

Trade and Health :

The challenge for finding the standing point's balancing

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Introduction

This article observes the interplay between trade and health in the globalization era. Both trade and health have emerged since the birth of human's community. The expansion of trade is a key to develop and prosper the wealth of the nation. But trade is not the only indicator of the nation's wealth. Health is also another factor that the state could not ignore. Trade and health are indeed closely related. But the globalization seems occasionally separate trade and health.

If trade and health are able to move forward together, there is no conflict about this matter. Unfortunately, when the demand of trade and health misalign, how should the state prioritize?

The parties who support the rich have tried to liberalize trade, to provide cheaper goods and services, by lowering trade barriers. The reduction of taxes and regulations, which assumes that the liberal economic, benefit the consumers more with lower prices of goods and services. The wealth of the Nation, then, will expand to everyone.

At the same time, the parties who support health are trying to create rules with the objective to protect public health for example the tobacco control law or the alcohol control law. Unlike narcotic drug, the entrepreneurs of the tobacco or alcohol are still allowed to sell their products without serious prohibition from the state. Over the past 20 years, trade in tobacco and tobacco products has rapidly expanded with this liberalization of the international trade. This fact highlights the inevitable connection between the international trade agreements and the tobacco control policies². The problem that increasingly occur is this kind of liberal trade, might conflict with the public health.

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The objective of the international trade agreements is to protect the benefits of all entrepreneurs, promoting the prosperity of the nation while, the state has the duty to protect the health of the population as well. As a result, we found growing conflicts under several international agreements between the state and the companies relative to health policy and the private loss's benefit. Must health be the priority during the trade talk? Are trade and health able to compromise their different objectives?

This article will examine the relationship between tobacco and health. The first part will learn about the global overview of trade and health (I) and the second part we will follow the overview of trade and health specifically in tobacco product (II).

I. Global Overview of Trade and Health

There are many, bilateral and multilateral trade agreements. The number of the international trade agreements globally grow for the objective of the prosperity, in contrast with health, which only one international agreement is issued, called the Framework Convention on Tobacco Control (FCTC). We consider, in this part, the series on trade and health in international context (A) and then trade and health in Thailand's context (B).

A. Trade and health in international context

There are two main organizations overseeing the issue of trade and health - The World Trade Organization (WTO) and World Health Organization (WHO). Each organization is responsible for its sector. The World trade organization regulates international trades while the World Health Organization concerns the international public health. In this regard, we consider, first of all, some of the international trade agreements (a) and then the international health agreement: Framework Convention on Tobacco Control (FCTC) (b)

a) The international trade agreements

The international trade is based on international law. There are obviously many agreements such as the Trade Related Intellectual Property Rights (TRIPS) and the General Agreement on Tariffs and Trade (GATT). These treaties apparently play the important role in promoting trade.

1. Trade Related Intellectual Property Rights (TRIPS)³

TRIPS is an international agreement by WTO. It has established the minimum standard of protection of the intellectual property rights such as trademarks, copyright and patents. Under TRIPS, the intellectual property's owner has the right to exclude the other to take benefits of their invention.⁴ TRIPS requires the members of WTO to register trademark⁵. Nevertheless, if the registration causes the confusion or misleading trademark, the state can refuse to register the trademark⁶ or the marks that cause misunderstanding⁷.

However, article 8 of TRIPS Agreement clearly states that the parties are able to adopt the necessary measures to protect the public health. In addition, the decision of the European Court ruled that TRIPS Agreement does not provide the parties the "right to use" in trademark of the owners during their trade. But TRIPS ensure the trademark's owners that they have the "right to exclude" others from using their trademark. At this point, it is clear that even though the intellectual property is a part of the trade, the state parties are able to adopt the necessary measures to protect the health of the population as well⁸.

2. General Agreement on Tariffs and Trade (GATT)

The General Agreement on Tariffs and Trade (GATT) aims toward the expansion of international trade and improves the better standard of living of the parties. This agreement seeks to liberalize trade by removing protective tariffs, quotas and other barriers. GATT

³ Article 8.1 of TRIPS "*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, provided that such measures are consistent with the provisions of this Agreement.*"

⁴ Article 28 of TRIPS "*1. A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process...*"

⁵ A trademark is a sign that an individual trader or company uses to distinguish its goods and service from the goods and services of another undertaking; it must be distinctive and not be deception.

⁶ Article 15(2) of TRIPS provides a right to deny registration on the grounds permitted under the Paris Convention for the Protection of Industrial Property

⁷ Article 6 quinquies B (iii) of TRIPS provides that Parties may refuse registration on the basis that a mark is misleading

⁸ Aua-aree Engchanil, Study on "The possibility of legal enforcement on Plain packaging in Thailand", Research: Ministry of Health, 2011, p.28

obligates each country to accord non-discriminative, most favored nation (MFN) treatment to all other contracting parties with respect to tariffs.

Article XX (b) of GATT⁹ allows a member to give priority to public health or an environmental policy over trade liberalization objectives since the measure is necessary to achieve those goals within the meaning of Article.¹⁰ According to the basic obligation in GATT relevant to domestic health regulation is that of non-discrimination, the health measures must not treat products from some WTO members better than others, or treat similar domestic products better than imports are consistent with WTO law¹¹.

b) Framework Convention on Tobacco Control (FCTC)

The Framework Convention on Tobacco Control (FCTC) is the first international instrument in public health from World Health Organization (WHO)¹². The FCTC has long been the concern because the tobacco is the main treat to the major global public health¹³. The fact is that even the rate of smoking is decreasing in the high-income countries; the smoking rate in poor and developing countries is on the rise. The reason is that the Transnational Tobacco Companies (TTCs) have come into the market of these countries in the past ten years¹⁴. WHO agreed that “Tobacco is the only legal consumer product that kills when used exactly as intended by the manufacturer”. By this fact, the FCTC had been elaborated with the objective to establish a global agenda for tobacco regulation, with the purpose of reducing initiation of tobacco use and encouraging cessation.

⁹ GATT Article XX “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (b) **necessary to protect human, animal or plant life or health;....**”

¹⁰ See in Thailand’s –cigarettes case, *infra* Part (a) of II. (B)

¹¹ WTO Agreements and Public Health in A joint study by the WHO and the WTO secretariat, World Health Organization and World Trade Organization, Geneva, August 2002.

¹² The Convention was adopted by consensus in May 2003 by the World Health Assembly (WHA) and was opened for signature on 16 June 2003. A mere 12 months later, at the end of the signature period, the WHO FCTC had already received 168 signatures. The WHO FCTC entered into force on 27 February 2005, and since then, the number of Parties to the Convention has swelled from the 40 required for entry into force to a current membership of 180 parties, making the Convention one of the most widely and rapidly embraces treaties in United Nations history, see in Tania Voon, Andrew D.Mitchell, Jonathan Liberman and Glyn Ayres, Public health and plain packaging of cigarettes : Legal issues, (Glos: Edward Elgar Publishing Limited 2012), p.12

¹³ Aua-aree Engchanil, International Trade and Health Protection, Law Journal, Faculty of law, Thammasat , Vol 32, n.3, 2013, p.6

¹⁴ Jha, P.,Chaloupka, F.J.(eds). Tobacco Control in Developing Countries. New York : Oxford University Press, 2000 in Aua-aree Engchanil, International Trade and Health Protection, p.6

The FCTC's provisions intend to reduce the demand and supply of tobacco products. Many significant provisions of the treaty require the parties to implement measures such as the limitation in the interactions between lawmakers and the tobacco industry and its lobbyist¹⁵, the tax and other measures to reduce tobacco demand¹⁶, the augmentation of the packaging and labeling with large health warning¹⁷ ; prohibition of deception labels such as mild or light¹⁸ and the comprehensive ban to tobacco advertising¹⁹.

According to the relationship between the exception for health of TRIPS and the FCTC's objective, we can presume that both international agreements do not oppose each other. As the article 11.1 of the FCTC states that "*the packaging and the labeling must not appear to cause confusion, delusions, including the use of the words displayed on the trademark as light or mild to guide the tobacco products that use such labels are less dangerous health than other types of tobacco products*" while the article 8 of the TRIPS define the flexibility to adopt the necessary measures to public health by the parties.

At this point, the distinctiveness of the mentioned trademarks is crucial because the tobacco control measures are closely related to the limited of trademark use such as a ban on the use of text on packaging that can cause confusion to consumer or the restriction to the advertisement of tobacco products.²⁰ A trademark owner still has the right to exclude others from using of the trademark and a right to register the mark²¹. Therefore, the registration of a trademark arguably reflects a legitimate interest of the trademark owner to use the trademark in accordance with the TRIPS Agreement. It also gives rise to the possibility that the trademark has other features associated with property²². The TRIPS assume the rights of the trademark owners as the "right to exclude" others from using the trademark registered during their trade, not the "right to use" the trademark. Therefore, the arguments over the use of

¹⁵ Article 5.3 of FCTC

¹⁶ Article 6&7 of FCTC

¹⁷ at least 30% of the packet cover, 50% or more recommended

¹⁸ Article 9&11 of FCTC

¹⁹ Article 13 of FCTC

²⁰ Aua-aree Engchanil, International Trade and Health Protection, p.10

²¹ Daniel Gervais and Susy Frankel, Plain packaging and the interpretation of the TRIPS agreements, Vanderbilt journal of transnational law, Vol.46, n.5, November 2013, p. 1193

²² *Ibid.*,p.1194

trademarks and the scope of dilution as an infringement arise precisely because trademark owners' rights are not absolute but limited by certain boundaries²³.

B. Trade and Health in Thailand's context

Thailand is a party to several international trade agreements and also the FCTC. This part will examine trade and health in domestic legal context. Firstly, trade and health in legislative framework (a) and secondly, trade and health in judicial interpretation (b).

a) Trade and Health in legislative framework

According to Thai Constitution B.E. 2550 (2007), Thai economy is based on free market principle or capitalism.²⁴ The provisions guarantee the intellectual property right²⁵, the property right²⁶ and the occupation right as well²⁷. These rights accordingly support the concept of free economy in the globalization.

Regarding international obligation, Thailand is a party to the international trade agreements such as TRIPS. As the country has adopted the dualist system, Thailand legislated the acts to accord with the intellectual property as the Patent Act B.E.2522 (1979), the Trademark Act B.E.2534 (1991) and the Copyright Act B.E.2573 (1994).

In light of health, article 80 of the Constitution assumes that the State must pay attention to the public health²⁸. In the aspect of global health's treaty, Thailand also signed

²³ *Ibid.*, p.1197

²⁴ Article 84 of Thai Constitution B.E.2550 (2007) "*The State shall pursue directive principles of State policies in relation to economy, as follows: (1) to promote a **free and fair economy based upon market force** and encourage sustainable economic development...*"

²⁵ Article 86 of Thai Constitution B.E.2550 (2007) "*The State shall pursue directive principles of State policies in relation to science, **intellectual property** and energy, as follows:... (2) to promote inventions or discoveries leading to new knowledge, preserve and develop local knowledge and Thai wisdom and protect intellectual property;...*"

²⁶ Article 41 of Thai Constitution B.E.2550 (2007) "*The property right of a person is protected. The extent and the restriction of such right shall be in accordance with the provisions of the law...*"

²⁷ Article 43 of Thai Constitution B.E.2550 (2007) "*A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake fair and free competition...*"

²⁸ Article 80 of Thai Constitution B.E.2550 (2007) "*The State shall pursue directive principles of State policies in relation to social Affairs, **public health**, Education and Cultural Affairs, as follows:... (2) to promote, support and develop the health system based upon the fostering of health that leads to a sustainable state of happiness of the people, provide and promote public health services that meet the standard thoroughly and efficiently, promote participation by private individuals and communities in the development of health and the provision of public health service,...*"

and ratified the FCTC since the very beginning²⁹. Several domestic policies have been progressively implemented such as the price and tax measures³⁰ to reduce the demand for tobacco³¹, the protection from exposure to tobacco smoke³², the packaging and labeling of tobacco products³³, and the tobacco advertising promotion and sponsorship etc.

Domestically, Thailand has three acts relative to tobacco. Tobacco Act B.E. 2509 (1966), which is controlled by the Ministry of Finances, has the objective for taxation, the permission of the licensing to the tobacco agriculture and the tobacco seller. The second one is the Tobacco Product Control Act B.E.2535 (1992) and the last one is the Non-smokers Health Protection Act B.E.2535 (1992), both are under the control by the Ministry of Public Health. These both acts are to protect public health. The fact that these two acts have entered into force more than twenty years, means a lot of loopholes to control effectively the recent technique of the tobacco market. As a result, the Tobacco Product Control Act and the Non-smokers Health Protection Act, are being combined and adjusted for the drafting of Tobacco control Act B.E.... The draft is pending for the cabinet's consideration³⁴.

It should be noted that several measures to control tobacco of the FCTC are incorporate into the abovementioned draft such as the barring of lobbyist's communication during the process of policy or law making³⁵, the regulation on minors³⁶ and the augmentation of the packaging and labeling with large health warning.

Although, Thailand is much appreciated from WHO for its progressive tobacco control and the Ministry of Public Health that continually adopts the measures to decrease the spread of Tobacco particularly among women and children, the annually expenditure of Thai

²⁹ Thailand signed the FCTC June 20, 2003 and ratified November 8, 2004

³⁰ Article 6 of FCTC

³¹ Example taxation for tobacco products, particularly manufactured cigarettes has gradually increased for 9 times since 1992, recently increased from 80% (2007) to 85% of ex-factory price for domestic cigarette and 85% of CIF plus custom tax for imported cigarette (2009) which is 70% of the retail price.

³² Article 8 of FCTC

³³ Article 11 of FCTC

³⁴ Update on April 2015

³⁵ Article 5.3 of FCTC “...(3) *In setting and implementing their public health policies with the respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law...*”

³⁶ Article 16 of FCTC

dispenses still approximate more than 50,000 millions baths³⁷ to treat the patients who suffer from smoking³⁸.

b) Trade and Health in judicial interpretation

Although, the right of occupation and the property right are imposed by the Constitution, the state is able to restrict them with the motive as allowed in the Constitution regarding to the public interest, health or public moral.³⁹

The decision of the Thai Constitutional Court⁴⁰ clarified the relationship between trade and health that the state can claim the exception in the constitutional provision to limit the right of occupation and the property right in order to protect the public health. This case concerned article 32 of the Alcohol Control Act B.E. 2551 (2007) that contain a ban on alcohol advertisement. The plaintiff argued that it affected the right of occupation. The Court ruled that despite an effect of a ban on the sale of alcohol beverage, the state still has the authority to legislate the law which corresponds to the objective of the public order or the good morals of the people. Although, this provision of the Alcohol Control Act B.E.2551 (2007) restricts right and freedom which has been approved by the Constitution but it is conducted under the term of necessity. In addition, the advertisement is not strictly prohibited; it is permissible if the alcohol advertising publicize health information. Thus, the provision to ban the alcohol advertisement does not substantially affect to the right of the occupation.

The decision above of the Constitutional Court evinces between the right to occupation and public health. Thai Constitutional Court emphasize on health. The state is able to take the measures to ensure the protection of public health. These public interest

³⁷ 1 US Dollars = 33 Bahts

³⁸ Fact and necessity of the Tobacco Control bill, Action on smoking and health foundation Thailand, White paper on tobacco control law, 3eme edition, March 2015, p.6

³⁹ Article 43 of Thai Constitution B.E.2550 (2007) "...(2) *The restriction on such liberties under paragraph one shall not be imposed except by virtue of the law specifically enacted for maintaining the security and safety of the State or economy of the country, protecting the public in regard to public utilities, maintaining public order and good morals, regulating the engagement in an occupation, consumer protection, town and country planning, preserving natural resources or the environment, public welfare, preventing monopoly, or eliminating unfair competition*"

⁴⁰ Number 2-4/2555

measures must not have a discriminatory characteristic and respect the principle of equality⁴¹.

II. Overview of Trade and Health in Tobacco Product

Tobacco is, in legal term, not drug. This kind of product appears wherever the market exists. Therefore, there is undeniable that it seriously harms smokers and also second-hand smokers. Since the government has played the major role to making up the well-being of the nation, which means both economical growth and also good health of the population, tobacco has become a public health issue⁴². By the 1990s, WHO has described that tobacco is a public health problem of epic proportions and “one of the major public health disasters of the past century”⁴³. With all of this fact, we must be reminded that tobacco is not itself drug’s product. As a result, the state must balance the profit of the private sector and population’s health. Eventually, when the state’s policy affects private’s benefit, they will complain by citing international trade agreements. The litigations between the state and the tobacco industries have obviously been increasing in the past ten years. We will study these in this part, one big latest challenges between the state and tobacco companies on the global challenge on the tobacco control policy (A) and then, we will focus on the challenge between the international tobacco industries and Thai government in 85% of pictorial health warning (PHW) (B).

A. Global challenge on the tobacco control policy

Many measures for public health are being applied to control the tobacco such as banning all tobacco’s advertisement or the requirement that a cigarette pack bears a warning label⁴⁴, information policy is intended to make consumers better informed about the consequences of smoking⁴⁵,

This part will study the legal challenge between the international tobacco companies and the Australia government over plain packaging’s measure (a) and follow to the next global trend of this packaging measure.

⁴¹ Aua-aree Engchanil, International Trade and Health Protection, p.15

⁴² Tobacco use was a leading cause of premature death; it resulted in at least 3.5 million deaths in 1998 alone, and was expected to cause deaths per year by 2030 if the epidemic continued unchecked – with 70 percent to these deaths expected to occur in developing countries; in Tania Voon, Andrew D.Mitchell, Jonathan Liberman and Glyn Ayres, Public health and plain packaging of cigarettes : Legal issues, 2012, p.12

⁴³ *Ibid.*, p.12

⁴⁴ Stephen L.Isaacs and James R.Knickman, Tobacco control policy, San Francisco: Jossey-Bass, 2006, p.24

⁴⁵ *Ibid.*, p.25

a) Plain packaging: the intensive enforcement of tobacco control

In November 2011, Australia became the first country in the world to legislate for plain packaging of tobacco product⁴⁶. This law imposes that all tobacco products sold in Australia are required to be in plain packaging⁴⁷. The result of this measure is that the package must be a standard dark brown color. Packs are distinguished from one another by brand and product name, which must be printed in a standard color, position, font size and style. Large graphic health warning must be displayed on at least 75% of the front and 90% of the back of packages⁴⁸. The objective of this measure is to improve public health⁴⁹ but it severely affects tobacco industries. As one might expect, there has been considerable opposition from tobacco companies to Australia's law⁵⁰, including British American tobacco, Philip Morris, Imperial Tobacco and Japan Tobacco International. The companies argued that the government was trying to acquire their intellectual property, including trademarks, without proper compensation. As the trademark plays a fundamental role in the marketplace, this tobacco plain packaging measure constitutes an expropriation. The plaintiffs were also systematically arguing that the plain packaging would not succeed in achieving the purported public health objectives. With all this accusation, the Australian government responded that it was only trying to regulate what appears on the boxes, and was not acquiring any trademarks.

The Australia's High Court⁵¹ eventually dismissed the constitutional challenges brought by tobacco companies and found that the Tobacco Plain Packaging Act 2011 was not in contrary to the right of property of the Constitution. Also there was no acquisition of property that would require the provision of just compensation under the Constitution.

⁴⁶ The stated core intention of Australia's Parliament in passing the law "regulating the retail packaging and appearance of tobacco product" is to :

- Reduce the appeal of tobacco products to consumers; and
- Increase the effectiveness of health warning on the retail packaging of tobacco products; and
- Reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products *in Tobacco Plain Packaging Act 2011 (Cth) s 3(2) (Austl)*

⁴⁷ Plain Packaging determines that the use of logos, brand imagery, symbols, other images, colors and promotional text on tobacco products and tobacco product packaging is prohibited.

⁴⁸ The Department of Health, Australian Government :

<http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain>

⁴⁹ It aims to improve public health by:

- discouraging people from taking up smoking, or using tobacco products
- encouraging people to give up smoking, and to stop using tobacco products
- reducing people's exposure to smoke from tobacco products

⁵⁰ British American Tobacco Australasia Limited and Ors and JTI International SA

Philip Morris Asia is challenging the tobacco plain packaging legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (Hong Kong Agreement). This is the first investor-state dispute that has been brought against Australia.

⁵¹ Decision on 15 August 2012

It is noted that the tobacco industry continues to pursue the case in the context of international law, both under WTO and bilateral treaties on investment (BIT). There are a number of disputes. But the main idea is that the conflict between Australian government's policy on cigarette packs for the public health and the tobacco industry that is protected by the international trade agreements, to promote free trade and to foster the wealth. Considering the Australian's plain packaging case, it is one good example about of what the state should choose between health and trade. The state must realize the priority of health when it set the policy over the trade negotiation.

b) Next global trend of plain packaging

The battle between Australia and the tobacco industries is ongoing under the panel of WTO but the plain packaging's measure will soon be implemented in several countries⁵². The United Kingdom now has joined Australia and the Republic of Ireland in introducing the new policy. The Standardized (plain) packaging will also be introduced at the same time as the EU Tobacco Products Directive measures on packaging and labeling, on 20th May 2016⁵³. Panama, Chili, Turkey and Burkina Faso engage in the implementation of this measure to control the tobacco of WHO. As a result, we will possibly see further lawsuits between state and tobacco industries under the conflict of trade and health.

B. Litigation between Thai government and international tobacco industries

Two big lawsuits between Thai government and the international tobacco industries are, on the one hand, the international challenge (a) and on the other hand, the domestic challenge (b).

a) International challenge: Necessity and Equality in Health Protection Measure

The case is a dispute between the United States and Thailand⁵⁴. In 1990 the United States has brought the dispute to the dispute resolution process of WTO, claiming that the ban of the importation of the tobacco under the measure of tobacco control by the Tobacco Act B.E. 2509 (1966) was contrary to GATT 1947 by the reason that Thailand still allow the

⁵² Available from : <http://www.sciencesetavenir.fr/sante/20150319.OBS4954/industrie-du-tabac-la-declaration-choc-de-l-oms.html>, April 2, 2015

⁵³ Available from: http://ash.org.uk/files/documents/ASH_937.pdf, p.4, April 7, 2015

⁵⁴ Available from : <http://www.worldtradelaw.net/reports/gattpanels/thaicigarettes.pdf>, April 4, 2015

sale of manufactured cigarettes in the country⁵⁵. Thailand argued that the measures restricting imports cigarettes from the United States to an exception under Article XX (b)⁵⁶ because of the measures are taken to protect lives and public health. The chemicals and other additives in cigarettes from the United States may cause harm to health than manufactured cigarettes within the country⁵⁷. In this case, the judge said that the measures to restrict the cigarettes import by Thailand is inconsistent with Article XI: 1 and not according to the principles of Article XI: 2 (c)⁵⁸. The judge also concluded that restricting import was not considered as measures "necessary" under the definition set out in Article XX (b)⁵⁹ because Thailand is also able to restrictive perform other alternative measures.

It is clear that even when the state is able to use the exceptional cause in GATT to protect health, the measure to prohibit the selling of the imported tobacco products does not correspond to the objective of GATT XX(b) mentioned to the protect public health. This measure must equally apply to both domestic and imported cigarettes in the country. It emphasizes that Thai policy-maker must be aware before applying the further measure on to the issue of trade and health. The following measures, after this litigation, such as taxation and banning to the advertisement of the tobacco product would definitely be done without the discrimination⁶⁰.

b) Domestic challenge: The 85% of graphic health warning

The latest attempt of Thailand to implement the FCTC is to regulate the size of Pictorial Health Warning (PHW). In fact, the PHW has been continuously developed.⁶¹ In

⁵⁵ The tobacco company in Thailand is a state-owner (Tobacco monopoly)

⁵⁶ Article XX: General Exceptions: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...(b) necessary to protect human, animal or plant life or health;..."

⁵⁷ Pantip Wattanakijkan, WTO and Environment, Thesis, Law, Thammasat University, 2003, p.42

⁵⁸ Article XI 2 "The provisions of paragraph 1 of this Article shall not extend to the following....(c) Import restrictions on any agricultural or fisheries product, imported in any form, * necessary to the enforcement of governmental measures which operate:..."

⁵⁹ The panel explained this principle in the following: "Import restriction imposed by Thailand could be "necessary" in terms of Article XX (b) only if there were no alternative measures consistent with the General Agreement or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives..."

⁶⁰ Aua-aree Engchanil, International Trade and Health Protection, p.8

⁶¹ - The Ministerial notification No.12, 2006: Prohibition of misleading words such as Mild, Medium, Light, Ultra Low Tar.

- The Ministerial notification No.10, 2006: Labeling indicates toxic substances and carcinogens on packages

- The Ministerial notification No.10, 2007: Pictorial health warning for cigars (5 color pictures).

October 2013, the Ministry of Public Health of Thailand adopted the regulation relevant to the enlargement of PHW on cigarette packaging. This law requires expansion of the size of textual and graphic health warning on cigarette packaging from 55%⁶² to 85%⁶³. However, before this regulation should come into effect, the International Tobacco Companies (ITCs) claimed against the Ministry of Public Health to the Central Administrative Court that this law will have an impact to the intellectual property right, the right to occupation and also the proportionality principle. The ITCs then asked the administrative court to invalidate this regulation.

In August 2013, the Central Administrative Court issued a temporary injunction suspending the effective date of the regulation. The Ministry of Public Health then appealed the injunction to the Supreme Administrative Court and asked that the regulation to come into effect as planned. In June 2014, the Supreme Administrative Court lifted the Central Administrative Court's injunction order, reasoning that the requirements issued are not outside the intended scope of the tobacco control law and noted that the requirements were issued to "protect the people and our youth." Additionally, the Court held that allowing the regulations to remain in effect while this case is still being decided on the merits will not burden the state or in any way cause problems that will be difficult of remedy later on. The plaintiff could restore their production system to its former state without experiencing undue loss, as they will be using their former production system and will not experience any impact to their trademarks or other interest⁶⁴.

The Minister of Public Health made immediate announcement to require 85% of PHW on September 2014. Today, all tobacco industries follow 85% of PHW. The case requesting court to revoke the 85% of PHW regulation is still under consideration by the Central Administrative Court.

It is noted that the regulations enlarging the PHW are regulated several times but this is obviously the first time that Thai Ministry of Public Health was sued by the ITCs. As in others countries, the challenges between the state and international tobacco companies are

- The Ministerial notification, 2007: Pictorial health warning for roll your own cigarettes (2 black and white pictures).

⁶² The Ministerial notification 2009 under Tobacco Control Act 1992 increased the number of the PHW to 10 pictures and 10 warning messages with tobacco cessation hotline number 1600 printed and increased the size to cover 55% of both of the largest sides of the cigarettes packages, cartons and other forms of packaging.

⁶³ Which inspired by Uruguay 85% of PHW and the plain packaging of Australia

⁶⁴ The decision of the Supreme Administrative Court: JT International (Thailand) v. Minister of Public Health Thailand on May 29, 2014

increasing⁶⁵. It reflects to the conflict of trade and health. The companies get basically the protection from the international trade agreement while the state must move forward to health policy.

Conclusion

The interplay between trade and health, wealth and public health policy, may conflict. However, the relationship between trade and public health need to find the balance.

Considering the international trade agreement as GATT and TRIPS, there is definitely the exception on the ground of health and allows the parties to adopt the measures for protection of health. But this kind of conduct must be non-discriminate and necessary.

The preparation of trade's rule should take into account the importance of health in primary issue and should be held in the heart of the trade agreement as well. The importance of health is the substances above wealth. If the trade's promotion liberally ruins public health, at the end, no one will benefit from the wealth of the nation anymore.

“None of the market shall be ever sustainable growth if the people's health decline until no demand and supply in that market anymore”

⁶⁵ Such as Norway, France, New Zealand, India, Sri Lanka and Uruguay, which the State's policy having an impact to the tobacco companies and they finally decided to proclaim on the court.

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