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CAFTA-DR AND TOBACCO CONTROL: The Public Health Case Against CAFTA-DR

The Central America-Dominican Republic-U.S. Free Trade Agreement (CAFTA-DR) includes a broad range of provisions relating to tariff and nontariff measures that will interfere with public health efforts to reduce tobacco products' toll of death and disease on people in the United States and throughout the Central America/Dominican Republic region.

By their direct impact, and through chilling of government officials fearful of running afoul of trade agreement obligations, these measures will lower cigarette prices and undermine policies -- such as prohibiting use of the misleading terms "light," "mild," and "low" -- designed to reduce smoking-related death and disease.

This needless public health cost is too high a price to pay for CAFTA.

MARKET ACCESS, TARIFFS AND TOBACCO

What CAFTA-DR Does: CAFTA-DR requires that countries eliminate tariffs on cigarettes and tobacco products,

Impact On Public Health and Tobacco Control: Opening domestic markets to tobacco product imports increases smoking rates and consumption. The market opening leads to enhanced price and product competition and intensified marketing efforts.

"Reductions in the barriers to tobacco-related trade will likely lead to greater competition in the markets for tobacco and tobacco products [and] reductions in the prices for tobacco products," according to a World Bank report. "As a result, the death and disease from tobacco use will also increase." The World Bank concludes that tariff removal leads to a 10 percent increase in tobacco consumption.ⁱ

After the United States exerted trade pressure to open Asian tobacco markets in the 1980s. In the single year after South Korea opened its market, smoking rates among teenage girls more than quintupled, from 1.6 percent to 8.7 percent.ⁱⁱ

INTELLECTUAL PROPERTY PROTECTIONS

What CAFTA-DR Does: CAFTA-DR requires member countries to provide strong protections for intellectual property -- patents, copyright, trademark and trade secrets.ⁱⁱⁱ

Impact On Public Health and Tobacco Control: In Canada, Brazil, Thailand and elsewhere, tobacco companies have argued that large health warnings, plain packaging rules and bans on the use of misleading descriptors ("light," "mild" and "low") -- all important public health measures to reduce smoking rates -- violate their trademark rights under trade agreements.^{iv} Big Tobacco has also argued that ingredient disclosure rules violate their trade secret rights.

INVESTMENT PROTECTIONS

What CAFTA-DR Does: Modeled on NAFTA's Chapter 11, CAFTA-DR contains very strong investment protections. These protections bar "expropriation," or actions "equivalent" to expropriation, except for public purpose and with fair market value compensation.^v "Expropriation" in CAFTA-DR/NAFTA terms is roughly equivalent to the U.S. constitutional concept of "takings," and is inclusive of an extremely broad definition of regulatory takings. The investment protections also permit investors directly to bring suit against, and seek compensation from, governments that have infringed on their investment rights.^{vi} (Most other provisions of CAFTA-DR enable only countries to bring challenges against other countries.)

Impact On Public Health and Tobacco Control: NAFTA Chapter 11 has provided the basis for a number of eyebrow-raising cases. In the largest Chapter 11 suit yet brought against the United States, the Canadian corporation Methanex in 1999 sued the U.S. government for \$970 million because of a California executive order phasing out the sale of MTBE, a gasoline additive, on the grounds that the California environmental policy limits the corporation's ability to sell MTBE. This case is pending. In another pending case, the U.S.-based United Parcel Service (UPS) is pursuing a NAFTA Chapter 11 case against Canada for \$100 million, arguing that the Canadian postal service's involvement in the courier business infringes upon the profitability of UPS operations in Canada. UPS claims that by integrating the delivery of letter, package and courier services, Canada Post has cross-subsidized its courier business in breach of NAFTA rules.^{vii}

Applied in the context of the tobacco industry, investment protections are obviously quite worrisome. They give Philip Morris, BAT and the rest of the industry direct standing to invoke trade agreements to challenge national law, overcoming the political reluctance of most governments to advocate aggressively on behalf of cigarette companies.

The substantive provisions of the agreements provide considerable fodder for the industry. For example, each of the potential intellectual property claims of the industry --

on warning labels, bans on "light," "mild" and "low," on ingredient disclosure -- can be recast as an expropriation.

Though it has not filed suit, Philip Morris made exactly this argument in Canada, citing comparable NAFTA investment protections.^{viii}

Distribution networks favoring national producers, especially state-affiliated companies that are not available to foreign companies, may also be characterized as violations of national treatment obligations under CAFTA-DR.

Indeed, the broad reach of the CAFTA-DR investment provisions means that creative lawyers may at any time innovate viable claims against U.S. or Central American public health measures. Under NAFTA, for example, a small Canadian tobacco company is seeking \$340 million from the United States, on the grounds that the 1998 U.S. state settlement with the tobacco industry discriminates against small foreign firms such as their own. Such a claim would fail under U.S. law because it involves state action -- but the very fact of state action makes it vulnerable in the NAFTA context.

CAFTA-DR's investment chapter does contain an annex that purports to provide protection for legitimate public health measures,^{ix} but the general and vague nature of this provision is unlikely to provide much protection in the face of investment claims that cite more specific and direct provisions in the agreement.

THE PATH NOT TAKEN — EXCLUDING TOBACCO PRODUCTS FROM CAFTA-DR — AND THE CASE FOR REJECTING CAFTA

There is a simple solution to the problems posed by CAFTA-DR to tobacco control: tobacco products should be excluded from the agreement.

There is no legitimate purpose for inclusion of tobacco products CAFTA-DR. Trade agreements like CAFTA-DR are designed to facilitate trade and remove tariff and nontariff barriers to commercial transactions -- an inappropriate goal for tobacco products, consumption of which is harmful.

If tobacco products were excluded, countries would not need to ensure their rules were consistent with CAFTA-DR's provisions. Governments would not be chilled by threats trade challenges.

There is precedent for excluding tobacco from trade agreements. The U.S.-Vietnam Free Trade Agreement excludes tobacco from its tariff regulation and reduction scheme, for example.

CAFTA-DR itself contains a long list of product exemptions.^x These include, for Costa Rica, crude oil and rum; for the Dominican Republic, old cars and motorcycles; for El Salvador, old cars and buses; for Guatemala, coffee and weaponry; for Honduras, wood

from broadleaved forests; for Nicaragua, used clothing and rags; and for the United States, logs of all species.

There is no technical difficulty in exempting tobacco from CAFTA-DR -- a simple declaration that the agreement does not apply to tobacco products, in words no more complicated than those, would be sufficient.

The failure to include such language means that CAFTA-DR, if adopted, will pose a serious threat to sound tobacco control measures, in both Central America and the United States.

No international trade agreement should so needlessly endanger lives. Congress should vote to defeat CAFTA-DR.

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ⁱ World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, Washington, DC: World Bank, 1999, Chapter 1.

ⁱⁱ U.S. General Accounting Office, *Trade and Health Issues: Dichotomy Between US Tobacco Export Policy and Antismoking Initiatives*. Washington, DC: General Accounting Office, 1990.

ⁱⁱⁱ CAFTA-DR, Chapter 15.

^{iv} See Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information Foreign Trade Notification No. G/TBT/N/CAN/22, (undated), p. 9; Carla Hills, *Legal Opinion with Respect 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, pp. 1-2; Japan Tobacco International, "JT and JTI Launch Legal Challenge Against EU Tobacco Directive" (news release), September 20, 2001.

^v CAFTA-DR, Article 10.4.

^{vi} CAFTA-DR, Chapter 10, Section B.

^{vii} A listing of NAFTA Chapter 11 cases is available at <<http://www.state.gov/s/l/c3439.htm>>. For a comprehensive and critical analysis of the NAFTA cases, see Mary Bottari and Lori Wallach, *NAFTA Chapter 11 Investor-State Cases: Lessons for the Central America*, Washington, DC: Public Citizen, 2005.

^{viii} Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information Foreign Trade Notification No. G/TBT/N/CAN/22, (undated).

^{ix} CAFTA-DR, Annex 10-C, 4(b).

^x CAFTA-DR, Annex 3.2.