HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN LAW

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.[i] 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.[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).[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*).[ix] In practice, however, arbitrators rarely examine actual state practice. Instead, they simply cite the awards of other tribunals[x] or the text of other investment treaties[xi] 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.[xii] 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

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i *See Outlines of the Trans-Pacific Partnership Agreement* (Nov. 12, 2011)*, available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement.

ii Request for Arbitration, FTR Holdings S.A. v. Oriental Republic of Uruguay, ICSID case no. ARB/10/7, noticed February 19, 2010, registered March 26, 2010 (hereinafter "PM v. Uruguay Request for Arbitration"), *available at* http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf; Notice of Arbitration, Philip Morris Asia Ltd. v. Commonwealth of Australia, noticed Nov. 21, 2011 (hereinafter "PM v. Australia Notice of Arbitration"), *available at* http://www.ag.gov.au/Internationallaw/Pages/Investor-State-Arbitration---Tobacco-Plain-Packaging.aspx.

iii PMI v. Australia, Notice of Arbitration, para. 8.3.

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]").

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

http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563618/ (viewed Feb. 29, 2012).

[vi] Robert L. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992); *see also* Brief of Amici Curiae Tobacco Control Legal Consortium and Tobacco Control Resource Center, Howard A. Engle, M.D., et. al., Petitioners, vs. Liggett Group, Inc., et. al., Respondents. (Florida 2004), available at http://www.law.fsu.edu/library/flsupct/sc03-1856/03-1856amicus.pdf (viewed February 29, 2012).

[vii] *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).

[viii] *See* PMI 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).

[ix] S*ee, e.g.,* Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ch. 11, art. 6(2)(c), Feb. 27, 2009, *available at* http://www.dfat.gov.au/fta/aanzfta/chapters/chapter11.html#fr6 ("[T]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights."); U.S. Model Bilateral Investment Treaty, art. 5.2, 2004, *available at* http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf ("The concept… of 'fair and equitable treatment' . . . do[es] not require treatment in addition to or beyond that which is required by [customary international law], and do[es] not create additional substantive rights").

[x] *See* Moshe Hirsch, *Sources of International Investment Law* at 27 (International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law, Working Paper No. 05-11, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892564 ("An examination of decisions rendered by investment tribunals indicates that investment tribunals that pronounce various customary rules are inclined *not* to discuss the existence (or lack of) of the separate components of 'practice' and '*opinion juris'*, and that they frequently rely on decisions of international courts and tribunals . . . ."); Stephan W. Schill, *From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?* at 2 (2011) ("Investment treaty tribunals . . . generate and implement a multilateral structure for international investment relations . . . not by reference to customary international law, but by referencing their own jurisprudence.")

[xi] S*ee* 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 . . . .")

[xii] *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 . . . .")