

## Call to Action: Fix the Fatal Flaws in U.S. Trade Policy on Tobacco

*May 11, 2012*

**Tobacco use is the leading preventable cause of death worldwide, and a drain on national coffers.** Elected officials and public health authorities are increasingly adopting evidence-based tobacco control measures that are proven to reduce initiation by young people, and to help smokers who are already addicted to quit. In response, the tobacco industry has seized on complex rules governing international trade to challenge these measures. Tobacco control advocates are calling for removing tobacco, tobacco products and tobacco control measures from the jurisdiction of trade agreements.

The Obama Administration has announced an admirable and historic intention to shape a trade policy that recognizes and contains the uniquely deadly effects of tobacco. But **their proposal as described below offers little meaningful change from the status quo.** It will not stop the tobacco industry from using trade rules to delay or reverse the implementation of tobacco control measures. **The medical and public health community must continue to exercise the scientific and moral authority, and the collective voice, to transform this gesture into an effective trade policy that will protect lives, by carving out tobacco from trade agreements.**

The U.S. Trade Representative (USTR) has not released the actual text of this proposal. The U.S. does not reveal any trade proposals for public review and debate until just before they are presented to Congress for a vote. Drafts are presented in closed-door meetings with "cleared" advisors who are sworn to hold all information confidentially. Most advisers represent industries, including tobacco. Even most members of Congress are excluded from this club. This is an undemocratic and nontransparent process. Establishing trade policy through a system based on the equivalent of secret handshakes became dysfunctional long ago on issues like trade in cars and rice. It is indefensible in the case of tobacco control, an internationally significant public health concern. An open, multi-year process led to the creation of the Framework Convention on Tobacco Control (FCTC). **It is time to resume the important public discussion on reconciling trade rules with the increasingly popular FCTC.** As a first step, **USTR should release the text of this proposal.**

### Trade Agreements Threaten Tobacco Control and Public Health

The examples below note how trade agreements act as barriers to effective measures that reduce tobacco use: tariffs to raise prices on cigarettes; banning flavored tobacco products; and restricting marketing through plain packaging, and publishing graphic warning labels and toll-free quit lines on packages.

**Tariffs raise prices and discourage consumption.** Since 2002, every U.S. trade agreement has eliminated tobacco tariffs in partner countries, making them cheaper and more accessible.

**Ban on products.** This year Indonesia successfully challenged a U.S. ban on clove cigarettes, as well as several other flavors, though not menthols. Indonesia, as the major country of origin for clove cigarettes, claimed a violation of the World Trade Organization (WTO) rule that products and services must be treated equally, regardless of the country of origin. The ruling exemplifies the inadequacy of WTO standards and tribunals to supplant the democratic processes required to protect public health.

**Plain packaging.** Bilateral and regional trade agreements now include "investor-state" provisions that grant legal rights to private corporations to file trade challenges against governments for financial damages for a range of alleged infractions. The "investor-state" rule was first adopted in 1994 under NAFTA. Tobacco companies are now directly challenging plain packaging plans in Australia and Uruguay, claiming that these violate trademark rights under trade agreements, even though the measures apply equally to products from all countries. The tobacco industry's trade charges, while poorly substantiated, are disrupting implementation of plain packaging, and in the past have chilled such programs entirely.

### **Trans Pacific Partnership: An Historic Opportunity to Advance Health**

The U.S. proposes to introduce a new policy on tobacco in current negotiations on the Trans Pacific Partnership (TPP) Agreement, a major trade pact with 9 Pacific Rim nations in South America, Asia and Oceania. These countries include Australia and others in the forefront of implementing tobacco controls. The next round of talks is scheduled for May 8 - 16, 2012, in Dallas, Texas.

The following analysis is based on a verbal description of the Administration's proposal provided to CPATH and colleagues by the Assistant USTR for the TPP negotiations, Barbara Weisel, in response to CPATH's request. Our comments follow each proposal.

**U.S. Proposal 1.** **The U.S. recognizes the unique status of tobacco products**, as enshrined in the 2009 Family Smoking Prevention and Tobacco Control Act, and articulated in the emerging international consensus.

**Comment 1:** **This is an important and accurate statement, but not a change in policy.**

**U.S. Proposal 2.** **The U.S. will continue to seek to eliminate tariffs on tobacco and tobacco products**, but will accept countries' proposals for the timetable to phase out their own tariffs.

**Comment 2:** **This represents no substantive change in current trade policy. Eliminating tobacco tariffs will continue to make tobacco products cheaper and more accessible.**

USTR asserts that countries could impose other taxes on tobacco products that are trade-neutral; tariffs specifically tax only foreign-produced products. But International Monetary Fund economists note that a value-added tax is not proven to make up for the lost revenue from lowering tariffs. **Middle income countries are only likely to recover 45-60% of lost tariff revenue from other taxation sources and low-income countries are at best likely to recover 30% or less of lost tariff revenue from other taxation sources.** *Tax Revenue and (or?) Trade Liberalization*, Baunsgaard and Keen, June 2005, IMF Working Paper, WP/05/112, <http://www.imf.org/external/pubs/ft/wp/2005/wp05112.pdf>

There may be well-grounded public health reasons to use tariffs to target tobacco products from a particular country for different treatment. Foreign brands may use different additives, and different marketing budgets and policies, compared with national brands produced in some countries.

**U.S. Proposal 3.** Existing trade agreements offer a "**general exception**" to some trade rules, that state governments can adopt regulations that are necessary to protect public health. **The new policy would add the ability to adopt regulations that impose nondiscriminatory restrictions on tobacco products specifically, that are required to protect the public's health.** The policy applies to all chapters of the

agreement but maintains key trade disciplines: **regarding national treatment** (equal treatment of foreign and domestic products), **transparency** (requirements to reveal and allow extensive scrutiny of regulations, including by affected industries), or **expropriation** (protection from loss of future profits, for reasons that can include public health protections).

### Comments on #3:

**Existing "General Exceptions" have failed to protect public health:** Tobacco control measures **could still be challenged for violating rules regarding national treatment, transparency, or expropriation.** In addition, Article XX of the General Agreement on Tariffs and Trade (GATT), for example, states it permit measures that protect human, animal or plant life or health. But it also states two exceptions that have proven fatal in almost every trade challenge: The measure must be "**necessary**," and it **must not be discriminatory** or a **disguised restriction on trade**.

In case after case, public health regulations have proven vulnerable to aggressive charges that they are not "necessary." Trade tribunals routinely assert that if any hypothetical alternative remedy could be imagined, the actual hard-fought existing policy in question is not necessary, and thus is a violation of the trade agreement. (The policy described to CPATH used the word "required" rather than "necessary." This is not likely a significant distinction.)

In addition, **there are important tobacco measures, such as limits or bans on advertising and certain trademarks, that are intended to be trade-restrictive, and to discriminate based on country of origin. One report asserts that language on country of origin could mitigate the national treatment discipline. We have not been able to review this language.**

**U.S. Proposal 4.** The language is intended to provide a "safe harbor" if a government has identified measures determined by a public health agency or authority through a science-based process.

**Comment 4:** This would not protect actions by legislatures, such as Congress' action to ban clove cigarettes.

**USTR agrees that trade charges may be initiated, but asserts they would be more easily opposed. It is never possible to predict how a trade tribunal will rule. In addition, this limited objective might not address a variety of needs and concerns by TPP partner countries.**

### Tobacco Must Be Carved Out

Recognizing and naming tobacco as a special case in the context of trade policy is an important rhetorical step in the right direction. **The Administration** deserves encouragement to take a substantive policy position that clearly offers an effective remedy. It **should join with medicine and public health, and responsible corporate leaders in other sectors, to remove tobacco, tobacco products, and tobacco control measures from the jurisdiction of trade agreements.** In addition, it should **eliminate "investor-state" provisions** that authorize corporations to challenge nations' laws and regulations.