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CALL FOR A TOBACCO CARVE-OUT

BACKGROUND:

Recent and more persistent calls for a carve-out of tobacco from international trade agreements are born out of the tobacco industry's propensity to use trade-related arguments to challenge evidence-based tobacco control measures.

The free trade regime of the World Trade Organization (WTO) system created an opportunity that the tobacco industry, particularly the "tobacco transnationals, has been quick to exploit."ⁱ For instance, the United States (US) challenged Thailand's ban on tobacco advertising in the WTO.ⁱⁱ Japan, in defense of Japan Tobacco International (JTI), brought its complaint against a European directive on product labeling (prohibiting misleading descriptors) to the TBT committee.ⁱⁱⁱ In 2009, Philip Morris urged the Philippine government to challenge Thailand's tax valuation practices.^{iv} The United States recently lost a WTO case to Indonesia^v over the US ban on clove cigarettes.^{vi}

Regional free trade regimes have not been spared. At the European Free Trade Association (EFTA) Court, Philip Morris Norway challenged a Norwegian directive prohibiting the display of tobacco products in sales outlets.^{vii}

Leveraging the free trade rules on recognition of intellectual property, tobacco giant Philip Morris has started to use bilateral investment treaties to challenge tobacco control measures in an investor-state dispute settlement proceeding. Philip Morris International (PMI) challenged the graphic warnings and single presentation law of Uruguay^{viii} while Philip Morris Asia challenged the plain packaging law of Australia^{ix}... seemingly to fulfill a decade-old threat to do the same against Canada under the North American Free Trade Agreement (NAFTA).^x

RATIONALE:

There is no doubt that tobacco is a unique product entitled to special treatment. Some participating countries had attempted to exclude tobacco from different parts of their previous Free Trade Agreements (FTA) For instance, Brunei and Vietnam included certain types of tobacco in its "General Exception List" while Malaysia included the same in its "Sensitive List" under the ASEAN Free Trade Agreement.^{xi} Australia excluded the sale and distribution of tobacco products from its services schedule under the Australia-US FTA.^{xii}

A key driver of the TPP negotiations, the US, has a law, the Doggett Amendment,^{xiii} and an executive order, EO 13193,^{xiv} that disallows the government and the US Trade Representative (USTR) from using government resources to promote tobacco products in other countries.

The TPP countries are familiar with carve-outs in various approaches and forms. Based on a survey of over 60 international trade agreements that TPP countries have entered into, notable exceptions can be observed. This includes absolute exemption for cultural industries (Chile, Peru, US) through a special annex, exceptions for

environmental measures with further obligations in environment chapters (Singapore, US, Peru, Chile), non-application of national treatment for controls on logs export (US), exclusion of therapeutic methods in intellectual property (all), exclusion of products of prison labor (all), etc.

COMPLETE CARVE-OUT PREFERRED OVER EXCEPTIONS

Tobacco control regulation covers practically all aspects of tobacco trade and affects many chapters of a trade agreement, hence, a more practical approach to exclude tobacco would be to completely carve-out tobacco products (leaves and manufactured product), its related services (sales/distribution, advertising) and investments from the TPP.

- Although all TPP countries other than the US are parties to the World Health Organization Framework Convention on Tobacco Control (FCTC), mere reference to this treaty alone or stating that such a treaty prevails, does not stop the tobacco industry from invoking the trade rules to challenge tobacco control measures. Nevertheless, reference to the FCTC can be made to promote international cooperation and serve as a reminder that the FCTC obliges Parties to ensure that subsequent agreements, such as the TPP, shall be “compatible with their obligations under the Convention and its protocols.”^{xv}
- A general exception for public health is found in most FTAs (*e.g.*, “*Subject to the requirement that the measure is not applied in a manner that would constitute unjustifiable discrimination...nothing in this agreement shall prevent adoption or enforcement of measures necessary to protect health.*”). It is not sufficient because a bona fide tobacco control measure that incidentally provides differential treatment can easily be misconstrued as a disguised restriction in international trade. In a trade dispute, the defending country bears the burden of proof that a regulation is not more trade-restrictive than necessary, and it must justify any lack of consistency on how a product is regulated by multiple agencies and levels of government.
- Due to the comprehensive scope of tobacco control measures, a “tobacco carve-out” that applies only to specific chapters would be unwieldy to negotiate and could have a balloon effect.^{xvi} Restrictions on one part will just allow the balloon to bulge elsewhere, giving the tobacco industry other opportunities to challenge tobacco control with trade rules.

RECOMMENDATIONS:

In order to effectively ensure that the TPP will suppress challenges in implementing tobacco control measures and promote international cooperation in tobacco control, the following approaches for providing exclusions are recommended:

- a. Expressly provide, in effect, that the TPP Agreement shall not apply to tobacco leaves and products as well as services and investments directly related to these.^{xvii} (*e.g.*, “*Nothing in this agreement shall apply to tobacco*

leaves, tobacco products, or the sale, distribution, trade, advertisement, or promotion thereof.”^{xviii})

- b. As needed, adopt the definition of terms such as tobacco products and tobacco advertising and promotion, found in the FCTC.
- c. Promote international cooperation in implementing tobacco control measures as well as consistency with the tobacco carve-out in order to avoid disputes (based on pre-existing commitments) through specific obligations to
 - a. remove tobacco products/ sector from other existing trade agreements including bilateral investment agreements, and
 - b. in the interim, negotiate appropriate interpretative clauses in existing trade agreements and bilateral investment agreements to ensure that tobacco control measures are not easily challenged.

A real “carve-out” brings tobacco products outside of the TPP’s free trade regime while a general “exception” leaves the door open for potential disputes to be settled in all the facilities created by the TPP. An outright carve-out should be preferred over a specific “exception” that merely ensures that “the agreement does not preclude the enactment of stringent tobacco control measures.” Hence, wordings like “Nothing in this agreement shall apply to tobacco” (carve-out) should be preferred over “nothing in this agreement is construed to prevent the adoption of tobacco control measures” (general exception).

TRADE RULES THAT TEND TO RESTRICT TOBACCO CONTROL MEASURES

a. National Treatment (Article III of GATT)

In the two Thai Cigarette cases and the current U.S. Clove Cigarettes case at the WTO, discrimination or treating foreign products less favorably than “like” or similar domestic products was invoked. Discrimination was also a primary argument in the EFTA case against Norway.

b. Trade Related Aspects of Intellectual Property Rights (TRIPS)

Tobacco industry surveillance reports show how the tobacco industry has stretched intellectual property arguments to delay and undermine tobacco control measures particularly graphic warnings and plain packaging. Furthermore, the US proposal for the TPP intellectual property chapter recognizes the “right to use”^{xix} certain geographical indicators as well as requires TPP members to invest in resources to enforce intellectual property laws.

c. Technical Barriers to Trade (TBT)

Measures to ban additives and flavorings are currently being challenged as a violation of the TBT Agreement. Regulating tobacco products inevitably involves regulating its contents and design features, and it would be easy for the tobacco industry to claim that any new regulation, even if recommended by the FCTC guidelines, as an unjustifiable encumbrance. Notably, it is expected that many

new tobacco regulation measures will be adopted in light of the recent progress in the development of the FCTC Article 9 and 10 Guidelines.

d. Investment Chapter / Investment Agreement

The tobacco industry invokes investor rights to challenge tobacco control measures. Exclusion from the Investment Chapter should not be a mere exclusion from the investor-state dispute mechanism but from the entire chapter in order to avoid back-door remedies through umbrella clauses or MFN clauses. Likewise, tobacco companies might be able to use provisions on indirect expropriation and fair and equitable treatment to challenge the government measures in the domestic courts of some countries.

e. Tariff Elimination

Elimination of tariffs on tobacco products would offset efforts to employ price measures in order to reduce tobacco consumption. It must be noted that the WTO places some constraints in the case of FTAs in that duties shall not be as a whole higher than the general incidence of duties”^{xx} existing prior to the establishment of the free trade area.

f. Non-Tariff Measures (e.g., Import Restrictions)

Allowing restrictions on imported cigarettes may be justified to restrict the variety of cigarettes in the market and to provide options for effective enforcement of tobacco product regulation measures.

g. Trade in Services

Several sectors in the supply of services can be involved in tobacco advertising, (including promotion and sponsorship), distribution (sales), business services (e.g., digital marketing), performance arts, and even design. Comprehensive bans on tobacco marketing require imposing stringent requirements that may be challenged by the tobacco industry as a violation of market access rules (e.g., the prohibition on quotas or bans), necessity tests on domestic regulation of services, or a disguised barrier to international trade.

h. Regulatory Coherence

The Chapter on Regulatory Coherence presumes that the private sector is a partner that is expected to cooperate and collaborate with governments, among others, in developing regulatory impact assessments (RIA).^{xxi} This should not be the case for the tobacco industry. In fact, the FCTC underscored that the tobacco industry seeks to undermine and subvert tobacco control efforts. The FCTC Guidelines on Article 5.3 (General Obligation to protect against tobacco industry interference) has recommended rejecting partnerships with the tobacco industry.

ⁱ ANDREW COOPER AND JOHN KIRTON, INNOVATION IN GLOBAL HEALTH GOVERNANCE, Chapter on Globalization and the Politics for Health Governance, by Jeff Collin Kelley Lee, at 376 Ashgate (2009) - "The expansion and encroachment of a liberal trading regime under the auspice of GATT and WTO represent an opportunity that TTCs have been quick to exploit;" British American Tobacco on International Trade, September 2000, Bates No: 322253262-3275, available at <http://legacy.library.ucsf.edu/tid/qfm55a99/pdf>. - "Free and open international trade is crucial for the long-term health of our company."

ⁱⁱ Report of the Panel, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200, at 216-18 (1991), available at <http://www.wto.org/english/tratopE/dispuE/90cigart.pdf>.

ⁱⁱⁱ *Supra note 1*

^{iv} Ho, Abigail, Thailand Philippine Set to Cooperate on Cigarette Taxes, *Philippine Daily Inquirer*, July 17, 2011, available at <http://business.inquirer.net/7427/thailand-philippines-set-to-cooperate-on-cigarette-taxes>

^v See Request for Consultations by Indonesia, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/1 (Apr. 14, 2010).

^{vi} Family Smoking Prevention and Tobacco Control Act, Pub L No 111-31 (2009), § 101(b)(3), codified at 21 U.S.C. § 900 et seq.

^{vii} Case E-16/10 Philip Morris Norway v Staten v/ Helse- ogomsorgsdepartementet (Philip Morris), judgment of 12 Sept.2011. Alberto Alemanno, *The Legality, Rationale and Science of Tobacco*

Display Bans after the Philip Morris Judgment, 2 *European Journal of Risk Regulation* 4, 2011. Advisory Opinion in proceedings pending between Philip Morris Norway AS and the Norwegian State, represented by the Ministry of Health and Care Services, concerning whether Articles 11 and 13 EEA preclude a prohibition on putting tobacco products on display in sales outlets

^{viii} Request for Arbitration, FTR Holdings S.A. (Switzerland), Phillip Morris Products S.A. (Switzerland) and Abel Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID case no. ARB/10/7, noticed February 19, 2010 and registered March 26, 2010 (hereinafter, PM v. Uruguay).

^{ix} Notice of Arbitration, Philip Morris Asia Ltd. v. Commonwealth of Australia, noticed Nov. 21, 2011, available at <http://www.ag.gov.au/InternationalLaw/Pages/Investor-State-Arbitration---Tobacco-Plain-Packaging.aspx>

^x See Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris (May 3, 1994) available at <http://www.takingontobacco.org/trade/carlahills.pdf> last visited Feb 28, 2012 (hereinafter, Carla Hills, Legal Opinion).

^{xi} ASEAN Free Trade Agreement, Goods Schedule available at

<http://www.asean.fta.govt.nz/assets/Downloads/Schedules/Malaysia-Goods-Schedule.pdf>

^{xii} Australia-US Free Trade Agreement, Annex II (Services Schedule) available at http://www.dfat.gov.au/fta/ausfta/final-text/non-conforming_measures/Annex_II_combined.pdf

^{xiii} Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55 (H.R.2112), Div. B § 510 (effective through Sept. 30, 2012): "None of the funds provided by this Act shall be available to promote the sale or export of tobacco or tobacco products, or to seek 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."

^{xiv} Section 2(a) of Executive Order 13193, signed by President Clinton on January 18, 2001, states that "...[i]n the implementation of international trade policy, executive departments and agencies shall not promote the sale or export of tobacco or tobacco products, or seek the reduction or removal of foreign government restrictions on the marketing and advertising of such products, provided that such restrictions are applied equally to all tobacco or tobacco products of the same type."

^{xv} WHO FCTC Article 2.2. "The provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations under the Convention and its protocols. The Parties concerned shall communicate such agreements to the Conference of the Parties through the Secretariat."

^{xvi} ASH: "'balloon theory' of tobacco advertising: place a partial restriction on tobacco advertising, and it is like pressing down on a balloon full of money – it simply bulges somewhere else, often with the benefit of added stimulus to creativity." http://www.ash.org.uk/files/documents/ASH_206.pdf

^{xvii} This would suffice to ensure that the dispute settlement mechanism of the TPP will not be used to challenge tobacco control measures

^{xviii} "Nothing in this agreement shall apply to tobacco" (carve-out) should be preferred over "nothing in this agreement is construed to prevent the adoption of tobacco control measures." (general exception).

^{xix} The "right to use" trademarks is an argument that the tobacco industry has been using to support its arguments although the TRIPS provide only for the "right to register" and the "right to exclude others" from use of a trademark.

^{xx} GATT Art XXIV 5.a and b

^{xxi} TPP US Proposal for Regulatory Coherence Chapter

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