

A public health guide to trade and investment agreements: Aesclepius meets Mercury

Appendix B: Examples of significant health-related trade disputes.

PARTIES	DATE OF CLAIM	SUBJECT	THE CASE	RESULT	IMPLICATIONS
US vs Thailand	1990	Tobacco	<ul style="list-style-type: none"> • US requested Thailand to withdraw its ban on all tobacco advertising and exempt tobacco from import duty because domestic suppliers were not affected. • Thailand argued that the production and consumption of tobacco went against the objectives of GATT which included raising the standard of living because increased competition in the tobacco industry would lead to greater consumption of tobacco, resulting in more sickness and premature deaths. 	<ul style="list-style-type: none"> • GATT ruled that Thailand's measures were discriminatory as they did not also apply to domestic producers. Thailand had to amend its legislation. • GATT also ruled that Thailand could pass tobacco control legislation, provided it applied to both domestic and foreign producers, because it was a necessary measure to protect health. 	<ul style="list-style-type: none"> • The first tobacco case that GATT heard and set the precedent and paved the way for tobacco control legislation. • Although the ruling supported public health measures provided they were not discriminatory, opening Thailand's tobacco market led to an increase in tobacco consumption by consumers who considered the new imports superior to domestic products.

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US vs EC	1996 - 2012	Food	<ul style="list-style-type: none"> • The USA (and Canada) challenged a European ban on the use of growth hormones in livestock because it was inconsistent with the Sanitary & Phytosanitary Agreement. • In January 2009, the EU claimed that the US had escalated the dispute by making changes to the list of products subject to increased tariffs under the dispute. 	<ul style="list-style-type: none"> • Canada and US both imposed 100% import tariffs of EU beef & pork products • EC was given 15 months (to May 1999) to amend its position but the EU considered evidence to be sufficient to retain the ban. • In 2008 the Appellate Body agreed the US could continue its sanctions and that the EU could continue its ban. • A memorandum of understanding was signed in May 2009 to phase in changes so that the EU allowed the import of US beef raised without growth hormones while the US suspended higher duties for imported products listed during the dispute. • A similar agreement was eventually reached with Canada in 2011. • The dispute finally ended in April 2012 when the European Commission amended the tariff regulations. All sanctions are currently suspended. 	WTO members can: <ul style="list-style-type: none"> • take precautionary action but measures must be provisional and reviewed within a reasonable time • choose their level of health protection • differ from mainstream scientific advice
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EU vs Chile	1997 - 2000	Alcohol	<ul style="list-style-type: none"> The EU challenged Chile's alcohol taxation system which taxed spirits based on their alcohol content. This led to a 70% tax on imported whisky and vodka. The local spirit Pisco held 80% of the market share in spirits in Chile but was only taxed at 25%. 	<ul style="list-style-type: none"> The Appellate Body found Chile's taxation system to be discriminatory in favouring domestic products over equivalent imports. 	<ul style="list-style-type: none"> New regulations were introduced into Chile within the 10 month specified timeframe.
US vs EU	1997 -	Food	<ul style="list-style-type: none"> The US challenged the EU after it imposed a ban on using anything other than water to remove contamination. This effectively stopped imports of poultry from the US. The US claims that this breaks the Sanitary & Phytosanitary Agreement because the measure is not based on current scientific evidence. Following new guidelines in 2011 from Codex Alimentarius on the use of some hazard-based control measures, the European Food Safety Agency recommended changes to the EU's meat inspection procedures in 2012. However, the poultry industry does not accept this, believing it to be a substitute for good hygiene practice. 	<ul style="list-style-type: none"> A dispute panel was established in 2009 but has yet to rule. The dispute is ongoing. 	<ul style="list-style-type: none"> Differing views on food safety regulation can generate long-running disputes.

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Canada vs France	1998 - 2001	Health & safety	<ul style="list-style-type: none"> • Canada challenged a ban by France on the import of “white” asbestos, claiming that the health risk was not based on adequate science and controlled use of asbestos would be an equally effective (less trade-restrictive) measure. 	<ul style="list-style-type: none"> • The dispute panel found the ban to be discriminatory under the “like product” rules because France makes its own asbestos substitutes. • However, the Appellate Body considered that the physical properties of asbestos that had been used to determine likeness also included their carcinogenic nature. France’s use of a non-toxic alternative was upheld because controlled use of asbestos was not reasonable. 	<ul style="list-style-type: none"> • First WTO ruling to have supported a national measure to protect public health. • However, this case is notable because expert evidence was ruled inadmissible and WTO members felt it was inappropriate for civil society to intervene.
US vs Brazil	2001	Medicines	<ul style="list-style-type: none"> • The US challenged Brazil on its patent protection system that requires holders of Brazilian patents to either make the product in the country or license a company to do so within three years of being awarded the patent unless economically unfeasible. • Brazil argued that TRIPS provides for compulsory licensing if there is a failure to work a patent. • Brazil’s ability to manufacture medicines locally and more affordably was a notable factor in reducing the country’s AIDS mortality by providing universal access to antiretroviral drugs. 	<ul style="list-style-type: none"> • After registering the dispute in February 2001, the US came under so much pressure that it withdrew the complaint in June 2001, providing that Brazil gave 10 days notice of the intention to apply the local manufacture condition. 	<ul style="list-style-type: none"> • Humanitarian grounds may encourage big pharmaceutical companies to back down from trade disputes that embarrass a company and could damage reputations.

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Antigua vs US	2003 -	Online gambling	<ul style="list-style-type: none"> • Antigua claimed that the US was violating GATS by prohibiting online gambling sites whilst allowing some kinds of internet horse-racing betting. • The US claimed that this was necessary to protect public safety.. • The US failed to harmonise its domestic legislation on online gambling as ordered and in 2007 the US withdrew gambling services from WTO jurisdiction, thereby incurring the requirement to pay damages to affected nations. 	<ul style="list-style-type: none"> • The WTO determined that gambling was a recreational activity and therefore could not be the subject of further restrictive measures. • The Appellate Body ruled that federal laws were necessary to protect “public morals” but had been applied in a discriminatory manner. • In 2013 Antigua was authorised to suspend its TRIPs obligations with the aim of enabling free access to US copyrighted films, books and music to the tune of \$21m each year. • This has yet to be invoked and the US is still aiming to negotiate a settlement. 	<ul style="list-style-type: none"> • Even non-discriminatory advertising bans can be considered a trade violation unless they are notified at time of market liberalisation.
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Philip Morris vs Uruguay	2010 - 2016	Tobacco	<ul style="list-style-type: none"> • Philip Morris challenged Uruguay over the introduction of two tobacco control measures: <ol style="list-style-type: none"> 1) tobacco companies could no longer market multiple varieties of a brand 2) graphic health warnings should cover 80% of the packet rather than 50%. • Philip Morris claimed these measures reduced company value and deprived them of intellectual property rights. 	<ul style="list-style-type: none"> • The dispute panel found that trademarks do not carry an absolute right of use. They serve to prevent others from using that trademark but are still subject to regulation. • Uruguay had not imposed discriminatory legislation and had not violated its investment treaty. • The dispute panel accepted input from the WHO Framework Convention on Tobacco Control as independent expertise. • The case was dismissed and Philip Morris ordered to pay all costs and the majority of Uruguay's legal fees. 	<ul style="list-style-type: none"> • This was the first investment arbitration on tobacco control and the first time a tobacco company challenged a state. • Seen as a landmark case for public health. • Ruling shows that trademarks can be subject to government regulation for public health protection. • The Framework Convention on Tobacco Control can be used as a legal backing for protective health measures.
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EC vs Brazil	2005 - 2007	Environment	<ul style="list-style-type: none"> • The EC challenged Brazil over its restrictions on the import of used and re-treaded tyres, considering there were less trade-restrictive measures available to manage environmental damage. • Brazil claimed that re-treaded tyres have a shorter lifespan and would lead to greater numbers of waste tyres that act as breeding grounds for disease-carrying mosquitoes. • The EC argued that protectionist policies were discriminatory because Brazil's tyre industry had obtained a number of court injunctions allowing the import of used tyres to re-tread themselves as well as a number of re-treaded tyres under another trade agreement. 	<ul style="list-style-type: none"> • The dispute panel agreed on the risk of disease and accepted that Brazil did not have the capacity to implement environmental controls on accumulating waste tyres. • However, although the dispute panel agreed that import restrictions were necessary to meet public health goals, they had been applied in a discriminatory manner. The Appellate Body confirmed that Brazil could apply import restrictions but only without exemption. 	<ul style="list-style-type: none"> • Import bans can be accepted as necessary to protect public and environmental health even though they are restrictive to trade. However, such restrictions must comply with trade rules on non-discrimination.
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Notes:

- Further details about each case can be found in the link. The link is to an independent analysis of the case rather than the legal report.
- The WTO provides a one page summary of dispute settlements at: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

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