#### Why should tobacco products be treated differently?

1. All TPPA participants, except the US, are parties to the  $\boldsymbol{WHO}$   $\boldsymbol{Framework}$ 

Convention on Tobacco Control (WHO FCTC)i which mandates that:

- a) Parties shall ensure that **subsequent agreements like the TPPA are not inconsistent** with the FCTC. (Article 2.2, FCTC)<sup>ii</sup>
- b) Parties **should implement measures beyond the FCTC** in order to better protect human health<sup>iii</sup> (Article 2.1, FCTC)
- c) Parties **shall cooperate with each other to implement the substantive provisions**Articles 8-13, which includes measures on packaging and labeling, advertising and promotions ban, and product regulation. (Article 7, FCTC)
- d) Parties shall cooperate with other parties in developing appropriate policies from preventing and reducing tobacco consumption. vi (Art 5.2b, FCTC)
- Parties shall protect public health policies from the commercial and vested interests of the tobacco industry vii(Article 5.3, FCTC), which according to the Article 5.3 Guidelines, includes not giving the tobacco industry any incentives to run its business.

Moreover, FCTC parties are constantly improving on the measures required to implement the FCTC and have just concluded negotiations on a protocol to eliminate the illicit trade of tobacco. The nature of these measures would invariably produce constant tension between tobacco control and various aspects of trade.

- 2. US laws prohibit government funds from being used to promote tobacco in foreign countries and to undermine non-discriminatory restrictions by foreign governments on tobacco marketing. (Doggett Amendment, viii EO13193ix)
- 3. Notwithstanding existing public health exceptions and safeguards in trade agreements, tobacco companies have established a trend of **constantly utilizing arguments and disputes** based on international trade and investment agreements **to** intimidate governments\* and challenge tobacco control efforts and measures.\*
- 4. Due to the unique nature of the product, **tobacco has traditionally been treated differently.** For instance, TPPA participants impose high tariffs and other barriers on tobacco products. Some have excluded tobacco products from the agreement's tariff schedule, its distribution from the services schedule, included them in the negative or exclusion list on preferential tariffs, removed their investment from the coverage investment rules, and excluded them altogether from the trade agreements.

# How should tobacco products be treated in light of existing laws, international obligations and the behavior of the tobacco industry?

Tobacco products should be treated in a manner that

- a. Reduces or **removes the tobacco companies' ability to sue the government** for adopting tobacco control measures. xii
- b. **Disallows the use of any new provision/ agreement to reinforce common arguments** used by the tobacco industry against measures like product regulation, packaging and labeling, advertising ban, price measures, etc. such as violations of trademark rights, technical barriers to trade (TBT), national treatment, and

#### Trade-Related Disputes

Initiated by the Tobacco Industry
At the European Courts of Justice (ECJ), Japan Tobacco challenged the European Union (EU) ban on misleading descriptors by stating,

among others, that it violates their trademark rights. xvii

In 1994, lawyers representing Philip Morris claimed that the proposed plain packaging law of Canada would be an expropriation of their intellectual property rights and thus, a violation of both TRIPS and North American Free Trade Agreement (NAFTA). No dispute ensued; Canada did not proceed with adopting the proposed bill. \*viii\*

In 2010, Philip Morris Norway initiated a proceeding at the European Free Trade Agreement (EFTA) Court to challenge a Norwegian states' ban on point of sale display of tobacco products claiming that it is tantamount to a quantitative prohibition.

In 2010, Philip Morris affiliates claimed that the graphic health warning and single presentation law of Uruguay resulted in an expropriation of its intellectual property rights and thus, a violation of both TRIPS and the Swiss-Uruguay bilateral investment treaty (BIT). xix The case is still pending.

In 2011, Philip Morris Asia claimed that plain packaging would be an expropriation of its trademark and the violation of the TRIPS agreement would constitute a violation of the investment agreement under the "umbrella clause" of the Hong Kong-

minimum standard of treatment of investors.

- c. Recognizes and **addresses the craftiness of the tobacco industry in using trade- related arguments to pose regulatory chill** on governments attempting to enact effective tobacco control measures.
- d. **Ensures that the tobacco industry is not given incentives or benefits**<sup>xiv</sup> to run its business in accordance with the FCTC's Article 5.3 Guidelines, such as liberalization of the services sector, provision of stronger investor rights, and more stringent trade secret rules.
- e. Ensures that tobacco control measures recommended in the FCTC Guidelines would not be required to pass a necessity test<sup>xv</sup> and other hurdles because the tobacco industry has been exploiting such hurdles to weaken, delay, and challenge tobacco control measures despite the state's good faith implementation of the FCTC.
- f. Allows **flexibility for tobacco control measures that may incidentally be construed as "discriminatory"** or de facto discriminatory<sup>xvi</sup> due to the different impact on foreign brands.
- g. **Improve on past practices of treating tobacco differently** in international trade agreements.
- h. **Allows exclusion of unmanufactured tobacco** or tobacco leaves to the extent that such exclusion would contribute to tobacco control.

#### Recommended Treatment: Exclusion of Tobacco Products

e.g., "Nothing in this agreement shall apply to tobacco products," or "This Agreement shall not apply to tobacco control measures, tobacco products, sales, distribution, advertising, promotion of tobacco products, and investment in the tobacco sector."

#### Common arguments and Counter-arguments

**Argument:** Any sector-wide or product exclusion will "prompt TPPA partners to demand their own exemptions"

Counter-Argument: Tobacco is a unique product that deserves unique treatment. It is the only product that kills half of its consumers and is the only product for which regulation affecting specific aspects of its trade (packaging, labeling, marketing, sale, etc.) is mandated in a public health treaty. Because of the devious nature of the tobacco industry, FCTC parties have a unique obligation to protect their public health policies from the interests of the tobacco industry.

**Argument:** Excluding tobacco products in trade agreements undermines the assertion that existing "public health exceptions" provide adequate policy space.

Counter-Argument: Treating tobacco products differently from other products in a trade agreement is a response to the unique nature of tobacco products, the deviousness of the tobacco industry, the peculiarities of tobacco control measures, and the need to comply with national laws and treaty obligations. It should not be construed to question the merits or adequacy of the existing public heath safeguards in trade and investment agreements.

Australia BIT.xx

## Special Treatment of Tobacco

In trade and investment agreements

Special Treatment	FTA
Tobacco excluded from the FTA	US Jordan Free
	Trade Agreement
Measures to restrict tobacco investments	US-Turkey Bilateral
are allowed	Trade Agreement
Tobacco excluded from Preferential Tariff	India-Nepal Free
Treatment	Trade Agreement
Tobacco included in the General	ASEAN Free Trade
Exception List (Tariff Schedule)	Agreement
Tobacco included in the Sensitive List	ASEAN Free Trade
(Tariff Schedule)	Agreement
Sale and distribution of tobacco excluded	US Australia FTA
from service sector	

#### A Global Epidemic

"If nothing is done, 1 billion people will die from tobaccorelated deaths in the 21st century." WHO

The Cure: Tobacco Control
"The WHO FCTC was
developed in response to the
globalization of the tobacco
epidemic. The spread of the
tobacco epidemic is facilitated
through...factors...including
trade liberalization and direct
foreign investment." WHO
FCTC Foreword

#### A Dangerous Industry

"Defendants (Tobacco Companies) have marketed and sold their lethal products with zeal, with deception...without regard for the human tragedy..."US District Judge Gladys Kessler, 2006

**More Legal Challenges** 

#### Various Approaches:

Any trade agreement negotiated after the WHO FCTC entered into force should ensure that no additional benefits, rights, arguments, and privileges would accrue to the tobacco industry and that the agreement will not produce additional restrictions on the government's ability to adopt and implement tobacco control measures.

TPPA partners may have different approaches on how to treat tobacco in new agreements. The simplest way is to carve tobacco products entirely out of the TPPA.

#### **CHAPTER FOCUS**

If an outright exclusion or carve-out is not undertaken, TPPA partners must, at the minimum, take careful measures to add specific safeguards throughout the agreement with special focus on chapters that the tobacco industry commonly exploits. Safeguards may be in the form of an interpretative provision or an outright exclusion in certain chapters or schedules.

#### To illustrate:

For the Investment chapter, the following could be added "tobacco control measures shall not be deemed expropriation," and "Investment chapter shall not apply to the tobacco sector." For the Technical Barriers to Trade chapter: "Tobacco control measures, shall not be deemed a barrier that is more trade restrictive than necessary to fulfill a legitimate objective..."

For the Intellectual Property chapter: "Tobacco control measures as defined in the FCTC and its guidelines shall not be deemed an unjustifiable encumbrance in the use of a trademark."

#### OTHER OBLIGATIONS

Some TPPA partners may express concern and confusion over the potential impact of a tobacco carve-out on the obligations imposed under existing trade agreements.

Without incorporating language in the TPPA for the purpose of changing the obligations in other trade and investment agreements, the exclusion of tobacco products from the TPPA can be deemed to leave TPPA partners in its current state of affairs with respect to tobacco trade. Nevertheless, states may choose to include language to expressly emphasize the point that the tobacco treatment is not intended to apply retroactively.

On the other hand, states may also choose to take precautions and ensure that as between TPP partners, certain trade and investment provisions will be amended as to tobacco. For instance, states may add a provision to the effect that as to the treatment of tobacco in the investment chapter, "any existing bilateral investment agreement with any of the TPP parties will be deemed amended by the TPP," and hence the exclusion of tobacco sector from investments in the TPPA would not be undermined by a previous bilateral investment treaty. This approach can apply to other critical aspects of the trade agreement such as the chapters on services, TBT, intellectual property, regulatory coherence, and the like.

"We will continue to use all necessary resources.. and where necessary, litigation to actively challenge unreasonable regulatory proposals." CEO of Philip Morris International, 2010

### **Examples of Additional Safeguards**

This (provision) does not apply to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with tobacco control objectives.

National Treatment, Most Favored Nation Treatment, (specify other provisions) do not apply to tobacco products or tobacco control measures, including existing nonconforming measures and future measures

Regulatory actions by a Party that are designed and applied to achieve tobacco control objectives, do not constitute indirect expropriation.

The Parties recognize that it is inappropriate to encourage investment by relaxing tobacco control measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

<sup>&</sup>lt;sup>i</sup> World Health Organization Framework Convention on Tobacco Control (WHO FCTC), May 21, 2003, art. 6, 42 ILM 518

ii *Id.*, art 2.2 Relationship between this Convention and other agreements: This essentially states that provisions of the Convention "shall in no way affect the right of Parties to enter into bilateral or multilateral agreements... on issues relevant or in addition to the Convention...provided that such agreement... are compatible with their obligations under the Convention..."

iii *Id.*, art 2.1, Relationship between this Convention and other agreements: "Nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law."

iv Id., art 7, Non Price Measures to Reduce the Demand for Tobacco

YArticles 8-13 refer to the following core demand reduction provisions: Protection from exposure to tobacco smoke; regulation of the contents of tobacco products; regulation of tobacco product disclosures; packaging and labelling of tobacco products; education, communication, training and public awareness; tobacco advertising, promotion and sponsorship.

vi Id., art 5.2b, General Obligations

vii Id., art 5.3, General Obligations

viii 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."

ix 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."

<sup>&</sup>lt;sup>x</sup> W Duff, Cigarette Giants in Global Fight on Tighter Rules, New York Times, Nov 13, 2010, "Philip Morris International sued the government of Uruguay, saying its tobacco regulations were excessive. World Health Organization officials say the suit represents an effort by the industry to intimidate the country, as well as other nations attending the conference, that are considering strict marketing requirements for tobacco." Available at http://www.njgasp.org/Cig\_Giants\_in\_Global\_fight\_over\_tighter\_rules\_11-13-2010.pdf.

xi "Action on Smoking and Health website, Intimidation, "A major strategy of the tobacco industry is to invest in legal resources to undermine and/or delay policy changes. They have the legal resources and capacity to take legal actions against legitimate decisions." Available at http://ash.org.nz/?t=194

xii See M. Porterfield, C Byrnes, Philip Morris v. Uruguay On Cigarette Branding: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing Up In Smoke? Investment Treaty News, International Institute for Sustainable Development, July 11, 2012.: "For nearly two decades, the tobacco industry has used international investment rules to challenge government restrictions on cigarette marketing. In 1994, R.J. Reynolds Tobacco Company threatened to bring a claim under the North American Free Trade Agreement's (NAFTA) investment chapter as part of its successful lobbying campaign against Canada's proposed "plain packaging" legislation, which would have required that all cigarettes be sold in standardized packaging without logos or trademarks... The tobacco industry's aggressive use of investment rules could prove to be an effective strategy for opposing restrictions on tobacco marketing. Yet given the widespread support for tobacco regulations, it seems just as plausible that this strategy could result in a backlash against investor-state arbitration."

xiii For instance, the tobacco industry argues that by virtue of a trademark registration, it has a "right to use" trademarks not just a right to exclude third parties from using it.

xiv Conference of the Parties (COP) to the WHO Framework Convention on Tobacco Control, Third Sess. Nov. 17–22, 2008, *Guidelines for Implementation of Article 5.3*, ¶ 29 [hereinafter *Article 5.3 Guidelines*], *available at* http://www.who.int/fctc/guidelines/article\_5\_3.pdf.
xiv For a discussion of the necessity test, see G Kapterian (2010). A CRITIQUE OF THE WTO JURISPRUDENCE ON 'NECESSITY'. International and Comparative Law Quarterly, 59, pp 89-12.

xvi E. Gould, *Trade treaties and alcohol advertising policy*, J Public Health Policy 2005;26:364, available at <a href="http://www.jstor.org/stable/4125158.">http://www.jstor.org/stable/4125158.</a> The market is more familiar with imported brands therefore de facto discriminatory citing a EC case filed vs. Sweden for an alcohol ad ban ECJ Case c-405/98 Gourmet intls products 2001.

xvii The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT International SA), 2002, Case C-491/01, Paragraphs 151-153; Opinion of Advocate General Geelhoed, The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT International SA), 2002, Case C-491/01, paragraphs 267-269.

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)

xix 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

xx Request for Arbitration, *Philip Morris Asia Limited v. Australia*, UNCITRAL (Hong Kong/Australia BIT). -Noticed, 22 June 2011 available at <a href="http://italaw.com/documents/PhilipMorrisAsiaLimited\_v\_Australia\_NOC\_22Jun2011.pdf">http://italaw.com/documents/PhilipMorrisAsiaLimited\_v\_Australia\_NOC\_22Jun2011.pdf</a>