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DEBATING TRADE AND HEALTH: Developing the understanding of how far world trade law affects alcohol and public health

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Abstract

Aims: the alcohol field is gradually becoming ever-more aware of the consequences of world trade law for alcohol policies. However, there is a need for greater clarity about the different effects of trade on alcohol-related harm, in particular to avoid a ‘chilling’ effect on policy from misunderstanding current legal obligations.

Methods: a comprehensive review of all literature on alcohol and world trade (including WTO trade disputes on alcohol), supported by a more selective review of other relevant cases, academic reports and the grey literature on trade and health.

Results: the burden of WTO law on alcohol policies depends on the type of policy in question. Purely protectionist policies are likely to be struck down, which may lead to increases in alcohol-related harm. Partly protectionist and partly health-motivated policies are also at risk of being struck down. However, purely health-motivated policies are likely to be defended by the WTO – and to the extent that policymakers misunderstand this, they are needlessly avoiding effective ways of reducing alcohol-related harm.

Conclusions: WTO agreements contain genuine and substantial risks to alcohol policies, and various ways of minimizing future risks are suggested. However, the 'chilling effect' of mistakenly over-estimating these constraints should be avoided. Health policymakers should decide on which policies to pursue based primarily on considerations of effectiveness, ethics and politics rather than legality. If these are implemented as trade-unobtrusively as possible, then they are overwhelmingly likely to win any challenges at the WTO.

Keywords

WTO; alcohol policy; trade agreements.

Aims

Following a series of articles and presentations dating from an Addiction article in 2000, the alcohol field has gradually become aware of the potential threat of world trade law for alcohol policies [1-7]. Given the previous paucity of knowledge about such issues in the alcohol field, we are indebted to these researchers – mainly but not exclusively associated with the Canadian Centre for Policy Alternatives (CCPA) – for tirelessly bringing these matters to our attention.

This article seeks to build upon this work in two key ways. Firstly, we argue that there is a need for greater clarity about the effects of trade on alcohol-related harm. We therefore suggest a threefold typology of effects: changes to protectionist policies, health policies, and mixed-motive policies.

Secondly, we use this typology to argue that there is a *second* threat to alcohol policies beyond that of being ruled counter to world trade law. This is in the form of a ‘chilling effect’, whereby policymakers wrongly believe that certain policies are illegal and thereby needlessly reduce the policy space. This arises because the potential to implement purely health-focused alcohol policies is only minimally reduced under world trade law – as unheard voices have argued elsewhere [7, 8] – yet there is a perception that the effect is much greater.

We conclude by re-examining key policy options in the light of the typology adopted here, and summarising the argument made in the article.

Scope

International trade law is a generic term for many legal strands covering varying geographical areas and different issues. The most high-profile truly global agreement for many years was the General Agreement on Tariffs and Trade (GATT), covering goods. This was joined in the mid-1990s by the General Agreement on Trade in Services (GATS), covering services (defined to include most of human activity). These are the agreements that are most likely to affect alcohol policies, and it is these two agreements that will be the focus of study here.

To avoid confusion, a number of other agreements of lesser but potential relevance [9] will be set aside. This includes other WTO agreements, including the intellectual property treaty TRIPS and the Technical Barriers to Trade treaty (TBT) covering minimum standards for goods. It has sometimes been suggested that TBT could be a problem for alcohol [5:568, 10], but it offers a certain degree of flexibility [11] and may even be beneficial in developing countries [12, 13].

Furthermore, this paper does not include non-WTO international treaties, such as the EU treaties (covered in a separate submitted paper) and the Multilateral Treaty on Investment (MAI) whose negotiations collapsed in 1998. Some aspects of these treaties are worrying – such as the debate over the expropriation clause in NAFTA [1, 14:108] – but it is unhelpful to merge these issues into a discussion of the WTO.

Methods

This paper is based on a review of the academic and grey literature, undertaken in two separate strands. Firstly, a review was undertaken using the Web of Science, IBSS, PubMed, EconLit and Google Scholar, in order to comprehensively identify literature dealing with alcohol and tobacco (given the similarity of many trade issues). This searched titles and abstracts for a combination of WTO-relevant keywords (e.g. 'trade law', 'WTO' etc.) and alcohol- or tobacco-related keywords ('beer' etc.).

Secondly, a further search was undertaken on the more general area of 'trade' and 'health'. This included (i) searches of specific journals (e.g. 'Journal of World Trade', 'Journal of Law, Medicine & Ethics'), (ii) all relevant publications by the World Health Organisation [15-18], (iii) reports on key WTO disputes (using the WTO official documents, summaries from the European Journal of International Law (<http://www.ejil.org/journal/curdevs/AB.html>), and reports from the UN- and WTO-accredited International Centre for Trade and Sustainable Development (ICTSD)), and (iv) weekly reports from the BRIDGES Weekly Trade News Digest (hereafter 'Bridges') from 2004-2007.

Such a review cannot be 'systematic' in the conventional sense as it reviews legal opinions and policy developments rather than quantitative intervention studies. It is nevertheless a more comprehensive and transparent review than has previously been conducted in this area.

Results

The WTO as potential threat

The WTO agreements potentially outlaw a wide range of alcohol policies that could inadvertently benefit domestic businesses above foreign ones. Yet both GATT (Article XX) and GATS (Article XIV) explicitly state that nothing in either agreement “*shall be construed to prevent the adoption or enforcement by any contracting party of measures...necessary to protect...human health.*” This applies as long as measures are not a “*disguised restriction on trade*” or “*unjustifiable discrimination*” – these latter points being known as the ‘chapeau’.

While this health defence therefore appears to allow countries to implement alcohol policies when they are violating international trade commitments, the crucial word here is ‘necessary’. Those alcohol policies that restrict trade contra a country’s commitments must pass a WTO necessity test, which means that “*the measure be the least trade-restrictive measure reasonably available in the circumstances to meet the objective of protecting health*” [17:85].

The argument that the WTO is a threat therefore stems from the nature of this necessity test, which is interpreted narrowly [3, 12] and whose burdens are “*substantial and difficult*” [16]. As well as the burden of proof being upon the defending country to show the policy is not a disguised restriction on trade [11:95], they must also show that the alternatives will not be equally effective [17:153]. In the Thailand-Cigarettes case, the WHO pointed out that multinational tobacco companies had routinely circumvented national restrictions on advertising in the past [19, 20], but this was disregarded by the

panel [11]. Given that such cases are decided within opaque panels [1:369, 2:S495] by trade experts – although admittedly politically-sensitive ones [8] – there can therefore be a feeling that health views are marginalised.

Moreover, rulings are highly unpredictable [4], with many initial panel decisions being overturned by the Appellate Body on points of law, and countries finding themselves held to commitments they never knew they had made [14:53-55], such as in the US-Gambling case discussed again below [21]. The WTO has countered that GATS is ‘flexible’, due to the voluntary nature of its more exacting commitments [22]. However, this appears disingenuous given that countries face strong pressure towards increasing commitments which are then effectively binding in perpetuity when made – while countries can technically scale back their commitments in one area, this involves compensatory commitments elsewhere, effectively giving them a high price that is unaffordable for poorer countries [17:79,140]. Even the US – who are attempting such a readjustment following the US-Gambling case – are arguing that this ‘clarification’ should not incur compensatory payments given their prohibitive cost, although this does not appear to be held by most of the countries concerned (see Bridges 4/7/2007). Thus the commitments are effectively permanent for most countries, and this makes the unpredictability of rulings particularly difficult to combat [5, 6, 21, 23].

Clarifying the effect of the WTO on alcohol

Despite this, our contention here is that a focus on the problems of the health defence has obscured the value that remains within it. To demonstrate this, we first move beyond treating GATT/GATS as a unitary phenomenon. Instead, we clarify the

GATT/GATS effect on alcohol policy by dividing it into three parts, reflecting the different types of policies involved:

1. *Protectionist policies*

Those policies that aim to protect domestic alcohol industries from foreign competition are highly unlikely to be permissible under WTO law, whether they are tariff or non-tariff based [9]. This can be seen on the laws struck down in a series of pre-WTO disputes between Canada and the USA [24-26], and later disputes on giving locally-produced drinks a favourable tax treatment in Chile, Japan and Korea [5:569]; a pending case where the EU is challenging Canada is based on similar considerations (DS534). Tariffs charged on the import of foreign drinks are also likely to be scrapped where countries have made commitments, as can be seen in the recent abolition of a taxes on imported wines and spirits in India (Bridges Weekly Trade Digest 4/7/2007).

Removal of such policies is likely to increase alcohol consumption, via a combination of comparative advantage, productivity improvements and increased marketing [27-29]. This has been shown in the tobacco field, where trade liberalisation in low- and middle-income countries led to increasing marketing, especially to youth and women [30], and to increased tobacco consumption [31, 32:924]. Less evidence exists for alcohol, but the liberalization of spirits in Switzerland was found to lead to price reductions and increased spirits consumption [33].

While low-level alcohol consumption at the individual level can be beneficial to health, increases in alcohol consumption at the population level are likely to lead to increased

alcohol-related harm [34:223-230, 35]. WTO law is therefore likely to lead to an increase in alcohol-related harm *independently of their effect on health policies*.

2. Partly protectionist, partly health policies

It is technically true that only one measure – the French government’s ban on asbestos – has been fully defended on health grounds at the WTO [2:S496, see also 6:115, 29:128]. Yet the consistent response of the arbitrating bodies when dealing with fused protectionist and public policy interests has been to rule against former objective while reaffirming the rights to meet the latter one. To take but two examples:

- The Dominican Republic’s policies to reduce cigarette smuggling were ruled illegal in 2005 (DS302/5). Rather than showing that states have lost the right to secure compliance with laws, though [as argued in 5], the Appellate Body explicitly allowed certain policies but ruled that the particular discriminatory form of the laws was unjustifiable [36]. In particular, the WTO took issue with the necessity to affix tax stamps under the supervision of domestic tax authorities, which imposed additional costs on foreign producers.
- In a widely reported case, the US ban on foreign internet gambling was struck down for being unjustifiably discriminatory (DS285). While the interim report from the panel further argued that the US should have first turned to consultation [6:115], the Appellate Body viewed consultations as being an uncertain process and therefore no substitute for legislation – and went on to reaffirm the power to make policies based on ‘public morals’ considerations [22:114, 37].

This raises a problem, in that *“governments regularly, and rightly, adapt to political pressures by instituting policies that are complex delicate balances – sometimes messy compromises – having multiple aims and varying degrees of ineffectiveness”* [14:44].

For example, a government could impose restrictions only on new entrants to a market, but by doing this would be being implicitly protectionist (as new entrants are more likely to be foreign). There is real uncertainty about the legal status of these relatively common compromises [38], which may prove to be justifiable on health grounds, but run the risk of going the way of most previous cases on the health defence.

3. Health policies

In contrast, those policies that are purely motivated by health are highly likely to be defended by the WTO. This is with the caveat that policies will still be subject to a necessity test, which certain highly trade-restrictive policies are unlikely to pass. For example, alcohol monopolies, ‘freezing’ preferences for particular drinks [2, 17] or quantitative restrictions such as ‘economic needs tests’ are unlikely to be possible for countries that have made commitments in relevant sectors. Banning imports will also be unlikely to succeed, as found in the 1990 Thai-Cigarettes case (DS10/R) where the WTO ruled that there were equally effective but less trade-restrictive measures available, e.g. tax increases and an advertising ban.

Nevertheless, a purely health-motivated policy can be relatively confident of being upheld in the WTO courts, and countries are entirely free to set their own level of health protection [8]. When considering less trade-restrictive alternatives they are further permitted to take into account implementation issues, as when perfect management of

risks in the Brazil-Retreated Tyres was seen as unrealistic (Bridges Weekly Trade Digest 20/6/2007). They can also follow minority reasonable scientific opinion [13, 39] when assessing risks – which is arguably a form of the ‘precautionary principle’ [8, but see 39]. The European spirits group CEPS’ view that voluntary self-regulation and education are ‘reasonable alternatives’ to regulation [29:135] is therefore unlikely be upheld by a WTO Panel (see also EC-Asbestos AB report para 169-174).

This conclusion is also true for the ongoing discussions about Domestic Regulation, which appear to threaten a necessity test on all (even trade-irrelevant) policies [1, 40, 41]. Such a development would increase the number of alcohol policies deemed illegal [2, 3, 5, 42], but only those that are fully or partly protectionist; those that are fully health-motivated would be similarly unscathed. [Given that this would still increase alcohol-related harm, it should further be noted that such a wide-ranging necessity test is unlikely [17, 43], as trade negotiators at some of the major powers such as the US are firmly opposed to such an extension of the necessity test; see Bridges 10(23) and 10(26)].

This still raises the question of how a country can demonstrate to a suspicious WTO that its policies are motivated by health alone. A promising avenue here is by being clear in the ‘design, architecture and structure’ of a policy [38]. The US-Shrimp (DS58) case highlights this, in that the environmentally-motivated restrictions were firstly struck down by the WTO, but were later upheld after the US made clear efforts to meet the objectives in a fairer way, through both revisions and particularly multilateral efforts to find an alternative.

Designing policies in such a way may solve legal problems but simultaneously creates political ones. Health-relevant policies are much less likely to be supported by domestic industries if they offer no protection from foreign companies [8]. This will thereby raise the political threshold for action, reducing the level of alcohol policies and increasing alcohol-related harm.

Regulatory chill

Using this typology, we have clarified that trade policies are likely to increase alcohol-related harm through their effect on fully or partly protectionist policies. However, countries are effectively still free to regulate purely on health grounds, and in this sense the view that the health defence is ‘ineffective’ [5:575] or ‘weak’ [3:63] is overstated. Indeed, the WTO is arguably ‘highly deferential’ to health policies, at least compared to other safeguards in the WTO agreement [8].

Yet there are signs that the *belief* among the public health community is that a greater number of health-motivated policies may not be permissible under WTO law. For example, one recent review for the WHO notes that “*current international trade law and the presence of the free trade movement over controls on public health suggest that [controls on manufacture and distribution] may be of limited relevance in a number of countries*” [44:18-19]. Similar comments for areas including taxation policy and advertising restrictions can also be found in a WHO review on trade law [14] and a resolution of the American Public Health Association [45:4-5].

It has previously been argued that uncertainty over trade treaties – and the exaggerated claims made about them by companies [1:362] – can ‘chill’ domestic policymaking initiatives [14, 42] [5, 14:68]. Extending this further, we believe the danger here is that the mistaken *‘pessimism bordering on panic’* [8:530] about health-motivated policies could lead policymakers to avoid considering policies that are entirely legitimate under the current trading system.

To avoid this, it is necessary to send a clear message to policymakers that in general, they are free to adopt nearly any policy on alcohol as long as it is motivated purely by health and is designed to be as trade-friendly as possible. For existing policies that are compromises between health and protectionist interests, policymakers can decide to wait to see if they are challenged at the WTO, and if they are, can then redesign the policy on health grounds rather than abolishing it completely. Any perceptions to the contrary may be needlessly damaging to public health.

Conclusions and Implications

Policy implications

It is near-unanimously accepted by those in the health field that the trade negotiations and disputes must be made more transparent, have increased civil society involvement, and need to have a greater involvement of health interests such as the WHO [2, 5, 6, 11, 12, 26, 29], particularly given the diversity in how different stakeholders perceive the issues [46]. The extension of the necessity test to Domestic Regulation may be unlikely to occur but is still possible [47] and therefore in need of close attention [16], while clauses such as the NAFTA ones on 'expropriation' would be damaging to public health [9]. This requires an active mood on the part of the health field to 'inject themselves' into these debates [13:553], which the WHO and others appear to be doing with increasing energy.

Beyond this, the approach of this article helps us to evaluate specific changes in trade obligations on alcohol:

- Increasingly, some of those in the alcohol field suggest a '***Framework Convention on Alcohol Policy***' (FCAP) explicitly modelled on the current Framework Convention on Tobacco Control [1, 5, 48, 49], or an alternative method for creating a binding international agreement on alcohol [50]. This would not automatically make WTO-inconsistent policies somehow permissible [18], but it would provide an international community of support for such policies, and potentially help to manage the relationship between alcohol and trade [51].

It may also add weight to the defence of such policies under trade disputes, although how this would affect partly protectionist policies remains to be seen.

- There are various ways of **changing WTO agreements** – or more easily, their interpretation – in ways that would be beneficial for health [17:120]. In particular, the burden of proof for the health defence could be changed by requiring the country invoking the health exception simply to show that it was not *'patently unreasonable'* to have its present policies [11:116]. Alternatively, measures could be given “*a rebuttable presumption of legitimacy under international trade law*” [17:171]. Such changes would change the balance between trade and health when considering partly protectionist and partly health-motivated policies.
- The World Medical Association and others have suggested **'carving alcohol out' of trade agreements** completely [2:S498, 5:576-7, 12, 29]. While this is the strongest way of defending partly protectionist policies, alcohol is no different to other commodities subject to socially-motivated regulation here, and it may be hard to argue that this is an exceptional case. Where alcohol is 'no ordinary commodity' is for the potential increase in harm from removing purely protectionist policies. The importance of this depends on whether alternative measures are seen as capable of counter-acting the effects of liberalisation. For Thailand it seems as if there was an initial rise in smoking [5:570, 42], but that this was reversed with two legitimate tobacco acts [12, 18, 52]. The Secretariat of the Pacific Community have argued that resisting globalization will always be a

‘stronger’ option for alcohol [28:5], and this led to the carving out of both alcohol and tobacco from the Pacific Islands Community Trade Agreement (PICTA).

However, all of these approaches would require a level of political will that currently seems lacking at the international level. This is particularly true as each approach has specific political weaknesses. By imposing policies lacking public support in some countries, a FCAP could potentially damage the perceived legitimacy of international institutions [8]; this is an option that depends on suitable political timing [50]. Changing WTO agreements would require cooperation across multiple health and social welfare fields. And carve-outs’ defence of purely protectionist policies – such as Taiwan’s alcohol monopoly that *lowered* prices as an inducement to voters [7] – will seem unjustifiable from a trade perspective [51], and be particularly difficult to gain support for in a tense period of trade negotiations [52, 53].

Whatever the views on these options, governments can avoid making greater commitments on alcohol in future, and also introduce stringent alcohol policies to counteract the effect of liberalisation [28].

Conclusions

In this article, we have argued that it is necessary to split the influence of GATT/GATS on alcohol-related harm in three in order to properly grapple with its implications. Firstly, the degree of protectionism will decline as liberalisation proceeds, which will raise alcohol consumption. It is in this sense, *and this sense alone*, that it can be argued that the goals of trade liberalisation are inherently in conflict with public health [5:1, 29:125].

Secondly, alcohol policies that are a mixture of protectionist and health motives may be ruled illegal. Finally, and in contrast, purely health-motivated alcohol policies are likely to be upheld at the WTO (with the exception of the caveats mentioned above). This is not to suggest that such policies will be immune to pressure [6], but rather than their legal status is more secure than is commonly understood.

From the increased clarity this brings, we have argued that policymakers are at risk of avoiding certain health-motivated alcohol policies under the false impression that they are unlikely to be permissible under WTO law. Our most important conclusion, then, is that policymakers should decide on which policies to pursue based primarily on considerations of effectiveness, ethics and politics rather than legality. And when designing policies, they should consider how to make these policies as trade-unobtrusive as possible – secure in the knowledge that such attempts will only confirm the legality of such policies for the WTO.

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