

From: APHA Trade and Health Forum, APHA Medical Care Section, APHA International Health Section, APHA Occupational Health and Safety Section
Re: Call for Public Health Action on the Trans Pacific Partnership
Date: April 14, 2016

APHA policy calls for global trade agreements to protect public health and equity. The Trans Pacific Partnership (TPP) presents significant threats to global health and equity.

We hereby communicate an accurate report of APHA's policy, and, based on the entirety of the agreement, our resulting opposition to the TPP. We aim to clarify the limited nature of the TPP tobacco control provision, as well as threats to **income inequality, food and beverage regulations, access to medicines and health care services, environmental protection/climate change, labor standards, and occupational/environmental health.**

Public health goals for trade: TPP falls short

The Trans Pacific Partnership (TPP) is a proposed trade agreement among 12 nations. The official text of the TPP was released publicly in late 2015. [Policy statements](#) and publications by APHA and [allies](#) have expressed opposition to trade agreements that give corporations privileges over crucial public health rules and regulations.

The TPP's threats to tobacco controls, the history of failed attempts to resolve these problems, and the drawbacks of the TPP tobacco control provisions.

Bilateral and regional trade agreements, such as NAFTA and the proposed TPP, provide for investor-state dispute settlements (ISDS), that allow private foreign corporations that can claim to be based in one of the countries that are parties to the agreement to directly challenge government measures as violations of trade rules, and to seek compensation for harm. (World Trade Organization [WTO] structures and legal systems of accountability permit only government-to-government disputes.)

The tobacco industry has used ISDS trade dispute mechanisms to protest and delay tobacco control measures including graphic warning labels and plain packaging. In the last two decades, it has been used, for example, by Philip Morris to challenge evidence-based tobacco control measures in Uruguay and Australia.

The TPP negotiations provided a critical opportunity to curtail these actions by the tobacco industry and to reduce tobacco-related deaths. Local, state, and national decision-makers joined in statements by public health and medical associations delineating the threats of TPP provisions to tobacco control measures, and calling to carve out tobacco and tobacco control measures from the entire web of trade provisions that have ensnared them.

[APHA policy 201512, Ensuring That Trade Agreements Promote Public Health](#), "urges the United States Trade Representative, Congress, and international trade negotiators to advance

and support proposals to carve out/exclude tobacco and alcohol control measures from all trade agreements.”

But due to loopholes, the final version of the TPP does not conclusively protect nations’ tobacco control measures from trade challenges by tobacco companies. Nor would it necessarily prevent the types of cases Uruguay and Australia are facing.

APHA’s Feb. 3, 2016, letter misstates that the final TPP unequivocally protects governments’ rights to protect tobacco controls, asserting that the TPP “will protect the rights of current and future TPP participating nations to adopt public health measures that reduce tobacco use without fear of facing lengthy and expensive trade disputes initiated by tobacco companies...The TPP tobacco control exception will protect the sovereign rights of the U.S. and other TPP governments to effectively regulate tobacco products...”

Instead, the TPP would only provide each country an option to assert that its tobacco control measures will not be subject to challenges from corporations using the investor-state dispute mechanisms.¹ This requires each country to individually make it a priority to take on the tobacco industry’s clout and message machine, in order to “opt out” of a pending trade charge.

Local and state officials and legislatures would have no role or authority to exercise an opt-out.

If a country did exercise an opt-out in the face of a threatened ISDS challenge to a particular tobacco control measure, the election itself could be construed as tantamount to an admission that the measure does in fact violate a trade rule in some way. This could strengthen the basis for a tobacco company charge through another agreement that includes a corporate investor-state dispute system, or a state-to-state charge through a WTO agreement.

Tobacco is still treated like other products in the rest of the TPP. For example:

- The chapter on regulatory coherence requires Parties to set up mechanisms for ‘interested persons’ to provide input into regulatory oversight. There are no grounds for excluding tobacco corporations from this requirement.
- Tobacco is treated like any other product in terms of tariff reduction. For the most part, this means that tobacco tariffs are reduced to zero, which produces a windfall of tobacco profits—unless there is a later compensating increase in domestic excise taxes.

The APHA Feb. 3 letter goes beyond actual TPP language to suggest that governments are protected from trade charges only if they implement tobacco control measures that themselves protect trade concerns, that is, those that are “nondiscriminatory” to trade interests.

The letter suggests that it would be acceptable to protect only those tobacco control measures that are “nondiscriminatory” to the trade interests of a corporation, or a country.

The problem with requiring nondiscriminatory tobacco control regulations was addressed in detail in [a letter to AJPH in 2014](#),² and also in [APHA policy 201510](#):

"Trade agreements offer several additional potential avenues for industry to challenge or undermine tobacco control measures, including:

- **"nondiscrimination requirements used to protect tobacco company products and practices** (e.g., clove cigarettes in Indonesia and cigarettes with particularly lethal additives in the United States)

"Failure to craft explicit and specific provisions that address ... these threats with certainty in order to exclude tobacco from trade agreements holds the potential to sabotage tobacco control efforts under the World Health Organization's Framework Convention on Tobacco Control. Similar to tobacco control efforts, alcohol control measures may also be targeted in trade agreement negotiations, despite evidence that 4% of the global burden of disease is attributable to alcohol and the availability of effective interventions to prevent alcohol-associated morbidity and mortality."

The American Cancer Society letter on Feb. 2 explicitly states support for the TPP as a whole because of the inclusion of the tobacco opt out. This is certainly not APHA's position.

Advocates could debate whether the TPP provisions on tobacco control are a step forward or backwards. The APHA Governing Council, which had access to the final TPP language when they adopted Policy 201512, did not equivocate in calling for a strong carve-out.

Of equal or greater importance, the TPP does not meet the criteria for protecting public health in the major areas specified in APHA Policy 201512.

Income inequality: "The TPP repeats failed rules from prior trade deals with respect to labor rights, rules of origin, investment, procurement, the environment, and unbalanced restrictions on allowable legislation and regulation. It would repeat the failures of prior deals: costing jobs, harming wages, increasing inequality, and enhancing corporate influence in the U. S. and overseas."³

Access to medicines: The TPP would threaten access to medicines by including measures which "(1) weaken standards of patentability, leading to more patents; (2) extend patent terms to compensate for delays in granting patents or registering marketing approval; (3) adopt new exclusive rights relating to undisclosed registration-related/clinical-trial data; (4) prevent or interfere with the registration of generics where patents are claimed; and (5) enhance patent infringement remedies."⁴

Alcohol and obesogenic foods and beverages: No provisions to limit the negative impact of alcohol and obesogenic foods and beverages shown to result from trade liberalization are included in the TPP.

Climate change: The TPP may exacerbate climate change by increasing shipping, expanding production and consumption, and increasing trade of fossil fuels⁵. It does not include explicit language to promote climate change mitigation and adaptation measures, maintains protection of investments in fossil fuel industries, and leaves climate change mitigation and adaptation efforts vulnerable to ISDS mechanism.

ISDS mechanism: The Investor-State Dispute Settlement (ISDS) mechanism in the TPP privileges foreign investors to challenge domestic laws passed by any branch of government, at any level of government which an investor deems as discriminatory to commercial interests. This includes measures related to environmental protection, importation of adulterated drug products, regulation and restriction of smoking, alcohol control, hazardous waste management, and essential public utilities.⁶

Labor standards: The TPP references labor rights principles, but falls short of specific rules specified in International Labor Organization (ILO) labor conventions. In addition, governments are required to have laws concerning “acceptable work conditions” (including minimum wage, hours of work, and health and safety) but only as “determined by the party” and not in reference to an international standard.⁷

Preemption of public services: Public services (health, education, social services, water, corrections) are not exempted from the TPP.

We hereby clarify the limited nature of the TPP tobacco control provision, as well as threats to income inequality, food and beverage regulations, access to medicines and health care services, environmental protection/climate change, labor standards, and occupational/environmental health.

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¹ The Exceptions chapter of the TPP, in 29.5, states that any single TPP country (referred to as a “Party”) could individually elect to opt out of having its tobacco control laws and regulations subjected to ISDS trade challenges by corporations. (Corporations are referred to as “Investors,” and the ISDS process is described in the TPP’s chapter on Investment.) The verbatim language is:

"Article 29.5: Tobacco Control Measures (11) A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure (12) 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."

² Shaffer Ellen R. and Joseph E. Brenner, [Carving Out Tobacco From Trade Agreements](#), American Journal of Public Health, December 2014, Vol. 104, No. 12, pp. e4-e4

³ [Oral Testimony of Celeste Drake On Behalf of the AFL-CIO](#), Investigation No. TPA-105-001, Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, January 13, 2016.

⁴ Brook K. Baker. Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere. PLoS Medicine. <http://dx.doi.org/10.1371/journal.pmed.1001970>

⁵ Sierra Club. (2015). A Dirty Deal: How the Trans-Pacific Partnership Threatens Our Climate. Washington, D.C.; Sierra Club’s Responsible Trade Program. Accessed from: <https://www.sierraclub.org/sites/...sierraclub.../dirty-deal.pdf>

⁶ Lise Johnson and Lisa Sachs. (2015). The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system. Available from: <http://ccsi.columbia.edu/2015/11/18/the-tpps-investment-chapter-entrenching-rather-than-reforming-a-flawed-system/>

⁷ International Trade Union Confederation. (2015). Trans Pacific Partnership Labour Chapter scorecard. Fundamental issues remain unaddressed. Available from: <http://www.ituc-csi.org/trans-pacific-partnership-labour?lang=en>