

# **Necessary Constraints on International Trade Rules**

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## **Impacts of the WTO trade regime on essential human rights to food, water and public health.**

The international regime of trade and investment treaties provides the legal framework for the globalized economic system, but now intrudes into all elements of public policy and governance.

Increasingly, some citizens and governments are concluding that the WTO trade regime creates conflicts with the attainment of essential human rights to food, water and public health.

In response, some developments in international law are attempting to resolve these conflicts, premised on an identified need not to expand the WTO trade regime, but to constrain it.

### **Contextual framework**

- The United Nations Millennium Development Goals<sup>1</sup>
- The WHO's identification of the ten leading causes of human death, which include lack of food and safe water and use of tobacco<sup>2</sup>.
- The UNDP Background Paper: The Global Governance of Trade As If Development Really Mattered, Dani Rodrik, Harvard University, October 2001<sup>3</sup>
- The evolving UN law and processes regarding human rights to food, water and public health
- The interconnection of environmental protection with human health and development needs exemplified by human rights to food and water.

### **The Human Right to Food**

The UN Millennium development goal on hunger is to halve, between 1990 and 2015, the proportion of people who suffer from hunger. One element of food production that has been wrongly promoted as a solution to world hunger and has been addressed in international law is the proliferation of genetically modified ("gm") foods<sup>4</sup>.

The impetus for a biosafety protocol to regulate trade in these foods came from Southern countries, during negotiations for the Convention on Biological Diversity at Rio de Janeiro in 1992. It was founded on concern that living gm products can interbreed with local plants (biodiversity) everywhere, with possible dangers for

the agricultural and wild plants (and animals) essential to the food of billions of people.

Arduous negotiations between 1994 and 2002 resulted in the Cartagena Protocol on Biosafety, an international regulatory scheme, founded on the right of countries to decide whether or not to allow imports of these products and, if so, with what conditions.

The convention began as a means of protection of biodiversity with environmental protection goals. A strong draft treaty was produced in Africa, in which Ethiopia took a leading role.

However, the treaty then became, for agricultural-exporting nations including Canada, chiefly a trade treaty. These governments wanted this trade to be governed only by WTO rules, and intense disputes involved the language of the precautionary principle and the relationship between the Protocol and other (WTO) laws.

In the end, the Precautionary Principle was embedded in the Protocol<sup>5</sup> and language permitting the dominance of trade law was removed. The relationship between the Protocol and other international agreements, notably the WTO Agreements, is described in the preamble to the Protocol according to this convoluted and unclear compromise:

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,  
Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,  
Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.

Concluding observations regarding the Protocol:

- The Protocol is an example of the use of international law as a reinforcing screen for domestic regulation for an environmental goal relating to the human need and right to food. It mandates countries' legal right to assess the potential impacts of gm foods on local biodiversity for the protection of the local environment despite the regulatory approvals obtainable in exporting nations, which purportedly guarantee safety of the product.
- The presence of environment ministers from many countries, not just trade officials, was key at two crucial points in the negotiations, at Seattle in 1999 and in the final session in Montreal in January 2000. A more balanced approach to this law, which affects trade, resulted from the presence of not

only trade and economic officials, but also, environmental ministers and civil society representatives.

- Since the conclusion of the Protocol, there has been a proliferation of national controls on genetically modified products around the world, and the refusal of genetically modified food aid by African countries, again due to concern over impacts on local biodiversity.
- The continuing consumer (citizen) rejection of these products in Europe continues to exclude American and Canadian gm foods, despite repeated threats of retaliatory action at the WTO. The power of informed consumers and political action at the EU and in individual European countries remains a potent curb on corporate trade priorities.

### **The Human Right to Water**

The United Nations Millennium goal for environmental sustainability includes providing safe water to an additional 1.5 billion people by 2015. The UN notes that almost 20 percent of the world's people depend on unimproved water supplies to meet their needs, and that even piped water from municipal supplies may be contaminated by disease-bearing organisms and industrial pollutants<sup>6</sup>. Uncertainties from climate change mean that globally, a priority on water conservation and sustainable management are needed.

The UN Committee on Economic, Social and Cultural Rights, meeting in Geneva in November, 2002, considered the right to water in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights<sup>7</sup>. The committee found that the right to drinking water:

clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is the most fundamental condition for survival...The right to drinking water is also inextricably related to the right to the highest attainable standard of health...and the rights to adequate housing and adequate food...(and) the right to life and human dignity.<sup>8</sup>

The Committee noted that there is a widespread denial of the right to water<sup>9</sup>, and that with regard to implementation of international agreements:

Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right<sup>10</sup>.

Uncertainties from climate change mean that globally, a priority on water conservation and sustainable management are even more urgent.

Given negative experiences of water privatization in the UK, Bolivia, and South Africa, there is an increasing concern among civil society and some governments about the impacts of privatization of water services, as promoted by IMF and World Bank policies, and also, from the WTO General Agreement on Trade in Services.

Our study of the impacts of GATS on municipal services, including water and wastewater services, brought cautionary results<sup>11</sup>.

Although the impacts of GATS on countries varies, depending on the particular commitments made by each country, the Agreement may have far-reaching impacts on water management options even if countries did not list water services for specific coverage.

These impacts flow from the GATS VI(4) disciplines on domestic regulations regarding services, which must not be "more burdensome than necessary" and from the requirements of national treatment, most-favoured nation treatment and market access which apply to sectors for which countries have made full commitments.

The GATS promotes these effects:

- An increased number of actors promoting privatization of water services and able to pressure for it.
- GATS commitments in sectors other than those named as "water" services but that are related to water service delivery gives rights to foreign companies (engineering, construction, water testing and monitoring firms) to the same degree of involvement in water services and wastewater quality and quantity monitoring as domestic companies may have. It increases the number and scale of private sector players who may create pressure for more privatization of water services or parts of these services.
- Since GATS covers subsidies, private suppliers may demand access to subsidies like those paid to the public.
- The GATS I (3) (b) exemption for services provided by governmental authorities is weak, and may not actually protect many public services.
- The GATS contains no protection for water conservation measures, unlike GATT Article XX (g).
- Measures to promote water use efficiency and reduction, as well as energy reduction related to water services, if they impact private sector projects (the entry of new operators or access to the resource) or designs, may be vulnerable to challenge. They are not protected by the limited GATS XIV

general exception which does not protect measures taken for resource conservation.

- Improvements in water quality regulations may be challenged by foreign companies (through their governments) arguing that under GATS VI that such regulations are “more burdensome than necessary.”
- Environmental assessment requirements regarding water facility siting and treatment may be challenged as too burdensome.
- The use of a mix of regulatory tools (sewer use bylaws, permits, policies, user fees and education) to control discharges to sewers implies controls on rights of establishment of industries, as well as questions of domestic regulation of water effluents, both vulnerable to GATS oversight.
- Operator training and standards for training are the types of qualification requirements and licensing standards, that are subject to GATS VI and could be challenged as “too burdensome.”
- Changed land use planning for watershed management, stormwater runoff absorption, and demand management may ultimately imply limits to urbanization in certain rural areas and denial of water to proposed new businesses, meaning reduced opportunities for market entry by new suppliers, contrary to GATS XVI.
- The GATS VI test for regulations, “not more burdensome than necessary “ is vague and inappropriate, as a criterion of measurement for public protections, and invites biased decision-making in favour of strictly economic interests. It includes no articulated standard for measuring “burdensome” and for whether it includes measures that add mere inconvenience to potential exporters, or must entail significant costs or even serious disadvantage.
- The concept of regulations being burdensome conflicts with the increasing relevance of precaution in regulation-making for environmental protection and human health. Application of a precautionary principle or approach involves taking steps to prevent or minimize harm when a risk has become apparent, even though scientific uncertainty exists regarding some elements of the risk and the cause-effect relationships that produce it. Technical standards implemented on a precautionary basis are likely to be particularly vulnerable to a finding that they are unnecessarily burdensome
- The weakening of environmental and health standards due to trade rules is not only harmful for the environment and human health. It is also unwise economically, since strong environmental standards provide a major impetus for both public and private sector innovation and improved environmental technology. As the WTO Secretariat has noted:

National environmental problems and regulation have enabled firms to build up competitive advantages in different areas. For instance, the strict Japanese regulations on air pollution has made them market leaders in this domain, while the US industry's competitiveness in hazardous wastes is attributed to US Toxic regulations<sup>12</sup>.

Concern about the potential impacts of GATS on municipal decision-making has been expressed by the National League of Cities in the US, the Federation of Canadian Municipalities, and the Local Government Association in the UK.

In the current round of negotiations of the GATS, it is prudent for governments to analyze fully the potential impacts of this complex agreement before deciding on further liberalization of any sector.

### **The Human Right to Health: Public Programmes for Tobacco Control<sup>13</sup>**

The WHO lists tobacco use amongst the ten leading causes of human deaths<sup>14</sup>. As smoking rates decline in wealthy nations, the tobacco pandemic has moved to the developing world. Current projections of increased smoking point to a four-fold increase in tobacco-caused deaths in the developing world between 1990 and 2020. In 1990, there were three million deaths annually worldwide from tobacco use, about half in developed countries and half in developing countries. Current trends indicate that by 2020, there will be eight million deaths annually, three-quarters of them in developing countries.

A World Bank study has concluded that tobacco use constitutes a net drain on the global economy of \$200 billion. There is evidence that the penetration of new markets in the South by major tobacco producers leads to increased tobacco use.

Tobacco use is not only a global problem; it is a problem of globalization. Much of the increased spread of tobacco use can be traced to the vectors of liberalized trade, more active multinational corporations, with new technologies, increased marketing and foreign direct investment, and increased westernization.

There is a structural conflict between trade liberalization and public health. The benefits of liberalized trade (increased access to improved, more accessible and cheaper consumer products) apply in reverse to cigarettes. Public health is harmed when cigarettes are made more efficiently and inexpensively, more attractive, and more available. Resolving the conflict between trade liberalization and public health may be made more difficult in light of the WTO agreements through which global commercial activity – including the commerce of cigarettes – is governed.

### **Prohibition on Quotas**

The prohibition on "quantitative restrictions" in GATT Article XI means that countries cannot use quotas to restrict imports or exports of products, such as might be useful to restrict foreign-made tobacco to a limited share of a market.

## **"Like Products"**

WTO panels have consistently applied these principles to require that products which are used in similar ways must be treated equally as 'like' products. This has removed the ability for governments to make distinctions between goods on the environmental or social consequences of their manufacture and marketing. A WTO panel has determined that U.S.-style cigarettes are 'like' domestic cigarettes. The 'like-product' requirements forced Thailand to remove a ban on imported cigarettes.

## **Implications for key tobacco control policies**

WHO recommends comprehensive tobacco control programs. Yet the WTO agreements make it possible for the measures endorsed through one international agency (WHO), to be undermined by those of another (WTO). Such measures can be undone through official WTO rulings. They can also be blocked by the chilling effect when governments are dissuaded or discouraged by threats of trade action.

### **■ Ending tobacco advertisement and marketing**

Governments that try to ban or restrict cigarette advertising may find that they run against WTO agreements on services, technical barriers to trade, and intellectual property.

### **■ Health Warnings and Packaging Requirements**

Intellectual property and investment agreements can provide limits to intended governmental controls on tobacco packaging as Canada learned when the federal government considered requiring plain (generic) packaging of cigarettes. In the face of a contrary legal opinion from a former US Trade Representative, Canada dropped its generic tobacco packaging initiative.

### **■ Other measures**

Other sound public health measures that could potentially be challenged under one more international trade agreements include:

- Regulating tobacco product manufacturing
- Controls on smoking in public places and workplaces
- Differential tobacco taxation
- Bans on tobacco imports
- Supporting state monopolies for tobacco manufacturing
- Creating economic alternatives to tobacco growing and manufacturing

## **Conclusion regarding Trade and Tobacco Control**

Given the broad reach of the trade agreements, and the variety of potential barriers they pose to tobacco control policies, it is essential that those charged with negotiating international instruments resolve the current conflict between tobacco control and trade liberalization by ensuring that national and international measures



to curb tobacco are not undermined by obligations under commercial trade agreements. Treaty and trade negotiators should safeguard the ability to implement public health measures under all international obligations. Current negotiations for a new WTO services agreement and a WHO Framework Convention on Tobacco provide these powerful negotiators with opportunities and responsibilities to ensure this is done. In these negotiations, countries are attempting to ensure that domestic programs for tobacco control will not be threatened by challenges instituted under the WTO trade agreements.

## Conclusion

The breadth of the WTO agreements means that the goal of de-regulated trade now conflicts with other crucial public policies, including those related to human needs for food and water and effective public health programmes. It is now prudent for governments to examine the potential impact of trade law proposals on a wide range of public policies. The negotiation of international law within the United Nations system can be a counter-balancing approach to the creation and preservation of these crucial policies.

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<sup>1</sup> Millennium Development Goals, [www.developmentgoals.org](http://www.developmentgoals.org).

<sup>2</sup> Agence France\_Presse, Agency Puts Hunger No. 1 on List of World's Top Health Risks October 31, 2002

<sup>3</sup> Dani Rodrick, The Global Governance of Trade As If Development Really Mattered, Background Paper, UNDP, October 2001.

<sup>4</sup> This section is based on Michelle Swenarchuk, The Cartagena Biosafety Protocol: Opportunities and Limitations, February 2000, [www.cela.ca](http://www.cela.ca).

<sup>5</sup> Cartagena Protocol on Biosafety, Articles 10(6) and 11(8).

<sup>6</sup> [www.developmentgoals.org/Environment.htm](http://www.developmentgoals.org/Environment.htm)

<sup>7</sup> UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, draft General Comment No. 15 (2002), Geneva 2002

<sup>8</sup> Ibid, Paragraph 2

<sup>9</sup> Ibid, Paragraph 5

<sup>10</sup> Ibid, Paragraph 26.

<sup>11</sup> *From Global to Local: GATS Impacts on Canadian Municipalities*. M.

Swenarchuk for the Canadian Centre for Policy Alternatives and the Canadian Environmental Law Association. May 2002. [www.cela.ca](http://www.cela.ca)

<sup>12</sup> WTO Environmental Services, para.15, citing OECD, Future Liberalisation of Trade in Environmental Goods and Services: Ensuring Environmental Protection As Well As Economic Benefits, COM/TD/ENV((98)37/FINAL, 1998

<sup>13</sup> This section is based on: *An introduction to International Trade Agreements and their impact on Public Measures to Reduce Tobacco Use*, Cynthia Callard, Neil Collishaw, Michelle Swenarchuk, Physicians for a Smoke-Free Canada (Ottawa) and Commonwealth Medical Association Trust (London), April 2001

<sup>14</sup> Op.Cit. Endnote 2