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Excluding Tobacco From Trade Agreements: The Wrong Way To Promote Policy Space

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When Australia and Singapore upgraded their free trade agreement last month, the news did not garner much attention even in the media outlets of the two countries. It was probably assumed that small tweaks to an existing agreement between trade-friendly countries offered nothing of much interest.

This is an oversight. While the Singapore-Australia Free Trade Agreement (SAFTA) is just a bilateral pact, the revision carries a new clause which will have ramifications across the Asia-Pacific and the world. The update includes a provision that excludes tobacco control measures from the Investor-State Dispute Settlement (ISDS) system, marking the first such carve out in FTAs in this region and likely the first to be in force anywhere in the world.

ISDS is an investment protection mechanism often found in trade deals. ISDS gives investors the right to sue a foreign government through international arbitration rather than domestic courts. Its goal is to entice foreign businesses to invest in the host state, by giving them security in their investments, especially in developing economies. Whether it achieves this is open to debate, and ISDS has become increasingly controversial.

The SAFTA creates an exclusion from ISDS for “tobacco control measures.” The change means companies will no longer have the right to use ISDS with respect to such measures. In short, these companies will not have the same recourse that all other foreign investors have with regard to the authorities in Singapore and Canberra.

The purported reason behind the revision is to promote public health. Both governments want to tighten controls of tobacco and lower smoking rates.

While there may be some merit behind the general goal, the specific implementation of that goal here is misguided, from both a legal and business standpoint. The tobacco exclusion is both unnecessary and unfair. Instead of crudely singling out a single industry, the drafting of the treaty could be more nuanced, such that safeguards are introduced without compromising basic fairness. For instance, if they were worried about their ability to adopt public health measures, the parties could have amended the text of the agreement so that the existing “general exceptions clause" would explicitly allow governments to take action "related to" (as opposed to the stricter "necessary") the protection of public health, or even to follow Singapore's recent agreement with the European Union in significantly paring back the instances where a claimant can bring a claim under the notoriously investor-friendly "fair and equitable treatment" clause.

For tobacco firms operating in both countries, the revision is unsettling. For 13 years since the SAFTA was ratified in 2003, all investors have had the opportunity to enforce their rights under the treaty through ISDS. All of a sudden, enforcement rights have been removed for investors from a single industry. Such arbitrary treatment of investors by governments does not engender confidence in the system. It sets a dangerous precedent on free trade and investment, introducing capriciousness into the international economic regime and an already slowing global economy. As the world grapples with the fallout from Brexit and struggles to see a few bright sparks in this part of the world, it is unwise to add greater uncertainty to businesses. After tobacco, there is no telling which industry will be targeted next. It could be alcohol, processed foods, sugar or even mining.

Similarly, this exclusion clause could be copied by other trade pacts. As it is, the Trans Pacific Partnership Agreement, which covers 12 Pacific Rim countries, contains a similar clause excluding tobacco claims. But that clause has caused some Republicans in Congress to oppose the deal and ratification is uncertain. The tobacco exclusion now threatens to derail the entire agreement.

Moreover, SAFTA's impact as a role model cannot be understated. Despite being a small nation, Singapore holds a pre-eminent role as a regulatory beacon in Asia and particularly South-East Asia. It is likely that other Asean countries could copy SAFTA's move, and that is when things could spiral downwards rapidly. The exclusion of industries from ISDS could give carte blanche to governments. In the hands of Singapore and Australia, two countries where the rule of law is observed and enforced, the carving out of a particular industry is problematic but unlikely to lead to rampant exploitation and abuse.But if other countries in the region follow suit, it offers fertile ground for cronyism and corruption. For instance, there will be no legal recourse when, under the guise of a tobacco control measure, a corrupt official grabs the business of a MNC and boots it out of the country, leaving the market open for a friendly local contact. This is patently unfair and makes a mockery of the underlying investment agreement.

For those in favor of tobacco exclusions, or even of removing ISDS altogether, the argument rests in part on a supposed "regulatory chill" - meaning governments are afraid of enacting tobacco control measures for fear of being sued. The most frequently cited example is Philip Morris bringing claims against Uruguay and Australia for their respective tobacco laws. Both claims failed.

This argument is overstated and unconvincing. Even after the Philip Morris claims, over thirty countries have revised or enacted tobacco control laws, from banning retail display to plain packaging and raising the minimum legal age for smoking.

In the interests of public health, governments will continue to restrict tobacco usage and sales. Properly drafted treaties offer ample protection for legitimate measures. If obligations are drafted precisely, and general exceptions included, international economic agreements should not interfere with domestic public policy. There is no need to discriminate against tobacco and strip one industry defenceless.

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