Why trade and investment liberalisation may threaten effective tobacco control efforts

Trade and investment liberalisation in tobacco products offers no benefits for tobacco control. Thus, if trade and investment liberalisation—as embodied in international agreements or viewed as an economic process—may harm tobacco control, as we believe it might, then trade and investment liberalisation in tobacco is an unhealthy and inappropriate public policy.

We support the resolution of the 11th World Conference on Tobacco or Health that called on “the international tobacco control community [to] work vigorously to exclude and remove tobacco and tobacco products from bilateral and multilateral trade agreements that would have negative public health consequences.”

We think this position is well supported by the record of the last two decades on trade and tobacco, the text of existing trade agreements, and the threats posed by proposals for expanded trade and investment agreements.

The US trade offensive

In the 1980s, the Office of the US Trade Representative, working hand-in-glove with US cigarette companies, used the threat of trade sanctions to pry open key markets in Japan, Taiwan, South Korea, and Thailand.

In the face of US threats, these countries removed restrictions on tobacco imports. In Japan, Taiwan, and South Korea, the result was a rapid rise in smoking rates. After South Korea opened its market to US companies in 1988, for example, smoking rates among male Korean teens rose from 18.4% to 29.8% in a single year, according to the US General Accounting Office.1 The smoking rate among female teens more than quintupled from 1.6% to 8.7%.2 Overall, according to World Bank estimates, the opening of Asian markets to US cigarettes escalated Asian smoking rates 10% above what they would have been.3 Price competition and advertising—the introduction of slick promotional strategies that link cigarettes with notions of sophistication, freedom, and “hipness”, and a heavy linkage between smoking and sports and popular entertainment, appear largely responsible for this rise. Foreign imports and investment may also increase smoking rates by introducing “smoother” brands that are more attractive to new smokers, and by creating a powerful political lobby against tobacco control measures.

Thailand has been unique among these Asian nations. Although a General Agreement on Tariffs and Trade (GATT) trade tribunal ruled that Thailand must open its tobacco market to foreign cigarettes, it permitted Thailand to maintain stringent health regulations. Thailand maintains among the strongest tobacco control regimes in the world, and it has worked to prevent the rise in smoking rates that accompanied the market opening elsewhere in Asia.4

Nonetheless, the market opening in Thailand has put ongoing pressure on the country’s tobacco control measures, blocked or delayed innovations, and undermined political support for tobacco control.

• Where the local monopoly has accepted tobacco control regulations, multinational tobacco companies have vehemently tried to resist them, delaying implementation of section 11, the Thai regulation mandating disclosure of the ingredients of each brand of cigarettes, for five years.

• The multinational tobacco companies have “dumped” cigarettes into the Thai market, selling them at rates considerably below that charged in other countries, in order to expand their market share. The Thai ban on advertising has led them to be more competitive on price.

• The multinationals have effectively circumvented Thailand’s far reaching marketing ban through numerous promotional and advertising schemes.

• The multinationals have persistently sought to buy out the Thai tobacco monopoly or enter into joint venture arrangements with it. Their goal may be to convert the enhanced economic power of larger market share into sufficient political power to roll back Thailand’s tobacco control measures. Their existing influence seems to have been enough to downgrade the status, bureaucratic standing, and influence of governmental tobacco control agencies.

The Clinton administration has largely kept a promise to cease using trade threats to force open tobacco markets. But the US–China bilateral agreement that preceded the grant of “permanent normal trade relations” to China included a provision requiring China to slash its tariffs on imported cigarettes.5 Smoking rates in China among women and children are likely to rise as a result.

Trade agreements and tobacco

The World Trade Organization (WTO) and other trade and investment agreements contain far reaching trade liberalisation provisions that go beyond regulating tariffs and requiring countries to treat domestic and foreign producers equally. These include provisions placing limits on country flexibility in the areas of product standards and intellectual property.

In the case of the WTO, countries have a strong incentive to comply with WTO requirements; countries determined by a WTO panel
Debate to violate WTO rules to advance public health

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to violate WTO rules to advance public health

Internet advertising restrictions, which face
a series of potential difficulties under
international trade agreements. One prob-
lem emanates from the WTO services
agreement, expansion of which is now under
negotiation. Under the services agreement,
a country which agrees to open its borders
to advertising might be required to treat for-
eign advertising agencies providing tobacco
advertising over the internet with rights
equal to domestic advertisers—even though
the content of the foreign ones cannot be
effectively regulated under the recipient
country’s laws.

Product regulations and indoor air
regulations, which must comply with the
WTO’s Technical Barriers to Trade (TBT)
agreement. The TBT agreement prevents
countries from exceeding international
product and other technical regulation
standards, except in very rare instances.
Indoor air regulations that exceeded an
international standard might be in violation
of the WTO agreement, for example. Or a
regulation to diminish nicotine levels in
cigarettes while making other nicotine deliv-
ery devices might be held to violate the TBT
or other WTO provisions.

Against challenges of this nature, countries
have little defence, except to invoke article
XX(b) of the GATT. Article XX(b) establishes
an exception to WTO rules for public health
and environmental protection, but it is very
narrow.

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interests only if such measures are “necessary”
to protect human life. The heavy evidentiary
burden of the test of necessity is made heavier
by the WTO interpretations that “necessary”
can only justify policies that are also the “least
trade restrictive” means of achieving a particu-
lar goal. In the case of tobacco control, WTO
panels could determine that varied tobacco
control measures are not “necessary” because
excise taxes represent a less trade restrictive
alternative.

We are not asserting that a WTO panel
would rule against all or any of the tobacco
control policies we have listed, or others that
may be subjected to challenge. But we do
believe such challenges have a genuine chance of succeeding, and that article XX(b) defences
might well fail.

This uncertainty about potential outcomes
is enough to make the case against trade and
investment liberalisation for tobacco. First,
there are no offsetting benefits of tobacco trade
liberalisation for tobacco control—indeed, the
key purported benefit of trade liberalisation,
lower price, is actually harmful to the cause of
tobacco control. Second, the mere fact of the
uncertainty, and the strong reluctance
especially of developing countries to be hit with
WTO challenges, will chill many governmental
tobacco control initiatives, as has already been
the case.

Finally, we note as an aside that there were
no article XX(b) type protections in the Multi-
lateral Agreement on Investment (MAI), a
proposed international investment agreement,
that has now been tabled. The MAI contained
WTO-style rules, plus more—most danger-
ously, it would have permitted companies to
use governments directly to enforce their
“rights” under the agreement. Discussions
towards a multilateral MAI-style investment
agreement are proceeding, and similar invest-
ment protections already exist in NAFTA, are being
proposed for a Free Trade of the Americas
Agreement, and may enter into the WTO’s
investment agreement.

Solutions
The basic thrust of the tobacco control move-
ment is counter to the notion of trade and
investment liberalisation. When it comes to
tobacco, we want to limit the freedom of com-
mercial actors, not enhance it and carve it into
a corporate bill of rights.

In the international trade agreement
frameworks, tobacco and tobacco products
should be specifically excluded. Countries
should not have to subject their tobacco
control regulations to the WTO or other trade
agreement screens.

We favour provisions in the Framework Con-
vention on Tobacco Control (FCTC) that
would specify that it should take precedence
over the WTO on tobacco related matters. Most
important, however, is ensuring that the FCTC
does not overtly subordinate itself to the WTO,
as principle 4 in the current draft would do.
Moreover, FCTC provisions should be drafted
so that they specifically constitute a regulatory
floor, not a ceiling—because under WTO rules,
an international regulatory ceiling will be extraordinarily difficult to break through.

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7 Negotiations on the MAI are no longer taking place. Official OECD Statement 12/3/98.
Why trade and investment liberalisation may threaten effective tobacco control efforts

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