

**CITIZEN TRADE POLICY COMMISSION
DRAFT AGENDA**

Friday, February 10, 2012 at 9:30 A.M.
Room 220, Burton M. Cross State Office Building
Augusta, Maine

9:30 am Meeting called to order

I. Welcome and introductions

A. New member(s)

II. Review of letters sent to USTR regarding inclusion of Japan, Canada and Mexico in the Transpacific Partnership Agreement

III. Presentation from Troy Haines, Maine Fair Trade Campaign, regarding proposed “Fast Track Authority” for USTR to negotiate the TPPA

IV. Presentation from Representative Sharon Treat regarding recent IGPAC activity and updates on progress of the TPPA

V. Phone presentation from Zoltan Van Heyninge, Executive Director, US Lumber Coalition regarding the U.S.-Canada Softwood Lumber Agreement (Scheduled for 10:30 AM)

VI. Transpacific Partnership Agreement

A. Bi-annual assessment :

1. Discussion of proposed assessment structure
2. Discussion of potential contractors to conduct the assessment
3. Timeline for completion

VII. Proposed next meeting date of Friday, March 9th and suggestions for agenda topics

Adjourn

Sen. Roger Sherman, Chair
Sen. Thomas Martin Jr.
Sen. John Patrick
Rep. Joyce Maker, Chair
Rep. Bernard Ayotte
Rep. Margaret Rotundo

Heather Parent
Stephen Cole
Michael Herz
Michael Hiltz
Connie Jones



Wade Merritt
John Palmer
Linda Pistner
Harry Ricker
Michael Roland
Jay Wadleigh
Joseph Woodbury

Staff:
Lock Kiermaier

STATE OF MAINE

Citizen Trade Policy Commission

Re: Canada's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations

January 11, 2012

Mr. Paul Kirk, Ambassador
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Kirk,

We are writing to you in reference to the December 7, 2011 notice in the Federal Register requesting comments on Canada's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations.

The Maine Citizen Trade Policy Commission is authorized by current Maine law [10MRS §11(3)] "...to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements." In seeking to fulfill its statutory mandate, during its most recent meeting on December 15, 2011, the Commission voted unanimously to submit this letter to you stating our strong opposition to the possible inclusion of Canada, Mexico or Japan in the proposed Trans-Pacific Partnership negotiations.

Our opposition to the proposed inclusion of these countries in the TPPA is based on a number of concerns and includes:

- The original purpose and design of the TPPA was intended as an international trade agreement among the Pacific Rim countries. Including nations such as Canada with a large international economy and a contiguous border with Maine and other states in a binding trade agreement represents a significant departure from the original purpose and scope of the TPPA and an ominous threat to state sovereignty and existing trade relationships between Maine and these countries;
- The possibility of adding these neighboring countries and large trade partners also amplifies a concern about the loss of transparency that often occurs in this type of international trade agreement. Since the details of the negotiating process are confidential and yet the items being negotiated are often of paramount importance from a state's perspective, the inclusion of large trading partners tends to further diminish state sovereignty over matters such as business and environmental regulation and the procurement policies of state government without any meaningful opportunity for the state to comment until after the agreement has been finalized thereby rendering any state participation as essentially meaningless and without influence;
- From a state perspective, the possible inclusion of large trading partners like Canada, Japan and Mexico in the TPPA also magnifies concerns about the dispute resolution process that typically emerges from trade agreements of this magnitude. For a state such as Maine that has a large contiguous border and extensive trade with a contemplated treaty member such as Canada, a dispute resolution process that takes the state out of the process and instead substitutes the USTR as the defender of particular state regulations and trade deals is a potentially disastrous blow to state sovereignty and the ability to develop, enforce and negotiate

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c/o Office of Policy & Legal Analysis
State House Station #13, Augusta, ME 04333-0013 Telephone: 207 287-1670
<http://www.maine.gov/legis/opla/citpol.htm>

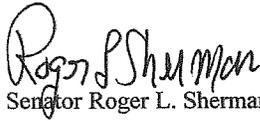
its trading relationships with a country such as Canada. A dispute resolution process that takes the state out of the direct loop in determining a fair outcome and yet imposes possible consequences is inherently unfair and is likely to be extremely detrimental to continued efforts by the state to manage its own economy, environment and overall public welfare;

- Further, the tendency of recent trade agreements to reach beyond the trade of tangible goods and intrude upon specific non-trade regulations and practices is an unwarranted intrusion upon a state's inherent ability to determine its own policies which include public health and safety, environmental and natural resource protection and allowable business practices; and
- Finally, the sum effect of all these aforementioned effects is manifested in the willingness of corporations using foreign investor rights provided by these agreements to purposefully use the provisions of a larger trade agreement like that contemplated for the TPPA to circumvent well conceived state regulations and policies to achieve their own narrow goals and objectives.

In closing, we wish to reiterate our strong opposition to the possible inclusion of including Canada, Mexico and Japan in the TPPA as an unwise and unjustified usurpation of state sovereignty in crucial matters of regulation, business practice and policy decisions regarding public health and welfare.

Thank you for the opportunity to make these comments. Please do not hesitate to contact either of us with any questions that you may have regarding the Commission's position on this issue

Sincerely,



Senator Roger L. Sherman, Chair



Representative Joyce Maker, Chair

Cc: Governor Paul R. Lepage
Senator Olympia J. Snowe
Senator Susan M. Collins
Representative Michael H. Michaud
Representative Chellie Pingree

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STATE OF MAINE

Citizen Trade Policy Commission

Re: Japan's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations

January 11, 2012

Mr. Paul Kirk, Ambassador
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Kirk,

We are writing to you in reference to the December 7, 2011 notice in the Federal Register requesting comments on Japan's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations.

The Maine Citizen Trade Policy Commission is authorized by current Maine law [10MRSA§11(3)] "...to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements." In seeking to fulfill its statutory mandate, during its most recent meeting on December 15, 2011, the Commission voted unanimously to submit this letter to you stating our strong opposition to the possible inclusion of Japan, Canada, or Mexico in the proposed Trans-Pacific Partnership negotiations.

Our opposition to the proposed inclusion of these countries in the TPPA is based on a number of concerns and includes:

- The original purpose and design of the TPPA was intended as an international trade agreement among the Pacific Rim countries. Including nations such as Japan with a large international economy in a binding trade agreement represents a significant departure from the original purpose and scope of the TPPA and an ominous threat to state sovereignty and existing trade relationships between Maine and these countries;
- The possibility of adding these neighboring countries and large trade partners also amplifies a concern about the loss of transparency that often occurs in this type of international trade agreement. Since the details of the negotiating process are confidential and yet the items being negotiated are often of paramount importance from a state's perspective, the inclusion of large trading partners tends to further diminish state sovereignty over matters such as business and environmental regulation and the procurement policies of state government without any meaningful opportunity for the state to comment until after the agreement has been finalized thereby rendering any state participation as essentially meaningless and without influence;
- From a state perspective, the possible inclusion of large trading partners like Canada, Japan and Mexico in the TPPA also magnifies concerns about the dispute resolution process that typically emerges from trade agreements of this magnitude. A dispute resolution process that takes states out of the process and instead substitutes the USTR as the defender of particular state regulations and trade deals is a potentially disastrous blow to state sovereignty and the ability to develop, enforce and negotiate its trading relationships with a country such as Mexico. A dispute resolution process that takes the state out of the direct loop in determining a fair outcome and yet imposes possible consequences is inherently unfair and is

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likely to be extremely detrimental to continued efforts by the state to manage its own economy, environment and overall public welfare;

- Further, the tendency of recent trade agreements to reach beyond the trade of tangible goods and intrude upon specific non-trade regulations and practices is an unwarranted intrusion upon a state's inherent ability to determine its own policies which include public health and safety, environmental and natural resource protection and allowable business practices; and
- Finally, the sum effect of all these aforementioned effects is manifested in the willingness of corporations using foreign investor rights provided by these agreements to purposefully use the provisions of a larger trade agreement like that contemplated for the TPPA to circumvent well conceived state regulations and policies to achieve their own narrow goals and objectives.

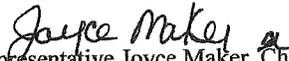
In closing, we wish to reiterate our strong opposition to the possible inclusion of including Canada, Mexico and Japan in the TPPA as an unwise and unjustified usurpation of state sovereignty in crucial matters of regulation, business practice and policy decisions regarding public health and welfare.

Thank you for the opportunity to make these comments. Please do not hesitate to contact either of us with any questions that you may have regarding the Commission' position on this issue

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STATE OF MAINE

Citizen Trade Policy Commission

Re: Mexico's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations

January 11, 2012

Mr. Paul Kirk, Ambassador
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Kirk,

We are writing to you in reference to the December 7, 2011 notice in the Federal Register requesting comments on Mexico's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations.

The Maine Citizen Trade Policy Commission is authorized by current Maine law [10MRS §11(3)] "...to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements." In seeking to fulfill its statutory mandate, during its most recent meeting on December 15, 2011, the Commission voted unanimously to submit this letter to you stating our strong opposition to the possible inclusion of Mexico, Canada, or Japan in the proposed Trans-Pacific Partnership negotiations.

Our opposition to the proposed inclusion of these countries in the TPPA is based on a number of concerns and includes:

- The original purpose and design of the TPPA was intended as an international trade agreement among the Pacific Rim countries. Including nations such as Mexico with a large international economy and a contiguous border with other states in a binding trade agreement represents a significant departure from the original purpose and scope of the TPPA and an ominous threat to state sovereignty and existing trade relationships between Maine and these countries;
- The possibility of adding these neighboring countries and large trade partners also amplifies a concern about the loss of transparency that often occurs in this type of international trade agreement. Since the details of the negotiating process are confidential and yet the items being negotiated are often of paramount importance from a state's perspective, the inclusion of large trading partners tends to further diminish state sovereignty over matters such as business and environmental regulation and the procurement policies of state government without any meaningful opportunity for the state to comment until after the agreement has been finalized thereby rendering any state participation as essentially meaningless and without influence;
- From a state perspective, the possible inclusion of large trading partners like Canada, Japan and Mexico in the TPPA also magnifies concerns about the dispute resolution process that typically emerges from trade agreements of this magnitude. A dispute resolution process that takes states out of the process and instead substitutes the USTR as the defender of particular state regulations and trade deals is a potentially disastrous blow to state sovereignty and the ability to develop, enforce and negotiate its trading relationships with a country such as Mexico. A dispute resolution process that takes the state out of the

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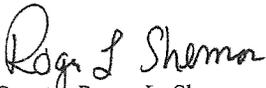
direct loop in determining a fair outcome and yet imposes possible consequences is inherently unfair and is likely to be extremely detrimental to continued efforts by the state to manage its own economy, environment and overall public welfare;

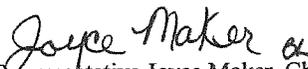
- Further, the tendency of recent trade agreements to reach beyond the trade of tangible goods and intrude upon specific non-trade regulations and practices is an unwarranted intrusion upon a state's inherent ability to determine its own policies which include public health and safety, environmental and natural resource protection and allowable business practices; and
- Finally, the sum effect of all these aforementioned effects is manifested in the willingness of corporations using foreign investor rights provided by these agreements to purposefully use the provisions of a larger trade agreement like that contemplated for the TPPA to circumvent well conceived state regulations and policies to achieve their own narrow goals and objectives.

In closing, we wish to reiterate our strong opposition to the possible inclusion of including Canada, Mexico and Japan in the TPPA as an unwise and unjustified usurpation of state sovereignty in crucial matters of regulation, business practice and policy decisions regarding public health and welfare.

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Representative Chellie Pingree

STATE OF MAINE

**IN THE YEAR OF OUR LORD
TWO THOUSAND AND ELEVEN**

**JOINT RESOLUTION MEMORIALIZING THE
PRESIDENT OF THE UNITED STATES, THE
UNITED STATES CONGRESS AND THE UNITED
STATES TRADE REPRESENTATIVE REGARDING
STATES' RIGHTS IN FUTURE INTERNATIONAL
TRADE POLICY**

WE, your Memorialists, the Members of the One Hundred and Twenty-fifth Legislature of the State of Maine now assembled in the First Regular Session, most respectfully present and petition the President of the United States, the United States Congress and the United States Trade Representative as follows:

WHEREAS, Maine strongly supports international trade when fair rules of trade are in place and seeks to be an active participant in the global economy; and

WHEREAS, Maine seeks to maximize the benefits and minimize any negative effects of international trade; and

WHEREAS, existing trade agreements have effects that extend significantly beyond the bounds of traditional trade matters, such as tariffs and quotas, and that can undermine Maine's constitutionally guaranteed authority to protect the public health, safety and welfare and its regulatory authority; and

WHEREAS, a succession of federal trade negotiators from both political parties over the years has failed to operate in a transparent manner and has failed to meaningfully consult with states on the far-reaching effect of trade agreements on state and local laws, even when obligating the states to the terms of these agreements; and

WHEREAS, the current process of consultation with states by the Federal Government on trade policy fails to provide a way for states to meaningfully participate in the development of trade policy, despite the fact that trade rules could undermine state sovereignty; and

WHEREAS, under current trade rules, states have not had channels for meaningful communication with the United States Trade Representative, as both the Intergovernmental Policy Advisory Committee on Trade and the state point of contact system have proven insufficient to allow input from states and states do not always seem to be considered as a partner in government; and

WHEREAS, the President of the United States, the United States Trade Representative and the Maine Congressional Delegation will have a role in shaping future trade policy legislation; now, therefore, be it

RESOLVED: That We, your Memorialists, respectfully urge and request that future trade policy include reforms to improve the process of consultation between the Federal Government and the states; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the President of the United States, the United States Congress and the United States Trade Representative seek a meaningful consultation system that increases transparency, promotes information sharing, allows for timely and frequent consultations, provides state-level trade data analysis, provides legal analysis for states on the effect of trade on state laws, increases public participation and acknowledges and respects each state's sovereignty; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the Federal Government reform the system of consultation with states on trade policy to more clearly communicate and allow for states' input into trade negotiations by allowing a state to give informed consent or to opt out if bound by nontariff provisions in a trade agreement and by providing that states are not bound to these provisions without consent from the states' legislatures; to form a new nonpartisan federal-state international trade policy commission to keep states informed about ongoing negotiations and information; and to provide that the United States Trade Representative communicate with states in better ways than the insufficient current state point of contact system; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that state laws that are subject to trade agreement provisions regarding investment, procurement or services be covered by a positive list approach, allowing states to set and adjust their commitments and providing that if a state law is not specified by a state as subject to those provisions, it cannot be challenged by a foreign company or country as an unfair barrier to trade; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the United States Congress fund a center on trade and federalism to conduct legal and economic policy analysis on the effect of trade and to monitor the effectiveness of trade adjustment assistance and establish funding for the Department of Commerce to produce state-level service sector export data on an annual basis, as well as reinstate funding for the Bureau of Economic Analysis's state-level foreign direct investment research, both of which are critical to state trade offices and policy makers in setting priorities for market selection and economic impact studies; and be it further

RESOLVED: That suitable copies of this resolution, duly authenticated by the Secretary of State, be transmitted to the Honorable Barack H. Obama, President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, to the United States Trade Representative Ambassador Ron Kirk and to each Member of the Maine Congressional Delegation.

**JOINT RESOLUTION MEMORIALIZING THE MAINE DELEGATION, THE
CONGRESS OF THE UNITED STATES AND THE PRESIDENT TO SAFEGUARD
THE STATE'S ROLE IN INTERNATIONAL TRADE AGREEMENTS**

WHEREAS, the State of Maine strongly supports international trade when fair rules of trade are in place, and seeks to be an active participant in the global economy; and

WHEREAS, the State of Maine seeks to maximize the benefits and minimize any negative impacts of international trade; and

WHEREAS, existing trade agreements have impacts which extend significantly beyond the bounds of traditional trade matters such as tariffs and quotas, and can undermine Maine's constitutionally guaranteed authority to protect the public health, safety and welfare, and regulatory authority; and

WHEREAS, a succession of federal trade negotiators from both political parties over the years have failed to operate in a transparent manner and have failed to meaningfully consult with states on the far-reaching impact of trade agreements on State and local laws, even when binding the State of Maine to the terms of these agreements; and

WHEREAS, existing trade agreements have not done enough to ensure a level playing field for Maine workers and businesses, or to include meaningful human rights, labor, and environmental standards, which hurts Maine businesses, workers, and communities; and

WHEREAS, the negative impact of existing trade agreements on the State's constitutionally guaranteed authority to protect the public health, safety and welfare, and regulatory authority has occurred in part because U.S. trade policy has been formulated and implemented under the Trade Promotion Authority (Fast Track) process; and

WHEREAS, Trade Promotion Authority (Fast Track) eliminates vital checks and balances established in the U.S. Constitution by broadly delegating to the Executive Branch authority reserved for Congress to set the terms of international trade; and

WHEREAS, Trade Promotion Authority (Fast Track) circumvents normal congressional review and amendment committee procedures, limits debate to 20 hours total, forbids any floor amendments to the implementing legislation that is presented to Congress, and generally creates a non-transparent trade policymaking process; and

WHEREAS, Trade Promotion Authority (Fast Track) is not necessary for negotiating trade agreements, as demonstrated by the existence of scores of trade agreements, including major pacts such as the agreements administered by the WTO, implemented without use of Fast Track; and

WHEREAS, the current grant of Trade Promotion Authority (Fast Track) expires in July 2007; now, therefore be it

RESOLVED: That the State of Maine respectfully requests that the United States Congress create a replacement for the Trade Promotion Authority (Fast Track) system so that U.S. trade agreements are developed and implemented using a more democratic and inclusive mechanism that entails meaningful consultation with states: and be it further

RESOLVED: That the State of Maine respectfully requests that the United States Congress fully fund and support export promotion programs and Trade Adjustment Assistance programs: and be it further

RESOLVED: That copies of this Joint Resolution be immediately transmitted to Senator Olympia Snowe, Senator Susan Collins, Representative Michael Michaud, and Representative Tom Allen and be copied to the Honorable George W. Bush, President of the United States; Ambassador Susan Schwab, United States Trade Representative; the President of the United States Senate; and the Speaker of the House of Representatives.



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

Replacing Fast Track with an Inclusive, Democratic Trade Negotiating and Approval Process

Fast Track was a U.S. procedure established in the 1970s by President Nixon for negotiating trade agreements that concentrated power in the president's hands. It delegated to the executive branch Congress' exclusive constitutional authority to "regulate Commerce with foreign nations." In particular, Fast Track allowed the executive branch to select countries for, set the substance of, and then negotiate and sign trade agreements — all before Congress had a vote on the matter.

As well, under Fast Track, normal congressional committee processes were circumvented and the executive branch was empowered to write lengthy implementing legislation for each pact on its own. Normal congressional committee processes, such as mark ups, were not allowed under Fast Track. The White House authored and submitted bills that could not be amended in committee or on the House or Senate floor. Yet, these executive-authored trade pact implementing bills altered wide swaths of U.S. law to conform domestic policy to each agreement's requirements. Fast Track was unique in that it empowered the executive branch to force a congressional vote on such implementing legislation and the related agreement within a set amount of time with no amendments allowed and only twenty hours of debate in each chamber.

Fast Track was used to push through Congress various trade pacts, including NAFTA, CAFTA and WTO, that did not enjoy broad public support. Fast Track renewal was last slipped through Congress at midnight in 2002 by only two votes. On June 30, 2007, the current grant of Fast Track, now called "Trade Promotion Authority" by its supporters, expired. Fast Track is not *needed* to approve trade agreements, a fact proven by the dozens of trade agreements that have been passed without its use. Fast Track unnecessarily creates a situation where negotiators cannot be held accountable by the public, and legislators are denied their constitutional authority to set the terms of trade agreements.

We need to replace the outdated Fast Track with a good process to get good trade agreements. Fast Track was designed over 30 years ago as a way to deal with traditional tariff and quota-focused trade deals. The Trade Reform Accountability Development and Employment (TRADE) Act cosponsored by 152 House members in the 111th Congress sets out a Fast Track replacement mechanism that enjoys broad support by small business, labor, consumer, family farm, faith, environmental and other groups.

Core Aspects of the Past Fast Track Trade-Authority Delegation

- Allowed the executive branch to select countries for trade pacts. Ninety-day notice to Congress was required before talks were initiated, but no mechanism was provided for Congress to disapprove;
- Allowed the executive branch to set the substance of, negotiate and then sign trade agreements, all before Congress had a vote on the matter. The executive branch was required only to notify Congress 90 calendar days before signing and entering into an agreement.

- Empowered the executive branch to write implementing legislation for each pact, without committee mark ups. As a concession to congressional decorum, the executive branch agreed to participate in “non” or “mock” hearings and markups by the trade committees. However, this is a practice, not a requirement. In 2008, President Bush chose to ignore this practice and submitted the Colombia FTA without an informal agreement on timing or mock mark ups, despite congressional leaders’ objections to the pact’s submission at that time.
- Once the executive branch transferred such a bill, the agreement itself, and various supporting materials to Congress, the House and Senate were required to vote within 90 legislative days.
- Such bills were automatically referred to the House Ways & Means and Senate Finance Committees. (In the 2002 Fast Track bill, the House and Senate Agriculture committees also got a formal referral). If a committee failed to report out the bill within 45 legislative days from when it was submitted the legislation to Congress, the bill was automatically discharged to the floor for a vote.
- A House floor vote was required no later than 15 legislative days after the bill was reported or discharged from committee. Thus, within 60 legislative days, the House was required to vote on whatever agreement the president had signed and the implementing legislation.
- The Finance Committee was allowed an additional 15 days after the House vote, at which time the bill was automatically discharged to the Senate floor for a vote required within 15 legislative days.
- The floor votes in both the House and Senate were highly privileged. Normal congressional floor procedures were waived, including Senate unanimous consent, debate and cloture rules, and no amendments were allowed. Debate was limited to 20 hours – even in the Senate.
- Once the president provided Congress with notice of his intent to sign an agreement, he was authorized to sign after 90 calendar days. However, there was no mandatory timeline for submission of implementing legislation. Thus, an agreement’s legal text finalized just minutes before the delegation authority expired could be sent to Congress even years later with the extraordinary floor procedures still applying. This “hangover” effect is why Fast Track procedures still apply to the Free Trade Agreements President Bush signed with Panama and Korea in 2007.
- Once a president submitted an agreement under Fast Track, that agreement’s Fast Track treatment was “used up.” If Congress adjourned before the mandatory vote clock ran out or if Congress voted against the agreement, Fast Track for that agreement expired. If it were to be submitted again, normal congressional procedures would apply. Thus, whether Fast Track applies to the Colombia FTA is a contested matter, as most procedural experts believe Fast Track permitted only one submission under the privileged rules. In 2009 the Bush administration used Fast Track to try to force a vote. Then-Speaker Pelosi worked with the Rules Committee to alter the rule and the vote did not occur.
- An advisory-committee system was established to obtain private sector input on trade-agreement negotiations from presidentially-appointed advisors. This system is organized by sector and industry and included 700 advisors comprised mainly of industry representatives. Throughout trade talks, these individuals obtained special access to confidential negotiating documents to which most members of Congress and the public have no access. And, they have regular access to executive-branch negotiators and must file reports on proposed trade pacts. The Fast Track legislation listed committees for numerous sectors, but not consumer, health, environmental or other public interests.
- The 1974 Fast Track also elevated the Special Trade Representative (STR) to the cabinet level, and required the Executive Office to house the agency. While other cabinet-level positions tend to be responsive to a pre-defined constituency (Agriculture and farmers, for instance), the STR was unique in that its only real constituency was the president, the gatekeeper committees of Congress, and the hundreds of trade advisory committees. And its main goal was proliferation of trade negotiations. The 1979 Fast Track changed the name of the STR to the U.S. Trade Representative.
- The 2002 Fast Track created an additional requirement for 90-day notice to the gatekeeper committees before negotiations could begin, but neither the gatekeepers nor the executive were required to take any further action after receiving this notice.

- In 2002, during the last grant of Fast Track, the procedure was formally renamed “Trade Promotion Authority”. However, it is still commonly referred to as Fast Track.

To Obtain Better Trade Pacts, Congress Needs A Meaningful Role in Formative Aspects of Trade Negotiations and the Public Needs More Transparency

Today’s “trade” agreements affect a broad range of domestic non-trade issues such as food safety, local prevailing wage laws, Buy-America procurement, zoning, and the environment. Fast Track should be relegated to a museum of outdated. Congress, state officials and the public need a new modern procedure for developing U.S. trade policy that takes into account the realities of 21st century globalization agreements. With a new forward-looking trade negotiating process, we can ensure U.S. trade expansion policy meets the needs of working families, farmers and small businesses. Many in Congress are unaware that Fast Track is just one – now outdated and inappropriate – way to do trade negotiations. We must replace Fast Track to ensure future pacts contain benefit most Americans. There are some key principles, included in the Fast Track replacement in the TRADE Act, for designing a new trade negotiating system that can deliver trade policy that works for the majority:

- **Readiness Criteria and Binding Goals: What Trade Partners and What Must and Must Not be in U.S. Trade Pacts:** Congress must set criteria to guide decisions about with which nations the U.S. negotiates. This is the system that the European Union uses to determine if new countries are ready to join the union. For prospective U.S. trade partners, certifying that a country meets ILO standards and human rights and democracy criteria will show a country to be ready for a win-win deal. The terms of future U.S. trade agreements must set new rules for the global economy. This will only happen if, when Congress delegates its trade authority, Congress sets mandatory goals on what must and must not be in trade pacts. These binding goals must include that U.S. trade deals require corporations to meet the many existing globally-agreed rules on labor, environment, human rights. We will face an endless race-to-the-bottom without imposing a floor of decency – specifying what standards must be met for the resulting commerce to enjoy trade benefits. These goals also must include states’ right to prior informed consent before being bound to meet pacts’ investment, procurement, service sector and other rules limiting their non-trade regulatory authority.
- **No Free Lancing: Systematic Briefings to Track Negotiations:** Today, executive branch negotiators regularly conduct trade talks with no real congressional oversight. Many in Congress and state legislatures are left with little information about what is happening during trade talks, even when negotiations directly affect their domestic jurisdiction. Official trade advisory committees, comprised of mainly big- business interests, have the official texts. Jurisdiction must be expanded to all congressional committees implicated by today’s expansive “trade” pacts. The expanded list of committees must be regularly briefed on negotiators’ progress in meeting Congress’ goals. Negotiators must regularly brief state legislative officials about proposals’ local effects. The trade advisor system must be reformed – requiring diverse participation and appointment of participants by Congress.
- **Certify that Trade Goals Were Actually Met in Negotiations:** Not only negotiators and business representatives with special access should determine if the goals Congress set have been met. Instead, when negotiators think they are done with talks, they must be required to give notice to all of the congressional committees with implicated jurisdiction and file an assessment of how their “finished” text meets Congress’ goals. Congress would then decide if negotiators really had met Congress’ goals. One way to give Congress this authority is to create a special super-committee of chairs and ranking Members of affected committees to certify mandatory goals were met. A supermajority vote by the special committee would certify that in fact negotiations have met the key

goals Congress listed. A super-committee certification would trigger a full-Congress vote on the agreement itself, binding the U.S. to the final text.

- **Congress Must Vote Before a Trade Agreement Can Be Signed and the U.S. Is “Bound”:** If the super-committee certifies that it is satisfied that indeed negotiators have met Congress’ goals, then their certification would trigger a congressional vote on a one-line resolution: “Congress authorizes the USTR to enter into the X agreement.” Only then could a deal be signed. This would shift Congress’ focus onto trade pacts’ actual texts at a time when changes can be made and give Congress leverage to control pacts’ contents. By inserting a congressional vote into the process early on, Congress would regain leverage to control the contents of the agreements.

- **The Debate Occurs Along the Way, so There Is Less Controversy Over Votes on Final Implementing Legislation:** The single most important change for any pro-democracy, pro-worker, pro-environment Fast Track replacement is to break up the pieces of Congress’ delegation. Congress must create opportunities – congressional votes –to ensure its goals are met. By front-loading roles for the public and Congress – and by providing states opt-in for non-trade terms - the tenets of U.S. democracy, such as checks and balances and federalism, would be preserved. This new process would give those who will live with the results a say in making U.S. trade policy. By moving adding votes earlier-on, the final vote to pass implementing legislation for trade deals would be less decisive of the outcomes and could be held under rules similar to final budget votes (limited amendments, privileged order).

111TH CONGRESS
1ST SESSION

H. R. 3012

To require a review of existing trade agreements and renegotiation of existing trade agreements based on the review, to set terms for future trade agreements, to express the sense of the Congress that the role of Congress in trade policymaking should be strengthened, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 24, 2009

Mr. MICHAUD (for himself, Mr. ABERCROMBIE, Mr. ALTMIRE, Mr. ARCURI, Mr. BACA, Ms. BALDWIN, Mr. BOCCIERI, Mr. BOSWELL, Mr. BRADY of Pennsylvania, Mr. BRALEY of Iowa, Mr. CAPUANO, Mr. CARNAHAN, Mr. CARNEY, Mr. CARSON of Indiana, Mr. CHANDLER, Mr. CHILDERS, Mr. CLEAVER, Mr. COHEN, Mr. CONYERS, Mr. COSTELLO, Mr. CUMMINGS, Mrs. DAHLKEMPER, Mr. DEFazio, Mr. DELAHUNT, Ms. DELAURO, Mr. DINGELL, Mr. DOYLE, Ms. EDWARDS of Maryland, Mr. ELLISON, Mr. FILNER, Ms. FUDGE, Mr. GORDON of Tennessee, Mr. GRAYSON, Mr. AL GREEN of Texas, Mr. GENE GREEN of Texas, Mr. GRIJALVA, Mr. GUTIERREZ, Mr. HALL of New York, Mr. HARE, Mr. HASTINGS of Florida, Mr. HINCHBY, Ms. HIRONO, Mr. HOLDEN, Mr. HOLT, Mr. JACKSON of Illinois, Ms. JACKSON-LEE of Texas, Mr. JOHNSON of Georgia, Mr. JONES, Mr. KAGEN, Mr. KANJORSKI, Ms. KAPTUR, Mr. KILDEE, Ms. KILPATRICK of Michigan, Ms. KILROY, Mr. KISSELL, Mr. KUCINICH, Mr. LANGEVIN, Ms. LEE of California, Mr. LIPINSKI, Mr. LOEBSACK, Mr. LYNCH, Mr. MASSA, Ms. MCCOLLUM, Mr. MCGOVERN, Mr. MCINTYRE, Mr. MOLLOHAN, Ms. MOORE of Wisconsin, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. MURTHA, Mr. NADLER of New York, Mrs. NAPOLITANO, Ms. NORTON, Mr. OBERSTAR, Mr. PALLONE, Mr. PAYNE, Mr. PERRIELLO, Mr. PETERS, Mr. PETERSON, Ms. PINGREE of Maine, Mr. RAHALL, Mr. ROSS, Mr. ROTHMAN of New Jersey, Ms. ROYBAL-ALLARD, Mr. RYAN of Ohio, Mr. SARBANES, Ms. SCHAKOWSKY, Mr. SCHAUER, Mr. SCOTT of Virginia, Ms. SHEA-PORTER, Mr. SHERMAN, Mr. SHULER, Ms. SLAUGHTER, Mr. SMITH of New Jersey, Mr. STUPAK, Ms. SUTTON, Mr. TIERNEY, Mr. TONKO, Mr. VISCIOSKY, Mr. WALZ, Ms. WASSERMAN SCHULTZ, Ms. WATERS, Mr. WELCH, Mr. WILSON of Ohio, Ms. WOOLSEY, Mr. WU, and Mr. SPRATT) introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on Rules, for a period to be subsequently deter-

1 (3) The Committee on Energy and Commerce
2 of the House of Representatives.

3 (4) The Committee on Financial Services of the
4 House of Representatives.

5 (5) The Committee on Natural Resources of the
6 House of Representatives.

7 (6) The Committee on Ways and Means of the
8 House of Representatives.

9 (7) The Committee on Agriculture, Nutrition,
10 and Forestry of the Senate.

11 (8) The Committee on Banking, Housing, and
12 Urban Affairs of the Senate.

13 (9) The Committee on Commerce, Science, and
14 Transportation of the Senate.

15 (10) The Committee on Energy and Natural
16 Resources of the Senate.

17 (11) The Committee on Environment and Pub-
18 lic Works of the Senate.

19 (12) The Committee on Finance of the Senate.

20 (13) The Committee on Health, Education,
21 Labor, and Pensions of the Senate.

→ 22 **SEC. 7. SENSE OF CONGRESS ON IMPROVING THE PROCESS**
23 **FOR UNITED STATES TRADE NEGOTIATIONS.**

24 It is the sense of the Congress that if Congress con-
25 siders legislation to provide for special procedures for the

1 consideration of bills to implement trade agreements, that
2 legislation should include—

3 (1) readiness criteria for the President to use in
4 determining whether a country—

5 (A) is able to meet its obligations under a
6 trade agreement;

7 (B) meets the requirements described in
8 section 3(e); and

9 (C) is an appropriate country with which
10 to enter into a trade agreement;

11 (2) a process by which the Committee on Fi-
12 nance of the Senate and the Committee on Ways
13 and Means of the House of Representatives review
14 the determination of the President described in
15 paragraph (1) to verify that the country meets the
16 criteria;

17 (3) requirements for consultation with Congress
18 during trade negotiations that require more frequent
19 consultations than required by the Bipartisan Trade
20 Promotion Authority Act of 2002 (19 U.S.C. 3801
21 et seq.), including a process for consultation with
22 any committee of Congress with jurisdiction over
23 any area covered by the negotiations;

24 (4) binding negotiating objectives and require-
25 ments outlining what must and must not be included

1 in a trade agreement, including the requirements de-
2 scribed in section 4(b);

3 (5) a process for review and certification by the
4 Congress to ensure that the negotiating objectives
5 described in paragraph (4) have been met during the
6 negotiations;

7 (6) a process—

8 (A) by which a State may give informed
9 consent to be bound by nontariff provisions in
10 a trade agreement that relate to investment, the
11 service sector, and procurement; and

12 (B) that prevents a State from being
13 bound by the provisions described in subpara-
14 graph (A) if the State has not consented; and

15 (7) a requirement that a trade agreement be
16 approved by a majority vote in both Houses of Con-
17 gress before the President may sign the trade agree-
18 ment.

○

U.S.–Canada Softwood Lumber Trade

U.S. and Canadian Industries Operate on Different Principles – With Significant Impact in U.S. Competitive Market

- The U.S. and Canadian softwood lumber industries operate under two very different systems:
 - In the United States, the industry operates under open market principles, and depends on its own competitiveness to survive.
 - In Canada, the provincial governments own over 90 percent of the timber supply and make it available to the Canadian industry at far below true market pricing. This is done in order to support jobs, by giving Canadian mills a government/taxpayer funded competitive advantage. In short, government policy, instead of the market, determines the cost of timber in Canada.
- The net result of Canada's system is that heavily subsidized Canadian softwood lumber exports severely disrupt the U.S. market.
- Efficient sawmills, workers, and communities across America are put in jeopardy as jobs fall victim to Canada's efforts to protect Canadian mills from free market realities and competition.
- In a commodity market such as lumber, unfair trade practices across Canada all the way to British Columbia have a significant impact on Maine's forestry industry. What happens in Canada with respect to subsidization of its industry matters to Maine.

Canada Has Repeatedly Violated Its Lumber Trade Agreement Commitments

- The U.S.–Canada Softwood Lumber Agreement was designed to help companies, workers, and communities in the United States withstand the negative effects of Canada's unfair government subsidies to softwood lumber production during a down cycle in the housing market.
- Canada is not living up to its lumber trade agreement commitments, to the detriment of the U.S. industry, its workers and their jobs, and private family forest landowners.
- Canada's non-compliance with critical parts of the Agreement has caused additional hardship in lumber-producing states – including the Pacific Northwest, the Inland West, the Northeast, and across the South.

U.S. Industry is Calling on Canada to Fully Comply With Its Trade Agreement Commitments – While Insisting on Swift and Effective Enforcement of the Lumber Trade Agreement

- While the U.S.–Canada Softwood Lumber Agreement has just been extended for two years – to October 2015 – the big question is "what happens after 2015."

- What happens post 2015 depends on whether Canada will take affirmative steps to come into full compliance with the agreement, or whether the United States has to repeatedly turn to arbitration panels to resolve Canadian trade agreement violations.

SETTLEMENT AGREEMENT TO RESOLVE CANADIAN LUMBER DISPUTE

- On September 12, 2006, the United States and Canada signed an agreement to settle the dispute regarding Canadian softwood lumber imports. The governments brought the agreement into effect (in a slightly amended form) on October 12, 2006.
- From the perspective of the U.S. lumber industry, the agreement has significant limitations. It will not soon and may never yield the U.S. industry's goal of open and competitive timber sales across Canada. Still, the agreement is, on balance, in the best interests of U.S. sawmills and mill workers.

Outline of the Agreement

- Canada must impose export restrictions on shipments of softwood lumber to the United States as described below.
- The United States and Canada are to move towards negotiations to end subsidies to and dumping of Canadian lumber.

Scope of Agreement -- The product coverage of the agreement matches the product coverage of the countervailing and antidumping duties (softwood lumber).

Export Measures -- Each region¹ has selected one of two types of export measures, Option A or Option B. The BC Coast and Interior regions and Alberta have selected Option A. The other non-exempt provinces -- Manitoba, Ontario, Quebec and Saskatchewan -- have selected Option B.

As described by the table below, export tax rates and quota volumes will depend on the level of lumber prices. Export measures will be more restrictive during periods of low prices (when unfair imports are particularly injurious).

<i>Random Lengths Framing Lumber Composite Price</i>	Option A: Export Charge	Option B: Export Charge Plus Quota
Over US\$355/mbf	0%	0% + no quota
US\$336 to US\$355/mbf	5%	2.5% + regional share of 34% of U.S. consumption
US\$316 to US\$335/mbf	10%	3.0% + regional share of 32% of U.S. consumption
US\$315 or under	15%	5.0% + regional share of 30% of U.S. consumption

Each region that selected Option B will have its regional market share determined based on the region's average share of total Canadian exports during the period 2001 to 2005.

3rd Country Trigger -- If during any two consecutive quarters the following three conditions exist, Canada will refund any export charges paid in those quarters (up to the equivalent of a 5% charge):

¹ Each Canadian province is a "region," except the western part of British Columbia (the "Coast" region) and the eastern part of British Columbia (the "Interior" region) are to be treated as separate regions.

- (1) the U.S. market share accounted for by third country imports (e.g., Germany) increases by 20%;
- (2) U.S. producers' U.S. market share increases; and
- (3) Canadian producers' U.S. market share declines.

Surge Mechanism -- If any region's exports to the U.S. exceed 111% of its allocated share in any period, then those exports face an export charge equal to 150% of the prevailing export charge during the period. Any region triggering this provision is ineligible for refunds under the 3rd Country Trigger provision.

Maximum Taxable Value -- The export tax is to be assessed on the first US\$500/mbf of the price of lumber shipped to the United States.

"First Mill" Treatment of Certain Remanufactured Lumber -- Lumber that is remanufactured by Canadian companies that do not use government timber and are independent of those that do is accorded "first mill" tax treatment. Export taxes are applied to the price of the lumber that is acquired by the remanufacturer as a production input -- not to the price for which the remanufacturer sells the finished product.

Exclusions -- Lumber produced from logs harvested in the Maritime provinces, the Yukon, the Northwest Territories or Nunavut is excluded from the border measures, as is lumber produced by certain Canadian companies (primarily along the Quebec/U.S. border) that were excluded from the countervailing duty.

Anti-circumvention Provision -- The agreement forbids the parties to circumvent their obligations under the agreement. For example, the provinces are forbidden to change their timber-pricing systems in ways that expand the subsidy to lumber. In addition, the provinces are forbidden to provide new conventional subsidies for lumber production.

Possible Regional Exemptions -- The agreement calls for the two countries to negotiate an end to timber-pricing systems that result in the under-pricing of timber. Provinces that adopt new systems that end timber under-pricing will be exempted from the border measures.

Dispute Settlement -- Any disputes under the agreement are to be resolved through a binding dispute settlement process involving non-North American commercial arbitrators.

Duration -- The Agreement is to last 7 years, and may be renewed for 2 more years. At Canada's insistence, in general, neither the United States nor Canada can terminate the agreement for the first two years that it is in place. If the United States terminates the agreement early without cause or the agreement runs its full term (7 or 9 years), U.S. unfair trade cases may not be brought against Canadian lumber for the first year after the end of the agreement.

Ellen R. Shaffer



Ellen R. Shaffer writes and lectures extensively on globalization and health, access to health care, and women's health. Under her leadership, CPATH called national attention to the impact of the US-Australia free trade agreement on drug reimportation measures. She is also an Assistant Clinical Professor in the Department of Clinical Pharmacy at the University of California, San Francisco.

She served as senior health policy advisor to U.S. Senator Paul Wellstone from 1992 to 1995, guiding staff work on national health care reform and managed care patients' rights. Her proposal for a state-based universal health service, under a grant from the California Health Care Options Project, extended her work with U.S. Representative Barbara Lee on H.R. 3000, the U.S. Universal Health Service Act. She co-authored the chapter on politics in the latest edition of *Our Bodies Ourselves*. She serves on the Executive Board of the American Public Health Association. She has a Masters in Public Health from the University of California at Berkeley, a Ph.D. from the School of Hygiene and Public Health at Johns Hopkins University, and is a Certified Employee Benefits Specialist.

**Testimony to the Trade Subcommittee
Ways and Means Committee
U.S. House of Representatives**

for:

**Hearing on the Trans-Pacific Partnership Agreement
December 14, 2011**

by:

**American Academy of Pediatrics
American College of Preventive Medicine
American Society of Addiction Medicine
Center for Policy Analysis on Trade and Health (CPATH)
Tom Houston MD, FAAFP, FACPM, Ohio State University**

**Exclude Tobacco From Trade Rules
To Protect Public Health;
Represent Medicine and Public Health on Trade Advisory
Committees**

Testimony to the Trade Subcommittee, Ways and Means Committee,
U.S. House of Representatives
Trans-Pacific Partnership Agreement:
Implications for Tobacco Control, and Comment on Trade Advisory Committees
Submitted December 28, 2011

On behalf of the American Academy of Pediatrics, the American College of Preventive Medicine, the American Society of Addiction Medicine and the Center for Policy Analysis on Trade and Health, we thank Subcommittee Chair Kevin Brady (R-Texas), Ranking Member Jim McDermott (D-Wash.), and members of the Trade Subcommittee of the Committee on Ways and Means for the opportunity to provide comments regarding the Trans Pacific Partnership Agreement (TPPA). Representing the perspective of medical and public health experts nationwide,^{1 2 3} we ask the Subcommittee to recommend that Ambassador Kirk and the office of the United States Trade Representative (USTR) ensure that all tobacco products, including tobacco, cigarettes, cigars, smokeless tobacco, and other tobacco products are excluded from all provisions of this and any other Free Trade Agreement (FTA), that tobacco control measures be specifically exempted from any trade rules protecting intellectual property including trademarks and also exempted from any investor-state dispute resolution processes, and that our trading partners' current applied tariffs on these products not be reduced or eliminated.

Trade-based challenges to health policies represent a growing threat against efforts to curb tobacco use. Ongoing trade-based tobacco arbitration and contemporary U.S. trade agreements challenge health principles by treating tobacco—a lethal and addictive product—the same as any other good.

Our comments convey the following:

1. Tobacco is a deadly product.
2. Countries around the world are enacting increasingly strong and effective tobacco control policies that are proven to reduce tobacco use.
3. Such measures are being contested as violations of international trade agreements.
4. To reduce worldwide tobacco consumption, tobacco must be carved out from all protections afforded under the TPPA.

1. Tobacco is a deadly product

The scourge of tobacco-related morbidity and mortality is a present and persistent threat. Tobacco use remains the world's leading preventable cause of death and disease. Teenage smoking is a serious public health problem in developed and developing nations and contributes to the global burden of noncommunicable diseases (NCD), extending into adulthood. Tobacco use accounts for 5.2 million deaths worldwide each year, or one in ten adults.⁴ There are 438,000 tobacco-related deaths each year in the U.S., more than deaths from HIV, illegal drugs, alcohol, motor vehicle injuries, suicides, and murders combined.⁵ On average, American adult smokers die 14 years earlier than nonsmokers.⁶

Use most often begins in youth. Exposure to tobacco smoke in childhood is correlated with increased asthma attacks, respiratory infections, and a higher incidence of Sudden Infant Death

Syndrome.⁷ Kids who smoke are more likely to consume alcohol and use illicit drugs; they also have a higher likelihood of suffering from mental illnesses including anxiety and depression.⁸

Global tobacco consumption is rising. Almost 80 percent of the world's tobacco consumers live in low- and middle-income countries.⁹ Many TPPA partners are low- and middle-income countries.

The World Bank estimates that the total health care cost from smoking typically constitutes between 1 and 1.5 percent of a country's GDP.

2. Countries around the world are enacting increasingly stronger and more effective tobacco control policies that are proven to reduce tobacco use.¹⁰

The US and TPP partners all recognized the prospect for concerted action to address the public health tragedy of tobacco use when each signed the world's first public health treaty, the Framework Convention on Tobacco Control (FCTC), a function of the World Health Organization (WHO). The FCTC supports international tobacco controls intended to reduce the demand for tobacco, which also represent the democratic will of the people in free societies around the world.

Increased cigarette prices are the single most effective strategy for reducing smoking, particularly among teenagers and young adults. Indeed, the Framework Convention on Tobacco Control (FCTC) states that "price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons." The FCTC provides that its parties should maintain measures which may include tax policies and price policies on tobacco products so as to reduce tobacco consumption, and prohibit or restrict duty-free sales of tobacco products to travelers. Reducing prices for cigarettes by cutting tariffs on tobacco or cigarettes will only undercut this evidence-based health initiative.

Several countries have experienced significant success in discouraging smoking and motivating current smokers to quit by using graphic warning labels, that also include toll-free phone lines that support quitting. The U.S. has taken steps in that direction. Furthermore, Australia has proposed plain packaging on cigarette packages.

The FCTC also supports bans on "low tar" or "mild" labeling, designs of warning labels, and restriction on mass-media advertising. The United States and over 120 other countries have instituted limits including bans on ad campaigns, particularly marketing that targets younger people. These measures are effective. A systematic review of research indicates that nonsmoking adolescents who were more aware of or receptive to tobacco advertising were more likely to become smokers later, compared with who are less exposed to tobacco ads.¹¹

Public health research demonstrates that warning labels on cigarette packages increase awareness of the harms of tobacco use, and increase the likelihood of attempting to quit smoking.¹² To date, more than 100 countries have placed warning labels on cigarette packages.

3. However, such measures are being challenged as violations of international trade agreements.

Unless explicitly excluded, tobacco products are subject to all trade rules, which have implications for tobacco control measures on distribution of tobacco products, trademarks, and advertising. Provisions regarding intellectual property as they relate to advertising, trademarks and labeling, services rules on product regulation and distribution, and rules on market access, and national treatment, could all interfere with tobacco control measures. Tobacco control measures have been subject to trade challenges in the past, under the investment provisions, and continue to be vulnerable since they are not explicitly excluded.

Around the world, tobacco corporations are using trade rules to file charges against effective tobacco control measures. Phillip Morris International is using the investor-state dispute mechanisms available through trade agreements to challenge these effective tobacco control measures, relying on the intellectual property provisions related to trademarks enshrined in some existing bilateral investment treaties. Trade-based lawsuits are ongoing in Uruguay and Australia, where arbitration focuses on whether cigarette packaging regulations impinge upon trademark displays. In Norway and Ireland, trade-based lawsuits question the governments' ability to enact retail display bans.

Trade agreements also reduce tariffs on tobacco products, making them less expensive. The agreements therefore promote and facilitate greater tobacco consumption.

Eight of the TPPA partner nations, but not yet the US, have ratified the FCTC. It would be inconsistent with American support for the FCTC and with those nations' obligations under the FCTC for our country to negotiate a trade agreement with TPP partners that would lower tariffs on tobacco and increase the incidence of smoking.

4. To reduce worldwide tobacco consumption, tobacco must be carved out from all protections afforded under the TPPA.

Unless tobacco products are excluded from all of its provisions, the TPPA has the potential to validate trade-based challenges to tobacco control measures and limit the ability of sovereign governments to use proven tactics of discouraging tobacco use. If tobacco products are granted protections under the TPPA, there is a serious prospect for losing ground and exacerbating current tobacco use around the globe. The Trans Pacific Partnership Agreement (TPPA) has the potential to undermine much of the progress made in tobacco control by limiting the ability of sovereign governments to use proven measures to discourage tobacco use.

The U.S. has the opportunity to forge a trade agreement for the 21st century, that promotes progress in public health. We should lead the way forward by eliminating the prospect for tobacco companies to manipulate trade rules in order to thwart the sovereign authority and obligation of states to protect health.

To reaffirm America's position as a global leader in tobacco control, we ask that the U.S. exclude tobacco products from all provisions of the TPPA. US trade negotiators should not ask any nation to weaken its current anti-smoking or alcohol control strategies.

In this event tariffs and other price controls designed to decrease tobacco use will remain in effect. New intellectual property rights would also not be extended to tobacco manufacturers, which they could otherwise use to challenge effective product controls on marketing and packaging such as warning labels. Hard fought victories in tobacco control must not be sacrificed the interest of promoting free trade.

It is imperative that the United States play a leadership role to reduce tobacco use and its devastating consequences around the world. Accordingly, notwithstanding any language to the contrary, nothing in the TPPA should block, impede, restrict, or modify the ability of any party to take or maintain any action, including tariffs or domestic content requirements, relating to manufactured tobacco that is intended or expected by the trading party to prevent or reduce tobacco use or its harms, or that is reasonably likely to prevent or reduce its use or harms. Moreover, if there occurs a conflict between provisions of this TPPA and any party's efforts to comply with the Framework Convention on Tobacco Control, the terms of the FCTC must prevail. Trade liberalization should not trump the goal of saving lives and promoting and protecting public health.

The US has already exempted other harmful products such as firearms from coverage by intellectual property rules and investor-state challenges. This should be our consistent position with regard to tobacco products and leaf tobacco.

Finally, the medical professions and public health would benefit from being well informed about trade policy, and are well positioned to advise the US Trade Representative on policies and measures that would safeguard health while promoting economic growth. We continue to advocate for full public health representation on trade advisory committees.

In conclusion, USTR should exclude tobacco and tobacco products from the TPPA and from all future free trade agreements.

Thank you for your consideration. We look forward to continued discussion on this important topic.

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The American Academy of Pediatrics is an organization of 60,000 primary care pediatricians, pediatric medical subspecialists and pediatric surgical specialists dedicated to the health, safety and well-being of infants, children, adolescents and young adults.

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ACPM is the national medical society for nearly 2,500 preventive medicine physicians who are uniquely trained in both clinical and population-based medicine and are committed to disease prevention and health promotion.

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¹ Report 18 of the Board of Trustees, American Medical Association, (A-04), International Trade Agreements, (Resolution 219-A-03), 2004.

² Joseph Brenner and Ellen Shaffer, co-directors, Center for Policy Analysis on Trade and Health (CPATH), Comments to USTR: Proposed United States-Trans-Pacific Partnership Trade Agreement [Docket: USTR-2009-0041] (January 25, 2010), available at:

<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a83af2>

³ Matthew Meyers, President of Campaign for Tobacco Free Kids, Comments to USTR: Proposed United States-Trans-Pacific Partnership Trade Agreement [Docket USTR-2009-0041] (January 25, 2010), available at:

<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a831a4>

⁴ <http://www.who.int/mediacentre/factsheets/fs310/en/index2.html>

⁵ http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/

⁶ http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/

⁷ http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/

⁸ <http://www.nlm.nih.gov/medlineplus/smokingandyouth.html>

⁹ World Health Organization (2011). Tobacco Fact Sheet. Available at www.who.int/mediacentre/factsheets/fs339/en/index.html

¹⁰ http://whqlibdoc.who.int/publications/2011/9789240687813_eng.pdf

¹¹ <http://summaries.cochrane.org/CD003439/does-tobacco-advertising-and-promotion-make-it-more-likely-that-adolescents-will-start-to-smoke>

¹² http://www.who.int/tobacco/global_report/2011/en/index.html



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Sean Flynn teaches courses on the intersection of intellectual property, trade law, and human rights and is the Associate Director of the Program on Information Justice and Intellectual Property (PIJIP). At PIJIP, Professor Flynn designs and manages a wide variety of research and advocacy projects that promote public interests in intellectual property and information law and coordinates PIJIP's academic program, including events, student advising and curriculum development. Professor Flynn's research examines legal frameworks promoting access to essential goods and services. He serves as counsel for advocacy organizations and state legislatures seeking to promote and defend regulations that promote access to essential medicines. (PIJIP).

Prior to joining WCL, Professor Flynn completed clerkships with Chief Justice Arthur Chaskalson on the South African Constitutional Court and Judge Raymond Fisher on the U.S. Court of Appeals for the Ninth Circuit. He also represented consumers and local governments as a senior associate with Spiegel & McDiarmid and as senior attorney for the Consumer Project on Technology, served on the policy team advising then Assistant Attorney General for Civil Rights Deval Patrick, and taught Constitutional Law at the University of Witwaterstrand, South Africa.

[Curriculum Vitae \(PDF\)](#)
[SSRN Author Page](#)
[Print Profile](#)

Currently Teaching

- LAW-962-002 [Human Rights&Access to Medicines](#)
- LAW-795-009 [Copyright Clearance & Fair Use in Film Industry \(10/28-29\)](#)
- Intellectual Property and Human Rights

Areas of Specialization

- Intellectual Property & Human Rights
- Comparative Constitutional Law (Especially South Africa)
- Essential Goods and Services Law and Policy
- Law and Development

Degrees & Universities

- J.D., Harvard Law School 1999 (*magna cum laude*)
- B.A., Pitzer College (Claremont) 1992 (*Political Science, honors*)

Selected Publications

Sean Flynn, *Using Competition Law to Promote Access to Knowledge*, in *Access to Knowledge in the Age of Intellectual Property* (A. Kapczynski ed., 2010). [SSRN Link](#)

Sean Flynn, Adrian Hollis & Mike Palmedo, *An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries*, 37 J.L. Med. & Ethics 184 (2009).

Sean Flynn, *Abbott's Refusal to Register Medicines as a Contravention of Section 28 of the Thailand Competition Act*, in *Right to Life*, 75 (Kannikar Kijtiwatchakul ed., Medecins Sans Frontieres 2007).

More Publications...

Books

Am. U. Program on Info. Just. & Intell. Prop. & Ctr. for Soc. Media, *Copyright & Documentary Film in the Commonwealth: Legal Scholar Reports from Six Countries* (Sean Flynn ed., 2009).

Other Publications

- Sean Flynn, *The Constitutionality of State Regulation of Prescription Data Mining*, 5 BNA Pharm. L. & Indus. Rep. 1146 (2007).
- Sean Flynn & Mike Palmedo, *Analysis of the KORUS FTA Pharmaceuticals and IP Chapters*, Program On Info. Just. & Intell. Prop. Br. (May 25, 2007).
- Sean Flynn & Mike Palmedo, *The Second Wave of Developing Country Activism on AIDS Drug Pricing*, Program On Info. Just. & Intell. Prop. Br. (May 08, 2007).
- Sean Flynn & Mike Palmedo, *The Price of Kaletra in Thailand*, Program On Info. Just. & Intell. Prop. Br. (Apr. 30, 2007).
- Sean Flynn, *Thailand's Lawful Compulsory Licensing and Abbott's Anticompetitive Response*, Program On Info. Just. & Intell. Prop. Br. (Apr. 26, 2007).
- Sean Flynn, Robert Weissman, Brook Baker, & Judit Rius Sanjuan, *Article Misleads in Support of Big Pharma, Op-ed*, Bangkok Post (Apr. 26, 2007).
- Sean Flynn, *How KORUS FTA Will Raise Drug Prices*, Program On Info. Just. & Intell. Prop. Br. (Apr. 18, 2007).
- Sean Flynn, *Annex 2C-plus" Provisions in the Korea-US FTA Pharmaceuticals Chapter*, Program On Info. Just. & Intell. Prop. Br. (Apr. 17, 2007).
- Sean Flynn & Sharon Treat, *A Drug Deal Gone Bad*, TomPaine.com (Mar. 30, 2007).
- Sean Flynn, *Considering Competition Complaints Against Abbott in Thailand - A Brief Explanation of Potential Legal Arguments*, Program on Info. Just. & Intell. Prop. (Mar. 23, 2007).
- Sean Flynn, *Access to Medicines Issues in the US-Korea Free Trade Negotiations*, Program On Info. Just. & Intell. Prop. Br. (Feb. 11, 2007).
- Sean Flynn & Tim Lay, *Who's Afraid of Competition? The Latest Assaults on Municipal Provision of Broadband Services and the Competitive Ideals of the Communications Act*, 13 J. Mun. Telecomm. Policy 6 (2006).
- Sean Flynn, *Democratizing the Regulation and Governance of Water in the U.S., in Reclaiming Public Water: Achievements, Struggles, and Visions from Around the World* (Belén Balanyá, Brid Brennan, Olivier Hoedeman, Satoko Kishimoto & Philipp Terhorst, eds., 2d ed., Transntl. Inst. & Corp. Eur. Observaotry 2005).
- Sean Flynn & Tim Lay, *Brand X and the New Agency Kings*, 46 Mun. Law. 6 (2005).
- Sean Flynn, Robert Jablon & Mark Hegedus, *Dispelling Myths: A Real World Perspective on Trinko*, 50 Antitrust Bull. 589 (2005).
- Sean Flynn, *Constitutional Issues and the Right to Water*, in *The Age of Commodity: Water Privatization in Southern Africa* (David A. McDonald & Greg Ruiters, eds., Earthscan Publications 2004).
- Sean Flynn, *Legal Strategies for Expanding Access to Medicines*, 17 Emory Intl. L. Rev. 535 (2003).

Selected Works in Progress

- Sean Flynn & Peter Jaszi, *Untold Stories in South Africa: The Creative Consequences of the Clearance Culture for South African Documentary Filmmakers* (forthcoming 2010). SSRN Link

Selected Presentations

- Sean Flynn, Presentation, *The Right to Benefit from Scientific Discoveries: The Case of Access to Medicines in South Africa* (Am. Acad. Adv. Sci., D.C., Sep. 10, 2009).
- Sean Flynn, Presentation, *Hale, Foucault, and the Possibilities for Post-Realist Essential Services Litigation Strategies* (U. Kwazulu-Natal, Durban, S. Afr., July 2009).
- Sean Flynn, Panelist, *Fair Use, Fair Dealing, and Documentary Film in the U.S., Canada, and South Africa* (U. Ottawa, Feb. 2009).
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- Sean Flynn, Presentation, *Special 301's Threat to Access to Knowledge* (Open Socy. Inst., London, Oct. 2008).
- Sean Flynn, Presentation, *The TRIPS Agreement and Prizes* (Geo. Wash. U., Feb. 2008).
- Sean Flynn, Presentation, *Prescription Data Privacy and the First Amendment* (Righting the Script: Improving Prescription Drug Policy in an Era of Health Reform, Carnegie Ctr., D.C., Dec. 2008).
- Sean Flynn, Presentation, *Legal Challenges to State Pharmaceutical Regulations* (Nat'l. Legis. Assn. Prescription Drug Prices, Portland, Me., Oct. 2007).
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- Sean Flynn, Presentation, *Constitutional Issues in State Drug Policy* (Winter Meeting of the National Legislative Association on Prescription Drug Prices, Manchester, N.H., Mar. 16, 2007).
- Sean Flynn, Presentation, *Access to Medicines Issues in the Korea Free Trade Agreement Negotiations* (Congressional Briefing on the Korea Free Trade Agreement Sponsored by the Korea Policy Institute, U.S. House of Representatives, Wash., D.C., Feb. 13, 2007).
- Sean Flynn, Presentation, *Competition Grounds for Compulsory Licenses for Needed Medicines* (UNCTAD Meeting on "Intellectual Property Arrangements: Implications for Developing Country Productive Capabilities in the Supply of Essential Medicines, Geneva, Switz., Oct. 18, 2006).
- Sean Flynn, Presentation, *Citizen Participation in Utility Oversight* (World Conference on Regulation, Wash., D.C., Oct. 8, 2006).

Selected Media Appearances

- New Hampshire Ban on Sale of Prescribing Data is Overruled* (AMNews May 28, 2007) (Quoted in Article).
- Thailand and Brazil Compulsory Licenses for Needed Medicines* (Slate.com May 11, 2007) (Interview).
- Abbot's Withdrawal of Drugs From Thailand in Response to Compulsory License Issued by Thai Government* (Reuters May 2, 2007) (Interview).
- Biogenerics and Drug Pricing: A Battle Royal* (Pharmacy Times Dec. 15, 2006) (Quoted in Article).

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Approaches to Limiting or Eliminating ICSID's Jurisdiction over International Investment Claims (International Institute for Sustainable Development, Nov. 2009)

U.S. Farm Subsidies and the Expiration of the WTO's Peace Clause, 27 U. PA. J. INT'L ECON. L. 999 (2007)

An International Common Law of Investor Rights? 27 U. PA. J. INT'L ECON. L. 79 (2006)

International Expropriation Rules and Federalism, 23 STANFORD ENV'T L. J. 3 (2004)

Who Preempted the Massachusetts Burma Law? Federalism & Political Accountability under Global Trade Rules, 31 PUBLIUS: THE JOURNAL OF FEDERALISM 1 (Fall 2001, with Robert Stumberg)

The Massachusetts Burma Law Decision, Obstacle Preemption, and the Role of International Trade Disputes in Challenges to State and Local Laws, MUNICIPAL LAWYER at 18 (September/October 2000)

State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism, 35 STANFORD J. INT'L L. 1 (1999)

Rippling Puddles, Small Handles and Links of Chain: The Scope of Environmental Review for Army Corps of Engineers Permit Decisions, 10 TULANE ENV'T L.J. 31 (1996)

Public Citizen v. Office of the United States Trade Representative: The (Con)fusion of Standing and the Merits under NEPA, 19 HARVARD ENV'T L. REV. 157 (1995)

Agency Action, Finality and Geographical Nexus: Judicial Review of Agency Compliance with NEPA's Programmatic Environmental Impact Statement after Lujan v. National Wildlife Federation, 28 U. RICHMOND L. REV. 619 (1994)

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Panelist, Congressional Staff Briefing, *Investment Provisions of U.S. Free Trade Agreements (January 2011)*

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Guide to GATS Negotiations on Domestic Regulation, Heinrich Boell Foundation (2011).

Tobacco in the Trans-Pacific Partnership, Forum on Democracy and Trade (draft working paper, 2011).

Procurement and Decent Work, Working Paper, International Labor Organization (Washington Office, 2010).

NAFTA Services and Climate Change, in the Future of North American Trade Policy: Lessons from NAFTA (Kevin Gallagher, ed., 2009).

Reform of Investor Protections, Testimony before the U.S. House Committee on Ways & Means, Subcommittee on Trade (May 2009).

The WTO, Services & the Environment, in *Handbook on Trade & Environment* (Kevin Gallagher, ed., 2008).

GATS & Electricity, State and Local Working Group on Energy & Trade Policy (April 2005).

Who Preempted the Massachusetts Burma Law? Federalism & Political Accountability Under Global Trade Rules, 31 *Publius: The Journal of Federalism* 1 (Fall 2001, with Matthew Porterfield).

Preemption & Human Rights: Local Options After Crosby v. NFTC, 32 *Law & Policy in Int'l Business*, 109 (2000).

Supreme Court Brief for Members of Congress, Amici Curiae, in *Crosby v. National Foreign Trade Council*, On Writ of Certiorari, Supreme Court No. 99-474 (January 13, 1999, with Matthew Porterfield).

A Multilateral Agreement on Investment: Would It Undermine Subnational Environmental Protection? 8 *Journal of Environment & Development* 5, March 1999 (with Thomas Singer).

Sovereignty by Subtraction: The Multilateral Agreement on Investment, 31 *Cornell Int'l Law Journal* 491 (1998).

Selected Presentations

International audiences

- China Administration of Grain, WTO subsidy rules – Georgetown Law June 2010
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Congressional testimony

- U.S. House Committee on Ways & Means, Subcommittee on Trade May 2009

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- National Conference of State Legislatures December 2011
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- National Conference of State Legislatures; Trade Policy Leadership Seminar, Atlanta, GA December 2008
- World Trade Organization, Annual Forum September 2008
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- California Energy Commission May 2007
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- California Senate, Committee on Business, Professions and Economic Development January 2006
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Tobacco in the Trans-Pacific Partnership
A web of investment and trade rules

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Discussion draft of February 21, 2011 – v7b

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Tobacco in the Trans-Pacific Partnership

Abstract

The Trans-Pacific Partnership Agreement (TPP) is the Obama Administration's proposal for a "21st Century Trade Agreement." Philip Morris International (PMI) wants the TPP to follow the current U.S. model for trade agreements. That model treats tobacco trade like any other sector. This paper explains how PMI is using the same kind of investment and trade rules that it wants in the TPP to challenge the world's leading tobacco regulations in Uruguay. In other words, the TPP could strengthen PMI's ability to challenge the strongest regulations that serve as models for implementing the Framework Convention on Tobacco Control (FCTC). Among the ways to block this threat are to exclude investor-state arbitration from the TPP and to simply to carve tobacco out of the TPP. This paper also offers questions that public officials and health advocates can raise during oversight of TPP negotiations.

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Acknowledgements

The author appreciates the helpful comments and editorial guidance from
Benn McGrady, Matthew Porterfield, Gus Van Harten, Christopher Byrnes,
Dana Eidsness and William Waren.



Tobacco in the Trans-Pacific Partnership

Introduction and summary

The Obama Administration is leading negotiations to create a Trans-Pacific Partnership Agreement, “a true 21st century trade agreement” that “will reflect U.S. priorities and values.”¹ A key question is whether those U.S. priorities include expanding or reducing tobacco trade.

As of November 2010, the TPP negotiations include nine Pacific Rim countries: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, United States, and Vietnam.² They may eventually be joined by Canada, Japan and Korea.³ With one exception, all TPP countries are members of the world’s first global health agreement, the Framework Convention on Tobacco Control (FCTC).⁴ The exception is the United States,⁵ which is home to the world’s largest tobacco company, Philip Morris International (PMI).⁶

¹ Remarks by Ambassador Ron Kirk at the Washington International Trade Association (December 15, 2009), available at <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/december/remarks-ambassador-ron-kirk-washington-inte> (viewed August 11, 2010).

² USTR, Update on Trans-Pacific Partnership Negotiations in Brunei Darussalam (October 7, 2010), available at <http://www.ustr.gov/about-us/press-office/blog/2010/october/update-trans-pacific-partnership-negotiations-brunei-darussa> (viewed October 20, 2010); see also USTR, TPP Contacts, available at <http://www.ustr.gov/tpa> (viewed October 20, 2010); USTR, Request for Comments on Negotiating Objectives With Respect to Malaysia’s Participation in the Proposed Trans-Pacific Partnership Trade Agreement, Federal Register, Vol. 75, No. 202, 64778 (October 20, 2010) (should the “viewed” dates be changed to sometime in November?).

³ Inside U.S. Trade, TPP Countries Say Canada Not Ready to Join Talks, Press Vietnam to Decide (October 22, 2010); Inside U.S. Trade, Japan Conducts High-Level Consultations on Whether to Join TPP Talks (October 8, 2010); Associated Press, Japan invited to meet with US-backed TPP members, Forbes.com (November 14 2010), available at http://www.forbes.com/feeds/ap/2010/11/14/business-as-japan-trade_8103664.html?boxes=Homepagebusinessnews (viewed November 15, 2010); Reuters, South Korea mulling U.S.-led TPP trade initiative: report (November 13, 2010), available at <http://www.reuters.com/article/idUSTRE6AD05L20101114> (viewed November 15, 2010).

⁴ WHO, Framework Convention on Tobacco Control, WHO Doc. A56/VR/4 (May 21, 2003), available at http://www.who.int/gb/ebwha/pdf_files/WHA56/ea56r1.pdf. See generally Allyn L. Taylor, Ruth Roemer and Jean Lariviere, *Origins of the WHO Framework Convention on Tobacco Control*, 95 AM. J. PUB. HEALTH 936 (2005); U. of Maryland Legal Studies Research Paper No. 2005-50, available at SSRN: <http://ssrn.com/abstract=818984>.

⁵ A White House spokesman said on November 11th that President Obama “hopes to submit” the FCTC to the Senate for ratification in 2011. Duff Wilson, *Cigarette Giants in a Global Fight on Tighter Rules: Governments Are Sued*, New York Times A1, at A6 (November 14, 2010) [hereinafter Wilson, NYT, *Cigarette Giants in a Global Fight*].

⁶ PMI, Company overview, available at http://www.pmi.com/eng/about_us/company_overview/pages/company_overview.aspx (viewed August 2, 2010). In 2008, PMI spun off as a subsidiary from Altria, “becoming the world’s leading international tobacco company and the fourth largest global consumer packaged goods company.” PMI, Our History, available at http://www.pmi.com/eng/about_us/pages/our_history.aspx (viewed November 17, 2010). Philip Morris USA (“the largest tobacco company in the US”) remains a subsidiary of Altria, Philip Morris USA, available at <http://www.philipmorrisusa.com/en/cms/Home/default.aspx> (viewed November 17, 2010). PMI has a much more aggressive litigation strategy than does Philip Morris USA. See Wilson, NYT, *Cigarette Giants in a Global Fight*, at A6.

In January 2010, the U.S. Trade Representative (USTR) sought public comments on the TPP. In its comments, PMI urged U.S. negotiators to continue their practice of treating tobacco trade like any other sector.⁷ In particular, PMI asked USTR to include investor-state arbitration, incorporate WTO rules to protect tobacco trademarks and brands, and expand restrictions on regulation of cross-border services, including distribution of tobacco.⁸ Public health advocates urged USTR to reject PMI's request and carve out tobacco from the TPP altogether. The advocates included the Campaign for Tobacco Free Kids⁹ (TFK) and the Center for Policy Analysis on Trade and Health (CPATH).¹⁰

Just a few weeks later, PMI invoked investor-state arbitration and WTO trademark rules to challenge Uruguay's limits on tobacco brands and packaging.¹¹ PMI sought arbitration under the Switzerland-Uruguay bilateral investment treaty (BIT).¹² Like most BITs, this one provides the remedy of monetary compensation for an investor's losses.¹³ Following the strategy used by oil companies under the U.S.-Ecuador BIT,¹⁴ PMI has also asked arbitrators to "suspend" Uruguay's new regulations.¹⁵ The challenged regulations do the following: (1) limit PMI to a "single

⁷ PMI, Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement (January 22, 2010) 2, available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a81299> (viewed August 11, 2010) [hereinafter, PMI, Comments on TPP].

⁸ *Id.*

⁹ Matthew Meyers, President of TFK, Comments to USTR: Proposed United States – Trans-Pacific Partnership Trade Agreement [Docket USTR-2009-0041] (January 25, 2010), available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a831a4> (viewed August 9, 2010) [hereinafter, TFK, Comments on TPP].

¹⁰ Joseph Brenner and Ellen Shaffer, co-directors of CPATH, Comments to USTR: Proposed United States-Trans-Pacific Partnership Trade Agreement [Docket: USTR-2009-0041] (January 25, 2010), available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a83af2> (viewed August 9, 2010) [hereinafter, CPATH, Comments on TPP].

¹¹ Request for Arbitration, FTR Holdings S.A. (Switzerland), Phillip Morris Products S.A. (Switzerland) and Abel Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID case no. ARB/10/7, noticed February 19, 2010 and registered March 26, 2010 available at <http://ita.law.uvic.ca/documents/PMI-UruguayNoA.pdf> (viewed March 5, 2011) [hereinafter, PMI v. Uruguay complaint].

¹² Agreement between the Swiss Confederation and the Eastern Republic of Uruguay relating to the Promotion and Reciprocal Protection of Investments, SR 0.975.277.6, 22 April 1991 [hereinafter, Switzerland-Uruguay BIT].

¹³ Switzerland-Uruguay BIT, art. 5(1) (Dépossession, compensation).

¹⁴ Like the Switzerland-Uruguay BIT, the U.S.-Ecuador BIT does not expressly limit arbitration awards to money damages or restitution of property. More recent U.S. BITs (e.g., Uruguay) and investment chapters of free trade agreements (e.g., Peru and Korea) do limit the scope of awards. This alone could explain why PMI chose to litigate under the Switzerland-Uruguay BIT rather than the U.S.-Uruguay BIT. Compare Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, art. VI (disputes and awards), S Treaty Doc No 103-15 (1993), 11 May 1997 [hereinafter, U.S.-Ecuador BIT] with Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, art. 31(1) (limiting arbitrators to awarding monetary damages and restitution of property), S Treaty Doc No 109-9 (2006), 1 November 2006 [hereinafter, U.S.-Uruguay BIT]. See also U.S.-Peru TPA, art. 10.26; proposed U.S.-Korea FTA, art. 11.26.

¹⁵ PMI v. Uruguay complaint, ¶¶ 88-94 (relief sought). In Chevron's BIT claim against Ecuador, Chevron asked the arbitrators for interim measures, which include ordering Ecuador (1) "to use all measures necessary to enjoin enforcement of any judgment against Chevron" and (6) "to refrain from taking any action that would aggravate, exacerbate or extend the dispute in question." Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador, Claimants' Request for Interim Measures (April 1, 2010) ¶ 14(a). In response, the arbitrators are monitoring domestic court proceedings against Chevron, and they ordered the parties to "maintain, as far as possible the status quo and not to exacerbate the procedural and substantive disputes." Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador, Order on Interim Measures (May 14, 2010) ¶ 1(i).

presentation” of a brand in order to eliminate “light” tobacco brands and (2) require 80 percent of a package (the most anywhere) to depict the risk of death and disease from smoking.¹⁶

In effect, PMI wants the TPP to include the same legal tools that it is using against Uruguay. PMI candidly admits that it is targeting tobacco regulations in at least two TPP countries, Australia and Singapore. If successful, PMI will be able to influence a much larger set of countries that want to exceed the “floor” of regulations required by the Framework Convention on Tobacco Control. If the TPP covers tobacco trade and investment, PMI would also have a platform to challenge future tobacco regulations in the United States (e.g., through a subsidiary in another TPP country). Congress recently delegated authority to the Food and Drug Administration to regulate tobacco products; this delegation is similar to the authority that PMI is targeting in Singapore.¹⁷

In addition to expanding investor-state arbitration, the TPP would also support PMI’s effort to incorporate certain trade obligations that pertain to investments. These are likely to include protection of trademarks under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and limits on domestic regulation of distribution services under the General Agreement on Trade in Services (GATS). PMI is using this web of trade and investment agreements to shrink the policy space that is available to the 171 parties of the FCTC.¹⁸

Over the past decade, TFK, CPATH, Essential Action, and others have outlined this threat. What this paper adds is a more specific description of the connections between three kinds of international economic agreements: (1) free trade agreements (FTAs, such as the TPP, which include investment chapters), (2) bilateral investment treaties (BITs, which cover additional countries), and (3) WTO agreements that pertain to investments (such as intellectual property and services). With the TPP, PMI’s objective is to expand this web of agreements in order to constrain tobacco regulations.

As explained below, the TPP follows a series of FTAs in which the U.S. negotiated tariff concessions to promote tobacco trade and non-tariff protections for investment, trademarks and services that treat tobacco like any other industry. By all accounts, the TPP is being modeled on those previous agreements. One purpose of this paper is to contrast the pro-tobacco treatment in recent FTAs with the Obama Administration’s support for stronger domestic regulation of tobacco products and sales.

Another purpose of this paper is to guide oversight of TPP negotiations by congressional committees as well as state legislatures and trade policy commissions.¹⁹ State-level regulation was the catalyst for many federal tobacco policies. State attorneys general directed 40 lawsuits that held tobacco companies accountable for misrepresenting health risks. Their Master Settlement Agreement (MSA) obligates tobacco companies to pay \$206 billion over the first 25

¹⁶ PMI v. Uruguay complaint, ¶¶ 20-38, 44-46 (single presentation), ¶¶ 39-42, 47 (demeaning pictographs and percent of package warning).

¹⁷ See “Number of brands and marketing terms,” notes 38-39 below, with accompanying text.

¹⁸ WHO, Parties to the WHO Framework Convention on Tobacco Control, available at http://www.who.int/fctc/signatories_parties/en/index.html (viewed August 2, 2010).

¹⁹ State-level commissions for oversight of trade policy have been created in Washington, Utah, Massachusetts, Vermont, New Hampshire and Maine.

years and \$9 billion per year thereafter.²⁰ In short, the influence of federalism is strong in tobacco regulation, and states have a major stake in oversight of the TPP.

Overview of lead questions for oversight

The sections of this paper focus attention on the following questions for oversight of tobacco trade in the TPP negotiations.

- **Which tobacco regulations is PMI challenging?**
In its international litigation to date, PMI is challenging display bans, plain packaging, limits on the number of brands and marketing terms, and package warnings. Generally, its strategy seeks to convert the FCTC's regulatory floors into ceilings. Specifically, PMI has targeted the TPP countries of Australia (plain packaging) and Singapore (package warnings and marketing terms). Other TPP countries also exceed the FCTC regulatory floors, and the United States will soon join them.
- **How does the TPP support PMI's litigation strategy?**
The United States is PMI's home jurisdiction. PMI asked U.S. negotiators to continue their practice of treating tobacco trade like any other sector. This entails tariff reductions and expanding the following: (a) access to investor-state arbitration, (b) protection of brands, and (c) limits on regulation of distribution services.
- **How can PMI use WTO obligations to strengthen its investment claims?**
As it did in its Uruguay claim, PMI can try to incorporate WTO obligations that pertain to investment (e.g., certain rules regarding intellectual property (TRIPS) and regulation of services (GATS) by using the TPP's most favored nation (MFN) clause to gain access to umbrella clauses or more favorable clauses in other BITs of TPP countries.
- **Have U.S. negotiators complied with prohibitions on promoting tobacco trade?**
Two directives prohibit federal agencies from promoting tobacco trade or undermining tobacco regulations abroad. One is President Clinton's Executive Order 13193, and the other is the Doggett Amendment, a recurring congressional limit on appropriations.
- **What are the options to limit TPP support for tobacco trade?**
The most elegant way to avoid undermining regulation of tobacco is to carve tobacco out of the TPP.

²⁰ See Report to Senate U.S. Comm. on Commerce, Science & Transportation, States' Use of MSA Payments, GAO-01-851, at 8 (June 2001). One of the lead authors of the Master Settlement Agreement was Heidi Heitkamp, who was then the Attorney General of North Dakota. She is presently a member of the board of directors of the Forum on Democracy and Trade. Several Canadian tobacco distributors were unsuccessful in their claims against the MSA in *Grand River v. United States*, an investor-state arbitration under NAFTA's investment chapter. In early 2011, the arbitrators ruled in favor of the United States on procedural and substantive grounds. As the *Grand River* claims challenged master settlement obligations and treaty status of indigenous investors, there is little direct relevance of this award to PMI's litigation strategy that targets regulatory standards. See generally International Centre for Settlement of Investment Disputes, Award, *Grand River Enterprises, Six Nations Ltd. et al, and the United States of America*, (January 12, 2011); all previous documents from this case are available at http://www.naftaclaims.com/disputes_us_grand_river.htm (viewed August 3, 2010).