



HARRISON INSTITUTE FOR PUBLIC LAW  
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# TPPA REGULATORY COHERENCE



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## Summary

The draft Regulatory Coherence Chapter of the TPPA creates two coordinating bodies to provide industry stakeholders with access to decision-making. This would contradict obligations under the Framework Convention on Tobacco Control (FCTC) for countries to protect their regulatory process from influence by the tobacco industry. Similarly, the RC Chapter promotes cost/benefit analysis that aims to minimize regulations and evaluate the “distributional impact” on stakeholder industries. This also contradicts an FCTC obligation to not balance the “irreconcilable conflict between the tobacco industry’s interests and public health.” The RC Chapter’s method for Regulatory Impact Assessment (RIA) could produce evidence that investors and governments could use in a different context to challenge tobacco controls. Negotiators can avoid these threats by carving tobacco out of the TPPA.

## History

The tobacco industry wants to limit governments to regulations that are “least impairing” of property rights, and “produce benefits that outweigh the costs ... to the public or persons.”<sup>i</sup> Several TPP countries (Australia, New Zealand, Singapore, Chile and Brunei) have included a similar test in their FTA chapters on services, which require that regulations are “not more burdensome than necessary to ensure the quality of the service.”<sup>ii</sup> Australia and New Zealand, among others, have pushed the WTO to apply a necessity test to limit regulation of advertising, distribution, and other services.<sup>iii</sup> In opposition, countries that usually support trade liberalization (Brazil, Canada, and the United States) argue that a necessity test “threatens the crucial discretion that regulators must maintain to ... take into account legitimate policy objectives.”<sup>iv</sup> In fact, the United States has deleted the necessity test from the services chapter of its most recent FTAs.<sup>v</sup>

## What the TPPA changes

The draft TPPA chapter on Regulatory Coherence (RC) provides for coordinating bodies and analytic tests that have failed to reach consensus within the WTO negotiations.<sup>vi</sup> The RC Chapter:

1. **Creates an international coordinator** – A Committee on Regulatory Coherence would “identify future priorities [and] ... sectoral initiatives for cooperative activities ...” and maintain a work plan that offers “incremental value added and avoids undermining or duplicating initiatives underway in other relevant fora.”<sup>vii</sup> The Committee “shall establish mechanisms to ensure meaningful opportunities for interested persons to provide views on approaches to enhance regulatory coherence.”<sup>viii</sup> Historically, the “persons” with greatest interest have been highly regulated industries such as tobacco.

2. **Requires a national coordinating process** – The RC Chapter requires “a process or mechanism to facilitate central coordination and review of certain new regulatory measures ... at the central level of government.” This body would coordinate “systemic regulatory reform” within the country.<sup>ix</sup> A country may challenge compliance with this mandate if it can “demonstrate ... that a violation [of the obligation to have a process or mechanism] affected trade and investment”.<sup>x</sup>
  
3. **Encourages regulatory impact assessment (RIA)** – The RC encourages analysis of regulations based on an RIA method that roughly parallels the WTO jurisprudence for applying a necessity test.<sup>xi</sup> The RIA also reflects the national practice of Australia, New Zealand, and the United States, as well as methods promoted by the OECD and APEC.<sup>xii</sup> Among other things, the RIA method should –
  - a. identify the “problem and policy objectives” of a new regulation;
  - b. identify “potentially effective and reasonably feasible alternatives”; (On this point, the WTO jurisprudence requires a challenging government to identify the alternatives; the RIA sets this as a task for government.<sup>xiii</sup>)
  - c. identify how regulators conclude that a regulation “maximizes net benefits, including qualitative benefits, while also considering distributional impact;”
  - d. assess “costs and benefits of each available alternative, including not to regulate”; and
  - e. explain “why the alternative chosen is superior ... through reference to the relative size of the net benefits of the available alternatives.”

### Threats to tobacco control

1. **Conflict with the FCTC** – The Framework Convention on Tobacco Control is the first global health treaty with 174 Parties.<sup>xiv</sup> Article 5.2(b) of the FCTC obligates each party to “adopt ... policies for preventing and reducing tobacco consumption.” It further requires that “Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry.” The RC chapter undermines FCTC objectives in three ways.
  - a. The Committee on Regulatory Coherence promotes a “wide range of stakeholder input in ... regulatory measures,” and is required to ensure that interested persons have the opportunity “to provide views on approaches to regulatory coherence” but the FCTC obligates governments to protect policies from the influence of the tobacco industry. The World Health Assembly formally urged its member nations “to be alert to any efforts by the tobacco industry to continue its subversive practice and to assure the integrity of health policy development in any WHO meeting and in national governments.”<sup>xv</sup>
  - b. The national coordinating body of the RC Chapter promotes “collaboration” with interested stakeholders.<sup>xvi</sup> This is even more at odds with the FCTC’s injunction on influence by “vested interests of the tobacco industry.”<sup>xvii</sup>
  - c. The RIA process of the RC chapter promotes analysis that aims to minimize regulations and evaluate the “distributional impact” on stakeholder industries. The RIA process is incompatible with the FCTC’s guideline indicating that “There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health ... .”<sup>xviii</sup>
  
2. **Evidence for tobacco litigation** – New Zealand’s Imperial Tobacco has already cited a government RIA to lobby against tobacco display regulations.<sup>xix</sup> A greater threat is that tobacco companies, as foreign investors, and TPP governments could use evidence generated by an RIA to challenge tobacco control measures under other trade or investment rules:<sup>xx</sup>
  - a. Investment – If an RIA quantifies costs borne by investors, they could use it to challenge a measure as sufficiently burdensome to be an indirect expropriation. Or, they could

- claim that failure to follow RIA procedure is evidence of denial of fair and equitable treatment.
- b. Technical barriers to trade – Tobacco controls have recently been challenged on grounds that they violate the WTO’s Agreement on Technical Barriers to Trade (TBT), which requires measures to be “not more trade-restrictive than necessary.”<sup>xxi</sup> A country could use evidence from an RIA to argue that a tobacco control fails this “necessity” test.
  - c. Services – Based on recent FTAs of several countries, there might be a necessity test in the chapter on services. Even if there is not, a country might be able to use an RIA as evidence to challenge tobacco control measures under WTO disciplines on domestic regulation, which would be incorporated into the TPPA at a future date.<sup>xxii</sup>

### 3. *Subjective and costly analysis*

- a. Bias in counting costs – As Professor Jane Kelsey observes, the cost-benefit analysis recommended by the OECD and APEC “is skewed towards metrics that privilege quantitative calculations and marginalize . . . non-economic considerations.”<sup>xxiii</sup> Cost-benefit analysis is controversial because it dresses subjective assumptions in the clothes of rational argument. For example, a review of studies on the economic impact of smoke-free policies revealed that “the best designed studies report no impact or a positive impact of smoke-free restaurant and bar laws on sales or employment” and that all studies “concluding a negative impact were supported by the tobacco industry.”<sup>xxiv</sup>
- b. Burden on governments – As noted above, the RIA process purports to be a recommendation, not a mandate. But the RC Chapter clearly mandates a process for “central coordination and review.”<sup>xxv</sup> As a result, the RC Chapter uses contextually ambiguous language to establish a burden on governments to undertake some kind of review process, if not the RIA as prescribed. For some governments that have not already established such a process, the burden of implementation might exceed existing resources.

### Options to avoid the threat

Negotiators could carve out all tobacco regulations from the scope of the RC Chapter. This option would avoid threats in the RC Chapter, but leave in place the threats posed by other chapters. The simpler solution is to carve out tobacco from the entire TPPA.

### Endnotes

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- <sup>i</sup> See, e.g., Imperial Tobacco New Zealand Limited, Submission to the Commerce Select Committee on the Regulatory Standards Bill, ¶¶ 3.4, 3.9, 3.10 (August 2011), in support of Hon Rodney Hide, Regulatory Standards Bill, § 7 Principles (2011).
  - <sup>ii</sup> Trans-Pacific Strategic Economic Partnership (the “P4” – New Zealand, Singapore, Chile, Brunei), art. 12.10.2(b).
  - <sup>iii</sup> Working Party on Domestic Regulation, Room Document from New Zealand, The Necessity Test in the Disciplines on Domestic Regulation, RD/SERV/39 (9 February 2011); Working Party on Domestic Regulation, Communication from Australia; Chile; Hong Kong, China; New Zealand and the Separate Customs Territory of Taiwan, Kinmen and Matsu, Article VI:4 Disciplines – Proposal for Draft Text, JOB(06)/193 (19 June 2006); see generally, Robert Stumberg, *GATS Negotiations on Domestic Regulation* (June 15, 2010).
  - <sup>iv</sup> Working Party on Domestic Regulation, Communication from Brazil, Canada and the United States, S/WPDR/W/44 (Mar. 22, 2011).
  - <sup>v</sup> Compare the provisions on domestic regulation of the 2011 US-Korea FTA (Article 11.7.2) with the 2009 US-Peru FTA (Article 11.7.2(b)).
  - <sup>vi</sup> See Working Party on Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Chairman’s Progress Report, S/WPDR/W/45, 17-18 (April 14, 2011).

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- vii TPP Regulatory Coherence, art. X.5.
- viii TPP Regulatory Coherence, art. X.6
- ix TPP Regulatory Coherence, art. X.2.2.e.
- x TPP Regulatory Coherence, art. X.8.
- xi *See generally*, WTO Secretariat, “*Necessity Tests*” in the WTO, S/WPDR/W/27 (Dec. 2, 2003).
- xii *See* Jane Kelsey, Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence (Oct. 23, 2011), 3-5, available at [http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific\\_RegCoherenceMemo.pdf](http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf) (viewed Feb. 28, 2012).
- xiii *See* Demitrios Delimatsis, *GATS and Public Health Care: An Uneasy Relationship*, TILEC Discussion Paper, DP 2012-005, 17 (2012), available at <http://ssrn.com/abstract=2001918> (viewed February 29, 2012).
- xiv WHO, Parties to the WHO Framework Convention on Tobacco Control, [http://www.who.int/fctc/signatories\\_parties/en/](http://www.who.int/fctc/signatories_parties/en/) (viewed Feb. 28, 2012).
- xv World Health Assembly, Resolution 54.18: transparency in tobacco control, ¶ 2 (2001); *see also* WHO, *Tobacco industry interference with tobacco control*, 2 (2008) available at [http://whqlibdoc.who.int/publications/2008/9789241597340\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241597340_eng.pdf) (viewed Feb. 28, 2012).
- xvi TPP Regulatory Coherence, art. X.3.7.b.
- xvii FCTC, art. 5.3.
- xviii WHO, Framework Convention on Tobacco Control, Guidelines for Implementation, Article 5.3 - Principle 1 (2010), available at [http://www.who.int/fctc/protocol/guidelines/adopted/guidel\\_2011/en/index.html](http://www.who.int/fctc/protocol/guidelines/adopted/guidel_2011/en/index.html) (viewed Feb. 28, 2012).
- xix Imperial Tobacco New Zealand Limited, Submission to the Commerce Select Committee on the Regulatory Standards Bill, ¶ 2.6 (August 2011).
- xx *See* JANE KELSEY, INTERNATIONAL TRADE AND INVESTMENT LAW ISSUES RELATING TO NEW ZEALAND’S PROPOSED TOBACCO CONTROL POLICIES TO ACHIEVE AN EFFECTIVELY SMOKEFREE NEW ZEALAND BY 2025, § 3.7.2 Regulatory Coherence, 2012 (forthcoming).
- xxi WTO, Agreement on Technical Barriers to Trade (TBT), art. 2.2. The WTO dispute panel rejected Indonesia’s challenge of the U.S. ban on clove flavoring in cigarettes on a number of grounds.
- xxii *See, e.g.*, Korea-US Free Trade Agreement, art. 12.7.3.
- xxiii Kelsey, TPP Domestic Coherence, at 7; *see also*, Claudio M. Radaelli, *Evidence Based Policy and Political Control: What Does Regulatory Impact Tell Us?*, Paper to the European Consortium for Political Research, University of Rennes, France (April 2008); Fiona Haines and David gurney, *The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict*, 25 LAW AND POLICY 353-380 (October 2003).
- xxiv M. Scollo et al., *Review of the quality of studies on the economic effects of smoke-free policies on the hospitality industry*, 12 TOBACCO CONTROL 13–20 (2003), *cited in* World Health Organization, *Tobacco Industry Interference with Tobacco Control* 18 (2008).
- xxv TPP Regulatory Coherence, art. X.2.1 and X.8.