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INTERNATIONAL TRADE RULES FOR BANNING E-VAPOR PRODUCTS

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EXECUTIVE SUMMARY

In many contexts, including definitions set by the World Trade Organization, e-vapor products (EVPs) like e-cigarettes and tobacco-heated products (THPs, sometimes referred to as "heat-not-burn") may be regarded as "like" traditional, combustible cigarettes. EVPs deliver nicotine through inhalation and often are used as a substitute because of their much lower risk profile. However, given the novelty of EVPs and the diverse perception of the harms they pose, more and more governments around the world are banning these products on a precautionary basis.

This leads to the question of whether such bans are legal under international trade law, particularly as EVPs often are subject to regulations that are more restrictive than those for conventional cigarettes. For example, currently, tobacco-heated products that contain tobacco are classified as *tobacco products* and therefore do not face discrimination issues. However, e-cigarettes, which do not contain tobacco, can be classified either as "recreational" or "medical products and devices." This broader classification opens the door for their prohibition, because nicotine is a drug that also has medicinal uses. Such classification can subject products that contain nicotine to a different set of classifications in ways that appear arbitrary. Given that nondiscrimination is a primary tenet of WTO law, such measures are likely illegal under WTO agreements, especially in the absence of solid justification for such discrimination.

The WTO's determination of discrimination is guided by a three-pronged standard of assessment:

1. Whether the product at issue is "like" any other product traded freely on the same market (either imported or domestic)[1];
2. Whether the regulatory measure in question results in less-favorable treatment of the product at issue, compared to like products it resembles; and
3. Whether the government introducing the regulation is covered by an exception from WTO rules.[2]

This white paper offers analysis of the legality of EVP bans under international trade law, which is rooted in the WTO – an organization with 164 members at the time of publication. With virtually universal membership, the major rationale of the organization is for member governments to provide a level playing field for trading across borders, irrespective of the origin of the traded goods or services. Its goal is to address the competitive disadvantage producers may face as a result of protectionist and discriminatory regulations on the global

1. As to a determination of "likeness," the assessment will start by checking if (imported) EVPs are "like" any other product on the domestic market. In the case of EVPs, likeness is assessed by a comparison to conventional cigarettes because of their relatively high standard of proximity.

2. Like, for example, the General Agreement on Tariffs and Trade (GATT) Article XX General Exceptions.

market. Such measures are, at times, used to insulate domestic industries against "like" imported products or to grant an advantage to a specific importer over other importers in the same market. Under current WTO agreements, prohibition of like products—in this case, e-cigarettes—is illegal and should be reversed.

AN OVERVIEW OF THE EVP MARKET

In order to begin to assess the issue of discriminatory regulation, it is important to understand the nuances of the EVP market. The term "e-cigarette" refers to a broad class of coexisting devices currently available: "first-generation," which are most like a traditional cigarette; "second-generation" vapor tank systems; and even larger "third-generation" personal vaporizers. These devices can also be classified as "closed" or "open" systems, depending mainly on the degree of control that users have over the liquid used in the e-cigarette, the voltage and resistance applied to heating the liquid and ventilation features.[3] The primary distinguishing feature of any type of e-cigarette is that its use does not entail the combustion of tobacco.

The global market for e-cigarettes in 2015 was estimated at almost U.S. $10 billion,[4] of which the United States constitutes about 56 percent and the United Kingdom about 12 percent. Another 21 percent of the market is divided among China, France, Germany, Italy and Poland, at roughly 3 to 5 percent each.[5]

Of the newer-generation EVPs (which include THPs and e-cigarettes), e-cigarettes have been classified as both recreational consumer products similar to combustible cigarettes, or as medicinal products. The latter classification is sometimes justified by the fact that e-cigarettes can be likened to other tobacco replacement therapies like nicotine patches or gum. However, once assigned such a classification, e-cigarettes (without tobacco) become subject to additional restrictions.

Unlike traditional tobacco cigarettes, e-cigarettes generate nicotine-containing aerosols by heating a solution that users inhale. In addition to nicotine, the main constituents of these e-cigarette solutions are propylene glycol or glycerol, and various flavoring agents.[6] The choice of e-liquid, the user's puffing style and the device's capacity to aerosolize the e-liquid at increasing temperatures[7] are all factors that determine whether the e-cigarette delivers sufficient nicotine to mimic the sensory feel of smoking.

However, a newer technology is beginning to gain ground in terms of user demand for nicotine and for satisfying overall experience. THPs—which use actual tobacco and, in some cases, require lighting—are engineered to heat, but not to combust for inhalation. For many smokers, this more closely mirrors the rituals associated with the habit, [8] such as handling, lighting and oral gratification.

As awareness of EVPs has risen and their market share has increased, major tobacco companies have become interested in investing in them. Currently, the largest tobacco companies already have e-cigarette products on the market or under development.[9] However, the market is quite fragmented and there are currently about 40 firms operating within it that are entirely independent of large tobacco companies.

WTO TRADE DISCRIMINATION

Nondiscrimination is one of the fundamental market-access principles of the General Agreement on Tariffs and Trade (GATT)/WTO system. The system's 1994 nondiscrimination obligations are distinguished by a two-pronged system of classification: national treatment or most-favored nation (MFN) treatment.

With respect to goods, national treatment means that once imported products have cleared customs and the applicable tariff or duty has been collected, they must be treated as domestic products. Otherwise, discriminatory treatment could erode the tariff concessions that members have negotiated within the WTO. The objective of the national treatment principle is "to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties," and "to protect current trade [and] to create the predictability needed to plan future trade."[10]

3. World Health Organization, "Electronic Nicotine-Delivery Systems (ENDS) and Electronic Non-Nicotine Delivery Systems," Conference of the Parties to the WHO Framework Convention on Tobacco Control, FCTC/COP/7/11, 1.

4. This includes all generations of e-cigarettes that do not contain tobacco.

5. The expansion of the THP technology that creates an alternative to e-cigarettes (or electronic nicotine delivery systems—ENDS) may change the structure of the market in the immediate future.

6. World Health Organization, "E-cigarettes or electronic nicotine delivery systems, the revised statement," *Tobacco Free Initiative*, March 30, 2016. http://www.who.int/tobacco/communications/statements/eletronic_cigarettes/en/.

7. This is achieved by modulating wattage and resistance.

8. Edward Anselm, "Tobacco Harm Reduction Potential for 'Heat not Burn,'" R-Street Institute Policy Paper No. 85, February 2017, 7. http://www.rstreet.org/wp-content/uploads/2017/02/85.pdf.

9. These companies include Lorillard, Imperial, British American Tobacco (BAT), Altria, Reynolds, Japan Tobacco International (JTI) and Philip Morris International (PMI).

10. World Trade Organization, "The General Agreement on Tariffs and Trade (GATT 1947)," 1994, Article III:1. https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleIII.

Mirroring the national treatment requirement, the WTO MFN obligation is contained in Article I:1 of the GATT 1994, and requires that:

> Any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the 'like' product originating in or destined for the territories of all other contracting parties.[11]

In short, this provision requires that the treatment extended to any imported product by a WTO member should be accorded to the imports of "like" products coming from *any other* member. This treatment refers to measures like customs duties, charges of any kind and/or regulations. Thus, an MFN treatment obligation prohibits the importing country from discrimination against imports coming from other countries by way of granting an advantage only to a single importer.

In the event that a banned product is found to be "like" another product that is not banned, it is feasible the less-favorable treatment of EVPs may be found illegal by the WTO judiciary. Such a finding would depend upon the extent to which the regulator can prove that it qualifies for a WTO exception. In the case of EVPs, given the health-driven motivations of the bans, the GATT Article XX:b health exception provision would likely be invoked, the relevant portion of which states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...(b) necessary to protect human, animal or plant life or health..."[12]

However, should the regulating country invoke this exception, it would be required to present solid scientific justification for the WTO judicial bodies to conclude that EVPs pose greater risk to health than traditional cigarettes and thus that a stricter regulation is justified.

WTO 'LIKENESS' ASSESSMENTS

Establishing likeness between EVPs and conventional cigarettes is crucial to determine whether any EVP trade-restrictive measure is discriminatory and, in the absence of an applicable exception, may be found illegal. Accordingly, it is a key concept that must be explored in defense of EVPs under international trade rules.[13] In the WTO context, likeness is judged based upon four major criteria:

1. Physical properties;
2. End use;
3. Consumer perception; and
4. Tariff classification.[14]

The test does not require that the products be identical, but rather, the closer the proximity created by the criteria between the two products, the higher the likelihood they will be deemed "like." Accordingly, it is often the case that diverse products have been found "like" in the WTO merely because of their ability to compete with one another on the market.

Physical properties

Although EVPs and conventional cigarettes are not identical, they do share some important physical characteristics. As previously mentioned, EVPs mimic many features of cigarettes, but do not contain all cigarette-related chemical substances (like carbon dioxide, for example). However, depending on the category of EVP, they may offer a similar taste and sensory experience and some categories also physically resemble conventional cigarettes, such as those referred to as "cigalikes," pictured in Figure 1.

FIGURE 1: CIGALIKE IMAGE

11. World Trade Organization, "The General Agreement on Tariffs and Trade," 1994, Article I:1. https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleI.

12. "The General Agreement on Tariffs and Trade," Article XX:b. https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.

13. Marina Foltea and Anna Markitanova, "The 'likeness' of E-vaping products and cigarettes," *European Journal of Risk Regulation* (EJRR), July 24, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844044.

14. World Trade Organization, United States - *Taxes on Petroleum and Certain Imported Substances: Report of the Panel Adopted on 17 June 1987*, pp. 16-17. https://www.wto.org/english/tratop_e/dispu_e/87superf.pdf.

Some studies claim that EVPs imitate the experience of smoking and provide a healthier alternative for nicotine delivery,[15] while others have contested these findings.[16] However, a variety of scientific studies confirm that nearly all the health risks of cigarettes come from tar, carbon dioxide and other substances found in the smoke, not from the nicotine itself. [17] It stands to reason, then, that products that deliver nicotine without combustion carry lower health risks than conventional smoking.[18]

End use

Even if EVPs and traditional cigarettes are not deemed physically "like," their "end use" puts them in a direct competitive relationship based on the extent to which the two products are capable of performing the same or similar functions.[19] In the case of traditional cigarettes and EVPs, both are capable of delivering nicotine and contributing to the "ritual" of smoking. According to a recent Reuters poll, EVPs are now used by roughly 10 percent of American adults (about 24.5 million people), 30 percent of whom use EVPs on an ongoing basis as a complete substitute for cigarettes; another 62 percent use them as a partial substitute.[20]

This shows that the majority of EVP consumers are former smokers, and an even a greater number use both types of products interchangeably. This compellingly demonstrates that e-cigarettes serve a similar, if not identical, end use as their traditional counterparts, and thus should be considered "like" products for the purposes of WTO discrimination assessments.

Consumer perception

Another important argument with respect to likeness—an extension of end-use considerations—is consumer perception of EVPs. This refers to the extent to which consumers perceive and treat products as alternative means of performing certain functions to satisfy a particular need.

EVPs increasingly are viewed by consumers as a safer alternative for those who do not want to quit smoking.[21] Some consumer surveys show there is significant switching by users of cigarettes to nicotine EVPs, which points to the fact the two products are considered interchangeable. For example, almost 40 percent of adult smokers in Italy had tried an e-cigarette by 2013, and 15 percent of those people had purchased such products on at least one occasion.[22] Data published in the *British Medical Journal* in 2014 show that the use of EVPs was especially high among smokers – with 32 percent of smokers in 2012 and 50 percent of smokers in 2013 reporting having tried them.[23] UK Action on Smoking and Health (ASH) data show that 2.8 million adults in Great Britain use EVPs (6 percent of the adult population), and of these, approximately 1.3 million (47 percent) are ex-smokers. In total, 1.4 million people in Great Britain (51 percent) continue to use both combustible cigarettes and e-cigarettes.[24]

Further, tests conducted in Japan and Italy of tobacco heated products (THPs) showed that as much as 30 percent of adult smokers who tried the products adopted them.[25] Some consumers even use EVPs simultaneously (dual use) as a permanent alternative to tobacco in situations where smoking conventional cigarettes is not allowed, or simply as a lifestyle choice.

Tariff classification

Despite these similarities, it is clear that EVPs and conventional cigarettes have different compositions and

15. It is often argued that non-tobacco, non-smoked nicotine products are less harmful than cigarettes. See, e.g., Action on Smoking and Health, "Electronic cigarettes (also known as vapourisers)," *ASH Briefing*, February 2016. http://www.ash.org.uk/files/documents/ASH_715.pdf.

16. See, e.g., Stanton Glantz, "Accumulating evidence suggests e-cigarettes are 1/3 to 1/2 as bad as cigarettes (maybe higher)," Center for Tobacco Control, Research and Education, July 9, 2016. http://tobacco.ucsf.edu/accumulating-evidence-suggests-e-cigs-13-12-bad-cigs-maybe-higher.

17. Konstantinos E. Farsalinos and Riccardo Polosa, "Safety evaluation and risk assessment of e-cigarettes as tobacco cigarette substitutes: a systematic review," *Therapeutic Advances in Drug Safety* 5(2), The National Center for Biotechnology Information, March 2014, 67–86. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4110871/.

18. Further, other studies suggest that e-cigarettes appear to be an effective to quit smoking and that the hazard to health that arises from long-term vapor inhalation is unlikely to exceed 5% of the harm from smoking tobacco. See, Royal College of Physicians, *Nicotine without Smoke: Tobacco Harm Reduction*, April 2016, p. 189. https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0. See also, Daniela Saitta, Giancarlo Antonio Ferro, et al., "Achieving appropriate regulations for e-cigarettes," *Therapeutic Advances in Chronic Disease* 5(2), The National Center for Biotechnology Information, March 2014, 50-61. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3926346/.

19. World Trade Organization, *Report of the Appellate Body: European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, March 12, 2001, p. 45. https://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf.

20. Jilian Mincer, "U.S. e-cigarette use stalls as health concerns grow: *Reuters*/IPSIS poll," Reuters, May 24, 2016. http://www.reuters.com/article/us-usa-ecigarettes-poll-idUSKCN0YF0DE.

21. One third of former smokers who have tried e-cigarettes said they used them as part of a quit attempt. See, e.g., Action on Smoking and Health, "Use of e-cigarettes (vaporisers) among adults in Great Britain" ASH Fact Sheet 33, May 2016. http://www.ash.org.uk/files/documents/ASH_891.pdf. Moreover, a Public Health England study found that electronic cigarette use might be effective in relapse prevention and smoking cessation; See, e.g., John Britton and Ilze Bogdanovica, "Electronic cigarettes: A Report commissioned by Public Health England," UK Centre for Tobacco and Alcohol Studies, May 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311887/Ecigarettes_report.pdf.

22. Bertrand Bonvin, Manuel Peitsch, et al., "Reduced-Risk Products," PMI Investor Day Archives, June 26, 2014, slide 57. https://www.pmi.com/investor-relations/pmi-investor-day-archives#2014.

23. Jessica Pepper, Sherry L. Emery, et al., "Effects of advertisements on smokers' interest in trying e-cigarettes: the roles of product comparison and visual cues," *Tobacco Control* 23:3, 2014. http://tobaccocontrol.bmj.com/content/23/suppl_3/iii31.full#xref-ref-16-1.

24. "Use of electronic cigarettes (vapourisers) among adults in Great Britain," *ASH Fact Sheet* 33, May 2016.

25. Bertrand Bonvin, Manuel Peitsch, et al., "Reduced-Risk Products," PMI Investor Day Archives, June 26, 2014, slide 92. https://www.pmi.com/investor-relations/pmi-investor-day-archives#2014.

methodologies in manufacturing. Not surprisingly, they are classified under different tariff headings according to the Harmonized Commodity Description and Coding System (Harmonized System),[26] a multipurpose international product nomenclature developed by the World Customs Organization. Importantly, according to the practice of most of the states, heated tobacco products are classified under HS Chapter 24, which is dedicated to tobacco products. This classification suggests that heated tobacco products are regarded as a category very close to cigarettes in the regulatory framework. Although these products are unlike in many other respects, for the WTO, their classification in the tobacco chapter brings this category even closer to meeting the "likeness" test. As of today, the precise subheading of where to classify heated tobacco products in Chapter 24 has not yet been decided globally.[27]

However, the classification of other EVPs in a nontobacco category (that is, e-cigarettes) does not mean that e-cigarettes and conventional cigarettes should be deemed "unlike." There are good arguments in the WTO jurisprudence that suggest the Harmonized System classification bears only a limited impact on the likeness analysis, especially when there are valid and compelling elements under the other criteria discussed above.[28] In the present case, the more appropriate basis for comparison is the direct competition of the two products in a specific market.

Other criteria

Additionally, the cross-price elasticity of demand (CPED) test has also served in the WTO jurisprudence as evidence that products should be considered "like." The CPED measures the rate of response of quantity of demand of one product due to a price change of another. In other words, it measures how the demand for product A (EVPs) changes if the price for its substitute product B (traditional cigarettes) increases or decreases.[29]

In several studies, participants indicated how many EVPs and conventional cigarettes they would purchase at the current market price for cigarettes, at half the price of cigarettes and at double the price, assuming that the price of EVPs remained constant. The CPED in this case was estimated to be 0.16, indicating that EVPs are perceived as substitutes to cigarettes.[30] While the exercise is to be conducted in a specific marketplace, this generally suggests the probability of finding a high degree of likeness between EVPs and conventional cigarettes with reference to their cross-price elasticity. Another criterion links how regulators regard the two products in normative terms and whether they see the need to regulate the two categories in the same way by placing EVPs and conventional cigarettes under the same regulatory regime. One such example is the U.S. approach. In May 2016, the Food and Drug Administration (FDA) promulgated rules to regulate EVPs amd other tobacco products (premium cigars and hookahs) in the same way it regulates cigarettes. [31] In what is now known as the "deeming regulation," the FDA considered these products so essentially similar that they opted to regulate them by identical rules. Another example is the newly revised EU Tobacco Products Directive, which covers both conventional cigarettes and EVPs,[32] although it does not regulate the two categories identically.

PRODUCTION AND RETAIL CHALLENGES

A notable characteristic of EVP regulation is the precautionary approach many regulators take, given allegedly insufficient evidence regarding their harm. A complete ban is the most trade-restrictive approach, and this regulatory option puts EVP manufacturers and retailers at a host of disadvantages due to loss of market share, increased costs and even potential restrictions on future marketing. For example, the sale and personal possession of EVPs containing nicotine is unlawful in Australia, unless prescribed for a therapeutic use and accompanied by cumbersome registration requirements. As a result, most EVP retailers have been forced out of the Australian market. Another example is that of Totally Wicked, a U.K. company that has indicated it will shutter its U.S. business by 2018 because of costly and burdensome FDA requirements. While these policies are decided by governments, it is important that industry players make their voices heard by consulting on these decisions, checking the legality of the proposed regulations and building trusted regulatory relationships.

26. World Customs Organization, "What is the Harmonized System (HS)?", 2015. http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx.

27. This is a decision under the remit of the World Customs Organisation in Brussels.

28. This is because the tariff classification is important mostly in cases where the dispute arises specifically from the way in which customs duties are applied. It is of lesser importance for disputes arising from internal regulations, such as bans and other restrictive measures.

29. Mike Moffatt, "Cross-Price Elasticity of Demand, A Primer on the Cross-Price Elasticity of Demand," *Thoughtco*, Feb. 25, 2017. https://www.thoughtco.com/cross-price-elasticity-of-demand-overview-1146251.

30. Randolph Grace, Bronwyn Kivell, et al., "Estimating cross-price elasticity of e-cigarettes using a simulated demand procedure," *Nicotine Tobacco Research* 17(5), May 2015, 592-98. http://www.ncbi.nlm.nih.gov/pubmed/25548256; See also, Michal Stoklosa, Jeffrey Drope, et al., "Prices and E-Cigarette Demand: Evidence from the European Union," Nicotine Tobacco Research 18(10), October 2016, 1973-80. https://www.ncbi.nlm.nih.gov/pubmed/27085083.

31. Government Publishing Office, *Federal Register* 81:90, May 10, 2016, p. 28974. https://www.gpo.gov/fdsys/pkg/FR-2016-05-10/pdf/2016-10685.pdf.

32. European Commission, "10 key changes for tobacco products sold in the EU," Press Release, May 20, 2016. http://europa.eu/rapid/press-release_IP-16-1762_en.htm. See also, European Commission, "Directive 2014/40/EU," *Official Journal of the European Union* L127, April 29, 2014, 25-29. http://ec.europa.eu/health//sites/health/files/tobacco/docs/dir_201440_en.pdf.

DOMESTIC POLICY COHERENCE

While they are concerned principally with fair competitive conditions among trading nations, international economic institutions also traditionally have considered other policy objectives, such as those concerning public health interests. However, policy incoherence is caused by a lack of proper coordination between domestic agencies, along with a strong attachment to their mandates. These challenges often can be compounded by political agendas. The extent to which these differing policy approaches to international trade are successful is determined by the degree to which they are based on scientific evidence and comply with domestic or international law. The absence of a constitution at the international level (and a clear priority of certain legal norms over others) can be successfully addressed by first introducing more coherence among various domestic governmental agencies.[33] In the case of EVP regulation, this coherence will mainly concern national health authorities and economic trade agencies. Such policy coherence must include the following:

A thorough legal check

There are many instances where legal inconsistencies are obvious, but this is not always the case. To avoid normative conflicts both domestically and abroad, the author of any health policy must check its limits against the set of other existing legal norms, including international trade agreements. As with any other product, this process will force the regulator to verify whether the same treatment would apply to a like product. It would also require the regulator to consider if the proposed rule is likely to result in less-favorable treatment of one like product over another. Finally, the regulator would have to consider if a departure from international trade obligations could be justified through solid scientific evidence.

Solid science checks on EVP harm

The WTO stipulates that regulations must be based on solid science in order to justify imposing trade-restrictive measures to further public health objectives. In order to ensure their compliance with international trade rules, regulators must continually verify that their chosen (or proposed) EVP legislation is supported by such evidence. Both in the committees and within the dispute settlement body of the WTO, scientific experts or other international organizations must be called to present available evidence in a specific field.[34] With evidence mounting that EVPs are much safer than cigarettes, banning these products while cigarettes remain freely traded will be difficult to justify under WTO rules.

Consultations with producers and retailers

Given the novelty of EVPs and the quickly evolving technology within the market, governments may not be aware of all the complexities involved in trading these products domestically or internationally. However, the private sector can play an important role to inform governments about these issues. Any available private-public consultation platform must be opened to EVP players before regulatory decisions are made. This is particularly true where governments have banned EVP trade on a "precautionary" basis because there is an absence of sufficient scientific evidence to prove harm.

RAISING INTERNATIONAL CONCERNS

With respect to the WTO, there are clear indications that EVPs and conventional cigarettes will be considered "like" products. Accordingly, the WTO seems the most appropriate international body to consider the compatibility of regulations with multilateral trade rules and to modify such regulations, if necessary. Aside from the fact that general trade prohibitions are forbidden and may be found illegal under WTO law,[35] a ban might be also found discriminatory and ultimately illegal. Moreover, any country that imposes an unjustified ban would be forced to repeal the relevant legislation or face retaliatory trade measures from other WTO members that will translate to higher costs within their own economies.

However, if governments are persuaded that the trading conditions faced by their EVP producers or retailers are unfair, a number of options are available to leverage this system and curtail the trade restrictiveness of a given measure.

Provide comments on WTO notifications

All members are obligated to notify the WTO of their trade-related legislation. A measure affecting trade in EVPs will most likely be notified under the Agreement on Technical Barriers to Trade (TBT Agreement). Following the date of notification, which is made publicly available on the WTO website, all interested parties, including those in the private sector, can comment and raise concerns directly with the regulating countries. These normally refer to the measure in question and present the reasons it may prove problematic with the WTO. Following such comments, the regulator is required to provide a response to the commenters. The latest

33. Thomas Cottier and Panagiotis Delimatsis, eds., *The Prospects of International Trade Regulation - From Fragmentation to Coherence* (Cambridge: Cambridge University Press), 2010.

34. Marina Foltea, *International Organisations in the WTO Dispute Settlement: How much institutional sensitivity* (Cambridge: Cambridge University Press), 2012, p. 246.

35. General Agreement on Tariffs and Trade 1994 Article XI:1: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

example of such a notification procedure was that of Chinese Taipei, which notified the WTO Feb. 13, 2017, of an amendment to its EVP regime.[36] Interested parties had 60 days after the date of notification to provide their comments directly to the Chinese regulators, along with comments and questions from the private sector.

Raise issues before WTO committees

Before bringing a claim to the WTO dispute settlement mechanism, members must attempt to find a solution through other internal mechanisms. Governments that regard the imposition of a ban as unfair to trade conditions on their EVP producers or retailers can raise questions about the legislation in specific WTO councils and committees, which are subsidiary bodies created to address special topics. Such questions are called "specific trade concerns."

Currently, the primary WTO forum for raising concerns about trade-restrictive measures is the Council for the Trade in Goods. Further, there are other committees, such as the Committee on Technical Barriers to Trade (TBT), to address more specific concerns, such as packaging and labelling issues. These committees are composed of governmental delegates from WTO member nations. While they do not have the authority to issue binding decisions on members' restrictive measures, they can raise awareness of the measure itself and its possible inconsistency with WTO rules. To date, many disputes have been discussed and resolved in these committees.

Bring issues to WTO dispute settlement

If the above-mentioned mechanism fails to address the issue, a government's claim that an EVP regulation is discriminatory may be brought under the WTO dispute settlement mechanism. The claim will then be considered by an ad hoc WTO panel comprised of three chosen experts in international trade law. The panel's decision can be appealed to the WTO Appellate Body and will then be considered by three (out of seven) randomly selected members. With respect to EVPs, the defendant's government would most likely seek to justify its regulation by referring to the public health exception contained in GATT Article XX:b because these WTO exceptions serve as an option to justify discriminatory regulations. However, the defendant would have to prove both that the regulation is necessary to protect human health (where science will play a prominent role) and that it is not a disguised restriction on international trade.[37]

Further, since growing evidence suggests the use of EVPs is less harmful than conventional tobacco smoking,[38] a public health exception would be very difficult to justify in these circumstances. If the WTO considers a regulation to be inconsistent with its rules, it will require the country that introduced the regulation to change it in a manner that will bring it into conformity. This will result in a repeal of the legislation or in its partial modification.

CONCLUSION

While EVPs should not be underestimated in their ability to address public health concerns related to tobacco use, governments may deploy scientifically unsound and highly restrictive regulations that create policy incoherence between domestic agencies and international trade law. Without consistent and coherent regulation of EVPs—and specifically e-cigarettes—the public health benefits these products offer cannot be fully realized.

Furthermore, prohibition of e-cigarettes may be found to violate both domestic and international rules of law. In order to avoid conflicting policy outcomes, certain steps can be undertaken by regulators with respect to these emerging products. First and foremost, the regulator's home country agencies must double-check the consistency of their proposed regulations with pre-existing legislation. Second, they must also regularly consult with EVP producers and retailers as sources of information and seek out scientific data relevant to proposed legislation. Finally, WTO member governments should report any proposed measure to the WTO secretariat and allow a time period for interested parties to comment in order to test the limits of their regulations before their adoption. This would allow interested parties—such as producers, consumer groups and the scientific community at-large—to convey their best knowledge to relevant regulators, and would ultimately result in regulation that is fairer, sounder and more consistent.

Further, the parties concerned with the proposed regulations should actively monitor these notifications on the WTO website and provide comments on their content to the relevant governmental agency. Through such engagement, interested parties can also propose raising issues at WTO committees, which represent a more formal avenue for state-to-state discussions on the conformity of trade-restrictive legislation with WTO law. Should this fail, highly restrictive trade measures affecting EVPs can be brought to the WTO dispute settlement body. When compliance with judicial recommendations is not achieved, the WTO judiciary bodies may allow the affected member states to retaliate against the noncompliant state by suspending import tariff concessions or other

36. Marina Foltea, "Tough Times Ahead for Taiwan 's e-cig market" Trade Pacts, March 21, 2017. http://tradepacts.com/news/tough-times-ahead-for-taiwans-e-cig-market/.

37. General Agreement on Tariffs and Trade 1994 Article XX:b. https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.

38. Britton and Bogdanovica, *A Report on E-cigarettes*, p. 24. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311887/Ecigarettes_report.pdf.

benefits in the same or a similar industry—yet another reason why such regulations should be based on accurate information.

Although e-cigarettes and traditional cigarettes do not carry "like" risk, these products are in competition with one another in the marketplace. There is therefore good reason to believe that, as long as traditional cigarettes are freely traded, a ban on EVPs will be found discriminatory under WTO rules. Accordingly, regulators must consider such issues of legality before enacting any such prohibitive laws.

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Marina obtained her Ph.D. in international economic law from the University of Bern, Switzerland. She was awarded the Walther Hug prize for the best legal dissertation in Switzerland and has published extensively in the field. Her thesis, "International Organisations in the WTO Dispute Settlement: How much institutional sensitivity?" culminated in a book published by Cambridge University Press in 2012.

Marina has advised many governments and private companies on international trade law and policy, including in the field of tobacco regulation. She also teaches international trade law courses. Her main areas of expertise are the linkage between trade and health, dispute settlement, market access, trade negotiations, intellectual property law, investment law and policy.

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