Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet

By Benn McGrady
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Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet provides a framework for analyzing what countries can and cannot do under WTO law in instituting their domestic public health measures. Continued trade liberalization, while allowing countries to reap numerous benefits, has also indirectly led to the spread of noncommunicable diseases associated with poor diet, alcohol, and tobacco consumption. Freer trade has negatively affected global public health in two ways: by leading to increased consumption of harmful products (as a result of price reduction and increased advertising) and by tying the hands of governments seeking to implement restrictions on the use of these products. By peeling back the intricate layers of multilateral trade and health treaties, Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet seeks to clarify their key points of intersection.

Author Benn McGrady is an Australian lawyer who is currently serving as an Adjunct Professor of Law and as a Project Director of the Initiative on Trade, Investment, and Health at the O’Neill Institute for National and Global Health Law at Georgetown University.¹ He also serves as a member of the European Journal of Risk Regulation and regularly reviews for international peer-reviewed journals and publishers.² With a unique background in both health sciences and international trade law, McGrady has provided legal advice to public health

¹ http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=2624.
² Id.
organizations, international leaders, and trade representatives as well as published works in the *Journal of International Economic Law, World Trade Review*, and *Journal of World Trade Law*.  

The book opens with the dilemma faced by national policy makers who have the simultaneous desire to provide their citizens with the benefits of a free market while retaining the regulatory autonomy to institute public health measures. In order to allow domestic producers access to the most competitive foreign markets, most countries have joined the World Trade Organization. By doing so, they have bound themselves to trade agreements that place limitations on how they treat products entering their domestic markets. When a country bound by WTO laws decides to enact legislation that places limitations on tobacco advertising or alcohol-content levels, it must also take into account the effect this legislation will have on international trade, even though the purpose of the legislation was purely health-related.

While the WTO has and most likely will continue to show great deference to countries in terms of public health measures, the book’s introduction shows that the tangle of international laws as it exists today is problematic for two reasons. First, the WTO in interpreting trade disputes has said through case law that it will take international health standards into consideration (*US - Shrimp*), but that it is not bound by extraneous international health treaties (*EC – Approval and Marketing of Biotech Products*). This has left national policymakers wondering what constitutes an international standard and how much consideration these standards will be given. The ambiguity here has made it impossible for policymakers to predict the outcomes of WTO disputes, leading to the second problem identified by McGrady. Since policymakers are concerned about what national measures may land them on the losing side of a

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WTO dispute, they are hesitant to pass public health-related legislation when it affects international trade, a phenomenon known as “regulatory chill.”

In chapters two through five, McGrady delves deeply into a textual analysis of the multilateral treaties governing international health and trade law, but structures his analysis in a way that allows even those unfamiliar with the texts to follow. Preparing his readers for their analytical journey, McGrady begins chapter two by providing an outline of the relevant international health instruments. Of note, he mentions the United Nations’ International Covenant for Economic, Social, and Cultural Rights which requires states to “undertake steps” to achieve the “highest attainable standard of health.” More significantly, the World Health Organization’s Framework Convention on Tobacco Control (FCTC) and the World Health Assembly’s Global Strategy Diet and Global Strategy Alcohol are discussed. These three documents provide specific state objectives for controlling the prices, marketing, and labeling of unhealthy products. While the FCTC is the only one that is a binding treaty, McGrady uses the remainder of the chapter to discuss how these international documents may be read alongside the WTO agreements using the Vienna Convention on the Law of Treaties. He discusses the possibility that extraneous treaties may be regarded by the WTO as evidence of fact, as evidence of an existing international standard, or even potentially as legal rules. McGrady concludes that:

In practice, WTO panels have generally observed the Appellate Body’s position that WTO law should not be interpreted in isolation from public international law. Both extraneous treaties and nonbinding international instruments have been used in the interpretation of the WTO-covered agreements…[However] more forceful obligations to integrate health norms into WTO law may be more likely to face resistance by WTO panels than less forceful means or means that are themselves built into WTO law.

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4 McGrady, supra note 3, at 21.
5 McGrady, supra note 3, at 36.
6 McGrady, supra note 3, at 78-79.
While McGrady’s writing style is remarkably clear given the subject matter, his article-by-article analysis in chapter two gives the impression that the purpose of his book is not to provide hobbyists with an overview of the subject, but to give policymakers a detailed road map of the issues they are sure to encounter. McGrady is wise to also draw the eyes of his intended audience to the uncharted portions of this roadmap, which he believes they have to power and obligation to define. He sets this tone strongly in chapter two and remains consistent throughout the remaining chapters.

Chapter three addresses where the conflicts in seemingly origin-neutral health policies may violate WTO policies in the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Tariffs and Services (GATS). McGrady looks specifically at price measures and marketing restrictions in order to point out potential conflicts. “For example, a graduated tax on alcoholic beverages that taxes beverages based on their alcoholic content may be intended to dissuade consumption of beverages with higher alcohol content. Depending on a range of factors, such as where beverages of differing alcohol content are produced, such a measure may favor domestic production.”7 The book, through a lengthy analysis of case law, concludes that the health-oriented objectives of the measure will not likely prevent that measure from being seen as prohibited by GATT or GATS. While the case law proves useful, McGrady may have made his points clearer had he used more hypothetical marketing restriction examples. However, given his target audience, extra examples might have seemed redundant.

Chapter four shows that prohibited measures may be subject to exception under the GATT Article XX(b) and GATS Article XIV(b) necessity clause. Critical of this analytical process, McGrady comments that the “Appellate Body’s weighing and balancing test shows that

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7 McGrady, supra note 3, at 83.
there is significant confusion about how exactly it is to be applied.”8 For instance, the WTO case law is unclear as to how immediate the danger to public health must be for a discriminatory measure to be allowed under the necessity clause. Also, case law has not shown the effect of the availability of alternative measures on deeming an employed measure as necessary. While McGrady does announce in both chapters one and three that chapter three will deal solely with prohibitions under GATT and GATS while chapter four will address the exceptions to those prohibitions, I think a brief explanation of what that means in chapter three may have made the transition between the two chapters less jarring. Chapter three goes into great detail showing what public health measures may be prohibited under GATT or GATS, but it is not until chapter four that readers are told that even a measure that is prohibited may be upheld under the exception provided in the necessity clause.

The book’s concluding chapter analyzes three alternative ways the international health and trade community could make WTO disputes involving public health measures more predictable and therefore reduce regulatory chill. First would be to have an independent body, and not the WTO, decide what constitutes legitimate public health measures. Second would be to create more international legislation like the FCTC that binds its members to their obligations to public health and as treaties will be given more weight by the WTO dispute settlement panels. Third would be to strive for greater harmony amongst international health standards as a means of creating binding customary law. The author advocates that the second and third options offer the most realistic methods for creating a more predictable system. These conclusions flow naturally from the issues McGrady discussed throughout his informative and thorough book. Through his chapters, McGrady has shown how the WTO is as equipped as any body to interpret the language of its own treaties. The book has also shown how overhauling the current system

8 McGrady, supra note 3, at 168
would do little to help the issue of predictability in the law. After reviewing the positive effects that new international legislation and changes in international customs have had on WTO rulings, McGrady logically concludes that the second and third options would provide a practical and gradual solution.

Throughout the book, McGrady is tactful in breaking his arguments down into accessible and organized pieces. The intricacy of the relationships between the trade and health agreements and domestic laws makes this a noteworthy accomplishment. However, the article-by-article analysis of international agreements without the incorporation of realistic hypothetical situations confirms that this book was designed to summarize the key legal issues for those already familiar with the debate and not for the trade novice.