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Health Preemption Behind Closed Doors: Trade Agreements and Fast-Track Authority

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Abstract

Noncommunicable diseases result from consuming unhealthy products, including tobacco, which are promoted by transnational corporations. The tobacco industry uses preemption to block or reverse tobacco control policies. Preemption removes authority from jurisdictions where tobacco companies' influence is weak and transfers it to jurisdictions where they have an advantage.

International trade agreements relocate decisions about tobacco control policy to venues where there is little opportunity for public scrutiny, participation, and debate. Tobacco companies are using these agreements to preempt domestic authority over tobacco policy. Other transnational corporations that profit by promoting unhealthy foods could do the same.

“Fast-track authority,” in which Congress cedes ongoing oversight authority to the President, further distances the public from the debate. With international agreements binding governments to prioritize trade over health, transparency and public oversight of the trade negotiation process is necessary to safeguard public health interests. (*Am J Public Health*).

INTRODUCTION

The United Nations 2011 high-level summit on noncommunicable diseases (NCDs) identified NCDs as the health issue of the 21st century.¹ Unlike infectious diseases, many NCDs result from exposure to or consumption of unhealthy products, including tobacco, which is promoted by transnational corporations.^{2,3} The tobacco companies' ability to dominate the public policymaking process is the main reason the global tobacco epidemic

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Contributors

E. Crosbie and M. Gonzalez share primary responsibility for this article. E. Crosbie and M. Gonzalez are co-first authors because they developed the concept, prepared the first draft, and prepared revisions to the article. S. A. Glantz prepared revisions to the article, and guided E. Crosbie and M. Gonzalez during the development of the research. S. A. Glantz had full access to all the data in the study and final responsibility for the decision to submit this article for publication.

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Human Participant Protection

Human participant protection was not required because there were no human participants in this study.

has persisted.⁴ This situation is changing because of increasingly effective political mobilization by health interests at all levels, from enacting local laws mandating smoke-free workplaces to implementing the international World Health Organization Framework Convention on Tobacco Control (FCTC).⁵ The FCTC has accelerated the diffusion of strong health warning labels on tobacco packages⁶ and promoted other policies to reduce tobacco use, including smoke-free environments and high taxes on tobacco products.⁷ Although implementing these policies is good for health, the associated reductions in tobacco consumption are costing the tobacco companies billions of dollars in lost sales,⁸ which motivates them to redouble their efforts to block these policies.

One of the tobacco companies' key strategies to block or reverse tobacco control policies is preemption, in which they secure legislation by removing authority from subordinate jurisdictions where tobacco companies are weak and transfer it to jurisdictions where they are strong.⁹ For example, in response to efforts by US states to require strong warning labels on cigarette packages and advertising in the late 1950s, tobacco companies agreed in 1966 to have Congress require weak warning labels on the sides of cigarette packages in exchange for preempting the states from doing more.¹⁰ Likewise, in the 1980s, as localities started passing smoking restrictions, tobacco companies won state preemption in 26 states,¹¹ effectively stopping policy innovation in those states until 1999, when preemption started being repealed.¹² (Tobacco companies have also used preemption to fight smoking restrictions in Mexico¹³ and Argentina.¹⁴)

Although tobacco companies pioneered preemption as a strategy, other industries have begun to use it.^{15,16} In 2011, the Institute of Medicine highlighted the importance of avoiding preemption, recommending that federal and state policymakers "should set minimum standards . . . allowing states and localities to further protect the health and safety of their inhabitants," and "avoid language that hinders public health action."^{17(p3)} International trade agreements, negotiated with little public oversight, provide corporations, including tobacco companies, a powerful opportunity to impose de facto preemption on national and subnational jurisdictions to implement health regulations.

THE CONFLICT BETWEEN TRADE AND HEALTH

In the late 1980s and early 1990s, the expansion of trade liberalization and lowered barriers to trade between countries allowed tobacco companies to open new markets in middle- and low-income countries¹⁸ and to influence trade agreement negotiations,¹⁹ resulting in increased tobacco consumption.²⁰ In 2014, tobacco companies, which are facing increased pressure around the world, are increasingly seeking to shift the policymaking venue from open domestic forums, where public health advocates can mobilize public support for tobacco control policies, to closed international trade forums where business concerns dominate.²¹

Recognizing the conflict between trade and health, during the negotiations that led to the FCTC, some sought an explicit provision establishing the primacy of health over trade, but others, who were concerned that such a provision would halt the treaty, blocked it.^{22,23} The continuing ambiguity has allowed challenges to be made to tobacco control policies under

the World Trade Organization (WTO) provisions, including the large graphic warning labels required in Uruguay and the plain packaging used in Australia.²⁴ (These disputes remained unresolved as of June 2014.) Tobacco companies were also using threats of similar action to oppose tobacco control measures in Africa.²⁵

The WTO grants investors (including tobacco companies) limited rights to challenge domestic policies. Investors who wish to challenge domestic policies alleging trade restrictions, intellectual property violations, or investment violations must convince a WTO member state to challenge the country that adopted the policy the investor opposes.

The WTO also provides a general exemption for health regulations that offers a defense to WTO member states to defend public health laws and regulations as long as they are not disguised trade barriers.²⁶ Some WTO agreements contain health-specific exemptions, such as the Technical Barriers to Trade agreement, which grants member states the right to restrain trade for the protection of human, animal, or plant life, or health (Table 1).²⁷ In addition, WTO trade dispute panels may be pressured to consider other international treaties, including the FCTC, when resolving disputes. For example, although it rejected the US ban on flavored cigarettes on the grounds of discrimination because the US exempted menthol, the WTO Appellate Body's 2012 decision on *United States—Measures Affecting the Production and Sale of Clove Cigarette*, did cite the FCTC as authoritative on health issues.²⁸

Since the mid-1990s, bilateral investment treaties (BITs) and free-trade agreements (FTAs) have emerged as a particular threat to public health because these agreements often contain expanded language protecting intellectual property and investment rights. Unlike the WTO, BITs and FTAs include investor---state dispute settlement mechanisms that allow foreign investors to sue national governments “directly” to challenge policies, such as public health laws that affect the contents or labeling of products, which reduce the value of their investments²¹ (Table 1). It can almost be assumed that any public health regulation would reduce the value of a company's investments, because if those companies could maximize profits by selling healthier products they would, which would make the regulations unnecessary.

No BITs and only some FTAs exempt health regulations (Table 1). For example, some challenges to public health and environmental laws under the North American Free Trade Agreement (NAFTA) resulted in decisions that public benefit laws damaged foreign investments and required governments to compensate corporations for lost profits.²⁹

The lack of health law exemptions in BITs and the ambiguity of FTA language and dispute outcomes has made the negotiations of these agreements venues for tobacco companies to directly challenge, and attempt to preempt national and subnational laws they cannot overturn in domestic venues.

For example, although Philip Morris International (PMI) lost domestic legal challenges to graphic health warning labels in Uruguay and plain packaging in Australia, it concurrently filed BIT trade disputes^{21,30} and paid legal costs for the Dominican Republic, Ukraine, Honduras, and Cuba to challenge Australian plain packaging via the WTO.^{24,31}

Although the tobacco companies have already been using trade agreements to challenge warnings on cigarette packages, there is no reason that they could not use these agreements to challenge other policies (such as taxes or smoke-free laws) on the grounds that they reduce the value of the companies' investments, because they lower cigarette consumption.

These dispute processes also lack transparency. Each BIT and FTA trade dispute is resolved privately by arbitration,²¹ and although either party in a WTO dispute can release the panel ruling, BIT and FTA decisions may be kept secret.³²

Defending against trade challenges is costly, particularly for low- and middle-income countries. The average legal and arbitration costs are approximately \$8 million, which would have forced Uruguay to settle their trade claim, until US-based Bloomberg philanthropies made a commitment to help finance Uruguay's defense of the policy.³³ (Fear of litigation can also deter public health policies in richer countries; the tobacco companies successfully used [hollow] threats of suing under international trademark agreements to deter Canada and Australia from implementing stronger warning labels for more than a decade.^{34,35}) By contrast, major transnational corporations can absorb the costs of litigation, even in cases with a low probability of success, as a routine business cost of preventing regulation.

Tobacco companies have a long history of using litigation and the threat of litigation to deter tobacco control policies at the local level in the United States despite generally losing when the cases go to court.⁹ They also have made intellectual property claims to fight warning labels and plain packaging despite their lawyers consistently advising them that these claims were invalid.³⁴ The cost of defending these suits, however, slowed the implementation of tobacco control policies in the United States⁹ and internationally.^{34,35}

The 2011 and 2012 BIT and WTO complaints over Australia's plain packaging law are having similar effects: New Zealand and Brazil indicated that they will wait on implementing plain packaging until the Australian case is resolved.³⁶

EXPANDING OPPORTUNITIES FOR PREEMPTION

The negotiations for the Trans-Pacific Partnership Agreement (TPP), which as of June 2014 involved 11 countries (including the United States) has provided tobacco companies another opportunity to secure provisions granting transnational corporations additional opportunities to use intellectual property or investment claims to block tobacco control measures through threats of litigation. In January 2014, a bipartisan group of 45 state attorneys wrote the US Trade Representative (USTR), highlighting how the TPP could facilitate challenges to federal, state, and local laws and regulations.³⁷

In addition, in 2013, the United States announced that it would pursue a Trans-Atlantic FTA between the United States and the European Union,³⁸ creating more opportunities for tobacco companies to preempt national and subnational legislation by shifting policymaking into closed trade supportive venues.

Some tobacco control advocates have been calling for tobacco control regulations to be exempted from FTA investor---state dispute provisions. In May 2012, the USTR issued a press release that proposed to recognize the “unique status of tobacco products” by including language in the TPP allowing “governments to adopt regulations that impose original-neutral, science-based restrictions on specific tobacco products.”^{39(p2)}

This proposal, however, would only impose modest limitations on tobacco companies, who are well-practiced at challenging “science.”⁴⁰ (In response to a December 2013 article in the *New York Times* on how the tobacco companies were using trade treaties to intimidate poor countries,²⁵ PMI responded with a letter to the editor stating, “The international trading and investment system has long protected the authority of governments to carry out this kind of legitimate, science-based public interest regulation.”) This language, which seems designed to protect the US Food and Drug Administration regulation of tobacco products, would do nothing to protect improvements to package warning labels or limitations on advertising and promotion (because they are not the “product”) or local laws (such as smoke-free laws or limitations on the sale of tobacco products to youths) where historically strong public health laws have been enacted.¹²

In August 2013, Malaysia became the first TPP member to propose a “carve out” of tobacco⁴¹ (a position endorsed by 45 state attorney generals and public health advocates³⁷), but as of June 2014, Malaysia remained the only member country to do so.

Tobacco company efforts to influence the TPP negotiations illustrate the importance they attach to trade agreements. In response to a USTR request for comments, PMI submitted a letter supporting an investor---state dispute settlement mechanism, because health “initiatives would severely impact PMI’s valuable trademark rights,” specifically referencing Australia’s then-proposed plain packaging law.⁴² In February 2012, PMI, along with Chevron, Target, and Pharmaceutical Research and Manufactures of America, sponsored a private Washington, DC, meeting for US governors, US trade negotiators, and top trade negotiators and representatives from the TPP countries to discuss the TPP.⁴³ The public was excluded.

Although the USTR has sponsored a series of brief conference calls and other meetings for public health (and other public interest) “stakeholders” that the USTR argues provides transparency, the negotiations and text still remained secret as of June 2014. The little knowledge the public has of the intellectual property provisions of the TPP were the result of a copy of that section of the treaty being provided to WikiLeaks.⁴⁴

FAST TRACK AND PREEMPTION

“Fast-track” presidential authority (renamed trade promotion authority in 2002) is another way to limit transparency and public access to the policymaking process around trade.⁴⁵ Once Congress enacts a law granting the president fast-track authority, the president can negotiate and sign trade agreements without previous Congressional approval, eliminating Congressional meetings as a venue for public engagement in the process. Once the president signs the FTA, Congress can only vote to pass or defeat it without amendment within a limited time.⁴⁵ Under fast track, provisions that could undermine public health are not

revealed until after a FTA is fully negotiated, leaving the public no opportunity to influence the content of the agreement, although trade agreements can preempt the authority of governments to pass strong tobacco control and other public health laws.

Beginning with the Trade Act of 1974, Congress granted presidents fast-track authority from 1974 to 1994 and from 2002 to 2007. Fourteen of the fifteen US FTAs enacted between 1974 and 2013 were developed under fast-track authority (Table 2), illustrating its importance.

Once enacted, tobacco companies have used FTAs to threaten proposed government health regulations, including using the NAFTA and the Dominican Republic---Central America Free Trade Agreement to discourage Canada and Costa Rica from implementing strong health warning labels.^{34,46} The last law granting the president fast track expired in 2007, but in September 2013, the Obama Administration announced the necessity to secure fast track to complete TPP negotiations in 2014.⁴⁷ In response, 151 Democrats in the House wrote a letter telling President Obama they will not support fast track.⁴⁸ Despite this, on January 10, 2014, Democratic Senator Max Baucus and Republican Senator Orrin Hatch and Republican Representative Dave Camp introduced the Trade Priorities Act, which would grant Obama fast-track authority.⁴⁹ In response, in January 2014, Democratic Senate Majority Leader Harry Reid and Democratic House Minority Leader Nancy Pelosi both rejected voting on fast track “right now,” but left open the possibility of supporting an alternative version of fast track at a later date.⁵⁰ Previously secret tobacco company documents show tobacco companies recognized the importance of fast track in the 1990s. In 1991, the Tobacco Institute, then the companies’ lobbying arm, funded the Washington Legal Foundation to publish papers on trade issues,⁵¹ including one by former USTR Carla Hills that promoted fast-track renewal of fast track to expedite NAFTA negotiations.^{45,52} In 1997 and 1998, PMI participated in the business coalition America Leads on Trade⁵³ to renew fast track.⁵⁴ Even so, Congress rejected fast-track renewal in September 1998.⁵⁵ In 2001, American Leads on Trade (including PMI) urged farmers to support fast track, arguing that FTAs would boost exports and increase jobs.⁵⁶ This push succeeded,⁴⁵ which assisted in developing 11 FTAs (Table 2).

PUBLIC OVERSIGHT

An increase in transparency with the help of the WikiLeaks’ February 2011 release of the TPP section on intellectual property created more public outcry and allowed several groups to publically scrutinize it, which led to a more nuanced discussion reflecting a wide variety of particular interests. For example, in addition to public health concerns raised about tobacco and access to medicines, the Electronic Frontier Foundation and its analogs in other countries expressed concern about the TPP preempting national policymaking because the intellectual property chapter would restrict digital freedom by (among many others things) narrowing fair use exceptions, expanding copyright terms, and placing greater liability on Internet intermediaries.⁵⁷ The public outcry led to increased public pressure to make the TPP negotiation process more transparent, including posting provisions of the treaty for public comment, and to remove problematic clauses.⁵⁸

In February 2014, in response to public pressure, including campaigning by public health advocates,⁵⁹ the Obama Administration proposed to create a Public Interest Trade Advisory Committee (PITAC) to “provide a cross-cutting platform for input into negotiations.”⁶⁰ Although a small step forward, Trade Advisory Committee (TAC) members would be bound by nondisclosure agreements that would limit their role in true public discourse. In addition, the proposed public interest members would be placed into less influential TAC group tiers than industry representatives.⁶¹ As of June 2014, the creation of PITAC remained pending, and calls to allow public comment on specific provisions were being ignored.

Public health advocates should consider reviving Representative Mike Michaud and Senator Sherrod Brown’s proposed Trade, Reform, Accountability, Development, and Employment Act, first introduced in 2009, to provide a permanent mechanism to promote public oversight and trans-parency.⁶² The act would require a comprehensive assessment of the impact of current trade agreements before any new agreement could be approved, which includes rejecting fast track and requiring more frequent consultations with any committee of Congress with jurisdiction over any area covered by the negotiations. The act also stipulates that a provision be included that gives priority to the implementation of international agreements related to public health (e.g., the FCTC), thus attempting to establish explicit primacy of health over trade that the FCTC negotiations failed to do.²²

CONCLUSIONS

Trade agreements relocate discussions about health and trade to venues in which there is little opportunity for public scrutiny, participation, and debate. These agreements are being used by tobacco companies to preempt domestic authority over tobacco policy by removing the policy dispute to an arena that favors minimal regulation. They constitute a platform for transnational corporations who profit by promoting products associated with NCDs, such as unhealthy foods, to challenge and preempt governmental population-level interventions, such as regulating salt or sugar content in food.

Fast-track authority further distances the public from the debate. Because 2 proposed US FTAs could provide venues through which tobacco control and public health generally can be challenged, it is important for the public and public health advocates to be aware of US domestic mechanisms and procedures that allow FTAs to be negotiated with little oversight.

Transparency and public oversight of the trade negotiation process are important because these international agreements bind governments at all levels to prioritize trade over health. This public oversight could then be used to ensure that FTAs embody the 2011 Institute of Medicine recommendation on the importance of avoiding preemption and “avoid language that hinders public health action.”¹⁷ Trade agreements have allowed for the deprioritizing of health-related issues in the context of negotiations for other sectors (such as investment, agriculture, and intellectual property protection), which means that there is a renewed need to promote and prioritize health in all international trade policies.

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TABLE 1

International Agreements and Domestic Regulations, Health Preemption Behind Closed Doors

	World Trade Organization	Bilateral Investment Treaties (BITs)	Free Trade Agreements (FTAs)
Aims			
Lower or eliminate tariffs on goods and services	Yes		Yes
Protect foreign investor rights	Yes	Yes	Yes
Protect foreign intellectual property rights	Yes	Yes	Yes
Design and membership	Multilateral	Bilateral	Bilateral or Multilateral
Dispute resolution (dispute resolution settlement body)	State–state (DSB)	Investor–state (ICSID)	Investor–state (ICSID or UNCITRAL)
Health exemptions	Yes-Article 20(b) & (g)	No	Varies from agreement to agreement
	TBT Article 2.2		
	GATS Article XIV (b)		
	TRIPS Articles 8.1 & 27.2		
	SPS Articles 2.1 & 2.2		
Transparency of trade negotiations	No	No	No

Note. DSB = Dispute Settlement Body of World Trade Organization; GATS = General Agreement on Trade in Services; ICSID = World Bank's International Center for the Settlement of Investment Disputes; SPS = Agreement on Sanitary and Phytosanitary measures; TBT = Technical Barriers to Trade; TRIPS = Agreement on the Trade-Related Aspects of Intellectual Property Rights; UNCITRAL = United Nations Commission on International Trade Law.

TABLE 2

History of Fast Track/Trade Promotion Authority and the Implementation of US Free Trade Agreements, Health Preemption Behind Closed Doors

Fast Track/Trade Promotion Authority	US Free Trade Agreements	US Presidential Signing Date	US Implementation Date
1974–1980 fast track	No FTAs		
1980–1988 renewed	US-Israel FTA	22 April 1985	1 September 1985
1988–1991 renewed	US-Canada FTA	2 January 1988	9 September 1988
1991–1994 renewed	NAFTA (Mexico and Canada)	17 December 1992	1 January 1994
1994–2002 (no fast track)	US-Jordan FTA	24 October 2000	17 December 2001
2002–2007 renewed (fast track renamed Trade Promotion Authority)	US-Singapore FTA	6 May 2003	1 January 2004
	US-Chile FTA	6 June 2003	1 January 2004
	AUSFTA ^a	18 May 2004	1 January 2005
	US-Morocco FTA	17 June 2004	1 January 2006
	US-Bahrain FTA	14 September 2004	1 August 2006
	DR-CAFTA	2 August 2005	1 January 2009
	US-Oman FTA	19 January 2006	1 January 2009
	US-Peru TPA	12 April 2006	1 February 2009
	US-Colombia TPA	22 November 2006	15 May 2012 ^a
	US-Panama TPA	28 June 2007	21 October 2011 ^a
2007–2014 (no fast track)	US-South Korea FTA	30 June 2007	15 March 2012 ^a
	TPP	Pending ^b	
	US-EU Transatlantic FTA	Pending ^b	

Note. AUSFTA = Australia-United States Free Trade Agreement (does not include investor-state provision); DR-CAFTA = Dominican Republic–Central American Free Trade Agreement; FTA = free trade agreement; NAFTA = North American Free Trade Agreement; TPA = trade promotion agreement; TPP = Trans-Pacific Partnership Agreement.

^aThese were implemented under the Obama Administration, but were negotiated and signed by President George W. Bush under fast track, so Congress could not make any amendments.

^bPending as of April 2014.