

Call to Action: Fix the Fatal Flaws in U.S. Trade Policy on Tobacco

Tobacco use is the leading preventable cause of death worldwide, and a drain on national coffers. Elected officials and public health authorities are increasingly adopting evidence-based tobacco control measures that are proven to reduce initiation by young people, and to help smokers who are already addicted to quit. In response, the tobacco industry has seized on complex rules governing international trade to challenge these measures. Tobacco control advocates are calling for removing tobacco, tobacco products and tobacco control measures from the jurisdiction of trade agreements.

The Obama Administration has announced an admirable and historic intention to shape a trade policy that recognizes and contains the uniquely deadly effects of tobacco. But **their proposal as described below offers no meaningful change from the status quo.** It will not stop the tobacco industry from using trade rules to delay or reverse the implementation of tobacco control measures. **The medical and public health community must continue to exercise the scientific and moral authority, and the collective voice, to transform this gesture into an effective trade policy that will protect lives, by carving out tobacco from trade agreements.**

The U.S. Trade Representative (USTR) has not released the actual text of this proposal. The U.S. does not reveal any trade proposals for public review and debate until just before they are presented to Congress for a vote. Drafts are presented in closed-door meetings with "cleared" advisors who are sworn to hold all information confidentially. Most advisers represent industries, including tobacco. Even most members of Congress are excluded from this club. This is an undemocratic and nontransparent process. Establishing trade policy through a system based on the equivalent of secret handshakes became dysfunctional long ago on issues like trade in cars and rice. It is indefensible in the case of tobacco control, an internationally significant public health concern. An open, multi-year process led to the creation of the Framework Convention on Tobacco Control (FCTC). It is time to resume the important public discussion on reconciling trade rules with the increasingly popular FCTC. As a first step, **USTR should release the text of this proposal.**

Trade Agreements Threaten Tobacco Control and Public Health

The examples below note how trade agreements act as barriers to effective measures that reduce tobacco use: tariffs to raise prices on cigarettes; banning flavored tobacco products; and restricting marketing through plain packaging, and publishing graphic warning labels and toll-free quit lines on packages.

Tariffs raise prices and discourage consumption. Since 2002, every U.S. trade agreement has eliminated tobacco tariffs in partner countries, making them cheaper and more accessible.

Ban on products. This year Indonesia successfully challenged a U.S. ban on clove cigarettes, as well as several other flavors, though not menthols. Indonesia, as the major country of origin for clove cigarettes, claimed a violation of the World Trade Organization (WTO) rule that products and services must be treated equally, regardless of the country of origin. The ruling exemplifies the inadequacy of WTO standards and tribunals to supplant the democratic processes required to protect public health.

Plain packaging. Bilateral and regional trade agreements now include "investor-state" provisions that grant legal rights to private corporations to file trade challenges against governments for financial damages for a range of alleged infractions. The "investor-state" rule was first adopted in 1994 under NAFTA. Tobacco companies are now directly challenging plain packaging plans in Australia and Uruguay, claiming that these violate trademark rights under trade agreements, even though the measures apply equally to products from all countries. The tobacco industry's trade charges, while poorly substantiated, are disrupting implementation of plain packaging, and in the past have chilled such programs entirely.

Trans Pacific Partnership: An Historic Opportunity to Advance Health

The U.S. proposes to introduce a new policy on tobacco in current negotiations on the Trans Pacific Partnership (TPP) Agreement, a major trade pact with 9 Pacific Rim nations in South America and Asia. These countries include Australia and others in the forefront of implementing tobacco controls. The next round of talks is scheduled for May 8 - 16, 2012, in Dallas, Texas.

The USTR's office has offered to discuss and describe the proposed new policy with interested stakeholders. The following analysis is based on a verbal description of the Administration's proposal provided to CPATH and colleagues by the Assistant USTR for the TPP negotiations, Barbara Weisel, in response to CPATH's request. Our comments follow each proposal.

1. The U.S. recognizes the unique status of tobacco products, as enshrined in the 2009 Family Smoking Prevention and Tobacco Control Act, and articulated in the emerging international consensus.

Comment: This is an accurate statement, but not a change in policy.

2. The U.S. will continue to seek to eliminate tariffs on tobacco and tobacco products, as it has in the past. However it will accept countries' proposals for the timetable to phase out their own tariffs.

Comment: This represents no substantive change in current trade policy. Eliminating tobacco tariffs will continue to make tobacco products cheaper and more accessible.

3. Existing trade agreements offer a "general exception" to some trade rules, that state governments can adopt regulations that are necessary to protect public health. **The new policy would add the ability to adopt regulations that impose nondiscriminatory restrictions on tobacco products specifically, that are required to protect the public's health.** This protection however **does not apply** to trade rules requiring **national treatment** (equal treatment of foreign and domestic products), **transparency** (requirements to reveal and allow extensive scrutiny of regulations, including by affected industries), or **expropriation** (protection from loss of future profits, for reasons that can include public health protections).

Comments:

a. Existing "General Exceptions" Have Failed to Protect Public Health: Existing "general exceptions" in trade agreements already state that countries can enact measures necessary to protect public health. As presented, the proposed exception for tobacco regulations does not appear to add any value. In addition, there are serious shortcomings to such general exceptions.

Article XX of the General Agreement on Tariffs and Trade (GATT), for example, purports to permit measures that protect human, animal or plant life or health, language very similar to that proposed by the

USTR. But it states two exceptions that have proven fatal in almost every trade challenge: The measure must be "**necessary**," and it **must not be discriminatory** or a **disguised restriction on trade**. In case after case, this language has proven vulnerable to aggressive charges that a given public health regulation was not "necessary." Trade tribunals routinely assert that if any hypothetical alternative remedy could be imagined, the actual hard-fought existing policy in question is not necessary, and thus is a violation of the trade agreement. (The policy described to CPATH used the word "required" rather than "necessary." This is not likely a significant distinction.)

In addition, there are important tobacco measures, such as limits or bans on advertising and certain trademarks, that are intended to be trade-restrictive.

Thailand's tobacco tariffs failed to meet either Article XX test in a 1990 trade charge by the U.S., resulting in increased rates of smoking and related deaths.

b. Excludes Actions By Legislatures: The language is intended to provide a "safe harbor" if a government has identified measures determined by a public health agency or authority through a science-based process. This is intended to protect regulations promulgated by public health authorities, but could exclude actions by legislatures. For example, the 2009 Tobacco Control Act might not be protected from trade challenges, though subsequent regulations promulgated by the FDA could be protected.

c. Would Not Preclude Trade Charges Against Tobacco Control Measures: When asked if this new language would preclude the ability of corporations or countries to file trade charges against tobacco control measures, Ms. Weisel stated that it would not, but would make it difficult for them to prevail, in the view of the USTR General Counsel and the HHS General Counsel on this issue.

Tobacco Must Be Carved Out

Recognizing and naming tobacco as a special case in the context of trade policy is an important rhetorical step in the right direction. **The Administration** deserves encouragement to take a substantive policy position that clearly offers an effective remedy. It **should join with medicine and public health, and responsible corporate leaders in other sectors, to remove tobacco, tobacco products, and tobacco control measures from the jurisdiction of trade agreements**. In addition, it should **eliminate "investor-state" provisions** that authorize corporations to challenge nations' laws and regulations.

