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New-generation free trade agreements threaten progressive tobacco and alcohol policies

The nine-country Trans-Pacific Partnership, which is currently being negotiated behind closed doors, aims to set a 'gold standard' for removing barriers to the global alcohol and tobacco industries and give them even greater leverage over domestic policy decisions. It threatens progressive policies and is an affront to sovereignty and democratic governance.

Negotiations are under way behind closed doors for a far-reaching new trade and investment agreement that could tie the hands of governments' future alcohol and tobacco control policies in perpetuity and empower corporations to challenge regulations nationally and, if that fails, to seek compensation in private international tribunals.

The days when these treaties were about eliminating import restrictions and discriminatory measures on alcohol and tobacco products are long gone. Trade is now seen as globally integrated flows of capital, services, products, information and elite personnel. A new generation of agreements promote the systemic integration of markets, supply chains and commercial players by reducing 'behind the border' barriers to their seamless operation.

De-coded, that means ensuring that domestic alcohol and tobacco policy and regulation poses minimal impediments to global strategies and that industry has a role in writing them. It leaves very little space for national innovation, trending instead towards the lowest common denominator. This shift in direction is a perfect fit, in particular, for the alcohol industry's strategy to focus on global supply chains [1–3] with centralized marketing of premium products.

The 'gold standard' for this new breed of agreements is the proposed Trans-Pacific Partnership (TPP) [4], currently being negotiated between Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, United States and Vietnam, with Canada, Japan and Mexico in the wings. Their goal is to produce a state-of-the-art agreement that other states in the Asia Pacific Economic Cooperation (APEC) grouping will adopt, culminating in a Free Trade Area of the Asia Pacific.

The draft Trans-Pacific Partnership agreement text is secret, aside from chapters and background documents that have been leaked [5]. The parties have agreed to continue this secrecy until a deal is signed, which they hope to achieve by the end of 2012—and that no draft texts and background documents will be released until 4 years after an agreement comes into effect or negotiations break down permanently [6].

Despite the secrecy, it is clear that the cumulative effect of its substantive rules and procedural requirements would shift the balance of policy-making power firmly in favour of transnational corporate interests.

Three chapters hold the key. The first is the right of investors to enforce investment rules through international tribunals. The privacy of the process can mean limited, and sometimes no, release of key documents or the final decision and exclusion of public interest advocates. Philip Morris is using similar powers to challenge Australia's plain packaging laws using a Hong Kong treaty [7] and Uruguay's under an agreement with Switzerland [8].

The global multi-billion-dollar commercial players that dominate the alcohol and tobacco industries can afford to fund lengthy and costly arbitration to stop precedent-setting policies, even where their legal case is weak. Indeed, they cannot afford not to challenge precedent-setting innovations.

The Howard government refused to include the power for investors to enforce the investment provisions directly against the government in the Australia US Free Trade Agreement [9]. It remains a red line for Australia in the TPPA. It is vital that it keeps that resolve, but the approach to seek a carve-out for Australia rather than excluding investor–state disputes from the agreement would leave progressive alcohol and tobacco policies in other countries vulnerable. As the Philip Morris case shows, the industry can shop around. Australia has many existing bilateral investment treaties that contain investor enforcement powers that would cross-fertilize with a TPP, allowing investors to seek the best of both worlds.

There is a risk that focusing on investor–state powers deflects attention from the less visible channels that industry can use to deter a government from adopting new policies or regulations. What is known as the 'chilling effect' can be extremely effective [10], especially with the implied or explicit threat of a legal dispute brought by a state or investor in the background.

Even without investor enforcement powers the proposed chapters on transparency and regulatory coherence in the TPP would give extensive leverage to 'stakeholders' to demand a right to influence the alcohol and tobacco policies, complain if they are excluded or marginalized from the policy-making process and force the government to engage and counter their arguments explicitly. The Council of Australian Governments' 'best practice' regulatory guidelines [11], whose criteria and methodology are intrinsically biased towards light-handed regulation and least restrictive options, would become legally embedded in the TPP.

In the context of alcohol and tobacco policies, the intended 'stakeholders' or 'interested parties' are not the public health community; they span the commercial interests in promoting manufacture, distribution, pricing and sale, the advertising industry, communications media and parts of the sports industry, along with well-resourced 'social aspects' organizations that already seek to influence policy processes by providing advice and helping to draft national public health strategies [12]. Detailed disclosure requirements would also expand the resources already available to industry to pursue investor–state disputes.

These novel provisions proposed for the TPP would be reinforced by obligations in other chapters in the agreement affecting goods, intellectual property, investment and cross-border services. These rules are likely to require a government to choose the regulations that would impose the least burden on economic interests while achieving its public health goal, and to consult with affected market players.

The TPP will also contain traditional goods and services rules. Recent attacks in the World Trade Organization (WTO) on progressive tobacco and alcohol policies in Brazil [13], Australia [14], Thailand [15,16] and Kenya [17], among others, and in the US Annual Report on technical barriers to trade [18], argue for less trade-restrictive ways to achieve the public health goal.

What can be done? The American Medical Association has called for the exclusion of measures affecting the supply, distribution, sale, advertising, promotion or investment in tobacco products and alcoholic beverages from trade agreements [19]. Tobacco control advocates are already well advanced in their campaign, bringing pressure at the national level (e.g. [20]), and at the stakeholder programmes held on the margins of the formal TPP negotiating rounds.

However, there is danger in focusing on issue silos. Beyond alcohol and tobacco are other public health concerns, such as the Pharmaceutical Benefits Scheme, and beyond public health is a multitude of other negative impacts, from mining and sustainable livelihoods to indigenous rights and culture.

At its core, the TPP threatens sovereignty and democratic governance. The problem is with the agreement itself.

Declaration of interest

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