

## Trading Away Health: The Influence of Trade Policy on Youth Tobacco Control

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**T**obacco companies and tobacco-producing nations are exploiting international trade rules to block implementation of policies designed to curb youth smoking. These challenges represent a growing threat to tobacco control efforts, of which pediatricians should be made aware. Ongoing lawsuits and trade disputes, as well as contemporary trade agreements, challenge health principles by treating tobacco—a lethal and addictive product—the same as any other good. This article equips health care providers with the requisite vocabulary, history, and analysis to understand the impact of global trade practices on youth tobacco control.

Described herein are examples of trade-based challenges to the following: (1) banning flavored cigarettes; (2) restricting point-of-sale product advertising; (3) placing graphic warning labels on cigarette packaging; and (4) taxing tobacco effectively.

### Evidence-Based Policies to Curb Youth Smoking at Risk

As highlighted in recent US Surgeon General reports, “tobacco use is a pediatric epidemic.”<sup>1</sup> Youth of all ages are at risk from this scourge, including newborns and toddlers for whom sudden infant death syndrome and asthma (both new onset and exacerbations of existing disease) are just 2 of the many health effects from exposure to secondhand smoke.<sup>2</sup> Adolescents—long known to be targets of tobacco marketing schemes<sup>3</sup>—are particularly at-risk, for teen smokers may well be consigned to lifelong addiction: nearly 90% of adult daily smokers smoked their first cigarette by age 18 years.<sup>1</sup>

Countries around the world are enacting regulations to curb youth smoking and combat notions that tobacco is cool, available, tasty, safe, and affordable. These include bans on flavored cigarettes, increases in tobacco taxation, restrictions on tobacco advertisements, and placement of graphic warning labels on cigarette packages. A robust basis of evidence underlies each of these policies. Bans on flavored cigarettes are supported by research indicating that adolescents are far more likely to smoke candy- and fruit-flavored cigarettes than adults.<sup>4,5</sup> Some studies have even documented a misperception among youths that flavored cigarettes are safer than traditional cigarettes.<sup>6</sup> Tax hikes on tobacco products are supported by data demonstrating that when the price

of cigarettes increases, youths buy fewer cigarettes (even more so than adults).<sup>7,8</sup> Marketing bans are backed by evidence suggesting that exposure to tobacco advertisements increases the likelihood that adolescents will start smoking.<sup>9</sup> Graphic warning labels increase awareness of the harms of tobacco use and increase the likelihood of attempting to quit smoking.<sup>10</sup>

Such health regulations also are supported by international legal norms. In 2005, 168 nations joined together to sign the world’s first health treaty, known as the Framework Convention on Tobacco Control (FCTC).<sup>11</sup> Housed at the World Health Organization, the FCTC sets forth universal minimum standards for key aspects of tobacco control, including advertising, labeling, and taxation.

Many of these standards are being challenged by existing global trade policies. Previous research by Shaffer et al<sup>12</sup> identified that international trade practices conflict with tobacco control regulations and public health norms. This article provides practicing clinicians with important updates, as well as an overview of the extent to which trade policies impede efforts to curb youth smoking.

### Challenges to Banning Flavored Cigarettes

In 2009, the Family Smoking Prevention and Tobacco Control Act was signed into law and banned the sale of flavored cigarettes in the US, including candy, fruit, and spice flavors, though with a notable exception for menthol. This policy was enacted to reduce teen smoking, given a strong inverse correlation between age and use of flavored cigarettes.<sup>2</sup> Since its implementation, 30-day prevalence rates of cigarette use among US adolescents continue to decrease to record lows.<sup>13</sup> In 2010, Indonesia—the world’s largest producer of clove cigarettes—alleged that the law was inconsistent with US trade obligations under various World Trade Organization’s (WTO) agreements.

Trade agreements bind signatory nations to rules intended to reduce barriers to cross border trade. Such barriers may be financial (eg, tariffs that make foreign goods more expensive) or regulatory (eg, laws that require products to meet particular standards). Trade agreements also allow for national regulations to be challenged if they discriminate between “like”

FCTC	Framework Convention on Tobacco Control
ISDS	Investor-state dispute settlement
PM	Philip Morris
WTO	World Trade Organization

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products by country of origin. On the basis of these principles, Indonesia claimed that the US violated WTO agreements by discriminating between “like” products (eg, clove and menthol flavorings) by banning imported clove cigarettes and permitting the sale of domestic menthol cigarettes.<sup>14</sup>

In April 2012, a WTO Appellate Body panel ruled in favor of Indonesia, agreeing that the US violated trade provisions by discriminating between the 2 flavors. The Body determined that menthol and clove flavors are “alike” because they share a competitive economic relationship. Health considerations played little influence on the ruling. The argument that removing clove cigarettes from the US market is a public health boon was rendered effectively irrelevant.

The ruling demonstrated the preeminence of trade and economic issues in international law and ostensibly paved the way for reintroducing clove cigarettes into US markets. This has not occurred, and in exchange for preserving the ban, the US recently agreed to make trade concessions with 2 other unrelated goods (ignition wiring sets and mineral ores) and to assist Indonesia with intellectual property right protections. The US also agreed “that it will not arbitrarily or unjustifiably discriminate against cigars or cigarillos (HS 2402.10) from Indonesia.”<sup>15</sup> The legal implications of this recent statement are uncertain, although the inclusion of any language that might obstruct efforts to ban flavored tobacco products (eg, clove cigars) is concerning.

### Challenges against Australia’s Plain Packaging Law

In late 2011, Australia passed legislation to create uniform cigarette packaging on which brand names would be listed in small font at the bottom of cartons, and pictorial warnings and a quit-line phone number would comprise the remainder. One of the explicit objectives of the measure was to “reduce the attractiveness and appeal of tobacco products to consumers, particularly young people,”<sup>16</sup> a claim supported by evidence from multiple studies showing youths find plain cigarette packs less appealing.<sup>17,18</sup>

Since implementing these laws, Australia has seen a 78% increase in the number of quit-line calls and decreases in adult daily smoking rates from 15.1% to 12.8% from 2010 to 2013, respectively.<sup>19</sup> The age at which youths (14-24 year olds) first smoke a full cigarette has also increased by 0.5 years from 2010 to 2013.<sup>19</sup>

Notwithstanding these successes, Philip Morris (PM) Asia (based in Hong Kong) is suing Australia, arguing that the bill violates conditions of a 1993 investment agreement between Hong Kong and Australia.<sup>20</sup> In trade terms, trademarks, including brand names and logos, are categorized as a company’s intellectual property. PM Asia claims that Australia’s law deprives the company of its intellectual property and infringes upon protections granted from the aforementioned trade agreement. The company argues that Australia should compensate PM for lost revenues and stop enforcing the law. Australia contends that trademark laws protect a corporation’s

branding from appropriation by competitors but do not confer an unlimited immunity from regulations. The case is being heard by a tribunal at the United Nations that carries a charge to review the claims for trade (not health) violations.<sup>21</sup>

In a separate contention against the plain-packaging law, several tobacco-producing nations (including Honduras, Ukraine, Cuba, and the Dominican Republic) claim that Australia’s policy is overly restrictive and contradicts trademark protections afforded by various WTO agreements.<sup>22,23</sup> These nations have filed suit at the WTO, where a tribunal was established in May 2014 to begin arbitrating these allegations.<sup>24</sup>

### Disputes against Uruguay’s Warning Labels

In 2006, the Uruguayan government—led by then-President and oncologist Tabare Vasquez, MD—passed a series of regulations to: (1) increase warning labels from 50% to 80% of the package; (2) place health images on packages; and (3) prohibit the use of “brand families” in which the same brand name is used across multiple product lines (eg, Marlboro Red, Marlboro Green, etc).<sup>25</sup> 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.<sup>26</sup>

In 2010, however, the Swiss operational hub of PM filed suit at the World Bank, claiming that government’s regulations violate a 1991 bilateral investment treaty between Uruguay and Switzerland. Using similar arguments to those posited by PM Asia against Australia, the Swiss-based PM contends that Uruguayan policies intrude upon PM’s intellectual property and exceed that which is reasonable to protect the public’s health.<sup>27</sup> 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; each side is currently submitting testimony to support their claims.<sup>28,29</sup>

### Challenges to Point-of-Sale Product Advertising

In January 2010, with the intent of reducing youth exposure to tobacco advertising, Norway banned point-of-sale displays of tobacco products in retail outlets.<sup>30</sup> Months later, PM Norway sued the Government, arguing that this policy violated the 1994 Agreement of the European Economic Area by restricting the company’s purported right to “free movement.”<sup>31</sup> Unlike the cases in Uruguay and Australia, this case was tried domestically (at the Oslo District Court) with consultation from the international Court of the European Free Trade Association.<sup>32</sup> In September 2012, the Court delivered its verdict and sided with the Government, noting that the display ban does not restrict product movement as defined as by the European Economic Area. Furthermore, the Judge noted that a ban is “suitable and necessary in order to ensure the protection of public health.”<sup>30</sup>

## Challenges to Tobacco Taxation

All of the aforementioned legal proceedings relate to trade agreements signed prior to 1994. To determine how tobacco is treated in more recent agreements, we analyzed US trade agreements with the following nations: Chile (2004), Singapore (2004), Peru (2009), South Korea (2011), Colombia (2011), and Panama (2011). In all 6 agreements, US tobacco exports are made tariff-free (ie, without an import tax) or placed on a tariff reduction schedule.<sup>33-38</sup> Essentially, as a result of these agreements, all 6 trading partners lose one means of tobacco taxation, an effective evidence-based measure known to reduce youth smoking.

## Detrimental Consequences of Trade-Based Challenges

As mentioned previously, increasing evidence suggests that policies designed to ban flavored tobacco products, institute large graphic warning labels on cigarette packages, restrict point-of-sale product advertising, or increase tobacco prices are effective in reducing youth smoking. These efforts are strongly supported by the World Health Organization's FCTC.<sup>39</sup> Furthermore, as a result of such progress (particularly in Australia), England, Ireland, New Zealand, and France are all in various exploration and planning stages to implement plain packaging laws.<sup>40</sup>

Despite this success, tobacco companies and tobacco-producing nations continue to use trade-based claims to delay, undo, or otherwise obstruct implementation of health policies. Defending these challenges—irrespective of verdict—is time consuming and immensely expensive, detracting efforts and funds available for public health generally. Arbitration between PM and Australia commenced 3 years ago, and yet the 2 parties are still at least 1 year away from settling jurisdictional matters. The legal battle with Uruguay formally began in March 2010 and is only slightly further along.

The legal process by which tobacco companies like PM bring claims against a government is also troubling. This is known as “investor-state dispute settlement (ISDS),” and has been written into many bilateral investment treaties, including the Australia-Hong Kong and Uruguay-Switzerland treaties described previously, as well as all 6 US trade agreements reviewed.<sup>33-38</sup> ISDS allows corporations (investors) to bring claims against the governments of trading partners without needing to engage their host government. Hong Kong and Switzerland are not parties in the respective lawsuits that PM has filed against Australia and Uruguay, even though the investment treaties in contention involve those governments. ISDS provides corporations with a startling degree of legal power in trade arenas and, depending on the coffers of the corporations involved, it can threaten the financial well-being of impacted nations. Uruguay, unable to afford the costly legal fees of this four-year-and-counting ordeal, is being aided by wealthy philanthropists.<sup>41</sup>

Trade-based challenges to tobacco control policies also act as a deterrent to other nations seeking to enact similar legislation.

Canada's attempts to ban misleading terms such as “light” and “mild” were forestalled after PM argued that such a policy would violate the North American Free Trade Agreement.<sup>42,43</sup> New Zealand has delayed introducing plain packaging laws pending the outcome of Australia's legal battles.<sup>44</sup>

## Reasserting the Primacy of Health Concerns in the Trade Agenda

Tobacco control measures and other public health laws and regulations frequently are at odds with commercial priorities and interests. In addition, public health policy and politics often are complicated and messy, involving compromises to achieve incremental progress. Requiring that tobacco control policies must additionally conform to trade rules designed to regulate fair treatment among businesses gives commercial interests an unfair “thumb on the scale.”

The outcome of current negotiations and outstanding trade disputes stand to have a tremendous impact on youth tobacco use. The extent to which sovereign nations can safeguard the health of their own people, using measures supported by international health conventions, hangs in the balance.

The US is currently negotiating 2 major multilateral trade deals—the Trans Pacific Partnership, a 12-nation pact with Pacific Rim nations, and another with European nations. Tobacco is proving to be a contentious topic in both negotiations. Although the US Trade Representative has acknowledged that tobacco is indeed different from other “goods” in these trade deals,<sup>45</sup> the Office has failed to promote substantive measures that afford tobacco control efforts effective legal protection.

Malaysia has called for an outright exclusion of tobacco from the protections and provisions of the Trans Pacific Partnership.<sup>46</sup> This would have a positive impact on public health worldwide. It would exclude the legal mechanisms (eg, ISDS) by which corporations can bring claims against the governments of trading partners, as well as precluding government-to-government disputes. Health care providers are taking greater notice of the troubling relationship between tobacco and trade, and pediatricians have been instrumental in calling for health-focused trade reforms, particularly Malaysia's proposed tobacco exclusion.<sup>47,48</sup>

We must continue to call on policymakers to mandate that investment agreements “do no harm” to existing tobacco control measures and assert the primacy of health concerns by insisting that governments defer to the FCTC in the event of discrepancy between a trade agreement and the FCTC. We have come so far in enacting sound policies to combat notions that tobacco is cool, available, tasty, safe, and affordable. Trade-based loopholes must not continue to stymie, or worse undo, such progress. ■

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