

# Tobacco industry innovation: cool **new** ways... to an early grave

## Why we need a Moratorium on new tobacco products

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## Introduction

Cigarettes and other tobacco products are so harmful and useless that if introduced today, they would be banned from the consumer market. While it may not be possible, now or in the near future, to completely ban tobacco products, there are health grounds which justify and even beckon a ban on the new and “improved” tobacco products that marketers can think of year in, year out. This paper examines the rational and feasibility of a moratorium on new tobacco products in Canada – that is, a ban on new products. Feasibility is examined within the confines of the Federal *Tobacco Act*, the Canadian Charter of Freedoms and Rights and Canada’s obligations with respect to the Framework Convention on Tobacco Control (FCTC) and international trade agreements (WTO and NAFTA).

### 1. What does new mean

Intuitively, one would think that a new product is one that is drastically different from those currently on the market. According to the tobacco industry, however, even the introduction of new brands, brand extensions, redesigned packaging and simple changes made to existing products turn current products into new products. For example, a document from the American based manufacturer Brown & Williamson dated in 1974 details three types of concepts that lead to new products:

#### Brown & Williamson’s definition:

**Technological innovations** (state of the art filters, new curing and fermentation processes, etc.)

1) Technological Innovation

This would be a new product resulting from a real breakthrough. A cigarette with a filter that is a real improvement over the current technology would be an example of this type of new product.

**Product changes and improvements** (longer or thinner cigarettes, new flavourings, new package constructions and shapes, etc.)

2) Product Changes and Improvements

A new product under this classification would incorporate innovations discernible to the consumer, but would not advance the state of the art per se. Examples are longer cigarettes, blend improvements, new flavorings, different package constructions, etc.

**Imagery** (new products that are different to current products by advertising, packaging, brand name, etc.)<sup>1</sup>

3) Imagery

A totally new image or new personality for a product is an example of this category. New brands under this classification are primarily differentiated by advertising, packaging, or brand name. There would be little or no discernible product difference for brands in this category.

*Brown & Williamson,  
1974  
No Rates*

Manufacturers do all that they can to retain their customers. Publicly, this appears to include portraying new products as simple improvements of current products, perhaps to reassure already wary users.

Despite what Imperial Tobacco Canada (ITC) tells retailers and smokers, British American Tobacco (BAT), its parent company, like Brown & Williamson, also acknowledged that even simple changes made to current products transform them into new ones. A 1990 work plan of the company details development of new products, many of which only involve modifications to conventional cigarette packaging, imagery and taste.<sup>2</sup>

Philip Morris/Altria (current owner of Canada's Rothmans Benson & Hedges) 1997 report titled "New Product Launches and Line Extensions" describes "New Products Launches" around the world, but all products being described are either new cigarette brands or new brand extensions.<sup>3</sup> The same report shows that from the business perspective, the launch of new products and brand extensions is viewed as a single activity.<sup>4</sup>

- Business environment remains highly competitive. **New launch and line extension activity increased by 28% in 1996.**

⇒ Total initiatives (not including USA) were 578 in '96 versus 452 in '95.

*Philip Morris, 1997.*

And words from the Brown & Williamson ring truer 35 years later, as the envisioned "non-menthol menthol cigarettes" "product idea" from 1974 makes its debut in the US and Japan.<sup>5</sup>



## 2. Why new products are bad for public health

### They outsmart regulators

Manufacturers find loopholes in legislation and develop new products and pro-tobacco marketing accordingly. In many instances, new products have enabled manufacturers to **circumvent or overcome** existing regulations and requirements. For example, many of the recently introduced new cigarette packages distort or minimize the impact and readability of the health warnings that government developed to suit the products as they appeared 10 years ago. New products have also allowed manufacturers to **offset** health concerns that smokers and others have, and that are known to promote

quit attempts. Marketers have developed new phrases and colouring schemes to evoke some form of wholesomeness or reduced risk (*100% natural tobacco, carbon filter, smooth, etc.*).

Thanks to innovative thinking, manufacturers transformed cigarettes into small cigars, a category that is less regulated than cigarettes. This has allowed what are essentially brown cigarettes to be sold in single sticks (as opposed to pack of 20 or 25) and without any health warning whatsoever. Moreover, many of today's new products distance themselves from those the public has been cautioned against; especially since many people mistakenly believe new products are approved by authorities. In fact, marketers are so wickedly creative that the "abundance of *new*" keeps Convenience Store Magazine "smiling" about the tobacco category, and this despite "discussions on category-killing legislation" and other tobacco control measures.<sup>6</sup>

## They generate interest

Innovation is integral to the marketing of tobacco. The introduction of new products enables manufacturers to reinvent and modernize tobacco products and the images associated with tobacco-use, especially to attract news users. According to a document updating BAT marketing strategy, innovation is the driving force behind premium brands and the creation of new markets.<sup>7</sup>

Be it through new packaging, new flavours, new brand names or technological innovations, new products are developed to keep users

"interested" and provide them with "alternatives",<sup>8</sup> especially as new products appear to be more appealing and convenient than those previously on the market.

Furthermore, today's new products come at a time when most governments are reducing the channels tobacco marketers can use to promote their products, but new products provide a pretext to reach out "legitimately". During the recent launch of a new designer-style super slim cigarette, Head of Global Customer Strategy, Planning, Insights & Development for BAT explained that "*Vogue, and in particular*



Innovation is integral to....

- Build high priced/margin Brands.
- Create new market segments, where BAT enjoys a USP.
- Improve the value equation and develop a portfolio in the New World of Marketing.
- Deliver brand and product experiences to drive superior, profitable organic share growth.



British American Tobacco, ca. 2005

lines such as Ephemère, is all about moving beyond tobacco towards the kind of merchandising that has served perfumes & cosmetics well, and it's about new ways of engaging with consumers.”<sup>9</sup>

## They increase sales

Interest often leads to trial. The sustained efforts with which tobacco manufacturers “improve” their products and their marketing undeniably serves to enhance the sale and use of tobacco products. In recent years, both Philip Morris International and BAT’s Canadian affiliate, Imperial Tobacco, have acknowledged that packaging redesign led to increased sales.<sup>10,11</sup>

In many cases, new tobacco products target and recruit new users. In Québec, youth smoking rates were in decline until single stick and trial pack flavoured cigarillos made their debut on the market.<sup>12</sup> There were no advertising campaigns, promotion of cigarillos was only at point-of sale and centered on the products characteristics (trial size and flavour). Similarly, the availability of multi flavoured chew tobacco coincides with increased use and trial by young Canadians.<sup>13</sup> In the U.S., the marketing of various new mentholated brands is known to have increased smoking rates among Black Americans.<sup>14,15</sup>

### 3. An overview of recent introductions

#### new gimmicks, same deceptions

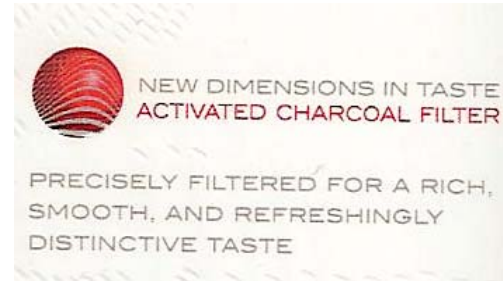
In the last 5 years, tobacco manufacturers have introduced hundreds of new products to the Canadian market.

#### Products based on “technological changes and innovations”

Some new products are presented as being the result of a technological breakthroughs that make them, in one way or another, less harmful or, at least, less problematic than older products. The market launch of cigarette brands *VitaCig*, *Azur* and *Mirage* with its “Less Smoke Smell technology” are illustrative examples of this ploy. *VitaCig* with its vitamin C, *Azur* with its spinach extracts and *Mirage* with its vanilla pellet falsely reassure smokers who are concerned about the health effects of smoking or secondhand smoke, in the case of *Mirage*, by suggesting that “less harmful” cigarette brands are out there and could be an alternative to quitting.



Similarly, Imperial Tobacco promoted the launch of charcoal (activated carbon) filters to its white package, “Fine” du Maurier brand. Carbon filters conjure improved filtration/ purification capacities, which may mislead many to believe that smoke from these cigarettes is free of many harmful chemicals. While carbon filters filter to various degrees semi-volatile and volatile organic compounds found in cigarette smoke,<sup>16</sup> their impact on many non-volatile carcinogenic compounds (TSNAs and aromatic amines) is quite limited if not insignificant<sup>17</sup>.



In spring 2009, Imperial Tobacco advertised new eco-friendly cardboard packaging for some *du Maurier* cigarettes by saying that “*Small steps make the difference*”.<sup>18</sup> Making environmental changes the focus of advertising campaign downplays the destructive impacts of cigarettes on health and wellbeing. Imperial Tobacco new gimmick may lull some to consider the smoking of *some* cigarettes as compatible with a modern environmental sound lifestyle choice or as blogger from *Eco-friendly Promos - Product and Promotions for a Greener World* website puts it: “*if you are a current smoker and don’t have any plans to quit, then it might be worthwhile to light up these cigarettes... it’s sort of the lesser of two evils*”.<sup>19</sup>

### New water-pipe products

Smoking water-pipes, which used to be found only in shops and food stores that specialized in Middle Eastern goods, are now available in a variety of shops, especially in Quebec. Merchants present water-pipe smoking as a pleasant, exotic and natural experience. The tobacco sold is a moist blend is usually offered in a variety of aromatic fruit flavours (grape, peach, strawberry, etc.). Some products are sold as “Herbal Hookah” and carry “Nicotine-free” and “Tar-free” labels. According to Health Canada data (2006), 24% of water-pipe smokers mistakenly believe that the smoke is “filtered” by water and is therefore less harmful than cigarette smoke.<sup>20</sup>



## New smokeless tobacco products

Widespread smoking bans mean smokers have fewer opportunities to light up. Manufacturers of smokeless or oral tobacco products have aggressively promoted flavoured and re-packaged chew tobacco as a mean for smokers to obtain “tobacco satisfaction”.

Moreover, companies have extended major brand lines to include smokeless products with leading cigarette brand names. In 2007, Imperial Tobacco introduced regular and mint flavoured “Swedish style snus” as a *reduced harm product*, because of its low nitrosamine content. In the US and South Africa, where snus has been introduced with cigarette brand names (Camel, Lucky Strike) use of smokeless products is on the rise, but does not appear to be producing declines of smoking rates.<sup>21,22,23,24</sup>



## New properties (flavours, super slims)

### FLAVOURS

The sale (in packs or individually) of cigarillos skyrocketed in recent years from 53 million units in 2001 to over 403 million units in 2007.<sup>25</sup> Cigarillos are particularly popular among young Canadians.<sup>26</sup> Increased consumption coincides with manufacturers launching numerous fruit and candy varieties, which are sold in amusing packaging that showcases their flavour. The same can be said for chew tobacco (smokeless tobacco), where consumption of chewing tobacco risen, reversing a steady 7 year decline dating back to 1998.<sup>27</sup>

The addition of sweet notes and menthol to tobacco products is known to improve the taste of tobacco products and mask the harshness of the smoke, making initial experiences with tobacco more enjoyable.<sup>28,29,30</sup>



## NEW LENGTHS

Manufacturers have introduced a variety of new widths and lengths for cigarette and cigars. Slim cigarettes have historically been seen as elegant and softer feminine products.<sup>31</sup> While many of the recently introduced “extra” and “ultra” slim products still bare romantic style lettering, feminine colours and daintier packaging (a & b), marketers have also launched some less gender-specific products.

Thanks to innovative style packaging and bold clean lines, RBH’s “super slims” brand (c) resemble the trendy iPod MP3 player. As gender barriers become a thing of the past, marketers update imagery to go beyond gender barriers (d). Or as one tobacco industry analyst comments the mounting popularity of slim cigarettes among men in Russia: *“Ultra-slim is chic, portrays wealth and a cosmopolitan attitude”*.<sup>32</sup>

Many new brands and varieties of little cigars come in sizes comparable to those of cigarettes, and in some cases, are even shorter than regular cigarettes. Cigars have historically been less regulated than cigarettes, and have often been perceived as being occasionally used products, that are not as addictive as cigarettes. Manufacturers inundated the market with cigarettes that could be sold as cigars that is cigarettes rolled in reconstituted tobacco as opposed to paper and sold in as single sticks or in inexpensive small packs, enticing to new users. Moreover, anecdotal reports suggest indoor smoking bans may make shorter cigarettes and cigars more convenient as they can be smoked more quickly than regular and king size cigarettes.<sup>33,34</sup> Smaller versions of larger products could also be seen as less offensive, less addictive and more kid-friendly than conventional cigarettes.

## New flavoured rolling papers

Hollow tube-like tobacco wrappers are sold as devices for smoking various substances, including marijuana. In 1999, federal government authorities in the U.S. documented the phenomenon of “blunting,” whereby a cigarillo rod is emptied of its contents and filled with various substances, mainly



(a)

(b)



(c)

(d)

From left to right:  
little cigarillo,  
cigarillo and  
conventional cigarette.





cannabis.<sup>35</sup> Since then, manufacturers have developed flavoured rolling papers and “blunt wrappers” in candy, alcohol and foods such as “peanut butter and jelly” or “brown apple Betty

### New package shapes, sizes, designs and colours

Restrictions on tobacco promotion and the ban on sponsorship and displays at point-of-sale, especially, have deprived industry of easily renewed lifestyle imagery – the long time building block for tobacco marketing. The industry’s now uses the packaging of its products to communicate brand “personality” and attributes. Packaging is far less regulated than other mediums of communication, yet packs are increasingly acting like mobile little billboards.



Through new pack shapes, designs and openings as well as revamped styled graphics, cigarette packs are modernized and made to look like trendy popular techno gadgets (iPods, BlackBerrys, cell phones, etc.). New designs and new product characteristics become the focus (or pretext) of advertising campaigns, emphasizing the innovative and novel “spirit” of the packs and their products.

Brands perceived to be for older smokers, are made to appealing to younger crowds, thanks to graphics and colours. Many new pack designs conveniently distort and minimize the appearance of health warning labels. New designs have also enabled the industry to perpetuate the myth that “light” and “mild” cigarette varieties deliver and “lower” tar and nicotine than regular cigarettes, despite the descriptor words “light” and “mild” being banned. New descriptor words (smooth, silver, etc.) and colour gradation schemes continue to mislead smokers’ into believing that some cigarette brands are less harmful (have lower health risks) than others.<sup>36</sup>

## 4. Moratorium design and viability

It is clear that governments have for the most part been playing catch up with the industry’s never-ending ability to rejuvenate and renew its deadly products. Authorities can respond to product innovation in several ways. The tobacco industry is sure to lobby against any measure that would deprive it of its formidable ability to adapt itself and its products to ongoing regulation and social tides. Some options are less vulnerable to industry challenges. It is therefore important to examine potential responses in terms of their ability to meet public health objectives *and* to withstand the test of challenges that industry will likely unleash.

### Option A: The status quo

The fact that Canada has been beset by new products clearly demonstrates that public-health objectives cannot be attained with the status quo. New flavours and packaging for cigarillos and chew tobacco have reversed progressive downward trends in tobacco consumption among young people.<sup>37</sup> Industry could still launch new products to overcome new regulatory and legislative measures, which would only lead to further undermining of public health law.

### Option B: A ban on all tobacco products

The government may eventually reach its objective by prohibiting the production and sale of tobacco products. Eventhough a majority of smokers wish to quit smoking, this is a difficult thing for them to do. A moratorium on all tobacco products would make access to tobacco difficult and hazardous. The sudden disappearance of tobacco products would not make the demand for them disappear since smokers are physiologically addicted or may not be ready to quit. Many smokers would turn to illicit products to ensure their supply of tobacco products. Currently, contraband accounts for approximately 30% of the market but with a complete ban, that percentage would soar to 100.

### Option C: A moratorium on new tobacco products without an exemption provision

A moratorium on all new tobacco products would target only products that are not (yet) sold in Canada. The moratorium would not of itself provoke contraction of the current market for local and foreign manufacturers as only the moratorium would only bar entry to product not as yet sold in Canada. A moratorium on new tobacco products would provide regulators time for reflection and for developing a more effective framework for new products, while not allowing the situation to worsen. Specific measures to manage the risks associated with new products could be developed an implemented.

### Option D: A moratorium on new tobacco products with an exemption provision

As compared with a moratorium with no exemption provision, a moratorium that would allow an exemption provision would be, in theory, less restrictive to commerce. If new products are barred from market entry given their negative effect on public health, products with a positive impact should be allowed on the market. The moratorium should include a mechanism or process allowing exempted products to enter the market.<sup>†</sup> Such a mechanism would confirm the moratorium's health goal and refute its opponents' claim of protectionism, a power.

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<sup>†</sup> From a precautionary perspective, conditions of exemptions should be as follows:

Furthermore, the government should seek to mitigate the economic losses ensuing from a moratorium on new products by granting a reasonable delay between the moratorium's introduction and its application. This would enable manufacturers who have begun marketing new products to complete these initiatives before the moratorium comes into force. They would have an opportunity to recover (or earn a profit from) amounts already invested in the development of these products. A six-month delay would be reasonable. Manufacturers may be required to submit evidence that such product development was already underway and fairly advanced.

## 5. Precedents

Authorities have primarily established moratoriums to deal with situations where risks are undetermined, irreversible or likely to worsen human and environment health. In many cases, they have afforded regulators the time needed to develop a proper response, while not allowing risks to amplify. The following section outlines several well documented moratoriums, some were in force for short time periods, others for years and some appear to be **permanent**.

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- 1) **Therapeutic use.** A tobacco product that receives a notice of Compliance and a Drug Identification Number (DIN) from the Therapeutic Drugs Directorate of Health Canada should be allowed on the market. While there would not necessarily be public health benefit, this would guarantee that a product receiving this exemption had met the same safety, efficacy and quality standards that we expect of other therapeutic drug products. In fact, promotion for such products is in many cases less regulated than it is for tobacco products.
- 2) **Products accepted by the Minister of Health.** Any tobacco product for which clear evidence, accepted by the Minister of Health, demonstrates substantial public health benefit in a large human population should also be allowed on the market. Manufacturers would have to demonstrate that such products were :
  - I. were in use for more than two years in a human population of more than two million people;
  - II. result, in the hands of the user, in a reduction of personal risk for users as compared with current tobacco;
  - III. lead to a reduction tobacco-related morbidity and mortality, meaning overall decrease in tobacco-caused harm in the population;
  - IV. causes less of harmful tobacco products in the population;
  - V. not incite, either directly or indirectly, a person who is not addicted to nicotine to try the new product and that its availability on the market should not encourage the use of other tobacco products.
- 3) **Products modified by law.** Products which are new because of requirements stemming from health, safety and other laws and regulations. Legal requirements affecting health warnings, tax markings, packaging standards, etc. would be definition also modify existing products into new products. Such products should also be allowed on the market.
- 4) **Products which are new because of the origin of the tobacco.** (Discussed later)

## Pig farming

Quebec imposed a moratorium on swine production from 2003 to 2005.<sup>38</sup> As part of the moratorium, the government allowed no new pig farming to occur, limiting activities to those that were already in place. The moratorium allowed authorities to develop a more effective framework for overseeing agri-food activities which, until then, had attracted several complaints, including health concerns related to air and water contamination from the spreading of pig manure. The moratorium was lifted in 2005, once government announced tighter restrictions over manure spreading and limited the number of pigs that can be raised in certain regions.

## Spraying of certain cosmetic herbicides

In 2006, Quebec became the first jurisdiction in North America to ban the sale and use of most herbicides used for residential lawn care. Over 200 products were pulled from the shelves. Herbicides containing active ingredients 2,4-D, MCPA and Mecoprop, were prohibited until such time as recognized agencies re-evaluated their toxicity.<sup>39</sup> In other words, several herbicides were banned and the sale of others was suspended until independent authorities found them to be safe. In August 2008, Dow AgroSciences, a major manufacturer of herbicides filed notice seeking compensation for over 2 million dollars, alleging that the Quebec ban was in violation of North American Free Trade Agreement (NAFTA) because it was without scientific merit and tantamount to a complete ban of herbicides in Quebec.<sup>40</sup>

## Ultraviolet (UV) waste-water treatment

In 2006, a moratorium was established until June 30, 2007 on the installation of waste-water treatment systems using ultraviolet (UV) rays. The moratorium was extended for another year,<sup>41</sup> but lifted once new criteria and guidelines came into force in October 2008. For the most part, residential use of such technology has been limited to municipalities, with others having to cede their equipment to municipalities.<sup>42</sup>

## Inefficient light bulbs

In April 2007, the Government of Canada launched a process aimed at phasing out the use of inefficient incandescent light bulbs prior to their complete ban in 2011.<sup>43</sup> The elimination of low-efficiency lighting is supported by regulation and standards established as part of Canada's *Energy Efficiency Act*. This phasing out of a product and establishment of standards is tantamount to a moratorium that will permit fewer and fewer exemptions over the course of time.

## Analog TV transmission

The Federal government will prohibit analog TV transmission as of August 31, 2011,<sup>44</sup> with the possible exception of broadcasting in northern and remote communities. It is believed that this prohibition will further encourage high-definition digital production and broadcasting. Government will also prohibit simultaneous analog and digital transmission, making older televisions (sets older than approximately 15 years) obsolete. While not a moratorium per se, this measure shows how governments can shape markets, by directing what manufacturers' can and can't produce.

## The regulation of asbestos in Canada

After gradually cutting back the market entry of new asbestos products, the Federal government completely banned the sale of consumer products containing Crocidolite fibers (a type of asbestos). In November 2007, an amendment to the *Hazardous Products Regulations (Crocidolite Asbestos)* banned (with a few exceptions) the import and advertising of products containing Crocidolite asbestos fibres in part or in whole.<sup>45</sup> It can be said that a moratorium was first imposed on the sale of Crocidolite asbestos to individuals but now it also extends to its imports, sale and use (by general or trained users). Meanwhile, the sale of other types of asbestos remains permissible by law.<sup>46</sup>

## Shops specializing in tobacco products

The moratorium concept is implicitly implemented in Quebec's tobacco legislation. In effect, only specialized shops and cigar salons that existed in 2005, and which abided by certain restrictions, are allowed to continue their operations (without expanding to new locations).<sup>47</sup> The opening of new establishments of this type is prohibited.

## New types of products containing nicotine or tobacco

The concept of limiting the market to currently available tobacco products is not new. As early as 1989, Norway enacted a regulation that prohibited the sale of all new tobacco or nicotine-containing products.<sup>48</sup> The regulation targeted the sale of tobacco products other than cigarettes and chewing tobacco, but omitted to include new product brands.

### *Section 3. Definitions*

*In these regulations, the term "new types" of tobacco and nicotine-containing products means all products containing tobacco or nicotine, with the exception of the products which, by tradition, are or have been sold in Norway (cigarettes, cigars, cigarillos, smoking tobacco, chewing tobacco and snuff).*

*Ministry of Health and Care Services, Norway, 1989*

## Sweet, candy, and liquor-flavoured tobacco products

The prohibition in certain jurisdictions of tobacco products with sweet or candy flavours (with the exception of menthol-flavoured products) is a quasi-moratorium. Generally speaking, the marketing of tobacco product's flavouring with fruit, sweet and candy aromas is a recent phenomenon, making such products rather "new". The state governments of South Australia,<sup>49</sup> New South Wales<sup>50</sup> and the Australian Capital Territory, have banned the sale of fruit-scented cigarettes, with Tasmania<sup>51</sup> extending the ban to all tobacco products and rolling papers. In the U.S., Maine<sup>52</sup> bans the import and sale of cigarettes and cigars that contain a "*constituent that imparts a characterizing flavor*" other than those of "*tobacco, menthol, clove coffee, nuts or peppers*", except for those that were on the market prior to 1985. Thus, older brands of mentholated and flavoured cigarettes or cigars remain legal.

## Oral tobacco products

Oral tobacco products, commonly referred to as "smokeless tobacco products" (including the Swedish-inspired Snus), are prohibited in the member states of the European Community other than Sweden, New Zealand, Australia, Hong Kong, Japan, Switzerland, and Israel.<sup>53</sup> These products are prohibited even if the launch of new brands of cigarettes, water-pipes, and other combustible tobacco products is permitted.

The prohibition in Europe has been challenged in the courts, notably by Swedish Match, the manufacturer of Snus in Sweden. In 2004, the European Court of Justice, the EU's highest tribunal, upheld the European ban on oral tobacco products.<sup>54</sup> The court stated that even though oral tobacco products are not fundamentally different in their composition or use from products that are not banned, they were not in the same situation as the latter when the ban legislation was adopted.<sup>55</sup> These were new products on the European market, which makes them different and justifies the difference in the way oral tobacco products are managed.

## Bottled water containing nicotine

Finally, it is worth noting that the United States prohibits the sale of bottled water containing nicotine as well as nicotine-laced lollipops.<sup>56</sup> These products appeared on the market after cigarettes, cigars and smokeless products.

## 6. Canadian and international legal framework

### Federal Tobacco Act

Cigarette manufacturers have never contested section 5 of the federal Tobacco Act, which gives the government the power to prohibit all or certain tobacco products:

*5. No person shall manufacture a tobacco product that does not conform with the standards established by the regulations.*

There is currently no jurisprudence citing section 5.

### Canadian Charter

The rights and liberties acknowledged by the charters are not absolute.<sup>57</sup> These may be limited when it is deemed necessary and justified to do so. Neither of the charters provides for rights to property, which is not a right but a privilege. Therefore, the Canadian Government is not bound to justify the moratorium on new tobacco products under any requirements stemming from the Canadian Charter of Rights and Freedoms. More specifically, the Charter does not prevent authorities from banning products which are the result of technological innovations and product innovations. Should new tobacco products be approved as a medication (i.e. as therapeutic support to quit smoking), they would be exempted from the moratorium. Such products would then be governed by the *Canada's Food and Drugs Act*, and their promotion would, for better or for worse, be subject to regulations governing drugs.

### Modifications to illustrations, packaging and trademarks

The packaging, illustrations and graphics that often accompany trademarks are widely considered a form of expression. Accordingly, manufacturers may argue that the moratorium prevents them from upgrading, expressing and/or benefiting from their trademarks, which in theory are protected by the Canadian Charter. The industry's claims may not be all that viable given that in its decision in support of the Federal tobacco legislation in 2007, the Supreme Court of Canada characterized advertising of tobacco products as possessing "*low value*".<sup>58</sup>

Furthermore, bans on freedom of expression are always easier to accept when they are deemed to be the least restrictive option. A moratorium on new products is just that, because the only forms of expression to be prohibited are those that have yet to be used commercially. Manufacturers could continue to market and "profit" from the forms of expression already present in the market prior to the cut-off date. This aspect of the moratorium represents another solid rebuttal to arguments based on the Charter.

## Framework Convention on Tobacco Control (FCTC)

Like Canada, 166 of the 192 World Health Organisation member states are parties to the Framework Convention on Tobacco Control (FCTC). Article 2 of the treaty encourages countries *“to implement measures beyond those required by this Convention and its protocols”*.<sup>59</sup> With public health being the sole motivating factor for a moratorium, governments should insist that any future disputes arising from the moratorium be settled through the mechanism established in article 27 of the FCTC rather than those of other international agreements. A framework that does not pit public health interests against other interests, especially commercial ones, best serves Public Health. The moratorium would therefore be judged on its conformity to the guidelines and objectives of the FCTC and not various trade agreements. Under FCTC’s article 5, Parties of the FCTC shall *“act to protect [the setting and implementing of tobacco control policies] ....from commercial and other vested interests of the tobacco industry in accordance with national law”*.<sup>60</sup> The FCTC’s language validates the moratorium’s unique ability to eliminate future harms generated by the industry’s ability to innovate and reinvent itself and its products. Indeed article 3 urges governments to implement proactive measures: *“The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke... in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke”*.<sup>61</sup>

Countries that have not signed the FCTC are likely to push for an arbitration process other than that provided for under the FCTC. Countries that tend to oppose anti-tobacco measures vociferously and which are members of the World Trade Organization but not parties to the FCTC are the United States, the Dominican Republic and Indonesia, and for this reason trade arguments and agreements are of vital consideration.

## 7. International trade agreements

The moratorium does affect trade, but is never the less necessary and justifiable. Countries may argue that a moratorium on new tobacco products prevents new players from entering the market, and is therefore a protectionist measure or quota parading as a public health measure. Trade challenges such as this could be launched against Canada and filed to Dispute Settlement body of the WTO - the Appellate Body. Countries found to violate WTO agreements and unsuccessful at achieving exemptions, face compensatory payments or trade penalties that are usually retaliatory in nature (i.e. levies against exports to some countries). Industries, and the tobacco industry in particular has been known to orchestrate impressive public relation campaigns to scare off public and political support in favour of for generic packaging.<sup>62</sup>



To decrease the likelihood of countries launch, let alone, win such trade disputes, Canada would need to design the moratorium in a manner that allows it to adhere to the terms and principles of the WTO agreements to the fullest possible extent. This means imposing the fewest possible limitations on trade, complying with the principles and criteria of trade agreements or meeting criteria to be exempted from them.

### **World Trade Organization (WTO) Agreements**

More specifically, the moratorium would have to comply with the 21 agreements Canada has signed with the WTO as well as commitments under the North American Free Trade Agreement (NAFTA) and the bilateral agreements signed with the EU, Colombia, Chile, Costa Rica, Jordan and Israel.<sup>63,64</sup> While each trade agreement has its particularities, all share some elements, often referred to as guiding principles. The moratorium adheres to the guiding principles of the WTO Trade Agreements in the following manner:

- **The Most Favoured Nation principle:**

Trade agreements ensure identical treatment for all parties. A moratorium would be giving identical treatment for all parties as all new products, brands and packaging — be they domestic or foreign — would be banned, based on the public health risks that are associated with “innovations” and not their country of origin.

- **The National Treatment principle:**

Under trade agreements, countries cannot provide preferential treatment to domestic players, unless otherwise agreed to. A moratorium would give domestic and foreign manufacturers equal to compete in the Canadian market. The approval of new product exemptions, if applicable, should be issued in reasonable and equal timeframes, regardless of a product’s origin. Likewise, the coming into force of the moratorium should be the same for all product categories, to prevent any instances of preferential treatment.

- **The principle of prohibiting quotas: no volume restrictions on imports**

There are currently both domestic and foreign products available on the market. The moratorium would not have an impact in this regard, nor would it prevent existing products from being manufactured as they are presently, in domestic or foreign plants. The moratorium can therefore not be understood as an “absolute quantitative restriction” akin to the setting of quotas.

- **The principles of transparency and disguised restrictions**

The adoption, implementation and monitoring of the moratorium should stem from a clear, public and transparent process.<sup>65</sup> Ideally, the moratorium should be subject to a recommendation from Parliament. Exemptions and delays for introduction should be the same regardless of the product, category or origin of the manufacturer. As mentioned previously, governments should, on the basis of strict criteria, allow manufacturers who have begun marketing new products to complete these initiatives before the moratorium comes into force. They would have an opportunity to recover (or earn a profit from) amounts already invested in the development of these products.

- **The Principle of similar treatment for similar products: Policies and measures must treat “like” products in a “like” manner.**

WTO jurisprudence illustrates that with the exception of a few notable instances, products consisting of similar materials or destined for more or less the same use are considered “like” products.<sup>66</sup> In other words, the WTO deems that allowing the marketing of certain cigarette brands would likely require that the marketing of all cigarette brands be authorized, given that these products would be considered similar rather than new or different. Industry would surely raise this argument.

It could be argued that new products are often the result of industry’s adaptation to tobacco control measures, and they therefore constitute greater risks that has yet to be addressed by government measures and information campaign. Indeed, comprehensive tobacco policies, laws and programmes will gradually lead to declines in both the supply and demand for current tobacco products, but the most effective way of preventing new products from becoming established and creating new health risks is to prevent them from ever reaching the market.

In its judgment validating the EU’s ban on smokeless tobacco products, the highest court in the European Union stated that it did not consider this ban to be discriminatory, since smokeless tobacco products had been launched in the market after combustible products.<sup>67</sup> Government was therefore justified in providing different treatment to different products.

Nonetheless, there is a risk that the WTO not extend this vision to all new tobacco products or share the EU Court’s opinion. It is therefore important to design the moratorium so that it need not meet the WTO agreements, but instead qualifies as an exemption under article XXb of the General Agreement on Tariffs and Trade (GATT).

Under certain conditions, Canada can be exempted from having to comply with the WTO agreements. The EU was granted such an exemption when it banned new asbestos products, a measure that was contested by a number of countries, including Canada.<sup>68</sup> The asbestos case is also relevant to the

moratorium in that the WTO did distinguish products that are basically similar by taking into consideration their distinct harmfulness.

- **Least trade-restrictive principle**

International trade regulations require that governments reach their public health objectives by relying on the policies and measures that represent the fewest possible obstacles to trade, even if these alternatives are not considered to be the most favourable for public health.<sup>69</sup>

Bans on smoking and tobacco taxes are recognized methods for reducing tobacco use; however, they do not counteract the potential attraction exerted by the marketing of new products. The moratorium represents a supplementary measure designed to work in tandem with other initiatives developed to counter tobacco marketing. It also complements the WHO's recommendation to ban all tobacco-related advertising.<sup>70</sup>

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The three<sup>72</sup> agreements most often cited in the various disputes related to public health are:

- Technical Barriers to Trade agreement (TBT);<sup>73</sup>
- Sanitary and Phytosanitary Measures agreement (SPS);<sup>74</sup>
- General Agreement on Tariffs and Trade (GATT).<sup>75</sup>

- **TBT agreement**

This agreement aims to ensure that regulations, standards, and test and certification procedures do not create unnecessary obstacles to trade or voluntarily favour one country over another.

The agreement makes it possible for trade to be restricted by a given measure when scientifically justified. The TBT agreement strongly favours the use of international standards.

There is currently no international standard approving the use of certain tobacco products. Instead, various jurisdictions choose to prohibit or allow certain tobacco products or product categories based on their characteristics.

Canada would have to justify why consumers in Canada require greater protection from new products than from the products they are currently exposed to. The moratorium may be justified by alluding to the history of products marketed as being less harmful, less addictive, increasingly natural or helpful in quitting smoking. A moratorium would likely have prevented the marketing of cigarillos that will ultimately contribute to an increase in the number of smoking-related deaths in Canada.

- **SPS agreement**

The SPS agreement would come into play only if the moratorium were to limit the introduction of new products as the result of modifications (voluntary or not) to tobacco plants during production.

Given the impact of the SPS agreement on tobacco plants<sup>76</sup>, it is important to anticipate an exemption for new products resulting solely from changes to a supply source or a natural seasonal variation. Careful wording of exemptions is necessary in order to prevent manufacturers from toying with nicotine and other content levels by switching tobacco varieties.

- **GATT agreement**

A special feature of this agreement is that it can exempt a measure considered necessary from a public health perspective from the obligations of the WTO agreements and free trade agreements (for example, NAFTA). In the case of an eventual dispute (dealt with by the WTO arbitration mechanism, not that of the FCTC), Canada should seek this exemption.

According to GATT section **XXb**, members are entitled to introduce measures to restrict imports and exports of products in order to “*protect human, animal or plant life or health*”.<sup>77</sup> A measure is subject to agreement requirements only if it meets the conditions prescribed in the introduction to article **XX**, which reads:

*“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...<sup>78</sup>*

Article **XX** does not include an obligation to quantify the risk to people’s lives or health. This risk must simply be demonstrated. The more critical a measure is to health protection, the more likely it is that an exemption will be granted.

The non-preferential and non-prejudicial character of the proposed moratorium presumes that Canada may be eligible for the exemption provided for under article XXb of the GATT. The ban on all new tobacco products (with exemptions), regardless of form, origin or appearance, on the basis solely of its existence in Canadian market prior to the cut-off date, strengthens the moratorium with regard to disputes in relation to trade agreements.

The WTO, however, has only granted one (1) of the eleven (11) exemptions requested prior to 2000 (asbestos). While jurisprudence does not lean towards public health measures, the coming into force of the FCTC, an international treaty signed by nearly all parties to the WTO agreements, gives a significant boost to anti-tobacco measures. Over time, the FCTC may come to be considered an international standard, that is, an important criterion for benefiting from exemption XXb.

The government would need to demonstrate that the moratorium is “*scientifically justified and necessary*”. The moratorium meets these criteria because:

- the measure is efficient and there are no less trade-restrictive measures that can achieve the desired objective;
- the measure does not consist of a disguised obstacle to trade or constitute “arbitrary or unjustifiable” discrimination;
  1. the introduction of a moratorium is a common practice, shown to be effective in managing public health risks;
  2. the moratorium would prevent the marketing of products that may contribute to an epidemic;
  3. the most effective way of preventing dependency with regard to new addictive and fatal products is to prevent them from entering the market.

### **NAFTA and the rights of investors**

Section 1139 of NAFTA’s chapter 11 proposes a rather broad definition of the term “investment.”<sup>79</sup> In fact, an investment is deemed to include a company, a loan to a company, the owner of an interest in a multinational company, operating licenses, patents, trademarks and copyrights.<sup>80,81</sup> The exemption provided for under article XXb of the GATT does not extend to the guarantees covered by chapter 11 of NAFTA.

Contrary to the disputes reported to the WTO, NAFTA allows investors from member countries (Mexico, the United States and Canada) to file a complaint against the government of another country, without mediation or support from its own government. Canadian, Mexican or American tobacco manufacturers

and distributors who believe that they have been harmed by a regulation that amends the operating conditions of their companies are likely to initiate a lawsuit and claim an indemnity from the government in question. Tobacco multinationals would argue that the moratorium would reduce the future value of their investments in Canada. NAFTA provisions that may very well be key factors in a dispute on the moratorium are articles 1102, 1105 and 1110.

■ **National Treatment (article 1102)<sup>82</sup>**

Major manufacturers, along with small foreign manufacturers, can argue that the moratorium prevents them from entering the Canadian market by prohibiting them from competing with existing products through the introduction of “like” products. Using the European Court ruling on the ban on smokeless products in EU States (except for Sweden), it can be argued that pre- and post-moratorium conditions are not “*like circumstances*” as mentioned in article 1102 and that there is no prejudice or “*less favourable treatment*” for small or large manufacturers of new products.

■ **Obligations with regard to the minimum standard of treatment (article 1105)<sup>83</sup>**

A transparent process, the period between the adoption of the moratorium and its coming into force, and the possibility of marketing a product that meets exemption criteria are all factors attesting to the implementation in good faith of regular legislation. As specified by the NAFTA Free Trade Commission in July 2001, parties to NAFTA are not required to protect investors rights “*in addition to or beyond that which is required by the customary international law minimum standard*”,<sup>84</sup> meaning the standard is not as specific or superior to the principles set out by NAFTA and the WTO agreements.

■ **Expropriation and Compensation (article 1110)<sup>85</sup>**

According to an analysis by Canada’s Department of Foreign Affairs and International Trade, “under section 1110, no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except:

- for a public purpose;
- on a non-discriminatory basis;
- in accordance with due process of law and Article 1105(1) (minimum standard of treatment);
- and,
- on payment of compensation.”<sup>86</sup>

A moratorium is a public policy instrument which discriminates on the grounds of temporal (before and after the moratorium) rather than geopolitical barriers. Provisions for exemption to the moratorium also

comply with the obligations and will of the FCTC and seemingly and most importantly, the requirements provided for in article XXb of the GATT agreement.

According to the courts created under chapter 11 of NAFTA, expropriation exists when a measure prevents a company from benefiting from the vast majority of its activities and earnings, rather than when it simply leads to a reduction in its activities and earnings.<sup>87</sup> The moratorium would not prevent tobacco multinationals with existing access to the Canadian market to continue earning profits from the sale of products and brands which they already market. The moratorium, while preventing domestic or foreign companies from carrying out future development, would nonetheless enable them to continue marketing products exempted from the moratorium.

Major manufacturers may rely on their facilities in Mexico or their partnerships with U.S.-based interests to file a dispute and request compensation for the losses resulting from the prohibition of applying their trademark to new tobacco products. They would undoubtedly evaluate their losses in the hundreds of millions of dollars. Yet even if manufacturers were to win their case in court, the moratorium could be upheld.

The government could call for a minimal indemnity or even no compensation at all, arguing that:

1. there should be no positive value associated to future sales of products acknowledged to cause preventable disease and deaths;
2. manufacturers are fully cognizant of the existence of public policies designed to reduce or eliminate their market, yet continue to invest in it;
3. products that have not yet been introduced in the Quebec market are of purely speculative value;
4. contrary to a ban, a moratorium does not constitute an expropriation. A moratorium, in and of itself, would not result in trademarks or brands being removed from the market. A moratorium would have no impact on products that are already present in the market.

## **8. Which countries would champion the tobacco industry?**

Only WTO member countries can file a dispute with the WTO. Countries that decide to champion the cause of tobacco manufacturers would certainly be poorly regarded by their own population and the international community. Even Swedish manufacturers did not succeed in their attempts to convince Sweden to contest the ban on snus in several countries, on the basis the WTO agreements

- **Major manufacturers and NAFTA**

The moratorium would to a certain extent protect the advances made by major manufacturers. It would increase the value of existing trademarks and products while sheltering them from competing products that are just as detrimental to public health but offered at a lower price. In addition, since the moratorium does not ban the marketing of exempted tobacco products, manufacturers cannot argue that it prevents them from selling less harmful products.

- **Small manufacturers and NAFTA**

In the short term, the moratorium is most likely to be disputed by small U.S. and Mexican manufacturers as well as American investors in Aboriginal manufacturers on the basis of NAFTA. These Canadian, U.S., or Mexican investors, however, may be reassured by the fact that the Canadian market would not once again be beset by new products from Asia, the Middle East, and elsewhere.

- **Disputes**

In the best-case scenario, the moratorium would not be disputed. After all, the law prohibiting tobacco products from being displayed in plain view in retail outlets was not disputed by any country or investor under NAFTA. Likewise, no cigar manufacturer or exporting country disputed the moratorium on specialized tobacco shops in Quebec.

In the worst case, even if there were an appeal under NAFTA chapter 11, the moratorium would still be deemed a measure to protect the public interest. Quebec would be required to pay indemnities. The period between the moratorium's adoption and its implementation would give investors time to adapt. They would continue to benefit from earnings from existing products. Given the circumstances, indemnities may be nearly insignificant when compared to the benefits of a major drop in tobacco use in Canada, once tobacco products and their marketing appear outdated and anachronistic.

A moratorium on all new tobacco products, which may include exemptions, appears to be a realistic means of protecting the public from the undesirable, even catastrophic, effects of the unsupervised and poorly structured introduction of new tobacco products. The tobacco industry may suffer a serious blow from a moratorium on new tobacco products, particularly if other jurisdictions follow suit. A moratorium can be designed in such a way that it can withstand disputes filed by the tobacco industry and its allies.



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