

# The alcohol industry and trade agreements: a preliminary assessment

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## ABSTRACT

**Aims** To review trade agreements, their relation to alcohol control policy and examine the role of the alcohol industry in supporting and attempting to influence trade policy. **Methods** Review of peer review, public health advocacy literature (both pro and con on free trade), business, press and government documents on trade agreements, assess current and potential challenges by trade agreements to alcohol control policy and investigate the means and extent of industry influence in trade agreements. **Findings** 'Free' trade agreements reduce trade barriers, increase competition, lower prices and promote alcohol consumption. However, international treaties, negotiated by free trade experts in close consultation with corporate lobbyists and without significant, if any, public health input, governments and corporations contain significant provisions that will result in increased alcohol consumption and may challenge public health measures of other nations as constraints on trade. Conversely, alcohol control measures seek to reduce access and consumption, raise prices and restrict advertising and product promotion. The prospect is for increased alcohol consumption and concomitant problems throughout the world. **Conclusions** Trade agreements challenge effective alcohol control policies. The alcohol industry seeks to influence agreements and can be expected to work through trade agreements to reduce tariffs, increase market access and seek to restrict effective domestic regulations. Further research is needed on the impact of trade agreements and the ongoing role of the industry. Advocates must recognize the inherent conflicts between unbridled free trade and public health, work to exclude alcohol from trade agreements, counter industry influence and protect alcohol control policies.

**Keywords** alcohol industry, alcohol control, trade agreements, corporate influence.

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## INTRODUCTION

Internationally branded alcohol beverages are increasingly marketed globally. Beer is produced locally primarily by or under licensure from multi-national corporations. Branded spirits and wines are exported widely. Spirits account for the largest global sales followed by European-style beer [1]. The alcohol industry is increasingly active in the policy arena and '[in] some countries, the industry is the dominant non-governmental presence at the policy making table' [2]. One policy table determines provisions of free trade agreements which treat alcohol products as conventional 'goods', and assumes that expanding commerce in these products is beneficial [2–4]. Liberalization of alcohol trade increases availability and access, lowers prices through reduced taxation and tariffs and increases

promotion and advertising of alcohol [4–6]. Understandably, the industry 'enthusiastically supports the work of the World Trade Organization' (WTO). In April 2006, the Distilled Spirits Council of the United States reported that since the 'conclusion of the Uruguay Round of WTO in 1994, US exports of distilled spirits have increased 86%, growing to \$743 million in 2005' [7]. According to the European Spirits Organization (CEPS), the 'EU [European Union] is the world's leading producer of spirit drinks, exporting to some 200 world markets and generating more than €5 billion a year to the EU's balance of payments. Given such large export interests, it is hardly surprising that . . . CEPS is so heavily involved in international trade matters' [8].

Because governments tend to promote the interests and rights of their major industries and producers, critics

see free trade agreements often compromising social rights and entitlements of their citizens with 'unhealthy and inappropriate public policy' [9–14]. This paper reviews international trade agreements, the congruence of free trade policy of governments and transnational corporations and examines evidence of industry attempts to influence development and enforcement of trade agreements.

## BACKGROUND TO TRADE AGREEMENTS

According to the WTO liberalizing trade, in general, has significant benefits: enhanced competition and efficiency; lower prices, better quality and wider consumer choice; increased domestic and foreign investment, leading to economic growth, a higher standard of living and improved health for all societies, particularly the developing countries [5,11,15,16]. International trade agreements are treaties establishing rules for trade among signatory countries. Twenty-three nations formed the 1948 General Agreement on Tariffs and Trade (GATT 1948) to reduce tariffs and increase trade in goods and products. Subsequently, trade talks led to the 1994 Uruguay Round and formation of the WTO in 1995. The WTO Agreement includes the General Agreement on Trades and Tariffs (GATT 1994), the Technical Barriers to Trade Agreement (TBT), the General Agreement on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS). Underpinning these agreements are dispute settlement mechanisms and trade policy reviews [15]. In addition to WTO agreements agreed to by 149 countries, hundreds of regional and bilateral agreements exist currently and many more are under negotiation [17].

Nations wishing to join the WTO must describe all aspects of their trade and economic policies that have a bearing on WTO agreements and, often, need to make significant changes to achieve approval [15]. According to the World Bank the price of accession is rising and represents possible one-sided power plays by current WTO members which 'wring commercial advantage out of weaker economic partners' [18]. Concessions have involved alcohol. For example, Algeria lifted a ban on alcohol imports to help negotiations for WTO membership [19]. The biggest obstacle to Vietnam's admission was from the United States who called into question Vietnam's tax policies which allegedly favored domestic distilled spirits [20]. Referring to Russia, the European Spirits Organization stated that: 'WTO accession negotiations provide a "one off" opportunity for our industry to secure the spirit industry tariff and non-tariff objectives in countries wishing to join the organization' [21]. Further, 'CEPS strongly believes that all applicants should be

pressed to offer a zero tariff rate for spirits within three years of accession' and targets Russia, Ukraine and Vietnam [22].

Signatories must accept the WTO Agreement as a whole and must comply with certain requirements or 'general obligations'. These include: Most-Favored-Nation (MFN) Treatment—treating products and service suppliers from all other WTO member countries equally; and National Treatment—treating foreign suppliers no less favorably than domestic suppliers. These obligations have implications that parallel goals of the alcohol industries to reduce the general role of government; restrict governments' ability to regulate; privatize ownership and production of services and goods; reduce public funding generally and, particularly, subsidies to domestic private corporations; and to decentralize administrative and financial procedures to the state at the local level [23,24].

## OPPORTUNITIES FOR CORPORATE INFLUENCE

Trade agreements are negotiated primarily in secret by government (often under pressure from and/or in close consultation with business interests) [25]. The alcohol industry, particularly the distilled spirits interests, has been active in trying to influence trade policy. One means is through coalitions of sister companies. For example, the Distilled Spirits Council of the United States (DISCUS) is the national trade association that represents producers, marketers and exporters of distilled spirits products. Member Companies include: Bacardi USA, Barton Incorporated, Brown-Forman Corporation, Cruzan International, Diageo, Future Brands LLC, Luxco, McCormick Distilling Co., Moët Hennessy USA, Pernod Ricard USA, Remy Cointreau USA, Sidney Frank Importing Co. and Suntory International Corporation [26]. The membership of the European Spirits Organization, CEPS, consists of 38 national associations representing the industry in 29 countries, as well as a group of leading spirits-producing companies [27].

The European Spirits Organization (CEPS) was a 'steadfast supporter of the World Trade Organization (WTO) since its formation in 1995 and . . . has participated in a wide-range dialogue with officials from key national delegations and the WTO Secretariat in Geneva, aimed at furthering trade liberalization in world markets' [28]. The World Spirits Alliance comprises national associations from Australia, Canada, the Caribbean, Europe, Japan, Mexico, New Zealand, South Africa and the United States [8].

In addition, one can observe the industry involved with other business coalitions. For example, DISCUS and

Diageo serve on the US–Thailand FTA Business Coalition [29]; Brown-Forman, Diageo and DISCUS on the Comprehensive Market Access Coalition to pass the Central American–Dominican Republic FTA [30]; DISCUS on the National Pork Producers Council in support of the Peru Trade Promotion Agreement [31]; DISCUS on the US–Middle East Free Trade Coalition [32]; and DISCUS at the Americas Business Forums for passage of the FTA of the Americas [33]. Moreover, the distilled spirits groups were represented at several WTO Ministerial conferences as eligible non-governmental organizations (NGOs). For example, at the 2005 Hong Kong Ministerial, the European Spirits Organization (CEPS); Confederation of the Food and Drink Industry of the EU (CIAA); Distilled Spirits Council of the United States; Federation des Exportateurs de Vins et Spiritueux de France (FEVS); Federation Internationale des Vins et Spiritueux (FIVS, France); Federation of the German Food and Drink Industries; Foreign Spirits Producers Association (Hong Kong, China); Liquor, Hospitality and Miscellaneous Union (Australia); Scotch Whisky Association (UK); and World Spirits Alliance (UK) were alcohol-related NGOs [34].

US law requires consultation with the private sector in the development of trade proposals. The US Trade Representative (USTR) established official advisory committees. Currently, the USTR Advisory Committees on Consumer Goods, Distribution Services and Intellectual Property have six alcohol industry representatives, but no public health voice until forced recently to provide one [35,36]. In the United States, texts of the final agreements are published for public comment *following* completion of trade negotiations. Requests from some countries for commitments in WTO negotiations to open markets are not disclosed to the public, and even less information is available publicly on the positions and negotiations of regional and bilateral agreements [37]. In addition, the United States has a long-standing ‘fast-track’ approval process in which Congress votes on each final agreement as a whole, without opportunity for amendment [37,38].

Moreover, it has been well documented in the United States that trade lawyers move in and out of government service, writing the official texts and laws they use later as tools on behalf of future corporate clients [39]. For example, Deborah Lamb served for 10 years on the staff of the US Senate Finance Committee and was instrumental in formulating permanent normal trade relations with China. Lamb is now Vice President for International Issues and Trade of DISCUS, and the Bush Administration named her to the USTR’s Transition Advisory Team where she gives advice on market access, bilateral and multi-lateral trade [35].

## TARIFFS AND TAXATION—PRIME TARGETS OF TRADE AGREEMENTS

Import tariffs have the effect of lessening demand and consumption by increasing the price of imported products. Tariffs may also reduce the need for aggressive marketing and promotion of domestic products, and with less outside competition domestic producers may not be pressured to improve the quantity and variety of products [5]. These consequences of tariffs are consistent with goals of alcohol control policies [2,4].

Under GATT and multi-lateral treaties from the 1940s to the formation of the WTO in 1995, trade agreements focused on trade in goods and, specifically, reducing tariffs and taxes [40]. In the 1990s, the EU Commission challenged the high tax policies of Britain, Ireland and Nordic countries and lowered tariffs on alcohol exports by seeking harmonization of alcohol taxes with pressure to lower and not raise taxes [1,41,42]. Following a US challenge, Canada lowered minimum prices and allowed access for cheaper US-produced beer in Ontario’s monopoly beer retail system [43]. Moreover, the United States, Canada and the European Union leveraged WTO national treatment rules to eliminate Japan’s higher taxes on imported spirits (based on alcohol concentration, ingredients and processing) than on the traditional liquor *shochu* [5]. Japan subsequently opened its market in 1996 not only to vodka (deemed ‘like’ *shochu*) but also to gin, rum, brandy, whisky and other imported spirits [44,45].

Several countries also filed complaints that taxes in Chile and South Korea discriminated against imported spirits in favor of their indigenous products. In 1998, a WTO panel ruled that Chile’s tax system favored domestic liquor *pisco* over imported spirits with higher alcohol content and shocked Chile to the point of asking whether WTO membership was worth the price [46]. Subsequent negotiations under the Uruguay Round reduced tariffs on *pisco*, Chile’s most important spirits export. In 2003, DISCUS President Peter Cressy testified before the US Congressional hearing on the proposed US–Chile treaty which would eliminate the tariffs (except on brandy and gin) and enable American products to compete in Chile ‘on an equal footing with spirits from Mexico, Canada and the European Union’ [47]. During negotiations for the Free Trade Agreement of the Americas, DISCUS recommended to the Working Group on Market Access of the Americas Business Forum in Miami, 2003, elimination of all tariffs and discriminatory internal tax systems that protect domestic industry [33].

DISCUS took credit for influencing the reduction of Romanian tariffs on US Bourbon. In 2003, the spirits lobby petitioned the US Government to suspend preferential duty-free treatment extended to developing countries

until Romania reduced its tariff on US spirits to that imposed on EU products [48]. The US distilled spirits group also lobbied for passage of the US–Central American–United States–Dominican Republic Free Trade Agreement (CAFTA–DR) to reduce alcohol tariffs which ‘will have a direct and immediate impact on the sale of U.S. made spirits products’ [49].

The WTO conducts periodic Trade Policy Reviews of member nations to identify barriers to trade which are inconsistent with WTO goals and which need further liberalization. For example, the 2004 report on Norway pointed out that in recent years, cross-border shopping to Sweden increased due to Norway’s higher food prices and its high levels of excise duties on alcohol and tobacco. A further decrease in excise duties in Sweden, triggered by European Community rules on imports of alcohol for personal use, could increase further downward pressure on Norwegian excise duties [46].

Regional and bilateral agreements also apply pressure to remove tariffs [3]. However, elimination of import tariffs on alcohol products could change the market dynamic and significantly undermine government efforts (albeit not a usual goal) to reduce consumption levels and related harms. Even though trade agreements seek to reduce tariffs and non-tariff barriers to trade, a joint 2002 WHO/WTO report indicated that governments can still apply non-discriminatory internal taxes and certain other measures to protect health [11]. However, as a counter-measure, merely increasing taxes on all foreign and domestic products will not necessarily address all the market effects that come from tariff reduction. A 2005 report by the Secretariat of Pacific Community, an inter-governmental organization for Pacific island countries, predicted that differential taxes favoring domestic brands with weaker strengths or ingredients that are less harmful will be challenged under national treatment provisions of trade agreements [5].

## TBT

The TBT sets a code of practice by central and local governments and non-governmental bodies related to products and processes to eliminate barriers to trade [4]. Regulations, standards, testing and certification procedures may be considered technical barriers to trade [15]. TBT may also cover health, safety, environmental and consumer regulations and forbids exceeding international standards without specifying which body sets the standards [5,50,51]. This ambiguity creates opportunities for pressure to accept industry-led standards or self-regulation [14].

TBT might also affect public health measures relating to alcohol production and sale, alcohol licensing restrictions and sales in stadiums or other venues [52]. For

example, American brewers sought to reduce non-tariff barriers in a challenge of an Ontario law taxing non-refillable alcohol beverage containers (disposable cans), arguing that the policy benefited Canadian brewers who used more glass bottles [53].

Prior to the 2005 WTO Hong Kong Ministerial meeting, the World Spirits Alliance called for ‘elimination of non-tariff barriers and other procedural/regulatory obstacles to trade but warned that if the [Doha Round] negotiations on trade in services do not succeed, the industry will seek action through the Triennial Review of the agreement on Technical Barriers to Trade (TBT)’ [24].

## NATIONAL TREATMENT

National treatment refers to a general obligation that means that each country must treat equally the services and suppliers from all other WTO countries [52]. According to GATT, tax and regulatory measures apply equally. Even though GATS applies national treatment to *services*, the North American Free Trade Agreement (NAFTA) between the United States, Mexico and Canada, applies it to goods, services *and* investments. However, as equal treatment may still be insufficient to achieve substantive national treatment, other provisions may be required to ensure that imported products are treated no less favorably. A 1989 GATT panel required ‘effective *equality of opportunities* for imported products’ [emphasis added]. This ‘clearly constrains government measures taken to control alcohol as a good’. For example, alcohol control strategies might seek to limit exposure to the product lest the public acquire a taste for new alcoholic products, especially with higher alcohol content or those targeting youth, e.g. alcopops. However, what may be good health policy could be challenged as protectionism and discrimination against foreign competitors from the perspective of GATT [52].

Many international tax disputes have been based on the national treatment rule. Disputes over what constitutes a ‘like’ or ‘substitutable’ product have been common. For example, Denmark’s excise duty on spirits was attacked successfully under the European Economic Community Treaty because the domestically produced *aquavit* was deemed ‘like’ the higher-taxed imported spirits. In 1983, there was a successful challenge to the United Kingdom’s duties on wine and beer on the grounds that they favored a domestic product over wine, an imported product [52]. Similarly, in 1999, the EU was able to overturn Korea’s tax system for spirits as imported spirits and the domestic *soju* (an indigenous 25% ethanol spirit) were ‘like’ products and the differential tax violated national treatment GATT rules on internal taxation and regulation. South Korea then moved to equalize taxes on

*soju* and imported whisky (usually 40–43% ethanol) and was ordered to change its law, pay compensation or face retaliation [52].

An example from tobacco control in Thailand demonstrates further the influence possible under trade agreements. The Thai government had banned imported cigarettes, contending that they contained ingredients that were more harmful than their domestic cigarettes. In its efforts to open Asian markets to tobacco the United States, supported by the EU, filed a complaint under GATT to block the ban. The trade tribunal forced Thailand to lift its import ban and to reduce tobacco excise duties, both of which were deemed unnecessary because Thailand had other acceptable and less trade-restrictive alternatives to protect health, e.g. labeling rules, a tobacco advertising ban and domestic monopolies, as long as they did not discriminate against foreign enterprises [23,40,50]. The tribunal gave approval to Thailand requiring ingredient disclosure and banning unhealthy substances [1,5].

The Thai decision showed that the 1948 GATT public health exception had some significance and might be invoked to defend some public health regulations. However, it also demonstrated that the exception would be narrowly framed, i.e. 'necessary' was interpreted with a bias against rules that discriminate against foreign investors. The trade panel also ignored any input from the public health community, including support of Thailand by the WHO. Moreover, this case may stand alone, as WTO rules do not require dispute panels to follow precedent [50]. It is uncertain if the Thai ban on advertising could now survive challenges under GATS [54]. While a small victory, the net result of reducing tariffs and permitting entry of foreign products has been an increase in tobacco consumption in Asia [1,55].

## TRIPS

TRIPS was the first multi-lateral agreement on intellectual property rights. TRIPS covers trademarks, product logos, brand names and trade secrets and could affect trademark protection and disclosure of product information considered confidential by producers [3,5,11]. TRIPS has special provisions to protect geographic indications for wines, beers and spirits, e.g. champagne and scotch, a high priority of the alcohol industry. [15,22,33,56,57] In March, 2005 the EU and United States agreed to remove barriers to wine trade and recognized geographic names of products from US states and wine-growing regions to prevent counterfeiting [58]. This action had strong backing from the Wine Institute [59].

## GATS

GATS is the first and only set of multi-lateral rules governing international trade in services and 'constitutes

one of the most important trade agreements from the perspective of health' [45]. It covers a broad range of service sectors: professional, health-related, educational and environmental services; research and development on natural sciences; and production, marketing, distribution and sales of products, including alcohol and tobacco [5]. For example, services might include the production and transportation of grain to the brewery or distillery, alcohol production, bottling, distribution, marketing, advertising and serving of alcohol [45,60]. Under GATS, no government action, whatever its purpose, is in principle beyond scrutiny and challenge, including measures taken by 'central, regional or local governments and authorities; and non-governmental bodies' in the exercise of government-related powers [61].

GATS provides a framework for negotiations. A participating country can choose to open specific service sectors, specify conditions on the trade, and can also request other participating countries to open trade in their service sectors. Member countries declare their Schedules of Commitments covering areas where specific foreign products or service providers will have access to their markets [5]. For GATT these took the form of binding commitments to tariffs on *goods*, but under GATS the commitments state how much access foreign service providers are allowed. If a country chooses to open a service sector to trade, there are 'specific commitments': (i) full market access with no laws, rules or regulations that restrict the number of service providers; (ii) treat foreign service suppliers no less favorably than domestic suppliers (national treatment); and (iii) if a country opens trade in a service, the country ensures that its regulations are administered objectively and impartially (domestic regulation) [15].

Each country can specify the level of market access and national treatment it will allow for each service sector it opens to trade but are obligated to 'engage in successive rounds of negotiations with a view to achieving progressively a higher level of liberalization in trade in services' [45]. The EU and United States seek market access on tobacco and alcohol in all countries, while Canada declined to make commitments on alcohol [62].

While GATS acknowledges the need for some services to remain carefully regulated to serve the public interest, it distinguishes between regulations that act as trade barriers, which distort competition and restrict access by service providers, and regulations that are necessary but no more burdensome than necessary to ensure the quality of service and protect the public interest. This vague standard invites WTO panels to review domestic regulations that affect services [54]. Once governments agree to have a service governed fully by GATS (full market access) they can no longer place limits on it. [45]. Because GATS defines trade as covering supply of services

between and within countries, limits on potentially any type of advertising may be threatened [63]. The World Spirits Alliance has a specific priority to liberalize services related to 'restrictions on marketing, including elimination of discriminatory advertising measures' [24,56]. Similarly, an objective of DISCUS for the Doha Development Agenda was the 'elimination of discriminatory restrictions in the advertising and distribution of imported spirits' [7].

Even though GATS provides governments with a certain degree of flexibility, there are serious limits which free trade proponents seem to understate. GATS enables governments to withdraw from previously made commitments as long as they are prepared to compensate other governments whose suppliers are allegedly affected adversely [45,61].

### QUANTITATIVE RESTRICTIONS

GATS Article XVI (market access) prohibits limitations on the number of service suppliers. Consequently, signatories having made commitments under 'distribution services' will have restrictions on regulatory measures to limit alcohol supply, limiting retail outlets and total volume or total sales. GATS completely prohibits these 'quantity-based restrictions' even when they are applied equally to domestic and foreign products [52,60].

Germany had minimum alcohol content rules designed to prevent proliferation of beverages with low alcohol content. This was challenged successfully under Article 30 of the 1979 European Economic Community Treaty. Quantitative restriction considerations were also used against the Netherlands' minimum prices for gin, and in 1987 against Germany's prohibition of sale of beers not in compliance with the country's purity requirements [52].

The Caribbean nation of Antigua challenged the US prohibition on internet gambling. The WTO Appellate Body found that the United States violated GATS market access with a quantitative restriction, its zero quota, even though the United States had no intention to include gambling as a service [45]. The rule now subjects other US gambling regulations to challenge, e.g. number of casinos or state monopoly lotteries. According to Lori Wallach's testimony before the EU Parliament's Committee on International Trade, the gambling decision has significant implications for all domestic policies, even those with flat bans in covered sectors of trade agreements [64,65].

GATS has become 'the world's first multilateral agreement on investments and covers cross-border trade and every possible means of supplying a service, including the right to set up commercial presence in the export market' [66]. However, in 1998, former WTO Director-General

Ruggiero predicted surprising consequences because 'GATS provides guarantees . . . into areas never before recognized as trade policy. I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments' [67].

### IMPACT OF TRADE AGREEMENTS ON STATE MONOPOLIES

The alcohol monopoly systems in Finland, Norway, Sweden, Canada and the control states of the United States seek to reduce individual and social harm as a result of alcohol consumption by reducing opportunities for private enterprises [4,68]. However, there has been a world-wide shift toward privatization of state-owned enterprises, opening markets to global competition and consolidation by multi-national corporations [40]. Economically, it is less expensive to acquire existing plants, especially in developing countries where there are also fewer regulations and to enter into licensure agreements, than to compete with extensive marketing campaigns in developed nations [1,39,68,70]. Proponents of WTO agreements state that government services are carved out and that nothing in GATS forces privatization of publicly held companies. Critics, on the other hand, see great pressure to privatize government and other not-for-profit monopolies, as they may be incompatible with GATS free trade principles of national treatment and market access [3,51].

European integration led to unprecedented and sustained pressure on off-premise retail monopolies, greater scrutiny of the import, export and wholesale monopoly functions and broad challenges to the price and taxation systems. The EU forced privatization of wholesale and product monopolies which deprived governments of revenue while increasing problems associated with increased consumption [6,42,52,71]. In global trade agreements, the EU seeks an end to government monopolies. In its request of Canada, the 'EU equates the Canadian Liquor Boards with monopolies, and perceives these monopolies as imposing restrictions on European imports' [72]. The 2003 WTO Trade Policy Review pressured Canada to liberalize its monopoly system [73]. Similarly, there has also been pressure on China and Taiwan during negotiations to join WTO to privatize their state tobacco monopolies [54].

Privatization is also consistent with corporate goals. The World Spirits Alliance met with WTO Director General in 2000 to call for changes in 'state trading enterprises that hold monopoly importation and distribution rights and which unfairly discriminate between substitutable and directly competing products' [74]. DISCUS urged that the proposed Free Trade Agreement of the

Americas (FTAA) eliminate 'non competitive practices by state monopolies regarding production or sale of goods' which exist in several American states and Canada [33]. However, from a public health perspective, the goal should be to utilize all policy options, including monopoly control, to reduce alcohol consumption [2,40,75].

## ENFORCEMENT OF TRADE AGREEMENTS

Trade agreements are made and enforced and bind national governments, but not corporations [60]. Previously, only national governments could bring legal actions to enforce the provisions of trade agreements but under recent bilateral and regional treaties investors can bring suit against a government (investor-state), a common feature in US treaties, and based on the model Bilateral Investment Treaty [76]. While trading members are urged to resolve disputes through consultation, WTO rules establish tribunals (panels) of trade experts who have no background in public health to decide controversy [2,3,37]. If found contrary to WTO rules, a government must either change its laws or face trade sanctions or fines equal to the amount of harm to other countries based on lost market opportunities [50]. Because the purpose of trade agreements is expansion of trade, agreements can only constrain or proscribe—rather than strengthen—government regulation of alcohol advertising and, in the past decade, even non-discriminatory policies [63].

One of the most significant features of GATS is to develop new restrictions on domestic regulation. When challenged, a government must demonstrate that even non-discriminatory regulations are 'necessary' and that no less commercially restrictive alternative measure was possible. This potent provision affecting potentially all public regulations may enable the World Spirits Alliance to achieve its 'unified trade negotiating strategy' covering non-tariff measures (import quotas and licensing, state-trading, product standards and labeling requirements) and services (restrictions on marketing and advertising, distribution and retailing) [77].

## ADVERTISING RESTRICTIONS

Restrictions on advertising are important components of alcohol policy. There have been several examples of advertising bans being upheld by trade panels. In the 1980s, Thailand won a challenge brought by the United States in which the tribunal working under GATT-1948 declared that Thailand could ban all tobacco advertising as it was non-discriminatory [78]. More recently, the European Court ruled that even though the French Loi Evin alcohol advertising ban constituted a restriction on services, it was justified to protect public health [79].

There may be an interesting dual jeopardy, however, as advertising is a 'good' under GATT and a 'service' under GATS. Because a prohibition on advertising is the strictest possible limitation on trade in advertising services, it would be the hardest to justify as 'necessary'. Probably, a local ban on outdoor alcohol advertising could be countered by voluntary industry self-regulation as a suitable alternative. Alcohol awareness or media 'drink responsibly' campaigns might be ruled reasonable alternatives to a total advertising ban, even though they have been shown to be less effective [46,63].

While advertising challenges have not come to the WTO, a Swedish court applying EU law ruled against a Swedish alcohol advertising ban brought by the European Commission after a complaint by a Swedish food magazine. The court ruled that the ban discriminates against imports because domestic brands are already familiar to the public, i.e. that it was *de facto* discrimination—a possible precedent for other advertising regulations on health issues or professional services [63]. Due to potential threats of a WTO challenge using new provisions in the GATS, it will become much harder for health groups to convince regulators that outright bans or strong restrictions are needed [11,41,63,80]. Not surprisingly, the World Spirits Alliance sees opportunities in trade agreements to liberalize 'restrictions on distribution rights and advertising freedoms as essential components of market access' [24].

## HEALTH EXEMPTIONS

The preponderance of researchers on trade and public health are very skeptical about the health exemptions in trade agreements and whether they are adequate or weak, at best [3,23,44,51]. Both the 1994 General Agreement on Tariffs and Trade (GATT Article XX-b) and the General Agreement on Trade in Services (GATS Article XIV-b) provide a limited exception to trade rules in order to protect human, animal or plant life, or health. However, this exception is subject to several tests which have been difficult to meet. To withstand a challenge, a government measure that protects life or health must be neither 'arbitrary or unjustifiable discrimination', a disguised restriction on trade in service, or more trade-restrictive than 'necessary'—both of which are 'formidable hurdles' [23,61]. To establish that a measure is 'necessary', a nation must also show that it is effective and that no other alternative policy is available that would be less restrictive to trade [3,11]. Moreover, GATS Article VI.4 requires that a measure must be 'actually necessary to achieve the *specified legitimate objective*' [emphasis added]. Only one regulatory measure has ever been saved based on GATT Article XX—a French ban on asbestos products in a case brought by Canada [3,40,81].

Article XX is an ineffective exclusion as there is almost always an alternative to a policy, regardless of whether the alternative is effective or politically and financially feasible, and because necessity has been difficult to prove conclusively [50,60].

Such health reservations are interpreted narrowly under international law and apply only once, i.e. they protect existing measures against specific provisions of a particular agreement and do not create a binding precedent [3]. Thus limited, reservations do not assure future policy flexibility. Moreover, NAFTA includes a pre-emption 'standstill' which prohibits introduction of new or more restrictive measures or exceptions. Many agreements also require a 'rollback' to reduce or eliminate non-conforming measures. Therefore, the only way to protect measures that safeguard public health permanently is for treaties to protect them explicitly from challenge [44].

GATS Article XIV has not been involved in WTO disputes but is likely to provide problems because its language is narrower than GATT Article XX, which only makes exception reliably for national security measures [61]. Moreover, the health exception in TRIPS is negated largely by the qualification that public health and nutrition measures 'be consistent with the agreement' [54].

While countries can limit market access to 'sensitive products', the EC considers alcohol a common commodity and seeks to exempt only arms, ammunition and explosives, thus making health claims even more difficult to withstand challenge [41,72]. Under the US-Bahrain FTA, tariffs on all alcohol and tobacco products will be eliminated for imports from the United States beginning in the 10th year of the Agreement. 'Alcohol and tobacco were sensitive for Bahrain for cultural and public health reasons—the ten-year phase out is not an unusually long period for tariffs on sensitive products' [82]. This agreement was endorsed strongly by the USTR's consumer products advisory committee, which included Deborah Lamb of DISCUS, Marcus Smith of Brown-Forman Corporation, and was chaired by Donald Nelson of Altria [83].

In March 2006, Diageo, DISCUS and Altria (Philip Morris) joined 73 diverse businesses to pressure the US Trade Representative not to exclude any product, service or sector in the agreement with South Korea [84]. Similarly, DISCUS urged negotiators of the Doha Round to include '[d]isciplines on the designation of "special products" and "sensitive products" so that these do not become market access escape routes' [7].

## REGIONAL AND BILATERAL FREE TRADE AGREEMENTS

There is a growing trend, led largely by the EU and United States, to negotiate regional and bilateral free trade agree-

ments. There were approximately 300 regional and bilateral trade agreements world-wide by the end of 2005, a sixfold rise in two decades. Bypassing the WTO, they offer flexibility to pursue 'trade-expanding policies not addressed well in global trading rules' [17]. As bilateral and regional agreements cannot be weaker than WTO rules, they can cut tariffs below WTO levels and have stronger intellectual property or investment provisions. The United States and the EU hope to have so many of these agreements covering enough of the globe to have changed international norms [45,50].

While WTO rules have relatively weak protections for investors, new regional agreements contain greater enforcement provisions [23]. For example, the NAFTA included the first investor rights clause in regional trade agreements and contains very strong investment provisions [50]. NAFTA has broad definitions of 'investment', 'investor' and 'enterprise' and makes no distinction between socially beneficial and socially harmful investments. Property rights redefine public regulation as a government 'taking' of private property that requires compensation to the owners, just as when a government takes private land for a highway it has to pay fair compensation. Determining expropriation and compensation are appropriate roles for government. However, NAFTA prohibits not only direct but indirect expropriation and 'measure[s] tantamount to . . . expropriation'. In one of the first NAFTA investor versus state disputes, the US-based Ethyl Corporation challenged Canadian pollution control legislation that banned a gasoline additive from import and inter-provincial trade. The Ethyl Corporation alleged that the legislation was 'tantamount to expropriation'. Assuming defeat, Canada paid Ethyl \$US13 million, issued an apology and rescinded the ban on the gasoline additive. Consequently, as any new domestic regulation is bound to have an economic impact on some private assets, this doctrine is a formula to limit the authority of government and cripple the regulatory state [39].

Because foreign investors can challenge a government directly for alleged breaches of the treaty [55], the investor-state dispute mechanism bypasses domestic laws and juridical authority which protect the public's health and general welfare and short-cuts ways in which governments normally resolve disputes between themselves [85].

In disputes, corporations often present nuisance complaints with exaggerated claims of property loss. Together with the uncertainty over expropriation provisions, there has been a chilling effect on health legislation [63]. Tobacco companies used NAFTA, not TRIPS, which does not allow investor suits, to challenge Canada's regulations requiring plain cigarette packaging as expropriation of intellectual property—even though the packaging



requirement was to apply equally to domestic and foreign products. US firms contended that these tobacco control measures constituted an expropriation of property rights worth hundreds of millions of dollars. The threat convinced Canada to back down from instituting plain packaging with health warnings for cigarettes [23,60,63]. Coincidentally, a key US official in the development of NAFTA, Carla Hill, left government services to form a trade-consulting firm whose clients were Philip Morris and RJR which successfully protested Canadian restrictions on cigarette labeling [39].

Investor rights provisions have been proposed or adopted in US bilateral or regional agreements [61]. For example, the 2003 US–Singapore trade agreement eliminated tobacco tariffs and contained provisions that permit investors to challenge government regulations—the investor right rules which the transnationals want in upcoming WTO agreements [86].

The alcohol industry, particularly distilled spirits, has been active promoting regional and bilateral agreements. For example, DISCUS supported negotiations of NAFTA and Chile's accession to the WTO with position papers at meetings of the Business Forum of the Americas (Cartagena, Columbia, 1996; Belo Horizonte, Brazil, 1997; San Jose, Costa Rica, 1998) [87]. DISCUS has supported CAFTA and other regional agreements actively [88].

Not only are many non-governmental, public health and anti-globalization groups concerned about the rapid development of and innovations in regional and bilateral agreements. The World Trade Organization itself set up a special Committee on Regional Trade Agreements (RTAs) as early as 1996 to monitor and assess whether regional trade agreements help or hinder the overall WTO [15]. Of concern were the 'regulatory regimes which increasingly touch upon policy areas uncharted by multilateral trade agreements [which] may place developing countries, in particular, in a weaker position than under the multilateral [i.e. WTO] framework'. As for the entire multi-lateral trading system the proliferation of RTAs is 'already undermining transparency and predictability in international trade relations, which are the pillars of the WTO system' [89].

## RECENT WTO DEVELOPMENTS

WTO negotiations to open specific service sectors to trade were progressing with an unofficial deadline of January 2007 [64]. Expecting to influence policy, the World Spirits Alliance and DISCUS were among non-governmental organizations at the WTO Ministerial meetings in Cancun (2003) and Hong Kong (2005). Deborah Lamb of DISCUS was 'an advisor to the U.S. government delegation' at Cancun where she urged

negotiators to agree to a 'plan to aggressive trade and liberalization' [57]. Prior to the December 2005 Hong Kong meeting, the World Spirits Alliance indicated that while ending tariffs is its 'foremost priority', 'tariffs have been driven down progressively within the GATT, and now the WTO, so the *importance of non-tariff barriers as impediments to market access has increased significantly*' [emphasis added]. Moreover, it 'is clear that the services negotiating mandate [of WTO] includes those areas of particular interest to the industry, namely distribution and advertising services' [24].

The 2005 WTO Hong Kong Ministerial Declaration said that members 'must intensify their efforts to conclude the negotiations on rule-making' under GATS. Referred to in a single footnote referring to the 2005 Report of the Working Party on Domestic Regulation, 'Members shall consider proposals and the illustrative list of possible elements'. The new trade 'disciplines' on domestic regulation would require governments to take the least-burdensome approach when regulating services and constrain both the content and process for democratic lawmaking. Secondly, the 'disciplines' would limit the range of legitimate objectives to ensure the quality of a service. Proposing the 'use of relevant international standards' would empower national governments to preempt local standards and would increase the threat of trade disputes if national and subnational standards are more burdensome than international standards [90–94].

The Hong Kong Declaration mandated that groups of members were to start presenting their requests on various services sectors to other members [95]. Subsequently, the EU, United States and others have issued plurilateral requests which include alcohol unless negotiated otherwise and specified county-by-country [96]. This will pressure countries to essentially give up the policy tools they will need to address future alcohol problems in their countries and will make it more difficult to address the global harm caused by alcohol.

However, the Doha Round was suspended in July 2006 due to disputes over agricultural subsidies in the EU and United States. DISCUS immediately issued a statement of disappointment [38]. The European Spirits Organization also announced that it had 'a particularly busy time' up to and following the collapse of the Doha Development Agenda (DDA). 'While disappointed with the overall outcome from Hong Kong, the EU spirits industry remains committed to pursuing its trade agenda on a multilateral basis via the WTO with the help of its partner associations in the World Spirits Alliance, and is optimistic that the DDA talks may yet resolve some of the problems currently facing EU spirits in key markets' [8].

Upon release in October, 2006 of the EC's new trade policy of a new generation of bilateral trade agreements to complement the EU's commitment to the WTO, CEPS

reported that 'specific initiatives must be considered in order to improve the industry's competitiveness on the world market. In combination with an active multilateral [i.e. WTO] agenda, the spirits trade welcomes the positive approach for a new generation of Free Trade Agreements (FTAs) and fully supports the opening of negotiations with South Korea, ASEAN, India and Russia, all of which show extremely promising growth for exports' [97].

## CONCLUSIONS

Free trade policies, the basis of our global economy, have objectives that are fundamentally incompatible with alcohol control measures [9,54,98]. Challenges and uncertainty loom as transnational corporations expand globally and press through trade agreements to ensure and maximize free movement of investments, services and goods [2,10,51,52,55,81,99]. Challenges to policies to control these 'goods' are not unintended consequences but are 'well grounded in reasonable interpretations of trade agreements' [3,11,50]. It is reasonable to believe that continued global economic development, together with the erosion of public health policies, will help to create the 'perfect storm' for alcohol-related problems, particularly in developing countries [69,70,100].

This review is a preliminary assessment of the role and influence of the alcohol industry in the formulation, implementation and enforcement of trade agreements. The topic deserves continued research. Trade agreements are indeed complex and have ramifications for public policies, not the least of which relate to alcohol control everywhere on the globe. Mika Alavaikko observed that 'trade policy occupies the heart of day-to-day nation-state-level policy-making. The social and health policy aspects of public policy making are the passive, defensive factors in the process' [3,5,72]. We must turn passivity into activism lest our hard-fought evidence-based prevention measures fall to the challenges of trade agreements [45]. The observation of former WTO Director General Ruggiero gives reason for concern that 'neither governments *nor* industries have yet appreciated the full scope of these guarantees or the full value of existing commitments' [emphasis added] [67,101].

This reviewer has great concern about the expansion of transnational corporations in the developing world, and the pervasive but largely behind-the-scenes influence of the alcohol industry in trade negotiations [1,2,68,81]. There is little doubt that, if they do not already, corporate interests will appreciate the 'full scope and potential' of the treaties to further their objectives. Health advocates must promote actively the 'ascendancy of health over trade' [23,101]. Civil society should expect coherence between trade and public policies and demand health assessments of trade. Public health experts must be

brought into trade deliberations to provide input so that trade policies are less likely to stimulate alcohol use and related consequences. Two possible strategies are to: (i) treat alcohol as an extra-ordinary commodity and that 'measures affecting the supply, distribution, sale, advertising, promotion or investment in alcohol beverages be excluded from international trade agreements', as recommended by the World Medical Association [102] and Babor, *et al.* [2], and (ii) advocate for a Framework Convention on Alcohol Control to deal effectively and collectively on alcohol issues at the global level as permitted in Article XIX of the WHO constitution [2,10,63,79,102,103]. The WHO needs to be urged to address alcohol and trade agreements, to provide further support for a Framework Convention and to provide more protection from the provisions of the trade agreements [104].

## Declaration of interest

None.

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