



**The Trans-Pacific Partnership (TPP) presents an opportunity to end the abusive tobacco industry trade lawsuits which are both undermining legitimate tobacco control policies and complicating trade negotiations.**

**Manufactured Tobacco Products are Unique.** Tobacco products are the only consumer products that kill when used exactly as intended. Without effective tobacco control policies to reduce consumption, tobacco products will kill 1 billion people in this century. No other consumer product kills 1 in 2 of its long-term users. That's why 184 parties have ratified or signed the WHO Framework Convention on Tobacco Control (FCTC) – the world's only public health treaty.

The tobacco industry abuses trade and investment agreements that include Investor State Dispute Settlement (ISDS) provisions to sue, or threaten countries, over lawfully adopted domestic tobacco product control policies, even after domestic courts have upheld them. These cases undermine the sovereignty of nations and their right to protect the health of their citizens. Even the threat of an ISDS challenge discourages countries from passing or implementing strong laws to protect the health of their citizens.

**According to the Director-General of the WHO, Dr. Margaret Chan, "[t]he high-profile legal actions targeting Uruguay, Norway [and] Australia . . . are deliberately designed to instill fear in countries wishing to introduce similarly tough tobacco control measures."**<sup>1</sup>

- **Philip Morris Brands Sarl & Ors v. Uruguay:** In 2010 Philip Morris filed a trade dispute against Uruguay based on an investment agreement between Switzerland and Uruguay, challenging Uruguay's decision to increase the size of warning labels on cigarettes and to limit the number of variations of each cigarette brand.<sup>2</sup> Uruguay adopted these policies after the tobacco industry attempted to circumvent Uruguay's ban on the use of the deceptive terms "light," "low tar" and "mild" by using color-coded brand names such as "Marlboro Green (Fresh Mint)." The arbitration costs millions of dollars to defend and is likely to continue into 2016. The ISDS case is continuing despite Philip Morris's subsidiary losing in Uruguay's highest court.<sup>3</sup>
  - **Philip Morris Asia v. Australia:** In 2011 Philip Morris Asia filed a trade dispute against Australia based on an investment agreement between Australia and Hong Kong, challenging Australia's new tobacco product packaging law.<sup>4</sup> Again, the ISDS case is continuing after being fully considered by Australia's highest court. According to Australia's defense, Phillip Morris Asia shopped around for a treaty it could use to sue, after learning about the proposed packaging law.<sup>5</sup> Phillip Morris Asia is seeking billions of dollars in damages.<sup>6</sup> The ISDS case may not be resolved until 2016 or later. Australia is also facing challenges to its tobacco product packaging law in the WTO with the tobacco industry paying the legal fees for the Ukraine, Honduras, and Dominican Republic.<sup>7</sup>
  - **Namibia:** In 2011, British American Tobacco (BAT) wrote to the Namibian government threatening that proposed tobacco control measures violated trade rules. Namibia's Health Minister, Dr. Richard Kamwi, reports that "[w]e have bundles and bundles of letters from [the tobacco industry]."<sup>8</sup> The industry's threats have delayed implementation of provisions such as limiting advertising or placing large health warnings on tobacco packaging.
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- **Gabon, Togo and Uganda:** BAT, or those representing or furthering its interests, have sent communications regarding proposed tobacco control measures to each of these governments.<sup>9</sup>
- **New Zealand:** When New Zealand announced its plans to revise its tobacco product packaging law, the tobacco industry threatened it with the same type of cases filed against Australia. As a result, New Zealand announced that it would await the outcome of the Australian proceedings before implementing plain packaging (even though a decision may not come for several years).<sup>10</sup> It estimates that an ISDS dispute could cost \$3-6million.<sup>11</sup>
- **Ireland:** Tobacco industry executives met with Irish government officials in 2013 in an effort to discourage plain packaging laws.<sup>12</sup> The Health Minister said he would be "astonished" if the tobacco industry did not challenge the packaging policy.<sup>13</sup> Ireland adopted a plain packaging policy in March 2015 despite industry opposition. The policy will go into effect in 2017.
- **Philip Morris Norway v. Norway:** In 2010 Philip Morris Norway, using provisions similar to ISDS within the European Union, challenged Norway's extension of its longstanding ban on advertising to include retail displays of tobacco products. The court for the European Free Trade Association upheld Norway's policy as a public health measure.<sup>14</sup>
- **Scotland:** In January 2014, using provisions similar to ISDS within the European Union, Phillip Morris threatened to challenge Scotland's proposed plain packaging law, seeking £500 million in lost intellectual property rights.<sup>15</sup>
- **England:** England adopted plain packaging in March of 2015 despite multiple industry threats including one from Philip Morris which threatened the government with a lawsuit seeking damages between £9 and £11 billion if it goes ahead with plain packaging.<sup>16</sup> The policy will go into effect in 2017. Scotland and Wales plan to implement the policy.

**Any delay in implementing lifesaving tobacco control measures is itself a victory for the tobacco industry, giving it years to establish a market for its products and addict a new generation of smokers, especially in emerging markets in developing countries.**

**The tobacco industry's use of trade agreements to prevent or delay tobacco control policies is a deliberate strategy which dates back to the early 1990s.**

- **Australia** originally considered implementing plain packaging in 1992,<sup>17</sup> followed by **Canada**<sup>18</sup> and **New Zealand**.<sup>19</sup> The industry successfully won a 20 year delay of the legislation in Australia (and an indefinite delay in Canada and New Zealand) by threatening governments that the law would breach trade agreements.<sup>20</sup> The tobacco companies did so notwithstanding legal advice they had received to the contrary, including advice from the World Intellectual Property Organization.<sup>21</sup>
- In 1998 the tobacco industry warned **South Africa** that its proposed graphic health warnings on 25% of the front and 50% of the back of tobacco packs would expropriate intellectual property and breach its international legal obligations.<sup>22</sup> South Africa passed the law notwithstanding the threat, which did not materialize. The tobacco industry made similar empty threats in **New Zealand**,<sup>23</sup> **Canada**<sup>24</sup> and **Hong Kong**.<sup>25</sup> Today, graphic health warnings of 50% or more are common globally and there has not been a successful trade or investment challenge.
- In 2000, BAT<sup>26</sup> and Japan Tobacco<sup>27</sup> claimed to the WHO that proposals in the FCTC to ban tobacco advertising and misleading descriptors such as "lights" would infringe intellectual property rights guaranteed in international trade law. Similar threats were made against the

**European Union.**<sup>28</sup> These tobacco control policies are enshrined in the FCTC and commonplace globally, and still have not been subject to any successful trade or investment challenge.

- In 2001, Philip Morris threatened **Canada** with a lawsuit pursuant to the ISDS provisions in NAFTA if it banned misleading descriptors such as "lights." Philip Morris alleged that it had "invested substantial sums to develop brand identity and consumer loyalty for these low yield products."<sup>29</sup> Canada subsequently delayed regulations banning these misleading terms until 2011, notwithstanding that these bans are wholly consistent with international law.

### **Philip Morris International is pushing for even stronger ISDS provisions in the TPP to advance its abusive strategies**

Philip Morris International has made clear its views on the importance of the TPP protecting its rights to use ISDS. In its 2010 submission to USTR, PMI fell just shy of acknowledging that it wants to use the TPP to sue countries over tobacco control policies like plain packaging:

*PMI is becoming increasingly concerned about government-sponsored initiatives that would effectively cancel or expropriate valuable trademark rights. PMI supports the inclusion of a comprehensive "TRIPs-plus" intellectual property chapter that includes a high standard of protection for trademarks and patents.*

*Trade restrictive legislation and regulations of the type currently being considered by several countries within the TPP ignore the rights of trademark holders under domestic legislation as well as the obligations of those countries under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Implementation of these measures would have serious implications for all intellectual property rights holders. Such legislation may also be in violation of the WTO Agreement on Technical Barriers to Trade (the TBT Agreement)...*

*The consequences of the introduction of plain packaging in Australia are far-reaching and should be examined in the broader context of U.S.-Australia trade relations and in the upcoming TPP negotiations....*

***PMI considers the availability of an investor-state dispute settlement mechanism, including the right for investors to submit disputes to independent international tribunals, a vital aspect of protecting its foreign investments (emphasis added).***<sup>30</sup>

### **The problems with the tobacco industry's right to challenge a country's tobacco control measures using ISDS provisions are compounded by the system for resolving these disputes.**

The process for resolving state to state challenges through the WTO includes a timeline, public access to documents and hearings, and an appeals process which fosters a consistent body of case law. In sharp contrast, the ISDS process is generally unpredictable and ad hoc:

- Disputes are decided by three arbitrators: one selected by each party and the other by a process of consensus (or appointed if the parties cannot agree). Disputes are often heard behind closed doors with most of the documents kept from the public.
- There is no appeals process.
- Decisions are not binding on subsequent cases, resulting in inconsistent decisions.
- ISDS challenges can run into the millions of dollars to defend and damage awards can run into the millions, and even billions, of dollars.

**The TPP must set an example for a 21<sup>st</sup> Century trade agreement by, at a minimum, recognizing the unique harms caused by tobacco products and preventing the tobacco industry from using the TPP to challenge current and/or future Parties' actions to reduce the use of tobacco products.**

The tobacco industry's abuse of ISDS provisions to challenge tobacco control measures contributed to the European Union's decision to push the "pause button" on ISDS in Transatlantic Trade and Investment Partnership negotiations with the US and conduct a public consultation that resulted in 150,000 public comments, with 97% opposing ISDS<sup>31</sup> In 2013, then EU trade commissioner, Karel De Gucht, singled-out Philip Morris's case against Australia in emphasizing that something must be done to prevent abuse of ISDS.<sup>32</sup> The current EU Trade Commissioner Cecilia Malmstrom references the need to block tobacco industry challenges as the EU continues to debate its position on ISDS.<sup>33</sup>

The global tobacco epidemic is too dangerous to give the tobacco industry yet another tool to fight important tobacco control policies that protect public health. The threat of tobacco industry litigation using ISDS provisions in trade agreements is itself a deterrent to policy implementation and a cost no country should have to face when taking action to save lives.

For Further information contact:

Ann Mesnikoff, Campaign for Tobacco-Free Kids (202) 481-9327

Gregg Haifley, American Cancer Society Cancer Action Network (202) 661-5702

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<sup>1</sup> Chan, M., Keynote address at the 15th World Conference on Tobacco and Health in Singapore, March 20, 2012, [http://who.int/mediacentre/news/releases/2012/tobacco\\_20120322/en/index.html](http://who.int/mediacentre/news/releases/2012/tobacco_20120322/en/index.html).

<sup>2</sup> Lalive, Request for Arbitration, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, February 19, 2010, <http://www.italaw.com/sites/default/files/case-documents/ita0343.pdf>.

<sup>3</sup> Supreme Court of Justice, Judgment, *Abal Hermanos, S.A. v. Uruguay*, November 17, 2010.

<sup>4</sup> Philip Morris Asia Limited, Notice of Claim, July 16, 2011,

<http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Claim%2027%20June%202011.pdf>.

<sup>5</sup> Commonwealth of Australia, Response to Notice of Arbitration, December 21, 2011,

<http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Australias%20Response%20to%20the%20Notice%20of%20Arbitration%2021%20December%202011.pdf>.

<sup>6</sup> Philip Morris Asia Limited, Notice of Arbitration, November 21, 2011, [48],

<http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf>.

<sup>7</sup> NBC, "Tobacco industry uses trade pacts to try to snuff out anti-smoking laws",

[http://investigations.nbcnews.com/\\_news/2012/11/29/15519194-tobacco-industry-uses-trade-pacts-to-try-to-snuff-out-anti-smoking-laws?lite](http://investigations.nbcnews.com/_news/2012/11/29/15519194-tobacco-industry-uses-trade-pacts-to-try-to-snuff-out-anti-smoking-laws?lite).

<sup>8</sup> The New York Times, "Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws", December 13, 2013, [http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?\\_r=0](http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?_r=0).

<sup>9</sup> *Ibid.*

<sup>10</sup> The Australian, "NZ waits on Australia on tobacco packaging", February 11, 2014,

<http://www.theaustralian.com.au/news/latest-news/nz-waits-on-australia-on-tobacco-packaging/story-fn3dxix6-1226823105574>.

<sup>11</sup> New Zealand Ministry of Health, Regulatory Impact Statement, March 28, 2012, p12.

<sup>12</sup> The Journal, "Taoiseach, ministers criticised for "inappropriate" tobacco industry meeting", May 23, 2013, <http://www.thejournal.ie/taoiseach-ministers-tobacco-industry-meeting-921637-May2013/>.

<sup>13</sup> The Journal, "Reilly: Tobacco industry wants to take me to court over plain packaging," December, 18, 2013, <http://www.thejournal.ie/james-reilly-versus-tobacco-industry-1230519-Dec2013/>.

<sup>14</sup> EFTA Court, Judgment, *Philip Morris Norway AS v The Norwegian State*, September 12, 2011, [http://www.eftacourt.int/uploads/tx\\_nvcases/16\\_10\\_Judgment\\_EN.pdf](http://www.eftacourt.int/uploads/tx_nvcases/16_10_Judgment_EN.pdf).

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<sup>15</sup> Edinburgh News, “Big tobacco’s £500m threat to Scottish Government”, February 4, 2014, <http://www.edinburghnews.scotsman.com/news/health/big-tobacco-s-500m-threat-to-scottish-government-1-3292422>.

<sup>16</sup> RT, “Big tobacco fuming: Philip Morris threatens to sue over plain cigarette packaging”, <http://rt.com/uk/180032-morris-sue-cigarette-packaging/>, August 13, 2014.

<sup>17</sup> In April 1992 the Australian Centre for Behavioural Research in Cancer recommended plain packaging: “*Health warnings and contents labelling on tobacco products*,” Anti-Cancer Council of Victoria, 1992.

<sup>18</sup> AP News Archive, May 19, 1994, “Canada May Be First To Force Plain Packaging Of Cigarettes”, <http://www.apnewsarchive.com/1994/Canada-May-Be-First-To-Force-Plain-Packaging-Of-Cigarettes/id-2f0910736bd084091073415fc2bd0668>,

<sup>19</sup> New Zealand Public Health Commission, Draft Policy Paper on Tobacco Products (recommending plain packaging), July 14, 1993, <http://legacy.library.ucsf.edu/tid/elf48a99>.

<sup>20</sup> See, for example: RJR McDonald Inc (subsidiary of RJ Reynolds Tobacco), Letter to Canadian Prime Minister Chretien, March 25, 1994, <http://legacy.library.ucsf.edu/tid/epe03d00/pdf>. See also: <http://legacy.library.ucsf.edu/tid/wwf00a99>; <http://legacy.library.ucsf.edu/tid/tla36a99>; <http://legacy.library.ucsf.edu/tid/zsv93c00>; <http://legacy.library.ucsf.edu/tid/hna36a99>; <http://legacy.library.ucsf.edu/tid/qnd14a99>; <http://legacy.library.ucsf.edu/tid/tyr76c00> and <http://legacy.library.ucsf.edu/tid/drx42c00>.

<sup>21</sup> See, for example, World Intellectual Property Organization, Letter to Rothmans International Services, July 6, 1994, <http://legacy.library.ucsf.edu/tid/awd28a99>; see also: <http://legacy.library.ucsf.edu/tid/brs60d00>; <http://legacy.library.ucsf.edu/tid/bim33a99>; and <http://legacy.library.ucsf.edu/tid/eko08a99>.

<sup>22</sup> The Tobacco Institute of Southern Africa, “Submission in respect of Tobacco Products Control Amendment Bill”, September 29, 1998, <http://legacy.library.ucsf.edu/tid/lcd73a99/pdf>, accessed 11 February 2014; see also: Philip Morris International, draft letter to Director-General, National Health and Population Development, August 23, 1994, <http://legacy.library.ucsf.edu/tid/xot45c00>.

<sup>23</sup> Tobacco Institute of New Zealand Limited, Submissions to Ministry of Health, December 1997, <http://legacy.library.ucsf.edu/tid/qee51a99>.

<sup>24</sup> Canadian Tobacco Manufacturer’s Council, Brief in Response to Health Canada’s Proposals for Tobacco Act Regulations, March 12, 1999, <http://legacy.library.ucsf.edu/tid/pqh62c00>.

<sup>25</sup> Tobacco Institute of Hong Kong Limited, Letter to Secretary for Health and Welfare, March 14, 1996, <http://legacy.library.ucsf.edu/tid/dpj44a99>; see also <http://legacy.library.ucsf.edu/tid/zza55d00>.

<sup>26</sup> British American Tobacco, Submission to the WHO’s Framework Convention on Tobacco Control, undated, <http://legacy.library.ucsf.edu/tid/akm55a99>; see also British American Tobacco, Press Release, <http://legacy.library.ucsf.edu/tid/frl55a99/pdf>.

<sup>27</sup> Japan Tobacco Inc, Comments on the proposed Framework Convention on Tobacco Control, undated, <http://legacy.library.ucsf.edu/tid/kkm55a99>.

<sup>28</sup> RJ Reynolds, Conflict Between Proposed EU Directive on Advertising and Sponsorship of Tobacco Products and International Trademark Law, February 22, 1999, <http://legacy.library.ucsf.edu/tid/vlf90d00/pdf>.

<sup>29</sup> Philip Morris International, Submission in response to the National Center for Standards and Certification Information Foreign Trade Notification No. G/TBT/N/CAN/22, <http://www.smoke-free.ca/trade-and-tobacco/Canada/pmresponsetonoi.pdf>.

<sup>30</sup> Philip Morris International, Submission in response to the request for comments concerning the Proposed Trans-Pacific Partnership Trade Agreement, [http://www.smoke-free.ca/trade-and-tobacco/Resources/TPPA/PMI%20comments%20on%20TPP\\_USTR-2009-0041-0016.1%5B1%5D.pdf](http://www.smoke-free.ca/trade-and-tobacco/Resources/TPPA/PMI%20comments%20on%20TPP_USTR-2009-0041-0016.1%5B1%5D.pdf); see also: <http://legacy.library.ucsf.edu/tid/iyf17a00>.

<sup>31</sup> <https://www.theparliamentmagazine.eu/articles/special-report/malmstr%C3%B6m-tells-meps-ttip-consultation-not-referendum>

<sup>32</sup> See Commissioner de Gucht’s speech at:

[http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc\\_152075.pdf](http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152075.pdf). See also <http://inside.org.au/philip-morris-australia-and-the-fate-of-europes-trade-talks/>. See further the European Union’s position paper on ISDS: [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf).

<sup>33</sup> “Malmstrom Floats Ideas On ISDS To Froman, Ending Long ‘Pause’ In TTIP” <http://insidetrade.com/daily-news/malmstrom-floats-ideas-isds-froman-ending-long-pause-ttip>, May 4, 2015.