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USTR's Proposal for Coverage of Tobacco under the Trans-Pacific Partnership Would Violate Executive Order 13193



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Summary

Executive Order 13193 and the Doggett Amendment to the Commerce, Justice and State Appropriations bill prohibit federal agencies, including the Office of the United States Trade Representative (USTR), from using trade policy to promote the export or sale of tobacco products or to undermine nondiscriminatory restrictions by foreign governments on tobacco marketing. USTR's August 2013 proposal for covering tobacco trade under the Trans-Pacific Partnership (TPP) violates the Executive Order and the Doggett Amendment by seeking the elimination of tariffs on tobacco, leading to an increase in exports and sales of tobacco, and by permitting challenges to nondiscriminatory tobacco laws and regulations under the TPP's trade and investment rules. USTR can comply with these provisions by excluding tobacco from coverage under the TPP.

Executive Order 13193 and the Doggett Amendment

Two provisions of law prohibit federal agencies from using trade policy or other means to promote the export of tobacco products or to undermine nondiscriminatory restrictions by foreign governments on tobacco marketing. Section 2(a) ("Tobacco Trade Policy") 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.

Since 1997, Congressman Lloyd Doggett has sponsored an amendment to the annual Commerce, Justice and State Appropriations bill that imposes similar prohibitions with regard to the agencies funded through that bill, including USTR.ⁱ

Executive Order 13193 and the Doggett Amendment prohibit USTR from pursuing two categories of trade policies, those that either—(1) promote "the sale or export of tobacco or tobacco products," or (2) seek "the reduction or removal" of nondiscriminatory restrictions by foreign governments on tobacco marketing. As discussed below, USTR's current approach to the TPP negotiations violates both of these prohibitions.

USTR's proposal for covering tobacco under the TPP

On May 18, 2012, USTR released a proposal concerning the treatment of tobacco trade and tobacco regulations under the TPP.ⁱⁱ The proposal included the following three elements: (1) a commitment to seeking tariff phase-outs on tobacco products, (2) a recognition of the “unique status of tobacco products from a health and regulatory perspective,” and (3) a “safe harbor” provision in the general exceptions chapter of the TPP that would “allow[] health authorities in TPP governments to adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health . . . while retaining important trade disciplines (national treatment, compensation for expropriations, and transparency) on tobacco measures.”ⁱⁱⁱ

On August 21, 2013, USTR released a new proposal that maintains the commitment to seek tariff reductions on exports of tobacco, but drops both the reference to the “unique status” of tobacco and, more significantly, the safe harbor provision.^{iv} The new USTR proposal would replace the harbor provision with (1) language indicating that the TPP’s general exception for measures necessary to protect human health “applies” to tobacco control measures, and (2) language requiring the health authorities of the affected TPP Parties to consult before one Party could bring a state- to- state claim regarding a tobacco measure under the TPP. The new proposal has been widely condemned by public health advocates.^v

USTR's proposal to seek tariff reductions on tobacco under the TPP would violate the prohibition on promoting tobacco exports through trade agreements

According to the World Bank, reduced tariffs and other restrictions on tobacco products “tends to introduce greater competition that results in lower prices, greater advertising and promotion, and other activities that stimulate demand,” leading to “increases in cigarette consumption, particularly in the low- and middle-income countries.”^{vi} USTR’s proposal to use the TPP to eliminate tariffs on tobacco products is therefore inconsistent with the prohibition on promoting tobacco sales and exports.

It has been suggested that the language at the end of the relevant section of the Executive Order excluding “restrictions [that are not] applied equally to all tobacco or tobacco products of the same type” renders the prohibition on “promot[ing] the sale or export of tobacco products” inapplicable to efforts to reduce tariffs on tobacco products exported by the United States.^{vii} This language, however, does *not* apply to the prohibition on promoting the export or sale of tobacco products. The limiting phrase applies to “restrictions,” which clearly refers to the “restrictions” referenced in the second category of prohibited activity.

The syntactical logic of this reading of the provision can be illustrated by eliminating the phrase describing the first category of prohibited activity (promotion) from the text:

[i]n the implementation of international trade policy, executive departments and agencies shall not . . . 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.

The resulting text is syntactically coherent and logical. Conversely, eliminating the phrase describing the second category of prohibited activity (seeking the reduction or removal of marketing restrictions) results in an incoherent sentence:

[i]n the implementation of international trade policy, executive departments and agencies shall not promote the sale or export of tobacco or tobacco products . . . provided that such restrictions are applied equally to all tobacco or tobacco products of the same type.

Accordingly, USTR's proposal to promote the sale and export of tobacco products by negotiating tariff reductions is inconsistent with the Executive Order.

There are precedents for excluding tobacco and other products from tariff reduction commitments. Tobacco is not subject to tariff reduction commitments under the U.S. - Jordan Free Trade Agreement, rice is excluded from tariff concessions by South Korea under the U.S. - Korea FTA, and sugar is excluded from tariff concessions by the United States under the U.S. - Australia FTA.^{viii}

USTR's proposal to permit trade and investment challenges to tobacco control measures violates the prohibition on undermining nondiscriminatory restrictions on tobacco marketing

USTR's proposal would permit tobacco control measures to be challenged under trade and investment rules contrary to the provisions of Executive Order 13193 and the Doggett amendment that prohibit federal agencies from undermining nondiscriminatory restrictions on tobacco advertising and marketing. Under the TPP's expropriation and fair and equitable treatments provisions, for example, tobacco companies could challenge tobacco marketing regulations based on their adverse impact on their business *even if the challenged regulations were nondiscriminatory and applied equally to foreign and domestic businesses.*^{ix}

The threat to tobacco regulations from trade and investment rules is not merely theoretical. The United States has already lost a WTO challenge to Congress's ban on clove cigarettes.^x Philip Morris is using investment provisions in other international agreements to challenge tobacco packaging laws in Uruguay and Australia that require large graphic images depicting the adverse health effects of tobacco.^{xi} The Ukraine and Honduras are also challenging Australia's "plain packaging" law before the WTO.^{xii}

USTR's proposed language would not prevent the use of the TPP to challenge nondiscriminatory restrictions on tobacco marketing and advertising. The proposed consultation requirement would not preclude a Party from proceeding with a dispute, and would be largely redundant with the consultation procedures that are typically included in free trade agreements.^{xiii}

The language indicating that the TPP's general exception for health measures "applies" to tobacco control measures is not legally significant for two reasons. First, the general exception will not apply to investor-state disputes under the TPP's investment chapter, such as the claims being brought by Philip Morris against Uruguay and Australia. Second, there is not any debate concerning whether tobacco control measures constitute health measures. As the WTO panel noted in the clove cigarettes dispute, "It is self-evident that measures to reduce youth smoking are aimed the protection of human health . . ."^{xiv} The issue is not whether a tobacco control measure would be considered a health measure under the general exception, but rather whether the measure would satisfy the rigorous standards for necessity and the tests under the chapeau of the general exception. The WTO's Appellate Body in the clove cigarette dispute applied what it characterized as a comparable standard under the WTO's Agreement on Technical Barriers to Trade in striking down the United States ban on clove cigarettes.^{xv} Accordingly, the new U.S. proposal on tobacco in the TPP is inconsistent with the prohibition under Executive Order 13193 and the Doggett amendment on using trade policy to undermine restrictions on the marketing and

advertising of tobacco products.

USTR can comply with E.O. 13193 and the Doggett Amendment by excluding tobacco from the TPP

The simplest approach that USTR could take to comply with E.O. 13193 and the Doggett Amendment would be to exclude (“carve out”) tobacco completely from all chapters of the TPP. A complete carve-out of tobacco would not only prevent violations of the Executive Order and the Doggett Amendment with regard to tariff provisions, it would also avoid any violations that could occur through other trade and investment provisions of the TPP that could be used to challenge tobacco marketing regulations.^{xvi}

ⁱ See Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, Div. B, § 509 (effective through Sept. 30, 2013):

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.

ⁱⁱ Office of the United States Trade Representative, *TPP Tobacco Proposal* (May 18, 2012). The May 2012 tobacco proposal has been removed from USTR’s website, but is available at <http://www.scribd.com/doc/162101394/2013-08-12-TPP-Tobacco-Proposal>.

ⁱⁱⁱ *Id.* The safe harbor provision previously proposed by USTR would apparently have applied only to tobacco control “regulations” issued by administrative agencies and would not have protected tobacco control legislation from challenges under trade and investment rules. This approach would be inconsistent with Executive Order 13193 and the Doggett amendment, which prohibit federal agencies from undermining “restrictions” on tobacco advertising and marketing, regardless of which branch of government promulgates them. It is not clear why USTR chose to make this distinction, particularly given that the United States has recently lost a trade challenge before the World Trade Organization (WTO) to a legislatively imposed ban on clove cigarettes. See Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (April 4, 2012).

^{iv} See USTR, *Fact Sheet: New U.S. Proposal on Tobacco Regulation in the Trans-Pacific Partnership* (August 21, 2013), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/august/fact-sheet-tobacco-and-tpp>.

^v See, e.g., Michael R. Bloomberg, *Why is Obama Caving on Tobacco?* NEW YORK TIMES (Aug. 22, 2013), available at http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html?hp&_r=1& (describing the Obama Administration’s new proposal for covering tobacco under the TPP as “weak half-measures at best that will not protect American law—and the laws of other countries—from being usurped by the tobacco industry, which is increasingly using trade and investment agreements to challenge domestic tobacco control measures”); Action on Smoking and Health (ASH), *Obama Goes to Bat for Big Tobacco in TPP* (Aug. 19, 2013), available at <http://ash.org/obama-goes-to-bat-for-big-tobacco-in-tpp/>; Action on Smoking and Health (ASH), Center for Policy Analysis on Trade and Health (CPATH), Corporate Accountability International, Human Rights and Tobacco Control Network (HRTCN), International Association for the Study of Lung Cancer (IASLC), *Smoke Out Tobacco from the TPP—Exclude tobacco from the Trans Pacific Partnership*, available at

<http://www.cpath.org/id51.html>; Campaign for Tobacco-Free Kids, American Cancer Society Cancer Action Network, American Heart Association, American Lung Association and American Academy of Pediatrics, *USTR Abandons Plan to Protect Tobacco Control Measures under Trans-Pacific Partnership Trade Agreement* (Aug. 19, 2013), available at http://www.tobaccofreekids.org/press_releases/post/2013_08_19_trade.

- ^{vi} The World Bank, *CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL* (1999) at 14-15, available at <http://go.worldbank.org/USV7H5C800>.
- ^{vii} See Simon Lester, *Free Trade and Tobacco: Thank You for Not Smoking (Foreign) Cigarettes* (CATO Institute, August 15, 2012) (arguing that “targeting discriminatory measures is clearly permitted, and tariffs are a classic form of discriminatory measure”), available at <http://www.cato.org/publications/free-trade-bulletin/free-trade-tobacco-thank-you-not-smoking-foreign-cigarettes>. Although USTR has not explained its apparent position that its approach to covering tobacco under trade agreements is consistent with E.O. 13193 and the Doggett Amendment, its Fact Sheet on the new proposal suggests that it may be relying on the language regarding discrimination: “we will continue to press for the elimination of tariffs on U.S. agriculture exports, which, by their very nature, discriminate against American farmers.” See August 2013 Fact Sheet, *supra* note iv.
- ^{viii} See Remy Jurenas *Agriculture in U.S. Free Trade Agreements: Trade with Current and Prospective Partners, Impact, and Issues* at 9 (Congressional Research Service, Updated January 30, 2008) available at <http://www.nationalaglawcenter.org/assets/crs/RL34134.pdf>.
- ^{ix} See Lester, *supra* note vii (“some of the intellectual property and investment provisions cited in the plain packaging cases do go beyond nondiscrimination, and could put constraints on nondiscriminatory actions by governments.”)
- ^x See Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (April 4, 2012).
- ^{xi} Request for Arbitration, *FTR Holdings S.A. v. Oriental Republic of Uruguay*, ICSID case no. ARB/10/7, noticed February 19, 2010, registered March 26, 2010 (dispute over mandatory graphic health warnings on cigarette packages and restrictions on brand packaging); Notice of Claim, *Philip Morris Asia Ltd. v. Commonwealth of Australia*, available at <http://www.ag.gov.au/InternationalLaw/Documents/Philip+Morris+Asia+Notification+of+Claim.DOC.pdf>
- ^{xii} See *Request for Consultations by Ukraine, Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/1 (March 13, 2012); *Request for Consultations by Honduras, Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/1 (April 4, 2012).
- ^{xiii} See, e.g., United States – Republic of Korea Free Trade Agreement, art. 22.3 (Cooperation) (“The Parties shall endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation”), and art. 22.7 (Consultation) (“Either Party may request consultations with the other Party with respect to any matter . . .”), available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file973_1272.pdf.

^{xiv} Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R (2 Sept. 2011) ¶ 7.347.

^{xv} See Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R (4 April 2012), para. 96:

The balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.

^{xvi} A more narrow approach would be to carve out tobacco from all provisions of the TPPA with the exception of the rules prohibiting discriminatory treatment of foreign products, services, and investors : “national treatment” (NT) and “most favored nation” (MFN). This approach would arguably comply with the Executive Order and the Doggett Amendment, given that both permit the use of trade agreements to seek the removal of discriminatory tobacco regulations. However, NT and MFN provisions in the TPPA could be interpreted broadly to permit challenges to nondiscriminatory tobacco regulations.

Last year, for example, the WTO’s Appellate Body held that the United States’ ban on clove and other flavored cigarettes violates the NT provision of the WTO’s Agreement on Technical Barriers to Trade (TBT Agreement) because the ban does not apply to menthol cigarettes. See Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (April 4, 2012). Although the ban applies equally regardless of where the cigarettes are produced, the Appellate Body concluded that it violates NT because it had a “detrimental impact on competitive opportunities for [imported] clove cigarettes” in comparison to domestically produced menthol cigarettes. *Id.*, para. 224. The Appellate Body rejected the United States argument that there were legitimate regulatory reasons for exempting menthol cigarettes from the ban, which was targeted at products smoked primarily by young people. *Id.* para. 225. As the Office of the United States Trade Representative has noted, the Appellate Body’s broad interpretation of NT in the *Clove Cigarettes* dispute “should be of grave concern to any Member regulating for the benefit of public health” *Statement by the United States at the April 2012, DSB Meeting, available at <http://geneva.usmission.gov/2012/04/25/statements-by-the-united-states-at-the-april-24-2012-dsb-meeting/>.*

Similarly, MFN provisions under the TPPA could be interpreted to permit challenges to tobacco regulations under provisions of other trade and investment agreements. Philip Morris is already using this strategy in its challenge to Uruguay’s cigarette packaging laws under the Switzerland-Uruguay bilateral investment treaty, arguing that the MFN provision of the treaty permits it to invoke more favorable provisions in other investment treaties to which Uruguay is a party. See *Request for Arbitration, FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID case no. ARB/10/7, paras. 52-53, 71-75 (February 19, 2010), available at http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf.