



Trade and Public Health | Room to Regulate Jakarta, 2016

Center for International Trade and Investment

Structure of the present lecture

- We will analyse the relevance of existing WTO agreements in addressing public health issues
- We will discuss key principles under WTO that countries should bear in mind when adopting measures
- We will examine several cases under WTO that have concern on trade and public health

Introduction

- In the past, people tend to address trade and health as totally separated areas. However, as trade liberalisation is happening, trade and health are becoming more interrelated, directly or indirectly.
- Direct example of how trade can affect health such as importing poultry from a country that has bird flu can transmit the disease through the poultry traded.
- On the contrary, health can also affect trade, for example an outbreak of virus on oranges can distort trade between countries.
- Indirect example of how trade can affect health is changes of rules in patent may affect prices of medicines which definitely will affect public health.

First and Foremost: Definition

- WHO defines health as:
"a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".
- What is public health? Still definition from WHO:
Public health refers to all organized measures (whether public or private) to prevent disease, promote health, and prolong life among the population as a whole. Its activities aim to provide conditions in which people can be healthy and focus on entire populations, not on individual patients or diseases. Thus, **public health is concerned with the total system** and not only the eradication of a particular disease.

What about WTO definition?

- WTO has no specific definition of what public health is.
- However, WTO jurisprudence has established that Members have the right to determine the level of health protection they deem appropriate.

WTO Agreements related to health

Sanitary and Phytosanitary Measures (SPS)

Technical Barriers to Trade (TBT)

Trade Related Intellectual Property Rights (TRIPs)

General Agreement on Tariffs and Trade (GATT)

General Agreement on Trade in Services (GATS)

WTO Main Principle

- WTO is an organisation built upon non-discrimination principles, which consist of national treatment (NT) and most-favored nations (MFN) principles.
- WTO Members are not allowed to apply different treatment to domestic and foreign goods/services → National Treatment
- WTO Members are not allowed to apply different treatment to its trading partners → Most-Favored Nations

These two principles are reflected in GATT, GATS and numerous WTO Agreements.

General Exception in GATT & GATS

- GATT sets out basic rules for trade in goods under the auspices of WTO, while GATS provides basic rules for trade in services.
- Both agreements provide general exception, which contain list of objectives that Members can pursue, including **public health**, which means Members may deviate from its obligations in order to pursue a legitimate objective.
- However, the measures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. (Art. XX of the GATT & Art. XVI of the GATS)

An example of non-discrimination between trade and health

Country A restrict the level of pesticides on fruit because of unacceptable health risk. This will certainly affect trade to the extent that fruits that do not meet the specified requirement will not be able to enter country A's market.

Is this objective and this measure acceptable under WTO rules?

Answer:

Health is perfectly legitimate objective under WTO. However, if country A wants to restrict the level of pesticides on fruits, it does not matter where the fruits come from.

As long as the fruits fulfills the requirement of country A, it should be allowed to enter the market, regardless of its origin.



<http://www.consumerreports.org/cro/health/natural-health/pesticides/index.htm>

Case Study: *Brazil – Retreaded Tyres (DS 332)*



- In 2005, the EC filed a complaint against Brazil regarding Brazil's import ban on retreaded tyres from EC, but exempted MERCOSUR countries from the ban.
- Brazil argued that retreaded tyres have shorter lifespan which impact waste management of tyres in Brazil. These used tyres cannot be buried as it will poison the soil, while if they are burned, the tyres will release toxic substances. Ultimately, if the tyres are just dumped, it will be home to malaria mosquitos.

The Panel and AB agreed that public health is the legitimate objective pursued by Brazil. However, it was found that since the ban applied, the domestic retreading tyres industry had grown exponentially. Finally, although the WTO accept the objective of Brazil, it determined that the ban was a disguised restriction on trade.

Technical Barriers to Trade (TBT)

- TBT Agreement allows countries to obstruct trade for legitimate reasons, including health, but such measures shall not create unnecessary obstacles to trade.
- TBT Agreement aims to create a balance between regulatory autonomy and trade.
- TBT Agreement deals with process and production methods used in producing goods, such as packaging, labelling, manufacturing, etc.



Technical Barriers to Trade (TBT) – cont’d

- TBT agreement applies to product requirements that are mandatory (“technical regulations”) as well as voluntary (“standards”) and procedures (“conformity assessment procedures”).
- Members should seek to avoid unnecessary obstacles to trade, which means that Members must design the measure in a way that is “not more trade-restrictive” than necessary in order to achieve the legitimate objective.
- Members are also required to base their measure on international standards where applicable to avoid measures in different countries adopt different technical requirements that can obstruct trade.

Case Study: US – Clove Cigarettes (DS 406)

- In 2009, US issued a regulation which banned the production and sale of flavored cigarettes in the US (except menthol) with purpose to protect public health and prevent youth smokers.
- Indonesia as main producer of clove cigarettes brought a claim to the WTO in 2010, arguing clove and menthol cigarettes are like products and the ban was unjustified and arbitrarily.
- The Panel and Appellate Body, albeit of different reasons, agreed that the ban on flavored cigarettes is legitimate to protect public health.
- However, since it exempts menthol (which mostly produced by the US), Panel and Appellate Body decided that the US violates national treatment principle.

Sanitary and Phytosanitary Measures (SPS) Agreement

- Sanitary and Phytosanitary Measures (SPS) Agreement is WTO agreement that directly relevant to health.
- Objective of SPS Agreement:
 1. Recognize the sovereign right of Members to determine the level of health protection they deem appropriate;
 2. Ensure that a sanitary or phytosanitary requirement does not represent an unnecessary, arbitrary, scientifically unjustifiable, or disguised restriction on international trade.

Sanitary and Phytosanitary Measures (SPS) Agreement – cont'd

In reality, TBT and SPS measures are sometimes overlapping. Therefore, in order to determine a measure falls in the scope TBT or SPS, the nature and purpose of the measure should be examined.

Box 1

The definition of an **SPS** measure at a glance

Measures taken to protect:	from:
human or animal life	additives, contaminants, toxins or disease-causing organisms in their food, beverages, feedstuffs;
human life	plant- or animal-carried diseases (zoonoses);
animal or plant life	pests, diseases, or disease-causing organisms
a country	damage caused by the entry, establishment or spread of pests (including invasive species).

International Standard in SPS

- The SPS Agreement encourages members of the WTO to adopt international standards when adopting a measure whenever the international standards are deemed appropriate.
- In the area of food safety, the SPS Agreement explicitly recognizes the international standards developed by the joint FAO/WHO Codex Alimentarius Commission.
- This means that if a government has based its requirement, such as a maximum residue level for a pesticide in a food, on a Codex standard, it is presumed to be meeting its WTO obligations.

Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement

- TRIPS Agreement attempts to strike a balance between the longer term objective of providing incentives for future inventions and creations, and the shorter term objective of allowing people to use existing inventions and creations.
- The areas of intellectual property covered by the TRIPS Agreement that are relevant to health include: patents; trademarks including service marks, which are relevant, for example, to combating counterfeit drugs; and undisclosed information, including trade secrets and test data.

Relevance of some aspects in TRIPS and Public Health

Box 2

The relevance of trademarks and "undisclosed information" to health

- **Trademarks.** The agreement defines what types of signs must be eligible for protection as trademarks, and what the minimum rights conferred on their owners must be. It says that service marks must be protected in the same way as trademarks used for goods. Marks that have become well-known in a particular country enjoy additional protection.
- **"Undisclosed information".** Trade secrets and other types of "undisclosed information" which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices. But reasonable steps must be taken to keep the information secret. In the area of pharmaceuticals, certain production processes could be protected under trade secrets. Test data submitted to governments in order to obtain marketing approval for new pharmaceuticals (or agricultural chemicals) must also be protected against unfair commercial use.

The cooperating agencies: WHO - WIPO - WTO

- The WHO is the directing and coordinating authority for health within the UN system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries, and monitoring and assessing health trends.
- WIPO is the specialized agency of the United Nations dedicated to developing a balanced and accessible IP system which rewards creativity, stimulates innovation and contributes to economic development in the public interest.
- The core mission of the WTO is to open trade as well as to maintain and further develop the rules-based international trading system.
- Given that partnership is crucial for an effective international response to the ever-evolving challenges facing public health, the WHO, WIPO and WTO Secretariats have intensified interagency collaboration on matters related to public health, intellectual property and trade.

Famous case of Australia's plain packaging

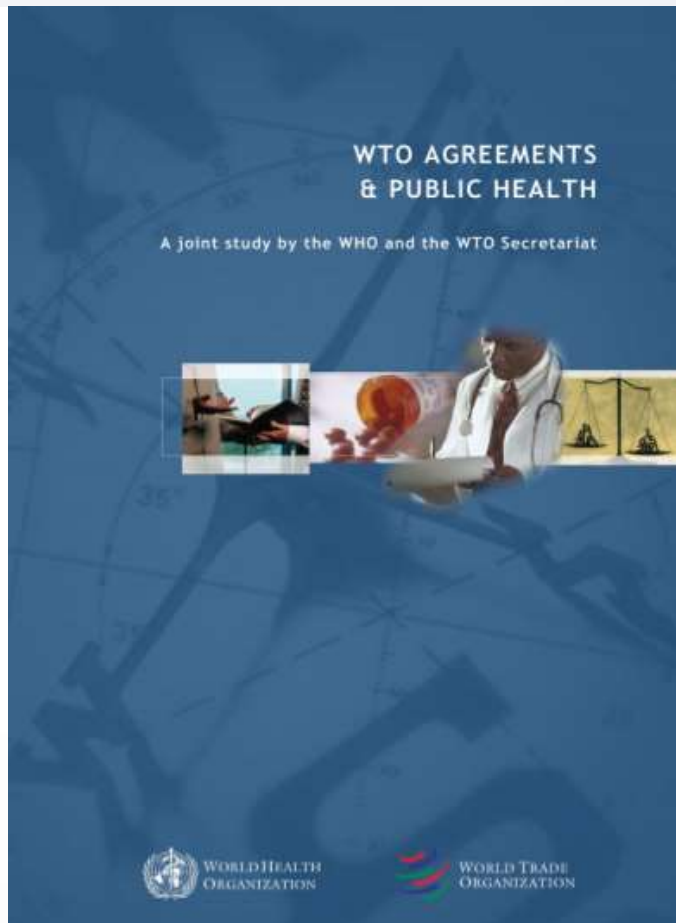
- In 2011, Australia adopted a measure that requires all tobacco products must be sold in plain packaging.
- Australia now is facing challenges from several countries in the WTO due to its plain packaging regulation for tobacco products.
- The claims not only invoke TBT agreement, but ultimately invoke TRIPS agreement as the plain packaging is argued to violate certain aspects of intellectual property.
- The cases are still going on and it would be interesting to see WTO's call on this.



Conclusion

- WTO although is an organization with objective to liberalize trade, but pays attention to other aspects such as public health.
- GATT, GATS, TBT, SPS, and TRIPS are some agreements under the WTO that provide room for countries to regulate on public health issues.
- Learning from previous cases, it is clear that WTO allows its members to adopt trade-distortive measures in order to pursue public health objective.
- However, often times countries use public health as “disguised protectionism or restriction”.

More reading on Trade and Public Health





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