

Proposal 8: Challenge vapor and smokeless prohibitions under WTO rules

Recommendation 8. The United States should initiate complaints under World Trade Organization agreements about wholly unjustified prohibitions of low-risk nicotine products in jurisdictions outside the United States. This would give a win-win for public health and American exporters, while challenging the negligence of the World Health Organization and some of its member states.

There are many countries that have taken a highly counter-productive and harmful approach to low-risk nicotine products, especially vapor products, and that is to ban the manufacturing, sale or import of these products – either explicitly or by default through excessive regulation. In the European Union, snus is banned other than in Sweden¹ even though the product has had very significant health benefits² and even though chewing tobacco or nasal snuff is allowed on the market. A 2016 survey reports the prohibitions of e-cigarettes in the following jurisdictions³:

Sale of all types of e-cigarettes is banned in 26 countries: Argentina, Bahrain, Brazil, Brunei Darussalam, Cambodia, Colombia, Greece, Jordan, Kuwait, Lebanon, Lithuania, Mauritius, Mexico, Nicaragua, Oman, Panama, Qatar, Saudi Arabia, Seychelles, Singapore, Suriname, Thailand, Turkey, United Arab Emirates, Uruguay and Venezuela.

In these countries, the much more harmful combustible tobacco products (cigarettes etc.) are freely available. Incredibly, the World Health Organization has encouraged these prohibitions via its submission to parties to the Framework Convention on Tobacco Control⁴. WHO's Director General, Dr. Margaret Chan even called for e-cigarettes to be prohibited in China⁵. This represents unethical⁶ and, at best, confused approach to health of over one billion existing smokers worldwide⁷.

There is no basis for snus or e-cigarette prohibition on public health, scientific or ethical grounds. Such bans may also be unlawful under trade law. This is the basis of the legal argument:

- **Trade law prohibits discriminatory treatment of 'like products' depending on their origin.** From a trade law perspective e-cigarettes and cigarettes may be considered "like products" based on four criteria (i) the physical properties of the products; (ii) their end-uses; (iii) consumer preferences and (iv) the international classification of the products for customs purposes⁸.
- If products are recognized as "like products" in the meaning of trade law, two key anti-discriminatory principles apply under the WTO General Agreement on Tariffs and Trade (GATT)⁹:
 1. **Most-favored-nation (MFN) principle** ("treating different foreigners equally"). Where a country allows market access to imported cigarettes from one trading partner, it must extend this "advantage" to the "like products" of other trading partners, including low risk nicotine products. Failure to do so would constitute a violation of Article I:1 of the GATT¹⁰.
 2. **National treatment principle** ("treating foreigners and locals equally"). If regulatory prohibitions prevent low-risk nicotine products from entering the market, while cigarettes can be produced, distributed and sold domestically, the conditions of competition discriminate against the imported product thereby constituting less favorable treatment under Article III:4 of GATT¹¹

- **Public health exception will not apply.** It is possible to override these anti-discriminatory measures on public health grounds under the General Exception provisions of Article XX of GATT¹². However, the country imposing the prohibition on the low risk product would need to justify the use of this exception, and it is hard to see how they could make this case – certainly not by relying on the WHO’s scientific assessment, which has been comprehensively discredited¹³.
- **Prohibition through excessive regulation.** Where technical regulations create discrimination via a *de facto* prohibition (for example in Australia), they may violate Articles 2.1 and 2.2 of the WTO’s Technical Barriers to Trade (TBT) agreement¹⁴, which respectively prohibit technical regulations that favor like products of national origin over like products from a foreign country, and require that “*technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective [including...] protection of human health*”.
- **WHO Framework Convention on Tobacco Control (FCTC).** The WHO’s tobacco control treaty does allow parties to take tobacco control measures that go beyond the terms of the FCTC, but only if these “*are in accordance with international law*” (Article 2)¹⁵, including WTO commitments.

The Office of the United States Trade Representative (USTR) monitors and secures U.S. trade interests¹⁶. The issue could come to the newly established White House National Trade Council for consideration. The Doggett Amendment¹⁷ should not apply or be disapplied for vapor products.

References

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- 4 WHO. Electronic Nicotine Delivery Systems and Electronic Non-Nicotine Delivery Systems (ENDS/ENNDS), FCTC/COP/7/11 August 2016. [\[Link\]](#) – see especially WHO’s policy proposals (para 29-32) which start by assuming prohibition is the norm.
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- 12 WTO General Agreement on Tariffs and Trade, 1994 Article XX:(b): [\[link\]](#)
- 13 Britton, J, McNeill, A, Bauld L, Bogdanovica I Commentary on WHO report on Electronic Nicotine Delivery Systems and Electronic Non-Nicotine Delivery Systems, UK Centre for Alcohol and Tobacco Studies, 26 October 2016 [\[link\]](#)
- 14 WTO Agreement on Technical Barriers to Trade Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies [\[link\]](#)
- 15 WHO. Framework Convention on Tobacco Control, 2003 Article 2 [\[link\]](#)
- 16 Office of the United States Trade Representative, Enforcement. Accessed 20 December 2016 [\[link\]](#)
- 17 “Doggett Amendment” Omnibus Appropriations Act Public Law 113-76 113th Congress, 17 January 2014 [\[link\]](#)