

CPATH ♦ Center for Policy Analysis on Trade and Health

Bringing a Public Health Voice to Trade and Sustainable Development

Public Health Comments

Investment Hearing

Trading Views: Real Debate on Key Issues in the TPP

U.S. House of Representatives Committee on Ways and Means

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Overview

On behalf of the Center for Policy Analysis on Trade and Health (CPATH), we appreciate the opportunity to comment on public health concerns regarding the investment provisions of the Trans-Pacific Partnership Agreement (TPP). The investment chapter includes rules for enforcing the terms of the agreement, including through the Investor-State Dispute Resolution System (ISDS), which has been used to contest a wide range of public health policies. The TPP's proposed "exception" from ISDS disputes in the case of tobacco control measures is limited at best.

Public health measures authorize local, state and national governments to identify, monitor and promote the conditions that achieve and maintain healthy individuals, communities and populations. These range from protection from tobacco and other hazards, to sustainable economic systems that increase income equality, democratic political inclusion and social justice.^{1 2}

Trade agreements establish countries' mutual rights and obligations with regard to trade. Matters of concern to public health include: tariffs; intellectual property rules on access to affordable medicines and to information, copyrights, and advertising; services ranging from banking to health care, water supply, and distribution of alcohol products; government procurement for grants and contracts; agriculture; and internet access and information privacy. These agreements can provide a basis for altering the implementation of domestic U.S. laws and policies, as well as those of our trading partners. Trade rules that advance corporations' ability to operate within uniform and predictable rules can foster sustainable economic development, democracy, and peace. They can also conflict with or subordinate policies that prioritize people's health.

The TPP and other trade deals should safeguard and improve the economic well-being of Americans and our trading partners, promote the health of our communities, and advance economically and socially just, democratically controlled, and environmentally sustainable outcomes.

¹Institute of Medicine. The future of public health in the 21st century. National Academies Press, Washington, DC. November, 2002. <http://www.iom.edu/Object.File/Master/4/165/0.pdf>

²World Health Organization. Constitution of the World Health Organization.

Rather, the TPP prioritizes commercial gain at the expense of people's health, including protection from deadly tobacco products, and undermines democratic sovereignty to make decisions to safeguard and improve our health. It expands the rights of transnational corporations to protect their profits over the rights of democratically elected governments and the public. These include the right to challenge the implementation of domestic laws and regulations in international trade tribunals.

Previous trade agreements have prohibited parallel importation (reimportation of pharmaceuticals to increase their affordability)³, and weakened the ability of local, state and national governments' procurement contracts to specify standards for medical and financial privacy, quality and performance, local economic development, and environmental protection.

Congress can't amend the TPP, but can only vote yes or no on the whole package, due to "Fast Track" rules. The text on tobacco control and other key public health concerns therefore requires particularly careful analysis. These concerns are also relevant to other complex, multi-national trade agreements being negotiated by the U.S. Trade Representative (USTR), including the Transatlantic Trade and Investment Partnership (TTIP) with the European Union, and the Trade in Services Agreement (TISA).

Investor-State Dispute Resolution

Trade agreements negotiated by the United States with other nations provide foreign governments and corporations with internationally enforceable rights. These rights increasingly supersede the rights and ability of domestic governments at the local, state and federal levels to regulate in the interests of the public and of public health.

State-to-state disputes arising from World Trade Organization (WTO) agreements are enforced by financial fines and trade sanctions in the case of violations. For this reason, they have proven to be the most effectively enforced international agreements. The WTO is set as the unequivocal arbiter of trade rules for its 162 member countries. Countries that believe their companies are being barred from trade by another country for reasons that violate WTO rules can file a dispute with the WTO. Disputes among nations are resolved by panels appointed by the WTO. The panels are not accountable to national governments or courts. The panels can authorize countries to impose trade sanctions, financial penalties and the boycott of products against other countries, as compensation for violations or for failure to comply with trade panel decisions.

Nations have successfully brought challenges before trade tribunals claiming that public health measures violate trade rules. Health and quality standards and labeling requirements have sometimes been construed by the WTO as barriers to trade. From a public health perspective, standards for labeling genetically modified foods or protecting dolphins from becoming snared in commercial fishing nets are important protections for human and animal health, and the environment. But businesses have asserted that these standards constitute barriers to trade.

Chapter 11 of NAFTA provides an "investors' rights" provision that allows individual foreign corporations (referred to as investors) to directly sue any of the three participating national

³ Australia-U.S. Free Trade Agreement, Article 17.9.4.

http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf.

governments. Companies can sue for the loss of current or future profits, even if the loss is caused by a government agency's prohibiting the use of a toxic substance. Prior to NAFTA, regional trade agreements only permitted country-to-country enforcement by governments. This was a major elevation of the rights of corporations, and an important blow to national sovereignty. Subsequent regional and bilateral agreements negotiated by the US include this investor's rights provision. Objections by the Intergovernmental Policy Advisory Committee to the USTR, composed of state and local public officials, contributed to keeping this provision out of the U.S.-Australia Free Trade Agreement.

The tobacco industry has used both WTO country-to-country dispute procedures, and investor-state mechanisms, to protest and delay tobacco control measures including graphic warning labels and plain packaging.

The following investor-state trade dispute cases illustrate the negative implications for health. As is typical of such cases, the health argument did not substantially prevail. The Methanex case, an exception, nevertheless extended exposure to a known health hazard:

- **Closure of a Toxic Waste Disposal Site**

In a landmark environmental case filed under NAFTA Chapter 11, a NAFTA tribunal awarded the U.S.-based Metalclad Company \$16.7 million in its suit against Mexico. The state of San Luis Potosí had refused permission for Metalclad to re-open a waste disposal facility, in the face of a geological audit showing the facility would contaminate the local water supply and resulting opposition by the local community. Metalclad claimed that this local decision constituted an expropriation of its future potential profits and successfully sued Mexico.

- **Eliminating Toxic Gasoline Additive**

The Methanex Corporation of Canada sued the United States for approximately \$1 billion, because the state of California banned the use of methyl tertiary butyl ether (MTBE), a gasoline additive. Though introduced to reduce air pollution, MTBE was found to be carcinogenic when it leaked into the water supply. Methanex produces methanol, a component of MTBE. Methanex ultimately lost its case, because the trade panel cast doubt on whether the state intended to discriminate against Methanex as a foreign corporation. However, due in part to the possible sanctions resulting from this case, MTBE remained in use within California for years as the case proceeded. The U.S. Dept. of Justice spent countless hours defending the case. Other states were meanwhile chilled from taking protective measure on MTBE.

Tobacco Control and Protection of Public Health

Tobacco use continues to be the leading preventable cause of death in the United States and worldwide, and is the only legal substance that, when used as intended, kills people, causing 6.3 million deaths a year.⁴ Cigarette smoking is responsible for about one in five deaths annually⁵ and a major contributor to the global pandemic of tobacco-related non-communicable diseases.

⁴ 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.

⁵ 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

Countries continue to tackle this public health crisis with sound policies supported by a robust body of scientific evidence designed to curb smoking and combat deceptive industry practices. Such regulations include bans on flavored cigarettes, increases in tobacco taxation, restrictions on tobacco advertisements, and placement of graphic warning labels on cigarette packages. Each has been contested in recent trade agreements and by trade-related challenges. Tobacco companies have accelerated their use of trade rules to attempt to delay and reverse tobacco control measures in the U.S., Australia, Uruguay, and Norway.⁶

U.S. bilateral agreements with Singapore and Peru also eliminated tariffs on tobacco and tobacco products.

The Doggett Amendment to the Foreign Service Act, passed by Congress in 1997, banned the use of government monies from the Commerce, Justice, and State Departments to promote the sale or export of tobacco overseas or to seek the removal of any nondiscriminatory foreign-country restrictions on tobacco marketing. However, it is subject to annual renewal, and compliance is up to the USTR and other Agencies. Unfortunately, the Doggett Amendment has not been honored since 2001. The U.S. has negotiated eliminating tariffs on tobacco products as well as leaf in bilateral and regional agreements, including the U.S. Singapore Agreement, CAFTA, and now the TPP. It is time for a change.

According to the Pan American Health Organization: “Transnational tobacco companies... have been among the strongest proponents of tariff reduction and open markets. Trade openness is linked to tobacco consumption.”⁷

Tobacco Industry Challenges

The industry has exercised trade rights in order to challenge and undermine the authority of the U.S. Food and Drug Administration (FDA) Center for Tobacco Products to oversee and regulate tobacco products, and to ensure compliance with the Family Smoking Prevention and Tobacco Control Act of 2009.

Curtailing these loopholes is a priority for securing and expanding measures at the local and state levels to reduce environmental exposure to the toxic effects of tobacco smoke and residue, and to regulate nicotine and tobacco products.

In the U.S.: The Family Smoking Prevention and Tobacco Control Act of 2009 banned the sale of certain flavored cigarettes. This provision was enacted to reduce teen smoking, given evidence that youth smokers are more than three times more likely to smoke flavored cigarettes as adults. One year later, Indonesia—the world’s largest producer of clove cigarettes—alleged that the law was inconsistent with U.S. trade obligations under the WTO’s 1994 General Agreement on Trade and

Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2010.

⁶ Sud S, Brenner JB, Shaffer ER. [Commentary](#): Trading Away Health: The Influence of Trade Policy on Youth Tobacco Control. *Journal of Pediatrics*. Online: Feb. 10, 2015. DOI: <http://dx.doi.org/10.1016/j.jpeds.2015.01.016>

⁷ D. Woodward, N. Drager, R. Beaglehole, D. Lipson. Trade in Health Services: Global, Regional and Country Perspectives.

Tariffs (GATT). GATT mandates that member nations cannot discriminate between “like products”, and since the U.S. law did not prohibit the sale of menthol cigarettes, Indonesia declared that the law was unfair and biased.

In April 2012, a WTO dispute settlement panel ruled in favor of Indonesia, agreeing that menthol cigarettes are “like” clove cigarettes, and that the United States violated provisions of the General Agreement on Tariffs and Trade (GATT) by discriminating between the two products. The U.S. had to decide among several options to comply with the ruling: (a) revise the Family Smoking Prevention and Tobacco Control Act to also ban the sale of menthol cigarettes; (b) revise the law to permit the sale of clove cigarettes; (c) pay a fine to Indonesia equaling the amount of trade lost, estimated at \$16 million per year; or (d) yield trade concessions to Indonesia for other goods or services.

In 2006, tobacco control legislation in Uruguay mandated: increasing warning labels from 50% to 80% of cigarette packages; placement of one of six selected health images on every package; and prohibiting the use of “brand families.” in which the same brand name is used across multiple product lines (e.g., Marlboro Red, Marlboro Green, etc.). In the years after enactment of these anti-smoking laws, 30-day prevalence rates of tobacco use among adolescents decreased by 8% annually, and per person cigarette consumption decreased by 4.3% annually.

In 2010, however, the Swiss operational hub of Phillip Morris filed suit at the World Bank, claiming that the government’s regulations violate a 1991 bilateral investment treaty between Uruguay and Switzerland, which granted internationally enforceable rights to corporations to file trade charges directly against a nation. The Swiss-based PM contends that Uruguayan policies intrude upon PM’s intellectual property rights and exceed that which is reasonable to protect the public’s health. Per the terms of the 1991 trade agreement, the dispute is being arbitrated by a tribunal of international trade experts housed at the World Bank, who ruled in July 2013 that it had jurisdiction to hear the case.

Through existing bilateral and regional trade agreements, to which the United States is a partner, PMI could challenge a host of tobacco control efforts in California, such as: reducing exposure to second-hand smoke, clean indoor air rules; restrictions on retail distribution networks for tobacco products; and advertising, promotion, sponsorship, and marketing restrictions.

In addition, the industry is actively contesting at every level of jurisdiction the right to enact and implement graphic warning labels and other marketing restrictions. A court ruling on July 11, 2012, overturned a New York City law requiring graphic warning labels. The Philip Morris attorney commented that the power to regulate is reserved to the federal government. But four of the five largest U.S. tobacco companies are suing the federal government saying the warnings violate their free speech rights. Tobacco industry use of trade rules to challenge federal authority to ensure compliance with the Tobacco Control Act of 2009 could have a significantly adverse effect on states.

In 2013, Australia’s highest court upheld Australia's cigarette plain-packaging laws that will require tobacco companies to remove branding and sell tobacco products in generic green packets. The High Court rejected a legal challenge by tobacco companies which argued that the value of their trademarks would be destroyed if they could no longer display their distinctive colors, brand designs and logos on packs of cigarettes. The issue of plain-packaging, however, is being challenged at the international level through intellectual property and other trade rules in existing trade agreements.

Tobacco control efforts at the state and local levels in the U.S. are vulnerable to tobacco industry challenges under existing trade rules.

Trans-Pacific Partnership Agreement The Trans-Pacific Partnership Agreement (TPP) provided a critical opportunity to curtail these actions by the tobacco industry and to reduce tobacco-related deaths. Local, state, and national decision-makers joined in public statements by public health and medical associations delineating the threats of TPP provisions to tobacco control measures, and calling to carve out tobacco and tobacco control measures from the entire web of provisions that have ensnared tobacco control measures through the jurisdiction of trade agreements.

This carve-out demand was tabled formally to the TPP by the Malaysian trade delegation. The USTR responded by circulating two complex but widely discredited alternative proposals. Neither the full carve-out, nor either US proposal, appears in the final TPP.

The "Exception" for Tobacco Control Is Flawed

The Exceptions chapter of the TPP, in 29.5, states that any single TPP country could individually elect to opt out of having its tobacco control laws and regulations subjected to ISDS trade challenges by corporations.

Despite claims to the contrary, this does not conclusively protect nations' tobacco control measures from trade challenges by tobacco companies. Nor would it necessarily prevent the types of cases Uruguay and Australia are facing. There are serious loopholes, though they are different from the loopholes evident in earlier proposed schemes.

Why is this the case? Like the product it sells, the tobacco industry has learned to inflict damage on the public's health by using the corporate dispute mechanisms in trade agreements exactly as intended.

Setting up the protection as an election for individual countries leaves the door open to back-door pressure by the tobacco industry and chambers of commerce to allow ISDS cases to proceed.

Rather than acting as a group of 12 nations to exclude tobacco companies from using ISDS, each country would have to muster the political will to take on the tobacco industry's clout and message machine, and make it a priority for officials to decide to "opt out" of the trade dispute system in the case of tobacco control rules. In practice this is an open invitation to Big Tobacco to sharpen its arrows to ensure that no country executes the election to safeguard public health and protect tobacco control measures.

In addition, many tobacco control measures are promulgated by local and state officials and legislatures. These bodies would have no role or authority in the face of an ISDS challenge. No recourse would be available to state and local officials or the public in the event of an unpopular decision at the federal/national level not to exercise the "election to deny" a tobacco-related trade challenge.

Further, if a country elects to deny the use of the TPP's trade dispute mechanism in the face of a threatened challenge to a particular tobacco control measure, the election itself could be construed as

tantamount to an admission that the country's measure does in fact violate a trade rule in some way. This could then strengthen the basis for a tobacco company charge through another agreement that includes a corporate investor-state dispute system, or a state-to-state charge through a WTO agreement.

This is a realistic picture of some of the flaws in the TPP's hastily drafted exception provision.

On the positive side, the description of tobacco control measures covered appears to be close to comprehensive, and offers a good basis for discussion for a future proposal linked to an actionable implementation mechanism.

Other Tobacco-Related Provisions

Regarding other tobacco-related provisions in the TPP, we note these comments by Action on Smoking and Health:

"Tariffs: Tobacco is treated like any other product in terms of tariff reduction. For the most part, this means that tobacco tariffs are reduced to zero, which produces a windfall of tobacco profits—unless there is a later compensating increase in domestic excise taxes. This explicit promotion of tobacco exports appears to violate the Doggett Amendment, a congressional limit on authority of U.S. agencies to promote tobacco sales.

"Other chapters: Tobacco is still treated like other products in the rest of the TPP, which signals that governments are still not recognizing that tobacco is unique in international trade (we want less, not more, and these same governments have agreed to this in the FCTC and other international instruments, such as the SDGs and the NCD summit). The failure to approve the full exemption will have consequences for tobacco control. For example, the chapter on regulatory coherence requires Parties to set up mechanisms for "interested persons" to provide input into regulatory oversight. This creates a direct conflict of law with FCTC Article 5.3, which requires Parties (11 of whom are also TPP Parties) to limit government interaction with the tobacco industry."

Conclusions: Promote Democratic, Transparent, and Accountable Trade Agreements

In order to advance the promises of the 21st century for sustainable technological and economic development policies that protect and promote health, CPATH recommends the following Public Health Objectives for Global Trade Agreements:

Public Health Objectives for U.S. Global Trade Agreements

1. **Assure democratic participation by public health and transparency in trade policy:**
 - a. Open all proceedings and documents of trade negotiations and trade advisory committees to the public; and
 - b. Appoint to all three tiers of trade advisory committees representatives of organizations that work to assure equitable access to affordable health-related services and products, and promote the health of individuals, communities and populations, who can provide formal advice to USTR from the public health and health care community to USTR; and
 - c. USTR to consult with all relevant committees of the House and Senate in the development, negotiation, implementation, and administration of trade and negotiating objectives.
2. **Develop mutually beneficial trade relationships with trade partners that create sustainable economic development** in an increasingly interdependent world.

3. **Recognize the legitimate exercise of national, regional and local government sovereignty to protect population health**, and ensure that countries do not weaken or reduce, as an encouragement for trade, sound policies that contribute to health and well-being and democracy, including laws on public health, the environment, labor, food safety, human rights and internet freedom.
4. **Exclude tariff and nontariff provisions that address vital human services** such as health care, water supply and sanitation, food safety and supply, and education, including licensing and cross-border movement of personnel in these fields.
5. **Exclude tobacco and tobacco products**, which are lethal, and for which the public health goal is to reduce consumption, from tariff and nontariff provisions of the TPP, including advertising, labeling, product regulation and distribution.
6. **Exclude alcohol products**, which present serious hazards to public health. Policies designed to reduce the harm caused by alcohol products should not be subject to compromise in exchange for other trade benefits.
7. **Eliminate intellectual property provisions related to pharmaceuticals from the TPP, and from TTIP negotiations**, as these are more appropriately addressed in multilateral fora, **and promote trade provisions which enable countries to exercise all flexibilities provided by the Doha Declaration on Public Health**, including issuing compulsory licenses for patented pharmaceuticals, parallel importation, and other measures that address high prices and promote access to affordable medicines.