

Excluding Tobacco from Trade and Investment Agreements: Transpacific Partnership Agreement (TPPA)

Background

On August 26, 2013, during the 19th Round of the negotiations on the Transpacific Partnership Agreement (TPP), Malaysia introduced language to exclude tobacco from the scope of the so-called 21st century trade and investment agreement. At the same time, the USTR tabled language on tobacco that involves creating consultation procedures in the event of a tobacco-related dispute and includes a provision to emphasize that tobacco control measures are “health measures.”

Participating nations, involving twelve countries of the Asia Pacific Economic Cooperation (APEC): Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA, and Vietnam, (TPP countries) will be discussing the “tobacco proposals” at the intersessional rounds to be held in September 2013. Other countries of the APEC that were reportedly invited in the past two years to join the negotiations are India, Korea, Philippines, and Thailand. The TPP countries are seeking to conclude negotiations by year-end.

Frequently Asked Questions

I. What is Malaysia’s “tobacco proposal” in the context of the TPP negotiations?

Malaysia seeks to “carve out” tobacco from the trade agreement or essentially, to take tobacco out of the scope of the agreement or exclude tobacco from the application of the trade agreement. Typically, the language would be: “Nothing in this agreement applies to measures that relate to tobacco and tobacco products.”

II. Why is it important to exclude tobacco from trade and investment agreements that are being negotiated such as the TPP?

1. Tobacco Industry undermines political will and sues governments

The tobacco industry has consistently used trade and investment agreements to challenge government policies consistent with the WHO Framework Convention on Tobacco Control (FCTC) such as the misleading descriptors ban, pictorial health warnings, plain packaging, and point of sale display bans. WHO reported that the industry arguments, as well as the threat of suit, undermine political will and have actually led to resource-intensive litigation and dispute settlement proceedings such as:

- Philip Morris International challenged Uruguay’s graphic health warnings and packaging restrictions, under the bilateral investment treaty (BIT) between Switzerland and Uruguay.
- Philip Morris Asia, launched a claim against Australia’s plain packaging law under the Australia-Hong Kong BIT, while Philip Morris, British American Tobacco, Imperial Tobacco, and Japan Tobacco challenged the law in domestic courts.
- Philip Morris challenged Norway’s point of sale display ban at the European Free Trade Agreement court.

2. Tobacco Industry tactics drain government resources

The foreign tobacco investor, Philip Morris, sought billions in lost profits from Uruguay and Australia. Legal costs for investor-state dispute proceedings range between US\$ 2-8M but could reach up to US\$50M, as seen in the *Fraport v. Philippines* case. Australia’s health

department took note of the tobacco industry's tactic to tie up significant departmental resources; for instance, processing British American Tobacco Australia's request for information relating to plain packaging had cost them \$643,000 over a period of 18 months.

3. Tobacco industry uses trade agreements to gain support from governments

The tobacco industry solicits support from and provides support to governments in order to challenge tobacco control measures at the World Trade Organization (WTO).

- With tobacco industry support, Indonesia challenged the US ban on clove cigarettes, while Philippines challenged Thailand's customs and excise tax measures on cigarettes.
- Ukraine, Honduras, the Dominican Republic, and Cuba are challenging Australia's plain packaging. News reports reveal that the tobacco industry is funding Ukraine in the dispute settlement proceeding.
- Governments have also raised concerns over Australia's plain packaging during meetings of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Committee.
- Approximately 30 governments challenged Brazil's tobacco product regulation policies and Canada's ban on flavoring during meetings of the Technical Barriers to Trade (TBT) Committee of the WTO.

4. Tobacco industry lobbies for stronger rules to protect commercial interests

The tobacco industry also lobbied for stronger trade and investment rules to protect its commercial interests. Particularly with regard to the TPP,

- Philip Morris welcomes the availability of investor state dispute settlement mechanisms that allow foreign investors to sue governments to challenge a policy, and that provide for expanded intellectual property rights; while citing, among others, that Singapore Health Ministry's authority is too broad and that Australia's plain packaging measures are excessive.
- Business groups claim that tobacco should be treated just like any other product that should benefit from the free trade and investment agreement.

III. How does the TPP add to these existing problems posed by the tobacco industry's trade related tactics?

The TPP is touted to be a "21st Century Free Trade Agreement" or a gold standard in trade agreements. Among others, it is poised to include provisions that will

- strengthen the role of the commercial industries in regulation,
- increase intellectual property protection of right-holders,
- enhance the capacity of foreign investors to challenge government measures that adversely affect the investors' legitimate expectations, and
- promote foreign investor CSR

When applied to the tobacco industry, the TPP provisions could have the effect of strengthening the tobacco companies' ability to challenge tobacco control measures even if these are consistent with the FCTC. Applying TPP provisions to tobacco is also inconsistent with the Parties' obligations under the FCTC to

- protect tobacco control measures from the commercial and vested interests of the tobacco industry,
- refrain from giving incentives for the tobacco industry to run its business, and
- comprehensively banning tobacco advertising including tobacco industry's so-called CSR.

IV. Are existing safeguards in free trade agreements such as a general exception for “measures necessary to protect public health” (exception clause) suffice to protect tobacco control measures from tobacco industry interference in the context of the TPP?

No. Existing safeguards such as the “exception clause” are used as a defense to a trade-related challenge initiated by the tobacco industry. It does nothing to prevent the tobacco industry from initiating a trade-related dispute or argument under the TPP. Such trade-related arguments and threats of disputes/claims undermine political will, drain limited resources, and gain support of other governments that have interest in tobacco.

The USTR proposed a special treatment of tobacco that relies on such an exception clause, including a statement that tobacco control measures will be deemed health measures for purpose of applying the exception. Analysts, medical associations, and public health advocates, have criticized this proposal as weak and recommended support for Malaysia’s proposal to exclude tobacco completely from the trade agreement. Businessman and philanthropist, Mayor Bloomberg, have criticized this proposal as a sign that the current administration is giving in to the tobacco industry. US laws (EO13193 and Doggett Amendment) prohibit the use of government funds for promoting the export of tobacco or for seeking to reduce foreign restrictions on tobacco marketing.

V. Does “excluding tobacco from the TPP” solve the existing problems with trade and investment related litigation instigated by the tobacco companies?

No. It is not a solution to the existing challenges that the tobacco industry presents, but it is a preventive measure that will preclude the risk of trade-related litigation under the TPP.

VI. What are the other benefits of excluding tobacco from the TPP?

The treatment of tobacco in the TPP could establish a new precedent in the treatment of tobacco for future trade and investment agreements. It may also create an opportunity for countries to revisit their own trade and investment policies to ensure a broad regulatory room for adopting and implementing tobacco control measures.

For the first time in the history of tobacco control, tobacco will be specifically tackled in a trade agreement in the same way that allowed labor, environment, access to medicines, cultural industries, and national security to be addressed.

Malaysia’s tobacco proposal heralds a new opportunity to remove tobacco’s status as any other product in a trade agreement or the tobacco industry’s status as any other foreign investor in an investment agreement. This could create an environment that is conducive to developing tobacco control measures that will save more lives.

VII. Why should tobacco be treated differently from other products?

Tobacco is inherently unique. It is the only consumer product that kills half of its consumers when used according to manufacturers’ instructions. Tobacco is the #1 cause of preventable death and disease: tobacco related deaths have risen to 6 million per year, a rate that will kill 1 *billion* people in the 21st century. It is the only consumer product that is subject of a treaty which binds over 175 nations, the FCTC. On the other hand, trade agreements – and marketing that follows their implementation – spur tobacco use and disease, particularly in developing countries.

All TPP countries other than the US are parties to the FCTC. The US itself has special laws that prohibit the government from promoting the export of tobacco or for seeking to reduce

non-discriminatory restrictions on tobacco marketing in foreign countries (EO13193 and Doggett Amendment).

According to Article 2 of the FCTC, the FCTC does not affect the right to enter into other treaties that are relevant to the FCTC provided that such agreements are compatible with the FCTC obligations. Article 5.3 of the FCTC obliges parties to protect tobacco control measures from the commercial and vested interests of the tobacco industry. Promoting trade and investment of tobacco products and giving the tobacco industry benefits of a 21st century trade agreement should not be deemed compatible with FCTC obligations.

VIII. What can public health groups contribute to support the exclusion of tobacco from trade agreements?

Tobacco control groups and governments looking to preserve policy space in order to accelerate FCTC implementation should support the proposal to exclude tobacco from the TPP. Many public health groups such as American Medical Association, American Lung Association, American Cancer Society, SEATCA, and Campaign for Tobacco Free Kids have consistently maintained that tobacco should be excluded from free trade agreements. In March 2012, delegates of the World Conference on Tobacco or Health (WCTOH) in Singapore approved a declaration that called for tobacco to be excluded from new trade and investment agreements. In August 2013, delegates of the Asia Pacific Association for the Control of Tobacco (APACT) conference called for the exclusion of tobacco from free trade and investment agreements and supported Malaysia's tobacco proposal. In Malaysia, the Malaysian Council for Tobacco Control and medical groups such as the Malaysian Medical Association, National Cancer Society Malaysia, Association of Private Hospitals Malaysia, Cancer Research Initiatives Foundation, Hospis Malaysia, Malaysian Oncology Society, InfoMed and the Malaysian Paediatric Association are fully supportive of the government's position on a tobacco carve-out from the TPP.

Recommendation:

Trade and investment agreements like the TPP provide benefits to the tobacco industry including expansion of intellectual property rights, requiring consultation with the tobacco industry in the development of regulation, and allowing tobacco companies to sue governments outside of domestic courts. Tobacco should be excluded from the scope of the TPP in order to prevent tobacco companies from exploring a new avenue where they can challenge life-saving tobacco control measures.

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