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The WTO, Tobacco, Alcohol, and Diet

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TRADE AND PUBLIC HEALTH

Noncommunicable diseases, associated with risk factors such as tobacco consumption, poor diet, and alcohol use, represent a growing health burden around the world. The seriousness of noncommunicable diseases is reflected in the adoption of international instruments such as the WHO Framework Convention on Tobacco Control; the WHO Global Strategy on Diet, Physical Activity, and Health; and the WHO Global Strategy to Reduce the Harmful Use of Alcohol. In line with these instruments, states are beginning to use measures such as taxes, restrictions on marketing, product regulation, and labeling measures for public health purposes. This book examines the extent to which the law of the World Trade Organization restricts domestic implementation of these types of measures. The relationship between international health instruments and the WTO Agreement is examined, as are the WTO-covered agreements themselves.

Benn McGrady is an Australian lawyer based at the O'Neill Institute for National and Global Health Law at Georgetown University. He is an Adjunct Professor at the Georgetown University Law Center and a Research Assistant Professor in the Department of International Health, School of Nursing and Health Studies. He has provided legal advice to public health bodies, foreign governments, and intergovernmental organizations concerning the impact of international trade and investment law on measures to protect public health and has published work in journals such as the *Journal of International Economic Law*, *World Trade Review*, and *Journal of World Trade*.

For my parents

Preface

This study sketches out the implications of trade law for domestic attempts to address noncommunicable disease. Much remains to be written about this subject. Nonetheless, I hope that this work fills some gaps in the literature and raises questions for further research.

Although this study lies at the intersection of trade law and public health, it is a legal study. The difficulty associated with differing research methodologies meant that a choice had to be made in favor of one discipline or another. The choice to cast this work as a legal study has the advantage of permitting a deeper legal analysis of some issues, but the disadvantage of being less accessible to members of the public health community who do not have legal training. There is some inevitable trade-off in this approach, and my hope is that this study will help public health lawyers and trade lawyers bridge gaps between their fields.

This study also straddles the fields of international trade law, global/international health law, and public international law. There is a very real chance that the study will leave trade lawyers wanting a more detailed analysis of trade law and public health lawyers wanting more detailed analysis of international law in a health context. Unfortunately, this is an inevitable consequence of a monograph that does not seek to cover the field. The intention of this study is not to end all debates about application of trade law to noncommunicable disease. My more modest hope is that this work will clarify key legal issues and give some shape to debates about the issues discussed herein.

This book has roots in a number of institutions and countries. I began research on the implications of WTO law for tobacco control while I was a Research Assistant at the VicHealth Centre for Tobacco Control, The Cancer Council Victoria in Melbourne. With support provided by an Australian Postgraduate Award, I later undertook a PhD on the same subject at Monash University, also in Melbourne. I spent a significant part of my candidature

conducting research and living in Bangkok. I was later offered the opportunity to expand my doctoral thesis into this study through a Postdoctoral Fellowship at the O'Neill Institute for National and Global Health Law at Georgetown University in Washington, DC. In association with this role, I was privileged to have appointments as a Research Assistant Professor in the Department of International Health, School of Nursing and Health Studies, and as an Adjunct Professor at the Georgetown University Law Center.

Over the past few years, I have also been privileged to provide legal and policy advice to organizations working on public health issues at the international level. The analytical focus of this book reflects that experience. Whereas trade lawyers may take different views concerning which legal issues are significant, this book is focused on the types of issues that arise for discussion in the context of public health lawmaking at the domestic and international levels.

I am particularly indebted to three people. Jeff Waincymer supervized my doctoral studies. Jonathan Liberman introduced me to the issues and provided support and comments throughout the process. Jeff Collman then showed enough faith in me to facilitate completion of this book at Georgetown.

A number of other people have read or commented on parts of this work at various stages, including Jane Bradley, Tomer Broude, Darren Lim, Tania Voon, Sanjula Weerasinghe, and anonymous reviewers. Tania Voon was also kind enough to read and comment on a late draft of this book in May 2010. I am also grateful to participants at conferences hosted by the Asian Centre for WTO & International Health Law and Policy, National Taiwan University, and the international economic law interest group of the American Society of International Law, as well as to participants at workshops hosted by the Institute for International Economic Law and the O'Neill Institute for National and Global Health Law, both at Georgetown University Law Center. As always, all errors remain my own.

A number of other people at Georgetown also deserve acknowledgment. Bernhard Liese and Larry Gostin have been very supportive during my time here. Lindsay Wiley was also particularly supportive and provided the initial push for me to teach a course on International Trade and Health, which has shaped some of the views in this book.

On a personal note, I would like to thank my partner, Sanjula Weerasinghe, for her invaluable support throughout the process.

Washington, DC
September 2010

Abbreviations

CAP	European Common Agricultural Policy
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CPI	Consumer Price Index
CRC	Convention on the Rights of the Child
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Commission
EU	European Union
FCTC	World Health Organization Framework Convention on Tobacco Control
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade (1994)
Global Strategy Alcohol	WHO Global Strategy to Reduce the Harmful Use of Alcohol, 2010
Global Strategy Diet	WHO Global Strategy on Diet, Physical Activity and Health, 2004
GMO	Genetically modified organism
HFCS	High fructose corn syrup
HIV/AIDS	Human immunodeficiency virus/acquired immune deficiency syndrome
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHR (2005)	International Health Regulations (2005)
ILC	International Law Commission

ISO	International Organization for Standardization
MERCOSUR	Southern Common Market
MFN	Most-favored-nation
NAFTA	North American Free Trade Agreement
PICTA	Pacific Island Countries Trade Agreement, done at Nauru 18 August 2001
SARS	Sudden acute respiratory syndrome
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS	Sanitary and phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNTOC	United Nations Convention on Transnational Organized Crime
U.S.	United States of America
Vienna Convention	Vienna Convention on the Law of Treaties
WHA	World Health Assembly
WHO	World Health Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

Contents

1

Intersections between Trade and Noncommunicable Disease

1. INTRODUCTION

The impact of the Marrakesh Agreement Establishing the World Trade Organization (WTO) (hereafter WTO Agreement)[1] – and its linkage to other social issues has long been a subject of debate.[2] One aspect of this debate is the linkage of trade and public health. In 2006 the World Health Assembly (WHA) passed a resolution stressing the need for greater coordination in the development of trade and health policies and recognizing the "demand for information on the possible implications of international trade and trade agreements for health and health policy at national, regional and global levels."[3] Following this, in 2007, the foreign ministers of Brazil, France, Indonesia, Norway, Senegal, South Africa, and Thailand issued the Oslo Ministerial Declaration. The declaration affirmed the interconnectedness of trade and health policies "in the formulation of all bilateral, regional and multilateral trade agreements."[4]

More recently, in early 2009, *The Lancet*, a leading public health journal, published a series of papers on trade and health. A number of commentators called for greater interaction between the public health and trade policy communities and for the public health community to play a greater role

[1] Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

[2] See, for example, the "Symposium on the Boundaries of the WTO" in 96(1) *American Journal of International Law*,(January 2002).

[3] Fifty-Ninth World Health Assembly, International Trade and Health – 59/15 available at http://www.who.int/gb/ebwha/pdf_files/WHA59/A59_R26-en.pdf (visited 12/12/07).

[4] "Oslo Ministerial Declaration – Global Health: A Pressing Foreign Policy Issue of Our Time," 369 *The Lancet*, London, (2007), pp. 1371–1378.

in trade policy making.[5] This series of papers was reflective of the trade and health issues that have garnered attention since the conclusion of the Uruguay Round, such as those relating to intellectual property rights and access to medicines[6] as well as trade in health services.[7] These issues have largely arisen by virtue of the post-1994 trade architecture and the conclusion of new agreements like the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS).

Although this focus on new agreements and their impact on health has merit, little attention has been given to the way that changes in public health practice have affected the relationship between trade and health. When the General Agreement on Tariffs and Trade (GATT) 1947 was agreed, the primary focus of public health practice was to address infectious disease. This was also the case in 1994 when the GATT was incorporated into the WTO Agreement. However, over recent years new conceptualizations of public health have expanded the field to encompass efforts to address noncommunicable diseases associated with risk factors such as tobacco consumption, alcohol consumption, and unhealthy diet.

There are at least two obvious points of tension between this new public health and the trade regime. The first is a theoretical tension between trade liberalization and measures to reduce the consumption of certain goods at the population level. The general benefits of liberal trade policies, such as greater competition and lower prices, can translate into negative health consequences. In particular, where increased competition and lower prices stimulate consumption of harmful products, there is likely to be a correlative increase in associated morbidity and mortality. This also has flow-on effects for health systems. Tariffs and subsidies affect the cost of goods, meaning that the use of these instruments can form an important part of the environment in which choices are made about consumption.

For example, a number of studies have offered empirical confirmation of the conclusion that trade liberalization may stimulate demand for tobacco

[5] See, for example, David Fidler, Nick Drager, and Kelley Lee, "Managing the Pursuit of Health and Wealth: The Key Challenges," 373(9660) *The Lancet*, London, (Jan 24–30, 2009), pp. 325–331; Richard D. Smith, Kelley Lee, and Nick Drager, "Trade and Health 6: Trade and Health: An Agenda for Action," 373(9665) *The Lancet*, London, (Feb 28–Mar 6, 2009), pp. 768–773; Rhona MacDonald and Richard Horton, "Trade and Health: Time for the Health Sector to Get Involved," 373(9660) *The Lancet*, London, (Jan 24–30, 2009), pp. 273–274.

[6] Richard Smith, Carlos Correa, and Cecilia Oh, "Trade and Health 5: Trade, TRIPS, and Pharmaceuticals," 363(9664) *The Lancet*, London, (Feb 21–27, 2009), pp. 684–691.

[7] Richard Smith, Rupa Chanda, and Viroj Tangcharoensathien, "Trade and Health 4: Trade in Health-Related Services," 363(9663) *The Lancet*, London, (Feb 14–20, 2009), pp. 593–601.

products. Frank Chaloupka and Adit Laixuthai[8] were the first to address the issue in an examination of the opening of tobacco markets in Japan, Taiwan, South Korea, and Thailand. Chaloupka and Laixuthai concluded that "cigarette consumption was nearly ten percent higher, on average, in 1991 in the four countries whose markets were opened to US cigarettes than it would have been if the markets had remained closed."[9] Similarly, Chee-Ruey Hsieh, Teh Wei Hu, and Chien Fu Jeff Lin[10] examined the impact of the opening of the Taiwanese market to U.S. cigarettes and concluded that "opening the market to cigarette imports led to a 20% increase in per capita cigarette consumption in 1987."[11]

A number of studies have also examined the relationship between general trade openness (using a share of trade in gross domestic product as a measure) and tobacco consumption.[12] In this respect, Craig Depken concluded that the "openness of a country to international trade … causes a decrease in the price of cigarettes."[13] Similarly, Allyn Taylor and others concluded that trade liberalization leads to increased smoking, particularly in low- and middle-income countries that have traditionally been less open.[14] Douglas Bettcher and others drew substantially the same conclusion.[15]

In addition, Bettcher and others found that "increased levels of [foreign direct investment] should lead to higher levels of cigarette consumption."[16]

[8] Frank Chaloupka and Adit Laixuthai, "U.S. Trade Policy and Cigarette Smoking in Asia," NBER Working Paper Series, Working Paper 5543, (April 1996) [hereinafter Chaloupka and Laixuthai, "U.S. Trade Policy"].

[9] Ibid., p. 15.

[10] Chee-Ruey Hsieh, Teh Wei Hu, and Chien Fu Jeff Lin, "The Demand for Cigarettes in Taiwan: Domestic Versus Imported Cigarettes," 17(2) *Contemporary Economic Policy*, (April 1999), pp. 223–234 [hereinafter Hseih, Hu, and Lin, "The Demand for Cigarettes in Taiwan"].

[11] Ibid., p. 231.

[12] Craig Depken, "The Effects of Advertising Restrictions on Cigarette Prices: Evidence from OECD Countries," 6 *Applied Economics Letters*, (1999), pp. 307–309 [hereinafter Depken, "Advertising Restrictions"]; Allyn Taylor, Frank Chaloupka, Emmanuel Guindon et al., "The Impact of Trade Liberalization on Tobacco Consumption" in Prabhat Jha and Frank Chaloupka (eds), *Tobacco Control in Developing Countries*, World Bank and World Health Organization, Oxford University Press, (2000), pp. 343–364 [hereinafter Jha and Chaloupka, *Tobacco Control in Developing Countries*]; Douglas Bettcher, Chitra Subramaniam, Emmanuel Guindon et al., "Confronting the Tobacco Epidemic in an era of Trade Liberalization," WHO Commission on Macroeconomics and Health, World Health Organization, (2001), CMH Working Paper Series, WG 4: 8 [hereinafter Bettcher et al., "Confronting the Tobacco Epidemic"].

[13] Depken, "Advertising Restrictions," p. 308.

[14] Taylor et al., "The Impact of Trade Liberalization on Tobacco Consumption," p. 360.

[15] Bettcher et al., "Confronting the Tobacco Epidemic," p. 51.

[16] Ibid., p. 52.