



STATE OF VERMONT
GENERAL ASSEMBLY

COMMISSION ON INTERNATIONAL TRADE AND STATE SOVEREIGNTY

July 25, 2012

Ambassador Ron Kirk
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Kirk:

We are contacting you on behalf of the Vermont Commission on International Trade and State Sovereignty (Vermont Commission) regarding the U.S Trade Representative's (USTR's) negotiation of the Trans Pacific Partnership Agreement (TPPA) and, more specifically, to express our support for the inclusion of language in the TPPA that trade and investment rules do not apply to measures that affect tobacco trade or investment.

At its meeting in June 2012, the Vermont Commission greatly benefitted from a thorough presentation on the status of TPPA negotiations from Sharon Treat, a current member of the Intergovernmental Policy Advisory Committee, the Executive Director of the National Legislative Association on Prescription Drug Prices (NLARx), and a State Representative from Maine. The Vermont Commission was also privileged to review a preliminary analysis of the U.S. proposal for tobacco in the TPPA published by the Harrison Institute for Public Law at Georgetown Law. Together, Rep. Treat's presentation and the Harrison Institute's analysis demonstrated significant gaps in the current USTR proposal that may expose state laws regulating tobacco to challenges from tobacco companies based in TPPA countries other than the United States, as well as foreign-domiciled subsidiaries of U.S. companies.

Our first specific cause for concern is the narrow scope of the current exception for tobacco, which applies only to "regulations" adopted by a "health authority." Under this language, the exception would not extend to legislation adopted by elected members of the legislative and executive branches of government, nor would it extend to any regulations adopted by non-health authorities, e.g., tax, license, consumer protection, environmental, intellectual property, or customs authorities. Furthermore, it is not clear that this narrow exception would apply to enforcement of existing measures regulating tobacco. Finally, it is not clear that the exception extends beyond the regulation of products to include the regulation of tobacco-related services, e.g., advertising or Internet sales (both of which are regulated in Vermont and many other states).

Our second specific cause of concern is that the USTR proposal is not clear on the applicability of three disciplines that have been previously used to challenge the regulation of tobacco: national treatment, compensation for expropriation, and transparency obligations. The continued

availability of these disciplines to potential challengers to tobacco regulations ensures that, even with some protection under the TPPA, states will likely be exposed to threats of costly litigation, thereby having a chilling effect on their willingness to aggressively pursue tobacco regulation.

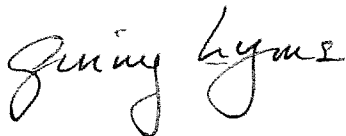
Our third cause for concern arises from the inclusion of two substantive tests in the USTR proposal: that regulations impose (1) "origin-neutral" and (2) "science-based" restrictions on specific tobacco products/classes in order to safeguard public health. As the Harrison Institute points out, the term "origin-neutral," as opposed to the more explicit "facially neutral," is sufficiently vague that it could encompass the meaning of national treatment and lead to a challenge that a regulation is not origin-neutral on a *de facto* basis, just as Indonesia argued that the U.S. ban on clove cigarettes was a *de facto* violation of national treatment. Similarly, the requirement that a regulation be "science-based" does not establish any clear standard as to the sufficiency of proof that a regulation is science based, whether any deference will be afforded to a state's reliance on scientific data and analysis, nor to the burden of proof as between parties who both offer "scientific" evidence. Without additional language or guidance, dispute panels will be left to interpret "science-based" and the result may be a higher burden of proof for governments to substantiate regulation.

We commend USTR's efforts to acknowledge the unique status of tobacco products in international trade, and to afford the Federal Drug Administration (FDA) and subnational health authorities substantial cover in designing and implementing health regulations concerning tobacco. However, the exclusion offered under the current proposal to TPPA does not go far enough to protect state legislation and regulations adopted by non-health authorities that attempt to protect the public health and safety against harmful tobacco products, marketing, and services. We believe the clearest and most efficient solution to affording this protection to states is to include explicit language in the TPPA that trade and investment rules do not apply to measures that affect tobacco trade or investment.


We would like to schedule a conference call, perhaps during our next Vermont Commission meeting on September 10, 2012, with appropriate members of your staff to discuss these issues. A representative of the Vermont Commission will be contacting your office to see if this can be arranged.

We greatly appreciate the opportunity to share our thoughts and concerns with you, and we hope you will let us know if we can provide further information or offer our assistance in any regard.

Sincerely,



Ginny Lyons
Co-Chair
Senator, Chittenden County



Kathleen Keenan
Co-Chair
Representative, St. Albans

Cc: Members, Commission
Senator Patrick Leahy
Senator Bernie Sanders
Representative Peter Welch
Governor Peter Shumlin
Intergovernmental Policy Advisory Committee, c/o Kay Wilkie and Sharon Treat
Representative Shapleigh Smith, Speaker, Vermont House of Representatives
Senator John Campbell, President Pro Tempore, Vermont Senate