette consumption. The dependent variable in the model — per capita cigarette consumption — was a function of real per capita GDP, trade openness and lagged cigarette consumption (included in the model to account for the addictive nature of cigarette consumption). The study examined 42 countries that were organized into three groups depending on their levels of per capita income over the period, 1970-1995. Those with a real average per capita GDP of US$ 1,000 were considered low-income countries, those between US$ 1,000 and US$ 3,000 as middle-income countries, and over US$ 3,000 as high-income countries.

Results showed that the openness measure was significant and positive for countries with low and middle income but was not significant for high-income countries. The positive relation between consumption and openness implies that trade liberalization leads to an increase in cigarette consumption in low- and
middle-income countries. Taylor et al. thus propose that trade openness has a diminishing marginal effect on cigarette consumption as openness rises. That is, since trade openness is greater in high-income countries, one could expect openness to have a greater marginal effect in countries with lower income.

C. New econometric research: Model specifications and results

In order to test the hypothesis that trade liberalization positively affects tobacco consumption, Perucic and Guindon employ a model using panel data similar to that used by Taylor et al., but with a larger panel dataset covering more than 80 countries for the period, 1970-1997. Three measures of trade openness commonly utilized in macroeconomic models are used: (i) Import penetration; (ii) Share of trade in GDP; and (iii) Share of trade with OECD countries in GDP. Tobacco-specific openness measures would be preferable, however, very few exist and none cover the years and countries under examination. Import penetration from OECD countries would likely be the most appropriate general measure of openness, since all major transnational tobacco companies are located in OECD countries. However, these data are not readily available and most major transnational tobacco companies have been shifting production away from OECD markets. Of the three openness measures used, import penetration is likely the better proxy for openness to tobacco trade. Ideally, the model would include tobacco control variables, which control for the strength of tobacco control policies and programmes such as health warnings, advertising bans and the availability of treatment for tobacco dependence, and important determinants of cigarette consumption such as prices and the intensity of tobacco advertising. However, time series of these data exist for only a few countries. Time and country dummy variables are included to control for country-specific and time-specific determinants of cigarette consumption that are not captured by other variables.

A log-log functional form that yields short-term elasticities is used. Because cigarette consumption is addictive, a dynamic demand model is used, where the dependent variable, cigarette consumption, is lagged by one year. Real GDP is included in all estimations, and openness measures are included separately. Econometric methodology developed by Baltagi et al., which proposes several pooled-estimators, is followed. The model first uses ordinary least squares estimation (OLS) with and without time and country dummy variables. A generalized least squares estimation with an AR(1) residual correction (GLS-AR(1)) is then used with country dummies. Because of the inclusion of the lagged dependent variable, the OLS results will be biased and inconsistent. To deal with the lagged consumption variable, instrumental variable estimators are used: 2SLS, with and without time and country dummies, and the Anderson-Hsiao estimator used by Taylor et al., which first-differences the data and then applies 2SLS using lagged values of the explanatory variables as instruments. (See Annex A for a detailed list of data variables and sources).

Different tobacco control environments in different regions and across levels of development suggest the application of the panel data model separately. Similar to Taylor et al., countries are grouped by levels of development according to World Bank income-level categories (low income, low-middle income, upper-middle income and upper income).

Import penetration was found to positively contribute to cigarette consumption in low-income and low-middle-income countries (see Annex B for detailed lists of countries). These results are in agreement with Taylor et al., who found that import penetration had a large and significant impact in low-income countries and a smaller but still important effect in middle-income countries. Generally similar results were obtained using share of trade in GDP as a measure of openness. Share of trade with OECD countries in GDP yielded fairly unstable results in all four income groups.

Tables 3 and 4 show the estimation results for low- and lower-middle-income countries. In agreement with Taylor et al., import penetration is found to affect positively cigarette consumption in lower-income countries. The lagged cigarette consumption has a strong and positive impact on current consumption, which confirms the hypothesis that cigarette consumption is addictive. In low-income countries a positive and significant effect of real GDP is noticed. In other words rising incomes in low-income countries would lead to higher cigarette consumption. As expected, income elasticity estimates diminish across income groups. Diagnosis tests are also performed to examine whether the inclusion of specific country and time dummies is appropriate. The reported coefficients represent short-run elasticities. Long-run elasticities are about 2 to 5 times larger.
In order to test the hypothesis that investment liberalization affects cigarette consumption, investment openness measures developed by Gastanaga et al. are used in the panel data model. Gastanaga et al. examined the effects of various policies on foreign direct investment (FDI) flows in a group of 55 developing countries and provinces (see Annex B for a list of countries and provinces). First, a qualitative index of the degree of openness to inward FDI (INFDI) constructed from the IMF’s Annual Report on Exchange Rate Arrangements and Restrictions is used. This variable takes the value of “0” if restrictions are high, “1” if moderate and “2” if low or non-existent. Secondly, a measure of exchange rates distortion, the black market premium (BMP), is used. The higher the distortions in exchange rates are in a specific country, the less attractive that country is to investment.

The estimation method outlined above is used. The INFDI variable yields very unstable results across estimators, and income groups and results are not reported. Table 5 presents the regression results for the model that includes the BMP variable. The BMP coefficients are negative and significant. That is, increased levels of FDI should lead to higher levels of cigarette consumption.

<table>
<thead>
<tr>
<th>Model Type</th>
<th>lnC_{it}</th>
<th>lnY_{it}</th>
<th>ln(M/Y)_{it}</th>
<th>Constant</th>
</tr>
</thead>
<tbody>
<tr>
<td>OLS</td>
<td>0.874*** (0.016)</td>
<td>0.071*** (0.018)</td>
<td>0.072* (0.019)</td>
<td>0.015 (0.122)</td>
</tr>
<tr>
<td>OLS with Di and Dt</td>
<td>0.652*** (0.027)</td>
<td>0.06** (0.03)</td>
<td>0.064** (0.033)</td>
<td>0.771*** (0.282)</td>
</tr>
<tr>
<td>GLS-AR(1) with Di</td>
<td>0.913*** (0.013)</td>
<td>0.032*** (0.012)</td>
<td>0.053*** (0.013)</td>
<td>0.114 (0.084)</td>
</tr>
<tr>
<td>2SLS</td>
<td>0.847*** (0.023)</td>
<td>0.098*** (0.024)</td>
<td>0.111*** (0.026)</td>
<td>-0.138 (0.167)</td>
</tr>
<tr>
<td>2SLS with Di and Dt</td>
<td>0.498*** (0.032)</td>
<td>0.06* (0.036)</td>
<td>0.064 (0.039)</td>
<td>1.816** (0.313)</td>
</tr>
<tr>
<td>FD2SLS with Di and Dt</td>
<td>1.49*** (0.341)</td>
<td>-0.05 (0.052)</td>
<td>0.122** (0.049)</td>
<td>0.717*** (0.219)</td>
</tr>
</tbody>
</table>

*a Values in brackets denote the standard errors.
*b ***, **, and * statistically significant at the 1%, 5%, 10% levels, respectively.

<table>
<thead>
<tr>
<th>Model Type</th>
<th>lnC_{it}</th>
<th>lnY_{it}</th>
<th>ln(M/Y)_{it}</th>
<th>Constant</th>
</tr>
</thead>
<tbody>
<tr>
<td>OLS</td>
<td>0.922*** (0.02)</td>
<td>-0.008 (0.026)</td>
<td>0.023 (0.018)</td>
<td>0.51** (0.026)</td>
</tr>
<tr>
<td>OLS with Di and Dt</td>
<td>0.616*** (0.036)</td>
<td>0.063** (0.04)</td>
<td>0.168*** (0.043)</td>
<td>1.5*** (0.351)</td>
</tr>
<tr>
<td>GLS-AR(1) with Di</td>
<td>0.972*** (0.013)</td>
<td>-0.005 (0.014)</td>
<td>0.01 (0.012)</td>
<td>0.191 (0.128)</td>
</tr>
<tr>
<td>2SLS</td>
<td>0.964*** (0.027)</td>
<td>0.037 (0.033)</td>
<td>0.013 (0.023)</td>
<td>-0.098 (0.298)</td>
</tr>
<tr>
<td>2SLS with Di and Dt</td>
<td>0.481*** (0.041)</td>
<td>0.225*** (0.046)</td>
<td>0.186*** (0.046)</td>
<td>1.318*** (0.409)</td>
</tr>
<tr>
<td>FD2SLS with Di and Dt</td>
<td>1.544*** (0.562)</td>
<td>0.239*** (0.075)</td>
<td>0.17** (0.077)</td>
<td>0.467*** (0.168)</td>
</tr>
</tbody>
</table>

*a Values in brackets denote the standard errors.
*b ***, **, and * statistically significant at the 1%, 5%, 10% levels, respectively.
Table 5. Black Market Premium and cigarette consumption in developing countries

<table>
<thead>
<tr>
<th>Model Type</th>
<th>InC_d,t</th>
<th>InY_d,t</th>
<th>In(M/Y)d,t</th>
<th>Constant</th>
</tr>
</thead>
<tbody>
<tr>
<td>OLS</td>
<td>0.896***</td>
<td>0.064***</td>
<td>-0.0001***</td>
<td>0.216***</td>
</tr>
<tr>
<td></td>
<td>(0.013)</td>
<td>(0.013)</td>
<td>(0.00004)</td>
<td>(0.084)</td>
</tr>
<tr>
<td>OLS with Di and Dt</td>
<td>0.412***</td>
<td>0.268***</td>
<td>-0.00009**</td>
<td>2.134***</td>
</tr>
<tr>
<td></td>
<td>(0.021)</td>
<td>(0.038)</td>
<td>(0.00004)</td>
<td>(0.132)</td>
</tr>
<tr>
<td>GLS-AR(1) with Di</td>
<td>0.883**</td>
<td>0.076***</td>
<td>-0.0001</td>
<td>0.186***</td>
</tr>
<tr>
<td></td>
<td>(0.014)</td>
<td>(0.011)</td>
<td>(0.00004)</td>
<td>(0.062)</td>
</tr>
<tr>
<td>2SLS</td>
<td>0.913***</td>
<td>0.054***</td>
<td>-0.0001**</td>
<td>0.177</td>
</tr>
<tr>
<td></td>
<td>(0.019)</td>
<td>(0.018)</td>
<td>(0.00006)</td>
<td>(0.112)</td>
</tr>
<tr>
<td>2SLS with Di and Dt</td>
<td>0.251***</td>
<td>0.348***</td>
<td>-0.00008*</td>
<td>2.651***</td>
</tr>
<tr>
<td></td>
<td>(0.023)</td>
<td>(0.043)</td>
<td>(0.00004)</td>
<td>(0.348)</td>
</tr>
<tr>
<td>F2SLS with Di and Dt</td>
<td>1.303***</td>
<td>-0.019</td>
<td>-0.0001***</td>
<td>0.027</td>
</tr>
<tr>
<td></td>
<td>(0.281)</td>
<td>(0.116)</td>
<td>(0.00003)</td>
<td>(0.044)</td>
</tr>
</tbody>
</table>

* Values in brackets denote the standard errors.
** *** levels of significance.

Conclusion and implications for further research

Economic theory suggests that, as markets open to trade and investment, cigarette consumption is likely to increase. The literature review and the empirical results provide evidence in support of the link between a country’s openness to trade and investment and cigarette consumption. It is important to note that empirical analyses that link cigarette consumption and openness to trade and investment are still scarce. There exists only one area specific analysis (Taiwan, Province of China) which provides some evidence linking openness and cigarette consumption. The analysis that examined the entry of transnational tobacco companies into four Asian markets also provides some evidence. However, the data utilized cover only a short period of time following the opening of the markets. Finally, the empirical research presented here adds to the findings of Taylor et al. by using more countries/provinces and more panel estimators, and by introducing measures of investment openness.

To better understand the links between cigarette consumption and transnational companies’ entry into developing country’s markets, country-specific tobacco openness measures need to be constructed. Future research would also benefit from the inclusion of more explanatory variables that reflect changes in prices or tobacco-control policies.

Despite recent anti-globalization protests, it is likely that markets, especially developing country’s markets, will continue to “globalize”. Given the probable link between openness and the consumption of cigarettes and the array of effective tobacco-control policies that exists (such as price increases, complete advertising and promotion bans, clean indoor-air laws, health warnings and counter-advertising), strong tobacco-control policies need to be implemented as globalization takes its course.
IV. FRAMEWORK CONVENTION FOR TOBACCO CONTROL:
A GLOBAL REGULATORY STRATEGY

Tobacco control has to contend with transnational determinants that contribute to the worsening of the tobacco epidemic. In Parts II and III above, we discussed the tobacco industry's desire for market expansion, the industry's access to new tools that extend its transnational reach, and econometric evidence that trade liberalization and foreign investment increase tobacco use. Here, we introduce the WHO Framework Convention on Tobacco Control (FCTC), a regulatory strategy aimed at addressing transnational determinants and coordinating global responses to the tobacco epidemic.

A. The FCTC: A paradigm shift in regulating "global bads"?

As a result of growing instability in the global marketplace, increasing attention is being paid to global "public bads", such as tobacco, which can exacerbate that instability.115 Here, we propose that, in the context of trade liberalization, regulating global "public bads" is rooted in a specific political economy paradigm.

The Uruguay Round (UR) tackled issues of strategic importance for the design and management of the global economy, including linkages between money, trade and finance. The thrust of the developed countries' position was to use the UR negotiations to maintain an international regime that would protect foreign capital and technology and secure compliance.114 Developing countries were apprehensive of developed countries' efforts to negotiate in new areas and reluctant to enter another round of negotiations so soon after the 1979 Tokyo Round, where their gains had been limited and of a dubious nature.115

In the early phase, and throughout negotiations, developing countries sought to limit damages in the new areas and achieve positive results in traditional areas, such as market access. In services, for example, developing countries tried to safeguard their nascent service industries and to seek access in areas where they had competitive advantage. Specifically, developing countries attempted to safeguard their interests by ensuring:

- In services, that any proposed regime would respect the policy objectives of national laws and regulations applying to services;
- In trade-related aspects of intellectual property rights (TRIPS), that negotiations were confined to GATT provisions and, as appropriate, that new rules and disciplines were elaborated;
- In trade-related investment measures (TRIMS), that negotiations examined the operation of GATT rules related to trade restrictions and distortions of investment measures and, as necessary, elaborated provisions to avoid such adverse effects; and
- In goods and services, that negotiations proceeded on separate tracks to avoid "cross retaliation" (i.e. retaliation by way of withdrawing or withholding concessions on trade in goods due to lack of compliance with liberalization commitments).116

Launched at the United States' initiative, the Uruguay Round negotiations addressed global production and production of capacities, and focused on broad economic issues and trade policy. The basic premise was that, since private enterprises and transnational corporations function efficiently and for the benefit of all when left to themselves, governments' powers to intervene and regulate must be curbed. Further, markets and development have no room for those who are not useful for consumption or production.117

The FCTC unfolds against a background of a rapidly growing awareness of health and other human rights. Although, whether existing international and national systems have achieved these rights, is debatable. The FCTC shows that the tobacco industry exemplifies an aspect of globalization as profit-making at all
costs, including the loss of lives. At the same time, it also shows that globalization can be about responsible industrialization and growth that incorporates sustainability, suitability, saving lives and protecting children.

In many national jurisdictions and at the global level, "cigarettes in a sense sit in a regulatory no man’s land, in that they are neither completely regulated as licit products nor treated as illicit ones." Moreover, tobacco is "the only legal consumer product that kills half of its regular users" when used as recommended, contains 4,000 additives and up to 60 carcinogens, harms non-users and has no mandatory product content disclosure information.

B. The FCTC negotiation process

1. Rationale and summary

To strengthen and coordinate global responses to the tobacco epidemic, the WHA adopted, on May 24 1999, a resolution to pave the way for accelerated multilateral negotiations on a WHO Framework Convention on Tobacco Control (FCTC) and possible related protocols.

The idea behind the FCTC process, the FCTC and related protocols, is that it will act as a global complement to – not replacement for – national and local tobacco control actions. Its entry into force and implementation by Member States will constitute an important component of a stable and integrated global regulatory environment approach for tobacco control. Mechanisms can be incorporated into the treaty to encourage States to comply with their international legal obligations, including mechanisms to enhance the technical capacity of poor countries to develop and implement strengthened tobacco control programmes. The FCTC and its protocols will be binding international law for those States that adopt and ratify the agreements once they enter into force.

2. Process and progress

(i) Pre-negotiation stage: The FCTC Working Group

The 1999 WHA adopted, by consensus, Resolution 52.18 that established a two-step political process for negotiating the FCTC. First, it created a working group, open to all WHO Member States, to consider the potential technical foundation for the FCTC and related protocols. Second, it established an Intergovernmental Negotiating Body (INB) to draft and negotiate the FCTC.

This first stage of the process, pre-negotiations, is complete. A technical working group met twice between May 1999 and October 2000 to elaborate the scientific and policy foundation for the FCTC. The group agreed that substantive tobacco-control obligations in the FCTC and related protocols should focus principally on empirically established demand-reduction strategies. Hence, from the inception of the FCTC process, WHO Member States have emphasized that the FCTC should promote global agreement and action on the primary interventions for which there is overwhelming scientific support: tobacco taxes and prices, advertising and promotion, education, warning labels, clean indoor-air policies, and treatment of tobacco dependence.

The working group met again in March 2000 to prepare a final report, a catalogue of possible draft elements for the FCTC, and a menu of possible options for the 52nd World Health Assembly. The group forwarded its work to the INB for consideration.

(ii) Negotiation stage: The Intergovernmental Negotiating Body

Formal political negotiations on the FCTC commenced with the first session of the INB in Geneva in October 2000. It was attended by 148 Member States and observers from the European Community, 25 nongovernmental organizations (NGOs) and nine intergovernmental organizations.
In January 2001, the FCTC negotiations took a major step forward with the release of the Chair’s Text, which was the first draft of the FCTC. The formulation of the first draft of an international instrument is a critical step in any treaty negotiation process. The text sets forth proposed substantive and procedural obligations under the FCTC. With respect to substantive obligations, the draft reflects a comprehensive approach to global tobacco control that addresses a broad range of concerns, including:

- General obligations to develop comprehensive, multisectoral tobacco control programmes;
- Specific control provisions, such as price and tax demand-reduction measures; non-price demand-reduction strategies, such as environmental tobacco smoke, advertising and labelling; and supply measures such as youth protection and smuggling; and
- Other potential national obligations under the FCTC, such as education, training, public awareness, and multilateral cooperation in surveillance, scientific research and information exchange.

Notably, the Chair’s Text calls for the negotiation of early protocols in a number of high priority areas for global tobacco control, such as advertising, promotion, sponsorship and illicit traffic in tobacco products.

The Chair’s Text does not represent a full draft of the FCTC. Rather, it is confined to areas addressed during the first session of the Negotiating Body and does not address matters not considered, such as amending and updating the text and final clauses. In many treaty negotiations, no full initial draft is prepared at all. Rather, the draft is developed "...provision by provision, on the basis of debates and of individual proposals considered in the course thereof.”

The Negotiating Body formally considered the Chair’s Text at its Second Session in Geneva, 30 April to 5 May 2001. Dividing the substantive consideration of different aspects of the FCTC into three plenary working groups, the participating Member States provided oral comments and written submissions to amend the Chair’s Text. In order to further negotiations, the Chair, in collaboration with the Co-Chairs of three working groups and the WHO Secretariat, has prepared a new integrated rolling text, which reflects all textual proposals to amend the Chair’s Text. This new text will be considered by participating States at the third session of the Negotiating Body in November 2001.

3. **Examples of regulatory challenges that could be addressed by the FCTC**

The Framework Convention itself essentially provides a template of areas for intergovernmental tobacco control. However, substantive obligations have yet to be negotiated and established in the associated protocols. As mentioned above, the Chair’s Text outlines priority areas for global tobacco control. Globalized trade in tobacco poses regulatory challenges for both national and international regulatory regimes. For example, e-commerce through the Internet and the illicit trade in tobacco increase the transnational availability of tobacco to consumers below market price. Both these threats to tobacco control may pose regulatory difficulties for countries at the national and global level and demand concerted national and global efforts. In this regard, the following analysis focuses in more depth on the regulatory conundrums associated with both the illicit and Internet trade in tobacco.

(i) **Regulating Internet advertising and trade**

Transnational marketing and sales media, such as satellite television and the Internet, pose specific challenges for tobacco control by permitting retailers to bypass national legislation to control access to information about harmful products. The Internet also permits tobacco retailers to avoid individual countries’ tax and import requirements. Here, we examine issues of technical and legal feasibility related to regulating tobacco sales and advertising in cyberspace. We then outline attempts to regulate tobacco sales and marketing.
Technical restrictions – The current state of technology supports a spectrum of Internet regulatory schemes, from censorship and heavy government regulation, to industry self-regulation to individual filtering of offensive or undesired websites. Regulatory schemes, particularly those for content regulation, often involve several technologies and require that all involved parties cooperate in good faith. Alternatively, a government may monitor Internet use by constructing what might be described as a national intranet, limit access to the Internet to users who have obtained a government licence, or entirely bar Internet access by eliminating Internet service providers (ISPs). However, some regulatory schemes are not appropriate in all national contexts. For example, Saudi Arabia’s system for filtering addresses and content may be feasible only in sparsely populated areas.

In response to harmful or undesirable content on the Internet, individual countries may act as cyberpolice. Some countries shift the burden of censorship to ISPs who must unilaterally censor undesirable information; their failure to censor may be punishable under criminal and civil laws. In devising a national or global regulatory model, it is crucial to analyse the allocation of burdens, costs and benefits of compliance on individuals, industries and governments.

Legal restrictions – The United Nations Commission on International Trade Law (UNCITRAL) has proposed a model law on electronic commerce that would address the myriad legal issues presented by international control of Internet trade. This model law follows agreements among the EU Member States and other countries to regulate specific types of online content and sales (such as child pornography). Furthermore, UNCITRAL proposes to harmonize legal standards dealing with other forms of trade and to translate these standards to the Internet environment.

Regulation of Internet tobacco advertising and sales involves issues of legal protection of expression and privacy, jurisdiction, choice of law, and liability; and determination of customs, taxation and international trade regimes. The following are some examples of relevant issues:

- In the area of customs, the central question is whether the Internet should be a tariff-free environment. The United States argues that it should be tariff-free when used to deliver products or services, while the EU holds that tobacco products sold through the Internet from one Member State to a private individual in another Member State are liable for duty in the Member State of destination.

- In the area of taxation, the OECD’s Taxation Framework Conditions conclude that international taxation norms may be applied to electronic commerce, and that taxation should occur in the jurisdiction where consumption takes place.

- In the area of international trade regimes, WTO agreements relevant to tobacco control attempt to balance Members’ commitments to fair trade with legitimate national interests in protecting, for example, human health. The general exception of GATT’s Article XX, to be discussed further below, functions as one such balancing mechanism.

Examples of actual Internet tobacco-control methods – Several regulatory mechanisms have been used to control tobacco sales and advertising on the Internet, including:

- Filters – Attempts to use blocking software to regulate consumer exposure to online tobacco promotion requires individual consumers to buy, install and use the software. This may be difficult for uninterested or technically inept consumers. Further, the success of any filtering scheme wholly depends on accurate labelling of websites.
Confronting the Tobacco Epidemic in an Era of Trade Liberalization

- **Age limits** – "Websites currently have no way to verify the age of the person placing the order or of limited sales to minors." In 1998, only 5% of tobacco sites referred to legal age restrictions associated with tobacco products. Credit cards are often required as a method of blocking underage access to websites. In the United States, some states have passed legislation placing the burden on the Internet retailer to establish that its tobacco customers are of legal age; for example postal service delivery of tobacco products requires an adult signature. However, United States sting operations confirm that children can easily evade or ignore online age limits.

- **Health warnings** – As a part of a lawsuit settlement, R.J. Reynolds Tobacco agreed to include a warning that additive-free cigarettes "do[es] not mean safer" cigarettes in all its advertisements, including those on the Internet. Similarly, the seven largest United States cigar companies agreed, in another settlement, to include warnings about significant health risks of cigar use in their Internet advertising. Other online retailers are not required to display these warnings.

- **Customs and taxation** – Despite countries' attempts to tax tobacco products, many Internet tobacco websites offer "duty-free" cigarettes. Retailers set up websites in countries with low tobacco tax rates and claim to sell products at greatly reduced prices, since the taxes of an importing country are not charged. Tax-free cigarette sales via the Internet often violate domestic law. Moreover, despite legal requirements, Internet sellers of tobacco products are reticent to report sales to the tobacco tax administrator for that State in which the sales are made.

- **Ban** – If a government body has jurisdiction to ban tobacco advertising in other electronic media, jurisdiction could also extend to banning tobacco advertising on the Internet.

Human rights and free expression proponents generally promote deliberate consideration of self-regulatory approaches to content control. Fear of government regulation, however, tends to be the primary motivator for industry efforts at self-regulation. Some suggest that the Internet economy should be market-driven, led by the private sector, and regulated only as a last resort, when the panoply of self-regulatory measures is exhausted.

(ii) **Regulating the illicit trade**

While licit transnational marketing and sales media may allow tobacco retailers to transcend national boundaries and thus national legislation, illicit trade in tobacco, by definition, directly defies legal conventions on trade. According to the World Bank, taxation is one of the most effective measures for reducing tobacco consumption. Some argue that higher taxes contribute to increased cigarette smuggling and associated criminal activity. However, econometric and other analyses of the experience of several high-income countries demonstrate that tax increases bring increased revenues and reduce cigarette consumption, even in the face of high smuggling rates. Moreover, the World Bank stresses that the determinants of smuggling are much more than price alone. Using indicators of corruption, levels of tobacco contraband tend to increase with the degree of corruption in a country. According to the World Bank, the appropriate response to smuggling is not to reduce taxes or to forego tax increases, but rather, to crack down on crime.

Interventions to combat smuggling are undertaken at different levels. The Government of the United Kingdom, for example, considered tobacco smuggling a serious threat to its revenue and to its health objectives. It implemented the Tackling Tobacco Smuggling Strategy, which provided £209 million for the period, 2000-2001, for investment in new equipment and extra front-line staff and investigators. In Europe, close collaboration between EU Member States and the European Anti-Fraud Office (OLAF) led to a reduction in the supply of smuggled cigarettes in Andorra and to a decline in cigarette smuggling in Spain. The United States proposed a plan to combat smuggling at the global level, which recommended that all countries should require licensing of manufacturers, importers, exporters and wholesalers of tobacco products. The United States suggested
that an effective anti-smuggling campaign would reduce crime, increase government revenue, and keep cheap tobacco off the consumer market. More recently, in 2001, the World Customs Organization and its 153 Members adopted a strategic plan to combat cigarette smuggling at a global level.

Tobacco smuggling is a global problem with evident international implications: it involves international brands, produced by multinational companies and distributed by criminal organizations. These criminal organizations operate worldwide, buying large amounts of tax-free cigarettes that had previously “disappeared” during international transport. Some 30% of internationally exported cigarettes are lost to smuggling, a far higher percentage than most internationally traded consumer goods.

Since 1997, several court cases and official investigations around the globe have charged the tobacco industry with supplying smuggled cigarettes or alleged industry liability through complicity in smuggling operations. For example, the High Court in Hong Kong Special Administrative Region of China (Hong Kong SAR) found a former executive of British American Tobacco (BAT) guilty of participating in an operation that smuggled cigarettes into China. In 1998, an affiliate of R.J. Reynolds International pleaded guilty to charges of helping smugglers illegally re-route export cigarettes into Canada. Recently, Canada, Colombia, Ecuador, the European Commission and 10 EU Member States (Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain), Honduras and Belize filed lawsuits against international tobacco companies for smuggling. Further, BAT is under investigation by the United Kingdom’s Department of Trade and Industry for tobacco smuggling. Other investigations continue, spurred, in part, by internal industry documents released in lawsuits brought against tobacco companies.

The illicit trade in tobacco is of obvious concern to tobacco control, as it increases the availability of cheap tobacco on the consumer market. If the FCTC were to adopt an initial protocol on illicit tobacco trade, it could consider including measures that:

- Require improved traceability of the goods, such as markings on all packages of tobacco products identifying the origin and the final destination;
- Hold the manufacturer or exporter – usually the tobacco company – responsible for ensuring that cigarettes arrive legally in their end-user markets, and liable if the product ends up on the black market;
- Institute a system of import and export licensing. Importantly, this type of regime would require changes in the transit process of traded tobacco products; and
- Include a ban on duty free sales, one source of smuggled cigarettes.
C. Relevant World Trade Organization agreements

The negotiation of an international regulatory approach, such as the FCTC, to stem the tobacco epidemic cannot be developed in isolation from the single package of WTO trade agreements. Here, we review the links of these WTO agreements to tobacco trade and tobacco control.

The three pillars of the WTO are GATT, the General Agreement on Trade in Services (GATS) and TRIPS, though a number of other WTO agreements are also relevant to tobacco control. The WTO jurisprudence suggests that the application of one set of rules does not preclude, and may well overlap with, the application of other sets of rules. What follows is an overview of the main provisions of agreements relevant to trade in tobacco and tobacco products.

**General Agreement on Tariffs and Trade (GATT)** – The GATT governs all trade in goods, and contains rules which discipline the use of trade policy instruments by countries to reduce barriers to trade. Through trade liberalization, the GATT raises incomes and standards of living. Trade measures undertaken by WTO Members with respect to tobacco products must comply with the main GATT obligations contained in the relevant GATT articles:

- Article I on the General Most Favoured Nation Treatment (MFN),
- Article II on Schedules of Concessions,
- Article III on National Treatment on Internal Taxation and Regulation (NT),
- Article XI on the General Elimination of Quantitative Restrictions, and
- Article XX on General Exceptions.

Articles II and XI are designed to guarantee access to markets. Article II forbids Members from imposing tariffs higher than the tariff bindings they agreed to in their Schedules of Commitments or from levying other duties and charges in connection with imports. And Article XI prohibits quantitative restrictions on the imports and exports of Members.

Articles I and III embody the basic GATT non-discrimination disciplines. Article I obligates Members to treat imports of “like” products as well as exports to other Members no less favourably than those from or to all other Members (the most favoured nation obligation). The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, Article III is designed to ensure that internal measures are not applied to imported and domestic products that are competing with each other so as to afford protection to domestic production. Article III:2 deals with internal taxes and other charges, and prohibits taxes imposed on imports that act “so as to afford protection” to “like” or “directly competing” domestic products. Article III:4 prohibits domestic regulations that treat imports less favourably than “like” domestic products. However, a mere difference in regulatory treatment between domestic and like imported products would not in and of itself be a necessary or sufficient condition for an Article III:4 violation.

The legal test developed through jurisprudence to prove a violation of national treatment varies, depending on whether the claim relates to domestic taxes or to other types of regulations. But essentially, the obligations of Article III:2 or III:4 have been interpreted to mean that Members must ensure “equality in the conditions of competition” between “like” or “directly competing” products. Thus, the determination of likeness, or of whether imported and domestic products are directly competing or are substitutable, amounts to an examination of the nature and the extent of the competitive relationship between and amongst products. To determine whether “less favourable” treatment of imports has taken place or if taxes have been used to “afford protection” to domestic industry, the measure in question is looked at to determine whether it affects...
the "conditions of competition" to the detriment of imports in the relevant market. Thus, if a tax which is applied to imported cigarettes and tobacco products, and to like and directly competing domestic cigarettes and products, maintains equality in the conditions of competition in the tobacco market, it would not violate Article III:2. Similarly, if regulations (such as advertising bans or labelling requirements) are applied to imported and like domestic tobacco products in a way that maintains equality in the conditions of competition between products, they would not violate Article III:4.

WTO jurisprudence has established four general criteria to determine the "likeness" of imports to domestic products.\textsuperscript{170,171} The health risks inherent in a product may be relevant in determining "likeness," as they could affect the competitive relationship between domestic and imported products.\textsuperscript{172} For example, knowledge of the health risks inherent in a product (such as a particular tobacco product) could influence consumers' tastes and habits so as to affect the competitive relationship between a product and a less harmful one.

The GATT recognizes that legitimate governmental policies may justify measures contrary to the disciplines cited above. GATT Article XX (b) allows for measures "necessary to protect the life or health of humans, animals, or plants".\textsuperscript{173,174} Pursuant to WTO case law, Members have the undisputed right to aim for the level of health protection they deem appropriate. A measure need not be of absolute necessity to be considered "necessary" to achieve the legitimate aim of health protection. Instead, a balancing test is used to determine whether a measure can benefit from the application of Article XX. This test considers the effectiveness and restrictive effect of the measure imposed and the relative importance of the common interests or values at which it is aimed. The more vital the common values, the easier it is to accept the measure as "necessary." Notably, human health has been recognized as highly important.

The General Agreement on Trade in Services (GATS) – Services are relevant for virtually all economic activities, in whatever sector of production. They are used as direct inputs into the production process, and they link producers with suppliers and customers. Of particular significance for manufacturers of final consumer products might be services such as advertising, transport, finance and distribution. The General Agreement on Trade in Services (GATS) covers trade in virtually all services.\textsuperscript{175} The Agreement's definition of trade is not limited to the traditional concept of cross-border supplies (mode 1) but, reflecting the need in many services for physical proximity between provider and consumer, it also includes the consumption of services abroad (mode 2), services supplied via foreign commercial presence (mode 3) and the presence of foreign natural persons in a host market (mode 4).

The implications of the GATS for any given service sector depend on some general rules – foremost, the requirement not to discriminate between trading partners (i.e., to grant MFN treatment) – and on the existence of market opening commitments in that sector. Each Member must submit a so-called schedule of specific commitments, listing the service sectors in which it grants market access and national treatment. Such commitments are specified for the four modes of supply. In any scheduled sector, Members are free not to commit on a particular mode or they can set certain conditions on their commitments. For instance, they may inscribe limitations on the number of service providers to which access is granted or the non-eligibility of foreign suppliers for subsidies or any other policy benefits.

Schedules vary widely in their sector and modal coverage. So far, advertising and distribution services have not proved very popular, with about two-thirds of WTO Members not having included them in their schedules. This means that the Members are free, subject to the MFN obligation, to apply whatever restrictions they deem appropriate in these sectors. Some of the members that have scheduled commitments have explicitly excluded "sensitive" goods and services from coverage. In some cases, limitations have been attached to market-access commitments for advertising services which explicitly exclude advertisements for products such as tobacco, alcohols and pharmaceuticals.

Such restrictions must not be used, however, to undermine tariff concessions that may exist under the GATT or otherwise discriminate against imported goods. In a similar vein, while a commitment in distribution services guarantees access conditions for suppliers of such services, it does not override GATT-compatible restrictions that a government may want to impose on any of the goods involved.

Schedules are not cast in stone. If a government feels unable to live up to a particular commitment in the future, it can modify or withdraw this commitment, against compensation, in negotiations with affected trading partners. Moreover, under Article XIV(b) of GATS, Members are entitled to depart from any of their obligations, if necessary, to protect human, animal or plant life or health. The Article, including its headnote, is very closely modelled on Article XX of the GATT (see preceding section).
Confronting the Tobacco Epidemic in an Era of Trade Liberalization

**Agreement on Technical Barriers to Trade (TBT)** – The TBT Agreement aims to ensure that product specifications\(^\text{176}\) and procedures used to assess compliance with specifications\(^\text{177}\) do not create unnecessary obstacles to trade. Pursuant to the conditions of the Agreement, all Members may put such requirements in place at what they consider an appropriate level.

Under the TBT Agreement, technical regulations may be developed for one or more of the "legitimate" objectives, including: "inter alia, national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment."\(^\text{178,179}\) For instance, WTO Members could develop technical regulations to protect human health by warning consumers against the hazards of cigarette smoking or to guard against deceptive practices that mislead or deceive consumers, such as false labels. Of all TBT regulations notified to the WTO in 2000, the most common objective was human health or safety.\(^\text{180}\) Recently, several cigarette labelling requirements have been notified.

In the preparation, adoption and application of their technical regulations, standards and conformity assessment procedures, Members must observe principles of non-discrimination, avoidance of unnecessary obstacles to international trade, harmonization, equivalence and certain transparency provisions. Moreover, through a decision of the TBT Committee, international standardizing bodies in all fields, including tobacco control, are called upon to consider the principles of transparency, openness, impartiality and consensus, effectiveness and relevance, and coherence in their work. They must also consider developing country concerns.\(^\text{181}\)

**Agreement on Agriculture** – The Agreement on Agriculture covers basically all agricultural products including tobacco.\(^\text{182}\) The Agreement on Agriculture and individual commitments on agriculture included in national schedules embody the reform process for trade in agriculture. The three main areas of policy, or the "three pillars," are:

- **Market access** – These commitments establish a tariff-only regime ("tariffication"), tariff reductions, and binding of agricultural tariffs. Tariff reduction provisions require all Members to reduce and bind all their customs duties on agricultural products, including the duties resulting from the tariffication process.\(^\text{183}\) Because the resulting duties were frequently high, Members provided for a certain quantity of import access opportunities at relatively low duties for tariffed products. Twelve Members have committed to opening minimum market access opportunities for a volume of nearly 170,000 tons of tobacco.\(^\text{184}\)

- **Domestic support** – These provisions encourage a further shift towards measures and policies that distort agricultural production and trade as little as possible. Two types of domestic support comprise the basic underlying consideration: "Green Box" measures are preferable because they distort trade minimally or not at all, while "Amber Box" measures distort trade.\(^\text{185}\) Each WTO Member with Amber Box measures commits to making reductions in these measures' aggregate monetary value.\(^\text{186}\) Eleven WTO Members provide Amber Box support to tobacco production that is subject to reduction commitments.\(^\text{187}\) However, three types of Amber Box measures are exempt from reduction. One of these, so-called "de minimis" support,\(^\text{188}\) allows Members to increase or decrease support for products not subject to reduction commitments, including tobacco.

- **Export subsidies** – Export subsidies on any agricultural product that are not subject to specific reduction commitments, or subject to the special and differential treatment available to developing countries are prohibited. Five Members have export subsidy reduction commitments for tobacco.\(^\text{189}\)

Article 20 provides for further negotiations for substantial progressive reductions in agricultural support and protection.\(^\text{190}\) During the first phase of negotiations, several developing countries presented proposals calling for an elimination of high tariffs and tariff peaks on products of interest to developing countries, including tobacco.\(^\text{191}\) In the second phase, Members will focus on all issues and options for relevant policy reform.
**Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)** – The TRIPS is the central body of international rights and obligations in the intellectual property arena, built upon the main pre-existing international conventions of the World Intellectual Property Organization (WIPO). The TRIPS aims to achieve an appropriate balance in intellectual property protection that recognizes the underlying public policy objectives of intellectual property. It provides a minimum level of protection, though Members can opt for more protection provided they observe the provisions of the Agreement. The main TRIPS features are coverage, basic principles, minimum standards, enforcement and dispute settlement.

The general principle related to health recognizes the right of countries to take measures necessary to protect public health, provided that such measures comply with the TRIPS provisions. Members may refuse patent protection to inventions the prevention of the commercial exploitation of which is necessary to protect, inter alia, human life or health. In the field of trademarks, Members are bound by the provisions of the 1967 Paris Convention, which explicitly recognize the right of countries to deny or invalidate the registration of trademarks that are contrary to morality or public order, particularly those that may deceive the public. In addition, it is relevant to note that TRIPS only prohibits the unjustifiable encumbrance of the use of trademarks by special requirements (Article 20).

Intellectual property touches upon most products in the field of tobacco. For example, protection might come from a patent for an invention for a new process to reduce tar or a new nicotine patch, plant variety protection for a new variety of a tobacco plant, and copyright for advertisements for tobacco products or a health campaign. Most, if not all, brand names for products like cigarettes are protected by trademarks.

With regard to illicit trade in tobacco products, the TRIPS contains special requirements for border measures aimed at preventing imports of goods that bear counterfeit trademarks or represent a piracy of copyright material, though it envisages similar measures against any exported or imported goods that infringe on an intellectual property right. WTO Members must provide for criminal procedures in case of infringements of intellectual property rights, in particular in the case of wilful trademark counterfeiting. Sanctions must be severe enough to provide a deterrent. The TRIPS also contains provisions on Members’ cooperation with a view to eliminating international trade in goods infringing on intellectual property rights.

**The Agreement on Subsidies and Countervailing Measures (SCM)** – The SCM Agreement addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies and the use of countervailing measures to offset injury caused by subsidized imports. Multilateral disciplines are the rules regarding whether a Member may provide a subsidy, enforced through the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a Member after that Member investigates and determines that the criteria set forth in the SCM Agreement are satisfied.

**Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)** – The dispute settlement mechanism of the WTO governs the settlement of all disputes under all WTO agreements. Provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is “a central element in providing security and predictability to the multilateral trading system.” It has a new appellate review process and “reverse consensus” rule, which reduces the ability of WTO Members to block the establishment of panels and the adoption of dispute settlement reports. Today, the “winning” WTO Member may be granted the right to impose economic sanctions against imports from the “losing” Member who does not implement the recommendations of a panel or of the Appellate Body to full satisfaction. The DSU also prohibits unilateral actions, and states that only WTO adjudicating bodies can assess violations of WTO provisions.

The dispute settlement mechanism can be initiated only by WTO Members when they consider that any benefits accruing to them directly or indirectly under any agreement are impaired by measures taken by other Members. To initiate a DSU process, challenging Members need neither prove any specific economic or legal interest nor provide evidence of the trade impact of the challenged measures. The process is divided into four stages: consultations, the panel process, the appellate review process, and the implementation of recommendations, with time limits at each stage. DSU’s Article 13 is extremely important for health-related disputes, as it allows panels to “seek information and technical advice from any individual or body which it deems appropriate”.

The 1990 Thai Cigarette Dispute and the 2001 Asbestos Dispute, two trade-related health disputes settled by GATT/WTO, demonstrate how WTO rules have been applied on matters pertaining to human
health (see Appendices 3 and 4). Notably, in the Thai Cigarette Case, the Panel found that Thailand could “give priority to human health over trade liberalization” as long as the proposed measures were “necessary.” The panel upheld Thailand’s internal tax on cigarettes as consistent with GATT Article III:2. However, the Panel found that import restrictions on cigarettes and tobacco preparations were inconsistent with Article XI and not “necessary”, and therefore did not qualify for the Article XX(b) exception. Saliently, in the Asbestos Dispute, the Appellate Body confirmed that WTO Members had the undisputed right to determine the level of health protection they deemed appropriate, that there was no requirement under GATT 1994 to quantify risk to human life or health, and that human health was “vital and important in the highest degree”.

As demonstrated in this section, there are several links between freer trade and tobacco control. Saliently, provisions being considered for inclusion in the FCTC and related protocols would potentially overlap with the WTO single package of trade agreements. Therefore, collaboration between WTO and WHO should aim to find areas of synergy between the two legal regimes, while at the same time ensuring that the public health implications of the tobacco epidemic are responsibly addressed.

V. CONCLUDING REMARKS: CURBING THE TOBACCO EPIDEMIC IN AN ERA OF TRADE LIBERALIZATION

This paper has demonstrated empirically why the regulatory terrain for tobacco control must shift at the global level. Without a timely and effective global intervention, the tobacco epidemic promises to claim a hundred million lives in the next 20 years. The Framework Convention on Tobacco Control is unfolding in a post-Uruguay Round era that is experiencing a clash of philosophies and paradigms. At issue are not the merits of globalization and competition. Competition is what got people out of caves; competition is what keeps prices down; competition is what fires the creative genius; and competition is what makes nations advance. Globalization as seen today is about managed competition. On the one hand, this kind of globalization has brought about more conflict and less resolution. On the other, increased political literacy in developing countries has brought into sharp focus the roles and responsibilities of national governments in ensuring the well-being of their citizens.

In the post-Uruguay Round world, the negative implications of trade liberalization, such as an increase in tobacco use, deserve attention. Some of the realities of this post-Uruguay political and economic terrain are as follows:

- Developing countries’ bargaining power remains limited.
- Primary health considerations and priorities of countries cannot be weighed on the same scales as telecommunications and consumer durables. With the FCTC, the WHO takes a lead role and mandate in ensuring that health implications are fully considered.
- Developed countries need to acknowledge that globalization includes a globalization of responsibilities as well as of rights.

Controlling the rapid globalization of tobacco consumption in an era of trade liberalization is daunting. This paper has sought to contribute to the small but growing body of empirical research which clearly indicates that the liberalization of tobacco-related trade has contributed to the global increases in cigarette smoking and other tobacco use, particularly in developing countries. In the absence of strong national and international tobacco control activities, the long-term consequences of this will be a significant increase in the burden of death and disease caused by tobacco. The preventive potential of key global tobacco control policies may be realized through the Framework Convention on Tobacco Control without discrimination to international trade. As demonstrated in our analysis, numerous challenges, such as commerce through the Internet and illicit trade, pose unique transnational threats to public health but remain largely unregulated by existing legal frameworks. The FCTC is an effort to fill this void.
### Summary of conclusions from earlier health agency reports on environmental tobacco smoke (ETS) and child health

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<td>Association with maternal smoking and increased risk of SIDS.</td>
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<td>Lung function</td>
<td>United States Environmental Protection Agency (1992)</td>
<td>Causal association with ETS</td>
<td>Increased prevalence of asthma due to ETS exposure.</td>
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<tr>
<td>Asthma</td>
<td>Suggestive evidence of ETS association with ETS; ETS may cause asthma</td>
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<td>Middle ear disease</td>
<td>United States Surgeon General (1986)</td>
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<td>Lower respiratory tract infections</td>
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Note: ETS = environmental tobacco smoke
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<td>Positive and significant effect of the openness measure on cigarette consumption in low- and middle-income countries but not significant in high-income countries.</td>
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Appendix 3

The Thai Cigarette Dispute (1990)

Under the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes. Cigarettes were also subject to an excise tax, a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with GATT Article XI (on the General Elimination of Quantitative Restrictions), and considered that they could not be justified by either, (i) some of exceptions to the elimination of quantitative restrictions allowed for under that same Article, or (ii) Article XX(b) (on General Exceptions pertaining to measures necessary for the protection of human life or health). The United States also argued that the internal taxes were inconsistent with GATT Article III:2 (on National Treatment on Internal Taxation and Regulation).

Thailand responded by arguing, *inter alia*, that the import restrictions were justified under Article XX(b) because the Government had adopted measures which could only be effective if cigarette imports were prohibited, and because chemicals and other additives contained in United States cigarettes might make them more harmful to human health than Thai cigarettes.

The Panel found that the import restrictions were inconsistent with Article XI and not justified under the Article's allowed exceptions. Further, the Panel concluded that the import restrictions were not “necessary” within the meaning of Article XX(b) (i.e. not necessary for the protection of human life or health). The internal taxes, on the other hand, were found to be consistent with Article III:2.

If the same case were to be examined today, Thailand would have difficulty in demonstrating that the import restrictions on cigarettes (of the nature considered in this dispute) are necessary to support its non-cigarette (non-smoking) policy, alleged to be vital for Thailand, if it allowed the production and sale of domestic cigarettes. Less restrictive WTO compatible alternatives would certainly exist to regulate the maximum level of chemical components contained in cigarettes sold in Thailand.
Appendix 4

The Asbestos Dispute (2001)

Canada challenged a French decree prohibiting the manufacture, sale, export, import and use of asbestos fibres and products containing asbestos fibres on the grounds of less favourable treatment of imported asbestos as compared to domestic substitutes for asbestos, contrary to Article III:4 (on National Treatment on Internal Taxation and Regulation) of GATT 1994. The Appellate Body examined whether imported asbestos fibres and domestic alternative fibres were “like products,” emphasizing that this question had to be informed by the obligation of Members to ensure “equality of competitive conditions” between domestic products and like imports. It listed four general criteria for likeness, namely, (1) the physical properties of the products; (2) their end uses; (3) consumer tastes and habits; and (4) tariff classification, emphasizing that this list was not exhaustive and that all pertinent evidence must be considered. The Appellate Body found that the health risks inherent in a product could be a pertinent element to consider, and could influence at least two of the above-mentioned criteria: the physical characteristics of products and consumer tastes and habits.

As Canada had not succeeded in proving that imported asbestos fibres and French alternative fibres were “like products,” no violation of National Treatment was found. The Appellate Body confirmed the Panel’s finding that the decree was “necessary” to protect human health within the meaning of Article XX(b) (on General Exceptions). Saliently, the Appellate Body stated that WTO Members had the undisputed right to determine the level of health protection they deemed appropriate. It also stated that there was no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health. A risk could be evaluated either in quantitative or qualitative terms. For the Appellate Body, the determination of whether a measure which was not “indispensable” could, nevertheless, be “necessary” involved a process of weighing and balancing a series of factors. These factors included the importance of the common interests or values protected by the measure, the efficacy of such measures in pursuing desired policies, and the accompanying impact of the law or regulation on imports or exports.

It also reiterated that a “weighing and balancing process” was inherent in the determination of whether WTO-consistent alternatives were reasonably available. Further, the Appellate Body noted that the more vital the common interests and values pursued, the more easily it could accept the measure designed to achieve those aims as “necessary.” Human health was “vital and important in the highest degree” and France had no other alternative measures before it to achieve its desired level of protection.
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References


9 Liu BQ et al. op. cit. in note 5, pp. 1411-1422.


12 Doll R. op. cit. in note 6, pp. 87-117.


14 Corrao MA et al. ibid.

15 Corrao MA et al. ibid.


22 Since 1970, the WHA has generated 18 resolutions that address issues of comprehensive tobacco control. See http://tobacco.who.int/en/fdc/resolutions.html for specific resolutions and links to their text.


25 These nine exhaustive measures for comprehensive tobacco control are taken from: Jha P, Chaloupka FJ, op. cit. in note 17, pp. 37-65.

26 World Health Assembly. op. cit. in note 23; World Health Assembly. op. cit. in note 24.


62 The price is not quite right. The Economist, 7 July 2001: 64-66.
67 Philip Morris. op. cit. in note 43.
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
81 Ibid.
82 Ibid.
83 Davidson PA, Banthin CN. op. cit. in note 60.
85 Yet, reported Internet spending by tobacco products manufacturers may well be understated. U.S. reports only reflect expenditures by leading manufacturers, and not advertising run independently by tobacco retailers. See Davidson PA, Banthin CN. op. cit. in note 60, and Federal Trade Commission, op. cit. in note 64.
87 Davidson PA, Banthin CN. op. cit. in note 60.
88 Ibid.
91 Tsuroouoka D. Web Content Sites Seek Glue To Hold Viewers Advertisers covet sites that can keep visitors sticking around for a long time. Investor’s Business Daily, 14 February 2001: A6.
94 Ibid.
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80 Pastore M. op. cit. in note 75.
81 Ibid.
87 Gross capital formation is the amount of capital increased during a year minus depreciation.
90 Ibid.
94 See Betcher DW et al. op. cit. in note 20, for a discussion of various components of trade which have direct or indirect effects on health.
98 Grise VN. op. cit. in note 96.
99 Chaloupka FJ, Laixuthai A. op. cit. in note 97.
100 Taylor A et al. op. cit. in note 1.
101 Grise VN. op. cit. in note 96.
102 Chaloupka F, Corbett M. op. cit. in note 18.
103 Ibid
105 Chaloupka FJ, Laixuthai A. op. cit. in note 97
109 Taylor A et al. op. cit. in note 1.
111 The model was also estimated by regions (Asia and the Pacific, Latin America and the Caribbean, sub-Saharan Africa, Middle East), developed countries and globally, but yielded very unstable results, with the exception of the Asia-Pacific region, where openness was found to contribute to cigarette consumption.
112 A test was performed on the specific country and time dummies showed that their coefficient were significantly different from zero with the following F(55,640)=52.54, which has a p-value of 0.0000. The same results occurred for the lower-middle income countries with F(48,499)=28.52 and its p-value of 0.0000.
116 Ibid.
119 Brundtland GH. op. cit. in note 95.
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135 The United Arab Emirates (UAE) censors websites for breaching local values and traditions. Material Reflecting National Or Cultural Attributes Mandated in a Broadcast Medium or Banned As Contrary To The Culture's Interest. London, Internet Law and Policy Group Working Group on Content Blocking, 1997 (Internet communication, http://www.lipg.org/work/content/mandate.htm).


137 Filtering software and ratings systems must be able to measure and assess or restrict viewing of certain sites. Commercial rating programmes provide automated filters searches for subjects listed on a ratings.

138 Bad faith metatagging, for example, would make voluntary self-regulatory schemes futile.

139 China established a four-tier system with a one-channel international gateway that enables the Government to block unwanted foreign websites. This scheme gives the Government at least the theoretical possibility to monitor or directly censor its citizens' online activities. See Reed KM, From The Great Firewall of China to the Berlin Firewall: The Cost Of Content Regulation On Internet Commerce. Transnational Lawyer, Fall 2000: 451-476.

139 Too hot to handle: Beijing bans online tobacco, sex ads—and a lot more. China Online, 16 April 2001.


141 Ibid.

142 Global Internet Liberty Campaign Member Statement. Submitted to the Internet Content Summit, Munich, 9-11 September 1999 (Internet communication, 2 August 2001 at http://www.glic.org/speech/ratings/glic-munich.html).


144 Ibid.

145 The Enemies of the Internet. op. cit. in note 134.


150 Ibid.

151 Global Internet Liberty Campaign Member Statement. op. cit. in note 136.

152 Davidson PA, Banthin CN. op. cit. in note 60.


154 Davidson PA, Banthin CN. op. cit. in note 60.

155 These warnings apply only to these seven United States cigar manufacturers, and must be clear and conspicuous and follow a standardized, agreed upon format. FTC Announces Settlements Requiring Disclosure of Cigar Health Risks. Washington DC, FTC, 26 June 2000.

156 Davidson PA, Banthin CN. op. cit. in note 60.


159 Davidson PA, Banthin CN. op. cit. in note 60.


161 Campbell AJ. op. cit. in note 143.


163 Jha P, Chaloupka FJ. op. cit. in note 17.


166 Estimates of the volume of cigarettes that disappear during transport derive from the difference between global exports and
imports. World cigarette production is known fairly accurately and, since cigarettes do not keep for long, world production is close to world consumption. That is, large quantities of cigarettes do not sit in storage. Thus, global imports should be close to exports, after allowing for legitimate trade, usually excluded from national statistics. However, for many years, imports have been lower than exports to a degree that cannot be adequately explained by legitimate duty free sales. In 1996, 1,107,000 million cigarettes were exported, but only 707,000 million imported, a difference of 400,000 million. After deducting 45,000 million for legitimate duty free sales, almost 355,000 million cigarettes are missing.

Specifically, that tobacco companies are aware of the illegal destinations of their products.


Tracking products from the beginning of their journey reduces opportunities for smuggling.

This type of liability regime is not unprecedented, as liability regimes are already in place in numerous conventions, such as those on small arms and light weapons, narcotics and psychotropic substances, and environmental treaties covering areas such as ozone-depleting chemicals, pesticides, persistent organic pollutants, hazardous waste and endangered species. See Bloom J. Public health, international trade and the Framework Convention on Tobacco Control. Washington DC, Campaign for Tobacco-Free Kids, February 2001.

The existence of large volumes of duty-free tobacco products in international commerce creates opportunities for smuggling. Further, in many legal actions on smuggling, duty free companies have also been accused as participants in smuggling operations.

This section has been prepared by the WTO Secretariat on its sole responsibility, and does not reflect the views of WTO Members. A summary of the research is presented in the main text and the research is presented in full in Annex C.

For brevity's sake, special and differential treatment for developing countries and transitional arrangements will not be entered.

This prohibition is interpreted broadly to cover all border measures that constrain importation or exportation, other than tariffs and charges.

These four characteristics are: (1) physical characteristics of products, (2) end uses, (3) consumer tastes and habits with respect to the products, and (4) the tariff classification of the product. Also, this list is not exclusive; all pertinent evidence must be taken into account.

Determining whether the products are like or directly competing is necessary in the case of different tax or regulatory treatment of various types of tobacco products.

For example, the physical characteristics of two different types of cigarettes conceivably could be considered unlike.

Article XVI(b) of GATS now provides a similar exception from GATS rules (containing a similar sub-paragraph to XX(b), but no equivalent to XX(g)).

To benefit from the health exception, a measure that falls into GATT or GATS general exceptions must also meet headnote (chapera) requirements which bar application of measures that would arbitrarily or unjustifiably discriminate or constitute a disguised restriction on trade. The chapera also serves to prevent abuse of the exceptions and to promote good faith in the exercise of rights.

The GATS contains a general carve-out for services provided in the exercise of governmental authority (Article I:3) and does not apply to air traffic rights.

Mandatory as well as voluntary specifications, known in the language of the Agreement as «technical regulations» and «standards.»

Also known as «conformity assessment procedures.»

While the Agreement lays out certain legitimate objectives, the term «inter alia» indicates that other objectives may be considered.

The risks associated with legitimate objectives are to be assessed against «inter alia, available scientific and technical information, related processing technology or intended end-uses of products.»

254 notifications regarded human health or safety, out of the total of 725.

Affirmed by the Second Triennial Review of the TBT Agreement in November 2000.

A separate Agreement, the Agreement on the Application of Sanitary and Phytosanitary Measures, deals with measures taken to protect food safety, animal and plant health.

Developed countries were required to reduce their duties by a simple average of 36%, with a minimum reduction on individual products of 15%, and to make these reductions in equal annual instalments over six years from 1995. Developing countries were allowed to make reductions only two-thirds as great (that is, an average of 24% and a minimum of 10%), and could implement the reductions over a 10-year period. Least developed countries were not required to make reductions. For previously unbound items, developing countries had the option to set maximum tariffs ("ceiling bindings").

The Members are Australia, Bulgaria, Costa Rica, El Salvador, Guatemala, Hungary, Malaysia, Poland, Romania, South Africa, Thailand and the United States.

For example, agricultural research or training provided by a government is regarded as a Green Box measure, whereas government support in at a guaranteed price ("market price support") counts as Amber Box.

Reduction commitments are stated in each country's schedule.

The Members are Argentina, Bulgaria, Canada, Cyprus, the Czech Republic, the European Communities, India, the Slovakia, South Africa, Turkey and the United States.
The de minimis levels at which support is regarded as having minimal effect are defined, for developed countries, as support not exceeding 5% of the current value of production of individual products or, in the case of non-product-specific support, of the current value of total agricultural production. For developing countries, the de minimis threshold is 10%.

The Members are Brazil, Bulgaria, the European Communities, South Africa and Turkey.

Negotiations should also consider non-trade concerns, special and differential treatment for developing countries, the objective of establishing a fair and market-oriented agricultural trading system, other concerns and objectives in the Agreement's preamble, and further commitments needed to achieve the long-term objective.

Two proposals specifically mention improved market access for tobacco and tobacco products. The first is G/AG/NG/W/37 and Corr.1, submitted by Cuba, Dominican Republic, El Salvador, Haiti, Honduras, Kenya, India, Nigeria, Pakistan, Sri Lanka, Uganda, and Zimbabwe; the second is G/AG/NG/W/102 from India.

Under the TRIPS Agreement, compliance with the substantive provisions of the Berne Convention on the Protection of Literary and Artistic Works, the Paris Convention on the Protection of Industrial Property, and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits is an obligation. A number of additional minimum standards are added in each case. The TRIPS must be read in conjunction with these conventions.

Article 7 states that “[T]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer 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.” Article 8.1 states that “Members may, in formulating their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote their public interest in vital sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”

Article 8.1 TRIPS.

Article 27.2 TRIPS.

Article 6 quinquies [Marks: Protection of Marks Registered in One Country of the Union in the Other Countries of the Union] of the Paris Convention. Its paragraph B states that: «Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: ...5. When they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order...»

Article 7 [Marks: Nature of the Goods to which the Mark is Applied] of the Paris Convention states that: «The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.»

“Counterfeit trademark goods” are defined as «goods, including packaging bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.»

Article 61 TRIPS.

Including, inter alia, the Agreement on Technical Barriers to Trade Agreement (TBT) (package and labelling), the Agreement on Agriculture (reduction of government support to tobacco production), the General Agreement on Trade in Services (GATS) (restrictions on advertising), and the General Agreement on Tariffs and Trade (GATT) (taxes, prohibitions, and human-health related exceptions to GATT rules).


In infants and very young children.

Fluid in the middle ear, or “glue ear.”

The report also concluded that exposure of pregnant non-smokers to ETS is causally associated with reduced fetal growth and that there is suggestive evidence that ETS is causally associated with adverse impacts on cognition and behaviour.

The report also concluded that there is suggestive evidence that exposure of pregnant non-smokers to ETS causes reduced fetal growth.
Annex A

Data research and sources

Per capita cigarette consumption:
Consumption was derived from aggregate production and trade statistics. Production plus imports minus exports yields “apparent” consumption estimates.

Per capita cigarette consumption figures were calculated using production, import, and export statistics found in various databases and publications. The best source for each country’s indicators was selected according to the following process. Production and trade data from the following trade and production data sources were compared and contrasted: ERC Statistics International, Faostat Statistical databases, official statistics of the Countries of the Commonwealth of Independent States (CIS), United Nations Industrial Commodity Production Statistics Database, Commodity Trade Statistics Database, United States Department of Agriculture databases (USDA), and, in a few instances, data from national sources. When the data were identical or very similar, the most complete source (the one with the most data points) was utilized. In a few instances, similar data from different sources were merged to expand the data coverage. When data from any of the sources conflicted with others, they were compared and contrasted with data reported in Tobacco or Health: A Global Status Report, the Pan American Health Organization's Tobacco or Health: Status in the Americas, Market Tracking International, OECD Health Data 1999, and International Tobacco Guide. If no consensus emerged, the data were not included. In some rare instances, cigarette consumption calculations yielded unrealistic estimates (for instance, negative consumption numbers). These estimates were also not included. For the purposes of the calculations, when cigarette production and trade were expressed in weight, one gram in weight was converted to one cigarette stick. The exact formula to calculate the per capita cigarette consumption is as follows:

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\text{Per capita Cigarette Consumption} = \frac{\text{Production} + \text{Imports} - \text{Exports}}{\text{Population 15+}}
\]


Real gross domestic product per capita (RGDP)
Source: Levine-Loayza-Beck Data Set based on Global Development Finance & World Development Indicators.

Total trade (% of GDP)
The total trade represents the sum of exports and imports of goods and services measured as a share of Gross Domestic product.
Source: Levine-Loayza-Beck Data Set based on Global Development Finance & World Development Indicators.

Trade with OECD countries (% of GDP)
Sum of exports and imports of goods and services from OECD countries as a share of GDP. Source: Levine-Loayza-Beck Data Set based on Global Development Finance & World Development Indicators.

Import penetration (% of GDP)
Imports of goods and services as a share of GDP. It represents the value of all goods and other market services provided to the world.
Source: Levine-Loayza-Beck Data Set based on Global Development Finance & World Development Indicators.

INFDI
Index of the degree of openness to inward FDI constructed by Castanaga et al. from the IMF’s Annual Report on Exchange Rate Arrangements and Restrictions. It takes the value of “0” if restrictions are high, “1” if moderate and “2” if low or non-existent.
Black Market Premium
This measures exchange rate distortions and is calculated as follows: black market premium = (Parallell exchange rate/official exchange rate-1)*100
Source: Castanaga et al. based on: Levine and Renelt, World Currency Yearbook (1985, 1990-93); Adrian Wood (1988). Global trends in real exchange rates: 1960-84 (filling in missing observations); Global Development Finance & World Development Indicators (1996-1997); values for industrial countries are added as 0.

References


Annex B

Countries and provinces

Low income

Bangladesh, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Côte d'Ivoire, Gambia, Ghana, Haiti, India, Indonesia, Kenya, Madagascar, Malawi, Nepal, Nicaragua, Nigeria, Pakistan, Senegal, Sierra Leone, Sudan, Togo, Uganda, Zambia, Zimbabwe

Lower middle income

Algeria, Belize, China, Colombia, Ecuador, Egypt, El Salvador, Guatemala, Guyana, Honduras, Islamic Republic of Iran, Jamaica, Jordan, Morocco, Paraguay, Peru, Philippines, Sri Lanka, Syrian Arab Republic, Thailand, Tunisia

Developing countries and provinces (Gastanaga et al.)

Argentina, Bahamas, Bahrain, Barbados, Bolivia, Brazil, Cameroon, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Ecuador, Egypt, El Salvador, Fiji, Ghana, Guatemala, Haiti, Honduras, Hong Kong (SAR), India, Indonesia, Israel, Jamaica, Jordan, Republic of Korea, Malaysia, Mauritius, Mexico, Morocco, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Sri Lanka, Suriname, Taiwan (China), Thailand, Trinidad and Tobago, Tunisia, Turkey, Venezuela, Zambia, Zimbabwe
Annex C

WTO* Contribution Towards the Expert Paper on Tobacco Control

* The World Trade Organization performed research for the paper prepared for the Commission on Macroeconomics and Health. A summary of this research is include in the main text of this report; in this Annex the research is presented in full.

A number of WTO rules are relevant for the issue of tobacco control. These include:

- Certain Articles of the General Agreement on Tariffs and Trade (GATT),
- Certain Articles of the General Agreement on Trade in Services (GATS),
- The Agreement on Technical Barriers to Trade (TBT),
- The Agreement on Agriculture,
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),
- The Agreement on Subsidies and Countervailing Measures (SCM), and
- The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

The following will provide an overview of the main provisions of these agreements, in some instances linking them to trade in tobacco and tobacco products. Special and differential treatment for developing countries and transitional arrangements will not be entered into for brevity’s sake. Two trade-related health disputes that have been settled by GATT and WTO will be presented towards the end to demonstrate how WTO rules have been applied on matters pertaining to human health.

I. Relevant Articles of General Agreement on Tariffs and Trade (GATT)

The GATT contains various rules which discipline the use of trade policy instruments by countries in order to reduce barriers to trade. Through trade liberalization, it raises incomes and standards of living. The main GATT obligations created to achieve this aim are contained in:

- GATT Article I on the General Most Favoured Nation Treatment (MFN),
- GATT Article II on Schedules of Concessions,
- GATT Article III on National Treatment on Internal Taxation and Regulation (NT),
- GATT Article XI on the General Elimination of Quantitative Restrictions, and
- GATT Article XX on General Exceptions

All trade measures taken by WTO members with respect to tobacco products would therefore have to comply with these disciplines.

Articles II and XI of GATT are designed to guarantee access to markets. Article II forbids members from imposing tariffs higher than the tariff bindings they agreed to in their Schedules of Commitments or from levying other duties and charges in connection with imports. Article XI prohibits quantitative restrictions on the imports and exports of members. This prohibition is interpreted broadly to cover all border measures, other than tariffs and charges, that prohibit or restrict importation or exportation. Its aim is to prevent the circumvention of GATT obligations through the creative use of border measures, such as import licences and minimum price systems, that restrict trade.

Articles I and III embody the WTO’s non-discrimination disciplines. Article I of the GATT obligates members to treat “like” imports from or exports to other members no less favourably than imports from or exports to any other country (the most-favoured-nation obligation). Thus, Members may not discriminate between “like products” at the border. Article III contains the national treatment obligation, that forbids discriminatory treatment once an import has crossed the border, so as to afford protection to domestic production. Article III:2 deals with internal taxes and other charges, and prohibits less-favourable tax treatment of imports as compared to “like” or “directly competing” domestic products. Article III:4 forbids discrimination between imports and “like” domestic products in respect of all laws and regulations.
These obligations have been interpreted to mean that Members must ensure "equality in the conditions of competition" between "like" (and, in the case of taxes, also "directly competing") products. Thus, formal difference in treatment between domestic and like imported products is not necessary or sufficient for a violation of Article III. Instead, "less favourable" treatment of imports compared to domestic products is to be determined by examining whether the measure affects the "conditions of competition" in the relevant market, to the detriment of imports. Thus, if the level of taxation applied to imported cigarettes and tobacco products and that applied to like and directly-competitive domestic cigarettes and tobacco products maintains equality in the conditions of competition on the tobacco market, the harmonized tax would not violate Article III:2. Similarly, if the regulations (such as an advertising ban or labelling requirements) applicable to imported tobacco products and like domestically-produced tobacco products were imposed in a way that maintains equality in the conditions of competition between the products, the regulation would be compatible with Article III:4.

However, in the case of different taxes or regulatory treatments of various types of tobacco products, it will be necessary to determine whether the products are like or directly competing. Four general criteria have been set in WTO jurisprudence to determine the "likeness" of imports to domestic products. These are the (1) physical characteristics of products, (2) their end uses, (3) consumer tastes and habits with respect to the products, and (4) the tariff classification of the product. However, this is not a closed list and all pertinent evidence must be taken into account. Important to note is the fact that it has recently been recognized in WTO jurisprudence that the health risks inherent in a product could be a relevant consideration in determining "likeness" as they could have an effect on the competitive relationship between the domestic and imported products. For example, it is conceivable that the physical characteristics of two different types of cigarettes would be such that they could be considered unlike. It is also conceivable that consumers tastes and habits could be affected by knowledge of the health risks inherent in a product (such as a particular tobacco product) so that the competitive relationship between that product and a less harmful one is affected. Such issues would have to be examined on a case-by-case basis, in the light of the specific facts of a dispute.

Since its inception, the GATT has always recognized the existence of legitimate government policies that justify measures contrary to the above-mentioned GATT disciplines. GATT Article XX states that:

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(b) necessary to protect human, animal or plant life or health;
(g) relating to the conservation of an exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

GATT Article XX(b) allows for measures necessary to protect the life or health of humans, animals or plants. Article XVI(b) of GATS now provides a similar exception from GATS rules (containing a similar subparagraph to XX(b), but no equivalent to XX(g)). According to WTO case law, Members have the undisputed right to aim for the level of health protection they deem appropriate. In determining whether a measure is "necessary" to achieve the legitimate aim of health protection, it has been recognized that the measure need not be indispensable or of absolute necessity. Instead, a weighing and balancing process is used to determine whether an alternative, less GATT-inconsistent measure is reasonably available, taking into account the effectiveness and restrictive effect of the measure imposed as well as the relative importance of the common interests or values at which it is aimed. The more vital the common values, the easier it will be that the measure be accepted as "necessary". Human health has been recognized as being highly important.

Once it is established that a measure falls within Article XX(b) of the GATT or Article XIV(b) of the GATS, it must meet the requirements of the headnote (chapeau) of these articles in order to benefit from the health exception. The chapeau requires that measures not be applied with would constitute an arbitrary or unjustifiable discrimination or a disguised restriction on trade. The chapeau tries to discipline the manner in which health measures are applied so as to avoid abuse of the exceptions. A balance must be struck between the right of a Member to invoke an exception and the substantive rights of other Members under GATT/GATS rules. A "line of equilibrium" must be found between these two sets of rights so that neither is cancelled out by the other. Thus, the chapeau has been said to embody the principle of good faith in the exercise of rights.
II. Relevant Articles of the General Agreement on Trade in Services (GATS)

As discussed above, all trade in goods is governed by GATT. Nevertheless, other WTO Agreements may be relevant for tobacco as well. WTO jurisprudence suggests that the application of one set of rules, such as the GATT, does not preclude, but may well overlap with, the application of other sets of rules. These include the rules of GATS. The GATS is relevant for virtually all manufacturing activities, in various ways, since services are needed to organize and maintain the manufacturing process and to link producers with their suppliers and customers. Such services typically include, but are not limited to, advertising, transport, communication, financing, warehousing and distribution.

The entry into force of GATS in 1995 was a landmark event in the history of the trading system, comparable to the inception of GATT in 1948. It responded to technical developments, including the ascent of e-commerce, as well as regulatory changes in many countries which have increased the "tradeability" of services. Although cross-border trade in services is still dwarfed by merchandise trade, services have become the largest and fastest-growing segment of the world economy, providing more than 60% of global output and employment.

The implications of GATS for any individual services sector essentially depend on three parameters:

(i) The institutional structure of the sector  
The GATS contains a general carve-out for public services (i.e. services provided in the exercise of governmental authority (Article I:3)). These are not covered by the Agreement, and will not be subject to negotiations. The carve-out applies whenever a service is provided either on a commercial basis or in competition with other suppliers; free education in public facilities is a case in point.

(ii) General obligations under the GATS  
Virtually all other services fall under the Agreement. This implies that some general, cross-sectoral rules must be respected. First and foremost among them is the obligation not to discriminate between trading partners (i.e. to grant MFN treatment). Pursuant to Article II of GATS, WTO Members are thus required, regardless of their trade regimes in individual sectors (foreign access may be completely banned), to apply the same conditions vis-à-vis all other Members. Exemptions from MFN treatment could have been sought at the date of entry into force of the Agreement; in priciple they should not exceed 10 years.

(iii) The scope of market access and national treatment commitments  
Article XX:1 provides that each Member must submit a so-called schedule of specific commitments. It lists the service sectors, and any relevant limitations, in which the Member grants market access and national treatment. Such commitments are specified for four modes of supply. These include not only the traditional concept of cross-border trade (mode 1), but the consumption of services abroad by nationals of the scheduling Member (mode 2) as well as services supplied via foreign commercial presence (mode 3) and the presence of foreign natural persons (mode 4) in the Member’s territory. The relevant definitions are contained in Article I:2 of the GATS. This modal structure of the Agreement reflects the need in many services for physical proximity between provider and consumer.

In any scheduled sector, Members are free not to commit on a particular mode (i.e. to leave it "unbound", or to further condition their commitment). For instance, they may inscribe limitations concerning the number of service providers (e.g. banks, telecom operators, department stores, advertising agencies) that are admitted in a sector, and the non-eligibility of foreign suppliers for subsidies or any other policy benefits.

Under relevant provisions, laid down in Article XVI of the GATS, full market access would imply, inter alia, the absence of quantitative restrictions, joint venture requirements and other restrictions on legal incorporation, and foreign equity ceilings. Pursuant to Article XVII, full national treatment would guarantee foreign service suppliers the same competitive conditions as those enjoyed by domestically-owned firms. Thus, contrary to the GATT, the operation of quotas or of measures inconsistent with national treatment are not prohibited per se, but only in those sectors and modes where a Member has undertaken commitments without limitations.
Current country schedules vary widely in their sector and modal coverage. While some Members have scheduled less than a handful out of a total of some 160 service sectors, others have included 120 and more. In the absence of specific commitments, a Member is free, subject to the MFN principle, to operate whatever prohibitions or restrictions it deems necessary on the services or the service suppliers concerned. Such restrictions must not be used, however, to undermine tariff concessions that may exist under the GATT, or otherwise discriminate against imported goods. In a similar vein, while a commitment in distribution services guarantees access conditions for suppliers of such services, it does not override GATT-compatible restrictions (bound tariffs or measures falling under Article XX) a government may want to impose on any of the goods involved.

Of the WTO's current 142 Members some 80 have not scheduled specific commitments for advertising services and close to 90 have not scheduled wholesale or retail trade services, respectively. Some of the Members that have scheduled commitments have explicitly excluded "sensitive" goods and services from coverage. In some cases, limitations have been attached to market access commitments for advertising services which explicitly exclude advertisements for products such as tobacco, alcohol and pharmaceuticals.

The use of electronic means of supply, while opening new commercial opportunities, does not fundamentally change the relevance of GATS and current commitments. In the context of a Work Programme on Electronic Commerce, the Council for Trade in Services, the body mandated to oversee the administration of the Agreement, discussed a variety of services-related aspects. It was the general view in this context that the electronic delivery of services falls within the scope of the GATS since the Agreement applies regardless of the means by which services are delivered. Moreover, while some delegations felt that further examination was necessary, it was generally recognized that the GATS is technology neutral, in the sense that it does not contain any provisions that distinguish between different technological means through which a service may be supplied.

Schedules are not cast in stone. If a government feels unable to live up to a particular commitment in the context of a Work Programme, the Council for Trade in Services, the body mandated to oversee the administration of the Agreement, discussed a variety of services-related aspects. It was the general view in this context that the electronic delivery of services falls within the scope of the GATS since the Agreement applies regardless of the means by which services are delivered. Moreover, while some delegations felt that further examination was necessary, it was generally recognized that the GATS is technology neutral, in the sense that it does not contain any provisions that distinguish between different technological means through which a service may be supplied.

Schedules are not cast in stone. If a government feels unable to live up to a particular commitment in future, Article XXI allows it to modify or withdraw this commitment, against compensation, in negotiations with affected trading partners. Moreover, under Article XIV of GATS, Members are entitled to take any measure, regardless of their obligations under the Agreement, that is necessary to protect human, animal or plant life or health. The Article, including its headnote, is very closely modelled on Article XX of the GATT (see preceding section).

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

The objective of the TBT Agreement is to ensure that product specifications (mandatory as well as voluntary ones, known in the language of the Agreement as "technical regulations" and "standards"), as well as procedures used to assess compliance with specifications (known as "conformity assessment procedures"), do not create unnecessary obstacles to trade. The Agreement recognizes the right of all Members to put such requirements in place at the level they consider appropriate, provided that they meet the various conditions of the Agreement.

Under the TBT Agreement, technical regulations may be developed for one or more of the objectives considered "legitimate" by the Agreement. Legitimate objectives include: "inter alia, national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment." While the Agreement lays out certain legitimate objectives, the words "inter alia" indicate that other objectives may be considered. According to the Agreement, WTO Members may develop technical regulations to, for instance, protect themselves against certain armaments (for national security), to protect endangered species (for the environment) and to warn consumers against the hazards of cigarette smoking (for human health). Deceptive practices refer to measures which mislead or deceive consumers, such as false labels. WTO Members are also allowed to adopt technical regulations to guard against such practices.

The Agreement states that the risks associated with legitimate objectives are to be assessed against the following factors: "inter alia, available scientific and technical information, related processing technology or intended end-uses of products."
The Agreement sets out a number of principles that Members must observe in the preparation, adoption and application of their technical regulations, standards and conformity assessment procedures. The principle of non-discrimination, which constitutes the backbone of the international trading system, is a central pillar of the TBT Agreement. It is a principle which outlaws discrimination between the like products of a Member’s trading partners, and between imported and like domestically-produced products. Under the TBT Agreement, therefore, a country cannot impose more stringent specifications or testing requirements on imported products than it does on like products that are being domestically produced, or impose them on some imported products, but not on others, based on their source.

Another principle of the Agreement is the avoidance of unnecessary obstacles to international trade. With respect to both technical regulations and standards, the Agreement states that Members must ensure that neither technical regulations nor standards are “prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” With respect to technical regulations, the Agreement elaborates on the meaning of this phrase. It stipulates that technical regulations not be more trade restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment would create.

Therefore, two steps are involved in determining whether a technical regulation poses unnecessary obstacle to international trade. First, the regulation must be designed to meet one of the legitimate objectives delineated in the Agreement, and, second, it must be the least trade-restrictive option available to a WTO Member that achieves that legitimate objective, taking into account the risks that would be associated with its non-fulfilment.

For instance, it is possible to imagine a situation in which a WTO Member wishing to warn consumers against certain extremely remote health hazards associated with a particular product, issues a technical regulation mandating that all such products carry the warning "very dangerous". However, given that such a mandatory warning requirement exaggerates the health risks associated with the product (which are, after all, only remote), it may not necessarily be the least trade-restrictive option available to the WTO Member that fulfils its stated objective. In addition, the damage done to trade by imposing the regulation may by far outweigh the benefits of the exaggerated warning (in other words, may outweigh the risks that non-fulfilment of the regulation would create). Therefore, less-trade restrictive options, such as more accurate (and less exaggerated) warning requirements, may need to be explored.

Also, with respect to the avoidance of unnecessary obstacles to trade, the Agreement encourages WTO Members to develop technical regulations and standards that are based on product performance, rather than design, requirements. Such requirements create fewer obstacles to trade, providing exporters with greater leeway in fulfilling the objectives of the technical requirements. For instance, if a country wished to ensure that all imported doors are fire-proof, it could either stipulate that they have a burn-through time of a minimum of 30 minutes, or that they all be made of certain materials (such as steel) and have a certain thickness; the former option would be preferred to the latter.

Another principle of the TBT Agreement is that of harmonization. The TBT Agreement encourages WTO Members to base their technical regulations, standards, and conformity assessment procedures, on international standards, and guides and recommendations, when these exist or when their completion is imminent, except when they are deemed to be inappropriate or ineffective. The call for harmonization is designed to avoid the emergence of undue layers of technical requirements and assessment procedures, and to encourage the use of ones that have been developed with the approval of the international community. To complement this requirement, the Agreement calls upon Members to participate in the work of international standardizing and conformity assessment bodies.

However, the Agreement recognizes that there may be instances in which Members would need to derogate from this obligation. It allows them to do so for technical regulations and standards in the event of fundamental climatic or geographic differences, or due to fundamental technological problems (for conformity assessment procedures, certain derogations from this obligation are also provided for). For example, a WTO Member may derogate from the use of international construction standards if, due to a fundamental geographic difference, such as its country being particularly earthquake prone, the standards are inappropriate for it. Such derogation could also take place when, for instance, the technology required for the application of the international standard is unavailable domestically.
One of the most important outcomes of the Second Triennial Review of the TBT Agreement (November 2000), was the adoption of a “Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations.” The decision calls upon international standardizing bodies to observe a certain number of principles in their work. These principles include: transparency, openness, impartiality and consensus, effectiveness and relevance, and coherence. It also calls upon them to take the development dimension into account in the elaboration of their standards, guides and recommendations. The principles would also need to be taken into account by international standardizing bodies working in the field of tobacco control.

Another principle of the TBT Agreement is that of equivalence. The TBT Agreement stipulates that WTO Members give positive consideration to recognizing other Members’ technical regulations as equivalent to their own, even when they differ from theirs, provided they are satisfied that they adequately fulfil their objective. As international harmonization is a time-consuming process, and is sometimes one which is difficult to achieve, the Agreement encourages Members to accept each other’s regulations as equivalent (perhaps until fully-fledged international harmonization becomes possible). With respect to conformity assessment procedures, the Agreement calls upon WTO Members to ensure, whenever possible, that the results of the assessment procedures of other Members are accepted as equivalent, even when they differ from theirs, provided the procedures give the same level of confidence. The purpose of this provision is to avoid multiple product testing (in both exporting and importing country markets), and its associated costs, financial and otherwise. The Agreement recognizes, however, that for equivalence to be achieved, negotiations may need to be entered into so that the continued reliability of conformity assessment results can be ensured (the accreditation of conformity assessment bodies is a factor that can be taken into account in this regard). To achieve equivalence, the Agreement encourages Members to enter into mutual recognition agreements (MRAs) for the acceptance of each other’s conformity assessment results.

Finally, the Agreement contains certain transparency provisions designed to encourage the exchange of information between Members and to allow Members to comment on each other’s new requirements when still at a draft stage.

Examples of Health Measures Falling under the TBT Agreement

Protection of human, animal, plant and environmental health are among the legitimate objectives for which product requirements and conformity assessment procedures may be developed. The following are examples of some of the measures that Members have recently notified, that have human health as their objective: one member notified a regulation to do with radio communications equipment which attempts to reduce human exposure to electromagnetic radiation, another Member notified a measure regulating the use of substances in cosmetics that instigate allergies, another notified measures regulating the use of chemicals causing occupational health hazards and several cigarette labelling requirements have also been notified. Of all TBT regulations notified to the WTO in 2000, the vast majority (254 notifications, out of the total of 725) had human health or safety as their objective.

IV. The Agreement on Agriculture

The Agreement on Agriculture covers basically all agricultural products including tobacco, most processed agricultural products, as well as a few specific products such as hides, skins, and raw silk, wool and cotton. Fish and fish products are not covered. A separate Agreement, the Agreement on the Application of Sanitary and Phytosanitary Measures, deals with measures taken to protect food safety, animal and plant health. However, since tobacco products are generally not considered foodstuffs, they are not covered by that Agreement.

The reform process for trade in agriculture is embodied in the Agreement on Agriculture and in the individual commitments on agriculture included in national schedules. The Agreement deals with three main areas of policy, often referred to as the “three pillars”: market access, domestic support and export subsidies. Special and differential treatment in favour of developing countries is an integral element of the Agreement.
The provisions of the Agreement permit Members to address a wide range of non-trade concerns such as food security, rural development and the protection of the environment. A specific clause mandated that at the beginning of 2000, negotiations to continue the reform process were to be initiated.

Market access

The key elements of the market access commitments for agricultural products are the establishment of a tariff-only regime ("tarification"), tariff reductions and the binding of all agricultural tariffs. Through the tarification process, all quantitative restrictions, variable levies, import bans or other non-tariff measures have been replaced for each product by an import duty set at a level calculated to be substantially the same, in effect, as the protection previously given.

Under the tariff reduction provisions, all Members were required to reduce and bind all their customs duties on agricultural products, including the duties resulting from the tarification process. Developed countries were required to reduce their duties by a simple average of 36%, with a minimum reduction on individual products of 15%, and to make these reductions in equal annual instalments over six years from 1995. Developing countries were allowed to make reductions only two-thirds as great (that is, an average of 24% and a minimum of 10%), and could implement the reductions over a 10-year period. Least developed countries were not required to make reductions. For previously unbound items, developing countries had the option to set maximum tariffs ("ceiling bindings").

Because the duties resulting from tarification were frequently high, in the case of tariffed products Members had to provide for a certain quantity of import access opportunities at relatively low duties (current and minimum access opportunities). Twelve members committed to opening up minimum market access opportunities for tobacco. The total volume of these minimum access commitments is close to 170,000 tons.

Domestic support

The central thrust of the domestic support provisions of the Agreement on Agriculture is to encourage a further shift, over time, towards measures and policies that distort agricultural production and trade as little as possible. The basic consideration underlying this concept is that there are two types of domestic support, one preferable to the other. The first type, usually called "Green Box" measures (the name reflects their acceptability), has little or no distorting effect on trade. The other type, the "Amber Box" measures, does distort trade. For example, agricultural research or training provided by the government is regarded as falling in the Green Box category, whereas government buying-in at a guaranteed price ("market price support") counts as Amber Box.

The Agreement commits each WTO Member that provides support to agriculture through Amber Box measures to make reductions in the aggregate monetary value of such measures. Those reduction commitments are stated in each country's schedule. In contrast, public spending on Green Box measures can be maintained, or even increased. This approach leaves considerable scope for governments to design domestic agricultural policies that will reflect, and respond to, the wide variety of specific circumstances in individual countries and individual sectors of agriculture, but with less trade distortion than in the past.

As far as those measures that are subject to reduction commitments are concerned, their combined annual value is calculated as the total aggregate measure of support (AMS). The total AMS figure is arrived at by adding together the support for individual products and the support which is not product-specific. Eleven WTO Members provide Amber box support to tobacco production that is subject to reduction commitments: Argentina, Bulgaria, Canada, Cyprus, the Czech Republic, the European Communities, India, Slovakia, South Africa, Turkey and the United States.
Confronting the Tobacco Epidemic in an Era of Trade Liberalization

There are three types of Amber Box measures exempted from reduction:

1. So-called "de minimis" support (see below);
2. Certain measures to encourage agricultural and rural development in developing countries, including generally available investment subsidies, subsidies to low-income producers, and support to diversification away from growing illegal narcotic crops; and
3. Certain direct payments under production-limiting programmes (sometimes dubbed "Blue Box").

The de minimis levels at which support is regarded as having minimal effect are defined, for developed countries, as support not exceeding 5% of the current value of production of individual products or, in the case of non-product-specific support, of the current value of total agricultural production. For developing countries, the de minimis threshold is 10%. Within de minimis levels, Members have the flexibility to increase or decrease support for products not subject to reduction commitments, including, where applicable, tobacco.

Export subsidies

The Agreement on Agriculture established new basic rules to govern export subsidies for agricultural products. For developed countries, the reduction commitments are based on requirements that, for each product group (for example tobacco), the subsidies concerned be reduced by 36% in value, normally by comparison with outlays in 1986-1990, over a six-year implementation period. Over the same period, the quantity of products benefiting from such subsidies (except for subsidies for products incorporated into exported products) had to be reduced by 21%.

Developing countries are subject to lower reduction requirements (cuts of 24% in value and 14% in quantity), and have the benefit of a 10-year implementation period. Least developed countries are not required to make reduction commitments. Developing countries are also not, in general, required to reduce subsidies affecting the marketing and transport costs of exports.

The Agreement on Agriculture includes a prohibition on the use of export subsidies on any agricultural product that is not subject to specific reduction commitments, or subject to the special and differential treatment available to developing countries. Five Members have export subsidy reduction commitments for tobacco: Brazil, Bulgaria, the European Communities, South Africa and Turkey.

Negotiations

An important element of the Agreement on Agriculture is its Article 20 on “Continuation of the Reform Process”. This provides for further negotiations towards the long-term objective of substantial progressive reductions in agricultural support and protection. The negotiations are to be based on the experience gained from implementing the reduction commitments, and on the effects these reductions have had on trade. They are to take into account non-trade concerns, special and differential treatment for developing countries, the objective of establishing a fair and market-oriented agricultural trading system, the other concerns and objectives included in the Agreement’s preamble, and what further commitments are necessary to achieve the long-term objective.

These negotiations began in March 2000. During the first phase of the negotiations, which lasted until March 2001, Members presented their proposals. Most Members participated very actively in this first phase, and a total of 45 negotiating proposals and 3 technical papers have been submitted by a total of 127 WTO Members. Several developing countries have presented proposals that call for an elimination of high tariffs and tariff peaks on products of interest to developing countries, including tobacco. In the area of domestic support, most proposals suggest further reductions while maintaining certain categories of exempt support. Many Members have proposed the elimination or substantial reduction of all forms of export subsidization. During the second phase of the negotiations, Members are working in depth on all issues and options for policy reform set out in these proposals.
V. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

General

The TRIPS Agreement is, along with the GATT and the GATS, one of the three pillars of the WTO. It is the central body of international rights and obligations in the area of intellectual property. The basic objective of the Agreement is to give adequate and effective protection to intellectual property rights, with a view to contributing to the promotion of technological innovation and to the transfer of technology, to the mutual advantage of producers and users of technological knowledge, in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The main features of the Agreement can be summarized as follows:

- **Coverage**: It deals with all the main categories of intellectual property rights – copyright and related rights; trademarks; geographical indications; industrial designs; patents; layout-designs of integrated circuits; and undisclosed information.

- **Basic principles**: In addition to reaffirming the basic national treatment principle in the area of intellectual property, it requires nationals of all Members to be accorded MFN treatment (i.e. not to be discriminated against vis-à-vis other foreign nationals).

- **Minimum standards**: For each area of intellectual property covered, it establishes minimum standards of protection to be applied by all signatories, defining what subject-matter must be protected, the rights to be conferred, the permissible exceptions to those rights and the minimum duration of protection.

- **Enforcement**: It contains detailed commitments, to be accepted by all Member governments, to provide procedures and remedies in national law which will ensure that these rights can be effectively enforced.

- **Dispute settlement**: It provides for the application of the integrated WTO dispute settlement mechanism for the settlement of disputes between governments.

In structure, the Agreement is built upon the main pre-existing international conventions of the World Intellectual Property Organization (WIPO). Compliance with the substantive provisions of the Berne Convention on the Protection of Literary and Artistic Works and of the Paris Convention on the Protection of Industrial Property as well as the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, is an obligation under the TRIPS Agreement, which in each case adds a number of additional minimum standards. The TRIPS Agreement has therefore to be read in conjunction with these conventions. It provides for a minimum level of protection and Members can, therefore, opt for a higher level protection, provided this does not contravene the provisions of the Agreement.

The TRIPS Agreement aims to achieve an appropriate balance in the protection of intellectual property that recognizes the underlying public policy objectives of intellectual property requirements. This is reflected in the numerous provisions which allow exceptions and other forms of flexibility and in Article 7 on Objectives and Article 8 on Principles.
Specific Points

Copyright and related rights
The basic obligation is to comply with the substantive provisions of the Berne Convention concerning economic rights. Computer programmes must be protected as literary works, thus receiving all the protection accorded to such works under the Berne Convention. Databases and other compilations of material will also be protectable under copyright where they constitute creations. The TRIPS Agreement sets rules relating to rental rights for certain works as well as the terms of protection for copyright and related rights.

Trademarks
The TRIPS Agreement defines the signs that must be eligible for protection as a trademark; establishes the main rights that must flow from ownership of a trademark; establishes a minimum 7-year period of protection, renewable indefinitely; and lays down the minimum period of non-use that might give rise to cancellation of a registration. These rules will also apply to service marks. The Agreement also contains specific rules on the protection of well known trademarks. It also deals with conditions concerning other requirements which a Member may set out.

Geographical indications
The basic obligation is that all Members must provide means for interested parties to prevent any use which might mislead the public as to the geographical origin of goods or which would constitute unfair competition. A higher level of protection, with certain exceptions, is provided for identification of wines and spirits, the use of which, on wines and spirits not originating in the area identified, is prevented.

Industrial designs
The TRIPS Agreement contains a set of multilateral norms for the protection of industrial designs, with a minimum duration of protection of 10 years. It includes special provisions to facilitate the protection of textile designs.

Patents
Patents must be available in virtually all areas of technology. Members may, however, provide for certain exceptions. One important permissible exception is the exclusion from patentability of inventions, "the prevention of the commercial exploitation of which is necessary to protect *ordre public* and morality, including to protect human, animal and plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law". Another important exception relates to certain inventions relating to animals and plants. If plant varieties are not protectable by patents, they must be protected by an effective *sui generis* system. The Agreement lays down 14 conditions controlling the grant of compulsory licences and government use of patents. The Agreement provides for a minimum 20-year patent term.

Layout-designs of integrated circuits
The basic obligation is to respect the substantive provisions of the Washington Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits (negotiated in 1989 under the auspices of WIPO but not in force). There are a number of additional provisions, including a minimum 10-year period of protection and the right to prevent dealing in products incorporating infringing layout-designs.

Protection of undisclosed information
Trade secrets must be protected against disclosure, acquisition or use in a manner contrary to honest commercial practices. Confidential data submitted to governments in order to obtain marketing approval for pharmaceuticals or agricultural chemicals are also protected against unfair commercial use.
Anti-competitive practices in contractual licences

The Agreement recognizes the right of governments to take action against licensing practices or conditions that constitute an abuse and have an adverse effect on competition in the relevant market and provides for cooperation and consultations between governments to facilitate remedial action where there is reason to believe that such practices have occurred.

Enforcement

The Agreement lays down obligations on governments to provide effective means of action by any right holders to secure the enforcement of their rights. The procedures and remedies must be available both internally and at the border and include both preliminary and final measures as well as both civil and criminal remedies. Criminal penalties must be available for wilful acts of counterfeiting and piracy on a commercial scale.

Remarks

In general it can be said that intellectual property touches upon most products in the field of tobacco. For example, a new process to reduce tar or a new nicotine patch may be protected by way of patent for an invention, a new variety of a tobacco plant by way of plant variety protection, and advertisements for tobacco products or a health campaign by way of copyright. Most, if not all, brand names for products like cigarettes are protected by trademarks.

The general principle related to health has been mentioned earlier (Article 8.1). The Article recognizes the right of countries to take measures necessary to protect public health and nutrition, provided that such measures are consistent with the provisions of the TRIPS Agreement. In the section on patents, the TRIPS Agreement provides that Members may refuse patent protection to inventions, the commercial exploitation of which would be contrary to human life or health (Article 27.2 TRIPS). In the field of trademarks, the TRIPS Agreement sets out in Article 15 the rules on "protectable subject-matter" (e.g. the conditions in which signs may be eligible for registration as trademarks); it states, however, that Members can deny registration of a trademark "on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967)." In this regard, it would be worth noting that the Paris Convention, which is incorporated in the TRIPS Agreement, explicitly recognizes the right of countries to deny or invalidate the registration of trademarks that are contrary to morality or public order, and, in particular, those which can deceive the public.

It is to be noted that, under the TRIPS Agreement as well as under national laws, intellectual property rights are defined as "negative rights". In other words, they give the right-holders the right to prevent others from undertaking, without their authorization, certain actions with regard to the subject matter of the protection (i.e. the patented invention, the trademark); they do not, as a rule, give the right-holders the right to commercially use the subject-matter. However, in the field of trademarks, there is a provision relating to the use of trademarks by the trademark owner. Article 20 of the Agreement reads as follows: "The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods and services of one undertaking from those of another undertakings..."

With regard to the illicit trade in tobacco products (in particular counterfeiting), it is worth noting that the TRIPS Agreement contains special requirements for border measures aimed at preventing imports of goods which bear counterfeit trademarks or represent piracy of copyright material. Although the TRIPS Agreement only requires, as a minimum requirement, action at the border against imports of counterfeit and pirated goods, it also envisages similar measures against any goods, whether imported or exported, that infringe any intellectual property right. Each WTO Member is required to provide means by which right-holders can obtain the cooperation of the customs authorities to suspend the release of infringing goods (i.e. suspend their circulation). A right-holder who suspects that counterfeit goods are about to be imported must apply in writing for action to be taken, giving prima facie evidence of the infringement and providing enough information for the customs authorities to identify the goods concerned. For their part, the authorities must inform the right-holder whether the application has been accepted, and for how long the customs will take action. The remedies available must include destruction or disposal of the infringing goods in a way that avoids any harm to the right-holder. In particular, counterfeit goods are not normally to be allowed to be re-exported unaltered, or under a different customs procedure (Articles 51-60).
With regard to measures aimed at preventing and combating the illicit trade in tobacco products, it is worth noting that WTO Members must provide for criminal procedures in case of infringements of intellectual property rights, in particular in the case of wilful trademark counterfeiting. Sanctions must be severe enough to provide a deterrent (Article 61). The TRIPS Agreement also contains provisions on Members’ cooperation with a view to eliminating international trade in goods that infringe on intellectual property rights. Contact points for this purpose have to be notified. The Agreement also sets out the obligation for Members to promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods (Article 69).

VI. The Agreement on Subsidies and Countervailing Measures (SCM)

The SCM Agreement addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidized imports. Multilateral disciplines are the rules regarding whether or not a subsidy may be provided by a Member. They are enforced through invocation of the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a Member after an investigation by that Member and a determination that the criteria set forth in the SCM Agreement are satisfied.

Coverage of the Agreement

Part I of the Agreement defines its coverage. Specifically, it establishes a definition of the term “subsidy” and an explanation of the concept of “specificity”. Only a measure which is a “specific subsidy” within the meaning of Part I is subject to multilateral disciplines and can be subject to countervailing measures.

Definition of subsidy: Unlike the Tokyo Round Subsidies Code, the WTO SCM Agreement contains a definition of the term “subsidy”. The definition contains three basic elements: (i) a financial contribution (ii) made by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist.

The concept of “financial contribution” was included in the SCM Agreement only after a protracted negotiation. Some Members argued that there could be no subsidy unless there was a charge on the public account. Other Members considered that forms of government intervention which did not involve an expense to the government, nevertheless, distorted competition, and should thus be considered to be subsidies. The SCM Agreement basically adopted the former approach. The Agreement requires a financial contribution and contains a list of the types of measures that represent a financial contribution (e.g. grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services or the purchase of good).

In order for a financial contribution to be a subsidy, it must be made by or at the direction of a government or any public body within the territory of a Member. Thus, the SCM Agreement applies not only to measures of national governments, but also to measures of sub-national governments and of such public bodies as State-owned companies.

A financial contribution by a government is not a subsidy unless it confers a “benefit.” In many cases, as in the case of a cash grant, the existence of a benefit and its valuation will be clear. In some cases, however, the issue of benefit will be more complex. For example, when does a loan, an equity infusion or the purchase by a government of a good confer a benefit? Although the SCM Agreement does not provide complete guidance on these issues, the Appellate Body has ruled (Canada – Aircraft) that the existence of a benefit is to be determined by comparison with the market place (i.e. on the basis of what the recipient could have received in the market). In the context of countervailing duties, Article 14 of the SCM Agreement provides some guidance with respect to determining whether certain types of measures confer a benefit. In the context of multilateral disciplines, however, the issue of the meaning of “benefit” is not fully resolved.

Specificity: Assuming that a measure is a subsidy within the meaning of the SCM Agreement, it, nevertheless, is not subject to the SCM Agreement unless it has been specifically provided to an enterprise or industry or group of enterprises or industries. The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. Thus only “specific” subsidies are subject to the SCM Agreement disciplines.
There are four types of “specificity” within the meaning of the SCM Agreement:

- Enterprise specificity. A government targets a particular company or companies for subsidization;
- Industry specificity. A government targets a particular sector or sectors for subsidization;
- Regional specificity. A government targets producers in specified parts of its territory for subsidization; and
- Prohibited subsidies. A government targets export goods or goods using domestic inputs for subsidization.

**Categories of subsidies**

The SCM Agreement creates two basic categories of subsidies: those that are prohibited and those that are actionable (i.e. subject to challenge in the WTO or to countervailing measures). All specific subsidies fall into one of these categories.

**Prohibited subsidies:** Two categories of subsidies are prohibited by Article 3 of the SCM Agreement. The first category consists of subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance (“export subsidies”). A detailed list of export subsidies is annexed to the SCM Agreement. The second category consists of subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods (“local content subsidies”). These two categories of subsidies are prohibited because they are designed to directly affect trade and thus are most likely to have adverse effects on the interests of other Members.

The scope of these prohibitions is relatively narrow. Developed countries had already accepted the prohibition on export subsidies under the Tokyo Round SCM Agreement, and local content subsidies of the type prohibited by the SCM Agreement were already inconsistent with Article III of the GATT 1947. What is most significant about the new Agreement in this area is the extension of the obligations to developing country Members subject to specified transition rules (see section below on special and differential treatment), as well as the creation in Article 4 of the SCM Agreement of a rapid (three-month) dispute settlement mechanism for complaints regarding prohibited subsidies.

**Actionable subsidies:** Most subsidies, such as production subsidies, fall in the “actionable” category. Actionable subsidies are not prohibited. However, they are subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of another Member. There are three types of adverse effects. First, there is injury to a domestic industry caused by subsidized imports in the territory of the complaining Member. This is the sole basis for countervailing action. Second, there is serious prejudice, usually arising as a result of adverse effects (e.g. export displacement) in the market of the subsidizing Member or in a third country market. Thus, unlike injury, it can serve as the basis for a complaint related to harm to a Member’s export interests. Finally, there is nullification or impairment of benefits accruing under the GATT 1994 which arises most typically where the improved market access is presumed to flow from a bound tariff reduction is undercut by subsidization.

The creation of a system of multilateral remedies that allows Members to challenge subsidies which give rise to adverse effects represents a major advance over the pre-WTO regime. The difficulty, however, will remain the need, in most cases, for a complaining Member to demonstrate the adverse trade effects arising from subsidization, a fact-intensive analysis that panels may find difficult in some cases.

**Agricultural subsidies:** Article 13 of the Agreement on Agriculture establishes, during the implementation period specified in that Agreement (until 1 January 2003), special rules regarding subsidies for agricultural products. Export subsidies which are in full conformity with the Agriculture Agreement are not prohibited by the SCM Agreement, although they remain countervailable. Domestic supports which are in full conformity with the Agriculture Agreement are not actionable multilaterally, although they also may be subject to
countervailing duties. Finally, domestic supports within the “green box” of the Agriculture Agreement are not actionable multilaterally nor are they subject to countervailing measures. After the implementation period, the SCM Agreement shall apply to subsidies for agricultural products subject to the provisions of the Agreement on Agriculture, as set forth in its Article 21.

**Countervailing measures**

Part V of the SCM Agreement sets forth certain substantive requirements that must be fulfilled in order to impose a countervailing measure, as well as in-depth procedural requirements regarding the conduct of a countervailing investigation and the imposition and maintenance in place of countervailing measures. A failure to respect either the substantive or procedural requirements of Part V can be taken to dispute settlement and may be the basis for invalidation of the measure.

**Substantive rules:** A Member may not impose a countervailing measure unless it determines that there are subsidized imports, injury to a domestic industry, and a causal link between the subsidized imports and the injury. As previously noted, the existence of a specific subsidy must be determined in accordance with the criteria in Part I of the Agreement. However, the criteria regarding injury and causation are found in Part V. One significant development of the new SCM Agreement in this area is the explicit authorization of cumulation of the effects of subsidized imports from more than one Member where specified criteria are fulfilled. In addition, Part V contains rules regarding the determination of the existence and amount of a benefit.

**Procedural rules:** Part V of the SCM Agreement contains detailed rules regarding the initiation and conduct of countervailing investigations, the imposition of preliminary and final measures, the use of undertakings, and the duration of measures. A key objective of these rules is to ensure that investigations are conducted in a transparent manner, that all interested parties have a full opportunity to defend their interests, and that investigating authorities adequately explain the bases for their determinations. A few of the more important innovations in the WTO SCM Agreement are identified below:

- **Standing.** The Agreement defines in numeric terms the circumstances under which there is sufficient support from a domestic industry to justify initiation of an investigation.
- **Preliminary investigation.** The Agreement ensures the conduct of a preliminary investigation before a preliminary measure can be imposed.
- **Undertakings.** The Agreement places limitations on the use of undertakings to settle Countervailing Duty (CVD) investigations, in order to avoid Voluntary Restraint Agreements or similar measures masquerading as undertakings.
- **Sunset.** The Agreement requires that a countervailing measure be terminated after five years unless it is determined that continuation of the measure is necessary to avoid the continuation or recurrence of subsidization and injury.
- **Judicial review.** The Agreement requires that members create an independent tribunal to review the consistency of determinations of the investigating authority with domestic law.
VII. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Two Relevant Disputes

The dispute settlement mechanism of the WTO, provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), is "a central element in providing security and predictability to the multilateral trading system". The DSU, which governs the settlement of all disputes under all WTO agreements, builds on the procedures that existed under old GATT Articles XXII and XXIII. It established a new appellate review process and introduced the "reverse consensus" rule, which reduces the ability of WTO Members to block the establishment of panels and the adoption of dispute settlement reports. Today, the "winning" WTO Member may be granted the right to impose economic sanctions against imports from the "losing" Member who does not implement the recommendations of a panel or of the Appellate Body to full satisfaction. The DSU also prohibits any form of unilateral actions, and states that violations of WTO provisions can be only be assessed by WTO adjudicating bodies.

The DSU process is divided into four stages: consultations, the panel process, the appellate review process, and the implementation of recommendations. Time limits have been put in place for each of these stages. The dispute settlement mechanism can be initiated only by WTO Members when they consider that any benefits accruing to them directly or indirectly under any agreement are being impaired by measures taken by other Members. Challenging Members do not need to prove any specific economic or legal interest to initiate a DSU process and they do not have to provide evidence of the trade impact of challenged measures.

After consultations of at least 60 days, a challenging Member can request the establishment of a panel composed of ad hoc panelists agreed to by both parties. The panels' duty is to assess whether the defending Member has in place a measure that violates one or more WTO provisions. Parties will provide the panel and the other party(ies) with at least two written submissions, will meet with the panel at least twice and will have to reply to extensive questions posed by the panels and the other parties. Interested third parties may also participate in the panel process through the end of the first meeting. The panel process usually lasts approximately nine months.

Article 13 of the DSU allows panels to "seek information and technical advice from any individual or body which it deems appropriate." The article also states that:

"Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group...."

Panels are entitled, therefore, to request information or expertise from any outside source. They may also request an advisory report from an Expert Review Group (ERG) on any scientific, technical or factual matter. The establishment of formal ERGs has, so far, never been done, however, mainly due to time constraints. In disputes involving environmental or Sanitary and Phytosanitary (SPS) matters, practice has had it that panels, after consulting the parties to the dispute, have appointed individual experts to help them understand technical and scientific issues. In consultations with the parties, panels have prepared written questions to the experts and have held additional meetings with them to discuss and better understand their responses. Article 13 is extremely important in resolving, among other issues, health-related disputes which tend to contain an important scientific dimension.

An important feature of the DSU is the new appellate review process whereby issues of law covered in the panel report, and legal interpretations developed by the panel, can be appealed before a standing Appellate Body. Generally the appellate review process lasts some 90 days during which parties meet with the Appellate Body once. The DSU requires panels and the Appellate Body to interpret the WTO agreements in light of customary rules of interpretation of public international law. Accordingly, when interpreting WTO provisions, panels and the Appellate Body are obliged to take into account any other relevant rules of international law applicable to the relations between those WTO Members, including general principles of law and other treaties.
The panel and Appellate Body reports must be adopted by the Dispute Settlement Body (DSB) - WTO Membership - unless, by consensus, the DSB decides not to adopt such report(s); this is the so-called consensus rule. Once the panel and the Appellate Body reports are adopted, the losing party has to notify its intentions with respect to the implementation of adopted DSB recommendations. If it is impracticable to comply immediately, the party concerned is given a reasonable period of time in which to do so.

After the expiry of the reasonable period of time, a rapid review process by the original panel and the Appellate Body can be triggered to assess the WTO compatibility of the measure, put in place to implement DSB recommendations. If the implementing measure is still considered to be incompatible with the WTO, parties can enter into negotiations to agree on temporary, mutually acceptable, compensation. In the absence of such an agreement on compensation, the winning party to the dispute may request authorization by the DSB to suspend concessions, or other obligations, made to the losing party. The DSB must then grant such authorization to impose sanctions, unless, by consensus, the DSB decides not to do so. Disagreements over the proposed level of sanctions may be referred to arbitration. In principle, concessions should be suspended in the same sector as that at issue in the dispute. If this is not practicable or effective, the suspension can be made in a different sector of the same agreement. In turn, if this is not effective or practicable, and if the circumstances are serious enough, the suspension of concessions may be made under another agreement. This is known as cross-retaliation.

Finally the DSU contains a number of provisions which take into account the specific interests of the developing and the least developed countries, including more favourable time-limits and the possibility of requesting the services of a legal expert from the Secretariat.

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**The Thai Cigarette Dispute (1990) – Resume**

Under the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes. Cigarettes were also made subject to an excise tax, a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with GATT Article XI (on the General Elimination of Quantitative Restrictions), and considered that they could not be justified by either (1) some of exceptions to the elimination of quantitative restrictions allowed for under that same Article, or (2) Article XX(b) (on General Exceptions pertaining to measures necessary for the protection of human life or health). It also argued that the internal taxes were inconsistent with GATT Article III:2 (on National Treatment on Internal Taxation and Regulation).

Thailand responded by arguing, *inter alia*, that the import restrictions were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarette imports were prohibited, and because chemicals and other additives contained in United States cigarettes might make them more harmful to human health than Thai cigarettes.

The Panel found that the import restrictions were inconsistent with Article XI and not justified under the exceptions which that Article allows for. It further concluded that the import restrictions were not “necessary” within the meaning of Article XX(b) (i.e. not necessary for the protection of human life or health). The internal taxes, on the other hand, were found to be consistent with Article III:2.

If the same case were to be examined today, Thailand would have difficulty in demonstrating that the import restrictions on cigarettes (of the nature considered in this dispute) are necessary to support its non-cigarette (non-smoking) policy, alleged to be vital for Thailand, if it allowed the production and sale of domestic cigarettes. Less-restrictive WTO compatible alternatives would certainly exist to regulate the maximum level of chemical components contained in cigarettes sold in Thailand.
A French decree prohibiting the manufacture, sale, export, import and use of asbestos fibres and products containing asbestos fibres was challenged by Canada on the grounds of less favourable treatment of imported asbestos as compared to domestic substitutes for asbestos, contrary to Article III:4 (on National Treatment on Internal Taxation and Regulation) of GATT 1994. The Appellate Body examined whether imported asbestos fibres and domestic alternative fibres were “like products,” emphasizing that this question had to be informed by the obligation of Members to ensure “equality of competitive conditions” between domestic products and like imports. It listed the four general criteria for likeness: (1) physical properties of the products; (2) their end uses; (3) consumer tastes and habits; and (4) tariff classification, emphasizing that this was not a closed list and that all pertinent evidence had to be taken into account. The Appellate Body found that the health risks inherent in a product could be a pertinent element to consider, and could influence at least two of the above-mentioned criteria - the physical characteristics of products and consumer tastes and habits.

As Canada had not succeeded in proving that imported asbestos fibres and French alternative fibres were “like products,” no violation of National Treatment was found. The Appellate Body confirmed the Panel’s finding that the decree was “necessary” to protect human health within the meaning of Article XX (b) (on General Exceptions). It is important to note that the Appellate Body stated that WTO Members had the undisputed right to determine the level of health protection they deemed appropriate. It also stated that there was no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health. A risk could be evaluated either in quantitative or qualitative terms. For the Appellate Body, the determination of whether a measure which was not “indispensable” could nevertheless be “necessary” involved a process of weighing and balancing a series of factors, which included the importance of the common interests or values protected by the measure, the efficacy of such measures in pursuing desired policies, and the accompanying impact of the law or regulation on imports or exports.

It also reiterated that a “weighing and balancing process” was inherent in the determination of whether WTO-consistent alternatives were reasonably available and noted that the more vital the common interests and values pursued, the easier it could accept as “necessary” the measure designed to achieve those aims. Human health was “vital and important in the highest degree” and France had no alternative measures before it to achieve the level of protection it desired.
Annex C References

1 This chapter has been prepared by the WTO Secretariat on its sole responsibility, and does not reflect the views of WTO Members.

2 For scheduling purposes, distribution has been further subdivided into commission agent’s services, wholesale trade services, retailing services, franchising, and other sub-sectors.

3 While a relatively small number of Members have scheduled specific commitments, they represent fourth-fifths of world production and trade.


5 The Members are Australia, Bulgaria, Costa Rica, El Salvador, Guatemala, Hungary, Malaysia, Poland, Romania, South Africa, Thailand and the United States.

6 Two proposals specifically mention improved market access for tobacco and tobacco products. The first is G/AG/NG/W/37 and Corr.1, submitted by Cuba, Dominican Republic, El Salvador, Haiti, Honduras, Kenya, India, Nigeria, Pakistan, Sri Lanka, Uganda and Zimbabwe; the second is G/AG/NG/W/102 from India.

7 Article 7 states that “[T]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer 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.”

Article 8.1 states that “Members may, in formulating their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote their public interest in vital sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”

8 Article 6 quinquies [Marks: Protection of Marks Registered in One Country of the Union in the Other Countries of the Union] of the Paris Convention. Its paragraph B states that: “Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: ...3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order...”

Article 7 [Marks: Nature of the Goods to which the Mark is Applied] of the Paris Convention states that: “The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.”

9 “Counterfeit trademark goods” are defined as “goods, including packaging bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.”

10 To mitigate this problem, the SCM Agreement established, during a five-year provisional period which ended 31 December 1999, a sub-category of actionable subsidies with respect to which a rebuttable presumption of serious prejudice existed. Under Article 31, this provision (along with the provisions concerning non-actionable subsidies) could be extended by consensus of the SCM Committee. As of 31 December 1999, no such consensus had been reached.