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A Breakthrough with the TPP:
The Tobacco Carve-Out

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The United States has made great progress in reducing tobacco consumption at home while spending taxpayer money to promote its consumption abroad.3 While U.S. tobacco consumption rates have fallen dramatically since the 1960s, they are soaring in the developing world.4 Today, about twenty percent of adults in the world smoke, and more than eighty percent of them live in low- and middle-income countries.5 As a result, tobacco could kill one billion people this century, and largely in these lower-income countries.6

Tobacco’s global success is partly the result of free-trade agreements that mandate the removal of import taxes and other commercial restrictions on most goods, including tobacco products.7 Both

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2 Chancellor’s Professor of Law and Director of the Center of Globalization, Law, and Society at University of California, Irvine School of Law.
3 Since the first Surgeon General’s Report on tobacco use was published in 1964, adult smoking rates in the United States have decreased by more than half, from 42.4% in 1965 to 16.8% in 2014. See OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 720 (2014); Ahmed Jamal et al., Current Cigarette Smoking Among Adults—United States, 2005-2014, 64 MORBIDITY & MORTALITY WKL. REP. 1233, 1233 (2015).
4 See Tobacco and the Developing World, ACTION ON SMOKING & HEALTH 1 (2015), http://ash.org.uk/files/documents/ASH_126.pdf; WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2015: RAISING TAXES ON TOBACCO 11 (2015), http://apps.who.int/iris/bitstream/10665/178574/1/9789240694606_eng.pdf (reporting that over 80% of premature deaths from noncommunicable diseases occur in the developing world, and that tobacco represents “the largest preventable risk factor” for these diseases). But see Carl E. Bartecchi et al., The Human Costs of Tobacco Use, 330 NEW ENG. J. MED. 975, 975 (1994) (reporting former Surgeon General C. Everett Koop’s statement that “cigarette smoking is the leading cause of preventable premature death in our society and the most important public health issue of our time”).
Republican and Democratic administrations have supported the tobacco industry in trade deals and awarded federal subsidies to tobacco growers and exporters for eight decades. These generous subsidies were only ended (at least for now) in 2014. U.S. policymakers have long maintained that since cigarettes are legally sold in the United States and abroad, trade officials should treat the industry no differently in trade agreements. A 1990 congressional report issued at the dawn of major trade negotiations noted the “conflict . . . between U.S. trade goals and health policy objectives,” but to no avail.

The tobacco ‘carve-out’ in the recently concluded Trans-Pacific Partnership Agreement (TPP) represents a historic shift. The carve-out permits TPP member countries to block corporations from using the ‘investor-state dispute settlement’ (ISDS) mechanism to receive compensation for commercial damages resulting from tobacco control measures. For the first time, an international commercial treaty treats tobacco companies exceptionally for selling—to quote from the World Health Organization—the “only legally available product that kills up to one half of its regular users.”


9 See McCord, supra note 8.

10 See, e.g., Thomas J. Bollyky, The Tobacco Problem in U.S. Trade, COUNCIL ON FOREIGN REL. (Sept. 5, 2013), http://www.cfr.org/trade/tobacco-problem-us-trade/p31346. But see Stan Sesser, Opium War Redux, NEW YORKER, Sept. 13, 1993, at 78, 79 (quoting Dr. James Mason, Assistant Secretary for Health in the U.S. Department of Health and Human Services under President George H.W. Bush, as saying: “Our country has been known for its humanitarian and health-related projects worldwide. This is a hundred and eighty degrees opposite. We’re talking about millions of lives—and that totally outweighs and overwhelms what we’ve accomplished in the humanitarian field. It’s outrageous for the United States to allow this misery and suffering to occur”).


13 Id. Article 29.5 of the TPP reads:

A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.


The carve-out comes in the wake of two key trends. On the one hand, tobacco companies are strategically using international litigation, such as ISDS, to challenge tobacco control measures around the world, including bans of flavored cigarettes; marketing and advertising restrictions; labeling requirements of health risks; import and export taxes; price, import, and export controls; and brand registration recognition. Philip Morris is implicated in one-third of thirty-nine international cases tracked by a recent study. On the other hand, in part because of international cases involving tobacco, litigation has incited growing resistance to ISDS in the United States itself, a challenge politically advanced by Senator Elizabeth Warren, among others. ISDS is not the only international dispute-resolution mechanism, but it raises particular concerns since it is not an interstate mechanism, but rather directly grants foreign companies legal standing to bring claims against governments before ad hoc arbitration panels. In ISDS cases, both the company and the government select one of the arbitrators from among a specialized bar paid large sums to arbitrate the disputes. The arbitrators’ decisions are not subject to appeal and national courts recognize their arbitral awards except on narrow grounds. ISDS claims have proliferated over the past decade, including against developed countries’ regulatory practices, and they have incited increasing contestation of the legitimacy of the ISDS system.

Current international litigation against Australia’s recent tobacco regulation illustrates these trends. Mobilized primarily by Philip Morris, four countries are challenging before the World Trade
Organization (WTO) an Australian law that mandates placing on all cigarette packages large graphic images of smoking’s effects. The companies argue that the law violates their trademark rights, despite losing this same issue before Australia’s High Court. Simultaneously, Philip Morris created a subsidiary to sue for damages before an ISDS arbitral panel under a treaty between Australia and Hong Kong on the grounds that Australia’s law constitutes an illegal ‘taking’ of its brands. Philip Morris recently lost the ISDS arbitration on jurisdictional grounds—an unsatisfactory outcome that failed to clarify the proper interaction between investment treaties and tobacco control efforts. As a result, tobacco companies can still use the threat of arbitration against countries considering tobacco control measures. The WTO case, moreover, continues.

The industry argues that the TPP carve-out unfairly targets tobacco products, and it has promised to sink the TPP in the U.S. Congress. We assert that the tobacco carve-out is far from unfair. It comes in paying the legal fees of bringing the case, which is arguably a standard practice in WTO disputes. See Sergio Puig, The Merging of International Trade and Investment Law, 33 BERKELEY J. INT’L L. 1, 33 & n.115 (2015). For background on the relation of private companies with governments in the bringing of WTO cases, see generally GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

The four countries are Cuba, Indonesia, Honduras, and the Dominican Republic. See, e.g., Dispute Settlement, Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WORLD TRADE ORG. (May 5, 2014), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (concerning matters labeled DS435, DS441, DS445, and DS467). At one point, Ukraine also participated but has suspended its involvement after one Ukrainian Member of Parliament expressed confusion when she learned that her country was a part of the litigation. See Norman Hermant, Ukraine Attacks Australia’s Plain Packaging Laws, AUSTL. BROADCASTING CORP. (Apr. 17, 2015), http://www.abc.net.au/liveticker/content/2012/s3479769.htm.

23 JT Int’l SA v Commonwealth [2012] HCA 43 (Austl.). In the Australian courts, the plaintiffs argued that the provisions were invalid because they constituted a taking of their trademarks on “[un]just terms.” Id. ¶ 2. The Australian High Court denied their claim, finding that the Act only controls the way tobacco is marketed. Id. ¶ 44.


response to increasing industry litigation used to chill tobacco regulation abroad. As documented by the Campaign for Tobacco Free Kids, tobacco companies have threatened international litigation against several poor countries considering tobacco control measures, all of which bowed to industry pressure and abandoned the intended legislation. Moreover, the carve-out applies only to ISDS, a venue considered more problematic than other international forums because companies have direct access to arbitral tribunals and there is no governmental screen between the companies and their introduction of an international claim. With ISDS there is thus a greater likelihood of overzealous litigation and private pressure behind the scenes through the threat of arbitration. Any of the current twelve signatory parties to the TPP can still bring claims (either before a WTO or a TPP panel) if they believe another governmental party to the treaty is regulating tobacco products for trade-protectionist reasons rather than to protect public health.

Unimpressed, advocates long concerned about international commercial deals and socially excessive litigation initiated by industry criticize the carve-out for being ‘too little, too late.’ We affirm, however, that the Obama Administration’s break with the tobacco industry is groundbreaking. With this move, President Obama risks his legacy pact since some otherwise ‘pro-trade’ Republican legislators have threatened to join many Democrats and vote against the TPP because of the tobacco carve-out. In past trade deals, the interests of tobacco producers were put above those of the public. The TPP carve-out hopefully begins a new trend to accommodate public health concerns in trade deals. It could help pave the way toward curtailing expansive intellectual property provisions, and the prospects of aggressive litigation under them, that empower large pharmaceutical companies against governmental interests and thus compromise public health.

The TPP could have gone further by exempting tobacco from tariff cuts, which we would support,
especially if coupled with consumption taxes, as this would raise revenue and reduce demand, particularly in poor countries like Vietnam. Nonetheless, public health advocates should move beyond the claim that the TPP is ‘too little, too late.’ The TPP tobacco carve-out is an underappreciated, critical first step that existing and future trade and investment agreements should also adopt. The United States already has free trade agreements with many TPP countries, such as Mexico and Canada under NAFTA, and these agreements grant ISDS rights to tobacco companies. These ISDS allowances will continue to coexist unless the agreeing governments amend the relevant provisions or explicitly provide for their replacement. The United States should turn this TPP carve-out into official U.S. policy for all trade and investment agreements, including NAFTA. This breakthrough should be generalized so that trade and investment policy always complement, rather than subvert, public health goals.

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29 See Michele Goodwin, Sergio Puig & Gregory Shaffer, Watch Out, Joe Camel is Back, Tobacco and the TPP, HUFFINGTON POST (Apr. 30, 2015), http://www.huffingtonpost.com/michele-goodwin/watch-out-joe-camel-is-ba_b_7177592.html. There are currently less than 8,000 tobacco farmers in the United States. Hence, the impact on U.S. jobs would be minimal.