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DEBATE

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."[1]

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.[2] 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 in 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 to be found violating WTO rules must either change their laws or face costly trade sanctions or fines.

Under existing WTO rules, as well as those included in the North American Free Trade Agreement (NAFTA) and other trade rules, a wide range of sound tobacco control policies might be found "illegal." These include:

- Labelling standards, with tobacco companies complaining that large warnings or plain paper packaging violates their trademark intellectual property rights, a claim used in Canada and elsewhere.[6]
- Ingredient disclosure rules, which the companies allege violate internationally accepted trade secret protections.
- Internet advertising restrictions, which face a series of potential difficulties under international trade agreements. One problem 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 foreign 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 delivery 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.

Article XX(b) is an awfully thin reed on which to rest our hopes. The tribunals that make the decisions to uphold or overrule public health measures are selected for their expertise in commercial trade, not public health. Not surprisingly, they have invariably looked at public health measures with their view filtered through the lens of free trade. Public health science is not easily presented to them: the proceedings are not open for public comment or viewing, and there is no opportunity for public health organisations to rebut misinformation.

Article XX(b) has succeeded only once in defending a sound public health measure from challenge, when France's ban on asbestos was upheld in 2000 against a challenge from Canada. The language of article XX(b) gives faint hope to public health: it permits measures to violate WTO rules to advance public health 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 particular 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 Multilateral Agreement on Investment (MAI), a proposed international investment agreement, that has now been tabled.[7] The MAI contained WTO-style rules, plus more—most dangerously, it would have permitted companies to sue governments directly to enforce their "rights" under the agreement. Discussions towards a multilateral MAI-style investment agreement continue. Similar investment 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 movement is counter to the notion of trade and investment liberalisation. When it comes to tobacco, we want to limit the freedom of commercial 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 Convention on Tobacco Control (FCTC) that would specify that it should take precedence over the WTO on tobacco related matters. Most important, however, is assuring 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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1 Recommended Global Tobacco Control Actions, 11th World Conference on Tobacco or Health, Chicago, Illinois, USA, 11August 2000. http://www.conference-cast.com/wctoh/ccast_schedule.htm

2 US General Accounting Office. *Trade and health issues: dichotomy between US tobacco export policy and antismoking initiatives*. Washington DC: US General Accounting Office, 1990.

3 The World Bank. *Curbing the epidemic: governments and the epidemic of tobacco control*. Washington DC: World Bank, May 1999.

4 World Health Organization. *Tobacco or health: a global status report*. Geneva: World Health Organization, 1997.

5 Agreement on Market Access. Between the People's Republic of China and the United States of America, 15 November 1999. Posted at http://www.uschina.org.

6 Hills C. Legal opinion with regard to plain packaging of tobacco products requirement under international agreements. Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994.

7 Negotiations on the MAI are no longer taking place. Official OECD Statement 12/3/98.