

The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?

Jane Kelsey[†]

I. INTRODUCTION

Proponents of the Trans-Pacific Partnership agreement (TPPA) describe it as a twenty-first century agreement that will reach further behind the border than any previous free trade or investment agreement. As the chief executive of Business New Zealand said during the round of TPPA negotiations in Auckland in December 2012:

It is true that TPP is more than just a trade negotiation.

That's because TPP has the capacity to reach further into domestic economies and domestic policy settings than a conventional trade agreement - as it must if the essential requirements of business are to be addressed and a real difference made, for growth, jobs and community success.¹

More specifically, the TPPA aims to frame how governments make their domestic policy and regulatory decisions as a complement to more extensive rules that constrain the substance of those decisions. These “disciplines” aim to empower commercial players and advance their interests, and to marginalize competing priorities, advocates, and agencies; including democratic political institutions.

Most critical analysts of the TPPA have not grasped this systemic intrusion into the domestic policy domain, because they approach the negotiations as if this is a traditional free trade and investment agreement. That observation extends to the impressive network of tobacco control analysts and advocates that has assiduously monitored, critiqued, advised, and lobbied on the TPPA since negotiations were launched in 2008.² It is this additional dimension that makes the TPPA an especially potent threat to national and international smoke-free goals. It also explains why traditional style solutions, such as proposals for a tobacco-specific exception, will not achieve their objective.

[†] Professor, University of Auckland Faculty of Law.

¹ Phil O'Reilly, Chief Exec., Remarks to TPP Stakeholder Forum (Dec. 7, 2012) (transcript available at www.businessnz.org.nz/file/2380/121207%20TPP%20Stakeholder%20Forum%20notes.pdf).

² A notable exception is the work of Professor Robert Stumberg and others from Georgetown Law, Washington, D.C. See generally Robert Stumberg, *Safeguards for Tobacco Control: Options for the TPPA*, 39 AM. J.L. & MED. 382 (2013).

This Article begins with a brief introduction to the TPPA and the current state of play. Section III explains what is different about the proposed agreement. Section IV gives an overview of proposed changes in the more common trade and investment chapters. That is followed by a discussion in Section V of the proposed chapters on regulatory coherence and transparency, which would impose novel disciplines on the policy and regulatory decisions and actions of each Party through such techniques as regulatory impact assessments, and confer rights on affected commercial interests to participate in regulatory processes. Section VI summarizes the cumulative effect of these various chapters on the process of developing and implementing tobacco control strategies.

The implications for smoke-free policies are explored in more detail in Section VII, using the example of Australia's plain packaging policy. Australian tobacco companies have used all available mechanisms to intervene at every stage of the domestic regulatory process. Along the way, they have accumulated evidence for use in legal disputes to challenge the plain packaging laws. As Section VII records, a similar pattern of behavior is emerging in relation to New Zealand's proposed plain packaging laws. Tobacco companies accuse both countries of failing to comply with their own "best practice" regulatory mechanisms and their obligations on intellectual property, technical barriers to trade, and investment in their free trade and investment treaties. Moves to embed such disciplines within the TPPA, and guarantee tobacco companies the right to participate actively in decision-making processes, could have serious consequences, especially for countries where such mechanisms do not currently apply.

The penultimate section asks what this means for strategies to neutralize the impacts of the TPPA on progressive tobacco control policies, focusing on the U.S. proposal for a tobacco exception. The Article concludes by urging a more systemic analysis of the TPPA, and its potential consequences for the kind of tobacco control policies that are necessary to achieve national and international smoke-free goals and achieve the objectives of the Framework Convention on Tobacco Control (FCTC).

II. A BRIEF PRIMER ON THE TPPA³

On March 15, 2010, trade negotiators from eight countries met to begin formal talks on a free trade and investment treaty, the TPPA.⁴ Seven were full participants: Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and the United States.⁵ Vietnam had associate status for the first three meetings; it became a full participant before the fourth round in Auckland, New Zealand in December 2010.⁶ So did Malaysia.⁷ Canada and Mexico asked to join the talks at the APEC meeting in Honolulu in November 2011 and were accepted after a lengthy process; they participated for the first time in the fifteenth round at Auckland, New Zealand in

³ For discussion of the history of the TPPA, see Jane Kelsey, *Introduction to NO ORDINARY DEAL; UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT* 9, 9-28 (Jane Kelsey ed., 2010). See also Deborah Elms, *Getting from Here to There: Stitching Together Goods Agreements in the Trans-Pacific Partnership (TPP) Agreement* 1-4 (S. Rajaratnam Sch. of Int'l Studies, Working Paper No. 235, 2012).

⁴ *Trans Pacific Partnership Agreement (TPP): Background and Negotiations*, SICE, http://www.sice.oas.org/TPD/TPP/TPP_e.asp (last visited Feb. 25, 2013).

⁵ Elms, *supra* note 3, at 2-3.

⁶ *Id.* at 3.

⁷ *Id.*

December 2012.⁸ Japan is the only other country to have formally asked to participate after teetering on the brink for several years.⁹ Thailand has also expressed interest, but not made a formal approach.¹⁰

Notionally, the United States, Australia, Canada, Malaysia, Mexico, Peru, and Vietnam are acceding to the Trans-Pacific Strategic Economic Partnership Agreement (known as the “P4”) that Chile, New Zealand, Singapore, and Brunei concluded in 2005.¹¹ In reality, the United States does not accede to other countries’ agreements. The U.S. Trade Representative (USTR) has dominated the negotiations, reportedly seeking to extend the rules in existing U.S. Free Trade Agreements (FTAs) and to supplement them with new proposals.¹² Other parties have sought to integrate and adapt the P4 text and graft their own proposals onto the U.S. template.¹³

The United States has been the main political driver. Although the process began under George W. Bush, the Obama administration has owned the TPPA as its principal (and until recently, only) significant trade negotiation and it is under pressure from business and political constituencies to deliver.¹⁴ Since 2011, it has represented the agreement as the economic limb of a two-pronged pivot to reinvigorate U.S. “leadership” in the Asia-Pacific region—the other limb being a renewed military presence—as a counter to China’s growing ascendancy.¹⁵ The specter of geopolitical and economic competition from China also infuses many of the United States’ substantive proposals.¹⁶

The initial informal deadline for the agreement to be concluded was mid-2012.¹⁷ That was never achievable. The next collective ambition of the parties was to bring negotiations to a point where a deal could be signed at the APEC political leaders meeting in October 2013.¹⁸ That would only be achievable if intense political pressure got the negotiators to set aside their rational concerns and accept ill-conceived compromises.

At the end of the Auckland round in December 2012, the negotiations remained at various levels of impasse, especially on medicines, information technology,

⁸ *Id.* at 4; see also *U.S. Official: Integrating Canada, Mexico Major Focus of Auckland Round*, INSIDE U.S. TRADE, Dec. 12, 2012, at 6 [hereinafter *Integrating Canada, Mexico*].

⁹ Int’l Centre for Trade & Sustainable Dev., *Japan Announces Goal of Joining Trans-Pacific Trade Talks*, BRIDGES WKLY., Mar. 20, 2013, at 1, available at <http://ictsd.org/i/news/bridgesweekly/158489/>.

¹⁰ Pradit Ruangdit & Saritdet Marukatat, *Thailand to Join TPP Talks*, BANGKOK POST, Nov. 13, 2012, <http://www.bangkokpost.com/lite/news/320886/thailand-to-join-tpp-talks>.

¹¹ Elms, *supra* note 3, at 1-4.

¹² *Id.* at 8.

¹³ *Id.*

¹⁴ See *Renew Trade Negotiation Authority*, U.S. CHAMBER COMMERCE, <http://www.uschamber.com/international/agenda/renew-trade-negotiating-authority> (last visited Feb. 24, 2013).

¹⁵ See Hillary Clinton, *America’s Pacific Century: The Future of Geopolitics Will Be Decided in Asia, Not in Afghanistan or Iraq, and the United States Should Be Right at the Center of the Action*, FOREIGN POL’Y, Nov. 2011, at 56, 62, available at www.foreignpolicy.com/node/1002667; Jane Kelsey, *TPP as Lynchpin for Anti-China Strategy*, SCOOP (Nov. 19, 2011, 8:08 PM), <http://www.scoop.co.nz/stories/HL1111/S00171/tpp-as-a-lynchpin-of-us-anti-china-strategy.htm>.

¹⁶ The most notable is the State-Owned Enterprises section of the Competition chapter, which was drafted principally with China in mind. See *USTR Using OECD Work as Guide for TPP Proposals on SOE Disciplines*, INSIDE U.S. TRADE, July 22, 2011.

¹⁷ *White House Eyes Mid-2012 TPP Deal, but Says No ‘Firm Deadline’ Set*, INSIDE U.S. TRADE, Nov. 18, 2011.

¹⁸ *Integrating Canada, Mexico*, *supra* note 8, at 7.

agriculture, textiles, state-owned enterprises, labor, and environment.¹⁹ The deadlocks are largely of the United States' own making; it has continued to table controversial new texts in areas of interest to its corporations, but failed to table revisions of draft texts that other parties have rejected.²⁰

A strong cross-sectoral campaign in a number of countries (especially the United States, New Zealand, Australia, and Malaysia) has heightened the tensions around the negotiations. Controversy over specific issues has been fueled by intense secrecy.²¹ Unlike the World Trade Organization (WTO)²² and negotiations for the Free Trade Area of the Americas (FTAA)²³ and the Anti-Counterfeiting Trade Agreement (ACTA),²⁴ the only working texts and position papers that are available are those that have been leaked.²⁵ The parties have agreed that no draft texts or working documents will be released during the negotiations and that no documents aside from the final text will be released for four years after the agreement comes into effect or negotiations are terminated.²⁶

Tobacco has been a surprise factor in the negotiations, thanks to the efforts of tobacco control advocates, although the magnitude of the other issues means it is unlikely to be a deal breaker. The spectrum of parties' positions on tobacco is complicated. All parties except the United States have ratified FCTC.²⁷ Australia and to a lesser extent New Zealand have ambitious smoke-free goals and are implementing novel policies that currently center on plain packaging of tobacco products, as discussed below.²⁸ The Malaysian, Brunei, and Singapore governments also have strong smoke-free policies, consistent with initiatives across the Association of Southeast Asian Nations (ASEAN).²⁹ Vietnam has a state-owned

¹⁹ *TPP Countries Aiming to Table Remaining Proposals Soon*, INSIDE U.S. TRADE, Jan. 9, 2013.

²⁰ *Id.*

²¹ *Groups to Obama: Reject "Unprecedented Level of Secrecy" in Trade Negotiation*, OPENTHEGOVERNMENT.ORG (Feb. 27, 2012), <http://www.openthegovernment.org/node/3377>.

²² *See WTO Staff Working Papers*, WORLD TRADE ORG. [WTO], http://www.wto.org/english/res_e/reser_e/wpaps_e.htm (last visited Feb. 27, 2013) (containing links to WTO working papers from 1996 to present).

²³ *See Draft FTAA Agreement*, FREE TRADE AREA OF THE AMERICAS, http://www.ftaa-alca.org/ftaadrafts_e.asp (last visited Feb. 27, 2013) (containing drafts of the FTAA).

²⁴ *See Previous ACTA Texts*, OFFICE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/intellectual-property/anti-counterfeiting-trade-agreement-acta/previous-acta-texts> (last visited Feb. 27, 2013) (containing drafts of the ACTA).

²⁵ Draft texts of the chapters on intellectual property, regulatory coherence, and investment; annexes on transparency in health technologies; and technical barriers to trade (TBT) on medical devices and pharmaceutical products have been leaked since the negotiations began. *See Trans-Pacific Partnership Agreement (TPPA)*, KNOWLEDGE ECOLOGY INT'L, <http://keionline.org/tpa> (last visited Feb. 24, 2013).

²⁶ Mark Sinclair, *Content of Confidentiality Letters*, N.Z. MINISTRY FOREIGN AFFAIRS & TRADE (Nov. 29, 2011), <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-29-Nov-2011.php> (last visited Feb. 24, 2013).

²⁷ The list of signatories and parties is available at *Parties to the WHO Framework Convention on Tobacco Control*, WHO FRAMEWORK CONVENTION TOBACCO CONTROL, http://www.who.int/fctc/signatories_parties/en/index.html (last updated Dec. 7, 2012).

²⁸ *See infra* Sections VII, VIII.

²⁹ VIET, STEERING COMM. ON SMOKING & HEALTH (VINACOSH) & SE. ASIA TOBACCO CONTROL ALLIANCE (SEATCA), THE ASEAN TOBACCO CONTROL REPORT 2012, available at <http://seatca.org/dmdocuments/ASEAN%20Tobacco%20Control%20Report%202012.pdf>. ASEAN health ministers agreed at their eleventh meeting in Phuket, Thailand in July 2012 to withdraw tobacco from the list of products subject to tariff removal in 2015. *Groups Laud Exclusion of Tobacco from AFTA Tariff List*, THIRD WORLD NETWORK, <http://twinside.org.sg/title2/FTAs/info.service/2012/fta.info.232.htm> (last visited Feb. 27, 2013).

tobacco producer,³⁰ which creates some tension between its commercial, political, and public health priorities. Canada has a mixed track record, with some strong policies, but it has also capitulated in the past to industry threats of investor-state disputes.³¹ Little is known about the approach of Chile and Peru to tobacco in the TPPA talks, or newcomer Mexico. Future participation by Japan could also be significant, as the government is a significant shareholder in Japan Tobacco Inc.³² Conversely, Thailand has world-leading public health strategies on both tobacco and alcohol.³³ To date, however, the United States is the only country to indicate its intention to table a text that deals specifically with tobacco; the content and timing of the exception is discussed in Section VI below.

III. WHAT IS DIFFERENT ABOUT THE TPPA

The branding of the TPPA as a “gold standard” for the twenty-first century³⁴ seeks to distinguish it from other international agreements that promote free trade, investment, and economic integration among the signatory parties. There are at least six features that aim to make the TPPA unique:

1. a seamless regulatory environment for cross-border movement of goods, capital, data, and elite personnel and their related commercial activities.³⁵ This is not unlike the internal and external synergies sought (more successfully) by the European Union,³⁶ but would embody U.S.-centric interests and the associated regulatory regime;
2. targeting the philosophy and processes, as well as the substance, of the parties’ domestic policy and regulatory decisions;³⁷
3. moving beyond the standard ideological, commercial, and mercantilist approach to individual chapters to incorporate cross-cutting themes and disciplines on all domestic regulatory processes, irrespective of the subject matter;³⁸
4. constructing a hegemonic regime where the cumulative norms, technical and evidential requirements, decision-making procedures, institutional arrangements, obligations to consult and report, surveillance

³⁰ This producer is the Vietnam National Tobacco Corporation (VINATABA).

³¹ PHYSICIANS FOR SMOKE-FREE CANADA, THE PLOT AGAINST PLAIN PACKAGING 3, 8 (2008), available at http://www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1.pdf.

³² See generally TOBACCO FREE KIDS, JAPAN TOBACCO INC AND JAPAN TOBACCO INTERNATIONAL (2011), available at www.global.tobaccofreekids.org/files/pdfs/en/Japan_Profile.pdf.

³³ See generally WHO, COUNTRY COOPERATION STRATEGY: THAILAND: 2012-2016 (2011).

³⁴ See, e.g., *Trade Representative Kirk Outlines Asia-Focused Trade Agenda at East-West Center’s USAPC Washington Conference*, E.-W. CENTER, <http://www.eastwestcenter.org/news-center/web-articles/trade-representative-kirk-outlines-asia-focused-trade-agenda-at-east-west-centers-usapc-washington-conf> (last visited Feb. 24, 2013).

³⁵ See *Trans-Pacific Partnership (TPP) Trade Ministers’ Report to Leaders*, OFFICE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re> (last visited Feb. 24, 2013) [hereinafter *Trade Ministers’ Report*].

³⁶ The Global Europe Strategy that was launched by the European Commission in 2006 and ran until 2010 aimed to achieve a seamless regulatory regime within and outside the European Union. For an evaluation, see *Report on Progress Achieved on the Global Europe Strategy, 2006-2010*, SEC(2010) 1268/2 (2010).

³⁷ See *Trade Ministers’ Report*, *supra* note 35.

³⁸ *Id.*

mechanisms, rights of stakeholder engagement, and legal enforcement make the whole much more potent than the sum of its parts;³⁹

5. extending its horizon beyond the original (currently eleven) parties by promoting it as a “living agreement” to which all Asia-Pacific countries will accede, without changing its pre-determined rules;⁴⁰ and
6. harnessing this U.S.-led regulatory hegemony to a parallel geopolitical strategy for the Asia-Pacific, with the aim to either encompass or isolate China.⁴¹

These high ambitions for the TPPA may not be reflected in the realities of the negotiations or the content of the final text. But they signal the distinctive elements that analysts need to consider when assessing its potential impacts on national and international smoke-free strategies.

IV. THE SCOPE OF THE TPPA

If concluded as planned, the scope of the TPPA would be massive. There are twenty-nine subject areas under negotiation, each of which corresponds to a potential chapter or section of the final text or constitutes a cross-cutting theme.⁴²

Only a few chapters involve old-fashioned cross-border commodity trade, such as market access for goods (including agricultural products and textiles), customs, trade remedies, and subsidies.⁴³ The rest of the working groups deal with governments’ behind-the-border powers and activities.⁴⁴ Some, notably technical barriers to trade (TBT), sanitary and phytosanitary measures, and government procurement are familiar from the later rounds of the General Agreement on Tariffs and Trade (GATT).⁴⁵ Other chapters cover policy and regulatory measures brought under the rubric of “trade” in the WTO and the early generation free trade agreements (FTAs)—especially services and related investments, intellectual property rights, and trade facilitation—as well as investment protections and investor-enforcement powers in bilateral investment treaties (BITs) and FTAs.⁴⁶

Most of these chapters have explicit criteria for decision-making, presumptions of light-touch regulatory approaches, requirements for evidence-based regulation

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Paul Eckert, *Analysis: Obama’s Pacific Aspirations Strain Ties with China*, REUTERS, Nov. 14, 2011, <http://www.reuters.com/article/2011/11/14/us-analysis-obamas-pacific-aspirations-idUSTRE7AD2E520111114>.

⁴² IAN F. FERGUSON ET AL., CONG. RESEARCH SERV., R42694, TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS AND ISSUES FOR CONGRESS 3 (2013). The negotiators have declined to confirm the specific titles of the chapters in the proposed agreement. They are understood to be market access for goods; textiles and apparel; customs; trade remedies; subsidies; trade facilitation; sanitary and phytosanitary measures; technical barriers to trade; government procurement; investment; cross-border trade in services; financial services; telecommunications; e-commerce; temporary movement of natural persons; intellectual property; labor; environment; competition, including state-owned enterprises; supply chains; transparency; regulatory coherence; dispute settlement; and exceptions.

⁴³ *Enhancing Trade and Investment, Supporting Jobs, Economic Growth: Outlines of the Trans-Pacific Partnership Agreement*, OFFICE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement> (last visited Feb. 28, 2013).

⁴⁴ *Id.*

⁴⁵ See *WTO Trade Topics*, WTO, http://www.wto.org/english/tratop_e/tratop_e.htm (last visited Feb. 28, 2013) (containing links describing the various trade measures).

⁴⁶ *Id.*

and industry-inclusive processes, as well as diverse disclosure, notification, consultation and enforcement mechanisms.

The rules that are reportedly being proposed for a number of these chapters have particular significance for tobacco control policies.⁴⁷

A. COMMODITY TRADE

The stated aim is to remove all remaining market access barriers, with no product exceptions, and further liberalize, streamline and harmonize the rules.⁴⁸ This would remove all tariffs on tobacco leaf and products,⁴⁹ a goal the U.S. tobacco industry supports,⁵⁰ and prevent licensing and quantitative restrictions on imports, unless the general exception defense was satisfied (see discussion below⁵¹).

B. TECHNICAL BARRIERS TO TRADE (TBT)

There has been little concrete information about new TBT proposals that might impact on tobacco control policies. Malaysia reportedly tabled a proposed Annex to the TBT chapter that seeks to prevent governments from requiring companies to hand over proprietary formulas for their products in order to market them in that country.⁵² This could affect a requirement to disclose the ingredients, including the nicotine content, of tobacco products. The report suggests the United States has supported Malaysia's proposal.⁵³

C. CROSS-BORDER SERVICES (CBS)

The cross-border services chapter has attracted relatively little public attention, which is surprising given the vigorous and very effective campaigns to prevent extension of the rules and commitments in the General Agreement on Trade in Services (GATS) during the WTO Doha round.⁵⁴

The most significant CBS issue involves disciplines on the domestic regulation of services, which New Zealand and Australia have spearheaded—and the United States has steadfastly resisted—in the WTO.⁵⁵ The current GATS provision applies to tobacco control policies that relate to licensing requirements and technical standards. It requires that administrative decisions be objective and impartial, and that regulation is based on objective and transparent criteria, is not more burdensome

⁴⁷ For a discussion addressing technical issues, see Stumberg, *supra* note 2.

⁴⁸ See *Trade Ministers' Report*, *supra* note 35.

⁴⁹ The current tariff bindings and applied tobacco tariffs among TPPA countries are set out in Stumberg, *supra* note 2.

⁵⁰ There are complex issues related to the meaning of the “Doggett Amendment” of 1998, which prohibit the U.S. government from taking actions to reduce another country's marketing restrictions on tobacco and, despite the amendment, tobacco has been routinely included in U.S. free trade agreements. Franco Ordonez, *Tobacco Growers Afraid Trans-Pacific Trade Deal Will Harm Exporters*, MCCLATCHY WASH. BUREAU (Feb. 29, 2012), www.mcclatchydc.com/2012/02/28/v-print/140249/tobacco-growers-fear-trade-deal.html.

⁵¹ See *infra* Part VIII.

⁵² *U.S. Backs Malaysian TPP Proposal Aiming to Protect Product Formulas*, INSIDE U.S. TRADE, Jan. 9, 2013.

⁵³ See *id.*

⁵⁴ For a discussion of the tobacco issues, see Robert Stumberg, *supra* note 2.

⁵⁵ WTO, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, Room Doc. No. 2160 (March 20, 2009).

than necessary to achieve quality of the service, and (for licensing procedures) does not itself restrict the supply of the service.⁵⁶

Based on the position New Zealand has promoted in the WTO domestic regulation negotiations, it is likely to seek the blanket application of similar rules to all services, even if they are excluded through the annexes of non-conforming measures. This obligation would apply to all levels of government and delegated authority,⁵⁷ and to a commercial presence of a TPPA Party.⁵⁸ If adopted, this would severely constrain tobacco control policies that involve licensing and technical standards for wholesale and retail distribution, advertising, printing and packaging, and the hospitality sector.⁵⁹

The parties will also be expected to reduce the lists of non-conforming measures in their existing agreements that exempt the application of market access and national treatment (non-discrimination) rules to a range of tobacco-related services or activities.

D. INTELLECTUAL PROPERTY

The intellectual property chapter has been the most controversial chapter in the TPPA negotiations, fuelled by several leaked texts.⁶⁰ Debate has centered on pharmaceuticals and the digital domain, with limited discussion of the impacts on tobacco control policy of proposals on geographical indications,⁶¹ rights of rights-holders to use intellectual property rights that have been registered,⁶² and trade secrets, including ingredients.⁶³

E. INVESTMENT

A leaked draft of the investment chapter builds on the standard approach of U.S. FTAs and BITs.⁶⁴ Square brackets indicate some resistance to U.S. attempts to extend some of these rules.⁶⁵

⁵⁶ Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. 6, Apr. 15, 1994, 1869 U.N.T.S. 183.

⁵⁷ Article 1.3(a) of the GATS required WTO members to “take such reasonable measures as may be available to it to ensure their observance” by sub-central levels of government. General Agreement on Trade in Services art. 1.3(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

⁵⁸ Known as “mode 3” of the GATS, Article 1.2(c). *Id.* at art. 1.2(c).

⁵⁹ See JANE KELSEY, TOBACCO CONTROL RESEARCH TURANGA, INTERNATIONAL TRADE LAW AND TOBACCO CONTROL: TRADE AND INVESTMENT LAW ISSUES RELATING TO PROPOSED TOBACCO CONTROL POLICIES TO ACHIEVE AN EFFECTIVELY SMOKEFREE NEW ZEALAND BY 2025 35-40 (2012).

⁶⁰ James Love, *Trans-Pacific Partnership Agreement*, KNOWLEDGE ECOLOGY INT’L, <http://keionline.org/tpp> (last visited Feb. 28, 2013).

⁶¹ Memorandum from Lloyd Grove and Robert Stumberg to Chris Bostic on ASH: Proposed TPP Intellectual Property Language on Geographical Indications (April 9, 2012).

⁶² TRANS-PACIFIC PARTNERSHIP, INTELLECTUAL PROPERTY RIGHTS CHAPTER: DRAFT – FEBRUARY 10, 2011, at art. 2.3 (2011), available at <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>.

⁶³ *Industry Groups Push USTR to Strengthen Trade Secret Proposal in TPP*, INSIDE U.S. TRADE, Mar. 6, 2012.

⁶⁴ The undated leaked text can be located at *Trans-Pacific Partnership: Investment*, CITIZENS TRADE CAMPAIGN, <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf> [hereinafter *Investment*]. Specifically, the rules on non-discrimination and performance requirements, plus investor guarantees of minimum standards of treatment and protection from direct and indirect expropriation, unrestricted capital transfers, and investor-state dispute settlement. *See id.*

One of the most problematic issues is the special protection for investors under the rules on minimum standards of treatment, including fair and equitable treatment,⁶⁶ and protection against direct and indirect expropriation.⁶⁷ Foreign investors are increasingly using these rules to target domestic regulatory decisions and processes and the ad hoc arbitral tribunals that hear them have creatively interpreted them in the investors' favor.⁶⁸ Attempts to control this trend have seen the inclusion of references to customary international law in relation to fair and equitable treatment,⁶⁹ and an interpretive annex on expropriation.⁷⁰ Recent arbitral decisions that have been issued during the course of the TPPA negotiations have cast serious doubt on the effectiveness of these clarifications.⁷¹

The leaked text revealed that only Australia has attempted to exempt itself from the application of Section B on investor-state dispute settlement (ISDS).⁷² Negotiators for other countries are acutely aware of the expansive interpretations of investor protections by ad hoc investment tribunals and the apparent impotence of attempts to rein them in by interpretive annexes and references to customary international law.⁷³ They are also concerned about the rapid increase in investor-initiated disputes that are challenging significant domestic policies. The investment disputes challenging tobacco control policies of Australia, Uruguay, and Norway have been a major factor in heightening these concerns, and strengthening the Australian government's resolve. All countries except Australia, however, have accepted ISDS and would find it difficult to backtrack, although some parties have made proposals that aimed to restrict its scope.⁷⁴

In addition, parties are under pressure to reduce or eliminate their existing restrictions in the annexes of non-conforming measures (which are common to the CBS chapter). These protections only apply to the rules on national treatment, most-favored-nation, performance requirements, and senior management.

The investment chapter has especially serious consequences for New Zealand, Malaysia, Brunei and Vietnam.⁷⁵ These countries do not have FTAs or BITs with the United States, so the TPPA would give U.S.-owned tobacco companies a more direct pathway to challenge new smoke-free laws.⁷⁶

⁶⁵ Notably, the U.S. provisions to insert explicit coverage of state enterprises and the enforcement of certain categories of state-investor contracts through the investor-state dispute mechanism.

⁶⁶ *Investment*, *supra* note 64, at art. 12.6.

⁶⁷ *Id.* at art. 12.12.

⁶⁸ UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, WORLD INVESTMENT REPORT 2012, at 86-87 (2012),

⁶⁹ *Investment*, *supra* note 64, at art. 12.6.2.

⁷⁰ There are two versions in the leaked draft TPPA investment chapter, Annex 12-C and 12-D. *See id.*

⁷¹ Matthew Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, INVESTMENT TREATY NEWS, Mar. 22, 2013, at 3, available at http://www.iisd.org/pdf/2013/iisd_itn_march_2013_en.pdf.

⁷² *Investment*, *supra* note 64. This position could change after the Australian general election in September 2013.

⁷³ This is based on confidential personal communications.

⁷⁴ Draft Article 12.16*bis*, for example, seeks to exclude a dispute related to government procurement or granting of a subsidy. *Investment*, *supra* note 64, at art. 12.16.

⁷⁵ The United States and Vietnam signed a Trade and Investment Framework Agreement in 2007. *See Trade and Investment Framework Agreement, U.S.-Viet.*, June 21, 2007, available at http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file81_12935.pdf.

⁷⁶ For a more detailed discussion of the implications for tobacco policy, see Stumberg, *supra* note 2.

F. COVERAGE

These more extensive rules would, in many instances, apply to all levels of government (central, regional, and local) and non-government entities exercising delegated authority.⁷⁷ Some would also apply to state enterprises, a subject on which the United States has tabled a draft text but where the definitions remain uncertain.⁷⁸ Other chapters may exempt sub-federal levels, which would disadvantage countries that have unitary governments. Certain chapters may contain annexes that allow the exclusion of certain levels of government, named entities, or non-conforming measures. Overall, however, the TPPA rules are intended to have more extensive and intrusive reach than existing agreements.⁷⁹ That would have important implications for smoke-free policies, as many measures are adopted by state or local governments or bodies that exercise delegated powers, such as licensing authorities.

V. WHAT IS NEW ABOUT THE TPPA

Much of the preceding analysis will be familiar territory for those who follow contemporary developments in trade and investment law. The novel features of the TPPA are the chapters on regulatory coherence and transparency. They provide the glue for the behind-the-border disciplines by setting institutional and procedural frameworks for the conduct of domestic regulation, mandating engagement with interested commercial interests, and introducing a general presumption in favor of light-handed regulation.

A. REGULATORY COHERENCE

The United States, Australia, and New Zealand have promoted a “best practice” approach to domestic policy and regulation in the TPPA. It is based on the model they themselves have adopted and successfully promoted as voluntary guidelines through both APEC⁸⁰ and the OECD.⁸¹ A draft text was leaked early in 2011.⁸² The leaked chapter proposed a template of pro-market factors that governments should consider when making domestic regulations and pro-business processes they should use in reaching those decisions.⁸³ It also provided a range of opportunities for TPP states and corporations to enter the domestic policy and legislative domain and

⁷⁷ *Investment*, *supra* note 64, at art. 12.3(2).

⁷⁸ *TPP Countries Signal New Proposals to Counter U.S. SOE, IPR Demands*, INSIDE U.S. TRADE, Dec. 14, 2012.

⁷⁹ Chin L. Lim et al., *What Is “High-Quality, Twenty-First Century” Anyway?*, in *THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT* 3, 4 (Chin L. Lim, Deborah K. Elms & Patrick Low eds., 2012).

⁸⁰ See ASIA-PAC. ECON. COOPERATION [APEC], APEC INFORMATION NOTES ON GOOD PRACTICE FOR TECHNICAL REGULATION (2000), available at http://www.jisc.go.jp/eng/apec-asem/pdf/grp_info.pdf (based on APEC, APEC PRINCIPLES TO ENHANCE COMPETITION AND REGULATORY REFORM (1999), available at www.oecd.org/gov/regulatorypolicy/2371601.doc).

⁸¹ See APEC & ORG. FOR ECON. CO-OPERATION & DEV., APEC-OECD INTEGRATED CHECKLIST ON REGULATORY REFORM (2005), available at www.oecd.org/regreform/34989455.pdf.

⁸² *Trans-Pacific Partnership: ‘Regulatory Coherence,’* PUB. INTELLIGENCE, <http://info.publicintelligence.net/TPP-RegulatoryCoherence.pdf> (last visited Mar. 4, 2013) [hereinafter *Regulatory Coherence*].

⁸³ JANE KELSEY, PRELIMINARY ANALYSIS OF THE DRAFT TPP CHAPTER ON DOMESTIC COHERENCE, CITIZENS TRADE CAMPAIGN 1, 3-5 (2011), available at http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf.

influence decisions in their favor, and for cross-Party oversight of compliance with the chapter.⁸⁴

These incursions into internal governance arrangements appear to have met increasing resistance from other parties who believe that best practice should be sensitive to each state's individual system of governance, constitutional structure, national priorities, and constitutional and international obligations.⁸⁵

The chapter proposed an enforceable obligation on governments to “endeavor” to establish a national coordinating agency or mechanism to promote coordination across their domestic agencies and to review compliance with “best practice” approaches to regulatory decisions.⁸⁶ “Best practice” included a formal process to review existing, and approve new, regulations and a presumption that “core good regulatory practices” involve the conduct of regulatory impact assessments (RIAs).⁸⁷

The leaked text stopped short of mandating the use of the RIAs. It imposed instead an obligation to “generally encourage” their use when conducting reviews of regulatory measures covered by the chapter.⁸⁸ A number of key elements of an RIA were listed.⁸⁹ While they were more general than the requirements in Australia, New Zealand, and the United States, there was a cross-reference to the APEC and OECD documents, which are more detailed.⁹⁰ The leaked text said an RIA should identify

- (1) the problem and policy objective that the measure intends to address, including an assessment of the significance of the problem and a description of the need for regulatory action;
- (2) potentially effective and reasonably feasible alternatives to achieve the policy objective; and
- (3) where appropriate, the grounds for concluding that the selected alternative achieves the objectives in a way that maximizes the net benefit [meaning a cost-benefit analysis]⁹¹

The RIA should also, consistent with a country's domestic law,

- (1) [consider] whether, for all aspects of the proposed measure, there is a need to regulate to achieve the policy objective or whether an objective could be met by non-regulatory and/or voluntary means . . . ;
- (2) [assess], to the extent feasible . . . , the costs and benefits of each available alternative, including not to regulate, recognizing that some costs and benefits are difficult to quantify and monetize;
- (3) [explain] why the alternative selected is superior to the other available alternatives, including, if appropriate, through reference to the relative size of net benefits . . . ; and

⁸⁴ *Id.* at 9.

⁸⁵ This is based on confidential personal communications.

⁸⁶ *Regulatory Coherence*, *supra* note 82, at art. X.2.1

⁸⁷ *Id.* at art. X.5.5.

⁸⁸ *Id.* at art. X.3.1.

⁸⁹ *Id.* at art. X.3.1.b.

⁹⁰ *Id.* at art. X.3.2.

⁹¹ *Id.* at art. X.3.1.a.

- (4) [make] decisions based on the best reasonably obtainable scientific, technical, economic, and other information, within the boundaries of the authorities, mandates, and resources of the particular regulatory authority.⁹²

Tobacco control advocates from Australia, New Zealand, and the United States may see this as relatively unthreatening. Their domestic policy regimes are already required to comply with these “best practice” obligations.⁹³ But tobacco companies are among those who accuse these governments of failing to meet their own standards.⁹⁴ Official reviews of compliance in the three countries might, at first glance, support that argument.

The independent review conducted of Australia’s compliance in 2012 reported “substantial dissatisfaction by all major stakeholder groups with the RIA Process” and, notwithstanding recent modifications, there was “widespread lack of acceptance of and commitment to the RIA process by ministers and agencies.”⁹⁵ Compliance in 2010 and 2011 had fallen to its lowest level in percentage terms since the current approach was introduced in 1997.⁹⁶

New Zealand conducted reviews in 2008 and 2009, which concluded that half the Regulatory Impact Statements (RISs) failed to meet the quality assurance criteria.⁹⁷ The 2012 review reported an improved result: of fifty RISs initially assessed by their departments or the Treasury’s Regulatory Impact Analysis Team as meeting the requirements, thirty-six percent actually met the criteria, fifty percent partially complied, and fourteen percent were totally non-compliant.⁹⁸

In the United States, scorecards assessing intelligibility, analysis, and use reported that the average quality of regulatory analysis in 2008 was improving, but the average score across the covered agencies still only averaged forty-five percent.⁹⁹ Compliance costs are also a significant drain on public policy resources, with one researcher estimating that complex and sophisticated new studies by the Environmental Protection Agency cost close to \$2 million.¹⁰⁰

There are several possible conclusions from these audits. It may be, as critics of “big government” often argue, that there is a large stock of unnecessary and over-burdensome regulation. Alternatively, the pro-market, pro-business “best practice” criteria and processes in the RIAs may not be fit for purpose. Tobacco policy is a classic example of an intrinsic conflict between industry interests and a public health goal that would see the industry’s effective demise. Moreover, statistics relate to failure by developed countries. It is quite unrealistic to impose similar obligations on

⁹² *Id.* at art. X.3.1b.

⁹³ KELSEY, *supra* note 83, at 3-5.

⁹⁴ See, e.g., *US Business Groups Attack NZ Plain-Packaging*, SYDNEY MORNING HERALD, Feb. 21, 2013, <http://www.smh.com.au/business/world-business/us-business-groups-attack-nz-plainpackaging-20130221-2esxy.html>.

⁹⁵ DAVID BORTHWICK & ROBERT MILLINER, INDEPENDENT REVIEW OF THE AUSTRALIAN GOVERNMENT’S REGULATORY IMPACT ANALYSIS PROCESS 9 (2012).

⁹⁶ *Id.* at 15.

⁹⁷ See CASTALIA STRATEGIC ADVISORS, REGULATORY IMPACT ANALYSIS 2012 (2012).

⁹⁸ *Id.* at 6-7.

⁹⁹ Jerry Ellig & Patrick McLaughlin, *The Quality and Use of Regulatory Impact Analysis in 2008*, at 3 (Mercatus Ctr., George Mason Univ. Working Paper No. 10-34, June 2010), *available at* http://mercatus.org/sites/default/files/WP1034_The-Quality-and-Use-of-Regulatory-Analysis-2008.pdf.

¹⁰⁰ RICHARD D. MORGENSTERN, RES. FOR THE FUTURE, RFF DP 11-17, REFLECTIONS ON THE CONDUCT AND USE OF REGULATORY IMPACT ANALYSIS AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY 3 (2011), *available at* <http://www.rff.org/RFF/Documents/RFF-DP-11-17.pdf>.

the developing countries in the TPPA grouping, even if it were desirable, or on other developing and least developed members of APEC whom they hope would eventually accede to the TPPA.

In addition to RIAs, the regulatory coherence chapter requires regulatory authorities to provide appropriate public access to measures and their supporting documentation, regulatory analyses, and data, in accordance with the transparency chapter.¹⁰¹ As demonstrated later in this Article, this gives the industry a license for harassment and access to more ammunition with which to litigate.¹⁰²

Each Party must also consider various methods to contribute to successful collaboration among the parties *and their respective stakeholders*,¹⁰³ including information exchanges, dialogues, or meetings. This potentially conflicts with the obligations of almost all the negotiating states under Article 5.3 of the FCTC to protect public health policies from commercial and other vested interests of the tobacco industry.¹⁰⁴

Finally, a special regulatory coherence committee of the parties would monitor and review compliance,¹⁰⁵ providing opportunities for states to obstruct or challenge new initiatives on behalf of their companies.

B. TRANSPARENCY

The obligations in the regulatory coherence chapter are explicitly cross-referenced to parties' obligations in the transparency chapter, which, although not leaked,¹⁰⁶ is expected to mandate active participation by affected interests in decisions affecting them.¹⁰⁷ The stand-alone transparency chapter needs to be read alongside the transparency provisions in subject-specific chapters and annexes. This is another U.S.-led chapter, which is expected to impose a series of obligations on a Party. First, it should publish promptly all laws, regulations, procedures, and administrative rulings,¹⁰⁸ and, to the extent possible, publish in advance the measures it proposes to adopt.¹⁰⁹ Again, to the extent possible, interested persons and the other parties should be given a reasonable opportunity to comment on proposed measures.¹¹⁰ Regulations of general application that are proposed by the central government should be published at least forty days before comments are due, with an explanation of the purpose of and rationale for the proposed regulations.¹¹¹ When such regulations are adopted, they should be published accompanied by an explanation of their purpose and rationale, how significant, substantive comments

¹⁰¹ *Regulatory Coherence*, *supra* note 82, at art. X.3.4.

¹⁰² *See infra* Part VI.

¹⁰³ *Regulatory Coherence*, *supra* note 82, at art. X.3.7.

¹⁰⁴ WHO, GUIDELINES FOR IMPLEMENTATION OF ARTICLE 5.3 OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 1 (2008), *available at* http://www.who.int/fctc/guidelines/article_5_3.pdf.

¹⁰⁵ *Regulatory Coherence*, *supra* note 82, at art. X.5.1.

¹⁰⁶ A proposed Transparency Annex on Healthcare Technologies has been leaked and confirms this general direction. *See Trans-Pacific Partnership: Transparency Chapter-Annex on Transparency and Procedural Fairness for Healthcare Technologies*, CITIZENS TRADE CAMPAIGN (June 22, 2011), <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificTransparency.pdf>.

¹⁰⁷ The chapter is expected also to have a section on corruption.

¹⁰⁸ *Id.* at art. 21.1.1.

¹⁰⁹ *Id.* at art. 21.1.2a.

¹¹⁰ *Id.* at art. 21.1.2b.

¹¹¹ *Id.* at art. 21.1.3b.

received during the comment period have been addressed, and the reason for any substantive revisions.¹¹²

If one Party considers an actual or proposed measure might affect the operation of the agreement, the Party introducing it should promptly provide information that is requested and respond to questions.¹¹³ It should also ensure, wherever possible, that persons of another Party directly affected by an administrative proceeding have reasonable notice and a reasonable opportunity to present facts and arguments to support their position.¹¹⁴ Finally, it should provide procedures for prompt review of final administrative action, which are conducted by independent and impartial tribunals, and ensure that parties to the proceedings have a reasonable opportunity to support their position and that a decision is based on the evidence and submissions of record.¹¹⁵

VI. CUMULATIVE CONSTRAINTS ON TOBACCO CONTROL POLICY

The proposed regulatory coherence and transparency chapters focus on process, evidence, documentation, surveillance and participation by industry players, with the former adding a general presumption in favor of light-handed regulation. When read in conjunction with the anticipated rules, presumptions, processes, and arrangements in other chapters,¹¹⁶ which are also designed to constrain domestic regulatory decisions, the implications of the TPPA reaching further behind the border than any previous agreement become very clear.¹¹⁷ On a best assessment based on existing leaked texts and previous U.S. FTAs, the diverse chapters in the agreement could impose constraints on governments' tobacco policy decisions through:

- i. substantive rules and prohibitions (in the goods, TBT, intellectual property, cross-border services, and investment chapters);
- ii. criteria to apply in making decisions (in the goods, TBT, intellectual property, cross-border services, investment, and regulatory coherence chapters);
- iii. criteria for choosing among available policy options (in the goods, TBT, intellectual property, cross-border services, investment, and regulatory coherence chapters);
- iv. processes to be used in making decisions (in the TBT, regulatory coherence, and transparency chapters);
- v. evidential basis for policy decisions (in the TBT, cross-border services, investment, and regulatory coherence chapters);
- vi. techniques for evaluating policy options (in the TBT and regulatory coherence chapters);
- vii. documentation, disclosure, and reporting requirements (in the TBT, intellectual property, regulatory coherence, and transparency chapters);
- viii. administrative arrangements (in the cross-border services and regulatory coherence chapters);

¹¹² *Id.* at art. 21.1.4c.

¹¹³ *Id.* at art. 21.2.

¹¹⁴ *Id.* at art. 21.3.

¹¹⁵ *Id.* at art. 21.4.

¹¹⁶ Although few of the texts from other chapters have been leaked, the likely content can be inferred from existing U.S. FTAs.

¹¹⁷ Especially the chapters on TBT, sanitary and phytosanitary measures, telecommunications, financial services, investment, competition, state enterprises, cross-border services, government procurement, and dispute settlement.

- ix. institutional entities and hierarchies among regulatory bodies (in the cross-border services and regulatory coherence chapters);
- x. engagement with commercial interests (in the regulatory coherence and transparency chapters); and
- xi. a domestic review and appeal mechanism (in the TBT, cross-border services, and transparency chapters).¹¹⁸

Governments would face an additional layer of supranational obligations among TPPA parties, requiring:

- i. notification to other Parties, per chapter;
- ii. consultations on request, per chapter;
- iii. committee review of compliance, per chapter;
- iv. periodic reporting to relevant chapter committees;
- v. monitoring of compliance with processes in relevant chapters;
- vi. peer review of compliance with processes in relevant chapters;
- vii. state-state disputes; and
- viii. investor-state dispute settlement.¹¹⁹

The sheer number, complexity, and duplication of duties on parties across these chapters would be problematic for any aspect of policy, especially for countries that have limited resources to support the development and implementation of policy initiatives and policy areas that have constrained budgets. Obligations in the TPPA would also duplicate obligations in the WTO and other FTAs, which might be identical or divergent. Governments will have substantive and reporting obligations that are additional to these economic agreements. These obligations may require them to pursue non-commercial objectives that are subordinated in the TPPA, whether under domestic constitutional or public law or in international forums, including the World Health Organization.

In such a controversial area as tobacco control policy the TPPA could provide multiple opportunities for obstruction and delay, the diversion of resources, and brinkmanship by the tobacco industry, its commercial and academic allies, and patron states. More extensive substantive rules would reduce governments' regulatory options. Criteria like evidence-based decisions, and thresholds, such as necessity tests, are intrinsically contestable, so the judgments of policy makers are fertile ground for challenge. Chapter-specific disclosure, notification, and consultation requirements, combined with the RIA process and transparency rules, would provide further opportunities to exert influence.

The availability of investor-state dispute settlement, especially in the hands of U.S. tobacco companies, invites threats of legal action for breach of the TPPA's substantive and procedural rules if a government fails to listen. Along the way, the industry and sympathetic parties can generate and compile evidence for use in subsequent state-state or investor-state disputes. The risks of legal costs and compensation for loss of future profits, with compound interest, from notoriously unpredictable and often biased investment arbitration tribunals provide the ultimate sanction.¹²⁰

¹¹⁸ Although few of the texts from other chapters have been leaked, the likely content can be inferred from existing U.S. FTAs.

¹¹⁹ See *supra* note 118.

¹²⁰ See PIA EBERHARDT & CECILIA OLIVET, CORP. EUR. OBSERVATORY & TRANSNATIONAL INST., PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (2012).

The combined effect could be a significant game changer for innovative tobacco control strategies in a number of countries.

VII. TOBACCO INDUSTRY CHALLENGES TO AUSTRALIA'S PLAIN PACKAGING LAW

Australia's plain packaging tobacco legislation provides a useful case study to assess how, in practice, commercial interests opposed to progressive tobacco control policies might exploit these opportunities in the TPPA.

As the latest step in a long-term smoke-free strategy,¹²¹ the Australian government passed the Tobacco Plain Packaging Act in December 2011, which came into effect in December 2012.¹²² The tobacco companies accuse the Australian government of breaching its obligations under three different legal instruments, which have given rise to distinct legal and evidential arguments and legal challenges in three separate forums.

A. THE AUSTRALIAN CONSTITUTION¹²³

Four tobacco companies¹²⁴ alleged the Tobacco Plain Packaging Act 2011 breached section 51(xxxi) of the Australian Constitution, which protects rights to tangible and intangible property.¹²⁵ The High Court of Australia rejected the claim in August 2012.¹²⁶ Although the case revolved around property rights and takings rules, the legal argument centered on statutory interpretation and case law precedents relating to the particular provision of the Australian Constitution.¹²⁷ The case did not rely on empirical evidence relating to the policy process and is not directly relevant to the TPPA analysis.

B. THE WTO AGREEMENTS ON TBT AND TRIPS

In March 2012, Ukraine initiated a WTO dispute alleging Australia has breached its TBT and TRIPS obligations.¹²⁸ The Dispute Settlement Body agreed in September 2012 to establish a panel.¹²⁹ Both Honduras¹³⁰ and the Dominican

¹²¹ *Recent History of Smoking in Australia*, ABC NEWS, <http://www.abc.net.au/news/2010-04-29/recent-history-of-smoking-in-australia/415748> (last updated Apr. 29, 2010, 8:09 PM).

¹²² *See Tobacco: Plain Packaging for Tobacco Products*, AUSTRALIAN GOV'T DEP'T HEALTH & AGEING, <http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-plain> (last updated Mar. 15, 2012).

¹²³ The compendium of documents and hearing transcript is available at *Case S389/2411*, HIGH CT. AUSTR., <http://www.hcourt.gov.au/cases/case-s389/2011> (last visited Mar. 4, 2013).

¹²⁴ British American Tobacco, Imperial Tobacco, JT International, Philip Morris Asia. *See id.*

¹²⁵ *See Case S389/2411*, *supra* note 123.

¹²⁶ For a discussion of the implications of the decision for the TPP negotiations, see PATRICIA RANALD, *THE AUSTRALIAN HIGH COURT TOBACCO PLAIN PACKAGING DECISION AND INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) (2012)*, available at <http://www.scribd.com/doc/105755455/Investor-State-Disputes-Settlement-and-the-TPP-Patricia-Ranald>.

¹²⁷ *See Case S389/2411*, *supra* note 123.

¹²⁸ *Dispute Settlement: Dispute DS435*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (last updated Nov. 20, 2012).

¹²⁹ *Dispute Settlement: Dispute DS434*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm (last updated Dec. 18, 2012).

¹³⁰ In October 2012. *Dispute Settlement: Dispute DS435*, *supra* note 128.

Republic¹³¹ have also requested the establishment of a panel, but the Dispute Settlement Body has so far deferred doing so.

Documents setting out the parties' substantial claims and evidence are not public. However, the complainants' likely arguments have already been rehearsed through consultations following Australia's notification under the TBT Agreement, and discussions at the TBT Committee and the Council on TRIPS, where the Australian government's policies came under considerable pressure. Information secured through the notification requirement, requests for further information and discussions at the committees, and the consultation phase of the dispute settlement process would clearly form part of the evidence and argument used against Australia in the formal dispute.

At the TBT Committee, Ukraine complained that Australia had provided no substantive responses to its questions and concerns regarding the WTO consistency or the effectiveness of the proposed plain packaging measures.¹³² Ukraine also objected that the committees of the Australian Parliament dealing with trade issues did not have the opportunity to review the legislation.¹³³ The European Union made a series of requests at the TBT Committee for the comments by other members and Australia's reply, the research and evidence to support the policy, the alternatives Australia had considered, and its reasons for rejecting them.¹³⁴ Other members made similar requests.¹³⁵

Parallel discussions at the TRIPS Council record requests for information from Australia and complaints that its replies were incomplete and disclosed inadequate evidence to support the measures.¹³⁶ The Dominican Republic introduced information relating to Australia's domestic process, noting that "the factual and scientific evidence for these measures had been challenged in public documents that had been submitted to the Australian Government in a timely manner."¹³⁷ Ukraine also referred to having made submissions at several stages of Australia's domestic policy process.¹³⁸

The tobacco companies have admitted providing legal support for the WTO dispute.¹³⁹ They will doubtless share the information collected during Australia's policy process and in return have access to information from the WTO process for disputes they prosecute in other forums.

C. THE AUSTRALIA-HONG KONG BILATERAL INVESTMENT TREATY 1993

Philip Morris Asia claims that the Australian government violated its rights under this BIT and lodged an investor-state dispute under the United Nations

¹³¹ In November 2012. *Dispute Settlement: Dispute DS441*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm (last updated Dec. 18, 2012).

¹³² Committee on Technical Barriers to Trade, *Minutes of the Meeting of 10-11 November 2011*, ¶ 181, G/TBT/M/55 (Feb. 9, 2012).

¹³³ *Id.*

¹³⁴ *Id.* ¶ 183.

¹³⁵ *See, e.g., id.* ¶¶ 184-189.

¹³⁶ Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 28-29 February 2012*, ¶¶ 155-229, IP/C/M/69 (May 15, 2012).

¹³⁷ *Id.* ¶ 163.

¹³⁸ Committee on Technical Barriers to Trade, *supra* note 132, ¶ 181.

¹³⁹ Christopher Thompson, *Cigarette Groups Aid Plain Packs Opposition*, FIN. TIMES, Apr. 30, 2012.

Commission on International Trade Law (UNCITRAL) rules.¹⁴⁰ A three-person ad hoc arbitral tribunal was constituted in May 2012. Its first procedural hearing was held in July 2012 in Singapore.¹⁴¹ According to the preliminary documents of each party to the arbitration, made available by the Australian government, Philip Morris is claiming breaches of minimum standard of treatment and expropriation of its trademarks and goodwill.¹⁴² In January 2013 the tribunal released a procedural order that confirmed the hearings will be closed to the public, although documents filed in the case may be released by the party that filed them, subject to requests by the other party for redactions to protect confidentiality.¹⁴³ The orders and decision of the tribunal will be published.¹⁴⁴

In its public response to the failure of the constitutional case, Philip Morris¹⁴⁵ identified four key points it would pursue in the other BIT and WTO disputes:

- Whether there is any reliable evidence that plain packaging will be effective at reducing smoking rates[;]
- Whether there are effective, less restrictive alternatives that Australia could have implemented instead[;]
- Whether plain packaging breaches Australia's international trade and treaty obligations[; and]
- Whether the Australian government will need to pay compensation to [Philip Morris Asia.]¹⁴⁶

Their substantive arguments and evidence to support these claims were not made available, and might never be for the investment dispute, given the tribunal's ruling.¹⁴⁷ Nevertheless, it was obvious that the substance *and processes* of the government's policy decisions would inform the legal arguments, and the tobacco company would make full use of the documentation that it and others had generated and collated.

Australia's domestic policy process involves numerous stages (Figure 1), which have parallels in the TPPA's transparency and regulatory coherence chapters. These provide multiple opportunities for tobacco-related interests to seek to influence the proposed legislation. The consecutive processes and related documents also provide opportunities and grounds for the industry to complain about previous processes and documents, and to accumulate a portfolio of evidence to use in litigation. In addition to the processes and copious documents generated during this lengthy process, the

¹⁴⁰ *Investor-State Arbitration – Tobacco Plain Packaging*, AUSTRALIAN GOV'T ATT'Y-GEN.'S DEP'T, <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx> (last visited Feb. 26, 2012).

¹⁴¹ *Id.*

¹⁴² *See id.*

¹⁴³ Luke Eric Peterson, *Philip Morris Vetoes Open Arbitration Hearings in Australia Case, but Filings May Be Released, and Tribunal Decisions Published*, INV. ARB. REP., Jan. 10, 2013, available at http://www.iareporter.com/articles/20130110_1.

¹⁴⁴ *Id.*

¹⁴⁵ Philip Morris is the common industry player across all three disputes, participating directly in the constitutional case and the investor-state dispute and indirectly through support to the WTO complainants. It is also the claimant in the investment disputes against Uruguay and Norway.

¹⁴⁶ *Philip Morris on Australian Plain Packaging for Tobacco*, SCOOP (Aug. 15, 2012, 4:14 PM), <http://www.scoop.co.nz/stories/PO1208/S00225/philip-morris-on-australian-plain-packaging-for-tobacco.htm>.

¹⁴⁷ *See* Peterson, *supra* note 143.

tobacco companies made many requests for information under Australia's Freedom of Information Act 1982.¹⁴⁸

¹⁴⁸ See Ben Packham, *Cigarette Makers Use FOI Laws*, AUSTRALIAN, Apr. 29, 2011, <http://www.theaustralian.com.au/national-affairs/cigarette-makers-use-foi-laws/story-fn59niix-1226046544322>.

Figure 1: Australia's Domestic Policy Process for the Plain Packaging Law	
<u>October 2008</u>	The Australian Government Preventative Health Taskforce released a Discussion Paper. ¹⁴⁹
<u>July 2009</u>	The Australian Government Preventative Health Taskforce Report recommended tobacco plain packaging legislation. ¹⁵⁰
<u>April 2010</u>	The Department of Health and Ageing drafted a preliminary assessment of the proposal and was advised that Regulation Impact Assessment was required. ¹⁵¹
<u>April 2010</u>	The Australian Government announced it would proceed with plain packaging legislation. ¹⁵²
<u>April 2010</u>	A draft Regulation Impact Statement was prepared by the Department of Health and Ageing. ¹⁵³
<u>April 2011</u>	The Minister of Health released a Consultation Paper accompanied by an Exposure Draft of the plain packaging legislation for public comment until June 2011. ¹⁵⁴
<u>July 2011</u>	The Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 were introduced and referred to the House of Representatives Standing Committee on Health and Ageing. ¹⁵⁵
<u>August 2011</u>	The House of Representatives Standing Committee on Health and Ageing conducted an inquiry into health related aspects of the proposed law, received sixty-three submissions, held a public hearing, ¹⁵⁶ and reported two weeks later. ¹⁵⁷
<u>September 2011</u>	Tobacco Plain Packaging Regulations were tabled in the House of Representatives. ¹⁵⁸
<u>November 2011</u>	The legislation was passed. ¹⁵⁹
<u>December 2011</u>	The legislation received the Royal Assent. ¹⁶⁰
<u>December 2012</u>	The legislation came into force. ¹⁶¹

¹⁴⁹ See AUSTRALIAN GOV'T PREVENTATIVE HEALTH TASKFORCE, AUSTRALIA: THE HEALTHIEST COUNTRY BY 2020 (2008).

¹⁵⁰ AUSTRALIAN GOV'T PREVENTATIVE HEALTH TASKFORCE, AUSTRALIA: THE HEALTHIEST COUNTRY BY 2020: TECHNICAL REPORT 2: TOBACCO CONTROL IN AUSTRALIA: MAKING SMOKING HISTORY (2009).

¹⁵¹ See *Draft Regulatory Impact Statement for the Tobacco Control Act and Related Documents*, AUSTRALIAN GOV'T DEP'T FIN. & DEREGULATION, http://www.finance.gov.au/foi/disclosure-log/2011/foi_11-26_draft_regulatory_impact_statement_for_the_tobacco_control_act_and_related_documents.html (last modified Nov. 9, 2011).

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ AUSTRALIAN GOV'T DEP'T OF HEALTH & AGEING, TOBACCO PLAIN PACKAGING BILL 2011 EXPOSURE DRAFT: CONSULTATION PAPER (2011), available at <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/tpp-paper#.URQ8eegcnWZ>.

¹⁵⁵ STANDING COMM. ON HEALTH & AGEING, AUSTL. HOUSE OF REPRESENTATIVES, ADVISORY REPORT ON THE TOBACCO PLAIN PACKAGING BILL 2011 AND THE TRADE MARKS AMENDMENT (TOBACCO PLAIN PACKAGING) BILL 2011, at 1 (2011).

¹⁵⁶ British American Tobacco and Imperial Tobacco made submissions; Philip Morris did not. Only British American Tobacco gave oral evidence; Imperial claimed inadequate notice.

¹⁵⁷ STANDING COMM. ON HEALTH & AGEING, *supra* note 155.

¹⁵⁸ Nicola Roxon, *1 Year for Big Tobacco to Get Plain Packs into Gear*, AUSTRALIAN GOV'T DEP'T HEALTH & AGEING (Dec. 1, 2011), <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr11-nr-nr255.htm>.

¹⁵⁹ Nicola Roxon, *Parliament Passes World First Plain Packaging of Tobacco Legislation*, AUSTRALIAN GOV'T DEP'T HEALTH & AGEING (Nov. 21, 2011), [http://www.health.gov.au/internet/ministers/publishing.nsf/Content/FE57EE8BD4E2C74FCA25794F00107034/\\$File/NR243.pdf](http://www.health.gov.au/internet/ministers/publishing.nsf/Content/FE57EE8BD4E2C74FCA25794F00107034/$File/NR243.pdf).

¹⁶⁰ Roxon, *supra* note 158.

¹⁶¹ *Id.*

The submissions made by the tobacco companies in Australia's domestic policy process drew on a wide range of this material;¹⁶² the same material can be expected to resurface in the international litigation.

Many of these documents related to the adequacy of the evidence to support the policy. The Department of Health and Ageing disclosed to IP Australia a month before the policy announcement that it had not collected or analyzed evidence to support the policy, or consulted governmental stakeholders to develop a whole of government response.¹⁶³ IP Australia disputed the Department of Health and Ageing's interpretation of Australia's TRIPS obligations¹⁶⁴ and advised that analysis of public interest needed to be based on stronger empirical evidence.¹⁶⁵ A Q&A document prepared by the Department of Health for the government had a spaceholder for inserting more evidence,¹⁶⁶ and a handwritten marginal note by the trade minister in a document questioned whether there was evidence to support the content of a ministerial submission.¹⁶⁷ An e-mail revealed that ministers had decided to announce the policy while analysis of that policy was still underway.¹⁶⁸ Other e-mails showed the government gave agencies short notice of its intention to legislate.¹⁶⁹ Media statements by the Minister of Health admitted the measure was somewhat experimental,¹⁷⁰ and said evidence did not exist because the measure was unprecedented.¹⁷¹

A handwritten comment by the Office of Best Practice Regulation questioned a statement in the Regulation Impact Statement that doing nothing was unrealistic.¹⁷² The draft regulatory impact statement said it was impossible to quantify certain information or isolate the impact of the specific policy from the suite of measures.¹⁷³ The Office of Best Practice Regulation subsequently wrote to the Department of Health informing it that evidence in the draft regulatory impact statement did not satisfy the government's best practice regulation requirements and would be reported as "non-compliant."¹⁷⁴ The Office of Best Practice Regulation had previously said that more work was required to meet Best Practice Regulation requirements in relation to a previous tobacco policy.¹⁷⁵

Earlier reviews conducted by the Senate Community Affairs References Committee in 1995 and the Australian Government's response to that review in 1997

¹⁶² See IMPERIAL TOBACCO AUSTRALIA LTD., SUBMISSION TO THE DEPARTMENT OF HEALTH AND AGEING REGARDING THE TOBACCO PLAIN PACKAGING BILL 2011 (EXPOSURE DRAFT) AND CONSULTATION PAPER (2011), available at <http://www.smoke-free.ca/plain-packaging/documents/2011/Imperial%20Tobacco%20Australia.pdf>; PHILIP MORRIS LTD., COMMERCIALIZING TOBACCO PRODUCTS THROUGH PLAIN PACKAGING WILL HARM PUBLIC HEALTH, VIOLATE TREATIES, AND DOES NOT MEET THE TEST OF "EVIDENCE-BASED POLICY" (2011).

¹⁶³ PHILIP MORRIS LTD., *supra* note 162, at 2.

¹⁶⁴ IMPERIAL TOBACCO AUSTRALIA LTD., *supra* note 162, at 22; PHILIP MORRIS LTD., *supra* note 162, at 24-25.

¹⁶⁵ PHILIP MORRIS LTD., *supra* note 162, at 2.

¹⁶⁶ *Id.* at 4.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Id.* at 4.

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.* at 5.

¹⁷¹ IMPERIAL TOBACCO AUSTRALIA LTD., *supra* note 162, at 6 (quoting Nicola Roxon, Minister, Australian Gov't Dep't of Health & Ageing, Press Conference – Canberra (May 24, 2011)); PHILIP MORRIS LTD., *supra* note 162, at 2-16.

¹⁷² PHILIP MORRIS LTD., *supra* note 162, at 29.

¹⁷³ *Id.* at 2.

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.* at 3.

did not support plain packaging legislation.¹⁷⁶ The Australian government itself had argued at the WTO's TBT Committee that Thailand's proposed alcohol labeling laws were neither evidence-based nor the less-restrictive option.¹⁷⁷

This catalog gives a clear idea of how the industry might use the behind-the-border disciplines in the TPPA to obstruct and challenge progressive tobacco control laws. Three points stand out.

First, Australia purports to operate an exemplary regulatory process. It has a well-established RIS procedure that is overseen centrally by the Office of Regulatory Best Practice, located in the Department of Finance and Deregulation—as mandated by the TPPA's proposed regulatory coherence chapter.¹⁷⁸ It also maintains various processes for industry participation, and requirements for government to articulate its objectives, processes, evidence, and basis for decisions.¹⁷⁹ These would be required, at least, under the TBT, regulatory coherence, and transparency chapters of the TPPA. Yet, according to its own central agency, the Australian government's approach to the plain packaging legislation did not comply with the best practice requirements that it advocates for all TPPA parties.

Second, Australia has made various notifications and consultations at the TBT and TRIPS committees in the WTO and faced three legal disputes in different forums. Under the TPPA, Australia or another country could face significant additional pressure from other Parties under the specific requirements of a number of TPPA chapters and the process obligations of the regulatory coherence and transparency chapters.

Third, and most importantly, the plain packaging example shows how a commercial player like the tobacco industry that is deeply hostile to a government's public health strategy would gain further leverage to harass the policymakers and gather material through the requirements of notification, consultation, and disclosure of the evidence base for decisions in various chapters, to support threats of, or launching, an investor-state dispute.

VII. PARALLEL PRESSURE ON NEW ZEALAND'S PLAIN PACKAGING PROPOSAL

Since 2011, New Zealand has been slowly moving towards a similar plain packaging law, as part of a comprehensive policy to make New Zealand essentially smoke-free by 2025.¹⁸⁰ Unlike in Australia, the governing National Party is pursuing the measure rather reluctantly, as a commitment in a coalition arrangement with the Maori Party,¹⁸¹ which led a parliamentary inquiry into the impact of the tobacco industry on Maori.¹⁸²

¹⁷⁶ IMPERIAL TOBACCO AUSTL. LTD., *supra* note 162; PHILIP MORRIS LTD., *supra* note 162, at 25.

¹⁷⁷ IMPERIAL TOBACCO AUSTL. LTD., *supra* note 162; PHILIP MORRIS LTD., *supra* note 162, at 30.

¹⁷⁸ *Regulatory Coherence*, *supra* note 82, at art. X.2.1; *see also* PHILIP MORRIS LTD., *supra* note 162, at 4.

¹⁷⁹ *See* IMPERIAL TOBACCO AUSTL. LTD., *supra* note 162; PHILIP MORRIS LTD., *supra* note 162.

¹⁸⁰ N.Z. PARLIAMENT, GOVERNMENT RESPONSE TO THE REPORT OF THE MĀORI AFFAIRS COMMITTEE ON ITS INQUIRY INTO THE TOBACCO INDUSTRY IN AOTEAROA AND THE CONSEQUENCES OF TOBACCO USE FOR MĀORI (FINAL RESPONSE) 4 (2011).

¹⁸¹ Isaac Davison, *Plain-Pack Ciggies No Slam-Dunk Says Key*, N.Z. HERALD (July 24, 2012, 5:30 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10821706.

¹⁸² MĀORI AFFAIRS COMMITTEE, AUSTL. HOUSE OF REPRESENTATIVES, REPORT I.10A, INQUIRY INTO THE TOBACCO INDUSTRY IN AOTEAROA AND THE CONSEQUENCES OF TOBACCO USE FOR MĀORI (2010).

Tobacco companies are adopting a very similar strategy to that used in Australia, using their claims of deficiencies in Australia's policy process to support their arguments. In a communication to the New Zealand government in 2011, Philip Morris New Zealand (PMNZ) asserted the importance of

effective and evidence-based regulation of all tobacco products. . . .

There is no evidence that plain packaging would reduce smoking rates. . . .

Documents released to Philip Morris Limited in Australia under freedom of information laws make it very clear that plain packaging has been proposed in Australia *despite*, not because of, the evidence.¹⁸³

The company condemned plain packaging as “expropriation of extremely valuable trademarks” and a breach of WTO intellectual property rules.¹⁸⁴ Further, PMNZ stated that “plain packaging breaches the government’s own regulatory principles.”¹⁸⁵

The New Zealand Ministry of Health released a consultation document and accompanying RIS in July 2012.¹⁸⁶ It reported that 293 submissions were received, but they would not formally be made public pending the Cabinet’s decision.¹⁸⁷ Several tobacco companies have released their own submissions.¹⁸⁸ They took slightly different approaches in relation to New Zealand’s international treaty obligations.¹⁸⁹

Philip Morris’s submission focused solely on New Zealand’s WTO obligations with no reference to investment rules.¹⁹⁰ This may have reflected an astute assessment that the government was sensitive and vulnerable on the trade front, but public sentiment was hostile to threats of secretive offshore arbitration using investment treaties.¹⁹¹

British American Tobacco New Zealand (BATNZ) went further. It argued, *inter alia*, that: plain packaging would not reduce tobacco consumption; less risky, effective alternative measures were available; and the law would violate New

¹⁸³ Letter from Brett Taylor, General Manager, Philip Morris (N.Z.) Ltd., to Tariana Turia, Assoc. Minister of Health, N.Z. Parliament (July 11, 2011), *available at* <http://www.health.govt.nz/about-ministry/legislation-and-regulation/regulatory-impact-statements/plain-packaging-tobacco-products-regulatory-impact-statement-consultation-phase/plain-packaging-consultation-release-background-documents-and-information>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See N.Z. MINISTRY OF HEALTH, PROPOSAL TO INTRODUCE PLAIN PACKAGING OF TOBACCO PRODUCTS IN NEW ZEALAND: CONSULTATION DOCUMENT (2012), <http://www.health.govt.nz/publication/proposal-introduce-plain-packaging-tobacco-products-new-zealand>; MINISTRY OF HEALTH, REGULATORY IMPACT STATEMENT: PLAIN PACKAGING OF TOBACCO PRODUCTS (2012).

¹⁸⁷ Martin Johnston, *Thousands Stubbing out*, N.Z. HERALD (Dec. 12, 2012, 5:30 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10853484.

¹⁸⁸ See, e.g., IMPERIAL TOBACCO AUSTL. LTD., *supra* note 162; PHILIP MORRIS LTD., *supra* note 162.

¹⁸⁹ See IMPERIAL TOBACCO AUSTL. LTD., *supra* note 162; PHILIP MORRIS LTD., *supra* note 162.

¹⁹⁰ PHILIP MORRIS LTD., *supra* note 162, at 2.

¹⁹¹ In a poll conducted during the Auckland round of TPPA negotiations in December 2012, sixty-two percent of New Zealanders said the government should reject investor-state dispute settlement in a TPPA, while only twelve percent said it should agree to the provision. Jane Kelsey, *Opinion Polls Show PM out of Touch with Public on TPPA*, SCOOP, (Dec. 19, 2012, 10:12 PM), <http://www.scoop.co.nz/stories/PO1212/S00285/opinion-polls-show-pm-out-of-touch-with-public-on-tpa.htm>.

Zealand's international obligations.¹⁹² In addition to TBT and TRIPS, BATNZ made explicit references to investment arbitration:

Certain companies within the BAT Group hold significant investments in New Zealand which are protected under several Investment Treaties. Plain Packaging legislation would breach these treaties, entitling the companies to an arbitral award requiring New Zealand to repeal the legislation and/or pay substantial sums in compensation.¹⁹³

Companies within the BATNZ group would take "all necessary steps" to protect their investment under New Zealand's investment treaties, as would other tobacco manufacturers.¹⁹⁴ Alleged breaches would include direct and indirect expropriation, fair and equitable treatment, full protection and security, and non-discrimination.¹⁹⁵ The company further claimed that the plain packaging law would destroy BATNZ's business model, which relied on premium brands.¹⁹⁶ If the government proceeded, it would expose itself

to significant legal costs, liability for damages under Investment Treaties, and a formal request that the Plain Packaging legislation be repealed. Australia's Department of Health and Ageing suggested that legal costs associated with Plain Packaging were likely to exceed A\$10 million. We have explained that they may well be significantly higher. No attempt is made in the RIS to quantify New Zealand's exposure to awards of compensation, which would be substantial.¹⁹⁷

BATNZ produced its own cost-benefit analysis of the plain packaging proposal.¹⁹⁸

The three main tobacco companies operating in New Zealand¹⁹⁹ are also reported to have made at least nine requests under the Official Information Act over the past two years relating to the plain packaging laws.²⁰⁰ The first of these, from BATNZ, specified sixty-three points for documentation.²⁰¹ Local tobacco control groups criticized the industry for trying to bog down officials, but the focus of the requests was clearly also directed towards the collection of evidence for future litigation. They sought all communications about plain packaging between the Ministry of Health and its Australian, Canadian, and British counterparts.²⁰² Presumably they intend to use the international comparators to link New Zealand to the deficient Australian approach and discussion in other countries on whether not to proceed with plain packaging laws. They also wanted documents that discussed how plain packaging would affect youth and smoking rates in New Zealand, how it would impact on the intellectual property rights of tobacco manufacturers and whether it would violate any of New Zealand's trade and investment treaty obligations.²⁰³

¹⁹² BRITISH AM. TOBACCO (N.Z.) LTD., PROPOSAL TO INTRODUCE PLAIN PACKAGING OF TOBACCO PRODUCTS IN NEW ZEALAND 6, 8-10 (2012).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 40.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 10.

¹⁹⁷ *Id.* at 70 (internal citations omitted).

¹⁹⁸ *Id.* at 71-72.

¹⁹⁹ The three companies are BATNZ, PMNZ and Imperial Tobacco. *New Zealand's Tobacco Industry, ACTION SMOKING & HEALTH*, <http://www.ash.org.nz/?t=101> (last visited Feb. 25, 2013).

²⁰⁰ Sam Sachdeva, *Tobacco Firms Use 'Stalling' Strategy*, THE PRESS, (Jan. 13, 2013, 5:00 PM), <http://www.stuff.co.nz/the-press/news/8172332/Tobacco-firms-use-stalling-strategy>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

Learning from the Australians' experience, and reflecting New Zealand's less open approach to releasing official information,²⁰⁴ the New Zealand government largely declined to provide the information on the grounds that it would require too much research and breach confidentiality.²⁰⁵ While that reduced the quantity and detail of evidence for the tobacco companies to draw on, there will still be an abundance of publicly available material produced through the background policy work, the Maori Affairs select committee inquiry, the RIS process, Cabinet decisions and advisory papers relating to the smoke-free 2025 policy, and the select committee hearings on the legislation, assuming a bill is introduced.

The fate of New Zealand's plain packaging laws now rests on the outcome of the cases against Australia. In February 2013 Associate Health Minister Tariana Turia announced the government's decision to introduce the legislation, but the Prime Minister admitted it might not proceed if Australia loses its legal challenges.²⁰⁶ Resolving those disputes will take a minimum of two years, and probably more.

Even if Australia wins the WTO and investment challenges, New Zealand could also face several legal challenges, even without the TPPA. New Zealand does not have a written constitution that could found a case at domestic law.²⁰⁷ However, BATNZ has hinted at a legal challenge based on the right to freedom of expression under the New Zealand Rights Act,²⁰⁸ especially as the government rejected restrictions on alcohol advertising on the grounds that it would breach similar fundamental common law principles.²⁰⁹

New Zealand has the same WTO obligations as Australia and could, in theory, face a similar challenge, but that seems unlikely. New Zealand is already a third party to the Australia-Ukraine dispute.²¹⁰ If Australia lost the dispute New Zealand would doubtless pull back from introducing its own law. If Australia wins, it is hard to imagine a new challenge being launched against almost identical measure from New Zealand.

The biggest risk of legal action is through investment arbitration. New Zealand has only one extant bilateral investment treaty but there are investment chapters in a number of its FTAs.²¹¹ The material collated during the domestic processes could serve as the basis for the industry to make more concrete threats of legal action, and pursue them if the government does not back down.

What difference would the TPPA make to New Zealand? First, the United States and any other TPPA country would be able to challenge New Zealand directly through the chapter-specific notification and consultation processes, in addition to those at the WTO, and in the state-state dispute process. Second, the tobacco industry in various TPPA countries could seek to circumvent Article 5.3 of the FCTC by citing the participation and consultation obligations in the transparency, regulatory coherence, and sectoral chapters, and urge their proxy states to object on

²⁰⁴ This observation is based on the author's own experience as a frequent user of the Official Information Act.

²⁰⁵ Sachdeva, *supra* note 200.

²⁰⁶ *Key Admits Plain Cigarette Packaging May Not Go Ahead*, TVNZ (Feb. 19, 2013), <http://tvnz.co.nz/politics-news/key-admits-plain-cigarette-packaging-may-not-go-ahead-5345464>.

²⁰⁷ See *The New Zealand Legal System*, N.Z. MINISTRY JUSTICE, <http://www.justice.govt.nz/publications/global-publications/t/the-new-zealand-legal-system> (last visited Feb. 28, 2013).

²⁰⁸ BRITISH AM. TOBACCO (N.Z.) LTD., *supra* note 192, at 6.

²⁰⁹ *Id.* at 10.

²¹⁰ *Dispute Settlement: Dispute DS434*, *supra* note 129.

²¹¹ These are discussed in KELSEY, *supra* note 59, at 13-15, 31-35.

their behalf. Third, the three main tobacco companies operating in New Zealand could use their U.S. affiliates to bring them under the ISDS jurisdiction in the TPPA, and use the material they have collected to allege an indirect or direct expropriation and breach of minimum standards of treatment. If they failed in their initial aim of chilling the decisions of an already reluctant government, they could force it to pay hefty legal costs in defending a dispute with the risk that a sympathetic investment tribunal could award hundreds of millions of dollars in compensation.

The impact on innovative tobacco control policies would be much more dramatic for countries like Malaysia, Vietnam, or Thailand, for whom the regulatory coherence and transparency chapters would introduce significant new obligations. They would in turn interface with the substantive and procedural rules in other chapters, and significantly raise the risks in an investor-state dispute.

IX. THE DUBIOUS VALUE OF THE TOBACCO EXCEPTION

Elsewhere in this Issue, Robert Stumberg will address the issues relating to specific safeguards and exceptions being proposed for tobacco policy in the TPPA.²¹² This section asks whether such exceptions are likely to be effective given the multifaceted and systemic constraints the TPPA aims to impose on government's regulatory decisions.

The standard structure and focus of general exceptions does not engage with the kind of systemic constraints on governments' behind-the-border policy decisions that this Article has identified.²¹³

Although they are described as "general exceptions," the provisions usually apply to specified chapters, such as goods, rules of origin, TBT, sanitary and phytosanitary measures, or cross-border services, but not always to all their rules. In the existing U.S. FTAs, the general exceptions do not apply to investment protections and investor-state dispute settlement or to the transparency chapter.²¹⁴ It therefore seems unlikely that they would apply to chapters in the TPPA that deal specifically with process, industry participation, and surveillance. Further, these exceptions usually impose a "necessity" test,²¹⁵ which would compound the predisposition to light-handed, self- or no regulation that would be mandated through the TBT chapter and regulatory disciplines on cross-border services, as well as the RIA.

Even if those obstacles were surmounted, the standard chapeau discounts measures that constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. Despite optimism about its application to tobacco control measures articulated by Tania Voon in this Issue,²¹⁶ that test has proved extremely problematic at the WTO.²¹⁷ It would be totally unpredictable in the hands of an ad hoc arbitral tribunal dealing with inter-state disputes under the TPPA, let alone an

²¹² Stumberg, *supra* note 2.

²¹³ The observations here are based on Article 23.1 of the U.S.-Korea FTA. United States-Korea Free Trade Agreement, *supra* note 213, at art. 23.1.

²¹⁴ See, e.g., *id.*

²¹⁵ See Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J. INT'L ECON. L. 153 (2009).

²¹⁶ See Tania Voon, *Flexibilities in WTO Law to Support Tobacco Control Regulation*, 39 AM. J.L. & MED. 199 (2013).

²¹⁷ See Lori Wallach, *Lessons for TPP: How Limits in Past U.S. FTAs Undermine the Effectiveness of General Exceptions and Scheduled Exceptions for Non-Conforming Measures*, PUB. CITIZEN GLOBAL TRADE WATCH, Dec. 2012.

investment arbitration tribunal. Even if the general exception did apply to tobacco control measures, it is a defense to be argued once a dispute has reached a hearing. The goal of the lengthy and intrusive disciplines on regulatory decisions is often to chill governments before they adopt a formal measure.

The most-favored-nation (MFN) provision in the TPPA²¹⁸ could also potentially bypass any general exception, where the Party or investor could invoke an FTA or BIT that did not contain the equivalent provision. The interpretation and application of MFN rules by investment tribunals in relation to such exceptions would be highly unpredictable.²¹⁹

The very fact that the United States was proposing a specific tobacco exception implied that the general exception was inadequate to protect tobacco policy. However, the U.S. proposal itself reflects a pragmatic compromise between the U.S. tobacco industry, growers, and the public health advocates.²²⁰ The drafting appeared to be designed specifically to address the finding against the United States in the WTO dispute in *U.S.—Clove Cigarettes*.²²¹ Its scope is limited in relation to: (a) the identity of the regulator; (b) the kind of regulation; (c) specific tobacco products and classes; (d) the rules and chapters to which it would apply; and (e) the requirement that the restrictions are both origin-neutral and science-based.²²²

An analysis prepared for Action on Smoking and Health observed that the proposed exception does not cover laws or regulations adopted by non-health authorities, including legislatures. It may not cover enforcement for existing measures. The exception may also be limited to measures that regulate a product, and not a service, such as retail display.²²³ The USTR explicitly excluded from its scope “important trade disciplines (national treatment, compensation for expropriations, and transparency) on tobacco measures.”²²⁴ Even if a policy did fit within these narrow parameters, it would still face the evidential barrier, for which the tobacco companies would again rely on the material it has collected. These limitations would make the exception irrelevant to the mass of tobacco control policies being considered in most TPPA countries.

It was first expected that the tobacco exception would be tabled at the Dallas round in May 2012. By the end of the Singapore round in March 2013 it had still not emerged, presumably due to pressure from the politically powerful tobacco lobby for whom it still went too far.²²⁵

²¹⁸ See HARVEY PURSE & SANYA REID SMITH, SOME IMPACTS OF A TPPA INVESTMENT CHAPTER (2011), available at <http://aftinet.org.au/cms/sites/default/files/Investment%20paper%20Santiago.pdf>.

²¹⁹ See Federico Ortino, *Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures*, 3 J. INT'L DISP. SETTLEMENT 31 (2012).

²²⁰ USTR Tobacco Proposal Viewed as Middle Ground Between Business, Activists, INSIDE U.S. TRADE, May 12, 2012.

²²¹ Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R 101 (Apr. 4, 2012) (adopted Apr. 24, 2012).

²²² Benn McGrady, *US Proposal on Tobacco in Trans-Pacific Partnership*, O'NEILL INST. FOR NAT'L & GLOBAL HEALTH L. (May 18, 2012), <http://www.oneillinstitutetradeblog.org/us-proposal-on-tobacco-in-trans-pacific-partnership/>.

²²³ Sumberg, *supra* note 2, at 426-28.

²²⁴ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FACT SHEET: TPP TOBACCO PROPOSAL (2012), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/may/tpptobacco-proposal>.

²²⁵ Franco Ordóñez, *Tobacco Growers Afraid Trans-Pacific Trade Deal Will Harm Exports*, MCCLATCHY NEWSPAPERS, Feb. 29, 2012, <http://www.mcclatchydc.com/2012/02/28/140249/tobacco-growers-fear-trade-deal.html#storylink=misearch>; Kirk Seeks 'Proper Balance' on Tobacco Treatment in TPP Proposal, INSIDE U.S. TRADE, Mar. 5, 2012; USTR Heeds McIntyre's Call, Holds off Introduction of Tobacco Text in TPP to Gather Input from Tobacco Community, CONGRESSMAN

A comprehensive carve-out of tobacco, tobacco products, and tobacco control measures from the jurisdiction of trade and investment agreements²²⁶ through a comprehensive and water-tight exception would overcome these deficiencies—but it would never be accepted by the TPPA parties.

X. CONCLUSION

Commentators on all sides of the TPPA debate tend to focus on individual chapters, such as goods or intellectual property, and the most controversial sectoral issues, such as medicines, the Internet, or tobacco. Where they recognize that more than one chapter is involved, they still tend to treat the rules of each chapter in isolation. Solutions and alternatives follow similarly traditional patterns, such as exception provisions that are modeled on earlier agreements of a qualitatively different kind. The interconnections across chapters and the systemic interface between the substantive, ideological, and procedural disciplines that pervade the proposed TPPA are either not understood or are largely ignored.

This reflects the way that lawyers perceive of legal rules and the manner in which legal disputes are framed: provisions of agreements are abstracted and fetishised, as if they have an existence that is independent of their systemic function in an integrated legal regime and without addressing the practical impact.

According to some TPPA negotiators, they also work largely in silos on their individual topics, negotiating draft texts that are drawn from existing U.S. FTAs or occasionally elsewhere. Despite the much-heralded “coherence” of the TPPA there is very little communication between the individual working groups or discussion of the implications of other subject areas. In recent rounds, some analysts have made a point of educating negotiators in one group about the implications for their issues of what their colleagues are negotiating elsewhere in the agreement.

The negotiating group on legal rules is formally responsible for ensuring cross-chapter coherence, but that is a technical exercise. The chief negotiators are supposed to bring the whole picture together through what they call cross-cutting themes. That task is complicated by the complexity and technicalities that infuse the various chapters and the divergent approaches that reflect the way each chapter has been negotiated. There is a very real risk that political trade-offs made to conclude the agreement would make total nonsense of any technical coherence anyway.

At the time of writing it is unclear if a final deal will be concluded. If it is, the unique features of the TPPA will have very little to do with the concrete commercial benefits to the parties or its legal niceties. It may well achieve the goal of imposing high-level, behind-the-border disciplines on governments through market-centric norms, an ideological commitment to light-handed regulation, and a structured role for corporate interests to interfere in countries’ domestic policy process. Attempting to apply that gold standard in practice would be a technical and practical nightmare for the policymakers who would be legally obliged to comply. That includes public health officials committed to a smoke-free twenty-first century.

MIKE MCINTYRE, http://mcintyre.house.gov/index.php?option=com_content&view=article&id=627:-ustr-heads-mcintyres-call-holds-off-introduction-of-tobacco-text-in-tpp-to-gather-input-from-tobacco-community&catid=1:2010-press-releases&Itemid=26 (last visited Mar. 6, 2013).

²²⁶ CTR. FOR POL’Y ANALYSIS ON TRADE & HEALTH, *CALL TO ACTION: FIX THE FATAL FLAWS IN U.S. TRADE POLICY ON TOBACCO* (2012), available at <http://www.cpath.org/sitebuildercontent/sitebuilderfiles/cpathfinalontppproposal5-6-12.pdf>.