

Tobacco, trade and global health: The challenge of policy coherence

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Summary



“It's the end of the
world as we know it...
(and I feel fine)”

Overview

- Beyond legal analyses: primacy of political economy
- Current context: disputes, Trans-Pacific Partnership, and Sustainable Development Goals.
- Historical context: Thai cigarette dispute
 1. Industry strategy: using trade agreements to undermine health policy
 2. Attempts to promote policy coherence: US and UK
 3. Politics of tobacco and trade: WHO Framework Convention on Tobacco Control (FCTC)
- Tobacco, trade and global health: limits of tobacco exceptionalism



WORLD TRADE
ORGANIZATION

Plain packaging: extensive (expensive) challenges

DS434 Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (**Complainant: Ukraine**) 13 March 2012

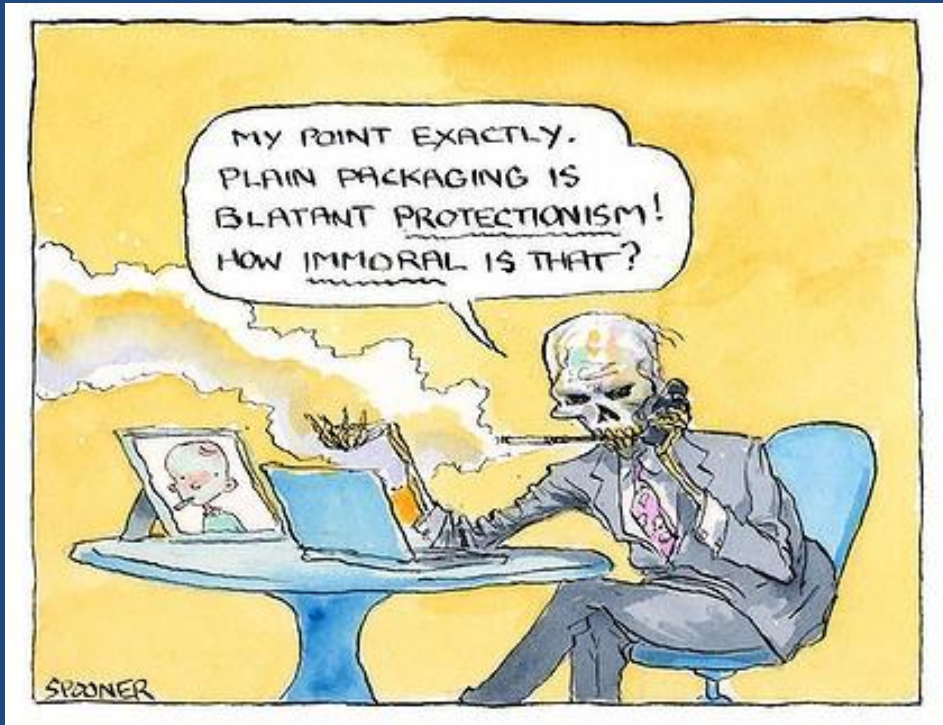
DS435 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (**Complainant: Honduras**) 4 April 2012

DS441 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (**Complainant: Dominican Republic**) 18 July 2012

DS458 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (**Complainant: Cuba**) 3 May 2013

DS467 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (**Complainant: Indonesia**) 20 September 2013

Australia's win in investor state dispute: Judgement deferred?



“There is nothing in today’s outcome that addresses, let alone validates, plain packaging in Australia or anywhere else. It is regrettable that the outcome hinged entirely on a procedural issue that Australia chose to advocate instead of confronting head on the merits of whether plain packaging is legal or even works.”

- Marc Firestone, PMI.



Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?

Matthew C. Porterfield & Christopher R. Byrnes – July 12, 2011



The Sydney Morning Herald

Trans-Pacific Partnership: Health groups say TPP will cost lives

Date

October 6, 2015 Amy Corderoy



The Sydney Morning Herald

Trans-Pacific Partnership: Health groups say TPP will cost lives

But is a triumph for tobacco control???

Date

October 6, 2015 Amy Corderoy

Curtin University professor Mike Daube said the provision that prevented tobacco companies suing countries for anti-tobacco laws was "a quite remarkable and historic development".

"It's a huge achievement for public health, and possibly the biggest international setback for the tobacco industry that we have ever seen," he said. "Tobacco has rightly been singled out as the pariah industry."

Trade and the Sustainable Development Goals



GOAL 2: END HUNGER, ACHIEVE FOOD SECURITY AND IMPROVED NUTRITION AND PROMOTE SUSTAINABLE AGRICULTURE

- ▶ Correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round (target 2b)
- ▶ Adopt measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility (target 2c)

GOAL 8: PROMOTE SUSTAINED, INCLUSIVE AND SUSTAINABLE ECONOMIC GROWTH, FULL AND PRODUCTIVE EMPLOYMENT AND DECENT WORK FOR ALL

- ▶ Increase Aid for Trade support for developing countries, in particular least developed countries, including Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries

GOAL 10: REDUCE INEQUALITY WITHIN AND AMONG COUNTRIES

- ▶ Implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements (target 10a)

GOAL 14: CONSERVE AND SUSTAINABLY USE THE OCEANS, SEAS AND MARINE RESOURCES FOR SUSTAINABLE DEVELOPMENT

- ▶ By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation (target 14.6)

GOAL 17: STRENGTHEN THE MEANS OF IMPLEMENTATION AND REVITALIZE THE GLOBAL PARTNERSHIP FOR SUSTAINABLE DEVELOPMENT

- ▶ Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda (target 17.10)
- ▶ Significantly increase the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020 (target 17.11)
- ▶ Realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access (target 17.12)



Strengthen the means of implementation and revitalize the global partnership for sustainable development

17.14

Enhance policy coherence for sustainable development

17.15

Respect each country's policy space and leadership to
establish and implement policies for poverty eradication and sustainable development

Policy coherence and global health

“the extent to which conflicts between policy agendas are minimized and synergies maximized” – *Blouin 2007*.

“promotion of mutually reinforcing policy actions across government departments and agencies creating synergies towards achieving the agreed objectives” (OECD , 2003).

- Between health and other policy agendas (particularly trade)
- Across different areas of health policy (eg tobacco control cf alcohol & obesity policies)

Collin J (2012)

Policy space



“the freedom, scope, and mechanisms that governments have to choose, design and implement public policies to fulfil their aims”

– Koivusalu et al 2007

- All international agreements imply some circumscription on policy space
- Restrictions can be health promoting (eg human rights)

Trade and Health: Historically complex relationship

- clear and continuing tensions
- health governance dependent on perceived advantage to trade for progress

“decided to establish common measures for protecting public health during cholera epidemics *without uselessly obstructing commercial transactions and passenger traffic*” - preamble, International Sanitary Conference 1893

“WTO’s existence has done more to increase the political profile of public health than almost anything else in the history of international health co-operation.” - Fidler 2005

Trade liberalisation and tobacco: significant (and inequitable) impacts

Inclusion of tobacco in GATT after Uruguay Round

Facilitated rapid recent expansion in tobacco trade

- 1994-97 12.5% growth in raw tobacco exports
- 1993-96 42% growth in cigarette exports

Overall increase but varying impact on consumption:

“trade liberalisation has a large and significant impact on smoking in low-income countries, and a smaller, but still important effect on smoking in middle-income countries, while having no effect on higher income countries” (Taylor et al 2000)

Health impacts – Section 301 countries targeted by US Cigarette Exporters Association

- Japan, South Korea, Taiwan, Thailand
- Across 4 Section 301 countries: per capita cigarette consumption 10% higher in 1991 than would have been in absence of bilateral trade agreements
- Massive rise among teen smokers in S Korea 1987-1988; males jumped from 18% to 29%, females quintupled from 1.6% to 8.7%
- Japan: cigarettes jumped from 40th to 2nd most heavily advertised product on television
- Biggest increases among youth and women: smoking among Tokyo women aged 20-29 increased from 10% in 1986 to 23% in 1991
- Thailand? Remarkable success in stabilising consumption

Chaloupka and Nair 2000; Chaloupka and Laixuthai 1996

5 October 1990

THAILAND - RESTRICTIONS ON IMPORTATION OF
AND INTERNAL TAXES ON CIGARETTES

*Report of the Panel adopted on 7 November 1990
(DS10/R - 37S/200)*

I. INTRODUCTION

1. On 22 December 1989, the United States requested consultations with Thailand under Article XXIII:1, concerning restrictions on imports of and internal taxes on cigarettes maintained by the Royal Thai Government (DS10/1).

73. The Panel then defined the issues which arose under this provision. In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be "necessary".

“Defeat in trade, Victory for health”

- Ambiguous and contested outcomes
- Debate at 11th WCTOH 2000:

“the Thai cigarettes case...means that there is nothing in the trading rules that stop a member country from regulating cigarettes and other tobacco products stringently.”

- D Bettcher, I Shapiro 2000

“market opening in Thailand has put ongoing pressure on the country’s tobacco control measures, blocked or delayed innovations, and undermined political support for tobacco control”

– C Callard, H Chitanondh, R Weissman 2000

“Health over trade”?

We support the resolution of the 11th World Conference on Tobacco or Health that called on “the international tobacco control community [to] work vigorously to exclude and remove tobacco and tobacco products from bilateral and multilateral trade agreements that would have negative public health consequences.”¹

- Callard C, Chitanonh H, Weissman R (2000)

‘Trade policy, not morals or health policy’: The US Trade Representative, tobacco companies and market liberalization in Thailand

Mackenzie R, Collin J

Global Social Policy

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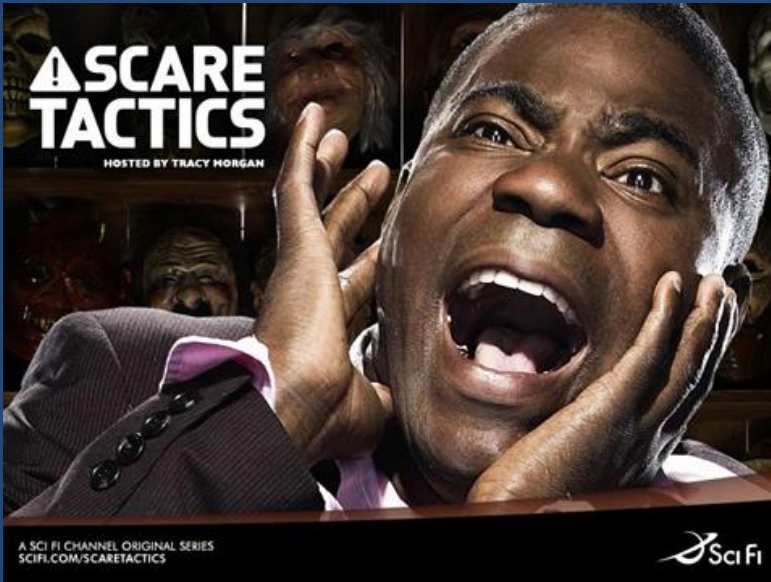
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‘The referral of recent trade issues to the GATT for resolution, e.g., Thailand, and **the ineffectiveness of the GATT process, as compared to bilateral trade negotiations**, does not bode well for the 301 process as a tool for the industry to liberalize other markets.’ – Ernest Pepples, B&W’s general counsel, 1991

Donald Albert, RJR, ‘repeatedly warned USTR and other US Government agencies that the GATT route was unadvisable and **we were dragged into the GATT kicking and screaming**’

1. Industry strategy: using trade agreements to undermine health policy



Eckersley R (2004) The Big Chill: the WTO and Multilateral Environmental Agreements. Global Environmental Politics 4(2):24-46

- global trading regime seen as undermining development of health & environmental policy via “the chilling effect”
- vulnerability to challenge leading to cautious implementation
- adopting an “increasingly self-censoring” approach to potentially trade restrictive measures (Eckersley 2004)
- core strategy for tobacco companies
- relevant on several occasions: Thailand; EU, UK, Canada, **New Zealand?**

Research Questions and Methodology

RO: Explore how tobacco companies have used claimed conflicts with obligations under World Trade Organisation agreements, intellectual property (IP) rights and bilateral investment treaties to oppose plain packaging

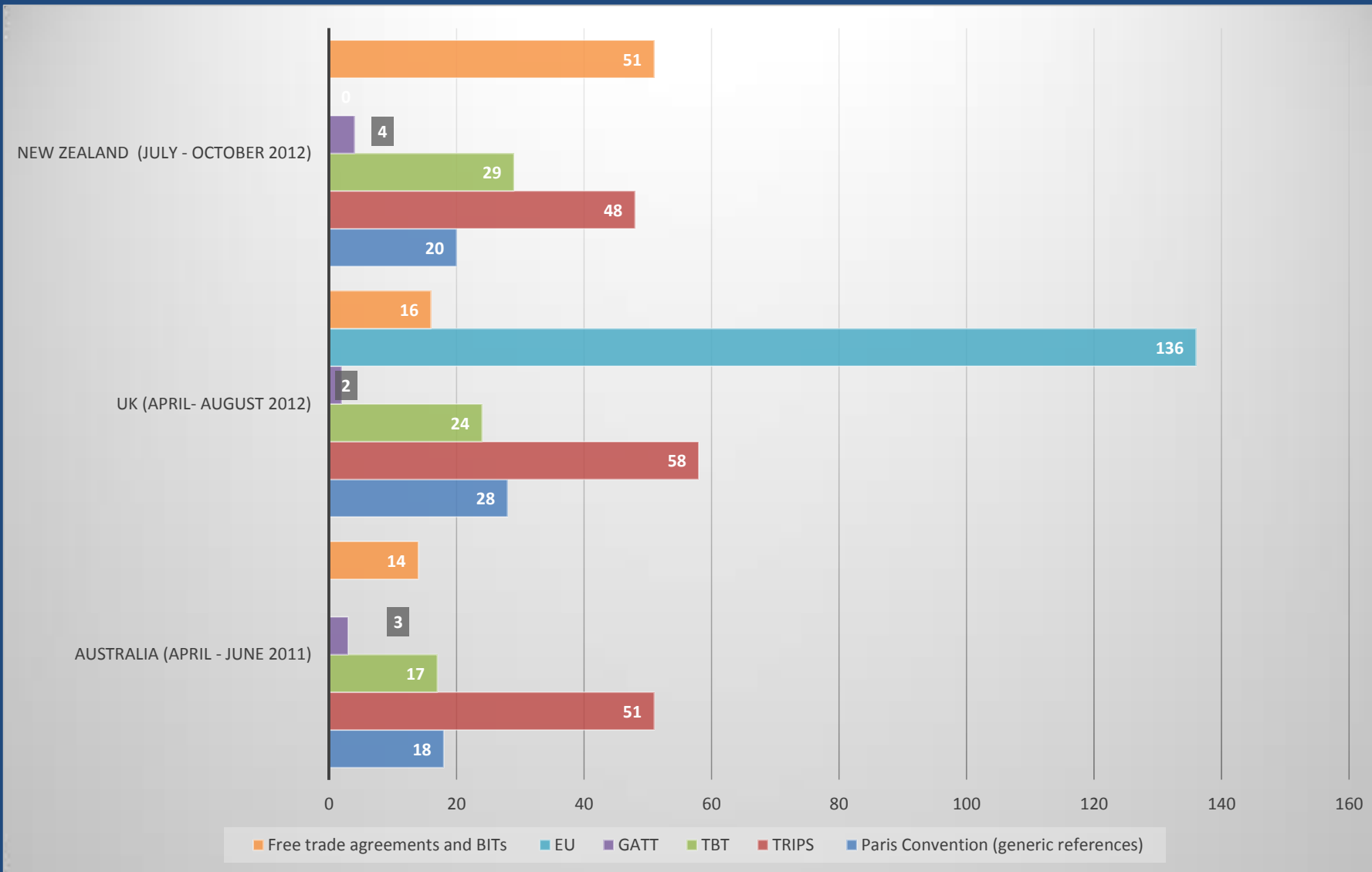
Methods:

- Three public consultations: AUS, the UK and NZ;
- Four tobacco manufacturing companies: BAT, PM, IT and JTI;
- Qnt. content analysis and structured thematic analysis;
- Nvivo software;

Trade: Companies allege multiple violations of agreements

Trade claims	Australia (April - June 2011)				UK (April- August 2012)				New Zealand (July - October 2012)			
	BAT	PM	IT	JTI	BAT	PM	IT	JTI	BAT	PM	IT	JTI
Paris Convention	V	V	V	V	V	V	V	V	V	V	V	V
TRIPS	V	V	V	V	V	V	V	V	V	V	V	V
TBT	V	V	V	V	V	V	V	V	V	V	V	V
GATT	V				V				V			
WTO trade and investment disputes	V	V	V	V	V	V	V	V	V	V	V	V
Regional Trade Agreements			V		V	V	V	V	V		V	V
Bilateral trade agreements and investment treaties	V	V	V	V	V	V		V	V		V	V

Shifting focus of TI claims: from TRIPs to bilaterals



Diverse damaging consequences

Financial implications

As a result of those violations, affected investors would be entitled to full compensation for the substantial loss in value of their investments (PM submission to Australia).

Punitive sanctions

... a breach of an international obligation would expose Australia to the risk of a WTO Panel which ...could also lead to retaliatory countermeasures by other WTO members (BAT submission to Australia).

Reputational risks

ITNZ submits that the introduction of plain packaging would jeopardise New Zealand's strong international reputation as a fair player and good international actor (IT submission to New Zealand).

Incalculable risks!

*“plain packaging would place the UK at **risk of expensive litigation**, leading to the **measure being overturned**, as well as **significant claims for compensation for depriving the tobacco companies of their trade marks**, copyrights, packaging patents and design rights, and valuable goodwill built over years in their brand portfolios. One cannot exclude the possibility of the UK not only facing **domestic challenges under UK, ECHR and EU law**, but also **international legal challenges** similar to those that Australia may soon face for breaching international trade obligations under WTO rules or foreign investment protection **obligations provided by the myriad bilateral investment treaties** to which the UK has subscribed. In addition to **claims by states under the WTO**, the UK Government risks facing **numerous claims from foreign investors** under bilateral investment treaties (BITs).”*

BAT submission to UK consultation, 2012.

“Beware the example of Australia!”

	UK	NZ
BAT	<i>.... Ukraine, Honduras and the Dominican Republic have taken the first steps in the WTO dispute resolution process by submitting formal requests for consultation to Australia on this issue.</i>	<i>An arbitration has been commenced against Australia by Philip Morris Asia Limited under the Investment Treaty between Australia and Hong Kong, seeking substantial compensation.</i>
PM	<i>Australia currently faces legal challenges related to plain packaging on multiple fronts: Philip Morris Asia Ltd. seeks compensation through international arbitration proceedings under the Hong Kong-Australia Bilateral Investment Treaty; and three WTO members are pursuing claims against Australia through the WTO dispute resolution process.</i>	<i><u>Australia is undertaking a public policy approach that should not be modelled or repeated by New Zealand</u></i>
JTI	<i>The legality of the only such law to be adopted in Australia is currently the subject of not one but three different challenges (before the World Trade Organization and elsewhere).</i>	<i>(I)n addition to the steps taken towards a WTO dispute by Ukraine, Honduras and the Dominican Republic, it has been argued that the Australian plain packaging legislation would have a detrimental impact on trade mark owners...</i>
IT	<i>The legislation in Australia is being challenged in the national courts and via International Tribunals. Ukraine, Honduras and the Dominican Republic have already filed Requests for Consultation with the World Trade Organization</i>	<i>The legislation in Australia is being challenged via International Tribunals. Ukraine, Honduras and the Dominican Republic have filed Requests for Consultation ("RfC") with the WTO.</i>

Tobacco industry & the politics of trade



- Importance of geopolitical context in which agreements occur
- For tobacco, perceptions largely shaped by industry
- Delayed implementation, particularly in NZ, suggests successful invocation of chilling effect
- Outcome of current disputes hugely important
- Industry framing of trade agreements:
 - can't go unchallenged
 - shouldn't be echoed

2. Attempts to promote policy coherence

United States General Accounting Office

Report to Congressional Requesters

TRADE AND HEALTH ISSUES

Dichotomy Between
U.S. Tobacco Export
Policy and
Antismoking
Initiatives

- Efforts to reposition US involvement in global expansion of tobacco companies under Clinton
- Pressure following 301 & Thai case
“U.S. policy and programs for assisting the export of tobacco and tobacco products work at cross purposes to U.S. health policy and initiatives, both domestically and internationally.”
- US General Accounting Office, 1992

Politics of tobacco exports

“Tobacco exports should be expanded aggressively because Americans are smoking less... We’re not going to back away from what public health officials say and what reports say. But on the other hand we’re not going to deny a country an export from our country because of that”

- Vice President Dan Quayle, 1990



“Doggett Amendment”

1997 amendment to the 109th United States Science, State, Justice, Commerce, and Related Agencies Appropriations Act

“None of the funds provided by this Act shall be available to promote the sale or export of tobacco or tobacco products, or to seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type.”

Initial industry response

It is very important that the U.S. policy toward cigarette exports be maintained. Next year almost \$1 billion of Philip Morris operating income will come from markets opened by cases brought under §301 of the Trade Act. If the countries involved in those cases can renege on their trade agreements relating to cigarettes, Philip Morris' business in those countries would be in jeopardy.

Owen Smith, PMI, 1997 Bates: 2073893754

If this amendment had been adopted ten years ago, the markets in Japan, Korea, Taiwan, and Thailand would remain closed to US exports of cigarettes, but the US market would be open to imports from those countries.

The amendment would lead to far more than merely deny funds to the USTR for cigarettes.

If this amendment involving cigarettes and tobacco is adopted it will encourage other activists to seek similar treatment for products they wish to put at a disadvantage, such as distilled spirits, infant formula, or red meat.

PM, Dec 1997, Bates: 2078335704-5705

Revised amendment

- Spoke with offices of Reps. Taylor and Latham re: Doggett amendment. Alerted them that industry does not object to amendment and asked them to help monitor the conference. PM Federal Tobacco Team, Oct 1997: Bates: 2078293609

“formalized the US position on tobacco exports--prohibiting promotion of tobacco overseas but allowing the government to fight discrimination specifically against US tobacco”

– Freedman T, senior advisor to President Clinton, November 1997

Impact?

- Reinforced by Executive Order 13193, still in force
- Often breached, but provides advocates with leverage
- Decade later, Doggett suggested it had a “modest effect” in lessening government help to tobacco companies overseas.
<http://www.washingtonian.com/2007/12/01/thank-you-for-smoking/>
- Cited in demonstrating compatibility of trade and health (including by WHO TFI)
- Mirrored in other contexts

UK Government Guidelines on tobacco to Overseas Diplomatic Posts

1999

2. Posts must no longer directly promote products containing tobacco, whether through advertising or through publicly associating HMG with their sale, especially where this might be misconstrued as some form of government endorsement or approval of them. However, given the general,

into account local circumstances. Posts should bear in mind that the international tobacco control lobby is increasingly well organised, and pressure groups may seek to highlight any apparently controversial involvement in an event sponsored by a tobacco company.

3. It follows from the above that Posts should not inter alia be associated in any way with the promotion of the tobacco industry, for example by accepting advertisements for UK or local tobacco products in publications issued by the Post, or sponsorship from tobacco companies for their activities, including Chevening Scholarships. Nor should they attend or otherwise support receptions or high profile events--especially those where a tobacco company is the sole or main sponsor--which are overtly to promote tobacco products, such as the official opening of a UK tobacco factory overseas; events where

United Kingdom's revised guidelines for overseas posts on support to the tobacco industry

December 2013

1. The Department of Health (DH) have decided to be more prescriptive in relation to the provision of support to the tobacco industry, to ensure any such support is consistent with the provisions of the WHO Framework Convention on Tobacco Control (FCTC). The Government takes very seriously its obligations as a Party to the (FCTC). This includes the treaty commitment at Article 5.3 to protect public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry.

5. Posts should limit interactions with the tobacco industry, including any person or organisation that is likely to be working to further the interests of the tobacco industry. In the event that interactions with the tobacco industry are necessary, these should be conducted with maximum transparency to demonstrate our compliance with the FCTC.
6. Posts must **not**:
- Be involved in activities with the specific purpose of promoting the sale of tobacco or tobacco related products (including promotional goods);
 - Encourage investment in the tobacco industry, or provide any assistance in helping tobacco companies influence non-discriminatory local business policies to their advantage (e.g.: taxation, plain/standardised packaging, etc);
 - Endorse, support, form partnerships with, or participate in activities of the tobacco industry that could be described as “socially responsible”, that relate, for example, to public education or that are aimed at improving public health;
 - Lobby against any local Administration’s policies that are aimed at improving public health; or
 - Engage with foreign governments on behalf of the tobacco industry, except in cases where local policies could be considered protectionist or discriminatory.

The Government's Alcohol Strategy

Neither “international” nor
“global” appear at all

Cm 8336

 HM Government

Alcohol strategies blind to global context - health impacts & policy



Changing Scotland's Relationship with Alcohol:
A Framework for Action

23. At the same time, this needs to be seen in the context of an alcohol industry that contributes greatly to Scotland's Purpose. The whisky industry, in particular, plays an important part in bringing wealth to Scotland through exports, and through attracting visitors to Scotland. Scottish Ministers have and will continue to responsibly promote whisky and Scotland in their international activities. Whisky is a distinctive brand. It raises the profile of Scotland throughout the world. At home, the alcohol industry provides much needed employment, particularly in some of Scotland's more rural and isolated communities, often serving as the sole or main employer in a particular area. That is why it is especially important to strike the right balance in our approach – to change our relationship with alcohol, not to destroy it.



Contrast with support for alcohol industry

- Guided Diageo's 2012 takeover of Meta Abo, Ethiopia's second-largest beer company
- "UK Trade & Investment's Ethiopia team supported and guided the company through the tender process" (UKTI, 2012a)
- "As a result of the support UKTI gave us we were as well prepared as we possibly could be ... We had access to decision makers, to opinion formers and to a wealth of experience of doing business in Ethiopia" (UKTI, 2012b).

3. Politics of tobacco and trade: WHO FCTC

Foreword:

The WHO FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, including trade liberalization and direct foreign investment. Other factors such as global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes have also contributed to the explosive increase in tobacco use.

Preamble:

The Parties to this Convention,

Determined to give priority to their right to protect public health,



WORLD HEALTH ORGANIZATION

**INTERGOVERNMENTAL NEGOTIATING BODY
ON THE WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL
Fifth session**

**A/FCTC/INB5/2
25 June 2002**

**Draft text: Penultimate INB
Subordinating health to trade?**

3. Nothing in this Convention and its related protocols shall be interpreted as implying in any way a change in rights and obligations of a Party under any existing international treaty.

5. While recognizing that tobacco control and trade measures can be implemented in a mutually supportive manner, Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means of arbitrary or unjustifiable discrimination in international trade.



ALLIANCE BULLETIN

Framework Convention on Tobacco Control

Geneva, Switzerland

Issue 40

21 February 2003

Over the past few days, SEARO, AFRO and WPRO have presented a united front in renewing demands that concern for public health should take precedence over tobacco trade interests, and that trade agreements should be interpreted in a manner consistent with the FCTC.

Those who support silence on this issue, as the Chair's text does, contend that there probably will not be conflicts between the FCTC and trade agreements. This is plainly wishful thinking.

- *John Bloom*
and *Ira Shapiro*

Embassy of the United States of America,

Riyadh, February 8, 2003.



“the United States will work to include recognition in the FCTC of fundamental trade principles, such as non-discrimination”

--We encourage trade and agriculture ministry participation in developing government positions for the February FCTC session.

--Based on these observations, and a text that is mutually supportive of health and trade policies, the Chairman's approach may offer a way forward by remaining silent on the issue of the FCTC's relationship to other international agreements.

THE FUTURE OF TOBACCO IN TRADE IS IN COP'S HANDS



ORCHID AWARD

Thailand, for pointing out that the goal of free trade is the free flow of goods, and "tobacco is no good"

the Committee B discussion on the Malaysian draft decision on future trade and investment agreements.

Acceleration of globalisation of trade and investment, to the benefit of the tobacco industry, hovers like the shadow of the grim reaper over the public health obligations of the Parties to the WHO Framework Convention on Tobacco Control (FCTC).

Tobacco, trade and global health:

More questions than answers



- Australia will “win”, but isn’t that missing the point?
- How relevant are the public health flexibilities allowed by WTO agreements when political & economic context inhibits their exercise?

TPP: Public health protected via a 'tobacco carve out'?



Article 29.5: Tobacco Control Measures¹²

A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure¹³ 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.

TPP: Is that it?



Article 29.5: Tobacco Control Measures¹²

¹² For greater certainty, this Article does not prejudice: (i) the operation of Article 9.14 (Denial of Benefits); or (ii) a Party's rights under Chapter 28 (Dispute Settlement) in relation to a tobacco control measure.

- “It only applies to corporations suing countries, not one country suing another”

<http://www.oneillinstituteblog.org/is-the-trans-pacific-partnership-a-win-for-tobacco-control-a-first-look-at-the-tobacco-carve-out/>

TPP: trade-offs for health behind closed doors

A dozen countries have signed the Trans-Pacific Partnership, a major trade agreement with complex implications for global health. Ted Alcorn reports from New York.

Carving out tobacco

Public health advocates had more to cheer about in a separate section of the agreement, which strengthened countries' abilities to implement strong tobacco-control measures.

Legitimizing function
of tobacco control
exceptionalism?



To the surprise of many, the final language of the TPP explicitly exempts tobacco products from ISDS. Chris Bostic, the deputy director for policy at the advocacy organisation Action on Smoking and Health, says this was particularly notable because earlier in the negotiations the USA had signalled a willingness to move to an even weaker position. But a consortium of organisations built support in Congress, engaged the Department of Health and Human Services to push back, and organised other signatory countries to take strong positions that ultimately caused a change of heart. "I think in the end it was a political decision in the USA that [the TPP] is more likely to pass the US Congress with a tobacco carve-out than without it", says Bostic.

Policy coherence or health policy compliance?

- Efforts to promote coherence are important, have yielded benefits, but are essentially unidirectional
- Exercises in exploring limits of the possible as defined by trade agreements (and trade politics)
 - WTO dispute settlement & ISDS vs FCTC without enforcement
 - High politics vs low politics

From policy coherence to regulatory coherence?

Transatlantic Trade and Investment Partnership aims to “significantly reduce the cost of differences in regulations and standards by promoting greater compatibility, transparency, and cooperation, *while maintaining our high levels of health, safety, and environmental protection.*”

- striking a balance between optimal regulation and maximum market freedom? Fung S, Cornell Int LJ, 2014
- Depoliticising trade?



Trade & policy space

- ***Procedural constriction***: increasingly complex policy process, uncertain boundaries, can inhibit policy innovation
- ***Substantive constriction***: directly limiting range of policy options available to governments
 - Fidler et al 2006, Baker et al 2014
- Can the SDG agenda be utilised to increase protections for policy space?

Impasse in politics of tobacco & trade



- Tobacco control has used the scream test as a valuable rule of thumb
- How should we interpret tobacco companies and public health both screaming the same thing?

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