

## **Intellectual Property Chapter of Trans-Pacific Partnership Trade Agreement, Tobacco, and Public Health**

November 25, 2013

Tobacco use is the leading preventable cause of death in the United States<sup>1</sup> and worldwide, and the only legal substance that, when used as intended, kills people, causing 6.3 million deaths a year. In addition, cigarette smoking is responsible for about one in five deaths annually<sup>2</sup> and a major contributor to the global pandemic of tobacco-related non-communicable diseases. Public health and medical organizations in the United States and around the world support the WHO Framework Convention on Tobacco Control, notably Article 5.3 on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry.

Tobacco companies have recently accelerated their use of trade rules to attempt to delay and reverse tobacco control measures that limit marketing in the U.S., Australia, Uruguay, Norway, and Ireland. Trade rules grant corporations rights to contest nations' public health and other policies. Countries that lose trade challenges face stiff financial penalties, payable to the complaining corporation.

[Public health and medical advocates in the U.S. and abroad have urged the USTR to exclude tobacco control protections](#) from trade challenges under the Trans-Pacific Partnership Trade Agreement (TPP).

This document assesses provisions of the text of the draft Intellectual Property Chapter of the TPP, leaked on November 13, 2013<sup>3</sup>, in relation to protecting public health from tobacco-related disease and death.

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<sup>1</sup> Centers for Disease Control and Prevention. Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004. Morbidity and Mortality Weekly Report 2008.

<sup>2</sup> U.S. Department of Health and Human Services. How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease. Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2010.

<sup>3</sup> <https://wikileaks.org/tpp/>.

The text of the draft Intellectual Property Chapter of the TPP does not mention the words “tobacco,” or “tobacco control.”

### **Understandings Regarding Public Health Measures Narrow Scope of Public Health Protections**

**Art. QQ.A.5 {Understanding Regarding Certain Public Health Measures} Para. (a)** of the TPP Intellectual Property Chapter (IP Chapter) borrows language from the Doha Declaration,<sup>4</sup> but narrows the scope of public health protection. (Box 1)

On November 14, 2001, the World Trade Organization adopted the Declaration on the TRIPS Agreement and Public Health (the Doha Declaration).<sup>5</sup> It states that the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Right) “does not and should not prevent [WTO] Members from taking measures to protect public health.”<sup>6</sup> Supporting public health involves “promoting both access to existing medicines and the creation of new medicines.”<sup>7</sup>

In the TPP text, in Art. QQ.A.5 {Understanding Regarding Certain Public Health Measures} Para. (a), specifies “promoting access to medicines” and focuses on specific diseases, “in particular, HIV/AIDS, tuberculosis, malaria, and other epidemics, as well as circumstances of extreme urgency or national emergency.”

The focus on epidemics and circumstances of “extreme urgency” or “national emergency,” in the TPP text, narrows the scope of the Doha Declaration, and limits a nation’s ability to protect public health in the TPP. The borrowed language from the Doha Declaration in para. (a) poses a risk that a standard will be established where public health plays less of a role in interpretation of the TPP,<sup>8</sup> for example, safeguarding tobacco control measures aimed at reducing tobacco-related disease and death.

These IP Chapter public health “understandings” offer significant loopholes that favor companies asserting trade charges.<sup>9</sup> They serve more in the nature of a preamble or statement of legislative intent. They have no clear legal effect to protect public health. Even if they were to provide interpretive guidance, they apply only to the IP Chapter, and not, for example, to investment claims that tobacco companies could bring under the TPP. Investment claims require multi-year, multi-million-dollar litigation to mount a defense – a burden that many countries cannot afford. The tobacco industry exploits the cost and uncertainty of using language such as

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<sup>4</sup> Benn McGrady, *Access to Medicines and the Draft TPP IP Chapter*, Blogpost, O’Neill Institute for National and Global Health Law, November 15, 2013. <http://www.oneillinstitutetradeblog.org/wp-content/uploads/2013/11/TRIPS-Flexibilities-and-TRIPS-Plus-under-the-TPP.pdf>

<sup>5</sup> World Trade Organization, WT/MIN(01)/DEC2, 20 November 2001; [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm).

<sup>6</sup> Id.

<sup>7</sup> WTO, “The Doha Declaration explained, Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health”; [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#trips](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#trips).

<sup>8</sup> McGrady, op.cit.

<sup>9</sup> R. Stumberg, Safeguards for Tobacco Control: Options for the TPPA. *American Journal of Law and Medicine*, 39 (213); 382-441.

in the draft public health understandings. (As a regional agreement, the TPP claims some latitude in varying from WTO rules.)

**Box 1 – Draft TPP IP Text**

**CHAPTER QQ1**

**{INTELLECTUAL PROPERTY RIGHTS / INTELLECTUAL PROPERTY}**

**Article QQ.A.5: {Understandings Regarding Certain Public Health Measures<sup>7</sup>}**

The Parties have reached the following understandings regarding this Chapter:

(a) The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, [US **oppose**: chagas] and other epidemics as well as circumstances of extreme urgency or national emergency. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all.<sup>8</sup>

<sup>7</sup> Negotiators' Note: JP is reflecting further on this paragraph.

<sup>8</sup> Negotiators' Note: AU is still considering the drafting and scope of this paragraph.

Limiting the Right of TPP Countries to Provide Access of Medicines to All

**Art. QQ.A.5 {Understanding Regarding Certain Public Health Measures} Para. (b)** states that “this Chapter does not and should not prevent the effective utilization of the TRIPS/health solution.” This language does not apply to tobacco products, or to protection of public health from tobacco-related disease or death. (Box 2)

The “TRIPS/health solution” refers to the implementation of paragraph 6 of the Doha Declaration. Paragraph 6 specifically addresses the issue of countries which have insufficient or no capability to manufacture drugs, and are not able to afford high-priced patented pharmaceuticals. An agreement reached at the WTO in August 2003 provides a mechanism for “least-developed countries” (LDCs) which cannot produce drugs, themselves, to implement paragraph 6 by importing affordable drugs.<sup>10</sup> The TRIPS/health solution also prohibits importation by the United States and other developed countries of medicines that are exported under this agreement.<sup>11</sup>

<sup>10</sup> WTO, “Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health,” WT/L/540, 1 September 2003.

<sup>11</sup> On the issue of access to medicines for all, the TPP IP text in para. (b) does not address the issue of a nation granting compulsory licenses to produce affordable generic drugs to meet public health needs within its own borders. Compulsory licensing allows countries to authorize production of affordable generic versions of costly patented medicines while they are still under patent. The Doha Declaration mandates that each nation “has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.” Compulsory licensing can be an important tool to provide affordable generic drugs to meet public health needs.

**Box 2 – Draft TPP IP Text**

**Article QQ.A.5: {Understandings Regarding Certain Public Health Measures}**

The Parties have reached the following understandings regarding this Chapter:

(b) In recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the General Council of 30 August 2003 on the Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540) and the WTO General Council Chairman's statement accompanying the Decision (JOB(03)/177, WT/GC/M/82) [SG/BN/VN/PE/CL/CA/MY/NZ/US/AU<sup>9</sup>/MX/JP: , as well as the Decision on the Amendment of the TRIPS Agreement, adopted by the General Council, 6 December 2005 US/MY propose: and the WTO General Council Chairperson's statement accompanying the Decision (WT/GC/M/100)] (collectively, the "TRIPS/health solution"), this Chapter does not and should not prevent the effective utilization of the TRIPS/health solution.

9 Negotiators' Note: AU is considering the drafting of the language.

**Lack of Policy and Regulatory Coherence Between Public Health and Intellectual Property**

The IP Chapter text in Article QQ.A.6: {Existing Rights and Obligations / International Agreements} indicates that countries do not agree on the relationship between the TPP and other multilateral agreements, including multilateral treaties concluded or administered under the auspices of the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). (Box 3)

Text proposed by Chile and New Zealand in IP Chapter Article QQ.A.6:2 would prohibit all provisions in the TPP IP Chapter from derogating or diminishing existing rights and obligations that nations have with and to each other under the TRIPS Agreement or other multilateral agreements, such as those concluded or administered under the auspices of the World Intellectual Property Organization (WIPO), the World Health Organization (WHO) and United Nations Educational, Scientific and Cultural Organization (UNESCO). The United States, Australia, Japan, and Mexico oppose this text. Lack of such language fosters a climate for future trade conflict, rather than coherence, between the TPP IP Chapter and other existing agreements which promote public health, such as the Framework Convention on Tobacco Control (FCTC).

Other TPP IP text, proposed by Canada, would foster coherence among international trade and health treaties by having TPP trading partners interpret the IP Chapter in such a way as to be complementary to /compatible with their rights and obligations under existing treaties, such as

the FCTC, “especially with regards to measures aimed at protecting public health and protecting equal access to knowledge and food.” The United States opposes this proposed text.<sup>12</sup>

### **Lack of Accountability for Abuse of Intellectual Property Rights by Rights Holders**

Ten nations, of the 12 TPP trading partners, have proposed language in Article QQ.A.9: {Implementation of this Chapter} to grant nations the right to adopt measures to prevent: a) the abuse of intellectual property rights by right holders, practices that unreasonably restrain trade or that adversely affect the international transfer of technology; and (b) anticompetitive practices that may result from the abuse of intellectual property rights. Such language would foster corporate accountability for abuse of intellectual property rights. The United States and Japan oppose this text.

#### **Box 3 – Draft TPP IP Text**

##### **Article QQ.A.6: {Existing Rights and Obligations / International Agreements}**

[**CL/NZ propose; US/AU/JP/MX oppose:** 2. Nothing in this Chapter shall derogate from existing rights and obligations that Parties have to each other under the TRIPS Agreement or other multilateral agreements, such as those concluded or administered under the auspices of the World Intellectual Property Organization (WIPO), the World Health Organization (WHO) and United Nations Educational, Scientific and Cultural Organization (UNESCO).]<sup>10</sup>

[**CA propose; MX/US oppose:** 2. Except as otherwise provided in this Chapter, the Parties shall interpret this Chapter in such a way as to be [complementary to / compatible with] their rights and obligations under multilateral treaties concluded or administered under the auspices of the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) to which they are party, especially with regards to measures aimed at protecting public health and protecting equal access to knowledge and food.]

##### **Article QQ.A.9: {Implementation of this Chapter}**

[**CL/NZ/VN/AU/BN/SG/PE/MY/MX/CA24 propose; US/JP oppose:** 1. Nothing in this Chapter shall prevent a Party from adopting appropriate measures to prevent: (a) the abuse of intellectual property rights by right holders or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology; and (b) anticompetitive practices that may result from the abuse of intellectual property rights; provided that such measures are consistent with this Agreement. [**PE propose; CL/AU oppose:** Nothing in this Chapter shall be construed to reduce the protection that the Parties agree on or have agreed on in benefit of the conservation or sustainable use of biodiversity.]]

10 Negotiators' Note: Parties to discuss paragraphs 1, 2 and 3 with legal group to consider possible redundancy with General Provisions and receive advice on resolution.

<sup>12</sup> While the alternate versions of IP Chapter Article QQ.A.6 para. 2, discussed above, might be helpful, even they stop short of expressing clear deference to health treaties.

## TPP IP Chapter Could Give Tobacco Industry New Right to Use Trademarks with a Place Name

The text of the draft IP Chapter grants corporations, including the tobacco industry, the right to use certain trademarks under Geographical Indications provisions. The United States is proposing language under Article QQ.D.14 that parties “*shall permit the use, and as appropriate, allow the registration, of signs or indications . . . that reference a geographical area that is not the place of origin of the goods.*” (Box 4) “This language is designed to enable Kraft to sell Parmigiano, Romano, and Provolone cheeses.<sup>13</sup> It also appears to cover Marlboro, Winston, and Salem.”<sup>14</sup>

### Box 4 – Draft TPP IP Text

{GEOGRAPHICAL INDICATIONS}

{Section D: Geographical Indications}

**Article QQ.D.14:** [US propose<sup>86</sup>; CL/PE/VN/MY/CA oppose: Each Party shall permit the use, and as appropriate, allow the registration, of signs or indications that identify goods other than wines or spirits, and that reference a geographical area that is not the place of origin of the goods, unless such use is misleading, would constitute an act of unfair competition, or would cause a likelihood of confusion with a prior trademark or geographical indication that identifies the same or similar goods. The foregoing shall not be understood to prevent a Party from denying registration of such a sign or indication on other grounds, provided such denial does not derogate from the provisions of the Paris Convention and the TRIPS Agreement.]

<sup>86</sup> Negotiators' Note: AU/ NZ/ SG/ BN reflecting on reformulated proposal. JP is considering this provision.

A remedy to the threat posed by this language to tobacco controls can be cured by adding tobacco products to the article’s terms of exclusion.<sup>15</sup>

The United States has proposed text in Article QQ.D.1: {Recognition of Geographical Indications} of the draft IP Chapter that geographical indications may be protected through a trademark or sui generis system or other legal means. Nine nations oppose inclusion of this

<sup>13</sup> Stumberg, op.cit, p. 389. Per Stumberg: The dairy industry sees Article 2(22) protections as an opportunity to block the EU’s attempt to expand the WTO’s TRIPS to protect products with place names as GIs. See BERNARD O’CONNOR, THE LAW OF GEOGRAPHIC INDICATIONS 50-51 (2006); DANIELE GIOVANNUCCI ET AL., INT’L TRADE CTR., GUIDE TO GEOGRAPHICAL INDICATIONS: LINKING PRODUCTS AND THEIR ORIGINS 16 (2009), available at <http://www.intracen.org/policy/geographical-indications/>. Compare the proposed U.S. language with proposed language for the EU-ASEAN FTA, which provides for “legal provisions laying down that registered names . . . (b) is protected against: . . . any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as ‘style,’ ‘type,’ ‘method,’ ‘as produced in’, ‘imitation’ or ‘similar.’” Draft European Union-ASEAN Free Trade Agreement, Intellectual Property Chapter, art. 7(6)(b) (2008) available at <http://www.bilaterals.org/spip.php?article14281>.

<sup>14</sup> Stumberg, *ibid*.

<sup>15</sup> Stumberg, 390. The remedy would be to insert tobacco in the phrase, “products other than wines or spirits”

language, which provides additional avenues of legal protection for intellectual property, and potential challenges to tobacco control measures under the umbrella of protection of geographical indications.

**Box 5 – Draft TPP IP Text**

**{GEOGRAPHICAL INDICATIONS}  
{Section D: Geographical Indications}**

**Article QQ.D.1: {Recognition of Geographical Indications}**

The Parties recognize that [US propose: CL/PE/CA/MX/SG/MY/BN/VN/JP oppose: subject to Article QQ.C.2(1),<sup>61</sup> (*Gls eligible for protection as trademarks*)] geographical indications may be protected through a trademark or sui generis system\* or other legal means.

61 Negotiators' Note: [JP is still considering this issue depending on the outcome of discussions on Article QQ.C.2][AU/NZ: will go with consensus.]

\* a special form of protection regime outside the known framework.

### **Enforcement of IP Protections for Tobacco Companies**

A key means for enforcement of IP protections utilized by the tobacco industry has been through trade provisions related to investment. The draft TPP Investment Chapter, separate from the draft IP Chapter, provides for “Investor-State Dispute Settlement” (ISDS); it empowers foreign investors to directly challenge measures that adversely affect their investments.<sup>16</sup>

Investor rights are distinctly WTO-plus, and the TPPA chapter expands preexisting investment agreements among TPP countries in at least two respects. First, it could provide ISDS where it does not yet exist. For example, Australia is defending against PMI’s investment claim under the Australia-Hong Kong treaty on jurisdictional grounds (in addition to substantive grounds). The TPP chapter could give Philip Morris International (PMI), a U.S. investor, standing to challenge the law of a TPP country; Australia has anticipated that threat by excluding itself from ISDS provisions of the investment chapter.<sup>17</sup>

<sup>16</sup> Ibid, 382-441 – (385-386); Draft Trans-Pacific Partnership Agreement, Investment Chapter (June 2012) [hereinafter Draft TPPA Investment Chapter], available at <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>.

<sup>17</sup> Ibid, 388.

- *Indirect expropriation*—PMI argues that packaging and branding restrictions significantly reduce the value of its trademarks.<sup>18</sup> Annex 12-C of the draft investment chapter states that arbitrators determining whether an action constitutes indirect expropriation can consider “the extent to which the government action interferes with distinct, reasonable investment-backed expectations.”<sup>19</sup> PMI argues that reliance on ability to use its trademarks was reasonable in light of national and international trademark protections.<sup>20</sup>

Phillip Morris (PM) Asia has argued that plain packaging legislation is equivalent to expropriation, by deprivation of PM Asia’s investments in Australia in two ways:

1. “The value of its shares and consequently Phillip Morris Limited (PML), which is heavily dependent upon the ability to use the intellectual property on or in relation to tobacco products and packaging...
  2. “The intellectual property and the goodwill derived from the use of that intellectual property. Loss of commercial use of the intellectual property substantially interferes with PML’s ability to denote the origin of its tobacco products, to differentiate between its own products, and to differentiate its products from those of its competitors and from illicit products. Plain packaging legislation destroys the commercial value of the intellectual property and goodwill.”<sup>21</sup>
- *Fair and Equitable treatment (FET)*—Arbitrators have interpreted FET to entitle foreign investors to a “stable and predictable regulatory environment” that protects their “legitimate expectations” of profit. PMI argues that it expected to continue using established brands and trademarks in packaging to differentiate its products from tobacco as a mere commodity.<sup>22</sup>

Phillip Morris argues that “...plain packaging legislation deprives PML of the intellectual property and its goodwill, effectively reducing it to a manufacturer of an undifferentiated commodity and undermining the economics of its business model...the State cannot justify the imposition of the regulation on the investor [where a regulation has not demonstrable utility to improve public health, violated international law, and effective alternative measures are available (all of which is the case here)]”<sup>23</sup>

The draft Investment Chapter expands investor-state arbitration rights for U.S.-based tobacco companies.

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<sup>18</sup> Stumberg, op.cit. Request for Arbitration, FTR Holdings S.A. v. Uruguay, ICSID Case No. ARB/10/7 (Mar. 26, 2010) [hereinafter Request for Arbitration, FTR], available at [http://www.smoke-free.ca/eng\\_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf](http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf). ¶ 82

<sup>19</sup> Ibid. Draft TPPA Investment Chapter, *supra* note 21, at art. 12.12, Annex 12-C, 4.(a)(ii). This text applies to expropriation claims, not claims asserting a violation of fair and equitable treatment.

<sup>20</sup> Ibid. Notice of Arbitration, Philip Morris Asia Ltd. v. Commonwealth, ¶ 8.3 (Nov. 21, 2011) [hereinafter Notice of Arbitration, PMA], available at: <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf>;

<sup>21</sup> Notice of Arbitration, PMA, *supra* note 19, ¶ 7.3.

<sup>22</sup> Stumberg, op.cit. Request for Arbitration, FTR, *supra* note 17, ¶¶ 84-85.

<sup>23</sup> Notice of Arbitration, PMA, *supra* note 19, ¶ 7.7.

## **Conclusion**

The Intellectual Property and Investment Chapters of TPP potentially threaten tobacco-control measures, and the sovereign ability of nations to protect public health from tobacco-related disease and death.

TPP Partner countries should advance and reach agreement on proposals that promote public health and stem preventable deaths from diseases related to tobacco, by guaranteeing nations' sovereign domestic rights and abilities to adopt or maintain measures to reduce tobacco use and to prevent tobacco-related deaths and diseases:

1. **Exclude tobacco control measures from existing and future trade agreements.**
2. **Do not request or agree to lower tariffs on tobacco leaf or products.**
3. **Remove investor-state dispute settlement (ISDS) provisions; these grant tobacco corporations rights to contest nations' public health and other policies directly for financial damages through the global trade arena.**
4. **Set trade policy through a transparent public process.**