

**INTERNATIONAL TRADE AGREEMENTS
AND TOBACCO CONTROL:

THREATS TO PUBLIC HEALTH AND
THE CASE FOR EXCLUDING TOBACCO
FROM TRADE AGREEMENTS**

November 2003, v 2.0

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1. OVERVIEW

National tobacco control efforts are now inextricably bound with international trade and trade rules.

Over the last decade, countries have entered into a wide array of trade agreements that cover matters far beyond tariff levels on imported goods. These agreements establish rules related to everything from a country's trademark protections to its food safety regulations, from health insurance to truck safety standards; and they obligate countries to adjust their domestic laws and regulations to comport with the trade pacts' rules. The agreements feature strong enforcement mechanisms, and countries that violate the agreements risk facing costly trade sanctions.

These trade agreements have the potential to interfere with and undermine sound tobacco control policy measures, including:

- * Warning labels
- * Ingredient disclosure requirements
- * Bans on misleading descriptors ("light," "mild," "low")
- * Tobacco tariff and tax policy
- * Cigarette content regulation
- * Advertising and marketing restrictions
- * Clean indoor air rules
- * Restrictions on retail distribution networks for tobacco products

This briefing paper argues that tobacco should be excluded from all current and future trade agreements. Trade agreements are designed to promote international trade, but expanded trade in tobacco products is harmful to public health. Recent trade agreements have not only set the terms for tariffs on tobacco products, they have restrained countries' ability to adopt health and safety regulations, including the stringent public health regulations vital to controlling the tobacco epidemic. The new round of trade agreements also

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include special provisions which give investors -- including Philip Morris, British American Tobacco (BAT) and Japan Tobacco International -- standing to challenge governmental regulations directly and seek compensation for profits lost due to rules that do not comply with strict investment obligations.

The paper explains how, in a variety of ways, trade agreements may undermine tobacco control efforts. Trade agreements commonly require the lowering of tariffs and removal of restrictions on foreign imports, including on tobacco products. But trade agreements' non-tariff provisions are equally as worrisome. Agreements on intellectual property, technical barriers to trade, services and investment may all provide the basis to challenge sound tobacco control rules. Tobacco companies have already used these agreements to contest an array of tobacco control policies, though few formal tobacco-related trade disputes have been actually litigated.

Challenges to tobacco control policy under trade rules appear to be well grounded in reasonable interpretations of trade agreements. The prospect of such challenges, and the possibility of their success, may chill many countries from proceeding to enact sound tobacco control policies. The Framework Convention on Tobacco Control provides a significant counterweight that should help countries defend tobacco control regulations against trade challenges, but even it does not offer certain security.

This paper first surveys the trade agreement landscape, and reviews the political strategy surrounding new trade negotiations. Then it considers the ways that various trade agreement provisions may conflict with tobacco control programs. It next explains an important effect of the agreements beyond their substantive obligations and enforcement scenarios: the chilling impact on country adoption of public health rules in the face of fear of trade challenges. The trade agreements do include minimal exceptions for public health; the paper next examines these exceptions, and considers how the FCTC will interact with trade agreements, and the extent to which it provides safe haven to countries complying with its terms. Next, the paper briefly recounts current U.S. law on trade and tobacco. It concludes by arguing that tobacco products should be excluded from trade agreements.

2. GLOBAL TRADING RULES AND THE TRADE AGREEMENT LANDSCAPE

An array of international trade and investment agreements establish the rules of the worldwide trading system.

The World Trade Organization (WTO) is a global organization with more than 140 members, including all of the world's significant economies other than Russia.² The WTO administers more than a dozen trade agreements. These cover tariffs for industrial and agricultural products, but also a host of non-tariff issues, including plant and animal safety rules, "technical barriers to trade" --

² http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

meaning various product-related regulations, rules -- and regulations covering services, government procurement, investment rules and intellectual property. WTO rules apply both to federal and subfederal governments (states, provinces, counties and cities).

The WTO is backed up by a very strong enforcement mechanism.³ It enables countries to challenge other countries' laws and regulations before WTO dispute settlement panels. These panels are composed of trade experts with no background in public health.⁴ No conflict-of-interest disclosure requirements or rules proscribing certain conflicts apply;⁵ and panel opinions are anonymous, so there is no way to know which panelists joined the majority and which dissented.⁶ The adjudications are closed to the public and media, and documents submitted to the panels are confidential.⁷ Losing parties may appeal to an internal WTO Appellate Body; the Appellate Body's decision is final, unless rejected by consensus of every WTO member, including the complaining country.⁸

A country whose laws have been found contrary to WTO rules must either change its laws, or face trade sanctions or fines equal to the amount of the harm (measured as lost market opportunities) to other countries.⁹ Sanctions may be levied against any industrial sector (not just an offending one), any state (not just an offending one) or against a country as a whole.¹⁰

Also on the trade system landscape are a series of bilateral and regional agreements, perhaps the most prominent of which is the North American Free Trade Agreement (NAFTA). The most important of these agreements cover most of the same areas as the WTO, and feature similar enforcement mechanisms. If reached between WTO members, these bilateral and regional agreements can only be stronger than the WTO agreements, which impose minimum obligations on all members. Thus regional agreement members may decide to cut tariffs below the levels mandated by the WTO, but they cannot raise them above the WTO levels. They may require stronger intellectual property or investment protections, but not weaker.

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

³ Understanding on Rules and Procedures Governing the Settlement of Disputes (World Trade Organization) ("Dispute Settlement Understanding").

⁴ Dispute Settlement Understanding, Article 8.

⁵ Dispute Settlement Understanding, Article 8.

⁶ Dispute Settlement Understanding, Article 14.

⁷ Dispute Settlement Understanding, Appendix 3, Working Procedures Paragraph 2.

⁸ Dispute Settlement Understanding, Article 17.14.

⁹ Dispute Settlement Understanding, Article 22.

¹⁰ Dispute Settlement Understanding, Article 22.3.

Thailand have just been announced, with more such announcements involving other countries expected soon.

The United States is not alone in pushing forward with regional trade agreements. Many developing countries are already members of regional economic groupings, some of which are only loose associations and some of which have taken or are taking steps to promote genuine regional economic integration. Many of these regional groupings do not include elaborate WTO-style rules for nontariff issues, but some do; and increasing numbers of these agreements include tariff reduction policies that may include tariffs on tobacco products. Meanwhile, the European Union is also negotiating economic pacts with developing countries, though typically it is employing a different model than that of the U.S. free trade agreements.

3. THE GAMESMANSHIP OF TRADE NEGOTIATIONS

The present U.S. negotiating strategy is to focus attention away from the WTO and on to bilateral and regional trading agreements.¹¹

With fewer parties involved in these negotiations, the U.S. is more able to set the terms of debate. Smaller countries on their own or in small groups have little capacity to do hard negotiating, and in many cases they are extremely eager to enter into agreements with the United States, hoping that they will offer improved market access that will in turn buffet their economies.

Substantively, the U.S. seeks to adopt provisions that go beyond those of the WTO -- such as more stringent intellectual property terms and investment obligations that are not included in the WTO.

Eventually, U.S. negotiators hope to have entered into enough bilaterals and regionals, covering enough of the globe, to have changed international norms. Then they will be able to return to the WTO with what will be a *fait accompli* for much of the world -- and simply advocate that this emerging global norm be extended to those not already covered. Countries already obligated to these new rules will have little incentive to contest their inclusion in the WTO, and thus the developing country bloc to offset rich country negotiating leverage will be significantly diminished.

Even where the provisions of the bilaterals and regionals overlap with the WTO, there is cause for concern. If provisions in the WTO were reformed -- for example, if a health exception were added to the TRIPS -- the reform would not apply to the corresponding provisions of the bilaterals and regionals.¹²

¹¹ Robert Zoellick, "America will not wait for the won't-do countries," *Financial Times*, September 22, 2003, p. 23.

¹² This is a very real problem. Following a special agreement relating to TRIPS on the export of pharmaceuticals, Canada has sought to implement the agreement -- but has been fearful of violating NAFTA obligations based on almost identical language as appears in the TRIPS. Heather Scofield and Steven Chase, "Canada to seek assent on AIDS drug plan: NAFTA could

Many developing countries are looking to regional integration either as a complement or alternative to agreements with the United States or other major economic powers. While many developing countries are eager to enter into agreements with the United States to gain market access, primarily for agricultural goods and textiles, they are also fearful of putting their industries in competition with powerful multinationals from rich countries. Regional agreements offer an alternative approach to expanding markets, with neighboring countries typically of similar economic strength. Combining forces as a regional bloc also strengthens developing country negotiating capacity with rich nations in either the WTO or other trade negotiations.

4. MARKET ACCESS, TARIFFS AND TOBACCO

It is now well established that opening domestic markets to tobacco product imports increases smoking rates and consumption. The market opening leads to enhanced price and product competition and intensified marketing efforts.

"Reductions in the barriers to tobacco-related trade will likely lead to greater competition in the markets for tobacco and tobacco products [and] reductions in the prices for tobacco products," according to a World Bank report. "Given the inverse relationship between price and consumption ... cigarette smoking and other tobacco use will likely increase under this scenario as tobacco markets become more open. As a result, the death and disease from tobacco use will also increase."¹³

In the 1980s, the Office of the U.S. Trade Representative (USTR), working hand-in-glove with U.S. tobacco companies, used the threat of trade sanctions to pry open key markets in Japan, Taiwan, South Korea, and Thailand.¹⁴

The opening of Asian markets to U.S. cigarettes escalated Asian smoking rates 10 percent above what they would have been, according to the World Bank.¹⁵

The effects in East Asia after the U.S. market-opening offensive were particularly serious among teens and women, who have low smoking rates in many developing countries, and who the multinationals have expertise in inducing to smoke. A GAO study cited survey results showing that, after South Korea opened its market to U.S. companies in 1988, the smoking rate among male Korean teens rose from 18.4 percent to 29.8 percent in a single year. The rate among female teens more than quintupled from 1.6 percent to 8.7 percent.¹⁶

snag exports to poor nations," *The Globe and Mail*, October 7, 2003.

¹³ Allyn Taylor, Frank J. Chaloupka, Emmanuel Guindon and Michaelyn Corbett, "The Impact of Trade Liberalization on Tobacco Consumption," in Prabhat Jha and Frank Chaloupka, eds., *Tobacco Control in Developing Countries*, Washington, D.C.: World Bank, 2000., pp. 345-346.

¹⁴ Glenn Frankel, "U.S. Aided Cigarette Firms in Conquests Across Asia," *The Washington Post*, November 17 1996, page A1.

¹⁵ World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, Washington, D.C.: World Bank: 1999, Chapter 1.

Price competition and advertising -- the introduction of slick promotional strategies that link cigarettes with notions of sophistication, freedom, and "hipness" and a heavy linkage between smoking and sports and popular entertainment -- appear largely responsible for this rise.¹⁷ Foreign imports and investment may also increase smoking rates by introducing "smoother" brands that are more attractive to new smokers, and by creating a powerful political lobby against tobacco control measures.

Market access for foreign tobacco products varies considerably around the world. Tariffs remain significant in many cases, reducing the level of market competition. Tariff reductions as part of the ASEAN Free Trade Area (AFTA) are requiring Thailand, which maintains a low-advertising government-owned tobacco monopoly that dominates the Thai market, to apply minimal tariffs to imports of Philip Morris and BAT products from within the region. Both companies have recently invested in production facilities in the region to jump the regional tariff walls and benefit from the low in-region tariffs. The result is growing market share for the multinationals' products, and growing worries that political pressures will mount to scale back Thailand's world-leading marketing restrictions and tobacco control measures.¹⁸

5. INTELLECTUAL PROPERTY PROTECTIONS

The WTO and most bilateral and regional trade agreements require member countries to provide strong protections for intellectual property -- patents, copyright, trademark and trade secrets.¹⁹ The WTO's intellectual property rules are contained in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

These agreements establish the scope and nature of protections that must be provided, as well as the term of protection.

In the area of trademark, TRIPS establishes that any sign capable of distinguishing the goods or services of an undertaking is eligible for trademark registration.²⁰ Trademark holders are given exclusive right to prevent others from using the trademark for similar goods and services and where such use would result in a likelihood of confusion.²¹ TRIPS requires that trademarks be granted

¹⁶ U.S. General Accounting Office. Trade and health issues: dichotomy between US tobacco export policy and antismoking initiatives. Washington DC: US General Accounting Office, 1990.

¹⁷ Allyn Taylor, Frank J. Chaloupka, Emmanuel Guindon and Michaelyn Corbett, "The Impact of Trade Liberalization on Tobacco Consumption," in *Tobacco Control in Developing Countries*, p. 346.

¹⁸ See Ashaluck Bhatiasevi, "Tobacco firms eye Afta avenue / Tax exemption may boost availability," Bangkok Post, January 10, 2000; Achara Deboonme, "Philip Morris aligns for Afta benefits," The Nation (Bangkok), October 21, 1999; P Vateesatokit, B Hughes, B Ritthphakdee, "Thailand: winning battles, but the war's far from over," *Tobacco Control* 2000;9:122-127; Action on Smoking and Health Foundation Thailand, "Tobacco Control Measures: Trade Agreements," at <<http://www.tobaccofreeasia.net/menu2/Trade%20Agreements.htm>>.

¹⁹ Agreement on Trade-Related Intellectual Property Rights (World Trade Organization).

²⁰ TRIPS, Article 25.1.

²¹ TRIPS, Article 16.1

for a term of no less than seven years, and be indefinitely renewable.²² TRIPS mandates that "the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements."²³

The TRIPS provision on trade secrets stipulates that businesses have the right to maintain trade secrets, so long as 1) the information is secret, in the sense of not being known or accessible to persons who deal with the kind of information in question; 2) the information has commercial value because it is secret; and 3) the party controlling the information has taken reasonable steps to keep the information secret.²⁴

TRIPS and other agreements also mandate that countries maintain robust domestic systems of intellectual property rights enforcement, with strong powers granted to private parties seeking to enforce their intellectual property rights. WTO members must have civil judicial procedures available to rights holders.²⁵ Judicial authorities hearing disputes must have authority to issue injunctions to stop alleged infringements of intellectual property rights.²⁶ And authorities must have the right to order payment of damages for infringements,²⁷ as well as to order disposal of any infringing goods.²⁸

On several occasions, the tobacco companies have invoked trade agreement intellectual property protections to challenge tobacco control regulations.

They have argued in Canada, Brazil, Thailand and elsewhere that plain packaging requirements for cigarette packaging or even large health warnings encumber their trademarks, and undermine the very purpose of trademarks, to provide easily determinable distinguishing marks for one company's product over another.²⁹

When Canada considered adopting a rule mandating plain packaging for cigarettes, R.J. Reynolds and Philip Morris commissioned a legal opinion on the issue from Carla Hills, the former U.S. Trade Representative. Hills concluded that "a plain packaging proposal would infringe the trademark rights of foreign investors who own or control the trademarks on cigarettes sold in Canada, in violation of the Government of Canada's obligations under: 1) the Paris Convention for the Protection of Industrial Property; 2) the North American Free

²² TRIPS, Article 18.

²³ TRIPS, Article 20.

²⁴ TRIPS, Article 39.2.

²⁵ TRIPS, Article 42.

²⁶ TRIPS Article 44.

²⁷ TRIPS Article 45.

²⁸ TRIPS Article 46.

²⁹ See Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994, pp. 1-2. ("It is important to note that in terms of providing for general exceptions from NAFTA obligations for reasons such as health and safety, as set out in NAFTA Article 101(1), Chapter 17 (Intellectual Property) was specifically excluded.")

Trade Agreement ('NAFTA'); and 3) the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods ('TRIPS') contained in the recently signed Final Act embodying the results of the Uruguay Round Multilateral Trade Negotiations."

In assessing NAFTA, Hills argued, "The proposal would seriously diminish the integrity of the trademark and substantially degrade the value of the distinctive packaging, or trade dress, in which the companies have invested heavily over the years. Therefore the proposal would deny adequate and effective protection to basic trademark intellectual property rights in violation of NAFTA Article 1701."³⁰

Hills made similar arguments concerning TRIPS: "The plain packaging requirement violates TRIPS Articles 16 and 20. Plain packaging for all cigarettes would result in exactly the type of confusion proscribed by paragraph (1) of Article 16 of the Agreement, since the appearance of the products would be substantially similar regardless of the manufacturer. Plain packaging would also be a special requirement which would unjustifiably encumber the use of a trademark in violation of Article 20 in absence of evidence that such measure was justified."³¹

BAT, Imperial Tobacco and Japan Tobacco have similarly argued that European warning label requirements violate the companies' trademark rights, by encumbering their use of cigarette packaging to display trademarks and distinguish their products. The European Court of Justice rejected the companies' intellectual property claims,³² but specified that it was not governed by TRIPS in its determination.³³

³⁰ See Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994, p. 13.

³¹ Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994, p. 17.

³² The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT International SA), 2002, Case C-491/01, Paragraph 150 ("As paragraphs 131 and 132 above make clear, the only effect produced by Article 5 of the Directive is to restrict the right of manufacturers of tobacco products to use the space on some sides of cigarette packets or unit packets of tobacco products to show their trade marks, without prejudicing the substance of their trademark rights, the purpose being to ensure a high level of health protection when the obstacles created by national laws on labelling are eliminated. In the light of this analysis, Article 5 constitutes a proportionate restriction on the use of the right to property compatible with the protection afforded that right by Community law.")

³³ The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT International SA), 2002, Case C-491/01, Paragraph 154 ("With regard, finally, to the validity of the Directive in the light of Article 20 of the TRIPs Agreement, the Court has consistently held that the lawfulness of a Community measure cannot be assessed in the light of instruments of international law which, like the WTO Agreement and the TRIPs Agreement which is part of it, are not in principle, having regard to their nature and structure, among the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions."); Opinion of Advocate General Geelhoed, The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT

The companies have also claimed that efforts to ban the use of the terms "light" "mild" and "low" may infringe trademark rights, because those terms are incorporated into cigarette names.

In late 2001, Canada proposed health regulations to prohibit the use of the terms "light" and "mild" on tobacco packaging. Canada proposed the regulation in response to a consensus among public health experts that the "mild" and "light" descriptors are fundamentally misleading. "Mild" and "light" cigarettes are not less hazardous to smokers' health, in part because it has been determined that smokers compensate for reduced tar and nicotine by inhaling more deeply, covering the "vents" on filters and by other means.³⁴

In announcing the regulatory proposal, Canada's health department cited survey data suggesting that more than a third of smokers of "light" or "mild" cigarettes choose these products for health reasons.³⁵

In comments produced in response to a U.S. announcement of the regulation -- after the Canadian notice and comment period had concluded -- Philip Morris disclaimed any health benefits for "light" or "ultralight" cigarettes, and agreed that "consumers should not be given the message that descriptors means that any brand of cigarettes has been shown to be less harmful than other brands."³⁶

But the company insisted it should still be able to use the terms, which it alleged communicate differences of taste to consumers. Barring use of the terms, Philip Morris argued, would violate Canada's obligations under the WTO and NAFTA.

Philip Morris argued, "Article 20 of the TRIPS Agreement provides as follows:

The use of trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in special form or use in a manner detrimental to

International SA), 2002, Case C-491/01, paragraphs 257 ("The Court has ruled on more than one occasion that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court may review the legality of measures adopted by the Community institutions.").

³⁴ See Donald Shopland, editor, "Risks Associated with Smoking Cigarettes with Low Tar Machine-Measured Yields of Tar and Nicotine," Washington, D.C.: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, 2001, <<http://cancercontrol.cancer.gov/tcrb/monographs/13>>; "Findings of the International Expert Panel on Cigarette Descriptors," p. 8. <http://www.hc-sc.gc.ca/english/pdf/media/cig_descrip_rep2.pdf>.

³⁵ "Findings of the International Expert Panel on Cigarette Descriptors," <http://www.hc-sc.gc.ca/english/pdf/media/cig_descrip_rep2.pdf>.

³⁶ "WTO members may adopt measures necessary to protect public health, but only if those measures are 'consistent with the provisions of the [TRIPS] Agreement.' TRIPS Art. 8. Because the proposed ban would violate Article 20, it plainly is not consistent with TRIPS." For more on the public health exception to TRIPS, see section __ below.

Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information foreign Trade Notification No. G/TBT/N/CAN/22, (undated), p. 4.

its capability to distinguish the goods or services of undertaking from those of other undertakings.

Prohibiting the use of descriptive terms in tobacco trademarks would violate Article 20. The proposed ban unquestionably would constitute a 'special requirement' that would encumber the use and function of valuable, well known tobacco trademarks. A ban would substantially impede the ability of manufacturers to distinguish regular, full flavor brands from their low yield counterparts."³⁷

The company claimed that the "descriptive terms such as 'lights' are an integral part of [its] registered trademarks" for products such as Benson & Hedges Lights and Rothmans Extra Light.³⁸

Japan Tobacco has similarly protested a European ban on descriptors as an infringement of its trademark rights, joining a case filed by BAT and Imperial Tobacco in the European Court of Justice.³⁹ The BAT/Imperial Tobacco case turned mostly on matters related to European Union regulatory powers, but Japan Tobacco did introduce the trademark issue. The European Court of Justice rejected Japan Tobacco's intellectual property claim,⁴⁰ but specified that it was not governed by TRIPS in its determination.⁴¹ In other words, the decision was not a determination of the TRIPS-legality of the European ban on descriptors.

³⁷ Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information foreign Trade Notification No. G/TBT/N/CAN/22, (undated), p. 9.

³⁸ Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information foreign Trade Notification No. G/TBT/N/CAN/22, (undated), p. 4.

³⁹ Japan Tobacco International, "JT and JTI launch legal challenge against EU tobacco Directive (news release, September 20, 2001, <
http://www.jti.com/english/press_room/press_releases/pr_article_20_09_2001.aspx) ("The intent of Article 7 of the Directive seems to be to ban the term 'Mild' in Mild Seven. This would preclude JT and JTI from having in Europe the benefit of the acquired intellectual property established in the Mild Seven trademark, and cause severe damage to the global value of the brand as it will no longer be possible to develop and market it as such."). See also Japan Times, "New EU law may stop Japan Tobacco from marketing top brands" March 1, 2001.

⁴⁰ The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT International SA), 2002, Case C-491/01, Paragraphs 151-153; Opinion of Advocate General Geelhoed, The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT International SA), 2002, Case C-491/01, paragraphs 268-269. ("I take the view that Article 7 is none the less not at variance with the right of (intellectual) property. In reaching this view I do not base myself on an assessment as to whether the very substance of the use of the trademark right is being undermined in this case, but rather reason on the basis of the trademark right itself. That right is not inviolable in se. Community legislation on trademark rights already provides for a number of individual grounds of invalidity. In this case, particular significance attaches to Article 3(1)(g) of Directive 89/104 on trademarks. Under that provision, trademarks which are of such a nature as to deceive the public are liable to be declared invalid.") See also Japan Tobacco International, "JT and JTI Disagree with European Court of Justice Decision," December 10, 2002, <
http://www.jti.com/english/press_room/press_releases/pr_article_10_12_2002.aspx>.

⁴¹ See note __ above

Finally, tobacco companies have claimed in Thailand and elsewhere that efforts to require disclosure to government agencies of cigarette ingredients, and public disclosure of the ingredient list, violates trade secret protections mandated by intellectual property agreements.

Under trade agreement rules, these are all strong arguments.

6. TECHNICAL BARRIERS TO TRADE

The WTO's Technical Barriers to Trade (TBT) Agreement establishes international rules relating to how, under what circumstances, and with what restrictions countries can establish technical regulations concerning products or processes related to products.⁴² Technical regulations may cover such matters as health and safety, environmental and consumer regulations.

The TBT agreement specifically permits countries to enact technical regulations for the purpose of protecting human health, but it defines two narrow parameters for the establishment of such standards. First, technical regulations must not be more trade restrictive than necessary to achieve a public health or other objective.⁴³ Under this standard, countries whose technical regulations are challenged must show that there is no other way to achieve their objective which would interfere less with trade. Second, where international standards exist, or their adoption is imminent, countries must use them, unless they can meet very stringent tests.⁴⁴

Philip Morris has argued that a Canadian ban on the use of the terms "mild" and "light" violates technical barriers to trade rules under NAFTA, on the grounds that they are not the least trade restrictive means to pursue the objective of ensuring consumers are not misled into believing there is a health benefit to products labeled "mild" or "light." "Canada could invoke the ban to bar the potential sale or licensing for sale in Canada of popular brands sold in the United States and elsewhere under trademarks containing descriptive terms such as 'light' and 'ultralight,'" asserted Philip Morris in its comments on the Canadian ban. "Moreover, because reasonable regulatory alternatives to a ban exist, any such barrier would be wholly unnecessary."⁴⁵

⁴² A technical regulation is a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, and which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, making or labelling requirements as they apply to a product, process or production method." Agreement on Technical Barriers to Trade, Annex 1.1. For a discussion of the broad reach of the Agreement on Technical Barriers to Trade, see European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, March 12, 2002, WT/DS135/AB/R, paragraphs 66-70.

⁴³ Agreement on Technical Barriers to Trade, Article 2.2.

⁴⁴ Agreement on Technical Barriers to Trade, Article 2.4.

⁴⁵ Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information foreign Trade Notification No. G/TBT/N/CAN/22, p. 10.

The exact same arguments can be made about plain paper packaging or labeling requirements.

The least trade restrictive obligation might prove a significant obstacle to efforts to regulate cigarette product content or other product regulations. For example, suppose, as some tobacco control advocates have urged, a country's regulators sought to require the progressive diminishment of nicotine levels in cigarettes (with the goal of making them less addictive) while also permitting the sale of other nicotine delivery devices (with the goal of preventing smokers from compensating by smoking more to achieve the same level of nicotine). A foreign tobacco company might argue that these regulations discriminated against foreign cigarette makers (despite the fact that the rule would apply equally to local manufacturers, if there were any), on the grounds that less trade restrictive alternatives (e.g., excise taxes) exist to achieve the objective of reducing smoking rates. They might also claim that such measures were not necessary to achieve a public health purpose.

The TBT agreement might also be invoked to protest smokefree air rules.⁴⁶ The American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) is a professional organization that sets voluntary standards for ventilation. These are typically adopted by American National Standards Institute (ANSI), a voluntary standard-setting organization, as the industry norm, and are often incorporated into city ordinances. Because of their widespread adoption, ASHRAE ventilation standards could be argued to constitute an international norm. ASHRAE's current standard on ventilation applies only to smokefree areas, but there are ongoing efforts by the tobacco industry and restaurant and bar associations to urge the association to adopt a standard for smoking areas.⁴⁷ If the industry were to succeed, it could then argue under the TBT Agreement that smoke-free regulations exceeded the global standard. That the tobacco industry may exercise influence over the setting of ASHRAE standards would not affect ASHRAE's status as an international standard-setting organization. If such an argument succeeded, a country seeking to adopt more stringent standards -- a smoke-free rule -- would have to meet the very tough WTO test of showing the international standard was inappropriate due to fundamental climatic or geographical factors or fundamental technological problems.⁴⁸ The problem would be more severe for an effort to promote outdoor smokefree areas, for all of the same reasons.

⁴⁶ There is an argument that smokefree rules are not a technical regulation, but since they relate to how a product (cigarettes and other tobacco products) are used, they may be considered a related "process" under the definition of a technical regulation provided in Annex 1.1. See note ___ above.

⁴⁷ "Schoen: the Ins and Outs of Standard 62" (interview), State Health Notes, November 4, 2002.

⁴⁸ Moreover, the fact that the Framework Convention on Tobacco Control does not specify a smokefree standard -- only calling on parties to adopt measures to protect persons from "exposure to tobacco smoke in indoor workplaces" and elsewhere (Framework Convention on Tobacco Control, Article 8) -- may be used by tobacco companies to argue that a smokefree standard exceeds that recommended by the global tobacco treaty. See ___ below for further discussion of the Framework Convention.

In general, although there is overwhelming evidence of the harms of exposure to second-hand smoke,⁴⁹ the industry continues to challenge the science over modes of limiting exposure. The allegation of scientific uncertainty in this area are important, because the Agreement on Technical Barriers to Trade requires technical regulations to be based on available scientific information.⁵⁰

A final conflict between Agreement on Technical Barriers to Trade and tobacco control measures may involve measuring the components of tobacco smoke, a controversial area in part because of the mechanisms smokers use to compensate for filters. The International Standards Organization sets standards in this area,⁵¹ but public health organizations and agencies have been critical of some of its approaches. However, the TBT Agreement requires deference to ISO standards.⁵²

7. SERVICES

The WTO's services agreement, known as GATS (General Agreement on Trade in Services) is presently a relatively weak treaty, with many countries and various kinds of services excluded from its scope. But negotiations are underway to progressively strengthen it.

GATS covers trade in services, as opposed to goods. Services include sectors such as retail distribution, advertising, transportation, energy provision, healthcare, and delivery. (A non-technical definition: a commercially traded thing that you can drop on your foot is a good; the rest are services.)

For areas that are covered, GATS requires countries to permit foreign companies to provide services on terms that are no different than for domestic firms.⁵³ In many cases, this will mean that firms must be permitted to operate in foreign borders, including through retail and distribution networks (think of UPS: to operate in a foreign country, it must be able to maintain storefront shops, handling and distribution centers, delivery trucks, etc.). The GATS nondiscrimination and national treatment rules may also be interpreted so that national laws and regulations may be considered discriminatory if they have a

⁴⁹ Philip Morris's position on the issue: "Public health officials have concluded that secondhand smoke from cigarettes causes disease, including lung cancer and heart disease, in non-smoking adults, as well as causes conditions in children such as asthma, respiratory infections, cough, wheeze, otitis media (middle ear infection) and Sudden Infant Death Syndrome." See www.pmusa.com/health_issues/secondhand_smoke.asp.

⁵⁰ Agreement on Technical Barriers to Trade, Article 2.2.

⁵¹ For example, see ISO 4388: 1991, "Cigarettes – Determination of the smoke condensate retention index of a filter – Direct spectrometric method."

⁵² Agreement on Technical Barriers to Trade, Article 2.4. See also Agreement on Technical Barriers to Trade, Annex 1.

⁵³ "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords its own like services and service suppliers." General Agreement on Trade in Services, Article 17.1.

disproportionate effect on foreign firms -- even if they apply equally to national and foreign firms.⁵⁴

For areas that are covered, GATS also precludes countries from maintaining national monopolies or limits on the number of service providers.⁵⁵

GATS rules could be used to challenge national advertising bans or restrictions, particularly restrictions that apply to certain forms of advertising but not others. A foreign advertising company that specializes in making television ads for tobacco companies might argue that an advertising ban unfairly discriminates against foreign advertising agencies. This argument would be strengthened if the ad company were complaining about a television advertising ban that did not extend to other media, and if foreign companies had a disproportionately larger share of the television advertising market. The challenging company might claim that it was not receiving equally favorable treatment as domestic advertising companies, even though the advertising restrictions applied equally to foreign and domestic firms.

Efforts to restrict distribution outlets for tobacco products would likely run afoul of strengthened GATS rules. If a country, for example, decided that tobacco products should only be sold through government distribution centers, a foreign company that retailed cigarettes could argue that this unfairly discriminated against them and violated a country's GATS market access obligations.⁵⁶ 7-Eleven, for example, is a major multinational company, with four times as many stores outside of North America as within the United States and Canada. As a major cigarette seller, it would be well positioned to challenge efforts to restrict retail distribution of cigarettes and tobacco products.

8. INVESTMENT PROTECTIONS

Particularly worrisome trade agreement provisions provide broad and intrusive protections for foreign investors. The WTO contains only a very weak investment agreement that poses little concern, in present form. But NAFTA contains very strong investment provisions, known as Chapter 11, the section of the agreement where the investment provisions appear. Free Trade Area of the Americas negotiators are debating adoption of Chapter 11-style provisions.

⁵⁴ "A Member may meet the requirement of [national treatment in Article 17.1] by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords its own like services and service suppliers." General Agreement on Trade in Services, Article 17.2.

⁵⁵ "In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as ... limitations on the number of service providers whether in the form of numerical quotas, monopolies, exclusive service providers or the requirements of an economic needs test." General Agreement on Trade in Services, Article 16.2(a).

⁵⁶ Because GATS only applies to sectors that WTO members each individually agree will be covered, this scenario will only apply to countries that have agreed to GATS coverage of their retail distribution services.

Chapter 11 contains two key features. First, it provides an array of very strong protections against government action or regulation that might affect foreign investors. These include "national treatment" obligations -- prohibiting countries from giving preferential treatment to domestic firms over foreign investors.⁵⁷ But they go far beyond the standard national treatment provisions of other trade provisions. They also include proscriptions against "performance requirements" -- obligations that investors undertake certain actions as a condition of making investments (for example, to train local staff for managerial positions).⁵⁸ And they prohibit "expropriation," or actions "tantamount" to expropriation, except for public purpose and with fair market value compensation.⁵⁹ "Expropriation" in NAFTA and FTAA terms is roughly equivalent to the U.S. constitutional concept of "takings," and is inclusive of an extremely broad definition of regulatory takings. Like other trade agreement provisions, the investment protections often proscribe even government action that applies evenly to foreign and domestic firms.

The second key feature of Chapter 11 is that it permits investors directly to bring suit against, and seek compensation from, governments that have infringed on their investment rights. Other provisions of NAFTA and most trade agreements enable only countries to bring challenges against other countries. The investor-to-state element of the investment chapter (as opposed to the state-to-state framework for most trade agreement provisions) removes some of the political checks on filing challenges.

NAFTA Chapter 11 has provided the basis for a number of eyebrow-raising cases. In the largest Chapter 11 suit yet brought against the United States, the Canadian corporation Methanex in 1999 sued the U.S. government for \$970 million because of a California executive order phasing out the sale of a Methanex product. Methanex claims that California's phase-out of methyl tertiary butyl ether (MTBE), a gasoline additive, violates the company's special investor rights granted under NAFTA because the California environmental policy limits the corporation's ability to sell MTBE. MTBE poisons groundwater. Methanex says that instead of banning MTBE, California should enforce rules prohibiting improper disposal.⁶⁰ This case is pending.

The MTBE case is reminiscent of a 1998 case brought against Canada by the U.S.-based Ethyl Corporation. In that case, Ethyl sued Canada for \$250 million after Canada banned the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT) because of health risks. The state of California had banned MMT and the U.S. Environmental Protection Agency (EPA) was working on a similar regulation. Ethyl claimed the Canadian ban violated NAFTA because it

⁵⁷ North American Free Trade Agreement, Article 1102.

⁵⁸ North American Free Trade Agreement, Article 1106.

⁵⁹ North American Free Trade Agreement, Article 1110.

⁶⁰ In the Matter of a Claim Under Chapter 11, Section A of the North American Free Trade Agreement and In the Matter of an Arbitration Under UNCITRAL Arbitration Rules, Between Methanex Corporation and the United States of America, Statement of Claim, December 3, 1999.

"expropriated" future profits and damaged Ethyl's reputation.⁶¹ After learning that the NAFTA tribunal was likely to rule against its position, the Canadian government revoked the ban, paid Ethyl \$13 million for lost profits to date, and, as part of a settlement with Ethyl, agreed to issue a public statement declaring that there was no evidence that MMT posed health or environmental risks.⁶²

In another pending case, the U.S.-based United Parcel Service (UPS) is pursuing a NAFTA Chapter 11 case against Canada for \$100 million, arguing that the Canadian postal service's involvement in the courier business infringes upon the profitability of UPS operations in Canada.⁶³ Canada Post is a government-owned corporation that does not receive public subsidies. Nevertheless, in this case, the first NAFTA investor-to-state case against a public service, UPS claims that by integrating the delivery of letter, package and courier services, Canada Post has cross-subsidized its courier business in breach of NAFTA rules. For example, UPS argues that permitting consumers to drop off courier packages in Canada Post letter mail postal boxes unfairly advantages Canada Post as against other courier services.⁶⁴ This case is still pending.

Applied in the context of the tobacco industry, investment protections are obviously quite worrisome.

They give Philip Morris, BAT and the rest of the industry direct standing to invoke trade agreements to challenge national law, overcoming the political reluctance of most governments to advocate aggressively on behalf of cigarette companies.

The substantive provisions of the agreements provide considerable fodder for the industry.

⁶¹ Statement of Claim between Ethyl Corporation v. Government of Canada, . A key part of the Ethyl claim was that Canada's regulatory action injured and was an expropriation of Ethyl's global goodwill. ("The reckless behaviour of the Government of Canada has adversely affected the company's goodwill both inside and outside Canada. ... The damage to the commercial reputations of Ethyl and Ethyl Canada by the defamatory statements of Canadian officials constitute expropriation as defined in the NAFTA of the goodwill of Ethyl Canada." Paragraphs 25-26)

⁶² Robert Weissman, "Expropriation Madness," *Multinational Monitor*, July/August 1998.

⁶³ Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between United Parcel Service of America, Inc. and Government of Canada, April 19, 2000.

⁶⁴ Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between United Parcel Service of America, Inc. and Government of Canada, April 19, 2000, paragraphs 154-155 ("The Government of Canada has transferred a substantial infrastructure worth approximately 3.1 billion dollars to Canada post that was established for the provision of basic postal services pursuant to the Canada Post Act. From the red letter mailboxes, to the mail trucks that empty the red letter boxes, to the sorting and distribution facilities, to the letter carrier who delivers Canada Post products to the customers' door, this infrastructure or network has been built up over the past 100 years to support the letter mail monopoly service. The price of each stamp is intended to continue to support that service. This long-established infrastructure is Canada Post's biggest advantage over courier industry competitors such as UPS Canada.")

Each of the potential intellectual property claims of the industry -- on warning labels, bans on "light," "mild" and "low," and ingredient disclosure -- can be recast as an expropriation. Carla Hills made such an argument concerning plain paper packaging in the RJR/Philip Morris memorandum.⁶⁵

In its comments on Canada's proposal to ban the use of the terms "light" and "mild," Philip Morris alleged a two-fold infringement of Chapter 11 rules.

First, it claimed that "banning these terms would destroy these valuable trademarks and the specific brands and goodwill they represent. Following a ban, the affected trademarks would simply disappear from the Canadian market."⁶⁶ This purported expropriation would be especially costly to the tobacco companies, Philip Morris contended, because they have "invested substantial sums to develop brand identity and consumer loyalty for these low yield products. Moreover, descriptors denote clear taste differences within brand families and have, over the decades, become markers for those taste differences."

Second, Philip Morris claimed that the Canadian ban on "light" and "mild" would violate Canada's obligation under Chapter 11 to provide "fair and equitable treatment" to foreign investors. "Government officials from Canada and the United States (as well as other members of the public health community) actively encouraged tobacco companies to develop and market low yield cigarettes. The Canadian government registered trademarks containing descriptive terms used to identify these products for consumers." Noting that regulations short of a ban were available to the Canadian government, Philip Morris argued that, "under these circumstances, banning the use of descriptive terms would be unfair and inequitable."⁶⁷ That Philip Morris might have influenced governments in these matters, or that the tobacco companies suppressed information known to them about the ineffectuality of low-tar and low-nicotine cigarettes, did not enter into Philip Morris's presentation.⁶⁸

Other pro-tobacco control rules and market arrangements may also run afoul of investment protections. For example, distribution networks favoring national

⁶⁵ Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994, pp. 20-21.

⁶⁶ Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information foreign Trade Notification No. G/TBT/N/CAN/22, p. 7.

⁶⁷ Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information foreign Trade Notification No. G/TBT/N/CAN/22, p. 8.

⁶⁸ See Martin Jarvis and Clive Bates, "Why Low-Tar Cigarettes Don't Work and How the Tobacco Industry Has Fooled the Smoking Public," London: Action on Smoking and Health UK, 1999, <<http://www.ash.org.uk/html/regulation/html/big-one.html>> (citing a 1975 Philip Morris study that found: "The smoker profile data reported earlier indicated that Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro smokers and Marlboro Lights smokers. In effect, the Marlboro 85 smokers in this study did not achieve any reduction in the smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.")

producers, especially state-affiliated companies, that are not available to foreign companies, may be characterized as violations of national treatment obligations.

9. THE CHILLING EFFECT

In the complex world of international trade, trade agreements matter both for what the explicit rules they establish, and for how they position public and private actors to behave in the context of the general rules.

As serious as is the prospect of actual enforcement of trade agreement provisions, at least as worrisome is the chilling effect.

Countries routinely choose not to enact legislation of various kinds because of concern that proposed laws would conflict with their international trade obligations. Sometimes the complaint of potential violation or the threat of enforcement comes from other countries. Sometimes threats come from private parties invoking trade agreement provisions. Sometimes trade ministries tell health or other ministries that they are forbidden from proceeding on one course or another because the health or other ministries' action would violate terms of agreements negotiated by the trade ministry. Sometimes a health ministry censors itself, based on its own understandings of trade agreements' provisions.

This dynamic is heavily skewed against public health interests.

First, the broad nature of the trade agreements means that many public health provisions may in fact contravene country obligations under international trade rules.

Second, the complexity and detail of the trade rules introduces uncertainty into their application -- the inherent uncertainty even for those steeped in trade law, and the much greater uncertainty for non-specialists. Given the penalties attached to violating trade agreements, countries tend to act cautiously -- to the point of being overcautious -- in the face of uncertainty, choosing not to implement public health measures that may or may not be compliant with trade agreements.

Third, private actors (here, the tobacco companies and others) and foreign countries both may make bad-faith claims under trade agreements or arguments based on extreme interpretations. Yet these arguments may prove persuasive because of the uncertainty around the agreements' meaning and the delicate political context in which developing countries respond to allegations of trade rule violations.

Fourth, the power imbalance between rich and poor countries deters poor countries from standing up to rich country pressure. This is particularly true in the case of bilateral pressure, where poor countries are not able to band together to offset pressure from rich nations.

Fifth, the resource imbalance works against developing countries defending their laws. They know they cannot match the legal power and expertise a rich country will devote to a dispute. Even in cases involving private parties -- both investment cases in front of arbitration tribunals, or in instances where national law incorporates trade agreement provisions and private parties may air disputes in national court -- multinational corporations typically have deeper pockets than the ministries they are challenging.

Finally, trade ministries are almost always more powerful than health ministries, and they claim a monopoly on power to interpret a countries' trade obligations. In a dispute between trade and health ministries over how to proceed with national law or policy, trade ministries will almost always win.

10. HEALTH EXCEPTIONS IN TRADE AGREEMENTS

The General Agreement on Tariffs and Trade (GATT) is the predecessor to the WTO and remains the core WTO agreement. GATT does contain a health exception for national laws and regulations that violate its rules -- such violating rules are permissible if they are "necessary" to advance a health objective.⁶⁹

WTO and GATT dispute settlement panels have interpreted the "necessary" standard very narrowly -- a regulation qualifies as necessary only if there is no less trade restrictive means to accomplish a desired ends, even if the alternative may not be politically or financially feasible.

How the health exception would be applied to a tobacco case was tested in 1990, in a GATT dispute involving the United States and Thailand.⁷⁰ The case emerged as the United States was placing bilateral pressure on Asian countries to open their tobacco markets. Thailand refused to bow to the pressure exerted by the United States, and supported by a global network of public health activists, succeeded in moving the dispute to the multilateral forum of the GATT.

The United States objected to Thai rules that effectively barred the import of foreign cigarettes.⁷¹ The import ban obviously discriminated against foreign products. Thailand argued that the import ban was necessary to achieve health objectives and was therefore justified under GATT's public health exception.⁷² Thailand maintained and continues to maintain some of the most far-reaching tobacco control policies in the world, and argued that its import ban was a key

⁶⁹ "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries when the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... necessary to protect human, animal or plant life or health." GATT Article XX(b).

⁷⁰ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200).

⁷¹ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraph 12.

⁷² Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraphs 21-35.

component of its comprehensive policy approach. The European Communities submitted a supporting brief urging support for the U.S. position.⁷³

Thailand argued that the production and consumption of tobacco was contrary to the basic purpose of GATT, to improve living standards through trade.⁷⁴

More specifically, Thailand argued that opening its market to foreign cigarettes would pave the way to industry efforts to roll back its far-reaching tobacco control measures: "Once the market was opened, the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which undermined public health and governments were left with no effective tool to carry out public health policies. Advertising bans were circumvented and modern marketing techniques were used to boost sales. Hence, Thailand was of the view that an import ban was the only measure which could protect public health."⁷⁵

Thailand also alleged that U.S. cigarettes posed special dangers, because of the additives employed by U.S. manufacturers. In materials submitted by virtue of a special agreement between the disputing parties, the World Health Organization, argued that the flavorings and other additives in foreign cigarettes made them easier to smoke and more likely to be taken up by children and non-smokers.⁷⁶

⁷³ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraph 49.

⁷⁴ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraphs 21 and 27.

⁷⁵ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraph 27.

⁷⁶ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraphs 52-54. ("According to the representatives of the WHO ... there were sharp differences between the cigarettes manufactured in developing countries such as Thailand and those available in developed countries. In Thailand like in other developing countries, the market was dominated by a state-owned monopoly that promoted smoking minimally, in the absence of competition. Locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. Locally-produced cigarettes were unlike those manufactured in western countries in that sophisticated manufacturing techniques such as the use of additives and flavourings, or the downward adjustment of tar and nicotine were not generally available, or were primitive in comparison to the techniques used by the multinational tobacco companies. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and create the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. In Thailand, half of the tobacco crop was consumed in the form of hand-rolled cigars or cigarettes which yielded large amounts of nicotine and tar and were popular among the elderly. However, their use was fading as old people died. There was no indication that young women turned to manufactured cigarettes instead of the self-made ones which their elders had smoked. ...

The representatives of the WHO stated that the use of additives in American cigarettes had increased greatly during the 1970s with the introduction of low-yield cigarettes. They were used to restore the lost flavour of the cigarette brought about by the reduction in tar and nicotine. The US Surgeon-General reports had concluded that the lowering of tar and nicotine had only a marginal benefit in contrast to quitting. Smokers of low-yield cigarettes had been found to increase their consumption or to inhale more deeply. The health effects of cigarette additives were being analysed by the US Department of Health and Human Services which considered this

The GATT panel ruled that Thailand was required to remove its ban on foreign imports. It applied the “necessary” standard from previous cases that had interpreted other GATT exceptions clauses: public health exceptions could only be justified if there was no less trade restrictive means to attain a legitimate public health objective.⁷⁷ Here, the panel found, Thailand’s import ban was not “necessary” to advance public health objectives, because it had other alternatives, including labeling rules, bans on tobacco advertising and maintenance of a domestic monopoly producer so long as it did not discriminate against imports.⁷⁸

Thailand’s ban on tobacco advertising and marketing ban was a subtext in the case. Although the United States had not asked the GATT panel to consider the Thai ad ban, it had exerted bilateral pressured on the country to remove the ad ban. The advertising ban applied equally to local and foreign manufacturers, but the United States argued that, given the historic exclusion of foreign cigarettes from the Thai market, the ad ban would have the effect of denying foreign sellers the opportunity to expand market share once the ban was lifted. Thailand asked the GATT panel to review the GATT-legality of the ad ban, as well as other tobacco control measures that Thailand argued were necessary to prevent new smokers from starting but to which the United States objected.⁷⁹

Although it did not consider the issue in the same detailed fashion as the import ban, the panel did indicate that the continuance of the ad ban and marketing restrictions would meet the standards of the GATT public health exception. A non-discriminatory ad ban – applying equally to domestic and foreign producers – would normally not run afoul of GATT’s national treatment requirement (stipulating that imports must be treated no differently than if they were produced domestically). But even if the U.S. argument was accepted, and an ad and

task to be “enormously complex and expensive.” Serious concerns about the presence in cigarettes of certain additives had been raised by the American Health Foundation which acted as a consultant to the Department of Health and Human Services on this issue. However, there was no scientific evidence that one type of cigarette was more harmful to health than another.

According to the WHO representatives, another major difference between manufacturers of American cigarettes and of Thai cigarettes was that the former designed special brands aimed at the female market. These cigarettes contained a much lower tar and nicotine level, thus making it easier for women to inhale the smoke. Some were also made to appeal to women by the addition of perfume or were made long and slender to suggest that smoking would result in thinness.”)

⁷⁷ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraphs 74-75 (“the import restrictions imposed by Thailand could only be considered ‘necessary’ in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonable be expected to employ to achieve its health policy objectives.”).

⁷⁸ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraphs 77-81.

⁷⁹ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraphs 34.

marketing ban was viewed as discriminatory in effect, the panel stated, it would be justified under GATT's public health exception.⁸⁰

There are several important features of the panel decision.

First, it showed that the GATT public health exception had some meaning, and could be invoked to defend some public health regulations.

Second, it showed that the exception would be framed narrowly. The definition of "necessary" was strict, and there would be a major bias against rules that discriminate against foreign producers, even if there was a public health rationale for doing so.

As explicated by Carla Hills in her RJR/Philip Morris memo:

GATT Article XX(b) is intended to allow Contracting Parties to impose trade-restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals only to the extent that such inconsistencies are unavoidable. As Canada pointed out in recent GATT dispute settlement proceedings, the proponent of the public health exception has the burden of providing the imposed measure is "necessary" (emphasis in original).⁸¹

Third, the GATT panels, though devoid of public health expertise, would not defer to public health authorities on public health questions. In the Thai case, the GATT panel dismissed the arguments of WHO.

Finally, the Thai decision does not necessarily indicate how a WTO panel or other trade agreement dispute settlement panel would interpret the same provision today. Although the GATT has been incorporated into the WTO, and the GATT agreement remains the core WTO agreement, there are a different set of rules and institutional contexts now in effect. Moreover, WTO rules do not require that dispute settlement panels follow precedent. And interpreters of other agreements are certainly not required to follow WTO precedent. Nonetheless, the Thai case remains important as influential if not binding precedent.

As important as it stands as precedent, the GATT public health exception does not apply to other WTO Agreements, which "impos[e] obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994."⁸² Where the GATT core principle remains non-

⁸⁰ Thailand – Restrictions on Importation of and Internal Taxes in Cigarettes, Report of the Panel adopted on 7 November 1990 (DS10/R-37S/200), paragraphs 78 ("such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes.").

⁸¹ Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994, p. 17 (footnotes in original omitted).

⁸² European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, March 12, 2002, WT/DS135/AB/R, paragraph 80.

discrimination, many of the various WTO agreements impose far-reaching obligations that restrict country flexibility, irrespective of whether its actions are non-discriminatory in law and/or effect.

For the WTO's Technical Barriers to Trade Agreement, where international norms are in effect, countries may adopt more stringent regulations not where doing so may be "necessary" for public health, but only where "international standards or relevant parts would be ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographic factors or fundamental technological problems."⁸³

For the WTO's Agreement on Trade-Related Aspects of Intellectual Property, "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health ..." but only "provided that such measures are consistent with the provisions of this Agreement."⁸⁴ In other words, public health concerns are not a basis for deviating from the agreement's obligations.

And, of course, WTO jurisprudence does not control interpretations of regional and bilateral agreements. NAFTA and other agreements may be interpreted to follow WTO rules or not. Notably, the investment agreement in NAFTA does not contain a public health exception. (It does contain a faux exception for health services -- they are not covered provided such services are performed "in a manner that is not inconsistent with this Chapter.") And the general health exception in NAFTA specifically does not apply to its intellectual property chapter, as Carla Hills noted in her 1994 memo for R.J. Reynolds and Philip Morris.⁸⁵

11. TRADE AGREEMENTS AND THE FCTC

The Framework Convention on Tobacco Control is silent on its relationship to trade agreements.

Draft versions had included provisions that would have explicitly subordinated the FCTC to trade agreements.⁸⁶ Those were deleted. Some countries proposed

⁸³ Agreement on Technical Barriers to Trade, Article 2.4.

⁸⁴ TRIPS, Article 8.1.

⁸⁵ Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994, p. 13 ("It is important to note that in terms of providing for general exceptions from NAFTA obligations for reasons such as health and safety, as set out in NAFTA Article 101(1), Chapter 17 (Intellectual Property) was specifically excluded.").

⁸⁶ "Trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on international trade." Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, First Session, Provisional agenda item 8, "Proposed Draft Elements for a WHO framework convention on tobacco control: provisional texts with comments of the working group," Guiding Principle 4, July 26, 2000, A/FCTC/INB1/2; and, from a later draft proposal: "Tobacco control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade."

provisions in which the FCTC would have claimed supremacy to trade rules.⁸⁷ Those were not adopted. In the end, the FCTC was silent on the issue.

It is uncertain how conflicts between FCTC implementation and trade agreement obligations, if any, will be resolved. Under standard rules of treaty interpretation, the most recent treaty prevails in the event of conflict.⁸⁸ The FCTC is a very recent treaty. On the other hand, with the constant negotiation of new trade agreements, many trade agreements will soon be "later in time." The FCTC will be an evolving agreement, as new protocols are added, but many trade agreements -- most notably, those of the WTO -- are also constantly upgraded and newly negotiated. Standard rules of treaty interpretation suggest the more specific agreement should prevail in event of conflict,⁸⁹ but while there are arguments that the FCTC labeling provisions are more specific than, say, intellectual property rules, there are counterarguments that the intellectual property rules, say, are very specific on trademark protection.

What is certain is that the conflicts between the FCTC and trade agreements will be resolved in trade agreement dispute settlement fora. It is the trade agreements that maintain their own enforcement machinery -- so the FCTC will be interpreted in light of trade agreements, not the other way around.

There is little doubt, however, that relevant provisions of the FCTC will provide more latitude to countries than they would have in its absence. FCTC packaging and labeling rules make a country's defense against an intellectual property claim on a labeling regulation much stronger. Still, genuine uncertainty will remain, as will the closely related chilling effect.

12. CURRENT STATE OF U.S. LAW ON TRADE AND TOBACCO

In 1997, Congress passed the Doggett Amendment, which banned the use of government monies from the Commerce, Justice and State Departments to promote the sale or export of tobacco overseas or to seek the removal of any nondiscriminatory foreign-country restrictions on tobacco marketing.⁹⁰ In 1998,

Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, Fourth Session, Provisional agenda item 4, "WHO framework convention on tobacco control: Co-Chairs' working papers: final revisions, Working Group 2," Guiding Principle D.5.[bracketed], January 24, 2002, A/FCTC/INB4/2(a).

⁸⁷ "Priority should be given to measures taken to protect public health when tobacco control measures contained in this Convention and its protocols are examined for compatibility with other international agreements." Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, Fourth Session, Provisional agenda item 4, "WHO framework convention on tobacco control: Co-Chairs' working papers: final revisions, Working Group 2," Guiding Principle D.5.[bracketed], January 24, 2002, A/FCTC/INB4/2(a).

⁸⁸ Vienna Convention on the Law of Treaties, Article 30.

⁸⁹ See Vienna Convention on the Law of Treaties, Article 31.3(c).

⁹⁰ "None of the funds provided by this Act shall be available to promote the sale or export of tobacco or tobacco products, or to seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type." This provision was enacted into law in the Departments of Commerce, Justice and State, the Judiciary and Related Agencies

the Clinton administration issued a directive to U.S. embassies to implement the law. In 2001, just before leaving office, the Clinton administration issued an executive order – still in effect -- that reaffirmed the Doggett Amendment and created a process by which the Department of Health and Human Services should be consulted on trade policy matters relating to tobacco.⁹¹

Although a positive step forward, the Doggett amendment is subject to annual renewal, does not cover all federal agencies, and leaves compliance responsibility in the hands of agencies (such as the USTR) that have historically been oblivious or antagonistic to public health concerns. It does not stop the U.S. from advocating tobacco tariff reductions as part of trade agreements, despite the clear evidence that such reductions increase tobacco consumption. And it does not stop the U.S. from negotiating general trade provisions -- such as intellectual property, investment or service agreements -- that benefit tobacco companies.

The result is ongoing endangerment of public health such as that caused by the U.S.-China trade deal prior to the U.S. vote to grant permanent normal trade relations (PNTR) to China. The agreement contains specific provisions mandating a reduction in tariffs on imported cigarettes, from a base rate of 65 to 25 by January 1, 2004.

CONCLUSION: EXCLUDING TOBACCO FROM TRADE AGREEMENTS

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

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

If tobacco products were excluded, countries would not need to ensure their rules were consistent with trade rules. Governments would not be chilled by threats or potential threats of trade challenges. Investment agreements would not empower tobacco companies to sue governments directly over tobacco control policies that might contravene investment guarantees. And countries would not be required to lower tobacco tariffs and stimulate tobacco market competition.

Appropriations Act, 1997 (HR 2267) Section 618 (enacted into law as PL 105-119), and has been included in all subsequent appropriations bills.

⁹¹ Federal Leadership on Global Tobacco Control and Prevention, Executive Order No. 13193, January 18, 2002, 66 F.R. 7387. ("The HHS shall be included in all deliberations of interagency working groups, chaired by the United States Trade Representative (USTR), that address issues relating to trade in tobacco and tobacco products. Through such participation, HHS shall advise the USTR, and other interested Federal agencies, of the potential public health impact of any tobacco-related trade action that is under consideration. Upon conclusion of a trade agreement that includes provisions specifically addressing tobacco or tobacco products, the USTR shall produce and make publicly available a summary describing those provisions." Section 2(b).)

There is precedent for excluding certain products from trade agreements. For example, military products and fissionable materials are not covered by the WTO agreements.⁹² Surgical methods as well as diagnostic and therapeutic methods are exempted from coverage by the WTO's intellectual property rules.⁹³

And there is precedent for taking tobacco out of trade agreements. The U.S.-Vietnam Free Trade Agreement excludes tobacco from its tariff regulation and reduction scheme, and tobacco was taken out of the tariff reduction schedule for the U.S.-Jordan Free Trade Agreement.

There is no technical difficulty in exempting tobacco from trade agreements -- a simple declaration that the agreement does not apply to tobacco products, in words no more complicated than those, would be sufficient. Effectively removing tobacco products from trade agreements does require more than exempting them from tariff reduction schedules; agreements must contain an explicit carve-out for tobacco products, or their non-tariff provisions will still apply to tobacco products. Model language for a tobacco product exclusion may be: Nothing in this Agreement shall be construed to apply in any way to tobacco products.

All that is required to achieve this public health victory is the political will.

⁹² GATT 1947, Article XXI (“Nothing in this agreement shall be construed ... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (a) relating to fissionable materials or the materials from which they are derived; [or] (b) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.”)

⁹³ TRIPS, Article 27.3(a).