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# TOMATO, TOBACCO, LET'S CALL THE WHOLE THING OFF

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The success of the Trans-Pacific Trade Deal (hereinafter "TPP"), which could become the largest trading bloc in the world, may hang in the balance of the Kentucky tobacco industry. The United States and eleven other countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) are involved in negotiations to remove trade barriers for goods and services, to improve intellectual property protection, and to create novel 21st century trade rules.<sup>[i]</sup> This agreement could support economic growth and jobs for the United States by bolstering trade and investments ties with these countries.<sup>[ii]</sup> Kentucky has approximately 193,000 jobs supported by trade with TPP countries and would see benefits by expanding trade between six existing U.S. free trade agreement (hereinafter "FTA") partners, establishing new markets with five Asia-Pacific countries not currently FTA partners, and increased investment ties between Kentucky and all TPP countries.<sup>[iii]</sup>

The Malaysian government has proposed that tobacco be "carved out" from the provisions of the TPP agreement.<sup>[iv]</sup> According to the South-East Asia Tobacco Control Alliance (SEATCA), this carve out is essential to ensure

governments' ability to protect the public health of their citizens.<sup>[v]</sup> Malaysia, along with a majority of the TPP countries, wish to prohibit tobacco companies from challenging smoking-related public health laws and regulations in international tribunals.<sup>[vi]</sup> The TPP includes an investor-state dispute settlement (hereinafter "ISDS") allowing corporations to directly sue governments in international trade courts over legislation and regulations.<sup>[vii]</sup> This concern makes complete sense for countries that have made strides over the past decade in tobacco control laws by implementing restrictions on tobacco advertising, packaging and labeling, and prohibiting tobacco in public places.<sup>[viii]</sup> For example, Australia has already experienced an attack on tobacco restriction laws by Phillip Morris, a cigarette company.<sup>[ix]</sup> Phillip Morris, under ISDS rights similar to those in the TPP, sued Australia for discrimination via a "plain packaging" law.<sup>[x]</sup> This law, similar to laws in Malaysia, prohibits any advertisement on cigarette packaging and requires health-warning labels to cover a majority of a



([http://img.timeinc.net/time/daily/2011/1106/360\\_wmitch\\_0613.jpg](http://img.timeinc.net/time/daily/2011/1106/360_wmitch_0613.jpg))

pack.[xi] Phillip Morris is seeking damages for billions of dollars in lost profits for this alleged discrimination.[xii] By carving out tobacco from the list of agricultural commodities, Malaysia hopes to protect its tobacco restriction laws by avoiding adjudication with tobacco corporations.[xiii]

The tobacco carve out proposal faces heavy-hitting opposition. Kentucky Senator Mitch McConnell stated, “[i]t is essential as you work to finalize the TPP, you allow Kentucky tobacco to realize the same economic benefits and export potential other U.S. agricultural commodities will enjoy with a successful agreement...”[xiv] McConnell’s sentiment may be influenced by the \$120,475 the tobacco industry donated to his 2014 election campaign.[xv] However, he does not stand alone against an agreement that would give the tobacco industry little protection against stiff regulations.[xvi] It is a shared concern among tobacco-backing senators that the tobacco carve out would set a “dangerous precedent for future trade deals and could scare away would-be supporters of the deal.”[xvii]

In 2015, a lecture on the dangers of cigarettes and the justifiable desire to eliminate the number one source of preventable deaths is unnecessary.[xviii] McConnell’s views on the carve out would essentially set the standard that tobacco and tomatoes are one-in-the-same. However, a tomato does not produce the same lethal outcome that tobacco does. Restrictions on tobacco are working.[xix] Take, for example, Australia, where smoking has declined by 12.8% since the plain packaging law took effect in 2011.[xx] However, by allowing tobacco to enjoy investor-state dispute settlement rights, countries may have tobacco restriction laws undermined by discrimination suits.[xxi] The tobacco industry regularly uses trade and investment agreements to challenge government restrictions, which requires excessive legal costs and rallies governments to challenge the imposed restrictions.[xxii]

The persuasion power of potential benefits for Kentucky’s number one agricultural export is easily felt.[xxiii] However, the love for tobacco in the United States has diminished just like in many of the TPP countries.[xxiv] Between 1965 and 2013, the proportion of the U.S. adult population that smoked fell from 42.4% to 17.8%.[xxv] The United States has enforced various restrictions on tobacco. The average sales tax on a single pack of cigarettes is \$2.21.[xxvi] The TPP will serve as the model trade product agreement for the 21st century, and will likely serve as the basis for future economic integration.[xxvii] The United States has the potential, on an international level, to expose tobacco for the dangerous product that it is.[xxviii] At the very least, the United States has the potential to acknowledge and protect a country’s right to restrict tobacco and promote the health of its citizens.

[i] Taylor Woodford, *What Is the Trans-Pacific Partnership and Why Are Critics Upset by It?*, Newsweek (June 12, 2015, 1:12 PM), <http://www.newsweek.com/tktk-tpa-explainer-342449>.

[ii] *Id.*

[iii] David Thomas, *A TPP Agreement: An Opportunity for Kentucky*, Business Roundtable 1, [http://tradebenefitsamerica.org/sites/default/files/studies/BRT\\_TPP\\_KY.pdf](http://tradebenefitsamerica.org/sites/default/files/studies/BRT_TPP_KY.pdf) (last updated Sept. 30, 2013).

[iv] *Will Malaysia’s Tobacco ‘Carve Out’ Be Adopted in Pacific Trade Deal?* Framework Convention Alliance, <http://www.fctc.org/media-and-publications/fact-sheets/industry-interference/1096-will-malaysia-s-tobacco-carve-out-carry-in-pacific-trade-deal> (last updated Sept. 16, 2015).

[v] *Id.*

[vi] John Brinkley, *Mitch McConnell Fights For Tobacco Interests In Trans-Pacific Trade Deal*, Forbes / Business (Sept. 8, 2015, 11:47 AM), <http://www.forbes.com/sites/johnbrinkley/2015/09/08/with-friends-like-mitch-mcconnell/2/2>.

[vii] *Will Malaysia’s Tobacco ‘Carve Out’ Be Adopted in Pacific Trade Deal*, *supra* note iv.

[viii] *Tobacco Control Laws: Explore Tobacco Control Legislation and Litigation from Around the World (Malaysia)*, Campaign For Tobacco-Free kids (July 22, 2015), <http://www.tobaccocontrollaws.org/legislation/country/malaysia/summary>.

[ix] Brinkley, *supra* note vi.

[x] *Id.*

[xi] *Id.*

[xii] *Id.*

[xiii] *Will Malaysia's Tobacco 'Carve Out' Be Adopted in Pacific Trade Deal, supra note iv.*

[xiv] Brinkley, *supra* note vi.

[xv] *Id.*

[xvi] *Id.*

[xvii] *Id.*

[xviii] *Smoking & Tobacco Use*, Centers for Disease Control and Prevention.

[http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/) (last updated Sept. 16, 2015).

[xix] *See* Brinkley, *supra* note vi.

[xx] *Id.*

[xxi] *See Will Malaysia's Tobacco 'Carve Out' Be Adopted in Pacific Trade Deal, supra note iv.*

[xxii] *Will Malaysia's Tobacco 'Carve Out' Be Adopted in Pacific Trade Deal, supra note iv.*

[xxiii] *Kentucky Agricultural Facts*, Kentucky Farm Bureau 1, 4, <https://www.kyfb.com/media/files/kfd/home-page/2013/CommodityBooklet.pdf> (last updated Dec. 16, 2013).

[xxiv] *See* Brinkley, *supra* note vi.

[xxv] *Id.*

[xxvi] *Id.*

[xxvii] *Will Malaysia's Tobacco 'Carve Out' Be Adopted in Pacific Trade Deal, supra note iv.*

[xxviii] *Id.*

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