



2016

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Recommended Citation

Puig, Sergio and Shaffer, Gregory (2016) "A Breakthrough with the TPP: The Tobacco Carve-out," *Yale Journal of Health Policy, Law, and Ethics*: Vol. 16 : Iss. 2 , Article 4.

Available at: <http://digitalcommons.law.yale.edu/yjhple/vol16/iss2/4>

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A Breakthrough with the TPP: The Tobacco Carve-Out

Sergio Puig* and Gregory Shaffer†

The United States has made great progress in reducing tobacco consumption at home while spending taxpayer money to promote its consumption abroad.¹ While U.S. tobacco consumption rates haven't fallen dramatically since the 1960s, they are soaring in the developing world.² Today, about twenty percent of adults in the world smoke, and more than eighty percent of them live in low- and middle-income countries.³ As a result, tobacco could kill one billion people this century, and largely in these lower-income countries.⁴

Tobacco's global success is partly the result of free-trade agreements that

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1 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 WKLY. REP. 1233, 1233 (2015).

2 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”).

3 See WORLD HEALTH ORG., *supra* note 1, at 15. According to the World Health Organization, member states are grouped into four income groups (low, lower-middle, upper-middle, and high) based on the World Bank's list of analytical income classification of economies. See *Health Statistics and Information Systems: Definition of Region Groupings*, WORLD HEALTH ORG. (2016), http://www.who.int/healthinfo/global_burden_disease/definition_regions/en.

4 See WORLD HEALTH ORG., *supra* note 1, app.VII (reporting an age-standardized tobacco smoking rate of 21.1% in 2013 among persons aged at least fifteen years); *Tobacco Could Kill a Billion People This Century, UN Health Official Warns*, UN NEWS CTR. (Apr. 29, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38240#.Vu713xIrKV4>.

mandate the removal of import taxes and other commercial restrictions on most goods, including tobacco products.⁵ Both Republican and Democratic administrations have supported the tobacco industry in trade deals and awarded federal subsidies to tobacco growers and exporters for eight decades.⁶ These generous subsidies were only ended (at least for now) in 2014.⁷ 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.⁸ 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.⁹

The tobacco ‘carve-out’ in the recently concluded Trans-Pacific Partnership Agreement (TPP) represents a historic shift.¹⁰ 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

⁵ See, e.g., Robert Stumberg, *Safeguards for Tobacco Control: Options for the TPPA*, 39 AM. J.L. & MED. 382, 382-83 (2013). *But cf.* Jeffery Drope & Jenina Joy Chavez, *Complexities at the Intersection of Tobacco Control and Trade Liberalization: Evidence from Southeast Asia*, 24 TOBACCO CONTROL e128, e129 (2015) (pointing to some complex methodological issues in studying the effects of trade liberalization and the level of tobacco consumption).

⁶ Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31; Tobacco Control Act, ch. 866, 48 Stat. 1275 (1934) (establishing price support and production adjustment for tobacco); For recent discussion on their elimination, see Emily McCord, *Tobacco Farmers Lose Longtime Safety Net*, NPR (Oct. 24, 2014), <http://www.npr.org/2014/10/24/357947259/tobacco-farmers-lose-longtime-safety-net>. In fact, since the 1960s countries like Malawi have complained about the effects of U.S. subsidies in global markets and on local production. See Statement by the Representative of Malawi Before the Council of Representatives for the General Agreement on Tariffs and Trade, United States Subsidy on Manufactured Tobacco (Nov. 6, 1967), https://www.wto.org/gatt_docs/English/SULPDF/90800173.pdf.

⁷ See McCord, *supra* note 6.

⁸ 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”).

⁹ U.S. GEN. ACCOUNTABILITY OFF., GAO/NSIAD-90-190, TRADE AND HEALTH ISSUES: DICHOTOMY BETWEEN U.S. TOBACCO EXPORT POLICY AND ANTISMOKING INITIATIVES 5 (1990), <http://www.gao.gov/assets/150/149076.pdf>.

¹⁰ See Jackie Calmes, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html>.

from tobacco control measures.¹¹ 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.”¹²

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.¹³ 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.¹⁴ 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

11 *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.

Trans-Pacific Partnership Agreement, art. 29.5, at 29-9, Feb. 4, 2016,

<https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf>.

12 *Tobacco Free Initiative (TFI): Tobacco Product Regulation*, WORLD HEALTH ORG. (2016), http://www.who.int/tobacco/industry/product_regulation/background/en.

13 See Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT’L L.J. (forthcoming 2016) (finding, based on 39 cases brought before international courts and tribunals, that at least 13 cases (or 34% of the surveyed cases) either directly or indirectly (i.e., through an affiliated company) involved Philip Morris International).

14 See Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html (describing ISDS panels as “rigged[] pseudo-courts” that favor multinational corporations at the expense of sovereign states and their citizens).

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.¹⁵

Current international litigation against Australia's recent tobacco regulation illustrates these trends.¹⁶ Mobilized primarily by Philip Morris,¹⁷ 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.¹⁸ The companies argue that the law violates their trademark rights, despite

15 See, e.g., David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 758-59 (2000); see also Anthony DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> (describing early criticisms of the role of international tribunals between parties to the North American Free Trade Agreement); Letter from Erwin Chemerinsky, Dean, Univ. of Cal., Irvine Sch. of Law, et al., to Sen. Mitch McConnell et al. (Mar. 11, 2015), <http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf> (collecting support from a broad group of law professors against inclusion of ISDS provisions in the TPP). See generally GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007) (describing various features of the modern system of investment treaty arbitration).

16 *Tobacco Plain Packaging Act 2011* (Cth) s 20(1), (2) (Austl.).

17 See Myron Leving, *Tobacco Industry Uses Trade Pacts To Try To Snuff out Anti-Smoking Laws*, NBC NEWS (Nov. 29, 2012, 12:14 AM), http://openchannel.nbcnews.com/_news/2012/11/29/15519194-tobacco-industry-uses-trade-pacts-to-try-to-snuff-out-anti-smoking-laws. In most trade agreements, including the WTO, any State party to the treaty may initiate an enforcement action. Governments tend to exercise restraint in the initiation of proceedings after carefully assessing the balance between the likely benefits, including market access and the costs of bringing an action. In the Australian case, British American Tobacco initially convinced Ukraine—with no direct interest in the Australian tobacco market—to bring a complaint. (After the 2014 revolution, the new government of Ukraine changed course and withdrew the case). Philip Morris convinced the Dominican Republic, which has some general interest in tobacco regulation but no significant amount of tobacco exports to Australia. Philip Morris is currently 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).

18 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, DS458, and DS467). At one point, Ukraine also participated but has suspended its involvement after one Ukrainian Member of Parliament expressed confusion

losing this same issue before Australia's High Court.¹⁹ 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.²⁰ 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.²¹ 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.²² We assert that the

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/lateline/content/2012/s3479769.htm>.

19 *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.

20 Notice of Arbitration, ¶¶ 7.2-7.3, *Philip Morris Asia v. Commonwealth of Australia* (Nov. 21, 2011),

<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf>;

see also *Bilateral Investment Treaty (BIT) Arbitration: Philip Morris Asia Limited & the Commonwealth of Australia*, PHILIP MORRIS INT'L

http://www.pmi.com/eng/media_center/company_statements/Pages/bilateral_investment_treaty.aspx (last visited May 16, 2016) (listing Philip Morris's claims against Australia's plain-packaging rules).

21 The tribunal's detailed reasoning for rejecting jurisdiction over Philip Morris's claims is not yet available. *See* Jarrod Hepburn & Luke Eric Peterson, *Australia Prevails in Arbitration with Philip Morris over Tobacco Plain Packaging Dispute*, INV. ARB. REP. (Dec. 17, 2015), <http://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/>. Phillip Morris also filed a case against Uruguay under the Switzerland-Uruguay bilateral investment treaty before the International Centre for Settlement of Investment Disputes regarding legislation requiring all cigarettes manufacturers to adopt a single presentation on packages. This case remains pending. *See* *Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶¶ 5-6 (July 2, 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3592_En&caseId=C1000.

22 *See* Alex Rogers, *Election Politics Might Delay Vote on Pacific Trade Accord*, NAT'L J., Nov. 5, 2015, <http://www.theatlantic.com/politics/archive/2015/11/election-politics-might-delay-vote-on-pacific-trade-accord/454998>. The American Chamber of Commerce representative said: "[S]ingling out tobacco [will] open a Pandora's box as other governments go after their particular bêtes noires." Danny Hakim, *U.S. Chamber of Commerce Works Globally To Fight Anti-Smoking Measures*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to->

tobacco carve-out is far from unfair. It comes in 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.²³ 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.’²⁴ 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.²⁵ 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

fight-antismoking-measures.html.

23 Sabrina Tavernise, *Tobacco Industry Tactics Limit Poorer Nations’ Smoking Laws*, N.Y. TIMES (Dec. 13, 2013), <http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html>.

24 See, e.g., Gary Fooks & Anna B. Gilmore, *International Trade Law, Plain Packaging and Tobacco Industry Political Activity: The Trans-Pacific Partnership*, 23 TOBACCO CONTROL e1, e5-e6 (2014); Joseph Stiglitz: *Under TPP, Polluters Could Sue U.S. for Setting Carbon Emissions Limits*, DEMOCRACY NOW (Oct. 27, 2015), http://www.democracynow.org/2015/10/27/joseph_stiglitz_under_tpp_polluters_could (arguing generally against ISDS, in part because of its use to neutralize tobacco control measures in Uruguay and Australia).

25 See Calmes, *supra* note 10. According to some sources, Ambassador Michael Froman, the current U.S. Trade Representative, was an important supporter of the carve-out. See Adam Behsudi, *Will the Trans-Pacific Deal Go up in Tobacco Smoke? The Ire of McConnell and Other Tobacco-State Lawmakers Throws a Wrench into the Negotiations*, POLITICO (Aug. 12, 2015, 1:41 PM), <http://www.politico.com/story/2015/08/will-trans-pacific-trade-deal-go-up-in-smoke-over-anti-tobacco-proposal-121272>.

companies against governmental interests and thus compromise public health.²⁶

The TPP could have gone further by exempting tobacco from tariff cuts. We would support this exemption, especially if coupled with consumption taxes that would raise revenue and reduce demand, particularly in poor countries like Vietnam.²⁷ Nonetheless, public health advocates should move beyond the claim that the TPP is ‘too little, too late.’²⁸ 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 the North American Free Trade Agreement (NAFTA), and these agreements grant ISDS rights to tobacco companies.²⁹ 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.

26 See Amy Kapczynski, *The Trans-Pacific Partnership Is It Bad for Your Health?*, 373 *NEW ENG. J. MED.* 201 (2015).

27 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 about 5000 tobacco farmers in the United States. See 1 NAT'L AGRICULTURAL STATISTICS SERV., U.S. DEP'T OF AGRICULTURE, 2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 559 tbl.44 (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/us_v1.pdf. Hence, the impact on U.S. jobs would likely be fairly minimal.

28 See, e.g., James Surowiecki, *The Corporate-Friendly World of the T.P.P.*, *NEW YORKER* (Oct. 6, 2015), <http://www.newyorker.com/news/daily-comment/the-corporate-friendly-world-of-the-t-p-p> (noting that tobacco is “hardly the only industry that raises serious health and environmental concerns” and questioning why these other industries should be allowed to use the ISDS process).

29 For discussion of NAFTA, see Daniel Price, *Some Observations on Chapter Eleven of NAFTA*, 23 *HASTINGS INT'L & COMP. L. REV.* 421, 426-27 (2000). Unlike the TPP, Chapter 11 of NAFTA allows government policies, including tobacco control measures, to be challenged through investor-state arbitration. *Id.*