

Global & Domestic Tobacco Policy Influence on Trade & Health: Trade threats to state tobacco control efforts

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Presenter Disclosures

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The following personal financial relationships with commercial interests relevant to this presentation existed during the past 12 months:

No relationships to disclose

Disclaimer

- TPP & TTIP text is secret
- This presentation is based on
 - reports in the media,
 - public statements by USTR,
 - leaked and public proposals, and
 - previous FTAs and investment treaties
- The actual text may differ from prior agreements and leaked text.

TPP CONFIDENTIAL
Declassify 4 years from
entry into force

Overview

- How do states engage in trade policy?
- State tobacco regulation
- Trade agreements under negotiation and provisions of concern
- How trade agreements might be used to challenge state regulation
- Alternative approaches in the TPP to protecting tobacco regulations from trade challenges
- Where things stand today

US States' Role in Trade Policy



- Limited role advising on trade policy
 - Formal state role: IGPAC
 - Lack of transparency – secret texts
 - Lack of state expertise, funding, awareness
- Yet state laws have been challenged in trade disputes under NAFTA and could be challenged under treaties under negotiation

Maine Citizen Trade Policy Commission



CHAPTER 699

H.P. 1337 - L.D. 1815 (2003, amended 2007) An Act To Establish the Maine Jobs, Trade and Democracy Act

“Purposes. The commission is established to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements.”

Website: <http://www.maine.gov/legis/opla/citpol.htm>

Modern Tobacco Regulation – It Started in the States



MASTER TOBACCO SETTLEMENT AGREEMENT

November 23, 1998

\$206 billion settlement between the tobacco industry and **46 states plus 5 territories** led to federal law giving FDA more authority to regulate packaging, safety. States retained authority to regulate in many areas.

State Tobacco Regulation

- TOBACCO SALE & USE
- BANS ON CERTAIN PRODUCTS
- AGE RESTRICTIONS
- INTERNET SALE RESTRICTIONS
- STORE DISPLAYS
- BILLBOARDS
- TAX POLICY & COLLECTION
- ENFORCEMENT

Maine's Tobacco Regulation

- **Tobacco specialty stores:** A person under 18 years of age is prohibited from entering a business licensed as a tobacco specialty store unless accompanied by a parent or legal guardian
- **Purchase/possession/use:** A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age
- **Prohibition on sale or distribution of flavored cigars.** A person may not sell or distribute or offer to sell or distribute any flavored cigar unless the cigar is a premium cigar
- **Hookah** use and sale banned for minors

Advertising Aimed at Kids

Attorney General Rowe Seeks to Stop Tobacco Company From Using Cartoons in Promotions

December 4, 2007: **"The Attorney General is seeking to permanently enjoin RJR from using cartoons in the advertisement or promotion of tobacco products.** The Attorney General's motion alleges that R.J. Reynolds Camel® The Farm advertisement and promotion violates the ban on cartoons in two ways. First, the advertisement itself contains cartoon images. Second, the advertisement is inextricably wrapped around and intertwined with a five-page Special Foldout drawn entirely in the cartoon style. Both the R.J. Reynolds advertisement and the Special Foldout have the same content and focus: independent rock music."

Vermont's Tobacco Regulation

- **Cigarette Brands Must be Certified as Fire-Safe** and Legal for Sale and have approved package markings.
- **Distributors must be licensed** by the Vermont Department of Taxes, and comply with all applicable tax statutes.
- **BAN ON INTERNET AND MAIL ORDER TOBACCO SALES:** it is illegal for cigarettes, roll-your-own tobacco, little cigars, or snuff, ordered or purchased by telephone, mail order, or through the Internet, to be shipped directly to consumers in Vermont.
- **ORGANIC TOBACCO:** A settlement with the maker of Natural American Spirit tobacco products requires the company to disclose in its advertising that "Organic tobacco does NOT mean a safer cigarette"

RETAIL TOBACCO PLACEMENT

- **27 states have state laws restricting customer access** to cigarettes and/or tobacco products in retail stores.
- Sixteen of these states - **Alabama, Alaska, California, Delaware, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Minnesota, New Mexico, New York, Oklahoma, Oregon, Utah and Wyoming** - *completely prohibit customers from having direct access to all tobacco products in retail stores, and/or have language prohibiting the use of self-service displays.*

VENDING MACHINES: States go beyond federal law

- 48 states and the District of Columbia have laws restricting the placement of tobacco product vending machines
- Idaho completely prohibits the sale of tobacco products through vending machines.
- 19 states prohibit tobacco vending machines everywhere except for bars, taverns and other places where minors are not permitted by law.

TOBACCO SAMPLES

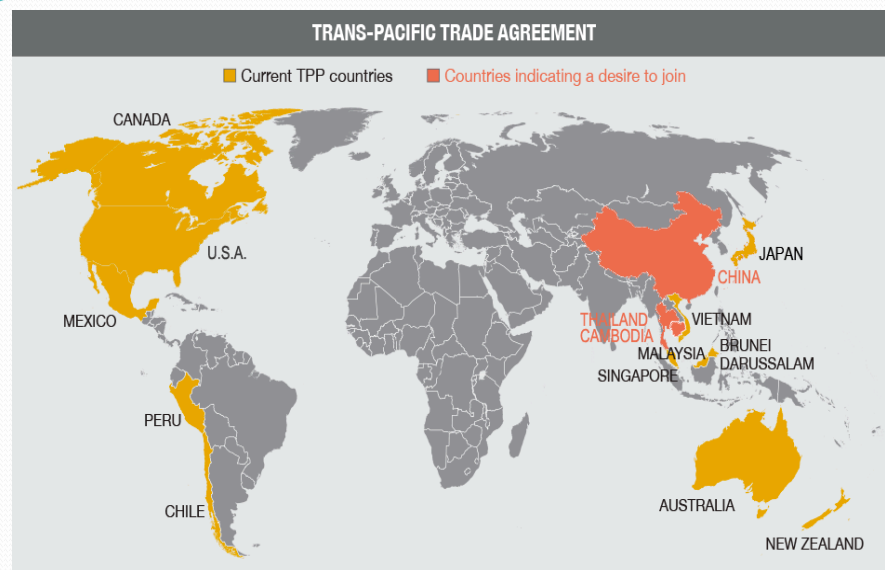
23 states & D.C. restrict where free samples of tobacco products can be distributed to the general public or **virtually prohibit the free distribution of tobacco products entirely.**

- **Minnesota** and **Massachusetts** prohibit the sampling of tobacco products entirely except for single-serving samples distributed in tobacco stores.
- **Nebraska** prohibits samples, coupons and rebate offers for smokeless tobacco products.
- **Oregon** prohibits sampling of smokeless tobacco products in places/areas where persons under 21 are allowed to enter.
- **Texas** prohibits the redemption of coupons, sample cigarettes and tobacco products through the mail or courier delivery.

SOME STATE AGENCIES INVOLVED WITH TOBACCO CONTROL

- PUBLIC HEALTH
- COMPTROLLER
- ATTORNEY GENERAL
- LIQUOR & TOBACCO CONTROL BOARD
- RETAIL, GAS & CONVENIENCE STORE LISENCING
- REVENUE & TAX AGENCIES

What is the TPP?



What is T-TIP (U.S.– EU FTA)?



Five TPP Chapters That Threaten Tobacco Control

- Investment
- Intellectual Property
- Services
- Technical Barriers to Trade
- Regulatory Coherence



TPP includes investor-state dispute settlement (ISDS)

- Proposed provisions allow corporations and subsidiaries based in member nations to sue governments directly for cash compensation in secret, closed-door trade tribunals, either avoiding the courts altogether or double-dipping when they don't like the outcome of a court decision.
- Philip Morris is doing this right now in its challenge under another trade agreement to tobacco packaging rules recently upheld by Australia's highest court.

Are state tobacco laws vulnerable to trade-based challenges?

- **Trade agreements cover measures that affect trade in goods, trade in services, or investments**
- Many state tobacco laws prohibit products (e.g., **flavored little cigars**) or modes of distribution (e.g. **vending machines, internet sales**)
- The **Market Access rule** for trade in services effectively prohibits a ban on a mode of distribution or a product that is covered by mode of supply (e.g., wholesale or retail distribution). Technically, the rule prohibits quotas, and the WTO's Appellate Body has interpreted a ban to be a quota of zero.
- **The "technical barriers to trade" provisions address labeling, product standards, disclosure of formulas**
Malaysia proposed a rule to prohibit laws that require businesses to disclose proprietary formulas

Cross-Border Services

- **Tobacco-related services** - Advertising, packaging, wholesale distribution, retail distribution – including Internet distribution
- **TPP is a “negative list” agreement**
Services for a product are covered unless carved out
- **No quotas / no bans**
Bans are quotas, according to the WTO
- **Potential necessity test**
Measures must be “not more burdensome than necessary to ensure the quality of the service”

Competing Tobacco Proposals in TPP

US Trade Representative

“... this proposal will, for the first time in a trade agreement, address specifically the public health issues surrounding tobacco ...”

Malaysia Trade Minister

“We’ve been able to table ... a carve-out of tobacco. Now, our challenge is to find alliances with other partner countries,”

Revised US tobacco proposal

- Zero tobacco tariffs
 - Lowers retail price
- Health exception - tobacco insert
 - No argument that tobacco is a health issue – acknowledged in Indonesia clove case
- Dispute settlement - consultation insert
 - Consultation already required, and no transparency, report, legal import

Was the earlier US
“safe harbor”
proposal better?

Initial U.S. Proposal - 2012

... allow health authorities in TPPA governments to adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health

Six major shortcomings ...

1. **Coverage** - does not apply to investment or IP
2. **Health authorities** - does not cover licensing, tax, customs
3. **Regulations** - does not cover legislation
4. **Science-based** – higher burden of proof than WTO exception
5. **Origin-neutral** - does not avoid de facto discrimination, the reason the US lost the clove cigarette dispute
6. **Products/classes** - does not cover regulation of services like advertising, packaging, distribution, etc.

Initial U.S. Proposal - 2012

... and in any event, USTR official confirmed that sub-federal laws & regulations were not intended to be covered by the proposed exception

Status of TPP negotiations



USTR Ambassador Froman meets with TPP ministers
[USTR photo)

Will TPP wrap up by Dec. 31?

- 3 years, 19 rounds
- Shutdown canceled President Obama's trip to APEC (Asia-Pacific Economic Cooperation) Summit
- "Political" issues remain – including ***tobacco text, intellectual property***
- US business groups urging USTR not to "compromise" to get it done
- Beware the "end game"



Public Health & Medical Associations Support Tobacco Carve-Out

- The American Public Health Association
- The Public Health Institute
- Center for Policy Analysis on Trade and Health
- American Academy of Family Physicians
- American Academy of Pediatrics
- American College of Physicians
- American Congress of Obstetricians and Gynecologists
- Health Officers Association of California

State Legislators & State Trade Policy Commissions Support Carve-Out

- Maine Citizen Trade Policy Commission
- Vermont Commission on International Trade & Sovereignty
- Working Group of State Legislators for Health Reform

NY Times: USTR Should Side with Public, Not Big Tobacco



Washington Post: Exempt tobacco control from legal challenge

"Tobacco sickens and, eventually, can kill if consumed as intended. Every country, the United States included, should be taking every effective step to prevent smoking...."

... It could also make an exemption from legal challenge for tobacco-control measures applicable only to those measures that treat domestic and imported products equally..."

Washington Post Editorial, 9/17/13

A dissenting voice...

A Bad Smoke

*“... The entire point of free-trade negotiations is to remove these political obstacles to investment and the movement of goods across borders. The tobacco carve-out is especially counterproductive because its economic importance is so small. **The Obama Administration shouldn't let anti-smoking activists interfere with America's larger economic interest.**”*

Wall St. Journal Editorial, 9/8/13

Maine Legislature's Bipartisan Resolution Opposing Fast Track



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