BLOWING SMOKE?: A REAPPRAISAL OF U.S. TOBACCO POLICY IN CHINA

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1. INTRODUCTION

According to a pair of recently released studies, tobacco-related illnesses will claim a staggering three million Chinese lives a year by the middle of the twenty-first century.[1] Another report predicts that smoking will prematurely kill more than fifty million people currently living in China.[2] While China traditionally has been a large consumer of tobacco, Chinese tobacco consumption has increased dramatically within the past two decades.[3] The age of first time users is dropping and many Chinese women are smoking for the first time.[4] One explanation for this increase has been the aggressive penetration of the Chinese tobacco market by Western, particularly United States, cigarette companies over the last fifteen years. Reeling from a strong surge of domestic anti-tobacco sentiment, U.S. tobacco giants have gone in search of greener pastures, expanding into a number of previously closed

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[1] *See* John Schwartz & John Pomfret, *Smoking Related Deaths in China are Up Sharply*, WASH. POST, Nov. 20, 1998 at A1. Two nationwide studies on the effects of tobacco in China were recently concluded. The studies involved 125 million Chinese and included the world's largest-ever study of tobacco-related deaths and health hazards. *See* WORLD BANK: Medical Study Predicts 100 Million Tobacco Deaths Among Young Chinese, M2 PRESSWIRE, Nov. 20, 1998 [hereinafter M2 PRESSWIRE].

[2] *See* Katherine Arms, *Millions Lighting Up Despite Warnings, Officials See Taxes as Best Deterrent*, WASH. TIMES, Nov. 8, 1999, at A15.

[3] *See* Schwartz & Pomfret, *supra* note 1, at A1 ("Chinese consumption has jumped from . . . 500 billion [cigarettes] in 1980 to 1.8 trillion today.").

[4] *See WHO Warns of Tobacco's Growth Market: Asian Women*, AGENCE FRANCE PRESSE, Nov. 15, 1999, *available in* 1999 WL 25143811 [hereinafter *WHO*].

Asian markets.[5] With one in four of the world's smokers,[6] China represents Big Tobacco's ultimate prize.

Entry into the Chinese market would not have been possible without the aggressive role adopted by the U.S. government, particularly through the U.S. Trade Representative.[7] These policies were adopted in the face of near incontrovertible evidence linking tobacco use to a number of deadly health risks.[8] As a result, commentators, both domestically and abroad, have lambasted the U.S. government for exporting death and taking part in a modern day opium war.[9] The horrifying statistics from recent studies will surely subject the U.S.'s policies to even greater criticism.

Can there be any conscionable defense to such actions, or has the United States simply appeased its own domestic tobacco lobbies at the expense of Chinese lives? Without in any way minimizing the magnitude of either the crisis facing the Chinese, or the seriousness of the health problems directly linked to tobacco use, this Comment will attempt to respond to some of the criticism levied against the United States for its policies in China.[10] From a human rights, health, and geopolitical standpoint, the United States is best served by maintaining its policy of "engagement" with China, a part of which is breaking the Chinese tobacco monopoly and encouraging efforts to educate Chinese citizens about the dangers of smoking.

Section 2 of this Comment outlines the state of the tobacco-health crisis in the United States and China, and examines the structure of the Chinese tobacco industry. Section 3 examines the role of the U.S. government and private U.S. interests in penetrating the Chinese tobacco market. Section 4 provides a small sample of some of the criticism that has been directed at the U.S. government for its role in facilitating the export of tobacco. Finally, Section 5 examines some potentially positive aspects of U.S. policy, and evaluates the extent to which it is fair to label the U.S.

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[5] *See* Eleanor Yang, *Big Tobacco: With U.S. Market Constricted, Cigarette Firms are Going Abroad*, YORK DAILY REC., Mar. 22, 1998.

[6] *See* M2 PRESSWIRE, *supra* note 1.

[7] *See infra* Section 3.1.

[8] *See* M2 PRESSWIRE, *supra* note 1.

[9] *See infra* Section 4.

[10] U.S. tobacco policies in nations other than China are beyond the scope of this Comment.

government a merciless death-dealer, unconcerned with the effects of tobacco use in China.

2. THE CURRENT TOBACCO CRISIS

A number of observers have noted that U.S. tobacco companies have responded to threats to their domestic market and the likely loss of U.S. smokers by aggressively pushing their products abroad, particularly in Asia.[11] Before evaluating either the effects of these policies or the role of the U.S. government in effectuating them, we must first come to grips with the state of the tobacco health crisis in both the United States and China.

2.1. Tobacco in the United States

Tobacco use is a major cause of heart disease and adult respiratory illnesses in the United States.[12] These illnesses lead to an estimated 434,000 deaths in the United States each year[13] and result annually in about $50 billion in medical costs.[14]

As early as 1963, scientists working for a prominent tobacco company were aware that the nicotine contained in cigarettes was addictive.[15] At that time, executives at Brown & Williamson, a major U.S. tobacco company, reportedly recognized that they were essentially in the business of selling nicotine.[16] The Surgeon General issued its first official report on the harmful effects of to-

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[11] "Capitalizing on the worldwide fascination with U.S. culture and mythology, U.S. tobacco companies are aggressively hawking their cigarettes in the economically fast-growing region of Southeast Asia." Robert Weissman, *Promoting the Tobacco Myth*, MULTINAT'L MONITOR, Nov. 1993, at 7; *see also* Jonathan Wike, *The Marlboro Man in Asia: U.S. Tobacco and Human Rights*, 29 VAND. J. TRANSNAT'L L. 329, 332 (1996) (discussing the flight of U.S. tobacco to Asia); Yang, *supra* note 5 (noting the increased smoking rates in Asia due to aggressive marketing by the U.S. tobacco companies).

[12] *See* Susan M. Marsh, *U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks*, 15 WIS. INT'L L. J. 29, 34 (1996) ("Tobacco use is the major cause of heart disease and adult respiratory illness . . . in the United States.).

[13] *See Health Organizations Petition State Attorney General and Department of Health Services to Call Cigarette Brands Drugs*, PR NEWSWIRE, Sept. 29, 1992.

[14] *See* Wike, *supra* note 11, at 333.

[15] *See* Anne Platt McGinn, *Peddling Cigarettes Abroad: The New Opium War*, WORLD WATCH, July 17, 1997.

[16] *See id.*

bacco and the connection between cancer and smoking in 1964.[17] Soon thereafter, antismoking campaigns began to organize and profoundly affect the consumption of tobacco products in the United States.[18] In the decades following the birth of the U.S. antismoking movement, tobacco use in the United States declined dramatically.[19]

In 1978, Congress established the Department of Health and Human Services Office on Smoking and Health.[20] This office works to educate Americans about the health risks of tobacco use and helps individual states develop antismoking and health education materials.[21] In August 1995, the Food and Drug Administration entered the fray, announcing that it would restrict the sale of cigarettes and smokeless tobacco to minors.[22]

Clearly, the United States has been the site of a lengthy battle over tobacco use, with the federal government taking steps to educate Americans about the dangers of smoking. Federal law banned the advertisement of cigarettes on radio and television, prohibited cigarette smoking on all domestic airline flights, and mandated the use of specific warning labels on packaging and on print advertisements for tobacco products.[23]

Perhaps the greatest domestic blow to U.S. tobacco came in 1998. In November of that year, U.S. tobacco companies agreed to: pay 46 states $206 billion over 25 years; finance antismoking programs and advertising; spend $1.7 billion to study youth smoking; and accept curbs on marketing practices that critics maintain appeal to children.[24] In return, the states agreed to re-

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[17] *See* THE ADVISORY COMMITTEE ON SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH EDUC. & WELFARE 37 (1964).

[18] *See* Wike, *supra* note 11, at 333.

[19] *See id.*

[20] *See* Marsh, *supra* note 12, at 41 (reviewing U.S. efforts to curb tobacco consumption).

[21] *See id.*

[22] *See id.* at 49; 21 C.F.R. § 897.14 (1998) (prohibiting sale of cigarettes to persons under eighteen).

[23] *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C.A. §§ 1331-1339 (West 1998); Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C.A. § 4401 (West 1998); Comprehensive Smoking Education Act, 15 U.S.C.A. 1341 (West 1998); Fire Safe Cigarette Act of 1990, 15 U.S.C.A. § 2054 (West 1998).

[24] *See $206 Billion Tobacco Settlement Unanimously Endorsed*, FLA. TODAY, Nov. 21, 1998, at A5 (discussing the details of the tobacco settlement).

solve all remaining state healthcare claims for smokers.[25] The remaining four states, Florida, Minnesota, Mississippi, and Texas, reached settlements for a combined $40 billion before this proposal was created.[26] Rather than sounding the death knell for U.S. tobacco companies, however, this increasingly hostile domestic market forced these companies abroad to maintain profits. In 1960, U.S. tobacco companies exported 20.2 billion cigarettes; in 1970, 29.2 billion; in 1980, 82.0 billion; in 1990, 164.3 billion; and in 1996, U.S. cigarette exports reached 243.9 billion.[27] The world's largest cigarette manufacturer, Phillip Morris, increased its international tobacco sales by eighty percent between 1990 and 1997.[28] For some, such statistics alone are damning. After all, how can the United States justify allowing companies to profit from the sale of an item overseas that the United States has clearly recognized as dangerous? Are the lives of people in other countries somehow worth less than the lives of U.S. citizens and residents?[29] Before addressing this question, the situation confronting the Chinese must be examined.

2.2. *The Chinese Crisis*

Smoking causes about 750,000 premature deaths in China each year.[30] If present trends continue, smoking will kill 3 million people a year by the middle of next century.[31] Approximately 300 million men and 20 million women now use tobacco in China and more than 2,000 a day die from tobacco related illnesses.[32] According to one recent study, such illnesses claimed one in 5 middle-aged men in the city of Shanghai.[33] China now loses more

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[25] *See id.*

[26] *See id.*

[27] *See* Susan Headden, *The Marlboro Man Lives! Restrained at Home, Tobacco Firms Step up Their Marketing Overseas*, U.S. NEWS & WORLD REP., Sept. 21, 1998, at 58 (citing U.S. Department of Agriculture statistics).

[28] *See Memo on Tobacco Trends in 21st Century: Domestic and Global Outlook*, U.S. NEWSWIRE, Dec. 16, 1999 [hereinafter *Memo on Tobacco Trends*].

[29] Jonathan Wike questioned whether U.S. policy contained the "implicit premise that noncitizens have less claim on ... [human] rights [like environmental quality] than do U.S. citizens?" Wike, *supra* note 11, at 357.

[30] *See* Schwartz & Pomfret, *supra* note 1, at A1.

[31] *See id.*

[32] *See* Arms, *supra* note 2.

[33] *See* Zheng-Ming Chen et al., *Early Health Effects of the Emerging Tobacco Epidemic in China: A 16-year Prospective Study*, JAMA, Nov. 18, 1997, at 1500.

of its citizens to tobacco-related illnesses than any other nation in the world; China smokes 30% of the world's cigarettes; and two-thirds of male Chinese become smokers by the age of 25.[34] Chinese consumption has jumped from 100 billion cigarettes a year in the early 1950s to 500 billion in 1980 to 1.8 trillion today, with average daily consumption rising from one cigarette per Chinese man in 1952 to 4 in 1972 to 10 in 1992.[35] Such statistics have understandably raised concern among Chinese leaders, and they have recently taken steps to reverse this trend.[36] Such steps are unlikely to expand into a full-blown antismoking movement, however, so long as Beijing continues to rely on the funds generated by the enormous Chinese state-run tobacco monopoly.

2.3. Structure of the Chinese Tobacco Market

In July of 1991, the China's National People's Congress promulgated the Tobacco Monopoly Law.[37] The purpose of the law was to "improve and strengthen China's tobacco monopoly system, promote the production and management of the industry in a planned and organized way, and crack down on illegal activities in [the tobacco] field in order to better protect the rights of consumers."[38] Today the Chinese tobacco industry is one of the biggest contributors of profits and taxes to China's economy.[39] From 1981-1990, total profits and tax payments increased from 7.5 billion rmb[40] to 151.1 billion rmb, 50% more than the total sum contributed to the economy during the period from 1949 to 1981.[41] While part of this increase can be traced to periods of rapid inflation in the late eighties and mid-nineties,[42] tobacco has

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[34] *See* Schwartz & Pomfret, *supra* note 1.

[35] *See id.*

[36] *See China: China Considers to Extend Anti-Tobacco Strategy*, CHINA DAILY, Nov. 24, 1998, *available in* 1998 WL 20479399 (outlining China's three-year project for reducing the smoking rate among teenagers and preventing younger children from smoking at all).

[37] *See China Issues Tobacco Monopoly Law*, XINHUA NEWS AGENCY, July 3, 1991 *available in* LEXIS, News Library, Xinhua File.

[38] *Id.*

[39] *See id.*

[40] "Rmb" is a contraction of "renminbi" (the people's money), the basic Chinese unit of currency.

[41] *See China Issues Tobacco Monopoly Law*, *supra* note 37.

[42] In 1988 the inflation rate in China had reached 18 percent. Following a period of retrenchment and relative fiscal conservatism on the part of the Chi-

been China's largest source of tax revenue since 1987 and in 1996 China collected 83 billion rmb, (US $10 billion) in tobacco taxes.[43] Chinese "tobacco leaf production in 1997 totaled 3,390,000 metric tons, accounting for one-third of the world total."[44] China exported 76,000 tons of tobacco in 1997, a rise of 22.5%, worth a record US $480 million.[45] In 1997, pretax profits in that tobacco grew by 8.4% to 90 billion rmb.[46] While foreign manufacturers are unquestionably profiting from cigarette sales in China, "[it is] the Chinese government that takes the lion's share of profits from the growing tobacco industry."[47]

Chinese health officials defend China's tobacco monopoly as an economic necessity, even in the face of studies forecasting millions of smoking related deaths by the turn of the century.[48] Health Minister Dr. Chen Minzhang stated, "[t]o reduce cigarette production, we have to step up our educational efforts."[49] "However . . . the US$ 10 billion . . . a year tobacco monopoly was a public service for 350 million smokers, in addition to millions of tobacco growers and factory workers."[50] Profits from the State Tobacco Monopoly Bureau's manufacture and sale of cigarettes are a source of ten percent of China's total tax revenue and generate approximately US $600 million a year in exports.[51]

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nese government, the Chinese economy began to heat up again in the early nineties, with inflation peaking at 21.7 percent in 1994. *See* Justin Yifu Lin, *The Current State of China's Economic Reforms*, *in* CHINA IN THE NEW MILLENIUM 39, 59-61 (James A. Dorn ed., 1998) (discussing economic growth and inflation in China from 1978 to 1996).

[43] *See China Tobacco Annual Report*, U.S. Dep't Agric. Trade Rep., May 1, 1998; Chinese Association on Smoking and Health, *Tobacco Tax in China 1996*, Beijing: Chinese Association on Smoking and Health, 1997.

[44] *China Tobacco Annual Report*, *supra* note 43.

[45] *See China Sets Record in Tobacco Exports*, XINHUA NEWS AGENCY, Jan. 21, 1998 *available in* 1998 WL 4798225.

[46] *See id.*

[47] Kevin Platt, *World, Buy Tobacco But Don't Smoke?: China's Double-Edged Message on Smoking*, CHRISTIAN SCI. MONITOR, May 6, 1999, at 7.

[48] *See* Tom Korski, *Money Talks in Smoking and Health Debate*, S. CHINA MORNING POST, Aug. 26, 1997, at 9 (discussing the reaction of Chinese health officials to the tobacco crisis in China).

[49] *Id.*

[50] *Id.*

[51] *See id.*

Obviously China's domestic tobacco monopoly is a tremendous source of income and foreign capital for the Chinese government.

3. UNITED STATES TOBACCO POLICY IN CHINA

Some observers have predicted that by 2010, China will have the world's largest economy, "with a large and prosperous middle class conducting business throughout East Asia and the world."[52] For U.S. tobacco companies, China is the "golden goose," representing the most attractive market available.[53] As Rene Scull, then a vice-president of Phillip Morris Asia, stated in 1985, "[n]o discussion of the tobacco industry in the year 2000 would be complete without addressing what may be the most important feature on the landscape, the Chinese market. In every respect, China confounds the imagination."[54] With cigarette consumption in the United States between 1990 and 1995 decreasing by 4.5%, and increasing by 8% in Asia over the same period,[55] such forecasts seem to have been accurate.

3.1. Section 301 Sanctions

Within the past decade the U.S. Trade Representative ("USTR") has successfully penetrated a number of Asian markets that had previously restricted the import of U.S. cigarettes.[56] These efforts to remove trade barriers erected against U.S. tobacco seem to conflict with U.S. health policy objectives. "On the one hand, federal resources are used to facilitate the export of U.S. tobacco and tobacco products, while on the other hand, the federal government has directed a major domestic antismoking effort and is a participant in the international antismoking move-

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[52] JAMES R. LILLEY & WENDELL L. WILLKIE II, *in* BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS, at ix (James R. Lilley & Wendell L. Willkie II eds. 1994).

[53] "With more than 1.2 billion people, China is the world's biggest producer and consumer of tobacco products. It accounts for about 30 percent of world consumption, creating a highly attractive market for foreign tobacco companies." Arms, *supra* note 2.

[54] Stan Sesser, *Opium War Redux*, NEW YORKER, Sept. 13, 1993, at 78, 79.

[55] *See* Headden, *supra* note 27.

[56] *See* U.S. GENERAL ACCOUNTING OFFICE, TRADE AND HEALTH ISSUES: DICHOTOMY BETWEEN U.S. TOBACCO EXPORT POLICY AND ANTISMOKING INITIATIVES, REPORT TO CONGRESSIONAL REQUESTERS, 1990 (GAO/NSIAD-90-190 Trade and Health Issues).

ment."[57] Critics have labeled the U.S. actions as, at best inconsistent[58] and hypocritical,[59] and at worst a violation of human rights.[60] These attacks have only intensified in recent years as the United States has sought access to the Chinese market for U.S. tobacco companies.

Under section 301 of the Trade Act of 1974,[61] the President of the United States, usually acting through the USTR, may impose duties on, or otherwise restrict, the imports of a country whose protectionist trade policies are considered unreasonable by the United States. In 1994, the United States used its power under section 301 to force China to accept U.S. tobacco companies after formally threatening to impose retaliatory tariffs on Chinese exports worth U.S. $3.9 billion.[62] "The USTR's efforts [in China were] premised[, at least in part,] on the theory that tobacco products [were] legally sold [in China] and, when it comes to trade negotiations, they should be treated no differently than other products."[63]

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[57] *Id.* at 1.

[58] "A dichotomy exists between U.S. trade goals and public health objectives regarding the export of U.S. tobacco products." Heidi S. Gruner, Note, *The Export of U.S. Tobacco Products to Developing Countries and Previously Closed Markets*, 28 LAW & POL'Y INT'L BUS. 217, 231 (1996).

[59] *See* Marsh, *supra* note 12, at 30 ("At present, the federal government simultaneously works to curb international and domestic consumption of tobacco, and to facilitate the sale of U.S. tobacco overseas. These hypocritical efforts undermine U.S. relations . . . ."); *see also* Sesser, *supra* note 54, at 79 (discussing tension between being a world leader in humanitarian and health-related projects and the facilitation of tobacco exports).

[60] *See* Joan Beck, *U.S. Trade Policies Push Death in China*, CHI. TRIB., Nov. 19, 1997 ("Of course, lung cancer and heart disease aren't the kind of human rights violations President Clinton timidly raised with . . . Jiang Zemin . . . ."); Gruner, *supra* note 58 at 247 ("The U.S. government has contributed in varying degrees to the violation of health and human rights in countries that import U.S. cigarettes.").

[61] Trade Act of 1974, Pub. L. No. 93-618, § 301, 88Stat. 1978, 2041 (1975) (codified as amended at 19 U.S.C. § 2411 (1994).

[62] *See* Judith Mackay, *Beyond the Clouds–Tobacco Smoking in China*, 278 JAMA 1531, 1531 (1997).

[63] Gruner, *supra* note 58, at 232 (quoting U.S. GENERAL ACCOUNTING OFFICE, TRADE AND HEALTH ISSUES: DICHOTOMY BETWEEN U.S. TOBACCO EXPORT POLICY AND ANTISMOKING INITIATIVES, REPORT TO CONGRESSIONAL REQUESTERS, 1990 (GAO/NSIAD-90-190 Trade and Health Issues) 21, 24).

3.2. Role of Private Industry

For many, the political clout wielded by the U.S. tobacco companies provides an explanation for the United States' seemingly hypocritical policies in China. According to reporter Eleanor Yang, in the two years prior to the spring of 1998, five tobacco companies had spent at least $625,000 lobbying on issues that included membership for China in the World Trade Organization ("WTO"), which would help open the Chinese market further.[64] Even before they gained formal access, "foreign firms [had] circumvent[ed] tariff barriers by importing sophisticated technology and equipment into China for use in cooperative ventures."[65] However, it has not been simply the sale of U.S. cigarettes in China and elsewhere that has incensed so many observers. What is most disturbing are the obvious efforts of foreign tobacco companies to expand their customer base to include women,[66] who until the last decade very rarely smoked in China,[67] and teenagers.[68] There is substantial evidence to support the contention that having "spent the past generation successfully marketing to women and children in wealthy countries . . . [the multinational tobacco companies] are now putting their expertise to work in . . . underdeveloped markets" such as China.[69]

The tobacco giants spread their message liberally in China, skirting foreign advertising prohibitions with an insidious practice known as "brand stretching"–or, promoting their names on non-tobacco products.[70] Advertisements are geared to the young, a practice now outlawed in the United States, and include the sponsorship of sporting events, pop concerts, and teen fashion shows, along with promotional devices such as free disco passes

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[64] *See* Yang, *supra* note 5.

[65] Gruner, *supra* note 58, at 224 n.47.

[66] *See WHO, supra* note 4 ("A WHO statement said only six percent of women in China smoked . . . [h]owever, if China's smoking rate for women doubled to near the same rate currently seen in Japan, there would be an additional 40 million smokers in that country alone.").

[67] *See* Chen et al., *supra* note 33, at 1501-02.

[68] *See* Sesser, *supra* note 54, at 78 (examining the expansion of Western tobacco companies into Asia and their efforts to get teenagers and women to buy cigarettes).

[69] *Memo on Tobacco Trends, supra* note 28.

[70] *See* Headden, *supra* note 27, at 58.

given out in return for empty cigarette packs.[71] Recently, Washington has acted to counter many of these practices.[72]

4. CRITICISM OF U.S. TOBACCO POLICY IN CHINA

As the unsavory practices of U.S. tobacco companies abroad gain more exposure, the role played by the U.S. government in helping them gain access to these markets has made it the target of fierce criticism among academics and the media. Accusations against the United States include: engaging in a modern Opium War,[73] speaking out of both sides of its mouth,[74] losing its moral leadership,[75] exporting cancer,[76] and peddling drugs.[77] Joan Beck, a reporter for the Chicago Tribune, accused the United States of falsely assuming it has the moral high ground in its dealings with China, while it helps to "plant time bombs of illness and death."[78] Another observer maintained that

> [t]hrough its actions, the United States has contributed to the violation of health and human rights [in] countries

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[71] *See* Sesser, *supra* note 54, at 81-82.

[72] *See infra* Section 5.5; *see also* Ellyn Ferguson, *Senators to Take Fight Against Tobacco Companies Before International Forum,* GANNET NEWS SERVICE, Mar. 8, 1999, *available in* 1999 WL 6963471 (regarding the efforts of Senators Ron Wyden, Richard Durbin, and Susan Collins in co-sponsoring the International Policy Conference on Children and Tobacco in March 1999).

[73] "'The race of foreign cigarettemakers [sic] into China reminds some of us of Britain's waging the Opium War to protect its right to sell opium to the Chinese,' says a student at Beijing University." Platt, *supra* note 47.

[74] *See* Wike, *supra* note 11, at 338.

[75] *See id.* at 337.

[76] *See* Gruner, *supra* note 58, at 217.

[77] "While the US [sic] blames Colombia and other South American countries for their cocaine exports, the US [sic] continues its indiscriminate promotional tobacco efforts [abroad] at a much higher human cost." *Tobacco Companies Lure Smokers from Third World,* FIN. EXPRESS, Oct. 9, 1999, *available in* 1999 WL 28451422.

[78] Beck, *supra* note 60.

> to adequately educate their populations about the risks of smoking and . . . counteract the influence of the introduction of U.S. advertising and promotional techniques.[79]

Others have likened U.S. tobacco exports to an attack on internationally recognized rights, similar to an action exacerbating global warming or the dumping of nuclear waste.[80] "Above all," says Susan Marsh, "the United States has a moral obligation to afford international consumers of tobacco the same protection it provides for its domestic consumers."[81] Much of this criticism seems justified.[82] However, with respect to China, is that all there is to say? In Section 5, this Comment will examine evidence that the penetration of the Chinese tobacco market is actually consistent with an overall policy that is working to improve the health and human rights situation in China. Further, this section will evaluate whether the U.S. government is indeed only concerned about tobacco related illness within its own borders.

5. ANOTHER LOOK AT U.S. POLICY

Opponents of U.S. tobacco policy in Asia maintain that in other countries where the United States has threatened Section 301 sanctions[83] in order to penetrate the local tobacco market, the indigenous domestic monopolies they helped erode, had actually been "a good thing."[84] What was "good" about the monopolies was that they were inefficient and therefore content to sell cigarettes to their traditional consumer base of adult males, and had no interest in expanding their sales to include women and teenagers.[85] In China, however, the United States has pursued an overall

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[79] Gruner, *supra* note 58, at 253.

[80] *See* Wike, *supra* note 11, at 354.

[81] Marsh, *supra* note 12, at 31.

[82] Such criticism may intensify following the recent decision of a federal court judge refusing to allow foreign governments to recover damages from U.S. tobacco companies. *See Court Rejects First Foreign Lawsuits Against Tobacco Companies*, PR NEWSWIRE, Dec. 30, 1999, *available in* LEXIS, Nexis Library, Prnews File.

[83] *See supra* Section 3.1. (discussing section 301 sanctions).

[84] Sesser, *supra* note 54, at 85 (referring to Japan, Taiwan and South Korea and quoting Michael Pertschuk, the co-director of the Advocacy Institute, a Washington-based public interest group that has opposed tobacco exports).

[85] *See id.*

policy of economic "engagement" with an oppressive communist government, partly in the hope that political and social change will follow economic reform. The Chinese State tobacco monopoly provides a tremendous amount of revenue and is closely linked to this regime.[86] Opponents of U.S. penetration of this market are therefore protecting the Chinese monopoly and thereby bolstering the oppressive Communist government, which may impede China's progression toward a more open, democratic society. While it is difficult to argue that U.S. tobacco in China will lead to the end of Chinese communism, fully integrating China economically into the world community would be beneficial for all concerned.[87] The lowering of trade barriers, including those erected in the tobacco market, is part of this process. This economic integration and development is in turn part of a still greater process that creates internal pressure for reform in areas outside the marketplace.

5.1. The Role of Engagement

Those who support the U.S. policy of "engagement" with China justify unrestricted free trade with an oppressive regime, "on the grounds that trade flows best when it flows freest, and future general welfare increases are the best road to human rights."[88] Economic development eventually leads to the creation of a middle class that grows weary of the restrictions placed on it by an oppressive government, and becomes concerned "about the progress and freedom of its sons and daughters."[89] These people place high value on creativity and education, and since economic progress depends principally on this same middle class group, these interests can only be suppressed at the expense of economic development.[90] "Human rights in China will naturally improve with

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[86] *See supra* Section 2.3.

[87] "China has become an increasingly important country in the world economy. It is one of the largest and fastest-growing economies of the world in the past two decades. China is too big to be changed and too important to be ignored." Wen Hai, *The WTO and China's Objectives as a World Trading Power*, *in* CHINA IN THE NEW MILLENIUM, *supra* note 42, at 175.

[88] Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, U. PA. J. INT'L ECON. L. 391, 423 (1998).

[89] Robert L. Bartley, *The Case for Optimism: The West Should Believe in Itself*, FOREIGN AFF., Sept.-Oct. 1993, at 15, 17.

[90] *See id.*

economic development and the expansion of a middle class."[91] Sustained U.S. economic and political engagement has already played a major role in advancing human rights in South Korea and Taiwan, nations whose human rights records improved markedly as their economies developed.[92] The United States has pursued a similar policy in China, extending it "Most-Favored-Nation" ("MFN") trading status every year for the past twenty years, rather than punishing China for its oppressive policies through trade sanctions.

MFN status is actually a misnomer since it is really the ordinary tariff level applicable to most U.S. trading partners.[93] However, such status has been denied to nations who have either engaged in unfair trade practices or whose policies subjected them to trade embargoes or sanctions, such as Cuba and Vietnam. Many who object to the policies of the Beijing government feel that MFN status should be tied to a number of issues including an improvement in China's human rights record, reductions in the $50 billion bilateral trade deficit between the United States and China, or greater protection of U.S. intellectual property rights.[94] However, those who favor a policy of engagement maintain that to "punish" China for human rights violations through trade restrictions or sanctions is counter-productive, and may actually lead to more extensive human rights violations.[95] As President Clinton stated in his 1999 State of the Union address, "[i]t's important not to isolate China. The more we bring China into the

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[91] Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China*, 17 U. PUGET SOUND L. REV. 611, 626 (1994).

[92] *See* James R. Lilley, *Trade and the Waking Giant— China, Asia, and American Engagement*, *in* LILLEY & WILLKIE, *supra* note 52, at 37.

[93] *See* Green, *supra* note 91, at 613.

[94] *See* Ted Galen Carpenter, *Trade and the Troubled U.S.-China Relationship*, *in* CHINA IN THE NEW MILLENIUM, *supra* note 42, at 225, 226.

[95] James R. Lilley points to the case of Vietnam as an example of how isolation as a policy is a complete failure. As victims of a complete Western trade embargo, Vietnam is the ultimate "disfavored" nation and their isolation has only brought impoverishment and misery to the lives of the Vietnamese people. *See* Lilley, *supra* note 92, at 36, 46. Another example is the case of North Korea, long the victim of a western trade embargo, characterized by Randall Green as "one of the most repressive societies in the world [whose] citizens remain isolated and poor." Green, *supra* note 91, at 631.

world, the more the world will bring change and freedom to China."[96]

5.2. *The Current Status of China*

The United States first extended MFN status to the People's Republic of China on February 1, 1980, under the provisions of the Jackson-Vanik Amendment.[97] "China has received an extension of MFN status each year since 1980, but not without significant congressional protests" on a number of occasions.[98] As China's economy has expanded and it has begun to reap the benefits of international trade, Beijing has made full participation in the international economic community through admission to the major international organizations of finance and trade one of its primary objectives.[99] Indeed, since 1978 China has declared among its main goals to "decentralize the economy," relying more on market forces in making decisions, and "to open and bring it further into the world market."[100] However, China failed to gain admission to the General Agreement on Tariffs and Trade ("GATT"), and as of this wrting, had not yet been admitted to the World Trade Organization ("WTO").[101] Although it was granted observer status on July 11, 1995, the eleventh largest trading nation in the world is still excluded from the most important

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[96] President William Jefferson Clinton, State of the Union Address (Jan. 19, 1999), *available in* 1999 WL 18086.

[97] *See* 19 U.S.C. § 2432 (1994 & Supp. 1998); H.R. Con. Res. 204, 96th Cong. (1980).

[98] Green, *supra* note 91, at 616.

[99] *See* Thomas Yunlong Man, Note, *National Legal Restructuring In Accordance with International Norms: GATT/WTO and China's Foreign Trade Reform*, 4 IND. J. GLOBAL LEGAL STUD. 471, 472 (1997) (discussing the relationship between national legal construction and normative legal practice using China as a case study).

[100] Kiichiro Fukasaku & Henri-Bernard Solignac Lecomte, *Economic Transition and Trade Policy Reform: Lessons from China, in* DIFFERENT PATHS TO A MARKET ECONOMY: CHINA AND EUROPEAN ECONOMIES IN TRANSITION 64 (Olivier Bouin et al. eds., 1998).

[101] *See CHINA: Everbright Bank of China Eyes Domestic Listing*, REUTERS ENGLISH NEWS SERVICE, Jan. 5, 2000 (predicting China's accession to the WTO by the middle of 2000); *see also* Robert S. Greenberger, *Trade Minister Says China Thinks it is Ready for WTO Membership*, ASIAN WALL ST. J., Jan. 4, 1999, at 4 ("China's trade minister[] said his country believes 'conditions are ready' for it to join the World Trade Organization, but complained that Beijing is 'overwhelmed' by demands made by the U.S. and the European Union.").

international trade organization.[102] China's main obstacle continues to be its tariff and non-tariff trade barriers.[103] Enterprises such as the State tobacco monopoly are exactly the kind of practices that keep China from fully entering the world economic community. In 1987, the tariff rate for tobacco imports into China was 87.5%.[104] Just six years later, the rate had increased to 145%.[105]

Membership into a body such as the WTO would not only accelerate China's economic reform programs, thereby bolstering forces within China working for political and social change, but would also force the Beijing government to accept a set of international rules and regulations. Requests that China adhere to other international norms, such as human rights, in addition to international economic practices would logically have a greater impact once China is a recognized member of the international community.

In November of 1999, Chinese state-owned enterprises represented 41.9% of China's economy, down from 56.2% in 1978, when broad economic reforms were implemented.[106] Since 1987, in attempting to gain membership into the GATT and the WTO, China has fundamentally altered the way in which it conducts foreign trade by transforming an essentially closed market into a considerably more open and increasingly market-driven system.[107] International economic forces have driven this process, profoundly changing China's internal structure. It is a transformation Chinese leaders are finding increasingly difficult to confine

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[102] *See* Man, *supra* note 99, at 474.

[103] *See U.S. Says China Trade Barriers Could Harm WTO Bid*, AFX NEWS (Associated Press), Dec. 17, 1998, *available in* 1998 WL 23084386 (referring to complaints made by Commerce Secretary William Daley concerning China's trade barriers to United States goods).

[104] *See* Fukasaku & Lecomte, *supra* note 100, at 71 tbl. 3 (comparing China's import tariffs, effective rates of protection and non-tariff measures in 1987 and 1993).

[105] *See id.*

[106] *See* John Pomfret, *In China, Reform Can Be Dangerous: Corrupt Officials Try to Block Cleanup of State-Owned Firms*, WASH. POST, Nov. 15, 1999, at A1.

[107] By lowering tariffs, eliminating non-tariff barriers, tax reform, foreign currency exchange management and the promulgation of the Foreign Trade Law in 1994, "China has made serious efforts during the last decade to move its foreign trade regime toward the international system represented by GATT/WTO." Man, *supra* note 99, at 499.

to the economic sector.[108] China's attempts to bring its economic policies in line with the international community have already had an impact on the lives of many Chinese people.[109] Prohibited from following the practices of Western countries, reform-minded Chinese leaders are forced to operate through international guiding principles and practices in order to induce change in China's economic structure.[110] Protection of China's giant tobacco monopoly impedes these efforts and delays China's entrance into the WTO. Indeed, there is some indication that the European Union feels that greater efforts must be made to break up China's tobacco monopoly prior to its accession to the WTO, "an area [where an EU official believes] the U.S. has been reluctant to exert pressure because of domestic political opposition to tobacco."[111] The absence of China in the WTO not only slows the pace of economic, and possibly social and political, reform in China, but also denies most developed economies the benefits that China's accession to the WTO would bring to the world economic community as a whole.[112]

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[108] "In a pointed speech delivered to Communist Party members in the Great Hall of the People, President Jiang Zemin made clear . . . that China's economic reforms were not a prelude to Western-style multiparty democracy and that those who challenged the party's supremacy would be quashed." Elisabeth Rosenthal, *Chinese Reminded: No Opposition Allowed*, N.Y. TIMES, Dec. 19, 1998, at A6; *see* Erik Eckholm, *China Sentences 3 for Their Dissent*, N.Y. TIMES, Dec. 22, 1998, at A1; *see also* Elisabeth Rosenthal, *Beijing Defends Arrest of a Top Dissident*, N.Y. TIMES, Dec. 3, 1998, at A20 (discussing the arrest of Xu Wenli, the founder of the China Democracy Party).

[109] For example, the development of a market economy has greatly increased opportunities for women in China. "As more people make their living outside agriculture, women find more opportunity outside villages, outside the reach of traditional patriarchal control." Kate Xiao Zhou, *Market Development and the Rural Women's Revolution in Contemporary China*, *in* CHINA IN THE NEW MILLENIUM, *supra* note 42, at 277, 294.

[110] *See* Man, *supra* note 99, at 502.

[111] Geoff Winestock, *China's WTO Deal: Pact Sets the Stage for EU's Talks*, ASIAN WALL ST. J., Nov. 17, 1999, at 10.

[112] Wen Hai cites a number of studies showing "that China's accession to the WTO will not only benefit the Chinese economy, but also benefit most developed countries and the world economy." Wen Hai, *The WTO and China's Objectives as a World Trading Power*, *in* CHINA IN THE NEW MILLENIUM, *supra* note 42, at 175, 187 n.1.

5.3. The Link Between Economic Development and Human Freedom in China

In the wake of the Tiananmen Square massacre Richard Holbrooke stated, "[f]or all his achievements, Deng [Xiaoping] made an absolutely basic mistake. He did not recognize that economic development creates pressure for political development. The more successful his economic program, the greater the pressure would be for political liberalization."[113] Following its extraordinary economic growth, China has witnessed the rise of a new layer of professional people with economic means and knowledge of the outside world.[114] This fledgling business community has already begun to make its voice heard in China.[115] The growth of this community has been substantially aided by China's trade relationship with the United States.[116] Within the past twenty years "[t]he power of the state . . . has eroded dramatically. And private enterprise has contributed substantially to the weakening of the power of the Communist system."[117]

Admittedly, U.S. tobacco policy has probably not been motivated by notions of improving human rights and living conditions abroad. However, it is difficult to deny that economic reforms have led to substantial social and political change in China.

> China's continuing transition from a planned economy to a market economy, as a way to organize economic life, has spilled over into everyday life and added immeasurably to human progress— people are freer to travel, to go into business, to change jobs, to work outside the state sector,

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[113] Richard Holbrooke, *A Dilemma for Washington*, NEWSWEEK, June 12, 1989, at 32.

[114] *See* Lilley, *supra* note 92, at 36, 52.

[115] "A prosperous business community in China is starting to shift power within China." Green, *supra* note 91, at 629.

[116] "In addition to the thrifty and industrious nature of the Chinese people . . . the major explanation for the rapidity of China's growth has been its openness to foreign trade, especially American trade." Lilley, *supra* note 92, at 36, 52.

[117] *Id.* at 50-51. "As we have seen in the real-world experiments of South Korea and Taiwan, economic development does in fact lead to a loosening of control by central governments that are no longer able to keep up with the complexities of a modern, growing, and powerful private sector." Green, *supra* note 91, at 634.

to talk with foreigners, to use the Internet, to read foreign literature, and to enjoy themselves then ever before.[118]

The erosion of a giant state-run monopoly, such as the Chinese tobacco industry, is unquestionably a part of this process. It is undeniable that the Chinese tobacco monopoly is a tremendous source of income for the Beijing regime.[119] Potentially, the dismantling of this tremendous cash cow could help weaken the aging Chinese communist leadership, thereby bolstering their opponents within China. To suggest that the sale of U.S. cigarettes in China will lead, even indirectly, to the abrupt transformation of Chinese society or the downfall of Chinese communism, is certainly overstating the matter. However, the weakening and eventual restructuring of the current trade regime, of which tobacco is undeniably a part, brings China one step closer to full fledged membership in the international economic community.[120]

Accession into such organizations as the WTO will benefit China economically and force it to abide by a system of internationally accepted trade regulations. In order to sustain high levels of economic growth, China must create regulations and institutions that are consistent with free-market principles.[121] As mentioned above, once economic reforms gain widespread acceptance and practice, it is difficult to keep such reforms confined to the market place.

5.4. Efforts to Help Raise Chinese Awareness of the Dangers of Smoking

Many critics accuse U.S. tobacco companies of somehow tricking Chinese consumers with their "slick Western marketing techniques," or feel that the Chinese people are incapable of making the same informed decision allowed Americans because they

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[118] James A. Dorn, *Introduction–China in the New Millenium*, *in* CHINA IN THE NEW MILLENIUM, *supra* note 42, at 1, 3.

[119] *See supra* Section 2.3.

[120] "Lack of firm commitment to import liberalization makes it difficult to integrate [the Chinese] economy fully into the international trading system." Fukasaku & Lecomte, *supra* note 100.

[121] *See* Justin Yifo Lin et al., *The Lessons of China's Transition to a Market Economy*, 16 CATO J. 226 (1996) (discussing the types of regulations and institutions that are essential in order to stimulate the growth of China's economy).

are unaware of the dangers of tobacco use.[122] According to one report, only 36% of Chinese smokers interviewed recognized that their habit could cause lung cancer, and only 4% were aware it could cause heart disease.[123] Assuming that this is true, efforts should then focus on educating the Chinese about the dangers of smoking, not on protecting the Chinese tobacco monopoly. Further, amidst all the criticism levied against the United States for its tobacco policy in China, very little has been written from a Chinese cultural standpoint. Tobacco has long occupied a prominent position in Chinese culture, "where an offer of a cigarette is a normal way to start a conversation."[124] During the Chinese Communist Revolution, "Mao Tse-tung pledged that the Communist State would provide enough food, shelter and cigarettes for everyone."[125] One of every three smokers in the world lives in China.[126] Beyond simply providing information on the deadly nature of tobacco use, efforts must focus on changing Chinese cultural attitudes toward cigarettes.[127] Some advocate increasing taxes on cigarettes and using the money generated by the price hike to fund research and antismoking programs.[128] According to a report prepared by the World Bank the most effective way to cut smoking is to make it more expensive.[129] The report further states that a ten percent increase in cigarette prices

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[122] "[T]he point some anti-tobacco forces are trying to make is that people in ... Asia ... aren't equipped to deal with slick Western-style advertisements." Yang, *supra* note 5. Tom Houston, a spokesperson for the American Medical Association, stated that part of the reason smoking rates abroad have been growing recently has been "a poor understanding of health concerns in those areas. *Id.; see also* Gruner, *supra* note 58, at 253 (accusing the United States of violating health and human rights in countries not able to counteract the influence of U.S. advertising and promotional techniques).

[123] *See* David Rennie, *Smokers in China 'Are Unaware of Cancer Link'*, DAILY TELEGRAPH (London), Oct. 12, 1999, *available in* 1999 WL 27192027.

[124] *Id.*

[125] Schwartz & Pomfret, *supra* note 1, at A51.

[126] *See* Guo Nei, *Smokers Pose a Big Challenge in China*, CHINA DAILY, June 1, 1999 *available in* 1999 WL 17779864.

[127] Many Chinese men smoke simply because it is customary for them to do so. *See* Sesser, *supra* note 54, at 89 (relating anecdotal evidence of the place of cigarettes in Chinese society).

[128] *See Antismoking Group Urges U.S. Lawsuits*, CHINA NEWS, June 1, 1999, *available in* 1999 WL 17734058.

[129] *See* Michael M. Phillips, *Study Cites Benefits of Tobacco Tax*, WALL ST. J. (EUR.), May 18, 1999.

worldwide would prompt forty million people to quit, and persuade others not to begin smoking in the first place.[130]

The United States, through its regular contributions to the World Health Organization's ("WHO") antismoking programs has helped raise awareness in China of the dangers of smoking.[131] In December of 1998, the WHO began work on an international treaty called the Framework Convention on Tobacco Control.[132] If ratified, the treaty would mandate that signatories drastically curb how tobacco is advertised, marketed, taxed and even grown.[133] Proponents of the treaty hope to "spark public demand for international standards in the same way momentum built around the world for global treaties on land mines and ozone depletion."[134] In October of 1999, the WHO convened an international convention to address the tobacco industry's aggressive advertising and promotional efforts in developing countries, as well as efforts to regulate cigarette ingredients and packaging.[135]

In China, an anti-tobacco strategy was implemented "in response to the World Health Organization's call for a tobacco-free world."[136] The project aims to reduce smoking rates among young people during a three-year period beginning in 1998.[137] Further, eighty-two cities in China have passed antismoking regulations and ten cities have banned tobacco advertising.[138] China is also taking steps to limit the number of new smokers,[139] and the

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[130] *See id.*

[131] "The U.S. government's efforts to reduce tobacco consumption are not limited to its own borders. Through its Office on Smoking and Health, the United States makes direct financial contributions to WHO's antismoking programs." Marsh, *supra* note 12, at 41-42.

[132] *See Memo on Tobacco Trends in 21st Century, supra* note 28.

[133] *See* Jane Armstrong, *WHO Meeting Seeks Curbs on Tobacco Use: UN Group Sees Smoking as Worldwide Issue That Should Be Addressed on a Global Scale*, GLOBE AND MAIL (Vancouver, BC) Dec. 2, 1998, at A4.

[134] *Id.*

[135] *See 'Death Clock' Starts Ticking Oct. 25 as World Negotiates First Tobacco Treaty*, U.S. NEWSWIRE, Oct. 21, 1999, *available in* 1999 WL 22282725.

[136] Zhu Baoxia, *China Considers to Extend Anti-Tobacco Strategy*, CHINA DAILY (Nov. 24, 1998) <http://www.chinadaily.com.cn/cndydb/1998/11/d2-2smok.k24.html>.

[137] *See id.*

[138] *See id.*

[139] *See Smoking-Ban Should Start with Youngsters*, XINHUA NEWS AGENCY, Apr. 26, 1995 (discussing programs at the national level and in a number of Chinese cities designed to prevent young people from beginning to smoke).

Tobacco Monopoly Law of 1991 contained provisions that banned or restricted smoking in public places and on public transports, and prohibited smoking among high school and middle school students.[140] While it may take some time, it is clear that China is awakening to the deadly problem in its midst and is beginning to take steps to alter the situation. U.S. policy should focus on aiding China in its attempts to regulate smoking, not on protecting their tobacco monopoly.

5.5. Possible Solutions

In the past few years there has been a growing public demand in the United States to require U.S. tobacco companies to refrain from engaging in practices which are illegal in the United States.[141] Such a policy would still weaken the Chinese tobacco monopoly by providing it with competition among its traditional consumers, while at the same time preventing U.S. companies from aggressively courting women and teenagers in China. The United States might also encourage China to pass stricter laws concerning the sale, distribution, and advertising of tobacco products and force both U.S. companies and Chinese retailers to abide by them.[142] For example, currently there are no laws in China prohibiting the sale of cigarettes to minors.[143] The United States should pressure Beijing to adopt such laws, as well as encourage them to enforce those laws already in place.[144]

The World Bank has recognized the negative global effects of tobacco and since 1991 its formal policy has been to reject loan

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[140] *See China Issues Tobacco Monopoly Law*, *supra* note 37.

[141] "U.S. Representative Martin Meehan of Massachusetts would require U.S. tobacco companies to comply with the same regulations and limits on advertising in their international markets as in their domestic markets." McGinn *supra* note 15; Senator Kent Conrad, D-N.D., introduced legislation in February 1999 "to bar federal promotion of tobacco product exports, prohibit the United States from challenging foreign countries' health measures, fund international control efforts, require warning labels on exports and prohibit targeting of children in foreign markets." Yang, *supra* note 5.

[142] *See* MacKay, *supra* note 62, at 1532 (discussing measures which China might adopt to achieve a reduction in smoking by the year 2025 or sooner, including bans on all advertising and promotion, establishment of smoke-free areas in all workplaces, indoor public areas, and public transport).

[143] *See* Rennie, *supra* note 123.

[144] "Although Beijing's government initially backed up the new [tobacco] laws with antismoking police, the enforcers have since seemed to vanish like a puff of smoke." Platt, *supra* note 47.

applications for use in tobacco production, processing, or marketing.[145] Further, the Bank suggests that governments control tobacco and reduce or minimize the tobacco epidemic by following some or all of the following recommendations:

i. Significantly increase tobacco taxes, and thus prices;
ii. Implement complete bans on tobacco advertising and promotion of tobacco products;
iii. Disseminate easily understood information on health risks;
iv. Research the causes, consequences, and costs of tobacco use; and
v. Increase funding and expertise for tobacco-control units. [146]

The key to helping the Chinese cope with its tobacco crisis is convincing them to treat the issue as one of critical importance for the health and welfare of their nation. According to a 1996 survey submitted to over 100,000 Chinese residents, thirty-four percent "of the respondents said they smoke at least one cigarette a day, while only [40%] of nonsmokers and smokers alike said they were aware of the health risks associated with smoking."[147] While banning U.S. cigarettes in China might constitute a victory for opponents of U.S. tobacco companies, it would leave the Chinese State tobacco monopoly free to generate income for Beijing unchallenged, and do little to aid the millions of Chinese who began smoking decades before a single U.S. cigarette landed on China's shores.

6. CONCLUSION

China has long been the victim of foreign states that are more interested in economic opportunity than health or human rights. Today the Chinese face an enormous health crisis that has been exacerbated by U.S. tobacco companies who have unquestionably increased the number of smokers in China. The U.S. government

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[145] *See* M2 PRESSWIRE, *supra* note 1.

[146] *Id.* (listing recommendations from the World Bank's 1997 Health Sector Strategy Paper).

[147] *Despite "Smoking Epidemic," Most Chinese Unaware of Health Risks-JAMA Report*, CHINA ONLINE, Oct. 6, 1999, *available in* 1999 WL 20785938.

played a vital role in forcing open the Chinese tobacco market, but has done little to control the behavior of these companies since. However, without apologizing for the unconscionable practices of the U.S. tobacco companies or trivializing the magnitude of the health problem facing the Chinese, the U.S. policy of market penetration on the one hand, and support for international antismoking efforts on the other, may not be as hypocritical as most critics maintain.

With the information now available in the United States, most Americans would agree that smoking should not be encouraged either at home or abroad. However, if tobacco is to be raised to the status of a vice that is simply too unhealthy to be exported, then why is it still legal in the United States? While smoking may lead to serious health problems, there are many people in the United States and China who currently smoke, are aware of the health consequences, and have no desire to stop. Further, as many as 555,000 U.S. jobs are directly related to the tobacco industry in the United States, with perhaps as many as 2.3 million indirectly related.[148] What then does a policy of "non-encouragement" mean? If Americans may legally farm tobacco, distribute tobacco, sell tobacco and smoke tobacco in the United States, does it make sense to prohibit, or even severely restrict, the export of tobacco to nations where smoking is not prohibited? Does it make a difference that such states are run by oppressive left-wing regimes that receive tremendous profits from their own state run tobacco monopolies?

Presently there are signs that the U.S. government is taking steps to regulate the policies and practices of U.S. tobacco companies abroad.[149] The United States has encouraged the international economic integration of China in all areas, including tobacco, by forcing it to lower trade barriers, thereby bringing China closer to admission to the WTO. The lowering of trade barriers to U.S. cigarette companies was part of an overall strategy of "engagement" that has helped to radically transform China's economy, and may one day lead to substantial social and

[148] *See* GAO, Tobacco: Issues Surrounding a National Tobacco Settlement, at 6-7 (Apr. 15, 1998) (Report to Rep. Robert M. Burr) (estimating numerical ranges of jobs created by the tobacco industry in three categories- the core sector (direct employment), supplier sector, and expenditure-induced sector (in direct employment)).

[149] *See supra* note 141.

political reform. At the same time, the United States has worked to educate and inform the Chinese about the dangers of smoking by giving generously to, and endorsing, the antismoking programs of organizations such as the WHO. In selecting these policies, the United States has carefully balanced a firm commitment to free trade, the forces of a powerful tobacco lobby, and the moral concerns of exporting a substance that, while hazardous to the health of those who use it, is legally sold and consumed in the United States. While certainly open to criticism, these policies are far from morally bankrupt or reprehensible. In the end, perhaps the best the United States can hope to provide the Chinese with is the same right allowed to its own citizens: the right to choose whether to smoke or not to smoke based on the best evidence available.

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