Comments on Treatment of Tobacco in the
Trans-Atlantic Trade and Investment Partnership (TTIP)
Docket Number USTR–2013–0019

March 10, 2013

The TTIP is supposed to be a "driver of our prosperity" that will "contribute to the development of global rules that can strengthen the multilateral trading system."[1] We take heart that trans-Atlantic leaders focus on mutual prosperity rather than a simplistic notion that trade should take priority over public health and a healthy overall economy.

The question we bring to your attention is whether the benefits of TTIP – expanded market access and investment protection – should extend to tobacco trade and investment, a sector that national and international policies have targeted as an unmitigated vector of disease and death.

Tobacco products are designed to be palatable and addictive. They are so addictive that the World Health Organization (WHO) describes the growing tobacco market as a global "epidemic" that will kill one billion people in this century. Not only is tobacco trade a vector of disease, it burdens taxpayers and the economy with the cost of tobacco-related diseases. For example, in the United States (2000-2004), the average value of cigarettes sold was $71 billion per year, but the annual economic losses from smoking were $193 billion ($96 billion in direct medical costs and approximately $97 billion in lost productivity).[2] Tobacco trade is not economic growth; it is a growth killer.

In our view, it is incoherent to commit national health policy to shrinking tobacco markets but then to give tobacco companies the benefits of expanded market access and investment protection under the TTIP. To the contrary, tobacco trade and investment should be excluded from the TTIP for the following reasons:

- TTIP could reinforce the tobacco industry's campaign of litigation and lobbying.
- WTO-plus elements of TTIP chapters would benefit tobacco companies.
- TTIP benefits would undermine national policy on tobacco control.
- Expanding tobacco trade and investment runs counter to the global consensus on the reduction of tobacco use under the WHO Framework Convention on Tobacco Control.
- The U.S. has made a commitment to the global reduction of non-communicable diseases, for which tobacco is the leading risk factor.

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[1] The White House, Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso (February 13, 2013), available at http:/www.ustr.gov/about-us/press-office/press-releases/2013/February/statement-US-EU-Presidents (viewed May 10, 2013).

[2] Michael Eriksen, Judith Mackay and Hana Ross, *The Tobacco Atlas*, 4th ed. (2012) 44.

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The Threat posed by WTO-plus chapters

The tobacco industry uses an international campaign of litigation and lobbying to chill, divert or delay tobacco-control policies. Existing flexibilities in trade agreements might enable countries to defend their measures, but the multi-year, multi-million dollar cost of doing so is daunting. The tobacco industry seeks to reinforce its strategy in trade negotiations to expand market access, strengthen trade rules, and expand investor rights. As TTIP parties prepare for negotiations, we can anticipate how a trans-Atlantic agreement would benefit tobacco companies based on what we know about six chapters of existing U.S. trade agreements and publicly available drafts of chapters in the proposed Trans-Pacific Partnership Agreement (TPPA). These chapters add WTO-plus rules that could be used in future rounds of litigation or to bolster industry lobbying:

(1) *Investment chapter* – Philip Morris International is already using investment agreements to challenge tobacco-control measures. PMI argues that the measures frustrate their expectations and ability to market tobacco products. PMI seeks to expand investor rights by using investor-state arbitration to enforce rules designed to protect investments in other international agreements (e.g., bilateral investment treaties and intellectual property treaties).

(2) *Intellectual property chapter* – Tobacco companies are constantly pushing for a right to use trademarks, which if adopted in a trade agreement, would bolster their claims that they are entitled to compensation if packaging restrictions limit their use of trademarks.

(3) *Cross-border services chapter* – The most recent U.S. FTA (Korea) covers more than cross-border services; it also covers domestic regulation of services by provided by "investments," which include corporate subsidiaries with a commercial presence in the country. This model could be used to challenge restrictions on advertising, promotion, or sales as "zero quotas."

(4) *Regulatory coherence chapter* – A novel chapter in the TPPA promotes industry stakeholder participation in decision-making. It also promotes regulatory impact assessments, which the tobacco industry has used to generate evidence to support its litigation.

(5) *Technical barriers to trade (TBT) chapter* – A coalition of U.S. business associations has urged the United States to limit the ability of the World Health Organization to promote guidelines for implementation of the Framework Convention on Tobacco Control and to cooperate with the WTO on strategies to avoid conflict between trade rules and tobacco-control measures. The TBT chapter merits close scrutiny as a target for industry influence on how governments cooperate to set standards or guidelines for tobacco control.

(6) *Tariff schedules* – The TTIP goal would eliminate tariffs on cigarettes. U.S. tariffs are 41.7 cents/kg + 0.9% (bound and applied rates), and EU tariffs are 10% ad valorem (bound and applied rates).[3]

[3] WTO, Tariff Analysis Online facility, search for U.S. and EU tariffs, bound and applied rates, HTS 240220 (Cigarettes containing tobacco) – available at https://tariffanalysis.wto.org/welcome.aspx?ReturnUrl=%2f%3fui%3d1&ui=1 (viewed May 10, 2013).

National policy on tobacco trade

In the mid-1990s, U.S. trade negotiators went out of their way to negotiate tobacco tariff reductions in Asia/Pacific countries in order to promote market access on behalf of tobacco companies. In response the U.S. Congress adopted the Durbin and Doggett Amendments, which prohibit federal agencies from promoting “the sale or export of tobacco or tobacco products” or seeking “the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type.” In 2001, President Clinton issued Executive Order 13193 to make clear that this policy applies to all executive agencies and “the implementation of international trade policy.”

The TTIP goal of eliminating tariffs and the TTIP chapters that expand market access and provide legal tools to challenge tobacco-control measures are inconsistent with these national policies on tobacco trade.

Exclude tobacco trade and investment

Anticipating the threat posed by international tobacco litigation, the U.S. government has drafted (but not yet proposed) a narrow exception in the TPPA negotiations for regulations that restrict tobacco trade. The exception is so narrow that it would not apply to legislation; it would not apply to regulations adopted by tax, custom, or licensing authorities; and it would require a scientific burden of proof that exceeds the burden in the WTO health exception under GATT and GATS. The U.S. proposal would not protect measures that freeze existing markets, e.g. the ban on flavorings that applies to cloves but not menthol, which Indonesia successfully challenged in WTO dispute settlement.

The more elegant alternative to a narrow and complex exception is to simply exclude tobacco-control measures from TTIP. An exclusion provides better protection than an exception; it contains litigation at the initial stage of determining whether a treaty applies to a measure.

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