New challenges to control tobacco consumption in Latin America: international trade and investment agreements

Nuevos desafíos al control del consumo de tabaco en América Latina: acuerdos internacionales de comercio e inversión

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Abstract

This article aims to give a glimpse at the potential impact of international trade and investment agreements on tobacco control regulations, especially on plain and large pictorial warnings packaging. To accomplish it, we describe the most important trade and investment agreements, and highlighting the provisions that were used or could be used by corporations to challenge tobacco control policies. In addition, we summarize the principal characteristics of the Framework Convention on Tobacco Control (FCTC), which is the first treaty negotiated under the auspices of the World Health Organization (WHO) with the goal of confronting the challenges that the globalized economy has imposed to national regulations.

Keywords: Tobacco control policies – international trade and investment agreements – Framework Convention on Tobacco Control – Latin America

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Resumen

El objetivo del artículo es proveer una aproximación inicial al tema del impacto potencial que los acuerdos internacionales de comercio e inversión pueden tener en las políticas de control de tabaco, especialmente en las de empaquetado plano y advertencias sanitarias fotográficas que ocupen gran parte del paquete. Para ello describimos los acuerdos de comercio e inversión más importantes, y remarcamos las provisiones que fueron o podrían ser usadas por las compañías de tabaco para cuestionar las políticas de control de tabaco. Además, sintetizamos las principales características del Convenio Marco para el Control del Tabaco (CMCT), que es el primer tratado negociado bajo los auspicios de la de la Organización Mundial de la Salud (OMS) con el objetivo de confrontar los desafíos que la globalización económica ha impuesto a las políticas regulatorias nacionales.

Palabras claves: Políticas de control de tabaco – acuerdos internacionales de comercio e inversión – Convenio Marco para el Control del Tabaco – América Latina

1. Introduction

Despite all the advances made in limiting tobacco consumption, the world deaths caused by tobacco are expected to rise to over 8 million people each year in the next two decades. More than 80% of those deaths will be happening in low- and middle-income countries. The risks of smoking escalates by the age of 30 including increased rates of cardiovascular deaths (ischemic heart disease and stroke) in relatively young people, higher rates of cancers (especially lung cancer) particularly later in life, death associated with diseases of the respiratory system, and communicable diseases, such as tuberculosis and infection of the lower respiratory tract.[1] In addition, public and social security healthcare systems confront a great economic burden providing care to those affected by diseases related to tobacco consumption.[2]

A critical body of research has been crucial in showing the need for tobacco control policies. The study by Doll and Hill in the 1950s established the first causal evidence between smoking and lung cancer at population level.[3] Later, thousands of studies confirmed that relationship between tobacco consumption and cancer, and contributed to identify cost-effective measures to confront the tobacco epidemic.[4] Since the early 1960s, the United States has been a leading force in developing health policy interventions to control tobacco consumption;[5] in the

1970s, other governments from developed countries followed, and intergovernmental agencies and civil societies added their voices.[4] Low- and middle-income countries also increasingly regulate tobacco consumption, especially in Latin America.

However, tobacco industry has found new strategies to challenge the advances in tobacco control policies and regulations through the use of international trade and investment agreements, both bilateral and multilateral. The tobacco industry is using these agreements in similar ways in all regions of the world. It is critical to understand these strategies and identify the opportunities that the countries have to defend the health of their population against tobacco, which is still one of the top killers of our time.

This article aims to give a glimpse at the potential impact of international trade and investment agreements on tobacco control regulations, especially on plain and large pictorial warnings packaging. To accomplish it, we describe the most important trade and investment agreements, and highlighting the provisions that were used or could be used by corporations to challenge tobacco control policies. In addition, we summarize the principal characteristics of the Framework Convention on Tobacco Control (FCTC), which is the first treaty negotiated under the auspices of the World Health Organization (WHO) with the goal of confronting the challenges that the globalized economy has imposed to national regulations.[6]

2. Globalization of free trade and tobacco

Tobacco control policies faced new challenges due to the process of globalization unleashed in the 1990s, which included a soaring liberalization of global trade. According to a landmark study commissioned by WHO in 2001, there is evidence that the creation of the World Trade Organization (WTO) facilitated tobacco markets expansion and trade liberalization, favoring lower prices and affordability of tobacco products for low income populations, increased advertisement, brand proliferation and targeting of specific populations, such as women and youths. The study also alerted on the limited bargaining power that the developing countries had to confront tobacco corporation lobbies, the need to recognize globalization as a set of rights and responsibilities, and that health protection should have a higher hierarchy than the protection of goods and services.[7] A 2012 WHO report confirmed previous findings and advanced the analysis in several dimensions: First, identifying the scarcity of studies on the links between trade and investment liberalization, and tobacco control; next, reporting the knowledge gained on how WTO rules applied in several trade and investment disputes, the increment in disputes using these agreements to confront tobacco regulations, and the lessons learned for countries trying to protect the health of their populations; last, illustrating how the tobacco industry has used these agreements in domestic debates on tobacco control measures.[8] The report highlighted the importance of the activation of the FCTC in 2005, as the first international legal instrument designed to promote multilateral cooperation and national action to reduce the spread of the global tobacco epidemic.[9] The study also underlined challenges at the country level, identifying two main issues: the difficulties to establish policy coherence between trade/investment and health policies, and insufficient capability to identify rights and obligations in this matter.

To add more complexity to the challenges imposed by global free trade to regulate tobacco consumption, according to WHO, governments are concerned due to the potential negative economic impact of increasing tobacco regulations.[10] Among the main concerns are the lowering of tax revenues via reduced demand, the increasing of illicit activities (such as tobacco smuggling); decreasing employment in the manufacturing, farming and retail sectors; and impoverishing smokers with higher prices. However, a growing body of evidence from developed and developing countries shows that the fears deterring policymakers from taking action are largely unfounded. For example, according to the World Lung Foundation, during 2000-2004, tobacco sales in the United States reached an average of 71 billion US dollars per year, but tobacco produced about 193 billion US dollars in annual health-related economic losses.[11]

In fact, the only beneficiaries of weaker regulations are the tobacco corporations and large growers that obtain revenues based on the deadly use of their products. In fact, as stated by WHO and many others, tobacco products are the only legally available products that can kill up to one half of their regular users if consumed as recommended by the manufacturer.[2] Globally, the annual revenues from tobacco industry are estimated in approximately a half trillion US dollars. In 2013, the six leading tobacco companies in the world had a combined profit of 44.1 billion US dollars compared with 35.1 in 2010. These profits are equivalent to the combined profits of Coca-Cola Company, Walt Disney, General Mills, FedEx, AT&T, Google, McDonalds and Starbucks. Moreover, the combined gross revenues of the world's biggest tobacco companies is more than the 2012 GDP of Denmark ($315.16 billion), the 34th highest GDP in the world.[11]

To sustain profit growth, tobacco corporations are using the legal loopholes that the bilateral and multilateral trade and investment agreements provide to challenge tobacco regulations at country level. In recent years, to advance tobacco consumption control, several countries embraced regulations on plain and large pictorial warnings packaging. Inspired by the Article 11 of the Framework Convention on Tobacco Control (FCTC) related to packaging and labelling of tobacco products.[12] This article stablishes that health warning on tobacco product packaging and labeling should cover 50% or more, but no less than 30%, of the principal display areas. A further step is represented by plain tobacco packaging policies, which require the removal of all branding (colors, imagery, corporate logos and trademarks), permitting manufacturers to print only the brand name in a mandated size, font and place on the pack, in addition to the health warnings and any other legally mandated information, such as toxicity and tax-paid stamps. These regulations proved to be successful in alerting consumers about the risks of smoking and reducing the appealing aspect of the product.[13] Recent studies in Australia showed that the plain packaging legislation introduced in 2012 had met their intended objectives: reduce appeal of tobacco, increase effectiveness of health warnings and reduce ability of packaging to mislead consumers about the harms of smoking.[14] Additional studies showed that plain packaging reduced the appeal of cigarette packs and the positive image of the brands among adolescents who smoke; they also showed a sustained reduction in the visibility of tobacco products and smoking in public areas, particularly in presence of children.[15,16]

In this context, among other interventions, several countries have enacted regulations related to plain packaging and large pictorial warnings.[17] By 2014, 77 countries had adopted regulations on this matter, 26 countries enacted regulations with pictorial warnings larger than 50% of the package and five countries approved plain packaging laws. Within Latin America, Brazil, Chile, Panama and Argentina have proposed plain packaging bills.[18] However, concerns about the success of these proposed and enacted legislations arose when the tobacco industry filed international litigations challenging packaging regulations in Australia and Uruguay. In 2010, Philip Morris, using a bilateral investment agreement between Uruguay and Switzerland, challenged the Uruguayan law that required health warnings to cover 80% of the package surface with specific images alleging that Uruguay was violating several articles of the agreement.[8,19] Australia is in formal consultations under WTO law with three Latin American countries (Honduras, Dominican Republic and Cuba) and Indonesia concerning its plain packaging legislation. These four countries claim that Australia is breaching its international trade obligations regarding intellectual property rights, in particular trademarks, and that the legislation is detrimental to their country's tobacco industry.[8] It is interesting to observe that when the public health protection is conflicting with economic interests, the situation poses ethical dilemmas for tobacco producer countries, including nations like Cuba. This country, a role model in both, protecting the health of its people and in international cooperation, is invoking trade protection provisions to push for its rights to defend tobacco exportations.

3. International trade and investment agreements with potential to undermine tobacco control policies

Latin American countries have signed hundreds of multilateral, regional and bilateral trade and investment agreements since the early 1990s, but the process initiated earlier. In South America, trade agreements were first linked to the intents of regional economic integration. The Latin American Free Trade Association (ALALC) was created in 1961 and in 1980 was replaced by the Latin American Integration Association (ALADI). In 1967, the Andean Pact, later the Andean Community of Nations (CAN), was created, as a customs union initially integrated by Bolivia, Colombia, Chile, Peru, Ecuador and Venezuela. Then the MERCOSUR was established.[20]

Bilateral trade and investment agreements in Latin America, both between countries of the region and with countries out of the region, abruptly increased in the 1990s. Argentina, for example, is among the top 20 countries in the world and the first in Latin America in the number of signed bilateral investment agreements; it is also the country that confronts most disputes in the region. Argentina signed 456 bilateral agreements of different kinds of which 56 are investment agreements.[21]

To understand the situation regarding tobacco trade and tobacco control regulations in South America is important to consider: the World Trade Organization (WTO), MERCOSUR, and the bilateral trade and investment agreements (BITs).

3.a. World Trade Organization (WTO). This organization has 161 state members (as of April 2015) and was created on 1 January 1995 to operate an integrated system of trade rules to cover goods, services and intellectual property. WTO replaced the General Agreement on Tariffs and Trade (GATT), which had been created in 1947 with the goal to oversee the multilateral trading system. The 128 parties that were part of the GATT in 1994 were incorporated as WTO parties at the moment of its creation.[22]

The main objectives of the creation of WTO were to lower customs tariffs and other trade barriers, create and keep open markets, and set procedures for settling disputes. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters and importers, conduct their businesses.[23] Legal provisions for trade agreed under WTO are used to dispute issues related to other trade and investment agreements.

The following specific agreements under WTO have legal provisions that could undermine tobacco control regulations:[8] a) GATT 1994 (included in WTO) governs trade in goods, its most important principle is non-discrimination; it also rules the concept of most-favored nation treatment, which means that if a good is imported from a country, it cannot be barred from another. Another rule prohibits a country member from treating imported tobacco products in a less favorable way than similar products of national origin and includes similar requirements for taxation measures. b) The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) contains measures that apply to food and beverage; in the case of tobacco, it could apply to dispute nicotine-infused foods and beverages. c) The Technical Barriers to Trade Agreement (TBT) includes measures such as packaging, labeling and product regulations, and restrictions on flavored tobacco products. It contains an article to ensure that regulations do not result in less favorable treatment to imported products than those applied to similar domestic products, and that products from one country are treated equally than similar products from another country. d) The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) establishes minimum standards for the protection of intellectual property rights, including all trademarks, and is relevant to tobacco packaging and labeling laws. e) The

General Agreement on Trade in Services (GATS) focuses on trade in services that could be affected by restrictions on the sale of tobacco products using remote means, such as the Internet and licensing measures. In recent years, it has been reported an increased utilization of these agreements in disputes involving tobacco products.[8]

3.b. MERCOSUR. In 1991, Argentina, Brazil, Paraguay and Uruguay signed the MERCOSUR, which is a customs union, another kind of trade agreement. Venezuela is a full member since 2012 and Bolivia since 2015, while Chile, Colombia, Ecuador, Peru and Suriname have the status of associated states. In this case, a group of countries charges a common set of tariffs to the rest of the world while granting free trade among the member countries of the customs union.[8] MERCOSUR provisions can be used to challenge WTO provisions with the goal to protect public health or vice versa. For example, WTO provisions may be utilized for a member country that exports tobacco, such as Argentina or Brazil (which are the first exporters of tobacco and tobacco products in Latin America), to undermine the tobacco control regulations of other members of the union.

Two cases exemplify the importance of considering customs unions when analyzing how corporations can challenge tobacco control policies. In one case, Philip Morris challenged tobacco control policies in Norway arguing that a ban on point-of-sale display violates Norway's obligations under its membership with the European Economic Area (an expansion of European Union). In the case of MERCOSUR, this agreement was utilized to undermine WTO health protection provisions in a dispute between Brazil and the European Union (EU), not on tobacco, but on the importation of retreated tires. Brazil banned the importation of retreated tires from EU countries alleging that these tires would increase the accumulation of toxic waste. Litigants defeated the position of Brazil arguing that under MERCOSUR, Brazil accepted exemptions to import this type of tires from neighborhood countries, then EU demanded the application of a WTO agreement provision of non-discrimination and Brazil lost the case in 2007.[8]

On one hand, besides the provisions regulating importation and exportation, MERCOSUR has passed two protocols in order to protect investments among Member States and non-Member States. For the Member States, MERCOSUR passed the Colonia Protocol for the Promotion and Protection of Investments; and for the non-Member States passed MERCOSUR/CMC/DEC. Nº 11/94: Protocol on promotion and protection of investments coming from non-MERCOSUR State Parties. Both protocols include provisions that protect intellectual property rights, trademarks, patents and investments. Corporations or tobacco exporter countries could use the clauses included in the protocols to challenge tobacco control policies that restrict, for example, trademarks.

3.c. Bilateral trade and investment agreements (BITs). Bilateral trade and investment agreements are other forms of economic accords among countries that are increasingly used by companies to dispute country tobacco regulations. These agreements were created in order to simplify the processes of approval therefore avoiding the complications raised by the discussion of multilateral agreements. Bilateral agreements allowed the progress on standardization and establishment of enhanced conditions for the penetration of private foreign investments on national economies. Consequently, BITs became important instruments for the protection of foreign investment. Private companies from one of the signatory countries can invoke these bilateral agreements to dispute tobacco regulations in the other country. The main argument used by the tobacco industry to challenge tobacco control measures under these BITs is the provision that protects intellectual property rights.

The most relevant example of the tobacco industry challenging country regulations using these types of agreements is the aforementioned case of Uruguay. In 2010, three Philip Morris International (PMI) companies initiated international arbitration proceedings against Uruguay, claiming that the country violated multiple provisions of the Uruguay-Switzerland Bilateral Investment Treaty (BIT). This BIT provides protections for investments made in Uruguay, including brands, intellectual property, and ongoing business enterprises. In 2009, Uruguay implemented 80% health warnings in cigarettes packages and a single presentation ordinance; PMI understood that these measures breached the protections guaranteed by the BIT and argued that it damaged their investments in the country. PMI is making these claims before an international tribunal, which consists of three arbitrators, in accordance with the rules of the World Bank's International Centre for Settlement of Investment Disputes (ICSID), which is the established instance to solve disputes in most BITs. According to PMI´s official web site[24]:

The two regulations PMI opposes are: "Single Presentation" Ordinance: This regulation restricts competition to the detriment of foreign investors because it prohibits sales of more than one variation of cigarettes under a single brand name. For example, Marlboro Red, Gold, Blue and Green cannot be sold at the same time. Only one of those variants may be in the market. As a result, PMI was forced to withdraw 7 out of 12 cigarette varieties from sale in the country. And 2) 80% Health Warning Requirement: Until 2009, health warning labels covered 50% of cigarette packaging in Uruguay, an amount PMI did not oppose. Uruguay increased the size to 80% on both the front and back of the pack, despite the fact that the 2009 Global Adult Tobacco Survey found that the awareness of the health risks of smoking is universal in the country. This requirement violates Uruguay's BIT agreement because it leaves virtually no space on the pack for the display of legally protected trademarks.

According to PMI, after the company is granted trademarks registration by a country, no government has the faculty to adopt measures that could restrict them. The parties are currently briefing the merits of PMI's claims that Uruguay breached the BIT. A hearing on the merits of the dispute likely will be held in the third quarter of 2015, and PMI anticipates that a decision will be issued in late 2015 or the first half of 2016.

To dimension the economic impact that this litigation could have for Uruguay, it is appropriate to mention that Uruguay's GDP in 2013 was about 55.7 billion US dollars, while Philip Morris' revenues the same year totaled approximately 80.2 billion US dollars. For this reason, Michael Bloomberg and Bill Gates launched a joint fund in 2015, the Anti-Tobacco Trade Litigation Fund, to help low- and mid-income countries pass tobacco-control laws and respond legal battle with industry giants. The goal of the fund is to offer technical assistance in drafting legislations and other documentations to avoid the legal challenges and potential trade disputes if tobacco-control laws are enacted. [25,26]

3.d. International trade agreements in the process of negotiation involving Latin American countries: There are two important trade agreements in negotiations that affect Latin America: the Trans-Pacific Partnership (TPP) and the Trade in Services Agreement (TiSA) that have been discussed in secrecy among parties.[27]

The TPP is a regional regulatory and investment treaty among 12 countries throughout the Pacific Region. From the Americas, the countries that participate of the negotiations are Canada, Chile, Mexico, Peru and the United States. The TPP started being discussed ten years ago and was approved in October 2015. Advocacy groups, international health professionals for health justice, organized labor, environmentalists, and many others have resisted the treaty. Tobacco-control advocacy groups have shown the potential danger of the TPP to undermine existing national and local tobacco regulations. In one of their latest communication, the Center for Policy Analysis in Trade and Health (CPATH), one of the most active US organizations monitoring trade agreements with potential to undermine tobacco control policies, explained that the Chapter 9 of the agreement allows any TPP nation member the right to "elect to deny" access to trade dispute by corporations for "claims challenging a tobacco control measure." Countries could invoke Chapter 9 before challenges on tobacco regulations are submitted to arbitration or during the proceedings. According to this chapter, if a country "elects to deny benefits with respect to such claims, the claim shall be dismissed." However, CPATH draws attention to the fact that "the provision forces TPP country partners to choose to exercise protection for tobacco control measures, instead of providing a guarantee under international law." It leaves countries' public policies to the merci of internal political agendas, lobbying power of tobacco giants and other political forces. In addition, individual TPP's country members that decide to opt for the protection could still be charged of violating other agreements (bilateral or multilateral).[28]

The Trade in Services Agreement (TiSA) is an international trade agreement between 24 parties, all members of WTO, including the 28 EU countries as one party. Initially, ten countries of the Americas were participating in the negotiations: Canada, Chile, Colombia, Costa Rica, Mexico, Panama, Paraguay, Peru, the US and Uruguay; but, in 2015, Uruguay withdrew from the negotiations. Talks on TiSA started in 2013 and was initially proposed by the US and the EU with the goal of increasing free trade of services in the areas of licensing, financial services, telecoms, e-commerce, transport, and professionals moving abroad to provide services, among many other topics.[29] Although the negotiations have been kept in secret, it has been leaked that TiSA would freeze national regulations of member parties and, if it is approved, could undermine the regulatory power of governments in many areas, and would further encourage privatization of public services to international corporations. Developing countries will enter in a very unfavorable situation regarding regulations to protect public health.[30]

4. Confronting the menaces of global trade and its tools in tobacco related public health regulations: the Framework Convention on Tobacco Control

WHO Framework Convention on Tobacco Control (FCTC) is the first treaty negotiated under the auspices of WHO to protect at a worldwide scale the health of the population against the challenge imposed by global trade in regards to tobacco products.[31,32] Based on the scientific evidence about the harms of tobacco consumption on the health of the population, the FCTC reaffirms the right of all people to the highest standard of health and "reframe the tobacco control debate in terms of corporate accountability rather than human frailty."[9] The FCTC was developed in response to the globalization of the tobacco epidemic facilitated by several complex economic dynamics with cross-border effects, including trade liberalization and direct foreign investments. Global marketing, transnational tobacco advertising, promotion and sponsoring, and the international movement of contraband and counterfeit cigarettes have also contributed to increase tobacco use, especially in low- and mid-income. The FCTC was unanimously endorsed in the WHO 56th World Assembly in May 2003 and was opened for signature in June 2003, entering into force in February 2005. As of December 2015, 180 countries ratified the FCTC, which makes it one of the most widely embraced treaties in the history of the United Nations (UN). All countries in the Americas had ratified the FCTC, with the exception of Argentina, Cuba, Haiti and the United States, which signed, but not ratified it, yet.[33] While signature expresses the disposition of a state to continue the treaty-making process, only ratification is the formal validation of a treaty.[34] The FCTC creates international legal obligations to regulate tobacco and compels parties to implement a range of tobacco control measures.[8]

The main objective of the FCTC is established in its Article 3 that states: "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"[6] The core demand reduction provisions in the WHO FCTC are contained in articles 6-14 and are divided in price and tax, and non-price measures to reduce the demand for tobacco. In the second category are: protection against tobacco smoke exposure; packaging and labeling of tobacco products; advertising, promotion and sponsorship of tobacco; smoking cessation; regulation of contents of tobacco products; regulation of tobacco product disclosures; and education, communication, training and public awareness. The core supply reduction provisions in the FCTC are contained in articles 15-17: illicit trade in tobacco products; sales to and by minors and provision of support for economically viable alternative activities.[6] Other articles that are important to consider when analyzing the Latin America situation are: interference of the tobacco industry (Art. 5); sustainable alternatives for tobacco growing (Art. 17) and protection of the environment (Art. 18).[35] In relation to trade and investment agreements, the FCTC strengthens public health arguments making these agreements more sensitive to tobacco control and also defines rules governing conflicts between itself and other treaties, including trade and investment agreements.[8]

In the context of the challenges that trade and investment agreements are posing to tobacco control, the existence of the FCTC is significant because its level of hierarchy as a treaty signed and ratified by most of the countries in the world acts counterbalancing other factors that facilitate the spread of tobacco consumption from developed to developing countries. The FCTC is a legal document that could play a role in the way that trade and investment agreements are set in relation to tobacco control. Specifically, the Article 5.3 states that parties should protect tobacco control policies from commercial and other vested interests of the tobacco industry. The guidelines to implement this provision state that due to the lethality of tobacco products, this industry should not be granted incentives or any kind of preferential treatment to establish or run their businesses.[8] The Article 2.2 gives priority to the FCTC in the event of conflicts with treaties concluded after its entrance in force, but this clause will not govern in treaties signed before the FCTC, such as the WTO, among others.

As indicated by Shaffer et al., the success of the FCTC encourages positive proactive tobacco control strategies, offering a potential counterweight and an alternative to international trade agreements. However, the authors also remark that tobacco control advocates did not succeed in including in the text of the FCTC that this treaty would prevail over international trade and investment agreements.[28] According to Mamudu et al., the absence of an explicit FCTC health-over-trade provision was due to the fears of some governments to jeopardize previous international trade agreements and the fears of tobacco advocates that forcing to impose this provision could threaten the entire negotiation.[36]

5. Potential for harmonization between international trade agreements and public health needs

As it was mentioned above, 180 countries have ratified the FCTC, accepting the obligation to take measures regarding tobacco control in order to protect public health. At the same time, most countries are also member states of WTO, which implies that they have the obligation to follow its rules on commercial rights, such as intellectual property, avoid trade barriers, and others. For this reason, it is important to remark that most of the international trade agreements include among their clauses those so-called “flexibilities,” which are incorporated into the international agreements to allow member states to protect public health.

For example, article XX of the General Agreement on Tariffs and Trade (GATT) allows countries to discriminate or restrict some imports to protect human, animal or plant life or health. To use these exceptions, there are procedures that countries need to follow and not always prevail in their demand of protection. The Technical Barriers to Trade Agreement (TBT) understands in its preamble that members are able to adopt technical measures that restrict international trade based on “legitimate objectives,” such as protection of human health or safety, animal or plant life or health, or the environment. The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) in its article 8 establishes: “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development”. The General Agreement on Trade in Services (GATS) also includes among its clauses that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (…) necessary to protect human, animal or plant life or health.” (Article XIV). The preamble of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) reaffirms that,

no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade.

All these flexibilities show that at the time of voting the agreements, countries had in mind the possibility of restricting free trade rights in order to protect human health.

MERCOSUR also passed public health protections for tobacco. In 2003, the Council of Common Market passed two resolutions on tobacco control: MERCOSUR/CMC/DEC. N° 20/03: Regional strategy on tobacco control in the MERCOSUR and MERCOSUR/CMC/DEC. N° 21/03, Regional strategy on tobacco control in the MERCOSUR and the Republic of Chile. These resolutions recognize the importance of adopting tobacco control measures, promote the ratification of the FCTC and approve the Strategic Guidelines for the development of Regional Action Plan on tobacco control. Also, the Council encourages state parties to adopt tobacco control measures assuring at least the minimum standards of the WHO Framework Convention on Tobacco Control.

Regarding the Trans-Pacific Partnership (TPP), the Office of the United States Trade Representative (USTR) informed on June 23, 2015, that a proposal to the handling of tobacco regulations will be, at this point, discusses during the TPP negotiations in Bandar Seri Begawan, Brunei August 23-30, 2015. US Trade Representative Michael Froman issued the following statement:[37]

Developed following extensive consultations with Congress and with a wide range of American stakeholders – from health advocates to farmers, representing many views on whether and how to address tobacco-related health policy measures in a trade agreement – this proposal will, for the first time in a trade agreement, address specifically the public health issues surrounding tobacco – preserving the ability of the United States and other TPP countries to regulate tobacco and to apply appropriate public health measures, and bringing health and trade officials together if tobacco-related issues arise – while remaining consistent with our trade policy objectives of negotiating a comprehensive agreement that does not create a precedent for excluding agricultural products. We will continue to keep our Congressional partners and stakeholders informed and involved as we negotiate this challenging and important issue with TPP partners, many of whom will be taking into account the same range of concerns.

From its part, the US Deputy Secretary of the Department of Health and Human Services (HHS) Bill Corr, issued the following statement:[37]

HHS believes the proposed tobacco language in the Trans-Pacific Partnership trade negotiation will make a difference for tobacco control and public health efforts. The U.S. Government seeks to include this language because tobacco is a unique product – it is highly addictive, always harmful to human health, and the single most preventable cause of death in the world. Recognizing these facts about tobacco through the TPP will represent an important step forward for public health in the international trade community.

The previous statements from two agencies of the Executive branch in the United States, show the benefit of pressuring for harmonizing health and trade policies. Although the final language of the TPP remains to be seen, it is important to recognize the role that public health professionals and advocates played in the United States during the last three years in denouncing the potential dangers of TPP to weaken existing tobacco control regulations.

As described in this section, flexibilities and resolutions exist to protect public health; they should not be ignored by policy makers when passing tobacco control laws, in particular those that involve restrictions to trademarks and cigarette packaging. Even when the tobacco industry uses trade agreements to challenge tobacco control measures, there are provisions to protect public health in the texts of the international trade agreements. These provisions recognize that health is a superior good over trade or commercial interests.

A landmark study by Crosbie and Glantz demonstrates that tobacco corporation's legal advisers consistently informed companies that international treaties do not protect trademark owners from government limitations (including prohibitions) on the use of their trademarks.[38] The study also shows that despite these advices the companies continue using these arguments to question the legality of countries to launch legal provisions regarding packing, labeling, marketing and so forth. The authors encourage governments not be intimidated by tobacco company threats and unsubstantiated claims, and be careful when writing tobacco control policies, considering the best language to avoid tobacco industry lawsuits.

A recent decision of the United Nations Commission on International Trade Law in December 2015, declining jurisdiction to hear the claim presented in 2011 by Philip Morris Asia challenging the tobacco plain packaging legislation under the 1993 Agreement between the governments of Australia and Hong Kong for the Promotion and Protection of Investments (Hong Kong Agreement) is an encouraging decision to advance plain packaging legislations.[39]

6. Final remarks

Tobacco corporations have in their favor a giant economic power to subvert existing tobacco control legislation and to delay or stop plain packaging, smoke-free legislation, advertising band and graphic pack warnings. They also count on the lack of shared knowledge and coordination among trade and public health governmental agencies when negotiating trade and investment agreements. Those who negotiate trade and investment agreements are not aware, most of the times, of the implicit or explicit dangers that some clauses may have to undermine tobacco control policies. The limited research experience in this matter, from a public health perspective, indicates that it is crucial to study the situation in order to provide government trade and public health policy makers, public health officials and advocates with instruments to lead a process in which the population's health is protected.

At this point, there is enough evidence that in developed countries, tobacco control policies have been very effective in decreasing the levels of exposure to tobacco products and their negative health consequences. Many developing countries have also had important advances in controlling tobacco consumption, but these advances are being threatened by increasing trade liberalization on a global scale guaranteed by the free trade and investment agreements. In developing countries, tobacco control policies found competing public health priorities, scarce funding, and political and economic pressures from tobacco corporations and, in some cases, a lack of knowledge from a public health perspective about the impact that trade and investment agreements could have on some regulations. Flexibilities provisions in favor of public health defined in the context of WTO and most of the other agreements are usually ignored, misunderstood or manipulated by the tobacco industry.

Particularly in developing countries, the power of the tobacco industry has slowed down the intents of enhancing national tobacco control regulations. Particularly, industry's complaints have discouraged many countries from adopting restrictive tobacco control policies. What moves companies to challenge tobacco control policies is more a tactic based on creating fear than a lawful right provided by the international agreements. Moreover, it is important to take into account that tobacco control is only a component of many other critical areas challenged by private corporations using signed trade and investment agreements. Similar situations are occurring with medicines, medical supplies, food, toxic waste, human trafficking, climate change related issues, employment, services of all kinds, including health services, the internet, finances, and many other areas.

For all of the previous reasons, it is important that those working in public health governmental agencies and non-governmental organizations learn about the international trade agreements and how these agreements could be used to undermine current and future health policies. Public health officials at governmental level should be involved in trade negotiations, and trade officials should understand the effects of trade agreements on collective health and the detrimental economic effects that some agreements can have in the long term. Several Latin American countries confront the ethical dilemma between producing/exporting tobacco products and protecting the collective health. Several studies are advancing the understanding of this situation and advocacy groups are proposing strategies to replace tobacco for other kind of agricultural products to protect the economy of small producers, while protecting the health of the people. More research focused on how trade agreements are affecting tobacco control policies in Latin America and how to develop harmonization policies between trade and public health areas is needed. This article contributes to create awareness on this issue and promotes that governmental and non-governmental organizations from different countries share information about the threats and potential solutions.

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