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"The Development Aspects of Trade & Health"[*]

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Introduction

International trade and the rules of the World Trade Organization (WTO) have profound implications for the global rise in non-communicable diseases such as cancers, cardiovascular diseases, chronic respiratory diseases, and diabetes, which together account for the majority of deaths witnessed worldwide today (far outweighing the number of deaths from infectious diseases such as HIV/AIDS).[1] These diseases are often preventable and can be significantly attributed to the use of tobacco and alcohol, poor diet and physical inactivity. Globalisation and trade liberalisation, while improving access to health-related technologies, simultaneously tend to increase production, consumption and marketing of products related to these risk factors.[2] Moreover, the burden of these diseases falls disproportionately and increasingly on poorer countries, highlighting their significance not only for public health but also for broader considerations of economic development.[3] Against this background, it is not surprising that numerous countries are increasingly, in both unilateral and multilateral settings, attempting to develop a range of means to combat the harmful lifestyle choices that often underlie non-communicable diseases. In this article, I explore whether the measures contemplated, many of which have the potential to restrict international trade, are consistent with obligations imposed on WTO Members.

Below, I first briefly explain why NCDs are a development issue. Then, I address the factors of tobacco, alcohol and poor diet in turn. In each instance, I identify certain trade-related responses that have been proposed or promoted pursuant to activities of the World Health Organization (WHO). I explain the extent to which these responses could conflict with core WTO obligations or 'disciplines', before considering the exceptions available in WTO law to justify conduct that might otherwise be regarded as a WTO violation. We also consider past, present and potential disputes between WTO Members concerning regulatory measures directed towards the identified risk factors. The WTO implications of health-related measures concerning tobacco, alcohol and poor diet are broadly similar, so each section below builds on the one before, and these overlapping discussions are intended to be read together.

What follows is not a comprehensive overview of all the possible implications under WTO law of regulatory measures designed to combat non-communicable diseases, but rather an examination of some of the most significant concepts and issues arising from such measures in the context of the WTO. Our goal is to increase awareness, particularly within the public

[1] WHO. *Preventing Chronic Diseases: A Vital Investment*. Geneva: WHO. Available at: http://www.who.int/chp/chronic_disease_report/full_report.pdf; 2005: 1-2.
[2] WHO. *Preventing Chronic Diseases: A Vital Investment*. Geneva: WHO. Available at: http://www.who.int/chp/chronic_disease_report/full_report.pdf; 2005: 51. Wipfli H, Bettcher D, Subramaniam C, Taylor A. Confronting the tobacco epidemic: emerging mechanisms of global governance. In: McKee M, Garner P, Stott R, (eds). *International Co-operation in Health*. Oxford: Oxford University Press; 2001: 127, 129-133.
[3] See 'Prevention and control of non-communicable diseases' A/RES/64/265. WHO. *2008-2013 Action Plan for the Global Strategy for the Prevention and Control of Noncommunicable Diseases*. World Health Assembly document A61/8. Geneva: WHO. Available at: http://www.who.int/nmh/Actionplan-PC-NCD-2008.pdf; 2008: [1]-[2], [13].

health community, of the trade implications of various tools that may be contemplated to combat non-communicable diseases, and to highlight ways of minimising potential conflicts with WTO obligations, while emphasising the flexibilities already in place within the WTO system to allow for measures that are genuinely directed towards legitimate public health objectives. In this specific context, we hope to add to the broader ongoing debate on the relationship between international trade and public health.[4]

NCDs as a Development Issue

On 13 May 2010, the United Nations General Assembly passed a historic resolution titled 'Prevention and control of non-communicable diseases', recognising the serious socioeconomic impact of NCDs on developing countries and calling for global and national action to address this development issue. The WHO notes that '[o]ver 90% of the deaths from NCDs before the age of 60 occur in developing countries and countries in transition, in particular among the poorest and most vulnerable people.'[5] NCDs directly impact on development as they result in lost productivity (for example through death) and increase the likelihood of people falling into poverty from the cost of health care. Without policy changes, NCDs are projected to increase by a further 19 per cent in developing countries before 2015, with the greatest impact (24 per cent) in Africa.

It is clear that NCDs must be addressed if the Millennium Development Goals (MDGs) are to be achieved. Interestingly, the MDG Review Summit outcome document contains the following statement:

> 37. We recognize that the increasing interdependence of national economies in a globalizing world and the emergence of rules-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and international development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space.[6]

I will go on to explore whether the WTO rules have constricted policy space in a way that prevents countries from taking action on the NCD risk factors of tobacco, alcohol and poor diet.

[4] See, for example, Smith R, Lee K, Drager N. Trade and health: an agenda for action. *Lancet* 2009;373:768.
[5] WHO, *Discussion Paper: Accelerating the MDGs by addressing NCDs* (2010)
[6] http://www.un.org/en/mdg/summit2010/pdf/mdg%20outcome%20document.pdf

Tobacco

WHO Framework Convention on Tobacco Control

According to the WHO, '[t]obacco use is the leading cause of preventable death, and is estimated to kill more than 5 million people each year worldwide'.[7] The *WHO Framework Convention on Tobacco Control* (FCTC)[8] is the first treaty negotiated within the WHO and represents the high water mark of international commitment to combat non-communicable diseases through a regulatory response. It currently has 168 parties, of which 138 are also WTO Members, including Australia, Brazil, Canada, China,[9] the European Union, India, Japan, New Zealand, and the United Kingdom. Thus, more than 80% of FCTC parties are WTO Members, and 90% of the WTO's 153 Members are FCTC parties. An additional 13 WTO Members, including Switzerland and the United States (US), are signatories but not parties to the FCTC.[10] In fulfilling its aim of 'protect[ing] present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke',[11] the FCTC contains several provisions that could be seen as conflicting with WTO law. We consider here a few key examples concerning the WTO's *General Agreement on Tariffs and Trade 1994* (GATT 1994),[12] although potential conflicts with other WTO agreements— including the *Agreement on Trade-Related Aspects of Intellectual Property Rights*[13]—have also been raised.[14]

Article 6(2) of the FCTC requires parties to consider national health objectives concerning tobacco control in designing their tax policies and encourages them to prohibit or restrict the duty-free importation of tobacco products by international travellers. According to a narrow definition of 'conflict' between treaties, this provision does not conflict with WTO law because it does not require FCTC parties to take any specific conduct, and a party could choose to implement Article 6 in a manner consistent with its WTO obligations. However, what if an FCTC party that was also a WTO Member implemented Article 6 by imposing high sales taxes and import tariffs on tobacco products, including tobacco imports in arriving

[7] WHO. *WHO Report on the Global Tobacco Epidemic, 2009: Implementing smoke-free environments*. Geneva: WHO. Available at: http://whqlibdoc.who.int/publications/2009/9789241563918_eng_full.pdf; 2009: 8.
[8] 2302 United Nations Treaty Series 166 (adopted 21 May 2003, entered into force 27 February 2005).
[9] China has advised that the FCTC also applies to Hong Kong and Macau, both of which are also WTO Members.
[10] WHO. *Parties to the WHO Framework Convention on Tobacco Control* at: http://www.who.int/fctc/signatories_parties/en/index.html. WTO. *Members and Observers* at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
[11] FCTC, Article 3.
[12] *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 33 *International Legal Materials* 1125 (signed 15 April 1994, entered into force 1 January 1995).
[13] *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 33 *International Legal Materials* 1125 (signed 15 April 1994, entered into force 1 January 1995).
[14] See, for example, McGrady B. TRIPs and trademarks: the case of tobacco. *World Trade Review* 2004;3:53. WHO/WTO. *WTO Agreements & Public Health: A joint study by the WHO and the WTO Secretariat*. Geneva: WHO/WTO. Available at: http://www.who.int/media/homepage/en/who_wto_e.pdf; 2002: [34].

travellers' luggage?[15] Again, this approach would not conflict with WTO obligations provided that it was carefully structured. In particular: the import tariffs could not be higher than the agreed (or 'bound') rate specified in the relevant WTO Member's GATT schedule; the rate of sales tax would have to be the same for all 'like' tobacco products so as not to discriminate, in law or fact, against imports or products from particular WTO Members; import tariffs could not be imposed on tobacco products that were merely in 'transit' (whether in travellers' luggage or otherwise); and any 'border tax adjustment' imposed on imported tobacco products could not be higher than the taxes and charges that would apply to those products if purchased within the relevant Member's territory.[16]

Article 13(2) of the FCTC requires parties to ban tobacco advertising, including cross-border advertising, but this is subject to 'the legal environment' and each party's 'constitution or constitutional principles'. Accordingly, FCTC parties are not required to undertake a ban contrary to their WTO obligations. In any case, a ban on tobacco advertising would not violate the national treatment or most-favoured nation (MFN) obligations in GATT 1994 as long as it was applied in a non-discriminatory manner with respect to all tobacco and substitutable products. Moreover, even if an advertising ban or other tobacco control measure was on its face inconsistent with a GATT obligation, it might nevertheless be justified under Article XX on the basis that it was '(a) necessary to protect public morals', '(b) necessary to protect human ... life or health', or '(d) necessary to secure compliance with laws or regulations' that are themselves WTO-consistent (such as customs enforcement). (The *General Agreement on Trade in Services* (GATS),[17] which might impose obligations in connection with advertising and distribution services associated with tobacco trade, contains similar exceptions.[18]) Ultimately, a WTO Member might even invoke the FCTC itself as an independent defence, although this would be controversial.

Under Article 15(1) of the FCTC, the parties recognise as an 'essential componen[t] of tobacco control' 'the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting'. Pursuant to this provision, FCTC parties have been in negotiations since early 2008 to draft a protocol to the FCTC in order to eliminate illicit trade in tobacco products.[19] The most recent version of the draft protocol contemplates certain trade-related provisions that are more prescriptive than their FCTC

[15] Some FCTC parties have adopted measures of this kind: Convention Secretariat. *2009 Summary Report on global progress in implementation of the WHO Framework Convention on Tobacco Control*. WHO document FCTC/2009.1. Geneva: WHO. Available at: http://www.who.int/fctc/FCTC-2009-1-en.pdf; 2009: 4-7.

[16] GATT 1994, Articles I:1, II:1(a), II:2(a), III:2, V:3.

[17] *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, 33 *International Legal Materials* 1125 (signed 15 April 1994, entered into force 1 January 1995).

[18] GATS, Article XIV. See Lin T. Addressing the issue of trade in services and public health in the case of tobacco: are the FCTC restrictions on tobacco advertising inconsistent with the GATS?. *Journal of World Investment & Trade* 2006;7(4):545.

[19] WHO Framework Convention on Tobacco Control. *Conference of the Parties: Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products – First Session, Summary Records*. WHO document FCTC/INB-IT/1/REC/1. Geneva: WHO. Available at: http://apps.who.int/gb/fctc/PDF/it1/FCTC_INB-IT_REC1-en.pdf; 2008. See Boister N, Burchill R. Stopping the Smugglers: Proposals for an Additional Protocol to the World Health Organization's Framework Convention on Tobacco Control. *Melbourne Journal of International Law* 2002;3:33.

counterparts, including requiring parties to the protocol to: establish a licensing system for the manufacture, importation or exportation of tobacco products; apply 'control and verification measures' to tobacco products in transit; ban the retailing of tobacco products via the Internet; and eliminate duty-free tobacco sales.[20] In order to maximise the effectiveness of the protocol, negotiators must attempt to ensure that both the final text of the protocol and the subsequent implementing measures of parties to the protocol will be consistent with WTO rules.

WTO Disputes Concerning Tobacco-Related Measures

A number of past and present disputes formally raised between WTO Members concern cigarettes, including their health implications. In 1990, the US brought a complaint pursuant to the GATT 1947[21]—the predecessor to the WTO—against certain Thai measures on cigarettes. In that case, the Panel hearing the complaint found that Thailand had acted inconsistently with GATT Article XI:1 by effectively prohibiting the importation of cigarettes. The Panel rejected Thailand's argument that the restriction of cigarette imports was necessary to protect human life or health within the meaning of GATT Article XX(b), because the Panel considered that less trade-restrictive measures were reasonably available to ensure the quality and curb the quantity of cigarettes consumed in Thailand, such as imposing labelling requirements and banning cigarette advertising.[22] This case demonstrates the stringency with which Article XX is traditionally (and continues to be) interpreted,[23] highlighting the need for WTO Members to exercise care in crafting their tobacco control measures to ensure consistency with WTO rules.

In a more recent WTO dispute, the Dominican Republic invoked the FCTC (and particularly Article 15.4 on illicit trade) to support its argument that tax stamps may be useful in preventing cigarette smuggling. Although the Panel accepted this broad proposition, neither the FCTC nor the Dominican Republic's submissions concerning public health were central to the case.[24] As the FCTC was not yet in force when the Panel Report in this dispute was

[20] FCTC Conference of the Parties, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products. *Draft Protocol to Eliminate Illicit Trade in Tobacco Products*. WHO document FCTC/COP/INB-IT/4/7. Geneva: WHO. Available at: http://apps.who.int/gb/fctc/PDF/it4/FCTC_COP_INB-IT4_7-en.pdf; 2010: Articles 5.1, 5*bis*, 10, 11*bis*.

[21] 55 United Nations Treaty Series 194 (signed 30 October 1947).

[22] GATT 1947. *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes: Report of the Panel adopted on 7 November 1990.* GATT document DS10/R-37S/200. Geneva: GATT 1947. Available at: http://www.worldtradelaw.net/reports/gattpanels/thaicigarettes.pdf; 1990: [67], [77]-[78], [81].

[23] See WTO. *Brazil – Measures Affecting Imports of Retreaded Tyres: Report of the Appellate Body*. WTO document WT/DS332/AB/R. Geneva: WTO. Available at: http://www.worldtradelaw.net.ezp.lib.unimelb.edu.au/reports/wtoab/brazil-tyres(ab).pdf; 2007.

[24] WTO. *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes: Report of the Panel*. WTO document WT/DS302/R. Available at: http://www.worldtradelaw.net/reports/gattpanels/thaicigarettes.pdf; 2004: [7.216]. WTO. *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes: Report of the Appellate Body*. WTO document WT/DS302/AB/R. Available at: http://www.worldtradelaw.net/reports/wtoab/dr-cigarettes(ab).pdf; 2005: [10].

circulated, we can expect that the FCTC and, once concluded, its protocol may play a more significant role in future WTO disputes.

The report of a WTO Panel on another dispute concerning Thai measures on cigarettes is due to be released shortly.[25] In addition, Indonesia has just requested formal consultations with the US in relation to its *Family Smoking Prevention Tobacco Control Act of 2009*. Indonesia alleges, among other things, that a US ban on all flavoured cigarettes—including clove cigarettes but excluding menthol cigarettes—discriminates against imports contrary to Article III:4 of GATT 1994.[26] Similarly, several WTO Members have raised concerns in the context of the WTO's *Agreement on Technical Barriers to Trade*[27] about Canada's *Cracking Down on Tobacco Marketing Aimed at Youth Act*, which bans the manufacture and sale of cigarettes containing a range of additives (again excluding menthol). Some Members contend that the law effectively prohibits traditional blended cigarettes containing burley tobacco.[28] These ongoing disputes illustrate the strength of the tobacco industry in lobbying governments and the ability of tobacco companies to exploit areas of uncertainty in WTO law,[29] but also the difficulties that arise in ensuring that WTO Members do not use legitimate public health objectives as an excuse to protect local industry. Nevertheless, these disputes offer an opportunity to clarify WTO rules on tobacco control measures and should not be perceived as an indication that such measures inherently conflict with WTO objectives or principles.

Alcohol

WHO Draft Global Strategy to Reduce Harmful Use of Alcohol

The WHO identifies the 'harmful use of alcohol ... as the third leading risk factor for premature deaths and disabilities in the world'.[30] On 21 May 2010, the Sixty-Third World Health Assembly endorsed the Draft Global Strategy to Reduce Harmful Use of Alcohol endorsed by the WHO Executive Board.[31] That strategy promotes several trade-related actions that may be taken by governments at a domestic level. Some of these are similar to those addressed above in the context of tobacco, such as restricting or banning certain types

[25] WTO. *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines: Communication from the Chairman of the Panel*. WTO document WT/DS371/6. Available at: http://docsonline.wto.org; 2010.
[26] WTO. *United States – Measures Affecting the Production and Sale of Clove Cigarettes: Request for Consultations by Indonesia*. WTO document WT/DS406/1, G/L/917, G/SPS/GEN/1015, G/TBT/D/48. Available at: http://docsonline.wto.org; 2010: 1.
[27] *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 33 *International Legal Materials* 1125 (signed 15 April 1994, entered into force 1 January 1995).
[28] WTO. *Committee on Technical Barriers to Trade: The Effect of Canada's Tobacco Act on Malawi*. WTO document G/TBT/W/329. Geneva: WTO. Available at: http://docsonline.wto.org; 2010. Opposition to Canada Tobacco Law Mounts, But U.S. Unlikely to Fight. *Inside US Trade* 2010;28(14).
[29] See WHO. *Tobacco industry interference with tobacco control.* Geneva: WHO. Available at: http://whqlibdoc.who.int/publications/2008/9789241597340_eng.pdf; 2009: 13.
[30] WHO. *Draft Global Strategy to Reduce the Harmful Use of Alcohol*. Geneva: WHO. Available at: http://www.who.int/substance_abuse/alcstrategyaftereb.pdf; 2010: [2].
[31] A63/13. WHO. *Strategies to reduce the harmful use of alcohol*. WHO document EB126.R11. Geneva: WHO. Available at: http://apps.who.int/gb/ebwha/pdf_files/EB126/B126_R11-en.pdf; 2010.

of advertising, and taxing alcohol sales. In particular, the strategy suggests that taxation might take into account 'the alcoholic content of the beverage', and also that countries might wish to 'reduc[e] the alcoholic strength inside different beverage categories'.[32] The strategy also promotes the options of a 'licensing system on retail sales', labelling alcoholic beverages to indicate alcohol-related harm, and enforcing quality control on the production and distribution of alcoholic beverages.[33] Below we consider several of these approaches to policy intervention, in the context of WTO rules and disputes.

Taxing Alcoholic Beverages Consistent with GATT 1994

A WTO Member that chooses to apply different tax rates to beverages depending on the degree of alcohol content or other distinctions must take care to ensure that the differentiation is not merely origin-neutral on its face but also does not amount to *de facto* discrimination against imports or against products from one or more WTO Members. Rather, if a Member draws distinctions between alcoholic beverages in order to further a health or other non-trade objective, the Member must be able to explain how that objective supports the chosen categorisation and (preferably) that the products themselves are distinct, as demonstrated by a number of GATT and WTO disputes. (Similar considerations apply to tobacco control measures that distinguish between different types of tobacco products, as foreshadowed above.)

In *Japan – Alcoholic Beverages II*, the WTO's Appellate Body found that vodka and shochu are 'like products' within the meaning of the first sentence of GATT Article III:2, such that a Japanese law taxing vodka in excess of shochu violated that national treatment provision. In concluding that these products were like, the Appellate Body focused on four primary criteria: the products' end-uses; consumer preferences; the properties, nature and quality of the products; and the tariff classification of the products under the Harmonized System for categorising imported products. The Appellate Body implicitly endorsed the Panel's rejection of Japan's argument that the 'aims and effects' of a challenged measure might be relevant in assessing likeness.[34] The Appellate Body's approach departed from a previous GATT Panel Report that not only accepted the so-called 'aims-and-effects test' in assessing likeness but also applied that test in concluding that low alcohol content beer was not like high alcohol

[32] WHO. *Draft Global Strategy to Reduce the Harmful Use of Alcohol*. Geneva: WHO. Available at: http://www.who.int/substance_abuse/alcstrategyaftereb.pdf; 2010: [31](a)], [34](a)], [36(d)].
[33] WHO. *Draft Global Strategy to Reduce the Harmful Use of Alcohol*. Geneva: WHO. Available at: http://www.who.int/substance_abuse/alcstrategyaftereb.pdf; 2010: [28](a)(i)], [36(f)], [39(a)].
[34] WTO. *Japan – Taxes on Alcoholic Beverages: Report of the Appellate Body*. WTO document WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R. Available at: http://www.worldtradelaw.net/reports/wtoab/japan-alcohol(ab).pdf; 1996: 20-23, 32. WTO. *Japan – Taxes on Alcoholic Beverages: Report of the Panel*. WTO document WT/DS8/R, WT/DS10/R, WT/DS11/R. Available at: http://www.worldtradelaw.net/reports/wtopanelsfull/japan-alcohol(panel)(full).pdf; 1996: [6.16]-[6.18]. See also WTO. *European Communities – Regime for the Importation, Sale and Distribution of Bananas*. WTO document WT/DS27/AB/R. Available at: http://www.worldtradelaw.net/reports/wtoab/ec-bananas(ab).pdf; 1997: [216], [241].

content beer in the context of a US tax measure aimed at raising revenue, protecting public morals or protecting human health.[35]

In *Japan – Alcoholic Beverages II*, Japan had argued that the differential tax rates 'equalize[d] the tax burden across tax categories' by harmonising 'the tax/price ratio of all tax categories', hence minimising distortions of competitive conditions between products.[36] As noted above, Japan's argument failed, and the aims-and-effects test appears to have been buried.[37] Nevertheless, a non-protectionist purpose such as protecting human life or health would still be relevant in demonstrating that a particular measure is not applied 'so as to afford protection' within the meaning of GATT Article III:1—which is specifically cross-referenced in the second sentence of Article III:2, which applies to the broader category of 'directly competitive or substitutable' products rather than like products—or that the measure is justified under GATT Article XX(b). In evaluating the existence and nature of such a purpose, a WTO Panel or the Appellate Body would typically focus not on subjective declarations of legislative intention but on objective expressions such as the measure's 'design, ... architecture, and ... revealing structure'.[38]

Japan – Alcoholic Beverages II and subsequent WTO cases concerning alcohol[39] clarified the requirements of GATT Article III:2, but health concerns played little role in the respondents' attempts to justify their challenged measures. Further guidance on the interpretation of the health exception in GATT Article XX(b) can instead be gleaned from *Brazil – Retreaded Tyres*, which concerned not non-communicable diseases but the health effects arising from waste tyres, which can give rise to toxic emissions from tyre fires as well as illnesses such as dengue fever through mosquito breeding. There, the Appellate Body made clear that in order to determine whether a challenged measure is '*necessary* to protect human, animal or plant life or health' within the meaning of GATT Article XX(b), it will weigh and balance—in the light of the importance of the objective of the measure—the contribution of the measure to that objective, and the extent to which the measure restricts or distorts trade. If this balancing process suggests the measure is necessary, the Appellate Body will confirm this conclusion by identifying the existence of any reasonably available less trade-restrictive alternatives that contribute equally to the Member's relevant objective. Even if the measure is provisionally

[35] GATT 1947. *United States – Measures Affecting Alcoholic and Malt Beverages: Report of the Panel adopted on 19 June 1992*. GATT document DS23/R-39S/206. Available at: http://www.worldtradelaw.net/reports/gattpanels/usmaltbeverages.pdf; 1992: [5.25]-[5.26], [5.74].

[36] WTO. *Japan – Taxes on Alcoholic Beverages: Report of the Panel*. WTO document WT/DS8/R, WT/DS10/R, WT/DS11/R. Available at: http://www.worldtradelaw.net/reports/wtopanelsfull/japan-alcohol(panel)(full).pdf; 1996: [4.19], [4.133].

[37] See Hudec R. GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test. *International Lawyer* 1998;32:619, 633-636.

[38] WTO. *Japan – Taxes on Alcoholic Beverages: Report of the Appellate Body*. WTO document WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R. Available at: http://www.worldtradelaw.net/reports/wtoab/japan-alcohol(ab).pdf; 1996: 29.

[39] WTO. *Korea – Taxes on Alcoholic Beverages: Report of the Appellate Body*. WTO document WT/DS75/AB/R, WT/DS84/AB/R. Available at: http://www.worldtradelaw.net.ezp.lib.unimelb.edu.au/reports/wtoab/korea-alcohol(ab).pdf; 1999. WTO. *Chile – Taxes on Alcoholic Beverages*. WTO document WT/DS87/AB/R, WT/DS110/AB/R. Available at: http://www.worldtradelaw.net.ezp.lib.unimelb.edu.au/reports/wtoab/chile-alcohol(ab).pdf; 1999.

justified under Article XX(b), it must also satisfy the requirement of the introductory paragraph of Article XX (the so-called *chapeau*) that it is not applied in a manner that would constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. Moreover, any discrimination arising from the measure must flow from the underlying objective of protecting life or health and not from some unrelated concern.[40] All these requirements reiterate just how closely a WTO Panel or the Appellate Body will scrutinize a WTO Member's claim that a measure that distorts or restricts trade in tobacco, alcohol or any other product is based on a public health policy.

Imposing Technical Regulations on Alcoholic Beverages Consistent with the TBT Agreement

The WTO's *Agreement on Technical Barriers to Trade*[41] (TBT Agreement) imposes requirements in addition to GATT 1994 on (among other things) 'technical regulations', which are mandatory requirements concerning 'product characteristics or their related processes and production methods', including 'terminology, ... packaging, ... or labelling requirements as they apply to a product, process or production method'.[42] The TBT would therefore apply to requirements imposed by a WTO Member on alcoholic beverages to identify alcohol-related harm on the label, limit the alcoholic content of beverages in a particular category, or otherwise determine the characteristics of the product or the way it is made.[43]

The national treatment and MFN obligations contained in GATT Articles III and I respectively are mirrored in Article 2.1 of the TBT agreement, which requires WTO Members to ensure, in respect of technical regulations, that 'products imported from the territory of any Member' are accorded 'treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country'. The meaning of 'like products' in this context has not yet been determined. The Appellate Body has emphasised that this term may have different meanings in different agreements or even different provisions of the same agreement.[44] The criteria identified above for assessing likeness under GATT Article III:2 are likely to be relevant also to TBT Article 2.1. However, the definition of like products for the purpose of the TBT Agreement may well be narrower

[40] WTO. *Brazil – Measures Affecting Imports of Retreaded Tyres*. WTO document WT/DS332/AB/R. Available at: http://www.worldtradelaw.net/reports/wtoab/brazil-tyres(ab).pdf; 2007: [119], [178], [210], [227], [228].
[41] *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 33 *International Legal Materials* 1125 (signed 15 April 1994, entered into force 1 January 1995).
[42] TBT Agreement, Annex 1, [1].
[43] An exception applies to 'sanitary and phytosanitary measures', which are governed by a separate agreement: TBT Agreement, Article 1.5. These include measures 'to protect human or animal life or health ... from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs': Annex A, [1(b)], *Agreement on the Application of Sanitary and Phytosanitary Measures*, contained in *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 33 *International Legal Materials* 1125 (signed 15 April 1994, entered into force 1 January 1995).
[44] WTO. *Japan – Taxes on Alcoholic Beverages: Report of the Appellate Body*. WTO document WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R. Available at: http://www.worldtradelaw.net/reports/wtoab/japan-alcohol(ab).pdf; 1996: 21.

than that under GATT Article III:2, because no general exceptions equivalent to GATT Article XX appear in the TBT Agreement to save measures found to violate TBT Article 2.1.

Words similar to those contained in GATT Article XX do appear in TBT Article 2.2, but in the form of a positive obligation rather than an exception. Specifically, Article 2.2 requires Members to ensure that they do not adopt or apply technical regulations 'with a view to or with the effect of creating unnecessary obstacles to international trade'. This means that technical regulations cannot be 'more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'. Article 2.2 contains a non-exhaustive list of legitimate objectives, including 'protection of human health or safety', and it specifies that 'available scientific and technical information' should be considered in assessing the risks of non-fulfilment. Accordingly, in designing health-related technical regulations with respect to alcoholic beverages (or, indeed, tobacco products), just as in designing taxation or other measures, WTO Members must attempt to minimise the effect on international trade by focusing on the underlying health objective and avoiding trade distortions and restrictions to the extent possible.

The TBT Agreement requires Members to have regard not only to scientific evidence (as mentioned in Article 2.2) but also to 'relevant international standards', which are documents 'approved by a recognized body' that provide voluntary 'rules, guidelines or characteristics for products or related processes and production methods' 'for common and repeated use'.[45] Under Article 2.4, where such standards exist or are imminent, Members shall use them as a basis for such technical regulations except when they 'would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued'. Moreover, under Article 2.5, a technical regulation to pursue an objective mentioned in Article 2.2 will be 'rebuttably presumed not to create an unnecessary obstacle to international trade' if it is 'in accordance with relevant international standards'. International standards could be developed by, for example, the Codex Alimentarius Commission, the WHO, or the Food and Agriculture Organization of the United Nations, although the TBT Agreement does not explicitly identify any international standard-setting bodies. To ensure compliance with the TBT Agreement, WTO Members must therefore keep abreast of standard-setting activities and decisions of international bodies in connection with alcohol and other risk factors for non-communicable diseases.

Poor Diet

WHO Global Strategy on Diet, Physical Activity and Health

The risks of non-communicable diseases are significantly increased by dietary-related factors including 'elevated consumption of energy-dense, nutrient-poor foods that are high in fat, sugar and salt', 'high blood pressure, high concentrations of cholesterol in the blood,

[45] TBT Agreement, Annex 1, [2].

inadequate intake of fruit and vegetables, [and] overweight or obesity'.[46] In responding to these problems, the WHO has recommended that countries use tax measures to encourage consumption of healthy foods and discourage unhealthy consumption (which could be done consistently with GATT 1994 as discussed above),[47] increase consumer information (which could involve imposing labelling requirements consistent with the TBT Agreement concerning the calorie, fat, sugar or salt content of food products, and taking into account the Codex Guidelines on Nutrition Labelling),[48] and promote 'the responsible marketing of foods and non alcoholic beverages to children'.[49] As indicated above in relation to tobacco, WTO Members would need to ensure that restrictions on advertising or marketing particular food products do not discriminate, in law or fact, against imported goods or goods from one or more WTO Members, in order to comply with the national treatment and MFN obligations in GATT 1994. Such restrictions would also have to eschew discrimination against or between foreign services or service suppliers contrary to a given Member's GATS obligations, which would depend on the national treatment commitments and MFN exemptions listed in that Member's GATS Schedule with respect to the advertising services sector.[50]

Numerous examples exist of countries implementing the kinds of measures advocated in the WHO Global Strategy on Diet, Physical Activity and Health. These examples illustrate the significance that governments attribute to health concerns arising from poor diet, as well as the challenges that may arise in ensuring that the corresponding measures are properly targeted to those concerns and do not unnecessarily restrict trade. Several US States impose a 'fat tax' on certain soft drinks or snacks, while New York requires restaurant chains to provide information concerning the calorie content of the food they serve.[51] In Australia, health (and environmental) reasons have been advanced for a legislative proposal that would require palm oil to be specifically identified on food labels, in contrast to the current flexibility allowing palm oil to be generically categorised as 'vegetable oil'.[52] The WHO itself has identified palm oil as relatively high in saturated fatty acids and has provided as an example of an effective intervention a regulatory policy in Mauritius to replace palm oil in cooking oil with soya bean oil, apparently resulting in a significant fall in total cholesterol

[46] WHO. *Global Strategy on Diet, Physical Activity and Health*. Geneva: WHO. Available at: http://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_R17-en.pdf; 2004: [4], [10].
[47] WHO. *Global Strategy on Diet, Physical Activity and Health*. Geneva: WHO. Available at: http://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_R17-en.pdf; 2004: [41(2)].
[48] Codex Alimentarius Commission. *Guidelines on Nutrition Labelling*. Rome: FAO. Available at: http://www.codexalimentarius.net/download/standards/34/CXG_002e.pdf; 2009.
[49] WHO. *2008-2013 Action Plan for the Global Strategy for the Prevention and Control of Noncommunicable Diseases*. World Health Assembly document A61/8. Geneva: WHO. Available at: http://www.who.int/nmh/Actionplan-PC-NCD-2008.pdf; 2008: [24].
[50] GATS, Articles II, XVII. WTO. *Services Sectoral Classification List: Note by the Secretariat*. WTO document MTN.GNS/W/120. Geneva: WTO. Available at: http://docsonline.wto.org; 1991.
[51] Gostin L, Pomeranz J, Jacobson P, Gottfried R. Assessing Laws and Legal Authorities for Obesity Prevention and Control. *Journal of Law, Medicine & Ethics* 2009;37:28, 29, 31.
[52] Commonwealth of Australia. *Parliamentary Debates: Senate, Second Reading Speech – Food Standards Amendment (Truth in Labelling—Palm Oil) Bill 2009*. Available at: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-11-23/0074/hansard_frag.pdf;fileType=application%2Fpdf; 2009.

concentrations in men and women.[53] However, in Australia, palm oil is exclusively imported, typically from two specific countries (WTO Members Malaysia and Indonesia), and food standards already require that the saturated fat be specifically listed on food product labels. In these circumstances, it might be difficult to justify the apparent discrimination of the proposed labelling requirement against imports in general as well as specifically against imports from Malaysia and Indonesia, given the potentially large impact on trade and the fairly limited contribution to health objectives.

Using WTO Subsidies Disciplines to Combat Unhealthy Food

Enhancing consumer information through labelling and providing price incentives through taxation or related schemes may become all the more important as global food prices rise while the cost of choosing healthy over unhealthy food appears to increase.[54] However, WTO rules are also relevant in understanding why the price of certain (often unhealthy) foods is low or falling. While the rest of this article has explored how to ensure that trade-related health measures comply with WTO law, we now wish to emphasise that WTO disciplines on agricultural and other subsidies may themselves be used to support health policies.

Domestic politics may explain why WTO Members, far from using subsidies as a tool to promote healthy eating habits, have instead often chosen to directly or indirectly subsidise culprits in the fight against non-communicable diseases[55] such as sugar,[56] butter,[57] and high fructose corn syrup.[58] Subsidies are permitted in the WTO, subject to compliance with stringent conditions set out in the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) and (in the case of agricultural products) the *Agreement on Agriculture*.[59] The disciplines established in these agreements can and should be brought to bear on massive subsidies of unhealthy food products, particularly where they fall within the categories of export subsidies (contingent on export)[60] or import substitution subsidies (contingent on the use of domestic over imported goods).[61] In addition to undermining health policy goals, these subsidies are often counterproductive from an economic perspective, shielding non-

[53] WHO. *Interventions on Diet and Physical Activity: What Works – Summary Report.* Geneva: WHO. Available at: http://www.who.int/dietphysicalactivity/summary-report-09.pdf; 2009: 11-12.
[54] Burns C. A Multidisciplinary View of Obesity: The Vulnerable and the Disadvantaged. *Australian Economic Review* 2008;41(1):90, 92-93.
[55] Pickett B. From a Rhetoric of Nostalgia to a Health-Based Policy: Tobacco, Obesity and the WTO. *Cambridge Review of International Affairs* 2006;19(1): 139, 140, 142.
[56] WTO. *European Communities – Export Subsidies on Sugar*. WTO document WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R. Geneva: WTO. Available at: http://www.worldtradelaw.net/reports/wtoab/ec-sugar(ab).pdf; 2005.
[57] Castle S. EU's butter mountain is back. *New York Times*. Available at: http://www.nytimes.com/2009/01/22/world/europe/22iht-union.4.19606951.html; 2009.
[58] WTO. *United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products: Request for the Establishment of a Panel by Canada*. WTO document WT/DS357/12. Geneva: WTO. Available at: http://docsonline.wto.org; 2007.
[59] Both agreements are contained in *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 33 *International Legal Materials* 1125 (signed 15 April 1994, entered into force 1 January 1995).
[60] SCM Agreement, Article 3.1(a). Agreement on Agriculture, Articles 3.3, 8, 9.2.
[61] SCM Agreement, Article 3.1(b).

competitive domestic industries from foreign competition, while simultaneously driving those foreign competitors (frequently from developing countries) out of business.

Conclusion

Globalisation, including trade liberalisation effected through WTO rules, may well have some negative health effects, but these should not obscure its potential benefits. If properly managed, positive welfare effects of trade liberalisation in the health sector may derive not only from the transfer of technology and knowledge but also from economic growth, fairer competition among producers and suppliers, and consequently increased access to a wider range of better quality health products and services. In the context of non-communicable diseases exacerbated by tobacco, alcohol and poor diet, the WTO agreements offer considerable deference to national policy interests, and rigorous compliance with WTO rules may in fact assist in ensuring that regulatory measures are optimally targeted to achieve their health goals. Fear, uncertainty, and ignorance of WTO law need not be accepted as an excuse for not systematically pursuing those goals.