

The TPP Exception for Tobacco: A Step Forward?

Ellen R. Shaffer, PhD MPH
Joseph Brenner, MA

CPATH
Center for Policy Analysis on Trade and Health

UCDC Forum June 8, 2012

Outline

CPATH

- Tobacco: Deadly, Addictive and Profitable
- Framework Convention on Tobacco Control: Countries' Tobacco Controls
- Trade Rules Intervene
- USTR Proposal

Prof. Benn McGrady: How It Works Now

Prof. Robert Stumberg: Critique of Proposal

CPATH Mission

Research, analysis and advocacy
to advance global economic policies
that improve and protect public
health

CPATH On Tobacco and Trade

- Shaffer, ER, JE Brenner and TPHouston. International trade agreements: a threat to tobacco control policy. *Tobacco Control* 2005;14;19-25.
- Shaffer, ER, H Waitzkin, J Brenner, R Jasso-Aguilar. Global Trade and Public Health. *American Journal of Public Health*. January, 2005

The TPP: Trans Pacific Partnership

- Global trade talks deadlocked (WTO)
- Regional: U.S., New Zealand, Australia, Brunei, Chile, Malaysia, Peru, Singapore, and Vietnam.
- Japan, Canada and Mexico - ?
- All 9 partners have signed the Framework Convention on Tobacco Control (FCTC); all but the U.S. have ratified it.

TPP and Tobacco Control

- The USTR announced it would present an exception for tobacco products and tobacco control measures in advance of a negotiating round for the Trans Pacific Partnership (TPP) in May, 2012

Does It Help?

Tobacco: Leading Preventable Cause of Death

- Annual death toll
 - Worldwide: 5.2 million
 - U.S.: more than 400,000

Use of Tobacco Products:

- Chile - 29% of population
- Singapore – 15% of population, up from 12.6%
- Vietnam – 18% of population, down from 25%

Teen Smoking: U.S.

- “About 30% of youth smokers will continue smoking and die early from a smoking-related disease.”
- “People who start smoking before the age of 21 have the hardest time quitting.”

”

-Centers for Disease Control & Prevention



But

- Addictive

- Profitable

No additives in our tobacco
does **NOT** mean a safer cigarette.

Winston Lights Box

9 mg "tar", 0.7 mg nicotine av.
per cigarette by FTC method.

**YEAH, I HAVE
A TATTOO.
AND NO,
YOU CAN'T
SEE IT.**



NO BULL



SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.





Framework Convention on Tobacco Control

“to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”

- Establishes minimum standards in the areas of
 - tobacco demand reduction
 - passive smoking
 - packaging and labeling
 - health awareness
 - advertising
 - sale to minors
 - smuggling

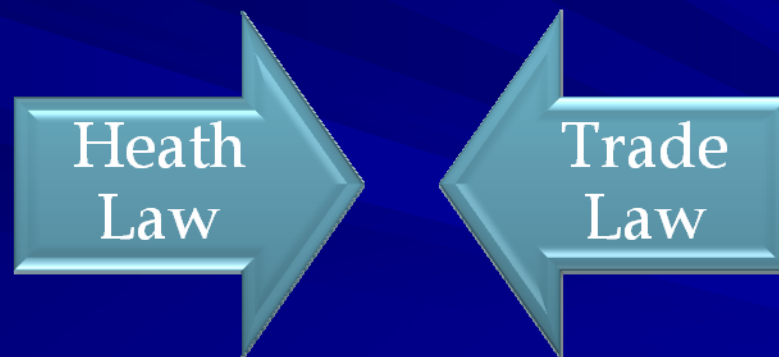


Countries Are Enacting Protections ~ But Facing Trade Disputes

- Graphic warning labels: Uruguay, (US)
- Plain packaging: Australia
- Ban on point-of-sale displays: Norway, Ireland
- Ban on flavored cigarettes: US

Opposition from Big Tobacco

- Trade agreements offer vehicle to contest domestic laws and regulations, where internal opposition fails

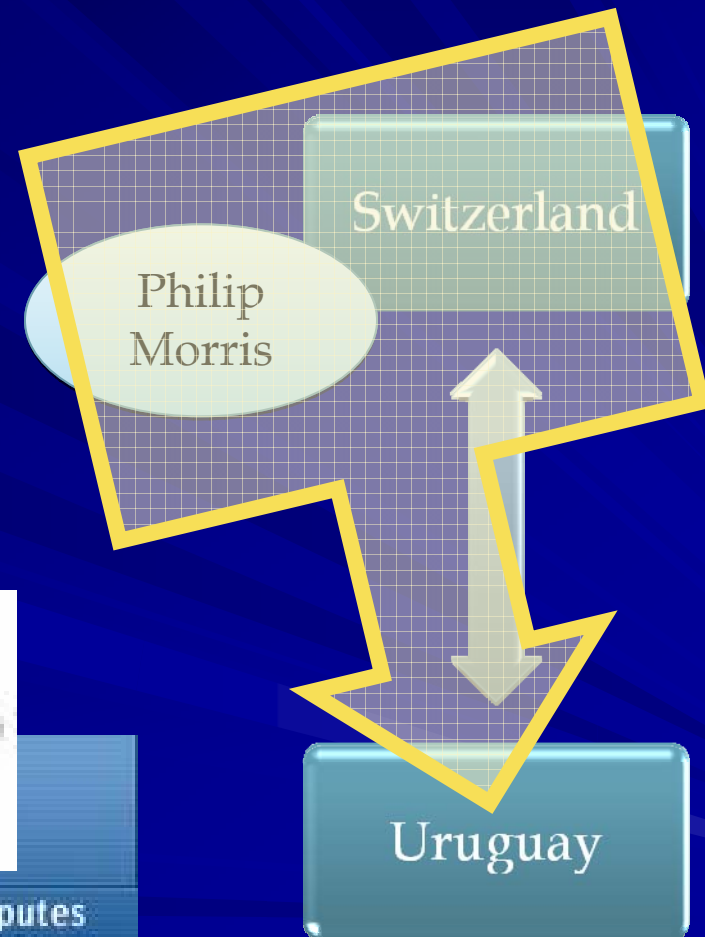


- At stake: the ability of sovereign states to safeguard the health of their own citizens.

Trade Agreements

- Bilateral
- Multilateral (e.g., NAFTA)
- International (e.g., TRIPS)

Investor-State Claim Expropriation



Grounds for Trade Claim: Is the Measure...

- Necessary to protect health
- Least trade-restrictive possible
- A disguised discrimination against another country's products or services
- Based on scientific evidence
- Based on scientific proof of the risk of the regulated product or service
- Expropriation of a company's expected profits

Effects of Trade Claims

- Delay or chill implementation of tobacco control measures
- Defense can be costly to governments
- Inconsistent dispute panel rulings - hard for governments to act with certainty



Canadian Cigarette Label

Tobacco Control in Uruguay



Tabaré Vázquez, MD (2005-2010)

- 2009 Uruguayan Tobacco Control Measures
- Increase health messaging on the bottom portion of cigarette packages from 50% to 80%,
- Mandate the placement of one of six selected health images on packages.
- Prohibit the use of “brand families” in which the same brand name is used across various across product lines (e.g., Marlboro Red, Marlboro Green, Marlboro Gold, etc).



<i>Lawsuit</i>	Philip Morris v Uruguay
<i>Background</i>	In June 2009, Uruguayan government passed legislation to place larger pictorial warnings on cigarette packages and prohibit the use of “brand families.”
<i>Basis of lawsuit</i>	Infringement on intellectual property without compensation
<i>Trade Agreement</i>	1991 Uruguay-Switzerland Bilateral Investment Treaty
<i>Court of Arbitration</i>	International Centre for the Settlement of Investment Disputes (ICSID)
<i>Status</i>	Currently undergoing procedural matters (e.g., jurisdiction)

Australia

CAUSES OF DEATH IN AUSTRALIA*



**SMOKING -
A LEADING
CAUSE OF
DEATH**

Health Authority Warning

SMOKING - A LEADING CAUSE OF DEATH

Health Authority Warning

CAUSES OF DEATH IN AUSTRALIA*



**Quitline
131 848**

Smoking causes more deaths than murder, illegal drugs, motor vehicle accidents and alcohol combined. Smokers not only live shorter lives, they also live more years with disabling health problems.

You CAN quit smoking. Call Quitline 131 848, talk to your doctor or pharmacist, or visit www.quitnow.info.au

* Source: ABS Quantification of drug caused mortality and morbidity in Australia, 1996 and ABS Causes of Death, 1996

Brand Name

<i>Lawsuit</i>	Philip Morris v Australia
<i>Background</i>	November 2011 legislation mandating uniform cigarette packaging, with brand names listed at the bottom, and with color, pictorial warnings covering the rest of the carton.
<i>Basis of lawsuit</i>	Infringement on intellectual property without compensation
<i>Trade Agreement</i>	1993 Australia-Hong Kong Bilateral Investment Treaty
<i>Court of Arbitration</i>	United Nations Commission on International Trade Law
<i>Status</i>	Currently debating the merits and jurisdiction of the lawsuit

US Ban on Flavored Cigarettes

- Cloves and other flavors banned
 - Tobacco Act 2009
 - FDA regulations
- Menthol not banned
- Indonesia claimed discrimination at WTO
- Trade panel upheld Indonesia

Expanding Rights: Corps. Vs. Countries

- Companies (investors) can bring trade charges against countries through BITs, bilateral and regional agreements
- No discrimination based on country of origin
- But: New agreements can give new rights: Corps. Can demand equal and better treatment

Expanding Corp. Rights

- Only countries can bring charges for WTO-level agreements – TRIPS, GATS
- PMI charge reaches around to claim right to litigate TRIPS

Expanding Corporate Rights to Arbitrate TRIPS

- PMI claim: Uruguay violates fair & equitable treatment and WTO/TRIPS obligations
 - Under the BIT's umbrella clause –
 - Uruguay must “observe the commitments it has entered into with respect to the investments of Swiss investors.”
- Commitments include obligations under TRIPS

Expanding Corporate Rights

- **Most Favored Nation (MFN)** and other clauses are designed to incorporate obligations from outside of the agreement, including from BITs. These include:
- Minimum standard of treatment (fair and equitable treatment): Ensure compliance with **customary international law (CIL)**
- International law clauses: Ensure treatment “in accordance with international law” – not limited to CIL.
- Umbrella clauses: Observe “any obligation” with regard to investments.
- **More favorable treatment** clauses: If another agreement between the parties provides “more favorable treatment” of investments, it will prevail.
- **Most-favored nation treatment**: Ensure the most favorable treatment provided to investors from any third country. - *Analysis by Harrison Institute*

Possible Violations: Plain Packaging

International Trade Law and Tobacco Control, Prof. Jane Kelsey

<http://www.cpath.org/sitebuildercontent/sitebuilderfiles/jkelseyfinalreportjktobacco.pdf>

Possible trade or investment claims

Lacks scientific proof and/or not least trade-restrictive measure

to achieve the objective

Interferes with use of trademarks

Interferes with use of trademarks

Trade or investment rule

Technical barrier to trade

Intellectual property

Investment

Agreements

TBT/FTIAs/
TPPA

TRIPS/FTIAs
/TPPA

BITs/FTIAs/
TPPA

Other Vulnerable Policies

Mandatory plain packaging
Ban on use of misleading terms
Enhanced high impact
warnings on packaging
Regulation of nicotine content
Control of constituents such as
flavors
Guidelines to stop industry
interference in policy
Annual reductions in imported
tobacco / tobacco retail outlets
Smoke-free cars or zones

Registration as pre-condition
to distribute
Disclosure of import volumes
Ban on duty free sales
Large annual increases in
tobacco tax
Fund tobacco control
policies by tax or levy
Public reporting of elements
of tobacco
Stronger disclosure of
additives

Major medical and public health
associations in U.S. and worldwide
support tobacco carve out

AAFP, AAP, ACP, ACPM, ACOG,
AMA, AMSA, ASAM, CPATH

to Congress, 12/11 <http://www.cpath.org/id47.html>

USTR Response

- US Trade Representative: carve out -
Slippery slope
- But: Can take effective measures to limit
damage

USTR Proposal - 1

<http://www.ustr.gov/about-us/press-office/fact-sheets/2012/may/tpo-tobacco-proposal>

■ TPP TOBACCO PROPOSAL

- We are currently consulting with stakeholders and Congress on our draft proposal. Below is a detailed summary of the current draft proposal, which we have prepared in order to facilitate meaningful engagement on its contents. The draft proposal has three elements:
- It would explicitly recognize the unique status of tobacco products from a health and regulatory perspective.

Tariffs Still Phased Out - USTR 2

- As in the past, the proposal would make tobacco products (like other products) subject to tariff phase-outs, thus avoiding putting U.S. tobacco products at a competitive disadvantage and avoiding a precedent for excluding tobacco or other products from future U.S. tariff negotiations. The United States will engage in discussions regarding the elimination of tariffs and tariff rate quotas with the four countries with which the United States is negotiating bilaterally—Brunei, Malaysia, New Zealand and Vietnam. Tariffs and tariff rate quotas on tobacco and tobacco product trade with Australia, Chile, Peru and Singapore have already been eliminated or are being phased out under the provisions of our existing bilateral FTAs with those countries.

Regulatory Protection? – USTR 3

- The proposal would include language in the “general exceptions” chapter that allows health authorities in TPP governments to adopt regulations that impose **origin-neutral, science-based restrictions** on specific tobacco products/classes in order to safeguard public health. This language will create a safe harbor for FDA tobacco regulation, providing greater certainty that the provisions in the TPP will not be used in a manner that would prevent FDA from taking the sorts of incremental regulatory actions that are necessary to effectively implement the Tobacco Control Act, **while retaining important trade disciplines (national treatment, compensation for expropriations, and transparency)** on tobacco measures.

Concerns with USTR Proposal

- Text Not Public
- Would proposal effectively discourage trade claims?
- Covers regulations, not laws
 - Subnational?
 - Range of regulatory bodies?
- Self-judging standards?
- Evidence/science barriers?

Effective Remedies

- Carve out tobacco trade and other industries that pose extraordinary threats to public health, food security, the environment, and public order

Remedy 1. Tobacco Control

- **Tariff and Nontariff Provisions:** Exclude tobacco products from all trade rules and in each relevant Schedule and Annex, including but not limited to Market Access, Most Favored Nation, National Treatment, Services, Intellectual Property, and tariff reduction schedules.

Remedy 2. Tobacco Control

- Notwithstanding any language to the contrary, nothing in this agreement shall block, impede, restrict, or modify the ability of any party to take or maintain any action, relating to manufactured tobacco products that is intended or expected, according to the party, to prevent or reduce tobacco use or its harms and costs or that is reasonably likely to prevent or reduce tobacco use or its harms, including tariffs and restrictions on the marketing of tobacco or tobacco products.

Remedy 3. Tobacco Control

- Add: Provisions of the Framework Convention on Tobacco Control shall govern, in the event of any conflict with this Agreement

Remedies: Dispute Rules (Investor-State)

- Exclude investor-state remedies – as in the Australia-US FTA.
- Limit MFN treatment – without it, TPPA carve-outs and other reforms can be undermined by investor recourse to more favorable provisions of older FTAs and investment agreements.

Public Health Objectives for Global Trade

- 1. To assure democratic participation by public health and transparency in trade policy**
- 2. To develop mutually beneficial trade relationships that create sustainable economic development**
- 3. To recognize the legitimate exercise of national, regional and local government sovereignty to protect population health**

Public Health Objectives for Global Trade

4. To exclude tariff and nontariff provisions in trade agreements that address vital human services
5. To exclude tobacco and tobacco products
6. To exclude alcohol products
7. To eliminate intellectual property provisions related to pharmaceuticals from bilateral and regional negotiations... and promote trade provisions which enable countries to exercise all flexibilities provided by the Doha Declaration on Public Health

Acknowledgments

Sohil Sud, MD MA

UCDC

Resources

- CPATH Website:

- Medicine and Public Health – Statements

- <http://cpath.org/id49.html>

- Prof. Jane Kelsey: Intl. Trade and Tobacco

- <http://www.cpath.org/sitebuildercontent/sitebuilderfiles/jkelseyfinalreportjktobacco.pdf>

- **Workshop on trade-related issues relevant to implementation of the WHO FCTC Executive Board**

- http://www.who.int/fctc/workshop_trade/en/index.html

CPATH

Center for Policy Analysis on Trade
and Health

Joseph Brenner

Ellen R. Shaffer

www.cpath.org

ershaffer@cpath.org

Phone: 415-922-6204