

TOBACCO CONTROL AND TRADE AGREEMENTS: EXPLORING A RESEARCH CONSORTIUM FOR CALIFORNIA, AND STRATEGIES FOR CHANGE

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The Center for Policy Analysis on Trade and Health (CPATH) and the Center for Tobacco Control Research and Education at the University of California-San Francisco, with support from the Tobacco Related Disease Research Program, are convening a consortium meeting to establish a research agenda related to tobacco control and trade agreements, and to explore strategies for progress.

Trade agreement rules are a critically important factor in tobacco control at the local, state, and national levels, and will have a major impact on tobacco control efforts in the state of California. In exploring a research agenda, we aim to identify key research questions that will inform public policy regarding how the tobacco industry can influence U.S. tobacco control laws and regulations that have an impact in California, including the Tobacco Control Act, through international trade rules. A goal of the research will be to develop public policy options to deter tobacco industry influence.

The meeting brings together diverse stakeholders in California, and invited national experts, active in tobacco control, and equipped to assess the nexus between tobacco control, global trade, and tobacco industry influence. Participants include public health practitioners, scientists, legal experts, governmental staff, and tobacco control advocates.

Program Overview: Selected participants will make presentations on the topic of the past, current and possible future threats of trade agreements to tobacco control laws and regulations at the national, state, and local levels. Dr. Glantz, Dr. Shaffer, Mr. Brenner, Dr. Sud, and Dr. Jarman will present based on their published works, and provide updates on the status of trade claims as well as domestic legal challenges to tobacco control measures.

Facilitated discussion will address the need for a consortium with a research agenda in California on the issue of trade and tobacco, and the present opportunities for strategic advances. Key questions will include:

1. What can we learn from tobacco industry documents and other sources about industry strategies to establish and use trade rules that enable legal challenges to tobacco control measures, particularly those related to marketing, at the local, state, national and global levels?
2. What research questions can identify and illuminate the elements of a successful strategy going forward?
Topics could include:
 - What arenas are proving successful at revealing and reversing industry strategies, or might be successful? What strategies best leverage the strengths of tobacco control at the local, state, national and international levels?
 - Jarman et al. and others have proposed strengthening public health influence by focusing on the FCTC, for example, as opposed to interacting primarily in trade-dominated arenas.
 - Calls for transparency, inclusiveness and democracy in trade negotiations are popular with some policy-makers and the public. Trade proponents assert the importance of confidentiality in commercial negotiations.

- What are lessons from the exercise to propose a limited "exception" for tobacco control regulations during negotiations for the Trans Pacific Partnership?
 - What are potential advantages of focusing advocacy on the powerful issues surrounding tobacco use, and what might be added by alliances with other constituencies?
 - Tobacco control policies and campaigns must contend with the nature of a product that remains legal, although lethal, in part because it is also addictive and therefore profitable.
 - What are the right time frames and metrics to measure success?
3. What opportunities exist, or must be created, for the state of California to take a pro-active approach to protecting the state's authority and accountability for enacting and implementing tobacco control measures, in view of trade rules and challenges?
 4. What can we learn from other efforts to identify and address industry strategies that use global trade rules to curtail domestic authority to adopt and implement laws, regulations and other measures that protect and advance health?

Background: The Tension Between Trade and Health Policies. Both trade and public health policies purport to maximize the welfare of populations. But there are sharp differences in theory and practice regarding the value and effectiveness of "free" market forces, economic competition within and among communities and nations, and the optimum relationship between the rights of government and societies to regulate economic activity and the rights of corporations. At least since the 1980s, the U.S., Europe, Canada and Japan have been committed to policies favoring privatization, deregulation, and "liberalized" trade of goods and services across the globe. Challenges have emerged from: competing economic blocs, including Brazil, India, and China; domestic demands for social and economic equality; and periodic economic downturns. While both the World Trade Organization and the World Health Organization have the potential to achieve major advances in international diplomacy and communication, both face significant constraints. Among countries, there is variation in the relationship between health agencies and ministries, and those in finance and commerce.

Trade agreements aimed at challenging laws and regulations that could pose "barriers to trade" can undermine the right and obligation of democratically elected and appointed representatives at the national, state and local levels to protect, provide, and regulate goods and services, and can give economic interests priority over health.

Tobacco and Trade: Tobacco use is the leading preventable cause of death worldwide. Tobacco control measures are critical to reducing tobacco-related death in California, the nation, and the world.

Trade agreements negotiated by the United States with other nations provide foreign governments and all corporations with internationally enforceable rights. CPATH and others have documented that 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.

The tobacco industry is acting in the trade arena to expand its influence on local, state, and national policy. Tobacco companies have accelerated their use of trade rules to attempt to delay and reverse tobacco control measures in the U.S., Australia, Uruguay, Norway, and Ireland. 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.

Understanding how the tobacco industry exerts its influence through trade rules and curtailing these loopholes is of the utmost urgency for safeguarding and strengthening the authority of the FDA Center for Tobacco Products, for securing and expanding California 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.

Tobacco Industry Challenges: 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 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 of Tariffs and Trade (GATT) by discriminating between the two products. The U.S. must now decide between several options to comply with the ruling. It can: (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 2009, 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.” Philip Morris challenged Uruguay in global court over its new labeling requirements, using trade rules of an existing bilateral investment treaty which granted internationally enforceable rights to corporations to file trade charges directly against a nation. PMI alleged infringement of intellectual property, and demanded compensation. 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 recent 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 California.

Recently, 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, can and 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 California are vulnerable to tobacco industry challenges under existing trade rules.

Trans-Pacific Partnership Agreement

The Trans-Pacific Partnership Agreement (TPP), a mega-trade agreement currently under negotiation by the United States with eleven Pacific Rim nations, provides a critical opportunity to curtail loopholes used by the tobacco industry, through informing and engaging local, state, and national decision-makers in California.

In 2010, during the early stages of negotiations of the TPP held in San Francisco, the San Francisco Board of Supervisors, working with the Center for Policy Analysis on Trade and Health (CPATH), unanimously passed a resolution calling for removing tobacco from TPP negotiations. At these negotiations, CPATH presented research findings, as a registered stakeholder, to trade negotiators from the negotiating nations, on how the tobacco industry has used trade rules to limit or curtail nations' tobacco control policies, and how the negotiators had the opportunity to create a 21st century trade agreement that reduces tobacco-related deaths.

During TPP negotiations in 2011, and in 2012, CPATH coordinated and joined in signing public statements by leading medical associations delineating the threats of TPP provisions to tobacco control measures, and calling to carve out tobacco and tobacco control measures from the jurisdiction of trade agreements. These medical societies included the American Medical Association, the American College of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American College of Physicians.

In July, 2012, Professor Stanton Glantz, from the Center for Tobacco Control Research and Education at UCSF, and CPATH presented to trade negotiators on trade rules, tobacco, and health, calling for the removal of tobacco from the TPP as the most effective remedy.

The United States, in the context of TPP negotiations, has apparently placed on indefinite hold its earlier proposal to discuss treating tobacco as a unique product, with the intent of safeguarding the Family Smoking Prevention and Tobacco Control Act from possible trade challenges by other nations and directly by tobacco corporations.

Following the 2012 TPP negotiations, the Vermont and Maine state trade commissions have written letters to U.S. Trade Representative Ron Kirk (VT- 7/25/12) and U.S. TPP Chief Negotiator Barbara Weisel (ME- 8/1/12) calling for a carve-out of tobacco from the TPP and commenting on the deficiencies of the tobacco proposal offered publicly by USTR.

Research is needed urgently to understand how the tobacco industry can use trade rules to influence the regulation of tobacco in the U.S., including the Family Smoking Prevention and Tobacco Control Act, which will affect local policies and ordinances in California. The statewide consortium meeting provides a critical and timely opportunity to identify key research questions that will both inform public policy, and establish a network in California to limit industry influence through the use of trade rules.