
CONFLICT BETWEEN THE TPP AND THE FCTC

BACKGROUND

The Trans-Pacific Partnership (TPP) Agreement is an Asia-Pacific regional free trade agreement (FTA) currently being negotiated among Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, United States (US), and Vietnam. This agreement originated as the P-4 Agreement (P-4), an FTA among Brunei, Chile, New Zealand, and Singapore, intended to be expanded to include additional members from both sides of the Pacific.¹ Like its predecessor, the P-4, the TPP aims for “geographic diversity, a high-standards agreement, and a model for expansion.”ⁱⁱ

The World Health Organization Framework Convention on Tobacco Control (WHO FCTC) is the first public health treaty negotiated under the auspices of the World Health Organization. It requires Parties to regulate all significant aspects of tobacco trade such as taxes, illicit trade, advertising, packaging, labeling, and product regulation. These provisions, among others, are intended to assist Parties, more so developing ones, to design and implement strong tobacco control measures.ⁱⁱⁱ

With the exception of the United States, all negotiating partners in the TPP are Parties to the WHO FCTC. The projected expansion of the TPP throughout Asia, Oceania, and South America,^{iv} would invariably affect many of the 174 Parties to the FCTC. In view of the Parties’ efforts to fulfill treaty obligations and promote public health consistent with the FCTC and its guidelines, the TPP negotiations present a unique opportunity to redefine how tobacco and tobacco products must be dealt with in a multilateral trade agreement.

TARIFF REDUCTION

The core feature of the TPP, like any free trade agreement (FTA), is the tariff reduction on imports. Unless there is a negative list for tobacco and tobacco products, these products will likely be included in a trade liberalization program which aims to drive tariffs down to zero.

Problems with reducing tariffs for tobacco

Evidence shows that trade openness and import penetration due to free trade policies have resulted in significant increases in tobacco consumption in lower- and middle-income countries,^v along with its attendant social and economic costs: high costs of tobacco expenditure, health costs, productivity losses, pain and suffering, due to premature deaths and long-term diseases caused by tobacco consumption and exposure.

The FCTC views taxes / price measures imposed on tobacco products as the single most effective measure to reduce tobacco consumption.^{vi} The FCTC thus encourages Parties to consider national health objectives in determining price measures on tobacco. The progressive or immediate reduction of tariffs on tobacco and tobacco products would restrict the kinds of fiscal policies available to increase tobacco prices and thereby reduce consumption.

Excluding tobacco in Tariff Reduction schemes

There is a precedent for excluding tobacco from the trade liberalization scheme of an FTA, some are justified for health reasons. Under the regional FTA of South Asia, the SAFTA, for instance, tobacco and tobacco products are in the negative or exemption list which contains products exempt from tariff commitments or concessional treatment. Under the ASEAN FTA

(AFTA), Malaysia and Laos placed tobacco under the “sensitive list,” where trade liberalization programs apply at a restricted pace or with transitional periods.

INTELLECTUAL PROPERTY PROTECTION

Like most bilateral and regional trade agreements, the TPP is likely to include strong protection for intellectual property including patents, trademarks and trade secrets. Based on recent FTAs being negotiated by the US with developing countries, the scope of protection for intellectual property often exceed those provided by the World Trade Organization (WTO) agreement on Trade Related Aspects of Intellectual Property (TRIPS).

Problems with protecting intellectual property of tobacco products

The tobacco industry has consistently used intellectual property arguments, particularly trademark protection rights, in many governments to counter tobacco control policies such as those imposing graphic health warnings, banning misleading descriptors, or banning point of sale advertising. As a result, many governments have delayed or avoided the implementation or adoption of these policies despite their obligations under the WHO FCTC. In some cases, governments have adopted a watered-down or compromised version of an evidence-based measure recommended under the WHO FCTC Guidelines.

In addition to trademark protection, the protection of trade secrets restricts the ability of governments to publicly disclose information about the toxic constituents of tobacco products in accordance with Article 10 of the WHO FCTC.

Intellectual property protection also entails that governments undertake an obligation to enforce intellectual property laws such as cracking down on counterfeit products for the benefit of tobacco companies; this increases the government’s engagement with the said companies, making it difficult for government to limit interactions with the tobacco industry as a means to comply with the obligation under WHO FCTC Article 5.3 “to protect.. public health policies from the commercial and vested interests of the tobacco industry.”^{vii}

Although FTAs like the TPP would typically contain a public health exception similar to the ones in TRIPS (i.e., permitting measures which violate general trade rules if they are “necessary” to advance public health); dispute panels and appellate bodies of the WTO have treated this exception very narrowly, covering regulatory measures only if they are deemed the “least trade-restrictive” way to accomplish a particular public health goal.

Excluding tobacco

The obligation to protect tobacco companies’ industrial property seem inevitable because many countries have already committed to protect intellectual property through the TRIPS, and some have further expanded such protection by concluding other regional and bilateral trade agreements with TRIPS-plus provisions. It bears stressing, however, that the TPP provides a unique opportunity to initiate an exclusion of tobacco and tobacco products from intellectual property rights protection because unlike other goods, there is no justification for incentivizing future innovation or original idea with respect to the development of tobacco products because they are uniquely harmful products with no known benefits.

A move toward removing privileges attached to the protection of intellectual property of tobacco companies assists FCTC Parties in fulfilling their obligations under Article 9 and 10 of the WHO FCTC,^{viii} which requires governments to test, measure, and publicly disclose toxic constituents of tobacco products. Consequently, a move to exclude tobacco products from the FTA/ TPP as a whole should be considered as a step towards ensuring a government's freedom to regulate tobacco products and towards full implementation of the FCTC.

INVESTOR PROTECTION

The TPP is expected to include a chapter that is reflective of the 2004 Model Bilateral Investment Treaty (BIT) of the United States which, among others, defines intellectual property as an investment and provides investor-state arbitration mechanisms that allow a foreign investor to choose the tribunal in which to bring claims against the government in proceedings that are typically confidential.

Problem with protecting foreign tobacco companies as investors

The proposed investment chapter of the TPP poses a real threat to a country's ability to regulate tobacco. Simply put, foreign tobacco companies would have the right to challenge any tobacco control regulation in commercial arbitration proceedings whenever they claim that such regulation has affected the reasonable expectation of investors or is unfair and inequitable. This remedy lends itself to abuse by the tobacco companies. The multinational tobacco companies are known to utilize legal strategies in many countries to deter or delay adoption and implementation of effective tobacco control measures; the trend towards employing investor-state arbitration as one of its legal tactics is illustrated best by the investment claim that Philip Morris International filed against Uruguay^{ix} and the one it threatens to file against Australia.^x

Furthermore, many international investment agreements such as those proposed by the US under the 2004 Model BIT, consider intellectual property as an "investment,"^{xi} hence, a foreign tobacco investor can claim that packaging and labeling measures are deemed to have expropriated "indirectly,"^{xii} or undermined the value of, its trademark; and unless certain conditions have been met (i.e. for public purpose, not discriminatory, **and** payment of just compensation), the government can be brought to arbitration and made liable for damages, including lost profits.

A further complication is the fact that there are several transnational tobacco companies operating in many countries including developing ones, and "foreign investors" under the international investment agreements are defined broadly such that it can include foreign stock owners of a locally constituted tobacco company and its corporate stockholders; thereby increasing the number of foreign investors and nationalities qualified to bring an investor-state claim. Hence, even if the government has concluded very few international investment treaties, the risks exist.

Remove investor-state dispute settlement mechanisms or exclude tobacco from the agreement

Tobacco products may be removed from the TPP in general so that, among others, the investment protection provisions will not apply to tobacco. This does not protect governments that have previously concluded BITs or other international investment agreements. Hence, in light of the risks revealed through recent developments, Parties intending to implement effective tobacco control policies in accordance with the FCTC and its guidelines must consider immediately reviewing and amending their current BITs in order to avoid exposure to the risk of being dragged to expensive investor-state disputes by the tobacco companies.

An option suggested by public health advocates is to remove the investor-state dispute settlement mechanisms. Although this arrangement protects states from being subject to commercial arbitration proceedings by foreign investors at the forum chosen by such investors; this arrangement will not address the fact that foreign tobacco companies would continue to enjoy the privilege of being recognized and treated as an “investor” which would thereby be conferred certain benefits...contrary to the recommendation of the WHO FCTC Article 5.3 Guidelines to avoid giving the tobacco industry preferential treatment.

SUMMARY

Tobacco is a unique product, it is the only consumer product which has no known benefits and kills half of its consumers when used as intended by the manufacturers. The tobacco industry has been known to promote the sole objective of protecting commercial interests at the expense of public health. The total economic and social costs incurred from tobacco consumption and exposure generally outweigh the value of government gains from tobacco trade. It is for this

reason that the international community has treated tobacco and tobacco products in a unique manner and has concluded a treaty on how to regulate it.

Trade rules and investment laws that protect tobacco/ tobacco products and the tobacco industry undermines an FCTC Party’s good faith compliance with its international obligation: particularly, to implement effective packaging and labeling measures; to comprehensively ban tobacco advertising, to regulate the product, to implement tax and price measures, and to protect such tobacco control policies from the commercial and vested interests of the tobacco industry.

Allowing tobacco products to be subject of the TPP which could entail allowing tariff reductions, intellectual property protection, and expanded investment protection, will result in restricting the government’s policy space in setting and implementing tobacco control measures in accordance with the FCTC and its guidelines. This essentially provides a significant challenge to Parties that are seeking to comply with its FCTC obligations.

The most powerful and simplest means to avoid the public health challenges that the TPP might bring in light of a country’s commitment to the WHO FCTC, is to carve out tobacco and tobacco products from the TPP.^{xiii}

ⁱ M. Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?*, 34 B.C. INT’L & COMP. L. REV. 34 (2011), available at <http://lawdigitalcommons.bc.edu/iclr/vol34/iss1/3>.

ⁱⁱ *Id.*, citing SICE, *Trade Policy Developments, Trans-Pacific Strategic Economic Partnership Agreement* pmbl. art. 1.1, Jul.

18-Aug. 2 2005, ORG. OF AM. STATES FOREIGN TRADE INFO. SYS., at http://www.sice.oas.org/TPD/CHL_Asia/CHL_Asia_e.ASP.

ⁱⁱⁱ See World Health Organization Framework Convention on Tobacco Control (WHO FCTC), May 21, 2003, 42 ILM 518.

^{iv} Lewis, *The Trans-Pacific Partnership*, *supra* note i, at 39.

^v PRABHAT JHA & FRANK CHALOUKKA, WORLD BANK, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL (1999); Allyn Taylor *et al.*, *The Impact of Trade Liberalization on Tobacco Consumption*, in PRABHAT JHA & FRANK CHALOUKKA (EDS), TOBACCO CONTROL IN DEVELOPING COUNTRIES 343 (2000); Douglas Bettcher & Ira Shapiro, *Tobacco Control in an Area of Trade Liberalisation*, 10 TOBACCO CONTROL 65, 53 (2001).

^{vi} PRABHAT JHA & FRANK CHALOUKKA, *supra* note v, at 6; WHO FCTC, *supra* note iii, art. 6.

^{vii} WHO FCTC, art.5.3 and its Guidelines referring to limiting interaction with the tobacco industry unless it is strictly necessary for purposes of regulation.

^{viii} WHO FCTC arts.9 & 10:

Article 9: Regulation of the contents of tobacco products The Conference of the Parties, in consultation with competent international bodies, shall propose guidelines for testing and measuring the contents and emissions of tobacco products, and for the regulation of these contents and emissions. Each Party shall, where approved by competent national authorities, adopt and implement effective legislative, executive and administrative or other measures for such testing and measuring, and for such regulation.

Article 10 Regulation of tobacco product disclosures Each Party shall, in accordance with its national law, adopt and

implement effective legislative, executive, administrative or other measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products. Each Party shall further adopt and implement effective measures for public disclosure of information about the toxic constituents of the tobacco products and the emissions that they may produce.

^{ix} Philip Morris claims that the tobacco control measures Uruguay seeks to institute pursuant to its obligations under the FCTC constitutes an indirect expropriation of its intellectual property, and thus subject to payment of just and adequate compensation.

^x Philip Morris claims that plain packaging law of Australia would violate investor rights under the Australia-HK Bilateral Investment Treaty.

^{xi} Increasingly, in recent years, BITs would specifically include “intellectual property” or “industrial property” as one of the assets in the (non-exhaustive) list of what it considers as “investment.” Even in cases where the investment agreement is silent, tribunals may interpret a broadly defined “investment” to include industrial or intellectual property.

^{xii} Broadly, regulatory policies that interfere with the legitimate expectations of an investor from an investment, including expected profits are deemed “indirect expropriation.”

^{xiii} Robert Stumberg, The Forum on Democracy and Trade, *Tobacco in the Trans-Pacific Partnership*, 7 (forthcoming). Stumberg indicated that public health advocates such as the Campaign for Tobacco Free Kids (TFK) and the Center for Policy Analysis on Trade and Health (CPATH), urged USTR to carve out tobacco from the TPP altogether.