INVESTOR RIGHTS

TPPA THREATS TO ASH

TOBACCO CONTROLS

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Summary
The TPPA will include an investment chapter that permits foreign investors to bring claims against governments before international tribunals based on regulatory measures that decrease the profitability of their investments.1 Philip Morris International (PMI) is using similar provisions in other international investment agreements to challenge tobacco-packaging laws in Uruguay and Australia that limit the display of cigarette trademarks and require graphic images depicting the adverse health effects of tobacco.ii These investment rules provide foreign investors — including tobacco companies — with both substantive and procedural rights that threaten tobacco regulations.

Procedural rights for tobacco companies
In general, only nation-states (“states”) have the ability to bring claims under international law against other states. Under some international investment agreements (IIAs), including both bilateral investment treaties and the investment chapters of FTAs, foreign investors are given the right to challenge states directly in international arbitration proceedings. Known as “investor-state dispute settlement” (ISDS), this process has three points of leverage against tobacco regulations:

• Monetary compensation – Usually foreign investors use this process to seek monetary damages. PMI, for example, is using ISDS under the Hong Kong – Australia Bilateral Investment Treaty to seek “billions of Australian dollars” from Australia for its tobacco packaging laws.iii

• Injunctive intervention – Increasingly, investors are also asking tribunals to order governments to stop enforcing regulations that they consider to be too burdensome. PMI is seeking such orders in its investment claims against Australia and Uruguay.iv

• Cost of arbitration – The cost of international arbitration typically runs several million dollars (US), an amount that eclipses tobacco control budgets in most countries. Advocates assert that the industry pushes litigation to divert scarce funds and government resources away from anti-tobacco campaigns.v The industry has been remarkably candid in saying that one of its litigation tactics is to “spare no cost in exhausting their adversaries’ resources.”vi

Substantive rights for tobacco companies
The investment provisions of the TPPA will also provide tobacco companies with powerful substantive rights that can be used to undermine tobacco regulations. The investor rights that pose the most significant threats to tobacco regulations include the following:
• **Expropriation** – The expropriation language of IIAs has been interpreted as requiring states to compensate foreign investors when laws have a “significant” or “substantial” adverse effect on the value of an investment. PMI is arguing that Australia’s plain packaging legislation is expropriating its investments by depriving it of its intellectual property and decreasing the value of the shares of its subsidiary in Australia.\(^\text{vii}\)

• **Fair and equitable treatment (FET)** – The fair and equitable treatment provisions in trade agreements have been interpreted to provide foreign investors with a right to a “stable and predictable regulatory environment” that protects their expectations concerning the profitability of their investments. PMI argues that Uruguay’s tobacco labeling laws violate its right to fair and equitable treatment under the Switzerland-Uruguay Bilateral Investment Treaty by frustrating its “legitimate expectations” concerning its investment in Uruguay. PMI suggests that Uruguay frustrated its expectations by, among other things, violating the provisions of the World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property (TRIPS).\(^\text{viii}\)

Several countries involved in the TPPA negotiations have previously attempted to constrain broad interpretations of FET by linking it to customary international law (CIL), which requires the investor to prove that its claim is based on a “general and consistent practice of States” that countries follow out of a sense of legal obligation (*opinio juris*).\(^\text{ix}\) In practice, however, arbitrators rarely examine actual state practice. Instead, they simply cite the awards of other tribunals\(^\text{xi}\) or the text of other investment treaties\(^\text{x}\) in support of broad interpretations of FET.

**Options for avoiding the threat**

Australia noted the threat to its tobacco regulations when it announced that it would not be subject to investor-state dispute settlement in any future agreements, including the TPPA.\(^\text{xiii}\) Other states involved in the TPPA negotiations could take a similar approach. Excluding ISDS would preclude tobacco companies from bringing direct challenges to tobacco regulations under the TPPA. It would not, however, prevent other states from challenging tobacco regulations under investment rules on behalf of tobacco companies. A more comprehensive solution would be to carve tobacco out completely from all provisions of the TPPA, including the investment chapter.

**Endnotes**


\(^{\text{iii}}\) PMI v. Australia, Notice of Arbitration, para. 8.3.

\(^{\text{iv}}\) See PM v. Australia Notice of Arbitration, para. 8.2 (“PM Asia seeks an order for the suspension of enforcement of plain packaging legislation . . . .”); PM v. Uruguay Request for Arbitration, para. 88 (“the Claimants respectfully request that the Arbitral Tribunal order the suspension of the application [of the packaging laws]”).

\(^{\text{v}}\) J K Ibrahim and Stanton A Glantz, Tobacco industry litigation strategies to oppose tobacco control media campaigns, 15 Tobacco Control 50, 54 (February 2006), available at
See PMA v. Australia, Notice of Arbitration, para. 7.3. See also PM v. Uruguay Request for Arbitration, paras. 82-83 (asserting that Uruguay’s cigarette packaging regulations expropriate Philip Morris’ intellectual property rights).  

See PM v. Uruguay Request for Arbitration, paras. 84-85. See also PM v. Australia Notice of Arbitration, paras. 7.6 -7.8 (assertion that failure to protect expectations concerning Philip Morris’s investment in Australia).  


See Charles H. Brower, II, Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105, 46 VA. J. INT’L L. 347, 358 (2006) (“[T]o the extent that treaties codify existing custom, their content should influence the application of [FET provisions] . . . . Alternatively, the widespread adoption of multilateral or bilateral treaties may reflect state practice sufficient to influence the development of custom . . . .”)  

See GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY, at 14 (April 2011) (“The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products . . . .”)