



ENSP

European Network
for Smoking and Tobacco Prevention

Transatlantic Trade and Investment Partnership (TTIP), Issues for Tobacco Control

Introduction

Tobacco products are unique: they cause chronic diseases for their active and passive consumers (cancer, cardio-vascular and respiratory diseases); they prematurely kill one in two loyal consumers (700 000 annual deaths in the European Union¹, 480 000 in the United States²); the cost of tobacco-related diseases weighs considerably more than the tax revenues from tobacco products (in France, the annual tobacco tax revenues are 11 billion euros, tobacco-related health expenditure is 26 billion euros³); productivity losses related to tobacco are far from negligible.

Faced with this public health scourge and despite intense lobbying by the tobacco industry, governments have reacted at the international (WHO Framework Convention on Tobacco Control - FCTC), European (Tobacco Products Directive - TPD) or national level by adopting tobacco control measures.

The tobacco industry is a highly concentrated economic player, with four multinationals (British American Tobacco, Imperial Tobacco, Japan Tobacco, Philip Morris International) dominating three-quarters of the world market outside China⁴. The global tobacco market is valued at near 570 billion euros⁵. This very special industry uses all possible channels to keep its harmful business.

Among these channels, trade or investment treaties are of particular interest to multinational tobacco companies. Among the draft treaties, they are particularly interested in the TTIP, which has the ambition to create a free-trade and free-investment zone between the United States (USA) and the European Union (EU). This ambition was recently reaffirmed by the European Council, which met on 20 and 21 October 2016, and “invites the Commission to continue the negotiations with the US authorities to be able to present an ambitious, balanced and comprehensive free trade agreement”⁶.

¹ Impact Assessment of the Tobacco Products Directive

² Tobacco Free Kids, *Toll of Tobacco in the United States of America*

³ Pierre Kopp, *Le coût social des drogues en France*, Office Français des Drogues et de la Toxicomanie, Décembre 2015

⁴ <http://www.bat.com/ar/2011/business-review/global-market-overview/>

⁵ EPHA, *Tobacco and public health in TTIP*, June 2016

⁶ European Council, *European Council meeting (20 and 21 October 2016) – Conclusions*

Three central elements of the future TTIP, and more generally of new trade and investment agreements, are of potential concern for tobacco control and public health:

- The regulatory pillar: In the name of regulatory coherence and living regulatory cooperation, there is a risk of weakening the right to regulate in the public interest, particularly in the area of health.
- Investor-state dispute settlement (ISDS) or investment court system (ICS): In the name of investment protection, systems of divesting state courts are being put in place for the benefit of private international arbitral tribunals, a means of litigation favoured by the tobacco industry.
- Market Access: By eliminating tariffs, without taking into account the specific nature of tobacco products, there is a risk of promoting accessibility to these harmful products.

Moreover, there is concern about the transparency of the negotiation process and the interference of tobacco industry. Recall the terms of Article 5.3 FCTC: *“In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law”*.

But the United States is not a Party to the Convention and the European Ombudsman has heavily criticised the failure of the European Commission (except DG SANTE) to disclose proactively the contacts with tobacco lobbyists, especially in relation to the TTIP negotiations⁷.

So TTIP is an issue for tobacco control and we must analyze this issue for a European Union based on treaties, including the Treaty on the Functioning of the European Union (TFEU), which contains a very ambitious article 168 on public health: *“A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”*.

1. Regulatory Pillar

In this field, we don't know much about the US position⁸, but the main elements of the EU positions have been revealed: early warning (obligation to notify at an early stage the other Party about proposals of regulation), trade impact assessments (with systematic impact on trade and investment), regulatory dialogue (dialogue between the Parties if a future measure could have an impact on trade), Regulatory Cooperation Body (a council to push for living regulatory cooperation and convergence), stakeholders' participation, sectorial working groups.⁹

⁷ <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/63624/html.bookmark> ; <http://www.corporateeurope.org/international-trade/2015/08/black-out-tobaccos-access-eu-trade-talks-erie-indication-ttip-threat>

⁸ But it seems that US negotiators are not very inclined to compromise in this area : “La coopération réglementaire au coeur du Tafta”, *Le Monde Economie*, 02 May 2016

⁹ *TTIP – EU proposal for Chapter : Good Regulatory Practices*, 21 March 2016 ; European Commission, *Regulatory cooperation in TTIP, An introduction to the EU's revised proposal*, 21 March 2016

With this agenda, there are concerns about the right to regulate for public interest, especially in the field of public health including tobacco control. TTIP must not be a means to undermine current regulations or to block further measures taken to protect people.

For tobacco control in the European Union, the challenge of the implementation of TPD and of FCTC requires to be vigilant about the guarantees in the TTIP text to avoid any “chilling effect” or “cooling impact” on the right of any level of government to adopt new public health, especially tobacco control policies.

This “chilling effect” is clearly one of the main objectives of the tobacco industry in the framework of TTIP negotiations¹⁰. On the US side, the US Chamber of Commerce has openly been one of the main forces pushing for making regulatory cooperation the cornerstone of TTIP. The US Chamber of Commerce is well-known for its proximity with tobacco industry.¹¹ On the EU side, some investigations even suggest that the lobbying of tobacco industry could have inspired the EU initial proposals in this field called “Better Regulation Agenda”¹². Corporate Europe Observatory thinks that, generally in situations of regulatory cooperation, «*the main proposals of the EU have footprint of major industry lobby groups*”¹³.

Without commenting more on the reality of this assertion, there is no doubt that assurances must be obtained that tobacco control regulations will not be considered as non-tariff barriers to trade (NTBs) or technical barriers to trade (TTBs). In fact, elimination of NTBs, with the focus on the cost of regulation for business and the call for Regulatory Coherence and Good Regulatory Practices, is the core of the new generation of trade and investment agreements¹⁴. The EU Council Directives for the negotiation precisely defined regulatory issues and NTBs as one of the “*three key components*” (with market access and rules)¹⁵.

Furthermore, as we have previously written, TTIP also envisions the creation of a Regulatory Cooperation Body and wants to establish a Living Regulatory Cooperation. This is consistent with the new generation of trade and investment agreements, which have moved beyond removal of tariffs and technical barriers to trade, towards including rights for the private sector to be informed at an early stage and to participate in the regulatory process¹⁶. The idea is to allow early intervention by US and EU regulators in each other’s rule and policy making processes, with

¹⁰ <http://www.corporateeurope.org/international-trade/2015/08/black-out-tobaccos-access-eu-trade-talks-erie-indication-ttip-threat>; Usman Khan, Robert Pallot, David Taylor, Panos Kanavos, *The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health*, January 2015

¹¹ http://global.tobaccofreekids.org/en/industry_watch/marketing/chamber_of_commerce; http://www.nytimes.com/2015/10/10/business/us-chamber-of-commerces-focus-on-advocacy-a-boon-to-tobacco.html?_r=0; <http://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html>; <http://www.nytimes.com/interactive/2015/06/29/us/us-chamber-commerce-cigarette-lobbying.html>

¹² *The Origin of EU Better Regulation – The Disturbing Truth*, http://www.smokefreepartnership.eu/images/event-file/Report_version_27012010_-2.pdf; *Evidence-based policy making and “Better Regulation”: The battleground for standardised packaging of tobacco*, <http://www.bath.ac.uk/ipr/pdf/policy-briefs/tobacco-plain-packaging.pdf>

¹³ Corporate Europe Observatory, *Cooperating to deregulate*. It is true, for example, that the factsheet of the European Commission – *Regulatory cooperation in TTIP* – is very similar to a document of Business Europe and US Chamber of Commerce named *Transatlantic Trade and Investment Partnership (TTIP), The Regulatory Component*, 2014

¹⁴ Regulatory Studies Center of the George Washington University, *Regulatory cooperation: Lessons and opportunities*, April 2016; Corporate Europe Observatory, *Dangerous Regulatory Duet*, January 2016

¹⁵ Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, 17 June 2013, declassified on 9 October 2014

¹⁶ Framework Convention Alliance (FCA), “Tobacco Control in Trade and Investment Agreements”, *FCA Policy Document*

involvement and consultation of stakeholders, “to promote the achievement of compatibility of regulatory regimes”¹⁷. Corporate Europe Observatory disclosed documents revealing that US and EU business groups have lobbied actively for years for such a structure, intending to get a chance to screen and influence future legislation¹⁸. The main US and EU business groups created an official Business Alliance for TTIP¹⁹, which pushed for a regulatory component in the TTIP defined as the “key to success”²⁰. One of the TTIP leaks, revealed by Greenpeace, shows that the participation of the stakeholders is envisaged by the negotiators as extending to the possibility to submit official proposals to both Parties at an early stage, even before EU Council and Parliament will examine the texts²¹.

Although the EU Council Directives stated that TTIP “will aim at removing unnecessary obstacles to trade and investment, including existing NTBs, [...] by reaching an ambitious level of regulatory compatibility [...], including through mutual recognition, harmonisation and through enhanced cooperation between regulators”, they also asserted that “Regulatory compatibility shall be without prejudice to the right to regulate in accordance with the level of health [...] protection [...] that each side deems appropriate, or otherwise meeting legitimate regulatory objectives”²².

The problem is to ensure that the final text will contain concrete guarantees, so that this assertion can be effective.

At this stage, thanks to TTIP leaks, we know of the detailed Initial Provisions for the regulatory issues proposed by EU and US negotiators²³, comments about the negotiation progress on this topic²⁴ and the EU’s revised proposals for legal text on Regulatory Cooperation and on Good Regulatory Practices dated both 21 March 2016²⁵.

The EU initial proposals wanted each Party to make publicly available at least once a year a list of planned regulatory acts at central level, with planning and timing of their adoption, including planned stakeholder consultations and potential for significant impacts on trade or investment. The EU text stated that “the regulating Party [...] shall take into account the contributions received in the finalization of their regulatory acts”; the US one went further, since it stated that the regulatory authority of the Party after receiving the comments may “revise the regulation” and must give “an explanation of the nature and the reason for any significant revisions to the regulation”. Moreover, the US text proposal stated that each Party “shall provide for any interested person to petition any regulatory authority of the Party for issuance, amendment, or repeal of a regulation”, for example in

¹⁷ Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, 17 June 2013, declassified on 9 October 2014

¹⁸ <http://corporateeurope.org/trade/2013/12/regulation-none-our-business> ; <http://corporateeurope.org/sites/default/files/businesseurope-uschamber-paper.pdf>

¹⁹ The members are Business Europe, American Chamber of Commerce, AMCHAM EU, AMCHAMS in Europe, EUROCHAMBRES, European Services Forum, ERT, Trans-Atlantic Business Council

²⁰ Business Alliance for TTIP, *Regulatory Component in the TTIP – Key to Success*, 30 September 2014

²¹ Note – *Tactical State of Play of the TTIP Negotiations*, EU restricted, March 2016

²² Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, 17 June 2013, declassified on 9 October 2014

²³ *Initial Provisions for Chapter [] [EU: Regulatory Cooperation] [US: Regulatory Coherence, Transparency, and other Good Regulatory Practices]*, EU restricted

²⁴ Check out especially the 15 Public reports on the rounds of negotiations, released by the European Commission.

²⁵ *TTIP – EU proposal for Chapter : Regulatory Cooperation*, 21 March 2016 ; *TTIP – EU proposal for Chapter: Good Regulatory Practices*, 21 March 2016 ; European Commission, *Regulatory cooperation in TTIP, An introduction to the EU’s revised proposal*, 21 March 2016 ; European Commission, *Regulatory cooperation in TTIP, The benefits*, 21 March 2016 ; European Commission, *Regulatory cooperation in TTIP, An introduction to the EU’s revised proposal*, 21 March 2016

case that “the regulation has become ineffective at protecting health”. The EU imagined the Regulatory Cooperation Body’s main function to be the preparation and publication of an “Annual Regulatory Cooperation Program” which shall be discussed with stakeholders representing “business, consumer, trade unions, environmental groups and other relevant public interest associations”.²⁶ The EU’s revised proposals dated 21 March 2016 did not substantially modify these mechanisms²⁷.

If the European Commission is perfectly right to say that regulatory cooperation will leave the ultimate decision to elected representatives and won’t undermine the EU treaties or Member State Constitutions, which lay down the right to regulate²⁸, we cannot ignore the potential impact on the EU decision-making of those processes. In fact, business groups and entities have the capacity to contract crowds of lobbyists in Brussels, without any comparison to the capacities of NGOs. Furthermore, industry lobbyists already have privileged access to EU officials²⁹. And the design of the stakeholders’ participation “offer ample opportunities for businesses”³⁰. In this context, regulatory cooperation could legitimate and increase corporate lobbying. For tobacco control, there is a risk that all these processes could facilitate the lobbying of the tobacco industry to block, delay or even roll back some regulations³¹. The precedent of its intense lobbying against the TPD reminds us of the danger. PMI alone employed 161 lobbyists against adoption of the TPD³².

Faced with this risk, the only proposed guarantees were in the initial proposals of the EU to introduce in the “General Objectives and Principles”, the following sentence: “The provisions of this Chapter do not restrict the right of each Party to maintain, adopt and apply measures to achieve legitimate public policy objectives, such as those mentioned in paragraph 1 [Health is part of those objectives], at the level of protection that it considers appropriate, in accordance with its regulatory framework and principles”. But it should be noted that the part on Objectives and Principles is like a preamble, not having the same legal force as the other legal provisions of a treaty. Furthermore, the wording is restrictive since it applies only to measures achieving legitimate public policy objectives, the notion of legitimacy being subjective and capable of multiple contestation³³.

In the Chapter about “Technical Barriers to Trade”, also revealed by TTIP leaks, US negotiators initially proposed to write that the objective to reduce unnecessary TBTs must be reached “while achieving the levels of health [...] protection that each side deems appropriate and otherwise meeting legitimate regulatory objectives”³⁴. But again, it seems more a declaratory right than a true legal norm.

²⁶ *Initial Provisions for Chapter [] [EU: Regulatory Cooperation] [US: Regulatory Coherence, Transparency, and other Good Regulatory Practices]*, EU restricted

²⁷ *TTIP – EU proposal for Chapter : Regulatory Cooperation*, 21 March 2016 ; *TTIP – EU proposal for Chapter: Good Regulatory Practices*, 21 March 2016

²⁸ European Commission, *TTIP and Regulation : an Overview*, 10 February 2015

²⁹ Check out the part of this study about Transparency

³⁰ Corporate Europe Observatory, *Cooperating to deregulate*

³¹ Robert Stumberg, “Safeguards for Tobacco Control: Options for the TPPA”, *American Journal of Law and Medicine*, no 39, 2013

³² http://tobaccotactics.org/index.php/PMI%E2%80%99s_Lobbying_Campaign_to_Undermine_the_TPD ; <https://www.theguardian.com/business/2013/sep/07/tobacco-philip-morris-millions-delay-eu-legislation>

³³ *Initial Provisions for Chapter [] [EU: Regulatory Cooperation] [US: Regulatory Coherence, Transparency, and other Good Regulatory Practices]*, EU restricted. The EU initially proposed also to include the same idea of protecting the right to regulate for “legitimate public policy objectives” in the article about Regulatory Compatibility, but the comments on the wording remain.

³⁴ *Chapter [] Technical Barriers to Trade*, 30 November 2015, EU restricted

The EU's revised proposal dated 21 March 2016 about Regulatory Cooperation sought to strengthen the protection of the right to regulate. In the Preamble to the TTIP, the EU proposed to reaffirm *"the importance of regulatory measures to achieve public policy objectives, [...] at the level each Party considers appropriate and does not reduce, undermine or otherwise compromise the level of protection in the relevant public areas"*. The paragraph 1 of the Objectives and General Principles section established a list of examples of public policies that should benefit from enhanced protection. Among the latter, the protection of public health was explicitly mentioned. Furthermore, it was written in this section that the aim of regulatory cooperation was to improve and *"not reduce, undermine or compromise the level of protection in public policy areas such as those referred to under paragraph 1"*, without affecting the ability of each Party to *"adopt, maintain and apply measures [...] at the level of protection it considers appropriate, in accordance with its regulatory framework and principles"*³⁵. The last sentence also appears in the General Provisions of the EU's revised proposal about Good Regulatory Practices³⁶.

It was clear that these new EU drafting proposals (including the abandonment of the "legitimate" qualification of the public policies) sought to reassure those concerned about the right to regulate, but it should be noted that none of these wordings are contained in the normative articles of what would become the treaty. They are all included in the preamble, or in Objectives and General Principles, or in General Provisions, all parts with relatively inconsistent legal normativity.

Consequently, this regulation silo remains a source of major concern for many European NGOs. For example, 170 of them made a public declaration urging the EU to remove completely the regulatory cooperation from TTIP negotiations³⁷. Without going so far, European Public Health Alliance (EPHA), European Heart Network (EHN) and European Association for the Study of the Liver (EASL), after knowing the EU's revised proposals about Regulatory Cooperation and Good Regulatory Practices, maintained their reservations about the integration of Good Regulatory Practices in TTIP and their concerns about the mandatory regulatory cooperation and the living agreement approach³⁸.

It is true that in the state of what is known about the negotiations, the guarantees for the right to regulate seem to lack consistency. At least, the right to regulate in the public interest should be included in a real normative clause with general application to all TTIP chapters and the wording should be clarified to avoid the necessity test of each measure adopted; it must be written explicitly that the regulatory harmonization could not legally be a downward harmonization but only from the top; the Regulatory Cooperation Body must be submitted to real transparency and accountability processes, including parliamentary control.

2. Investor-state dispute settlement (ISDS) or investment court system (ICS)

The possible inclusion in the TTIP of an investor-state dispute settlement (ISDS) mechanism is by far the most controversial part of the TTIP negotiations. In fact, the Directives for the negotiation given by the Council of the European Union to the Commission envisaged, since the beginning, the inclusion of an ISDS clause³⁹.

³⁵ *TTIP – EU proposal for Chapter : Regulatory Cooperation*, 21 March 2016

³⁶ *TTIP – EU proposal for Chapter: Good Regulatory Practices*, 21 March 2016

³⁷ *Déclaration des organisations de la société civile sur la coopération réglementaire dans le TTIP*, Février 2015

³⁸ EPHA, EHN, EASL, *Paralysis by Analysis : Public Health concerns on Regulatory cooperation in TTIP*, Joint Press Release, 18 March 2016

³⁹ *Initial Provisions for Chapter [] [EU: Regulatory Cooperation] [US: Regulatory Coherence, Transparency, and other Good Regulatory Practices]*, EU restricted

An ISDS mechanism can allow corporate investors to sue States before international private arbitration tribunals, for their real and virtual future losses because of the development of new rules that could impact their investment. So, there are many concerns about the risk of litigation for EU and EU Member States and for their right to regulate.

In fact ISDS, which has existed since the 1950s, is included in three thousand bilateral investment protection treaties (BITs) and has already led to multinationals suing countries for public interest regulations, including tobacco control measures⁴⁰. In the EU, ISDS is included in many of the 1 400 bilateral agreements concluded by Member States, while the EU is Party of only one ratified treaty with an ISDS mechanism⁴¹.

The ISDS mechanism is a tool to bypass the domestic court system with no judicial review at all in favour of a three-member panel made up of arbitrators, mostly lawyers from law firms specialized in international arbitration or in relation with these firms, chosen by both sides⁴², plus an agreed third one⁴³. One of these international arbitrators, Juan Fernández-Armesto, had a surprising but relevant statement about the ISDS mechanism:

“When I wake up at night about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...]. Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament”⁴⁴.

ISDS was initially conceived to protect investors from arbitrary decisions in countries with no solid legal systems and legal certainty⁴⁵. In fact, if 93% of BITs contain an ISDS, they are mostly agreements between developed and developing countries⁴⁶. Since the rule of law is respected in both EU and US legal systems, and that the courts of the US and the EU and the EU Member States grant foreign investors effective judicial protection, there is no clear reason to include ISDS in the TTIP⁴⁷. In fact, in 2004, Australia obtained that an ISDS clause was not included in its trade

⁴⁰ http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?pagewanted=all&_r=0# ; Apart from the emblematic litigation on tobacco control that we will study below, some famous examples in other fields : Swedish energy company Vattenfall sues Germany for phasing out nuclear (<http://power-shift.de/wordpress/wp-content/uploads/2012/06/TNI-PowerShift-Somo-Paper-Vattenfall-ICSID-case-updated-2013.pdf>); Lone Pine Resources sues Canada for its moratorium on fracking (http://www.huffingtonpost.ca/ilana-solomon/lone-pine-sues-canada-over-frackling_b_4032696)

⁴¹ It is the 1994 Energy Charter Treaty, CETA, and also the foreign trade agreement with Singapore, have an ISDS clause, but these have not been ratified yet: Elvire Fabry, Giorgio Garbasso, *ISDS in the TTIP, the devil is in the details*, Policy paper 122, Notre Europe – Jacques Delors Institute, 16 January 2015 ; Gus Van Harten, “The European Commission’s push to consolidate and expand ISDS: An assessment of the proposed Canada-Europe CETA and Europe-Singapore FTA”, *Osgoode Hall Law School Legal Studies Research Paper*, No 23, Vol. 11, Issue 05, 2015. There are even questions about the legality of such insertions of ISDS clauses under European law: ClientEarth, *Legality of investor-state dispute settlement (ISDS) under EU Law*, 22 October 2015

⁴² It is possible to have some doubts about the plain independence of the chosen arbitrators, when an OCDE’s working paper shows that 95% of dissenting opinion in ISDS are written by the arbitrator nominated by the losing party: OCDE, *Investor-state dispute settlement: A scoping paper for the investment policy community*, March 2012

⁴³ Dr Joshua Curtis, Dr John Reynolds, *TTIP, ISDS and the Implications for Irish Public Health Policy*, Irish Cancer Society, July 2015.

⁴⁴ www.globalarbitrationreview.com/journal/article/30399/stockholm-arbitrator-council-double-hat-syndrome

⁴⁵ Johanna Körning, Claudia Schmucker, *TTIP : A chance for Europe?*, German Council on Foreign Relations, 2014

⁴⁶ Elvire Fabry, Giorgio Garbasso, *ISDS in the TTIP, the devil is in the details*, Policy paper 122, Notre Europe – Jacques Delors Institute, 16 January 2015

⁴⁷ German Magistrates Association, *Opinion on the establishment of an investment tribunal in TTIP*, February 2016

agreement with the USA because “both countries have robust, developed legal systems for resolving disputes between foreign investors and government”⁴⁸.

Moreover, without such previous mechanism the EU and the US managed to become each other’s most important partners in foreign direct investment (FDI)⁴⁹. So, it is unclear why the ISDS mechanism would now be necessary in TTIP.

One of the most criticized issues of ISDS is the concept of “indirect expropriation” which allows an investor to claim for damages to the initial estimated profit from its investment over the duration of its originally planned lifetime⁵⁰. But there are further legal principles that can support the investor’s complaint: national treatment; direct expropriation; fair and equitable treatment; full protection and security; legitimate expectations. As with any legal provision, it all depends on the interpretation given to it. The ISDS tribunals’ interpretation developed a bold and innovative case law, providing very high levels of protection for investors⁵¹.

As a matter of law, there is no limit to the amount of the monetary penalty that may be imposed by those arbitration tribunals. In addition, even when the case is won, the remaining court costs for governments amount to an average of \$ 8 million⁵². It is true that “an international investment arbitration panel cannot force a government to change or withdraw legislation but only determine [...] a financial compensation”⁵³. But in the EU, the compensation payouts ranged from USD 0.46 million to 800 million, while in the US they varied between USD 0.5 million and 1 800 million⁵⁴. With the fear of a condemnation of such financial magnitude, the “regulatory chill” is quite understandable. Research points to the impact of such an effect in the environmental regulation field for example⁵⁵.

Furthermore, there is a problem of fair and equitable access to justice and regarding the disrupting effect on fair and free competition, because an ISDS clause would not allow governments, NGOs or domestic competitors to sue investors in international arbitration. Only multinational investors operating in another jurisdiction could activate the mechanism. Multinational investors have a long experience of using ISDS clauses to obtain financial compensation for their supposed losses and to discourage regulations. They even developed a real treaty shopping expertise, including via mailbox subsidiaries, according to their best interest⁵⁶.

As an order of magnitude, EU-US subsidiaries, which have their head offices in the USA or in the EU, but operate in the other’s region, amount to 75 000⁵⁷. Such a situation is liable to lead to the

⁴⁸ *Ibid.*

⁴⁹ Christiane Gerstetter, Nils Meyer-Ohlendorf, *Investor-state dispute settlement under TTIP, a risk for environmental regulation?*, Ecologic Institute, Heinrich Böll Foundation TTIP Series, 2013

⁵⁰ EuroMemo Group, *EuroMemorandum*, 2014

⁵¹ Dr Joshua Curtis, Dr John Reynolds, *TTIP, ISDS and the Implications for Irish Public Health Policy*, Irish Cancer Society, July 2015; [http://europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2015\)509988](http://europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)509988)

⁵² “Le traité transatlantique, un typhon qui menace les européens”, *Le Monde Diplomatique*, 29 octobre 2013

⁵³ Business Europe, *Transatlantic Trade and Investment Partnership (TTIP) Q&As*, 10 June 2014.

⁵⁴ Elvire Fabry, Giorgio Garbasso, *ISDS in the TTIP, the devil is in the details*, Policy paper 122, Notre Europe – Jacques Delors Institute, 16 January 2015

⁵⁵ Christiane Gerstetter, Nils Meyer-Ohlendorf, *Investor-state dispute settlement under TTIP, a risk for environmental regulation?*, Ecologic Institute, Heinrich Böll Foundation TTIP Series, 2013

⁵⁶ *Ibid.* ; <http://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade>

⁵⁷ The Greens, European Free Alliance in the European Parliament, *30 reasons why greens oppose TTIP*, 08 February 2016

proliferation of further litigation in the future. To this extent, it could lead to restrictions on the regulatory ambitions of governments.

For the specific issue of tobacco control, as EPHA has rightly written, *“Tobacco companies already have a strong track record in their resort to Investor Dispute Settlement mechanisms, established under other trade agreements, in order to sue sovereign governments for their application of tobacco control policies”*⁵⁸.

The cases Philip Morris vs Australia⁵⁹ and Philip Morris vs Uruguay⁶⁰ are well-known. In the first case Philipp Morris, using its subsidiary company in Hong-Kong and an investment bilateral treaty between Hong-Kong and Australia including an ISDS mechanism, tried to push the Australian Government to suspend the law about plain packaging and wanted to obtain a financial compensation of its loss caused by this legislation. In the second case, Philip Morris brought Uruguay before an international private arbitration tribunal because of its legislation about large health warnings on tobacco products, using the ISDS mechanism of the investment bilateral treaty between Switzerland and Uruguay.

These cases have demonstrated the “cooling impact” of ISDS, as evidenced by the announcement by the New Zealand Government of its decision to postpone the entry into force of its plain packaging legislation until the Australian case is resolved⁶¹.

If Australia won the case on procedural grounds, Uruguay won the court battle too but in a more interesting way for public health. In fact, the international private arbitration tribunal’s decision provides helpful lessons for public health. First, the importance of public health policy has been recognized by the tribunal: *“The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health”*. Second, the arbitrators recognized the FCTC as a text about best scientific practices and a valid source of legal obligations for Uruguay. Third, the decision of the arbitration tribunal stated that manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and stricter regulations will not be imposed. Last but not least, the tribunal stated that the legislation of Uruguay about large health warnings and single presentation requirement for tobacco products had a public health purpose, was proportionate to the objective pursued and adopted in good faith. So, the legislation of Uruguay fulfilled the conditions to be in accordance with international law⁶².

As Laurent Huber wrote, we can hope that this decision “will embolden other governments who have the political will to fight the tobacco epidemic but have been understandably circumspect about the possibility of multi-million dollar litigation”⁶³.

⁵⁸ EPHA, *Tobacco and public health in TTIP*, June 2016

⁵⁹ <http://www.mccabecentre.org/focus-areas/tobacco/philipp-morris-asia-challenge>

⁶⁰ http://www.tobaccotactics.org/index.php/Philip_Morris_vs_the_Government_of_Uruguay

⁶¹ <http://www.beehive.gov.nz/release/gouvernement-moves-forward-plain-packaging-tobacco-products>

⁶² Arbitration under the rules of the International Centre for Settlement of Investment Disputes, *Philip Morris Brand SARL, Philip Morris S.A. and Abal Hermanos S.A. Claimants versus Oriental Republic of Uruguay Respondent*, ICSID Case No. ARB/10/7, Decision, 8 July 2016 ; Campaign for Tobacco Free Kids, *Philip Morris versus Uruguay*, *Conclusions of the international arbitration tribunal*, July 2016

⁶³ Laurent Huber, Executive Director of Action on Smoking and Health (ASH) USA, “Uruguay’s Victory Over Philip Morris Will Change The Word”, *Huffington Post*, 19 July 2016

But this decision is not a binding precedent for another arbitration tribunal. Moreover the arbitral tribunals' responses are not quite homogenous in resolving disputes regarding characterization of public interest regulatory measures as indirect expropriation under an investment treaty⁶⁴, even though many of them attach importance to the purpose and proportionality of the measure if it is adopted in good faith⁶⁵.

In this worrying context, the strong opposition to ISDS by a large number of the most important EU NGOs, the continued rise in opposition within national parliaments and European political and trade union forces and the reluctance of some governments⁶⁶ allowed for a very heated debate across Europe on this topic. This debate and pressure resulted in the organization of a public consultation by the European Commission concluded on 17 July 2014, which saw 150 000 answers and an overwhelmingly negative response (97%) to ISDS⁶⁷. As a follow-up, on 8 July 2015, the European Parliament adopted by a great majority a compromise text on TTIP that urges to replace the ISDS system with a new system where private interests cannot undermine public policy objectives, where judges will be professional magistrates and respect the publicity of hearings and where a judicial review will be allowed by the creation of an appellate mechanism.⁶⁸

Under pressure, the European Commission elaborated EU's revised proposal for Investment Protection and Resolution of Investment Dispute, which was made public on 12 November 2015. It contained a specific section 3 on Resolution of Investment Disputes and Investment Court System (ICS).⁶⁹ According to numerous studies, EU's revised proposal⁷⁰ – the Investment Protection Court (ICS) – would not prevent those types of legal processes against States acting for public interest, especially tobacco control, and would not reduce the regulatory chilling effect⁷¹.

In fact, the ICS presents significant defects and threats for public interest policy and regulation: The existence of a parallel legal system is maintained; there is no domestic remedies' exhaustion obligation; the definition and scope of investment are still very large; nothing substantial is proposed to avoid the "regulatory chill"; the ICS is further from pure private arbitration than ISDS, but it is not an independent public court, neither than the envisaged Appeal Tribunal, but rather "*a permanent court of arbitration*"⁷²; there is not sufficient guaranties to eliminate the potential for

⁶⁴ On the judicial definition of the indirect expropriation as an infringement of the right to property without transfer of title, check out for example: Iran-United States Claims Tribunal, *Starrett Housing Corp. versus Iran, Case No 4 Iran-US CTR 122*, 19 December 1983.

⁶⁵ For example: CIRDI, *LGRE versus Argentina Republic, Case No ARB/02/1*, 3 October 2006

⁶⁶ "Tribunaux d'arbitrage : la France présente ses propositions", *Le Monde*, 2 June 2015

⁶⁷ European Commission, *Commission staff working document, Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement*, 13 January 2015

⁶⁸ European Parliament, Press Release, 8 July 2015 ; "Ces tribunaux privés qui font peur", *Le Monde*, 13 January 2015

⁶⁹ *Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Chapter 2: Investment, Section 3: Resolution of Investment Disputes and Investment Court System*, document made public on 12 November 2015

⁷⁰ As far as we know, this revised proposal was not accepted by the US negotiators: "Si vous n'avez rien suivi au Tafta, le grand traité qui effraie", *Le Monde*, 13 October 2015

⁷¹ https://www.foeeurope.org/sites/default/files.eu-us_trade_deal/2016/icstest_web.pdf ; Trans Atlantic Consumer Dialogue (TACD), *Response to the European Commission's Investor-State Dispute Settlement "Reform" Proposal*, January 2016 ; EPHA, *EPHA position on Investment Protection in TTIP and Trade Agreements, Response to the European Commission proposal for and Investment Court System to replace ISDS*, EPHA Position Paper, November 2015 ; German Magistrates Association, *Opinion on the establishment of an investment tribunal in TTIP*, February 2016

⁷² German Magistrates Association, *Opinion on the establishment of an investment tribunal in TTIP*, February 2016

conflicts of interest by arbitrators; the ICS remains a court, which can be seized only by multinational investors.

More fundamentally maybe, as the Canadian Centre for Policy Alternatives (CCPA) wrote, the “*Commission’s limited procedural reform proposals [...] avoid the essential issue: investor-state arbitration is not needed in [...] the TTIP*”.⁷³

In this context, a lot of EU NGOs maintain the firm position that ISDS should either be removed completely from TTIP or should not apply to any public interest measures. This position is expressed by EPHA and the Smoke Free Partnership (SFP) for instance⁷⁴.

If this goal will not be achievable, at the very least the TTIP must exclude all tobacco control measures from the scope of the investment protection provisions and from the ISDS mechanism, considering the specific and harmful nature of tobacco products. This solution could be inspired by the example of the Trans Pacific Partnership (TPP). TPP, for which the new US elected President Donald Trump promised not to seek ratification, contains a clause that allows Parties to deny the benefits of ISDS in respect of tobacco control measures:

“Article 29.5: Tobacco Control Measures

A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.”⁷⁵

It was a step forward for tobacco control, but it has its limitations. Firstly, it grants Parties the choice to deny, which requires them to actively opt-out, rather than just excluding tobacco control measures automatically. Secondly, it is limited to Investor-State disputes, so state-state disputes can still be brought. Thirdly, it only excludes tobacco control measures from the dispute mechanism, and not of the chapters on regulatory cooperation or tariff reductions. But the most difficult issue with the tobacco control exclusion from TPP, and the possible exclusion from TTIP, is that it deals with only one public interest issue – tobacco control. All other public interest issues, including other public health issues, are subject to ISDS.

3. Market Access, Tariffs

TTIP’s ambition is to remove the essential of EU and US tariffs⁷⁶. As far as we know, for the moment, the negotiators have the objective of eliminating 97% of tariffs⁷⁷. Among the latter, those affecting

⁷³ Canadian Centre for Policy Alternatives (CCPA), *Trade and Investment Research Project*, January 2016

⁷⁴ EPHA, *Tobacco and public health in TTIP*, June 2016

⁷⁵ <https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf>

⁷⁶ The initial objective of EU was “to eliminate all duties on bilateral trade”, in Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, 17 June 2013

tobacco products are concerned. It could lead to an increase in tobacco consumption, because of the higher affordability and availability of tobacco products, which could result of this removal. This could undermine tobacco taxes and price policies, which contribute considerably to reductions in tobacco use.

In fact, tariffs are a key factor in the retail price of tobacco products. In the EU, for example, tariff rates are 10.0% to 57.60% according to the different tobacco products⁷⁸, with a weighted average tariff at 22, 1%⁷⁹. So, EU high tobacco tariffs are serving public health, also if it is not their main purpose. They have a real impact on prices, and all evidence-based studies underline the impact of prices on tobacco consumption, especially among the young and the poor people for whom affordability is key⁸⁰. The potential removal of tariffs on tobacco products could lead to lower priced tobacco products and higher consumption, as scientific studies demonstrate⁸¹. Research even suggests that the impact of free trade agreements would be overall negative for health⁸². The Interim Technical Report, prepared by Ecorys society for the European Commission, focuses on the possible negative consequences of this removal:

*“For tobacco, alcohol, sugars: We find that, indeed, tariff liberalisation could lead to increased consumption of these commodities since this may have a price reduction effect. This potential negative effect would be disproportionately higher for the lower income strata of the population”.*⁸³

If such a situation would occur, the EU should at least try to compensate by harmonising and increasing taxes and excise duties on tobacco products⁸⁴. The process of the revision of the Directive 2011/64/EU of 21 June 2011⁸⁵, on the structure and rates of excise duty applied to manufactured tobacco, could be an opportunity.

In fact, it would be better to obtain the global exclusion of tobacco products from TTIP and from all free trade and investment agreements, because tobacco is the only consumer product that kills half of its long-term users and should not be treated as other products. But this does not seem to be an achievable goal.

4. Transparency

⁷⁷ European Commission, *Public Report of the 14th Round of negotiations for the Transatlantic Trade and Investment Partnership*, July 2016 ; European Commission, *Transatlantic Trade and Investment Partnership Advisory Group, Meeting Report*, 6 September 2016

⁷⁸ European Commission TARIC database ; EPHA, *Public Consultation on Sustainability Impact Assessment of EU Trade Negotiations*, August 2015

⁷⁹ European Commission, *Trade SIA on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA, Interim Technical Report*, prepared by Ecorys, July 2016

⁸⁰ World Health Organization, *WHO Report on the global tobacco epidemic*, 2015; F.J. Chaloupka, M. Grossman, *Tobacco control policies and youth smoking*, Cambridge, Massachusetts, National Bureau of Economic Research, 1996.

⁸¹ E.R. Shaffer, J.E. Brenner, T.P. Houston, “International trade agreements : a threat to tobacco control policy”, *Tobacco Control*, 2005, Vol. 14

⁸² U. Khan, R. Pallot, D. Taylor, P. Kanavos, “The Transatlantic Trade and Investment Partnership: international trade law, health systems and public health”, *London School of Economics and Political Science and Modus Europe Report*, 2015

⁸³ European Commission, *Trade SIA on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA, Interim Technical Report*, prepared by Ecorys, July 2016

⁸⁴ EPHA, *Tobacco and public health in TTIP*, June 2016

⁸⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:176:0024:0036:EN:PDF>

One of the most prevalent concerns is the lack of transparency in the TTIP negotiations⁸⁶. For tobacco control, this lack of transparency may be reflected in insufficient compliance with the requirements of Article 5.3 of the FCTC: *“In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law”*.⁸⁷

Regarding article 5.3 FCTC and its Guidelines, European Public Health Alliance (EPHA) recommends TTIP negotiating Parties to comply with them, urging TTIP to include a commitment from the USA to ratify the WHO FCTC⁸⁸. As USA is not a Party to the Convention, the US negotiators are not bound by FCTC measures, and it seems difficult to achieve the objective of the US ratification of FTCT in the framework of the TTIP. But the EU negotiating Party, the European Commission, must comply with FCTC and especially article 5.3.

In this regard, there are many questions among NGOs about the interference of industrial lobbies, including those of tobacco. Reports from Friends of the Earth Europe and from Corporate Europe Observatory reveal the extent to which corporations have lobbied the European Commission and dominated the process of consultation of the stakeholders for the TTIP negotiations⁸⁹. For example, Corporate Europe Observatory demonstrates that, of the 560 lobby encounters that DG Trade held to prepare the negotiations, 92% were held with business lobbyists, and only 4% with public interest groups. There are fears that this overwhelming representation has allowed an imbalance of the TTIP agenda in favour of corporate interests and to the detriment of the public interest⁹⁰.

Furthermore, talks on the TTIP still take place behind closed doors, as is the case with most international trade negotiations. The Commission explains that negotiators need to maintain a certain level of confidentiality to keep their negotiation positions secret. It is part of negotiating strategy not to reveal too much information about the other negotiating partner.⁹¹ For the Commission, transparency is ensured through direct and online contacts with stakeholders. The European Commission insists on its support for the publication of the negotiation directives and its repeated calls on the Council to declassify them⁹².

In fact, it must be acknowledged that Commissioner Malmström, in charge of the negotiations, has promoted progress in the area of parliamentary control. For example, the reading room, where selected documents are available, is opened to all MEPs and not only the members of the lead committee on International Trade.⁹³

Moreover, the European Commission published a lot of documents, including Directives for the negotiation or Public reports on the different rounds of negotiations for TTIP⁹⁴, some of which were

⁸⁶ European Parliament, Directorate General for External Policies, Policy Department, *Civil society's concerns about the Transatlantic Trade and Investment Partnership*, October 2014

⁸⁷ <http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1>

⁸⁸ EPHA, *Tobacco and public health in TTIP*, June 2016

⁸⁹ <http://www.foeurope.org/whos-driving-eu-us-trade-talks-070714> ; <http://www.corporateeurope.org/international-trade/2014/07/who-lobbies-most-ttip>

⁹⁰ Simon McKeagney, « Lobbyland : corporate-capture of TTIP talks revealed », <http://ttip2016.eu/blog/lobbyingTTIP.html>

⁹¹ http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf

⁹² http://europa.eu/rapid/press-release_SPEECH-14-549_en.html

⁹³ <http://ttip2016.eu/blog/HeidiHautalaTTIPTransparency.html>

⁹⁴ Check out http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm

obtained after strong pressure from European civil society⁹⁵. The European Ombudsman, Emily O'Reilly, inquired into the issue of the EU Commission's refusal to grant access to some requested documents about TTIP negotiations, on grounds of the protection of international relations and the decision-making process, and found no maladministration⁹⁶. But she urged the EU institutions, "given the significant public interest and the potential impact of TTIP on the lives of citizens, [...] to step up their proactive transparency policy"⁹⁷.

Furthermore, the EU positions were partially revealed by TTIP leaks by Greenpeace⁹⁸.

On the contrary, the documents and position papers of US negotiators are virtually unknown. Thereby, the US advisors and negotiators have access to a lot of EU texts, as many of them are publicly available, while the situation is different for EU advisors and negotiators. Moreover, there is a lack of access to consolidated texts, because the EU cannot take a unilateral decision to release these texts since they are shared between the EU and the US. Some members of the EU advisory group expressed their great dissatisfaction about this, but obtained only that the Commission agreed to raise the issue once again with the US side.⁹⁹

However, the European Ombudsman's inquiry into a complaint against the European Commission regarding its compliance with Article 5.3 of the FCTC and the accompanying guidelines, demonstrates that the Commission, except for DG SANTE, has a questionable ability to comply with those transparency requirements¹⁰⁰.

The complaint was initiated by Corporate Europe Observatory. This NGO complained that the European Commission was not meeting its obligation under article 5.3 FCTC to be accountable and transparent in its dealings with the tobacco industry. In particular, the complaint was that the Commission (with the exception of DG SANTE) was failing to proactively publish details and minutes of meetings with representatives of the tobacco industry.¹⁰¹

The Commission's position was that, by dealing with applications for access to documents concerning those meetings, and by responding to questions from MEPs, it was meeting its obligation under the FCTC. The Commission also contended that the strict and proactive rules adopted by DG SANTE reflected that Directorate's specific responsibilities and were not appropriate in the case of the Commission as a whole.¹⁰²

The Ombudsman, Emily O'Reilly, took the view that the Parties to the FCTC are required to take active measures both to limit the extent of interactions with the tobacco industry and to ensure transparency where such interactions occur. The Ombudsman rejected the view that the Commission generally could operate on a lower level of transparency than is required of DG SANTE: all of the Directorates are involved in legislative and policy areas, which relate to tobacco control.

⁹⁵ European Parliament, Directorate General for External Policies, Policy Department, *Civil society's concerns about the Transatlantic Trade and Investment Partnership*, October 2014

⁹⁶ European Ombudsman, Case : 119/2015/PHP, opened on 18 February 2015, Decision on 04 November 2015

⁹⁷ European Ombudsman, *Ombudsman asks Council and Commission to publish more TTIP documents*, Press release no. 17/2014, 31 July 2014

⁹⁸ <https://ttip-leaks.org/>

⁹⁹ European Commission, *Transatlantic Trade and Investment Partnership Advisory Group, Meeting report*, 5 April 2016

¹⁰⁰ European Ombudsman, Case : 852/2014/LP, opened on 20 June 2014, Recommendation on 01 October 2015, Decision on 06 December 2016

¹⁰¹ Complaint by Mr Olivier Hoedeman, Corporate Europe Observatory, ref. 852/2014/LP, 20 June 2014

¹⁰² Comments of the Commission on a request for information from the European Ombudsman – Complaint by Mr Olivier Hoedeman, Corporate Europe Observatory, ref. 852/2014/LP, 30 September 2014

Emily O'Reilly found inherent weaknesses in the current practices of the Commission (excluding DG SANTE), which makes it unreliable and unsatisfactory in terms of transparency and accountability. The Ombudsman found that the current practices amounted to maladministration. She recommended the Commission to *“ensure that the proactive policy put in place by DG SANTE, requiring the publication online of all the meetings its staff have with tobacco industry representatives and the minutes taken of those meetings, should apply across all of the Commission’s services irrespective of the seniority of the official concerned and including, specifically, members of its Legal Service”*. The Ombudsman invited the Commission to explain by 31 December 2015 how it will implement her recommendations.¹⁰³

The European Commission completely rejected her recommendations, arguing that *“the Commission continues to believe that it complies in full with its obligations under the FCTC and does not therefore consider that further steps are necessary”*.¹⁰⁴

The Ombudsman strongly disapproved of the Commission’s response to her Recommendation. She found that that the Commission failed to provide any convincing arguments to justify its refusal to apply, across all its services, the proactive transparency rules applied by DG SANTE. The Ombudsman also considered that there were no valid reasons for the Commission transparency rules regarding meetings with lobbyists to apply only to its most senior officials, thus excluding Directors, Heads of Units and any other official who interacts with the tobacco industry. Further, the Ombudsman did not agree that meetings between members of the Commission’s Legal Service and Tobacco industry lawyers did not fall under the FCTC transparency rules. The Ombudsman concluded her inquiry with a finding of maladministration on the part of the Commission arising from its refusal to apply the proactive transparency policy of DG SANTE across the entire Commission: *“The Commission’s refusal to publish online details of all meetings which its services and its staff have with the tobacco industry constitutes maladministration”*.¹⁰⁵

So, there is a lot to be done to improve the awareness by the European Commission (outside DG SANTE) and, more generally, EU decision-makers of the transparency requirements of the FCTC and in particular Article 5.3 and its guidelines. It is an important issue for defenders of public health, regarding the TTIP.

Conclusion

As we have seen, the TTIP could affect the ability of States to adopt policies and regulations of public interest, which would naturally affect the scope of tobacco control. In addition, the ISDS mechanism, including its modified version ICS, would cause a threat of litigation and a regulatory chill impact. Moreover, the reduction in tariffs, with no exceptions for tobacco products, is likely to facilitate their accessibility and affordability. Finally, the negotiating process raises questions regarding the transparency requirements of the FCTC.

¹⁰³ Recommendation of the European Ombudsman in the inquiry into complaint 852/2014/LP against the European Commission regarding its compliance with the Tobacco Control Convention, 1 October 2015

¹⁰⁴ Comments of the Commission on a request for information from the European Ombudsman – Complaint by Mr Olivier Hoedeman, Corporate Europe Observatory, ref. 852/2014/LP, 29 October 2015

¹⁰⁵ Decision of the European Ombudsman concerning the European Commission’s compliance with the Tobacco Control Convention (852/2014/LP), 6 December 2016

However, for the time being, the Brexit, the election of Donald Trump and his public position on free-trade issues as well as the reluctance of many European governments openly expressed by President François Hollande or the German Vice-Chancellor Sigmar Gabriel, make it difficult to sign and then ratify a treaty which, in the EU, will have to be ratified by the EU and all its Member States.

Despite this, the tobacco control community must remain vigilant on these issues of free trade and investment.