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Constraining Government Regulatory Authority: Tobacco Industry Trade Threats and Challenges to Cigarette Package Health Warning Labels

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### Author

Crosbie, Eric

### Publication Date

2016

Peer reviewed|Thesis/dissertation

UNIVERSITY OF CALIFORNIA  
SANTA CRUZ

**CONSTRAINING GOVERNMENT REGULATORY AUTHORITY:  
TOBACCO INDUSTRY TRADE THREATS AND CHALLENGES  
TO CIGARETTE PACKAGE HEALTH WARNING LABELS**

A dissertation submitted in partial satisfaction  
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

POLITICS

by

**Eric Crosbie**

June 2016

The Dissertation of Eric Crosbie is  
approved:

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Professor Roger Schoenman, chair

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Professor Kent Eaton

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Professor Eleonora Pasotti

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Tyrus Miller  
Vice Provost and Dean of Graduate Studies



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## Abstract

### **Constraining Government Regulatory Authority: Tobacco Industry Trade Threats and Challenges and Cigarette Package Health Warning Labels**

By Eric Crosbie

This dissertation investigates the rising authority of non-state actors vis-à-vis the state by examining how tobacco companies are using trade agreements to constrain governments from implementing progressive public health policies that require placing pictorial health warning labels (HWLs) on cigarette packages. In particular, the dissertation seeks to address two different but related puzzles. First, despite being developed countries and global health leaders, it is unclear why Australia has implemented strong HWLs on cigarette packages while New Zealand has delayed its HWL proposal. Second, it is unknown why Uruguay, a developing country, has implemented strong HWLs while New Zealand, a developed country, has delayed its proposal. Informed by archival research of previously secret tobacco industry documents, interviews conducted with policymakers and health advocates closely involved in the policymaking process, and applying a most-similar and most-different systems design, this research demonstrates that tobacco industry trade threats are causing a chilling effect by delaying strong HWLs in New Zealand, but not in Australia and Uruguay and that the key factor in determining the implementation of strong HWLs lies in the governments' *reception* to these trade threats. The findings suggest that leftist governments, continued bureaucratic leadership and capacity in the Health Ministry, and independent and confident tobacco control and trade advocacy are necessary conditions in explaining how governments can shape the reception of tobacco industry trade threats and properly implement progressive HWL policies without being weakened or delayed.

Given the limitations of using existing trade agreements to globally preempt strong HWLs in Australia and Uruguay, this analysis also examines the evolving nature of global trade and health governance to demonstrate how tobacco companies are aggressively attempting to shape the pending Trans-Pacific Partnership Agreement (TPP) to further distance decision-making authority away from governments. These efforts have succeeded in securing trade mechanisms, including trade promotion authority, aimed at eliminating the policy space for health advocates to lobby for public health exemptions in trade agreements, but have failed to secure the investor-state dispute settlement (ISDS) mechanism in the TPP to directly challenge tobacco control policies in TPP member states. The results of this research will assist governments to properly implement strong HWLs without being weakened or delayed, which will dramatically help reduce smoking initiation and cessation rates, lower government health expenditures and tobacco industry profits, and help accelerate the global diffusion of strong HWLs. These results also have important implications for future regulations of alcohol, food, and medicine, which are increasingly being targeted through trade agreements.

## **Acknowledgements**

I am extremely grateful for the support I have received throughout the development of this dissertation project. Over the past four years during my time at UC Santa Cruz, I have had the privilege of working with many dedicated and encouraging scholars who have greatly influenced my development in writing, researching and teaching. My advisor, Roger Schoenman, has from the beginning encouraged me to think deeper about my research in the larger debates of international political economy and to continuously adopt a multi-disciplinary approach to help frame my project. This research would not have developed and succeeded in this fashion without him, and I am extremely thankful for all of his advice and support.

I am also incredibly grateful to the assistance I have received over the past four years from Kent Eaton. Kent, much like Roger, has from the beginning encouraged me to think more critically about my research project. I truly appreciate the time, effort and most importantly the enthusiasm Kent has provided, which has inspired me throughout the process, reminding me the significance of my project in various areas of study.

I also truly appreciate the guidance I have received from Eleonora Pasotti. Eleonora has continuously encouraged me to think more broadly about the impact of my research. During my oral exams there was some doubt that my project was too ambitious, but Eleonora had the vision and understanding to see the bigger picture and the political as well as the policy impact my project could have globally. This guidance provided the right kind of reassurance that propelled me to continue working on my ambitious task of studying multiple country case studies so I thank her immensely for that support.

Several other professors, administrative staff, and students have also helped contribute directly or indirectly to this project. I would like to thank Ben Read, Ronnie Lipschutz, Mark Massoud, and Julie Guthman for their willingness to engage and assist me



by providing timely feedback in developing my project. I would also like to thank Cindy Morris and Sarah Amador for all of their administrative assistance during my time at UC Santa Cruz.

I would also like to extend my gratitude to my former mentor and colleagues at UC San Francisco. To Stan Glantz, I am thankful for your continued support over the last four years, especially with grant writing, which truly helped me secure external funding to achieve my goal of completing my dissertation in a productive manner. To Mariaelena Gonzalez, I am also grateful for your continued support in helping shape my research project.

Finally, to all of my close family members and friends who have assisted me over the last four years, I thank you for helping me relieve several burdens of stress that made it possible for me graduate. To my wife Nina, I am extremely thankful for all of your love and support and allowing me to pursue my passion, as it is not easy to pay a mortgage bill and raise a young boy when your spouse is trying to complete a doctorate degree. To Jeff Sherman and Martin Ordóñez, I am indebted to you for life for your warm hospitality and the gracious support you provided. My gratitude is also extended to every individual who assisted me over the past four years in helping me achieve my goal of completing my dissertation project.

## Acronyms and Abbreviations

AAR	Alliance of Australian Retailers
ALOT	America Leads on Trade
APEC	Asia-Pacific Economic Cooperation
ASH	Action on Smoking and Health
AUSFTA	Australia-United States Free Trade Agreement
BAT	British American Tobacco
BIT	Bilateral Investment Treaty
CAI	Corporate Accountability International
CIET	Tobacco Epidemic Research Center
COP	Conference of the Parties
CPATH	Center for Policy Analysis on Trade and Health
DR-CAFTA	Dominican Republic-Central American Free Trade Agreement
FCA	Framework Convention Alliance
FCTC	Framework Convention on Tobacco Control
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HWL	Health Warning Label
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MCDS	Australian Ministerial Council on Drug Strategy
MSSD	Most-Similar Systems Design
MDSO	Most-Different Systems Design
MFAT	New Zealand Ministry of Foreign Affairs and Trade
MP	Member of Parliament
MTBE	Methyl Tertiary Butyl Ether
NAFTA	North American Free Trade Agreement
NCD	Non-Communicable Diseases
NFTC	National Foreign Trade Council
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation
PAHO	Pan American Health Organization
PHAA	Public Health Association, Australia
PIR	Post-Implementation Review
PMI	Philip Morris International
RJR	RJ Reynolds
RIS	Regulatory Impact Statement
SUT	Uruguayan Tobacco Society
TAPS	Tobacco Advertising, and Promotion, and Sponsorship
TBT	Technical Barriers to Trade
TFK	Campaign for Tobacco Free Kids
TI	Tobacco Institute
TNC	Transnational Corporation
TPA	Trade Promotion Authority

TPP	Trans Pacific Partnership
TRIPS	Trade Related Aspects of Intellectual Property Rights
TTID	Truth Tobacco Industry Documents
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
USCIB	United States Council for International Business
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WLF	Washington Legal Foundation
WTO	World Trade Organization

## Chapter 1: Introduction

On February 19, 2010, Philip Morris International (PMI), a transnational tobacco company, sued the Uruguayan government under a bilateral investment treaty between Uruguay and Switzerland for implementing a public health regulation that required cigarettes to be sold with graphic pictorial health warning labels (HWLs) covering 80% of the front and back of the package.<sup>1</sup> A little over a year later, on November 21, 2011, PMI sued the Australian government under a bilateral investment treaty between Australia and Hong Kong for implementing HWLs completely covering the entire package, known as plain or standardized packaging.<sup>2</sup> These lawsuits not only represent the first instances of a tobacco company using international treaties to *directly* challenge domestic public health regulations, but highlight the growing concern across multiple disciplines about the increased authority transnational corporations (TNCs) are commanding vis-à-vis the state.

In addition to using trade and investment agreements as legal weapons to directly threaten and challenge domestic regulations, TNCs, including tobacco companies, have also aggressively lobbied governments for new protections and legal mechanisms during trade negotiations to further establish favorable regulatory environments and constrain government regulatory authority. Nowhere is this more evident than in the pending trade negotiations for the Trans-Pacific Partnership Agreement (TPP), a regional trade and investment agreement between the U.S. and 12 Asian Pacific countries, and the Trans-Atlantic Trade and Investment Partnership (TTIP), a regional trade and investment agreement between the U.S. and the European Union, where TNCs have been aggressively and privately negotiating with trade representatives.

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<sup>1</sup> Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7).

<sup>2</sup> Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12.

In light of these recent developments, furious debates and discussions among scholars, advocates, and policymakers have intensified concerning the rise of non-state actors (e.g. TNCs) and state autonomy, the impact of international trade and investment agreements on domestic policymaking, and the potential diminishing of policy space provided for advocates and activists to influence the regulatory development process. These changes have also forced scholars of legal studies, business, public health, and political science to confront intersecting issues of international law, global health governance, and corporate activity to address the constant evolving nature of the regulatory environment both at the domestic and international level in the 21<sup>st</sup> century.

Nowhere are these issues more contentious than in tobacco control where some of the most intensive battles are being fought both at the domestic and international level regarding the regulation of HWLs on cigarette packages. While the legal challenges in Uruguay and Australia have recently captivated the media's attention and galvanized the public's outlook on trade agreements, the truth remains that for decades tobacco companies have succeeded in relying on the mere *threat* of suing governments without ever actually having to go to international court to deter governments from enacting strong HWL regulations.<sup>3</sup> Due to the fear of diffusion of best practices,<sup>4</sup> tobacco companies have issued threats of arbitration concerning trade and investment to several governments with a global strategy of creating a global *regulatory chill*<sup>5</sup> by blocking, weakening and delaying the

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<sup>3</sup> Crosbie E, Glantz SA. Tobacco industry argues domestic trademark laws and international treaties preclude cigarette health warning labels, despite consistent legal advice that the argument is invalid. *Tobacco control*. May 2014;23(3):e7.

<sup>4</sup> Hiilamo H, Crosbie E, Glantz SA. The evolution of health warning labels on cigarette packs: the role of precedents, and tobacco industry strategies to block diffusion. *Tobacco control*. Jan 2014;23(1):e2.

<sup>5</sup> Eric Neumayer first referred to regulatory chill as a situation when policymakers may lower environmental standards in fear of capital flight and competitiveness; Neumayer E. Do countries fail to raise environmental standards? An evaluation of policy options addressing "regulatory chill". *LSE Research Online*. 2001;4(3):231-244. Please also see views from political science about the threats of arbitration and the lack of regulation; Tienhaara K. Regulatory chill and the threat of arbitration: A view from political science. In: Brown C, Miles K, eds. *Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press; 2011:606-628.

advancement of progressive and innovative HWL policies, including plain packaging, worldwide for decades.

Thus, following the direct international threats and lawsuits by TNCs, especially in the case with Big Tobacco, and their activity to influence current trade negotiations, many questions have been raised. How are tobacco industry international trade and investment arbitration threats produced, where and in what context do they emerge, and how are they perceived by governments? Under what conditions and to what extent are tobacco company trade threats and challenges constraining government regulatory authority? More specifically, how influential have tobacco companies been in using these trade threats to shape HWL regulations? Finally, and to a lesser extent, how are tobacco companies influencing current trade negotiations and what implications will these developments have on public health policymaking in the future?

In addition to these broader questions, the recent success in Australia and Uruguay coupled with problematic and unnecessary delays in New Zealand to implement similar strong HWL regulations raises two interesting but related puzzles. First, despite being developed, high-income countries, and global health leaders, it is unclear why Australia has implemented strong HWLs while New Zealand has delayed its HWL proposal. Second, it is unknown why Uruguay, a developing and middle-income country, has implemented strong HWLs while New Zealand, a developed and high-income country, has delayed its HWL proposal.

While each of these questions will be addressed in detail in the chapters to follow, the key findings of the dissertation are first briefly discussed here. Informed by interviews conducted with policymakers and health advocates closely involved in the process, as well as archival research of previously secret tobacco industry documents, this work explains how tobacco companies have developed a global multi-pronged trade attack to threaten

governments that have attempted to implement the most progressive HWL regulations. Through a comparative analysis of the three case studies and applying a most-similar and most-different systems design, this research demonstrates that tobacco industry trade threats and challenges are causing a chilling effect by delaying strong HWL regulations in New Zealand but not in Australia and Uruguay. The key factor in determining the implementation of strong HWLs lies in the governments' *reception* to the trade threats by tobacco companies. The findings suggest that leftist governments, continued strong bureaucratic leadership and capacity in the Health Ministry, and independent and confident tobacco control and trade advocacy are necessary conditions in explaining how governments can shape the reception of tobacco industry trade threats and properly implement progressive HWL policies without being weakened or delayed (Table 1:1).

Due to the limitations and shortcomings that existing international treaties pose for the tobacco industry, this analysis also illustrates how tobacco companies have aggressively lobbied trade negotiators and policymakers to advance and extend corporate rights for favorable regulatory environments through future trade agreements. These efforts have succeeded in securing the renewal of trade promotion authority, a trade mechanism designed to diminish the policy space for both policymakers and advocates by expediting the trade negotiation process in the U.S. However due to increasing pressure from health advocates to create exemptions for public health and a complete carve-out of tobacco from the TPP agreement entirely, tobacco companies have failed to secure the investor-state dispute settlement (ISDS) mechanism in the TPP to directly challenge tobacco control policies in the TPP member states. Other areas concerning public health, including food, alcohol and medicine remain exposed to ISDS challenges in the current text of the TPP, but as of May 2016 the agreement remains pending.

Table 1:1 Impact of trade threats on regulatory process of HWLs in Uruguay, Australia and New Zealand					
Countries	HWL proposal	Government in power	Sustained bureaucratic leadership & capacity in Health Ministry	Independent and confident tobacco control and trade advocacy	Impact of trade threats on regulatory process of HWLs
Uruguay	Pictorial HWLs (80%)	<b>Left</b>	<b>High</b>	<b>Very high</b>	<b>Low</b> -Implemented -Not weakened -Not delayed -Legal costs
Australia	Plain packaging (100%)	<b>Center-left</b>	<b>Very high</b>	<b>Very high</b>	<b>Low</b> -Implemented -Not weakened -Not delayed -Legal costs
New Zealand	Plain packaging (100%)	Center-right	Moderate	Low	High Not implemented -Not weakened -Delayed -No legal costs

These key findings also have broader theoretical implications, as the dissertation expands the understudied area of non-state actors vis-à-vis the state and the authority these actors command, especially in regards to global governance and global business regulation. In particular, it provides further evidence of the growth in authority of non-state actors, both TNCs and non-government organizations (NGOs) that have aggressively operated at the international level to force new openings for decision making rather than be delegated authority by states to do so. Tobacco companies have succeeded in helping capture trade and investment regulatory bodies to rewrite rules governing international trade governance, including forcing governments to cede increasingly more authority to TNCs in international dispute settlement bodies. Meanwhile public health groups and organizations have helped create and expand the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), the world's first and only international health treaty, which has been used as an international tool to pressure and force governments to adopt progressive public health policies. In addition to NGOs pressuring the state, state actors have acknowledged that they have reached out to NGOs for information



and advice pertaining to not only the scientific evidence surrounding strong pictorial HWLs but also the international legal ramifications concerning the HWLs. These policymakers also admitted that they have reached out to NGOs during FCTC negotiations to update the treaty, illustrating that they look to NGOs for advice not only at the state level but also at the international level.

Secondly, this research bridges the gap between trade and tobacco and political science and public health more broadly by examining the regulatory development process of HWLs both at the national and international level. The literature on trade and tobacco to date has mostly focused on the economic and legal implications of trade and investment agreements on tobacco control but this research carefully documents and analyzes the *political* implications of these agreements on the regulatory development process of HWLs. These political findings in turn highlight the public health benefits when governments properly implement strong HWLs without being weakened or delayed, which include saving lives and generating significant health costs savings.

Third, this project builds upon the legal and political science literature that examines regulatory chill by employing multiple qualitative methods to more accurately measure the *awareness* and the *effect* of trade arbitration threats and challenges on the policymaking process. In interviewing policymakers from each of the three case studies about tobacco industry trade threats and regulatory chill, this research illustrates that policymakers from multiple branches of government were aware and took into consideration international trade agreements during the regulatory development process of strong HWLs, even in the developing country of Uruguay. This research also represents the first study to date on regulatory chill to apply the comparative method and a most-similar and most-different systems design, which more accurately measures the existence of a chilling effect by controlling for other explanatory variables that might influence the

regulatory development process. Finally, whereas regulatory chill is typically tested if a regulation is withdrawn or weakened, this analysis also represents the first study to date that examines regulatory chill in terms of *delay* (time elapsed between introducing and implementing the regulation), which is incredibly significant as delays in implementation equate to substantial savings for the tobacco industry and significant health costs for individuals and governments.

Fourth, this research coins the term “global preemption” to indicate how tobacco companies have been able to shift decision-making authority outside of the parameters of the state and into international trade tribunals to preempt or constrain government regulatory authority. While tobacco companies have traditionally preempted strong local level policies with weak state laws and strong state policies with weak national laws, global preemption further distances decision-making power from all levels of government by transferring authority to international trade tribunals, which are typically business friendly, non-transparent and have little accountability. These institutional structures and procedures run in sharp contrast and attempt to eliminate the policy space for government by overriding the government regulatory process in domestic democratic settings, which despite having institutional constraints contain policy space for advocates, are relatively transparent, and through the electoral process can hold policymakers accountable.

Fifth, this study offers insights into the increasingly vigorous struggle between TNCs and NGOs to influence international trade governance in relation to public health in the 21<sup>st</sup> century by examining the trade negotiations for the TPP. This research demonstrates how tobacco companies have gained privileged access to trade negotiators and policymakers to renew trade mechanisms, including trade promotion authority to expedite future trade agreements by only allowing the U.S. congress to vote yes or no for trade agreements without amendments. This research also illustrates how health advocates have countered

these efforts by forcing policymakers to recognize their governments' international health agreement obligations and commitments, most notably to the WHO FCTC, and provide adequate health exemptions and safeguards to protect public health in future trade agreements.

Finally this dissertation builds upon the growing literature of trade and health and global health governance by offering important lessons learned from tobacco control that can be applied to other areas of health that are affected by trade including food, alcohol, and medicine. Given that these other areas of public health are increasingly being regulated, this research illustrates how health advocates need to continuously counteract the actions of TNCs in influencing international trade and investment agreements, which increasingly target nutrition policies, alcohol labeling regulations, and access to medicines.

## **THEORETICAL CONTEXT**

### **Global Governance and Global Business Regulation**

#### ***State autonomy under globalization***

In the field of international political economy, and international relations more broadly, states have been considered the primary and often the only legitimate actors in the international arena.<sup>6</sup> However over the past three decades, the lowering of trade barriers, the liberation of markets, and the mobility of capital have called into question the autonomy and authority of states. The ability of companies, production networks and markets to transcend national boundaries, has made it increasingly difficult for governments to regulate an increasingly fragmented global economy.<sup>7</sup> In response to these changes, some authors began calling for the eclipse or retreat of the state, arguing states fell victim to the

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<sup>6</sup> Mearsheimer J. *The Tragedy of Great Power Politics*. New York: W.W. Norton & Company; 2001. Also see Morgenthau H. *Politics Among Nations: The Struggle for Power and Peace*. New York: Alfred A. Knopf; 1948.

<sup>7</sup> Mayer F, Gereffi G. Regulation and Economic Globalization: Prospects and Limits of Private Governance. *Business and Politics*. 2010;12(3):Article 11.

market economy and were skeptical how states would regulate economic activity.<sup>8</sup> Other authors accepted the decline in autonomy of states in terms of economic controls but argued that the state was not retreating but responding to globalization.<sup>9</sup> For some, the state was merely shifting its role to accommodate the external pressures exerted by globalization, as it had done previously in an evolving market economy during the late 1800s.<sup>10</sup>

Yet this literature on state autonomy under globalization assumes that states are merely reacting and adjusting to the forces of globalization and not exerting any agency to alter the structures of an increasingly globalized world. Treating globalization as a casual factor for the transformation of the state overlooks how particular political choices and sets of interests can restructure globalizing practices. This is evident in the advancement of neoliberalism, which was partially driven by political and cultural ideas in the US and Britain that were in turn globalized throughout the world.<sup>11</sup> Therefore state autonomy under globalization represents a “duality of structure”<sup>12</sup> in which structures do not simply place constraints on human agency but possess enabling qualities as well. Globalization may constrain states’ behavior but it enables them to alter its structure as well.

Equally as important, this approach of state autonomy under globalization adopts Robert Gilpin’s two-way stream analysis of politics and the economy that assumes a direct one-to-one relationship between states and markets.<sup>13</sup> The approach ignores the existence of multiple authorities such as transnational corporations, cartels, terrorist groups, and

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<sup>8</sup> Swann D. *The retreat of the state: Deregulation and privatisation in the UK and US*. New York: Harvester Wheatsheaf; 1988.

<sup>9</sup> Evans PB. The Eclipse of the State? Reflections on Stateness in an Era of Globalization. *World Politics*. 1997;50(1):62-87.

<sup>10</sup> Kolko G. *Railroads and Regulation: 1877-1916*. New York, New York: W.W. Norton; 1965.

<sup>11</sup> Centeno M, Cohen JN. The Arc of Neoliberalism. *The Annual Review of Sociology*. 2012;38(1):317-340.

<sup>12</sup> Sewell Jr. W. A Theory of Structure: Duality, Agency, and Transformation. *American Journal of Sociology*. 1992;98(1):1-29.

<sup>13</sup> Gilpin R. *The Political Economy of International Relations* Princeton: Princeton University Press; 1987.

transnational activists and multiple markets such as those partially or entirely managed by governments or by cartels or dominated by TNCs.<sup>14</sup> This is one reason why more recent authors have been calling for disaggregating the state to analyze cross border networks, interactions, and transactions that attempt to capture the multiple authorities that exist.<sup>15</sup> Thus conceptualizing the state as a unitary actor vis-à-vis globalization oversimplifies the political processes, exchanges, negotiations, coalitions, networks, and norms that typically formulate multiple responses and shape globalizing practices.

One area in particular that problematizes the direct one-to-one relationship between states and markets is the rise in authority of non-state actors and their impact on global governance and global business regulation. Traditional pluralist accounts of the state viewed the government as an arena where several interest groups competed for power to determine “who governs.”<sup>16</sup> However in the past thirty years production and relations have become more complex, igniting a reconfiguration of the state, private and public governance, and businesses and society. Explanations concerning this reconfiguration pointed once again to the pressures exerted by globalization that created regulatory gaps and required global business regulation to solve the global governance deficit.<sup>17</sup> These arguments assumed these openings were created due to the inability and unwillingness of states to regulate trans-border economic activity and ignored how non-state actors contributed to helping forge some of these openings and altered these relationships. The reality is that a growing number of non-state actors including TNCs, NGOs, mafias, and

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<sup>14</sup> Strange S. *Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge (UK): Cambridge University Press; 1996.

<sup>15</sup> Slaughter AM. *A New World Order*. Princeton: Princeton University Press; 2004.

<sup>16</sup> Dahl RA. *Who governs? Democracy and power in an American city*. New Haven: Yale University Press; 1961.

<sup>17</sup> This typically refers to the deficits or gaps that exist in rules and regulations at the global level. See Haufler V. *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy*. Washington DC: Carnegie Endowment for International Peace; 2001. Also see Jenkins R, Pearson R, Seyfang G. *Corporate Resonsbility and Labor Rights: Codes of Conduct in the Global Economy*. London: Earthscan; 2002.

terrorist groups as well as networks, coalitions, and transnational activism have taken authoritative roles and functions in the international system.<sup>18</sup> This authority has included setting agendas, guaranteeing contracts, providing order and security, and authoring policies, practices, rules, and norms, which have been exclusively and traditionally associated with the state.<sup>19</sup> In particular, non-state actors have played an important role in altering and shaping global governance structures and practices including the governance of international trade and investment, private governance and self-regulation, and global health governance.

***New openings and new battlegrounds: Governance of international trade and investment***

David Vogel and Tim Buthe assert that one response to the global governance deficit has been to increase international cooperation among states through inter-governmental projects such as international trade agreements.<sup>20</sup> They argue that these efforts have proved to be slow and often ineffective for trans-border conflicts due to the fact that writing, maintaining, updating, and institutionalizing of rules is costly for states. Consistent with the approach above, these authors presume regulatory gaps occur due to inefficiencies of states and not the pressure non-state actors. A closer look at international trade reveals how TNCs contributed to creating these regulatory gaps and asserted themselves authoritative actors.

During the 1980s and 1990s, TNCs not only played an important role in lobbying government trade representatives during trade negotiations to lower the barriers to trade and increase access to new markets, but they also fought for stronger legal mechanisms to

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<sup>18</sup> Kratochwil F. *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press; 1989.

<sup>19</sup> Hall RB, Biersteker TJ, eds. *The Emergence of Private Authority in Global Governance*. New York: Cambridge University Press; 2002.

<sup>20</sup> Vogel D. Private Global Business Regulation *Annual Review of Political Science*. 2008;1(11):261-282. Also see Buthe T. Global Private Politics: A Research Agenda. *Business and Politics*. 2010;12(3):1-34.

ensure favorable regulatory environments and protect foreign investments.<sup>21</sup> The emergence of the World Trade Organization (WTO) reflected these interests by establishing new protections for TNCs in the area of intellectual property (e.g. copyright, trademark, and patent protection) and new dispute settlement mechanisms to challenge WTO member state regulations (Table 1:2). In the WTO state-state dispute settlement system, TNCs were now able to lobby one WTO member state to challenge another member state's regulation. For example, in 1999, US pharmaceutical companies lobbied the US to file a dispute with Argentina for not providing patent protection for pharmaceutical products and exclusive marketing rights for these products.<sup>22</sup>

Concurrently in the 1980s and 1990s, TNCs participated in bilateral and regional trade negotiations to create bilateral investment treaties (BITs) and free trade agreements (FTAs) that established protections in private investment.<sup>23</sup> Through BITs and FTAs investors (e.g. TNCs) in one state were granted a series of protections in another state that typically included fair and equitable treatment, and protection from expropriation (the value of investment loss). Unlike intellectual property rights, which grant "direct" expropriation of foreign investment and constitute a taking of a property, investment rights provide "indirect" expropriation of foreign investment and represent "the effective loss of management, use or control or a significant depreciation of the value of the assets of a foreign investor."<sup>24</sup> In this sense if a foreign investor could not prove a full taking of a property, the investor could rely on suing for a partial loss of value in their investment.

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<sup>21</sup> Jawara F, Kwa A. *Behind the Scenes at the WTO: The Real World of International Trade negotiations*. London: Zed Books; 2003.

<sup>22</sup> World Trade Organization. *Argentina-Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals* 31 May 2002.

<sup>23</sup> Shaffer ER, Brenner JE, Houston TP. International trade agreements: a threat to tobacco control policy. *Tobacco control*. Aug 2005;14 Suppl 2:ii19-25.

<sup>24</sup> Waelde T, Kolo A. Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law. *International and Comparative Law Quarterly*. 2001;50(4):811-848.

Table 1:2: International trade agreement components and dispute settlement procedures			
Aims	World Trade Organization (WTO)	Bilateral Investment Treaties (BITs)	Free Trade Agreements (FTAs)
Lower or eliminate tariffs on goods and services	X		X
Protect foreign investor rights	X	X	X
Protect foreign intellectual property rights	X	X	X
Design and membership	Multilateral	Bilateral	Bilateral or Multilateral
Dispute resolution (Dispute resolution settlement body)	State-state (DSB)	Investor-state (ICSID)	Investor-state (ICSID or UNCITRAL)
Transparency of trade negotiations	No	No	No
Transparency of dispute panel rulings	Yes	No	No
Accountability of arbitrators	Limited	No	No
DSB: Dispute Settlement Body of WTO ICSID: World Bank's International Center for the Settlement of Investment Disputes UNCITRAL: United Nations Commission on International Trade Law			

BITs and FTAs also established dispute settlement mechanisms that further strengthened the authority of TNCs to challenge government regulations. Unlike the WTO dispute settlement system, in which a TNC must try to convince a WTO member state to challenge another state's policy, BITs and FTAs include investor-state dispute settlement (ISDS) mechanisms that allow foreign investors to sue national governments "directly" to challenge policies.<sup>25</sup> These disputes are also resolved privately by arbitration,<sup>26</sup> and while either party in a WTO dispute can release the panel ruling, BIT and FTA decisions may be

<sup>25</sup> Crosbie E, Gonzalez M, Glantz SA. Health preemption behind closed doors: trade agreements and fast-track authority. *Am J Public Health*. Sep 2014;104(9):e7-e13.

<sup>26</sup> Fooks G, Gilmore AB. International trade law, plain packaging and tobacco industry political activity: the Trans-Pacific Partnership. *Tobacco control*. Jun 20 2013.



kept secret.<sup>27</sup>

### ***Private governance and self-regulation***

The ability of TNCs to help force these openings in part helped restructure global business regulation and shift the decision making authority away from government regulatory bodies. TNCs took advantage of these openings and began asserting themselves as authoritative actors, introducing private self-regulated voluntary measures that included setting their own rules of behavior in the form of mission statements, corporate guidelines and codes of conduct.<sup>28</sup> Self-regulating practices and voluntary measures have been designed historically to anticipate, prevent, and forestall government regulation as companies have attempted to shift decision making authority away from political actors and allow consumers to decide in an evolving market based regulatory environment.<sup>29</sup> Self-regulating measures have also been introduced as corporate social responsibility acts to promote themselves as responsible companies and to avoid negative publicity and consumer dissatisfaction.<sup>30</sup> When activist groups and consumers have not been satisfied with voluntary regulations, TNCs have also preferred to participate in collective multi-stakeholder approaches with NGOs to avoid government regulations.<sup>31</sup>

While TNCs prefer to avoid and delay government business regulations, civil society groups and NGOs have been confronted with difficult challenges of which authorities to target to regulate global business practices. Some activists and NGOs who have targeted governments have complained about slow legislative changes and the ability of TNCs to

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<sup>27</sup> Johnson L. Inching Towards Consensus: An Update on UNCITRAL Transparency Negotiations *Investment Treaty News*. 2012. <http://www.iisd.org/itn/2012/10/30/inching-towards-consensus-an-update-on-the-uncitral-transparency-negotiations/>. Accessed 6 June 2013.

<sup>28</sup> Haufler V. *Industry Self-Regulation*; 2001

<sup>29</sup> Lipschutz RD, Rowe JK. *Globalization, Governmentality and Global Politics: Regulation for the rest of us?* London and New York: Routledge Taylor & Francis Group; 2005.

<sup>30</sup> Vogel D. *The Market for Virtue. The Potential and Limits of Corporate Social Responsibility*. Washington D.C.: Brookings Institution Press; 2005.

<sup>31</sup> Buthe T. Private Regulation in the Global Economy: A © Review. *Business and Politics*. 2010 2010;12(3):Article 2.

block government regulations.<sup>32</sup> Other groups that have targeted TNCs directly have complained about the lack of enforcement capabilities and adequate institutional mechanisms to ensure proper monitoring and accountability.<sup>33</sup>

While limitations surely exist for activists and NGOs in both accounts, it remains difficult to decipher under what conditions governments are either unwilling or unable to regulate trans-border economic activity. Since scholars who have studied private regulatory efforts have focused on consumer and corporate behavior there lacks sufficient attention examining public political processes to regulate transnational business practices. Mayer and Gereffi have offered a set of hypotheses for when and where private governance is most likely to succeed and one hypothesis suggests that private governance is most likely to occur in developing countries where state regulatory capacity is often weak.<sup>34</sup> Yet it is difficult to determine if state regulatory capacity is weak without analyzing the political processes, exchanges, networks, and norms that occur to formulate and implement business regulations in a given state. Furthermore, if we turn to tobacco control we can see how NGOs have operated at the international level to alter and shape the global health governance of tobacco to assist states in regulating the global business practices of Big Tobacco.

### ***Global health governance and the expansion of tobacco control networks***

Much like other issues of global governance, the global governance of health involves states, international organizations, and non-state actors and the usage of formal and informal institutions, rules and processes to effectively address and deal with the challenges that require cross-boarder collective action. These global health challenges include combating communicable diseases (HIV/AIDS, influenza, SARS, and malaria) and

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<sup>32</sup> Ibid.

<sup>33</sup> Starobin S, Weinthal E. The Search for Credible Information in Social and Environmental Global Governance: The Kosher Label. *Business and Politics*. 2010;12(3):1-35.

<sup>34</sup> Mayer F, Gereffi G. *Limits of Private Governance*, 2010.

non-communicable diseases (environmental pollution, alcohol, obesity and tobacco consumption) in order to solve the global health deficit,<sup>35</sup> which requires among other things to implement international treaties on global health. Consistent with the approach of Vogel and Buthe, it is the states that have increased international cooperation through inter-governmental projects in health and have helped create the Framework Convention on Tobacco Control (FCTC), the WHO's first and only international health treaty, that regulates tobacco business practices by including rules that govern the production, distribution, sale, advertisement and taxation of tobacco.

However the creation of the FCTC provides another great example to illustrate the lack of attention to non-state actors in altering and shaping global health governance and global business regulation. By the mid-1990s it became apparent to some tobacco control advocates that while smoking prevalence rates were declining in developed countries, they were increasing in developing countries causing a concern about tobacco smoking globally.<sup>36</sup> This initial concern was not perceived by tobacco control advocates as a threat of repression or blockage by a lack of responsiveness or unwillingness by states as described by the boomerang model,<sup>37</sup> in which domestic groups bypass their governments and directly search for international allies to bring pressure on their states from the outside. Nor was the response an insider-outsider coalition that formed, in which activists privilege

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<sup>35</sup> David Fidler describes the "global health deficit" as trying to prevent health problems from becoming global dangers, produce effective responses to global health threats, implement treaties on global health, develop stronger health systems in developing countries, and stimulate sufficient progress on social determinants of health. Also see Collin J. Tobacco control, global health policy and development: towards policy coherence in global governance. *Tobacco control*. Mar 2012;21(2):274-280.

<sup>36</sup> Sebrie EM, Glantz SA. Attempts to undermine tobacco control: tobacco industry "youth smoking prevention" programs to undermine meaningful tobacco control in Latin America. *Am J Public Health*. Aug 2007;97(8):1357-1367.

<sup>37</sup> Keck M, Sikkink K. *Activists Beyond Borders*. Ithaca, NY: Cornell University Press; 1998.

domestic policy change keeping international activism as an option.<sup>38</sup> Instead, it was a small group of legal experts and tobacco control advocates that at an international tobacco conference in 1994, proposed the idea to create an international health treaty that would address the global smoking problem. By 1995, this small group of lawyers and advocates began working with the WHO Director General and exerted their own authority, or what Green refers to as “private entrepreneurial authority”<sup>39</sup> by drafting a legal framework and designing the world’s first international health treaty.<sup>40</sup> During the FCTC negotiations, international NGOs collaborated with governments throughout the multi-stakeholder negotiation and drafting process, including engaging in processes of accountability both internationally to hold political representatives accountable and internally to support NGOs in low and middle-income countries hold their representatives accountable to the drafted legal framework.<sup>41</sup> The FCTC negotiations concluded in May 2003 and the treaty came into force in February 2005 as it was signed and ratified by more than 160 countries.

In contrast to the multi-stakeholder approaches that typically involve industries and associations to tailor protocols, standards, and frameworks towards specific sectors, tobacco control NGOs targeted transnational tobacco companies as the chief culprits for the global tobacco epidemic and thus worked with governments and the WHO to deny their direct participation during the FCTC negotiations. While industry documents reveal that tobacco companies were able to lobby government officials participating in the FCTC negotiations, especially in helping defeat a provision that would have prioritized health

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<sup>38</sup> Sikkink K. Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition. In: della Porta D, Tarrow SG, eds. *Transnational Protest and Global Activism*. Lanham, MD: Rowman & Littlefield; 2005:151-173.

<sup>39</sup> Green JF. Private Standards in the Climate Regime: The Greenhouse Gas Protocol. *Business and Politics*. 2010;12(3):1-37.

<sup>40</sup> Roemer R, Taylor A, Lariviere J. Origins of the WHO Framework Convention on Tobacco Control. *Am J Public Health*. Jun 2005;95(6):936-938.

<sup>41</sup> Lencucha R, Kothari A, Labonté R. Enacting Accountability: Networked Governance, NGOs and the FCTC. *Global Health Governance*. June 2012;V(2):1-17. See also Lencucha R, Labonte R, Rouse MJ. Beyond idealism and realism: Canadian NGO/government relations during the negotiation of the FCTC. *Journal of public health policy*. Apr 2010;31(1):74-87.

over trade (see below), their relegated position as outsiders resulted in a dramatic shift in removing the participation of tobacco companies from the decision-making process. This was most evident in the establishment of Article 5.3 in the FCTC, which denies governments from engaging in any tobacco industry partnerships and requires that any meetings with tobacco companies must be transparent.<sup>42</sup> As a result, NGOs not only blocked tobacco companies from directly participating in the FCTC negotiations but also helped secure a legal framework for governments to reject the industry's involvement in the future drafting and regulating of tobacco control policies.

After helping establish the FCTC, tobacco control NGOs have utilized the treaty as a legal tool to leverage pressure against governments to enact strong public health policies. Whereas TNCs, including tobacco companies have typically preferred to shift decision-making authority away from states either through private governance and self-regulating practices or more recently to business friendly international trade tribunals, tobacco control NGOs have used the FCTC treaty to shift authority back to states and force governments to adhere to new international health commitments and obligations. In addition to removing tobacco companies from the drafting and regulatory process, the FCTC provides important guidelines for regulating tobacco in the areas of public places, taxation and advertising. For example, FCTC Article 11 states that FCTC parties should implement pictorial HWLs covering at least 30% of the package and recommends plain packaging as a best practice.<sup>43</sup> As a result, NGOs in various countries have utilized the FCTC as a valuable legal framework to pressure governments to enact strong public health policies by claiming

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<sup>42</sup> World Health Organization. *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry* November 2008.

<sup>43</sup> World Health Organization. *Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labeling of tobacco products)* November 2008.

that governments have an obligation to fulfill their commitments to the treaty as ratifying parties, which has helped accelerate the enactment of tobacco control laws globally.<sup>44</sup>

NGOs have also continuously updated the FCTC to assist governments in implementing strong domestic public health policies. NGOs have continued to command entrepreneurial authority by participating and collaborating with governments to update the FCTC to improve the implementation of the treaty globally. For example, NGOs have participated in the FCTC Conference of the Parties (COP), which are bi-annual meetings held to develop the implementing guidelines and protocols for the FCTC and monitor implementation. As we will see in chapter 5, the efforts by NGOs during the fourth COP session in Punta Del Este, Uruguay played a significant role in developing a FCTC declaration on trade and tobacco that helped assist the Uruguayan government in its legal defense against PMI and should help countries in the future defend similar public health policies. Although the FCTC has been a valuable tool in global health governance and the adoption of tobacco control policies, there still exists several unresolved issues in trade and health governance (see below).

The FCTC negotiations not only marked a dramatic shift in globally addressing the tobacco epidemic with the creation of a new international legal framework for tobacco control, but also represented a significant turning point in the expansion of tobacco control alliances and networks globally. During the 1970s and 1980s there was little international interaction and collaboration among tobacco control advocates as tobacco control efforts primarily consisted of doctors and pro-health advocates operating domestically. In 1992, GlobalLink, a web based forum was created, which expanded the interaction and

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<sup>44</sup> Sanders-Jackson AN, Song AV, Hiilamo H, Glantz SA. Effect of the Framework Convention on Tobacco Control and voluntary industry health warning labels on passage of mandated cigarette warning labels from 1965 to 2012: transition probability and event history analyses. *Am J Public Health*. Nov 2013;103(11):2041-2047. Also see Hiilamo H, Glantz SA. Implementation of effective cigarette health warning labels among low and middle income countries: State capacity, path-dependency and tobacco industry activity. *Social science & medicine*. Jan 2015;124:241-245.

collaboration among tobacco control advocates globally by facilitating the exchange of information and providing advocates with key updates about developments occurring globally related to tobacco control. This collaboration increased considerably during the FCTC negotiations as international tobacco control NGOs networked and created alliances that incorporated a broader and more formal network of advocates to influence the treaty.<sup>45</sup> This included the WHO providing resources to create the Framework Convention Alliance (FCA), which coordinated NGO participation during the FCTC negotiations,<sup>46</sup> and later facilitated the formation of an expansive global network that included northern NGOs assisting NGOs in low and middle-income countries and deepening North-South and South-South relations between advocates. Since the FCTC negotiations, tobacco control networks have continued to evolve to include public health researchers and scientists, civil society groups, individual health advocates, domestic and international health organizations, philanthropy donors, and increasingly international trade and legal scholars. These networks consist of non-state actors with shared values, principles, and ideas, common discourse, and an increasing exchange of information and services,<sup>47</sup> thus combining characteristics of global civil society,<sup>48</sup> epistemic communities,<sup>49</sup> and advocacy networks.<sup>50</sup>

This expansion in the global health network of tobacco control advocates has been fueled by the funding opportunities that advocates have taken advantage of to

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<sup>45</sup> Wilkenfeld J. *Saving the World from Big Tobacco: The Real Coalition of the Willing*: The Matthew B. Ridgway Center for International Security Studies, February 2005.

<sup>46</sup> Collin J, Lee K, Bissell K. The Framework Convention on Tobacco Control: The Politics of Global Health Governance. *Third World Quarterly*. 2002;23(2):265-282.

<sup>47</sup> Mukherjee A, Ekanayake EM. *Global Regime on Tobacco Control?: The Role of Transnational Advocacy Networks*, February 2013.

<sup>48</sup> Lipschutz RD, Rowe JK. *Globalization, Governmentality and Global Politics: Regulation for the rest of us?* London and New York: Routledge Taylor & Francis Group; 2005.

<sup>49</sup> Haas PM. Introduction: Epistemic Communities and International Policy Coordination. *International Organization*. Winter 1992;46(1):1-35. See also Mamudu HM, Gonzalez M, Glantz S. The nature, scope, and development of the global tobacco control epistemic community. *Am J Public Health*. Nov 2011;101(11):2044-2054.

<sup>50</sup> Farquharson K. Influencing policy transnationally: pro-and anti-tobacco global advocacy networks. *Australian Journal of Public Administration*. 2003;62(1):80-92.

institutionalize their network activity through formalized network organizations both at the global and regional level. Since the mid-2000s, philanthropy donors Michael Bloomberg and Bill Gates through the Bloomberg Initiative and the Gates Foundation have together contributed more than \$600 million to tobacco control efforts globally, mostly to assist tobacco control efforts in low and middle-income countries. These funds have led to the creation of funding-specific network structures, including an international legal consortium to support advocacy efforts and the adoption of progressive tobacco control laws.<sup>51</sup> The increased availability of funding has also helped facilitate the institutionalization of regional-level network structures to strengthen the capacity of local tobacco control advocates in implementing the FCTC and shaping domestic tobacco control policies.<sup>52</sup> This has included providing technical or legal advice to local advocates and governments to advance tobacco control policies.

Additionally this funding has been instrumental in countering the pressure of tobacco companies to block, weaken or delay tobacco control policies. As some of the wealthiest TNCs in the world, transnational tobacco companies possess the financial resources to hire some of the world's leading lawyers, lobbyists, marketers, and trade experts in order to influence policy. While this presents a significant challenge to adopting progressive public health regulations in most developed countries, it is even a greater challenge in developing countries, which lack the financial and technical resources to counter the bullying tactics of tobacco companies. Therefore the funds from philanthropy donors have provided significant resources to strengthen the capacity of tobacco control advocates to counter strong opposition from tobacco companies in multiple countries.

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<sup>51</sup> Gneiting U. From global agenda-setting to domestic implementation: successes and challenges of the global health network on tobacco control. *Health policy and planning*. Apr 2016;31 Suppl 1:i74-i86.

<sup>52</sup> *Ibid*, 78.



### ***Intersection of global trade and health governance: Trade and tobacco control***

There is a growing literature examining the relationship between trade and health, especially trade and tobacco. The expansion of trade liberalization and the lowering of trade barriers between countries during the late 1980s and early 1990s allowed tobacco companies to enter new markets in low and middle-income countries,<sup>53</sup> and influence trade negotiations,<sup>54</sup> leading to increased tobacco consumption, especially in developing countries.<sup>55</sup> Recognizing this conflict between trade and health, during the negotiations that led to the WHO FCTC, some public health professionals sought an explicit provision establishing the primacy of health over trade, but others who were concerned that the provision would ruin the entire treaty blocked the provision.<sup>56</sup> As a result, the conflict between trade and health has persisted, as the primacy of health over trade remains an unresolved issue.

During the 2000s, public health scholars and legal experts began documenting not only the effects of trade on health but also the legal provisions trade agreements contain that may impede the enactment of domestic public health policies. Early research on trade

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<sup>53</sup> Hurt RD, Ebbert JO, Achadi A, Croghan IT. Roadmap to a tobacco epidemic: transnational tobacco companies invade Indonesia. *Tobacco control*. May 2012;21(3):306-312. Also see Gilmore AB, McKee M. Moving East: how the transnational tobacco industry gained entry to the emerging markets of the former Soviet Union-part II: an overview of priorities and tactics used to establish a manufacturing presence. *Tobacco control*. Jun 2004;13(2):151-160, and see Nakkash R, Lee K. Smuggling as the "key to a combined market": British American Tobacco in Lebanon. *Tobacco control*. Oct 2008;17(5):324-331.

<sup>54</sup> Lambert A, Sargent JD, Glantz SA, Ling PM. How Philip Morris unlocked the Japanese cigarette market: lessons for global tobacco control. *Tobacco control*. Dec 2004;13(4):379-387. Holden C, Lee K. 'A major lobbying effort to change and unify the excise structure in six Central American countries': How British American Tobacco influenced tax and tariff rates in the Central American Common Market. *Global Health*. 2011;7(1):15.

<sup>55</sup> Gilmore AB, McKee M. Exploring the impact of foreign direct investment on tobacco consumption in the former Soviet Union. *Tobacco control*. Feb 2005;14(1):13-21. Also see Lee S, Lee K, Holden C. Creating demand for foreign brands in a 'home run' market: tobacco company tactics in South Korea following market liberalisation. *Tobacco control*. Nov 14 2012.

<sup>56</sup> Mamudu HM, Hammond R, Glantz SA. International trade versus public health during the FCTC negotiations, 1999-2003. *Tobacco control*. Jan 2011;20(1):e3. Also see Collin J. Tobacco control, global health policy and development: towards policy coherence in global governance. *Tobacco control*. Mar 2012;21(2):274-280.

agreements and tobacco focused on large multinational trade agreements such as the World Trade Organization, which contain legal provisions that grant TNCs like tobacco companies legal protections in areas such as intellectual property rights (copyrights, patents, trademarks) and investment.<sup>57</sup> More recent studies have begun to identify tobacco company legal trade challenges under bilateral and regional trade agreements that attempt to block strong tobacco control policies. This research has included challenges to health warning label policies in Uruguay and Australia, banning the public display of tobacco products in Norway,<sup>58</sup> and the banning of clove cigarettes in Indonesia.<sup>59</sup> Other research has begun to examine the legal implications of these bilateral and regional trade disputes.<sup>60</sup> This research has also prompted legal scholars to begin questioning the increased usage of the investor-state dispute settlement (ISDS) mechanism by TNCs to directly challenge government regulations and its ability to possibly create a chilling effect on regulations globally.

### ***Regulatory chill***

In the early 2000s, Eric Neumayer defined regulatory chill as a situation, in which policymakers may lower environmental standards in fear of capital flight and competitiveness.<sup>61</sup> Neumayer, who was interested if policymakers were scared away from raising standards or if they regarded these threats by industry groups as cheap talk, examined anecdotal evidence and concluded that regulatory chill is potentially serious but that the chilling effect did not completely prevent the introduction of carbon abatement

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<sup>57</sup> McGrady B. TRIPs and Trademarks: the case of tobacco. *World Trade Review*. 2004;3(1):53-82.

<sup>58</sup> Alemanno A. Tobacco display bans: Philip Morris vs Norway in front of the EFTA Court. 2011; <http://www.albertoalemanno.eu/articles/display-ban-of-tobacco-products-philip-morris-vs-norway-in-front-of-the-efta-court>. Accessed 6 November, 2013.

<sup>59</sup> Jarman H, Schmidt J, Rubin DB. When trade law meets public health evidence: the World Trade Organization and clove cigarettes. *Tobacco control*. Nov 2012;21(6):596-598.

<sup>60</sup> Stumberg R. Safeguards for Tobacco Control: Options for the TPPA. *American Journal of Law & Medicine*. 2013;39(1):382-441.

<sup>61</sup> Neumayer E. Do countries fail to raise environmental standards? An evaluation of policy options addressing "regulatory chill". *LSE Research Online*. 2001;4(3):231-244.

policies. For Neumayer, regulatory chill was potentially serious but difficult to detect the phenomenon. Mabey and McNally, who examined foreign direct investment in developing nations, also claim that regulatory chill is difficult to measure and that given “that there is little statistical evidence of this ‘chilling effect’ is unsurprising, because evidence is needed of what has not happened.”<sup>62</sup>

In light of the increasing usage of ISDS mechanisms by TNCs to challenge government regulations, legal scholars have begun to explore how investment arbitration may influence the development of public policies. Several legal scholars consider regulatory chill to exist when policymakers take into account potential trade and investment disputes by foreign investors when drafting and developing public policies. Therefore the chill would emerge only when the government has been “made aware” of the risks involved. As a result, several critics of the regulatory chill hypothesis have argued that 1.) regulators have little awareness or comprehension of trade and investment law and 2.) there is no evidence to suggest a chilling effect is indeed occurring to either remove or lower social, environmental or health standards.

In addressing the first critique, Coe and Rubins argue that the regulatory chill hypothesis “assumes regulators are aware of international law,” and even though they acknowledge regulators are more conscious than ever before, they contend that state actions are “clearly uninformed by the dictates of international law.”<sup>63</sup> For Gottwald, this unawareness of international trade law is worse in developing countries, which tend to lack resources and “affordable access to legal expertise.”<sup>64</sup> More recent studies have begun to

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<sup>62</sup> Mabey N, McNally R. *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*: World Wildlife Fund for Nature, August 1999.

<sup>63</sup> Coe J, Rubins N. Regulatory expropriation and the Tecmed case: context and contributions. In: Weiler T, ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*. London: Cameron; 2005: 597-667.

<sup>64</sup> Gottwald EJ. Leveling the playing field: is it time for a legal assistance center for developing nations in investment treaty arbitration. *American University International Law Review*. 2007:237-275.

acknowledge some awareness of international trade among regulators but primarily among high-ranking officials and government lawyers. Harten and Scott, who conducted private interviews with representatives from the trade ministry in Ontario, reveal that some higher-ranking officials were more aware of the trade concerns including ISDS than others.<sup>65</sup> In their interviews, one representative claimed that in order to increase this lack of awareness in other officials, threats or challenges need to be “seen as more significant in order for people to take it seriously” as some officials “haven’t felt that they’ve had to pay attention to it.”<sup>66</sup> Dupont and Schultz, who examine investment arbitration as a political system, also agree with Harten and Scott that states do adjust to feedback from international agreements “but that this adjustment seems to take place to a significant degree in the locus of government lawyers and bureaucracies, as opposed to political representatives.”<sup>67</sup>

In addressing the second critique, several authors claim that it is difficult to prove the existence of a chilling effect. In her study analyzing the WTO regulatory chill effect on sustainable development, Lydgate suggests that governments revising regulations took into account their WTO law commitments but argues that, “regulatory chill is difficult to document, as it takes the form of internal decision-making.”<sup>68</sup> Bernauer and Caduff, who studied the uptake in environmental regulation since the 1970s, admit that, “regulatory chill effect appears to be the exception and not the rule” and that there are few examples “leading to a lowering of environmental standards.”<sup>69</sup> Similarly in an analysis of a regulation to ban open-pit mining in protected forests that was repealed, Gross argues that the

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<sup>65</sup> Harten GV, Scott DN. Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada. *Osgoode Legal Studies*. 7 December 2015;12(6):1-27.

<sup>66</sup> *Ibid*, 22.

<sup>67</sup> Dupont C, Schultz T. Towards a new Heuristic Model: Investment Arbitration as a Political System. *King's College London Research Paper Series*. 22 December 2015;7(1):1-29.

<sup>68</sup> Lydgate EB. Biofuels, Sustainability, and Trade-Related Regulatory Chill. *Journal of Int Econ Law*. 15 March 2012;15(1):157-180.

<sup>69</sup> Bernauer T, Caduff L. In Whose Interest? Pressure Group Politics, Economic Competition and Environmental Regulation. *J of Pub Policy*. Jan-Apr 2004;24(1):99-126.

Indonesian government appeared to cave into trade threats by international mining companies but admits that the governments' "decision to repeal the ban cannot be conclusively determined."<sup>70</sup> Due to the shortcomings of these studies, scholars like Mabey and McNally have admitted, "this issue must be investigated by historians and political scientists."<sup>71</sup>

Despite the fact that the academic literature on international investment and ISDS has been dominated by legal analysis, which is understandable due to its complexity, a few scholars of political science have begun to examine regulatory chill, the threats of arbitration, and the impact of international trade and investment agreements on national regulatory authority. Kyla Tienhaara addresses some of the misconceptions in the legal literature about how regulators behave and argues that the *actual* threat of arbitration is not that crucial but rather it is the government's *perception* of the threat of arbitration that is important.<sup>72</sup> She illustrates through two case studies in Costa Rica that regulatory chill was more likely to occur when the government viewed threat as palpable rather than hollow. Christine Côté attempts to apply a systematic approach to analyzing regulatory chill by evaluating regulatory trends and the level of awareness of international trade and investment agreements by government regulators. She analyzes health, safety and environmental regulations, including tobacco plain packaging, and concludes that while there exists some influence by ISDS cases on the regulatory development process, there is

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<sup>70</sup> Gross S. Inordinate Chill: BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom-An Indonesian Case Study. *Mich. J. Int'l L.* Spring 2003;3(1):894-959.

<sup>71</sup> Mabey and McNally, 43.

<sup>72</sup> Tienhaara K. Regulatory chill and the threat of arbitration: A view from political science. In: Brown C, Miles K, eds. *Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press; 2011: 606-628.

no consistent observable evidence to support the possibility of regulatory chill due to an upward adoption of regulations and a low level awareness among regulators.<sup>73</sup>

However both of these attempts, although novel and ambitious in their approach, fall short in providing sufficient evidence to either support or deny the existence of regulatory chill. While Tienhaara has definitely advanced the literature on regulatory chill, especially examining the “threat” of arbitration rather than the actual challenges, her analysis lacks the in-depth case study analysis of either surveying and interviewing policymakers or detailing their public remarks that is sufficient to understand their behavior when confronted with arbitration threats.

Côté’s work also advances the literature on regulatory chill by attempting to survey and interview regulators but her systematic approach is too ambitious and oversimplifies government reactions to trade and investment threats and challenges. First, Côté’s examination of regulatory trends in the uptake of adopted pictorial HWLs since 2001 ignores the fact that while 75 countries have adopted pictorial HWLs, only 8 countries (11%) have adopted pictorial HWLs covering more than 50% of the package, thus highlighting the trend towards 50% coverage rather than towards plain packaging (100%) coverage. This trend is often better explained by the importance of NGOs operating at the international level and the creation of the FCTC that has assisted states in the acceleration of tobacco control regulations globally rather than the lack of regulatory chill. As we will see in chapter 2, historically governments, which have proposed the most progressive HWL policies worldwide (e.g. plain packaging) and not the trend (e.g. 50%) have been subject to greater trade and investment threats and challenges, mostly due to the fact of the tobacco industry’s fear of diffusion of best practices. Furthermore, tobacco companies, even with their vast resources, could not legally challenge every government’s HWL policy, thus

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<sup>73</sup> Côté C. *A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment*, February 2014.

highlighting why they have targeted the most progressive HWL policies. As a result, to more accurately capture the chilling effect the most progressive HWL proposals should be studied, which this dissertation project sets out to accomplish.

Second, Côté conflates tobacco packaging and labeling (HWLs) with tobacco advertising, promotion and sponsorship (TAPS). While it is true that HWLs represent a form of advertisement, the policy or provisions in a comprehensive tobacco control bill are separate from TAPS and more importantly face a different set of threats and challenges both domestically and internationally. For example, trade and investment threats targeting HWLs typically concern intellectual property (trademarks) while TAPS threats typically concern violations of consumer freedoms. Therefore Côté's supportive evidence towards regulatory uptake of TAPS is important but can again be attributed to NGOs and the FCTC and does not necessarily suggest the lack of regulatory chill.

Third, her conclusion that there exists a low level of awareness of international trade and investment agreements by government regulators relies on interviews with only 11 regulators, of which all are from Health Ministries. While it is typical for Health Ministries to draft and develop regulations, several other bodies of government are involved in shaping tobacco control regulations and are targets of trade threats by tobacco companies, including members of parliament or congressmen, the trade ministry, and sometimes the agricultural ministry, the commerce industry, and the president or prime minister. Furthermore, some of the regulators interviewed by Côté were from countries that are not currently involved in developing plain packaging proposals, again highlighting Côté's misrepresentation of those actually involved with the plain packaging process.

## RESEARCH DESIGN AND METHODS

### Policy selection: Cigarette package health warning labels (HWLs)

In terms of tobacco control, and public health more broadly, health warning labels (HWLs) on cigarette packages are some of the most effective measures in helping reduce tobacco use. HWLs inform smokers about the dangers of smoking and diminish the appealing attributes associated with particular brands that attract smokers, especially youth smokers.<sup>74</sup> HWLs have evolved from textual warnings on the side of the pack to pictorial warnings that cover a large portion of the front of the pack (Table 1:3),<sup>75</sup> including the entire package in Australia. Several studies have shown that larger and more graphic pictorial HWLs are more effective in discouraging the initiation of smokers (Table 2).<sup>76</sup>

While existing trade and investment agreements contain legal language that tobacco companies can use as weapons to undermine a variety of public health policies, the majority of trade and investment threats and challenges to date have been targeted towards HWL proposals. One possible explanation for this is that with the increase of tobacco advertising bans worldwide, the cigarette package has become one of the last forms of advertising for tobacco companies.<sup>77</sup> Recognizing this importance, tobacco companies have attempted to shift the debate away from public health and into other realms such as international trade when attempting to block, weaken or delay HWLs.

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<sup>74</sup> Thrasher JF, Rousu MC, Hammond D, Navarro A, Corrigan JR. Estimating the impact of pictorial health warnings and "plain" cigarette packaging: evidence from experimental auctions among adult smokers in the United States. *Health Policy*. Sep 2011;102(1):41-48.

<sup>75</sup> Hiilamo H, Crosbie E, Glantz SA. The evolution of health warning labels, 2014.

<sup>76</sup> Thrasher JF, Hammond D, Fong GT, Arillo-Santillan E. Smokers' reactions to cigarette package warnings with graphic imagery and with only text: a comparison between Mexico and Canada. *Salud publica de Mexico*. 2007;49 Suppl 2:S233-240. Also see Hammond D. Health warning messages on tobacco products: a review. *Tobacco control*. Sep 2011;20(5):327-337. Moodie C, Mackintosh AM, Hastings G, Ford A. Young adult smokers' perceptions of plain packaging: a pilot naturalistic study. *Tobacco control*. Sep 2011;20(5):367-373. Hoek J, Wong C, Gendall P, Louviere J, Cong K. Effects of dissuasive packaging on young adult smokers. *Tobacco control*. May 2011;20(3):183-188.

<sup>77</sup> World Health Organization. *WHO Framework Convention on Tobacco Control (2009) Guidelines for Implementation of Article 11: Packaging and Labelling of Tobacco Products* 2009.



Table 1:3: Evolution of cigarette package HWLs (1960-2015)

<p>Generation 1: Vague health message on the side of the pack</p>	<p>Generation 2: Affirmative health message on the side of the pack</p>	<p>Generation 3: Affirmative health message on the front of the pack</p>	<p>Generation 4: Rotating message on the front of the pack</p>	<p>Generation 5: Pictorial messages on the front of the pack</p>

### Case selection

Since HWLs are typically policies implemented at the national level, cases will focus on analyzing national government HWL policies with a focus on the trade and investment threats and challenges that attempt to constrain government regulatory authority. As of September 2014, over 150 countries have textual health warnings on cigarette packages, and 77 countries include pictorial HWLs.<sup>78</sup> The majority of these pictorial HWLs cover 50% of the front and the back of the package, and only nine countries (Australia, Uruguay, Thailand, Brunei, Canada, Nepal, Ireland, U.K., and France) have implemented HWLs covering at least 75% of the front and back, all of which except Australia and Uruguay have only been implemented since 2014. Given that internal tobacco industry documents reveal that tobacco companies have historically targeted the most progressive HWL proposals with aggressive trade threats in order to prevent the diffusion of best practices (see chapter 2), selecting these cases will offer the greatest insight into the impact of trade threats. However during the time of this study, only four known governments had attempted to enact pictorial HWLs that cover more than 80% of the pack, Australia, New Zealand,

<sup>78</sup> Canadian Cancer Society. *Cigarette Package Health Warnings: International Status Report* September 2014.

Uruguay, and Honduras, therefore these countries were selected and the other remaining countries will be discussed briefly in the conclusion (chapter 7). While Honduras was originally selected as a case study, accessing policymakers for interviews and congressional records proved to be extremely difficult as Honduras experienced a coup d'état in 2009. Therefore this work examines three case studies (Australia, New Zealand, and Uruguay), in which tobacco companies made trade and investment arbitration threats (Table 1:4).

## **Methods**

This interdisciplinary research employs multiple qualitative methods for triangulation, combining archival research, review of news sources and government legislation with interviews from key personnel involved in the policymaking process in a qualitative comparative analysis of multiple case studies.

### ***Comparative Analysis***

To address the first puzzle of why Australia has implemented strong HWLs while New Zealand has delayed its HWL proposal, a most-similar systems design (MSSD)<sup>79</sup> is applied, which compares similar cases that have had divergent outcomes. Applying a MSSD is ideal and a significant advantage in understanding this divergence in three important ways. First, employing a MSSD more accurately measures the reception and impact of trade threats by controlling for various variables that may otherwise explain the divergence (delay or no delay) in the regulatory development process in both countries. Second, since the divergence is measured in the delay in the regulatory process, a MSSD provides the ability to comparatively measure the time elapsed between proposing and enacting plain packaging in two similar cases with usually similar legislative timeframes.

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<sup>79</sup> Mills JS. *Logic, Ratiocinative and inductive: Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation*. London: Harrison and Co. Printers; 1843.

Table 1:4: Variation in the size of pictorial HWLs (30%-100%)

		
<p>Generation 5.a: Health message covering <b>30% of the pack</b> (New Zealand, 2008)</p>	<p>Generation 5.b: Health message covering <b>80% of the pack</b> (Uruguay, 2010)</p>	<p>Generation 5.c: Health message covering <b>100% of the pack</b> (Australia, 2012)</p>

This is significant because any delay in the policymaking process for strong HWLs minimizes the effectiveness of the regulation to reduce smoking initiation, smoking cessation, government health expenditures, tobacco industry profits, and the diffusion of best practices regionally and internationally. Therefore applying a MSSD not only captures the political delays in the regulatory process but also more precisely estimates the health costs and consequences of delaying strong HWL regulations. Third, by controlling for the other explanatory variables, a MSSD also more accurately measures the chilling effect of these trade threats in delaying strong HWLs. As mentioned previously, studies examining the chilling effect have relied on anecdotal and systematic approaches that are insufficient in measuring regulatory chill, whereas a MSSD controls for other explanatory variables thereby more accurately measuring the effect of trade threats and challenges in chilling the regulation.

To further evaluate the empirical reach and analytical leverage of the results from applying a MSSD to Australia and New Zealand, a most-different systems design (MDS) is applied to compare Australia to Uruguay in which two different cases have had similar outcomes, implementing strong HWLs without being weakened or delayed. As discussed by

King, Keohane, and Verba,<sup>80</sup> with more observations researchers always do better (or, in the extreme, no worse) therefore applying a MDS between Australia and Uruguay maximizes the observable implications for more accurate and efficient predictions. In doing so, applying a MDS also addresses the second puzzle of why Uruguay, a developing and middle-income country, has implemented strong HWLs while New Zealand, a developed and high-income country, has delayed its HWL proposal.

### ***Legacy Tobacco Documents Library (LTDL) Archive***

To identify and analyze tobacco industry trade threats and strategies, searches were conducted in the University of California, San Francisco (UCSF) Legacy Tobacco Documents Library (LTDL), now known as the Truth Tobacco Industry Documents (TTID), which is an online archive library that contains over 84 million pages of previously secret tobacco industry documents. This unique archive provides invaluable access to the internal operations of tobacco companies, and first hand accounts of tobacco industry inter-correspondents, memorandums, emails, notes from meetings, project plans, trade negotiations and economic performance reports between company executives, managers, employees, politicians, ministers, and legal representatives. The documents in the archive have become publically accessible through litigation and are available at (<https://industrydocuments.library.ucsf.edu/tobacco/>). This research looks to add to a growing body of literature that has analyzed the documents to reveal tobacco industry strategies related to marketing and advertising,<sup>81</sup> litigation,<sup>82</sup> and politics and policy.<sup>83</sup>

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<sup>80</sup> King G, Keohane RO, Verba S. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton, New Jersey: Princeton University Press; 1994.

<sup>81</sup> Ling PM, Glantz SA. Using tobacco-industry marketing research to design more effective tobacco-control campaigns. *Jama*. Jun 12 2002;287(22):2983-2989. Also see Apollonio DE, Malone RE. Turning negative into positive: public health mass media campaigns and negative advertising. *Health education research*. Jun 2009;24(3):483-495.

<sup>82</sup> Nixon ML, Mahmoud L, Glantz SA. Tobacco industry litigation to deter local public health ordinances: the industry usually loses in court. *Tobacco control*. Mar 2004;13(1):65-73. Also see Ibrahim JK, Glantz SA. Tobacco industry litigation strategies to oppose tobacco control media campaigns. *Tobacco control*. Feb 2006;15(1):50-58.

Research was conducted between June 2013 and September 2014 using a standard snowball search.<sup>84</sup> Initial search terms included “international trade”, “intellectual property”, “trademarks”, “health warnings”, “plain pack”, “generic pack”, “Paris Convention”, “NAFTA”, “GATT”, “World Trade Organization/WTO”, as well as project names, legislation numbers, and specific dates. A total of about 200 relevant documents were found and then used to detail the industry’s development of trade and investment arbitration threats and challenges.

While the archive library contains important access to tobacco industry activity, there were also some limitations from the archive searches. First, the majority of the documents are dated before 2003, thus placing a limitation on inquiring and assessing tobacco industry behavior post-2003. The archive does continue to grow through litigation as an average of 860 documents are being added every month. In particular, in January, April, and May 2012, and July 2014 new documents were added to the archive pertaining to tobacco industry strategies to undermine HWLs, including plain packaging. Second, the tobacco companies coded some of the documents, which are missing subfields (e.g. dates and authors), thus decreasing the accuracy, but only a few documents had this issue. Third, British American Tobacco (BAT) withheld 12 documents concerning intellectual property, international treaties, and HWLs by claiming attorney-client privilege.<sup>85</sup> These documents

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<sup>83</sup> Mamudu HM, Hammond R, Glantz SA. Project Cerberus: tobacco industry strategy to create an alternative to the Framework Convention on Tobacco Control. *Am J Public Health*. Sep 2008;98(9):1630-1642. Also see Fooks GJ, Gilmore AB, Smith KE, Collin J, Holden C, Lee K. Corporate social responsibility and access to policy elites: an analysis of tobacco industry documents. *PLoS Med*. Aug 2011;8(8):e1001076.

<sup>84</sup> Malone RE, Balbach ED. Tobacco industry documents: treasure trove or quagmire? *Tobacco control*. Sep 2000;9(3):334-338. Also see MacKenzie R, Collin J, Lee K. *The tobacco industry documents: an introductory handbook and resource guide for researchers*. London: Centre on Global Health and Change, London School of Hygiene and Tropical Medicine.; 6 November 2003.

<sup>85</sup> Clarke P. Confidential communication from internal counsel to employee and affiliate employee containing counsel's advice regarding NAFTA trade marks, leaf contracts and distributors contracts. 5 February 1993. Available at: <http://legacy.library.ucsf.edu/tid/nmv32b00>. 2.) Cooper R. Confidential communication from internal counsel to affiliate employee and internal counsel containing counsel's advice regarding implications of NAFTA on trademarks in US, Canada and

exist but without access to viewing them, it is unclear what they say. Finally, all tobacco documents are subject to the credibility and validity of tobacco company actions as the companies may discuss a plan, project, or strategy, but may never apply these practices. As a result of these limitations, other qualitative methods have been employed to triangulate the findings of this study.

### ***Review of news sources and government legislation***

To complement the archival research, leading news sources and legislative websites in each of the three countries were reviewed. I reviewed popular news sources (mostly online versions of newspapers) in all three countries for both background information and to understand the regulatory development process HWLs. Research was conducted between September 2014 and June 2015 using a standard snowball search. Initial search

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Mexico. 18 February 1993. Available at: <http://legacy.library.ucsf.edu/tid/kmv32b00>. 3.) Cooper R. Confidential communication from internal counsel to affiliate counsel requesting counsel's advice regarding exhaustion of rights relating to NAFTA. 3 March 1993. Available at: <http://legacy.library.ucsf.edu/tid/tjb42b00>. 4.) Bazerman S. Confidential communication from external counsel to internal counsel containing counsel's advice regarding NAFTA. 5 March 1993. Available at: <http://legacy.library.ucsf.edu/tid/sjb42b00>. 5.) Clarke P. Confidential communication from internal counsel to industry counsel and affiliate containing counsel's analysis and advice regarding impact of GATT/NAFTA. 26 April 1994. Available at: <http://legacy.library.ucsf.edu/tid/gwx32b00>. 6.) Clarke P. Confidential communication from internal counsel to employees and affiliate employee containing counsel's advice regarding group intellectual property services and trade mark issues. 8 January 1993. Available at: <http://legacy.library.ucsf.edu/tid/lmv32b00>. 7.) Clarke P. Confidential memorandum prepared by internal counsel containing internal counsel's advice and analysis regarding smoking and health issues and intellectual property. 11 March 1993. Available at: <http://legacy.library.ucsf.edu/tid/xwv32b00>. 8.) Clarke P. Confidential draft memorandum containing internal counsel's handwritten comments reflecting counsel's opinions and advice regarding marketing of new brands and involvement of group intellectual property services. 30 March 1993. Available at: <http://legacy.library.ucsf.edu/tid/vvw32b00>. 9.) Ackman R. Confidential communication from affiliate counsel to internal counsel containing counsel's advice regarding generic packaging. 9 June 1993. Available at: <http://legacy.library.ucsf.edu/tid/fuw32b00>. 10.) Latham D. Confidential communication from internal counsel to internal counsel containing counsel's advice regarding plain and generic packaging legislation. 13 July 1993. Available at: <http://legacy.library.ucsf.edu/tid/duw32b00>. 11.) Latham D. Confidential communication from internal counsel to internal counsel and employee containing counsel's advice regarding advice and review of papers relating to generic packaging and plain packaging. 16 July 1993. Available at: <http://legacy.library.ucsf.edu/tid/sjc42b00>. 12.) Kuk P. Confidential handwritten note from employee to internal counsel and employee requesting counsel's advice regarding possible infringement of intellectual property rights and confidential handwritten note from internal counsel to employee containing counsel's advice regarding same. 25 August 1993. Available at: <http://legacy.library.ucsf.edu/tid/wmw12b00>.

terms included “plain packaging”, World Trade Organization/WTO”, “United States Trade Representative/USTR”, “fast track authority”, “trade promotion authority”, “el comercio internacional”, “international trade”, “tratado bilateral de inversion” “bilateral investment treaty”, “propiedad intelectual”, “intellectual property”, “marcas” “trademarks”, as well as legislation numbers and specific dates, and key actors. A total of about 150 relevant documents were found and then used to detail the industry’s trade and investment arbitration threats and challenges and regulatory development process in each country as well as document efforts to influence the pending TPP agreement.

I also reviewed government legislative documents from each of the three countries between September 2014 and June 2015. This primarily consisted of analyzing government reports, health committee discussions and debates, executive decrees, and ministerial letters concerning the regulatory development process for strong HWLs. A close examination of health committee discussions and debates offered important insight into how the tobacco industry trade threats were delivered and highlighted the perception of these threats by policymakers during the course of the policymaking process. Furthermore committee submissions by all stakeholders, including most notably tobacco companies, health organizations, and health advocates were analyzed to compare the trade threats with other issues raised either in favor or against the HWL proposals.

### ***In-depth qualitative interviews***

In order to more accurately measure the effect of tobacco industry trade threats on the regulatory development process of HWLs and consequently notions of regulatory chill, I visited Australia, New Zealand and Uruguay between June and August 2015, to interview public health advocates and policymakers who have been closely involved in the regulatory process in each country. A total of 57 interviews (Australia-18, New Zealand-24, Uruguay-15) were conducted following a human subjects protocol that was approved and monitored

by the University of California Committee on Human Research. As a result, this study to date provides the most in depth analysis of interviewing policymakers from various departments and branches of government to analyze the impact of trade threats and challenges on the regulatory development process of strong HWL regulations and the impact of regulatory chill.

While this represents the largest and vast collection of interviews with policymakers and health advocates regarding regulatory chill, there still existed some limitations. Although several members of government in each country were contacted only half of them responded to be interviewed. In Australia, of those who voted against plain packaging, only a couple of the members of parliament were available for interview, thus limiting the perception of trade threats to mostly those who supported the measure. However analyzing the responses of those opposed to the proposals during parliamentary debates helped minimize this limitation. In both Australia and New Zealand, only a couple of members of the Department/Ministry of Health and the Ministry of Trade were available for interview, thus limiting the collective perception of the trade threats and challenges from each ministry. In all three countries, members of the attorney general's office were unavailable for interviews, limiting the knowledge surrounding the legal advice provided to Cabinet or the president's office regarding the HWL proposals amidst trade threats. Furthermore the tobacco companies attempted to request this legal advice through freedom of information acts but were denied so this information has remained confidential by all three governments. There were also limitations to the information provided in the interviews in Australia and Uruguay due to concerns over confidentiality because both of the trade disputes against each country remain pending.



## **OUTLINE OF CHAPTERS**

This research is organized as follows. The history of tobacco industry trade and investment threats and challenges is outlined in chapter 2. Providing the reader with the historical context necessary for understanding the nature of these threats, this chapter offers the backdrop of how tobacco companies operate at the international level and how the threat of trade and investment arbitration emerged and evolved. In doing so, it examines internal documents from tobacco companies that reveal the industry's global approach to preventing the diffusion of best practices, in this case the spread of progressive HWLs on cigarette packages. Specifically, it documents how the industry received internal legal advice privately that international treaties could not be used to prohibit governments from enacting HWLs, but publically continued to legally threaten governments these proposals were illegal under international law. An analysis of the internal documents also provides a closer examination of the trade threat as a multi-pronged strategy to influence the government regulatory process.

Chapter 3 addresses the first critique of the regulatory chill hypothesis, which claims that regulators are unaware and do not take into consideration international law during the regulatory process by analyzing tobacco industry trade and investment threats and challenges to strong HWL proposals in Australia and New Zealand. This chapter reviews news sources and government legislation to reveal that much of the discussions and debates surrounding the plain packaging proposals centered on the issues of trade and investment, thus highlighting the awareness of policymakers about the potential international legal consequences of proceeding with the plain packaging proposals. In seeking to further understand the impact of trade and investment threats, interviews from policymakers uncover that these threats have created a great deal of added complexity that requires multiple government agencies to spend extraordinary time and resources to

evaluate and reevaluate the plain packaging proposals. Interviews with policymakers also reveal that the threats seem to be more credible with those from center-right parties, but not necessarily those who have practiced in the medical field.

Chapter 4 addresses the second critique of the regulatory chill hypothesis, which claims that there is no evidence of a chilling effect by applying a most-similar systems design to explain how Australia has overcome industry trade threats to enact and implement plain packaging in a normal timeframe while New Zealand has caved into the threats and delayed its proposal for plain packaging. After controlling for several explanatory variables, this chapter illustrates how the governments' *reception* to tobacco industry trade threats explains the divergence in regulatory development process of plain packaging. In Australia, the center-left government, continued strong bureaucratic leadership and capacity in the Health Ministry, and independent and confident tobacco control and trade advocacy efforts helped reject the trade threats and properly implement plain packaging without being weakened or delayed. In New Zealand, a center-right coalition government, lack of continued bureaucratic leadership and capacity in the Health Ministry, and constrained and timid tobacco control and trade advocacy efforts were more vulnerable to the trade threats resulting in a delay in enacting plain packaging. New Zealand's cautious "wait and see" approach to see how the trade challenges against Australia will be resolved before enacting legislation demonstrates that the trade threats and challenges are having a chilling effect on the regulatory process in New Zealand.

Chapter 5 builds upon the evidence presented in Australia and New Zealand by employing a most-different systems design to compare how two different cases, Uruguay and Australia, overcame tobacco industry trade threats and challenges to enact and implement strong HWL regulations. This chapter also reviews news sources and government legislation to illustrate again that much of the debate and discussion regarding

HWLs focused on issues of trade and investment. More importantly, interviews with policymakers reveal that they were also aware and took into consideration international trade law during the drafting and implementation of strong HWLs. In addition to the added complexity of trade threats, the cost of international arbitration was more of a grave concern for policymakers in the developing country of Uruguay. After applying a most-different systems design, the case of Uruguay confirms that the governments' *reception* to tobacco industry trade threats, which was influenced by a leftist government, continued strong bureaucratic leadership and capacity in the Health Ministry, and independent and confident tobacco control and trade advocacy efforts, explains how the Uruguayan government implemented strong HWLs without being weakened or delayed similar to Australia.

An analysis of current U.S. trade negotiations for the TPP and the potential impact on public health is provided in chapter 6, which highlights how TNCs and NGOs are aggressively lobbying trade negotiators and policymakers to alter international trade governance in the 21<sup>st</sup> century. The chapter sheds light on how tobacco companies have secured important legal mechanisms in the U.S., including trade promotion authority, to expedite the trade negotiation process. Similar to preemption, fast tracking trade deals shifts authority, but in this case horizontally not vertically from the legislative branch to the executive branch to minimize congressional oversight and the policy space for discussion and debate to amend trade deals. The chapter also demonstrates how health groups and organizations have pressured policymakers to also consider the governments' commitments to international health treaties during trade negotiations. These efforts have led to semi-tobacco carve out in the pending TPP agreement, which continues to allow for the elimination of tobacco tariffs but prevents tobacco companies from using ISDS mechanisms to challenge tobacco control policies.

Chapter 7 concludes the dissertation by summarizing the primary theoretical and empirical findings presented and discusses the policy implications for other governments introducing advanced HWL proposals, including plain packaging. This discussion also highlights the policy implications of trade threats and how they may be employed and impact the regulatory development process in other health related fields such as food, alcohol, and medicine. Finally the future of trade and investment agreements is discussed and its impact on the public health and how non-state actors will continue to shape the regulatory environment both at the domestic and international level in the 21<sup>st</sup> century.

## Chapter 2: An Examination of Tobacco Industry Trade and Investment Arbitration Threats and Challenges

*"The tendency is for each country to think its problems are unique. The fact is that tobacco issues have always been international. Rotating labels came to us from Sweden-and the furor about environmental tobacco smoke was started in Japan. As one of our Australian colleagues puts it, 'A sneeze in one country today causes international pneumonia tomorrow!'"<sup>86</sup>*

Hugh Cullman, Vice Chairman, Philip Morris  
October 7, 1985

Internal tobacco industry documents suggest that tobacco companies have always approached the issue of health warning labels (HWLs) globally and have aggressively attempted to prevent the diffusion of progressive HWLs worldwide for decades. While tobacco companies operated in multiple countries and coordinated strategies internationally to block the global diffusion of HWLs, their activities until the 1980s primarily remained within the confines of the state. As HWLs evolved from requiring vague health messages on the side of the pack in the U.S. in 1966 to requiring graphic pictures with health warnings on the front and back in the 1980s, tobacco companies began not only coordinating internationally but looked to globally preempt or shift decision making authority away from states into international arenas and forums. In particular, tobacco companies looked to international treaties concerning trade and investment as opportunities to prevent the diffusion of HWLs worldwide.

This chapter explores this journey by tobacco companies and offers a first hand look at the emergence and development of using international treaties as a legal weapon to threaten governments over their proposals to advance HWLs. Through an examination of internal tobacco industry documents from the archive, this chapter provides a historical overview of tobacco industry's global approach to prevent the spread of HWLs and documents their usage of trade and investment arbitration threats and challenges since the

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<sup>86</sup> Cullman H. Remarks by Hugh Cullman, Vice Chairman Philip Morris at Corporate Affairs World Conference. 7 October 1985. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/hknv0114>.

1980s. Finally the chapter creates a typology of tobacco industry trade and investment arbitration threats and challenges, which will be used to characterize the deployment of this multipronged strategy to constrain the government regulatory authority in the three case studies examined in chapters 3-5.

### **Section I: History of trade and investment arbitration threats and challenges to oppose HWLs**

Since the 1950s, tobacco companies have attempted to block, weaken and delay HWLs on cigarette packages by privately influencing policymakers and the media, commissioning research (including legal research and opinion polls), and using third parties to argue that people are already aware of the dangers of smoking.<sup>87</sup> These traditional approaches have been employed inside the confines of the state, maneuvering through the domestic legislative, executive and judicial channels of government.

However in the mid-to-late 1980s tobacco companies became increasingly alarmed about the progress of HWL policies as the introduction of pictorial images on cigarettes packages emerged in Iceland and then were proposed in Sweden. In 1984, the Iceland parliament introduced the Icelandic Tobacco Act, which proposed becoming the first country in the world to adopt pictorial HWLs containing images of a patient in bed, a pregnant woman, black lungs, and a diseased heart<sup>88</sup> (Figure 1). Tobacco companies employed traditional lobbying strategies to block and weaken the proposal, but the Icelandic government implemented the pictorial HWLs in May 1984.

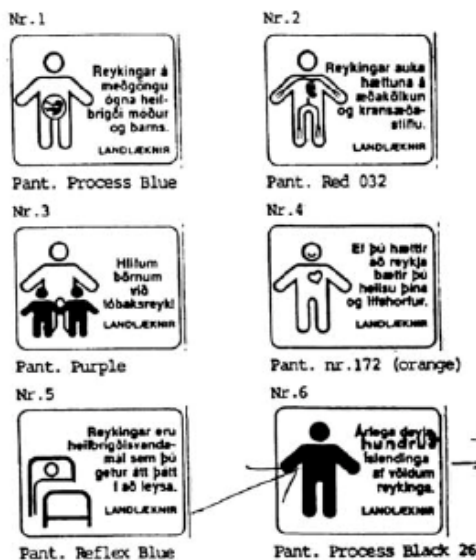
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<sup>87</sup> Glantz S, Slade J, Bero L, Hanauer P, Barnes D. *The cigarette papers*. Berkeley: University of California Press; 1996. Also see Chapman S, Carter SM. "Avoid health warnings on all tobacco products for just as long as we can": a history of Australian tobacco industry efforts to avoid, delay and dilute health warnings on cigarettes. *Tobacco control*. Dec 2003;12 Suppl 3:iii13-22.

<sup>88</sup> Blondal T, Magnusson G. Innovation in Iceland: graphic health warnings on tobacco products. *New York state journal of medicine*. Jul 1985;85(7):405-406.

Fylgiskjal

SIGARETTUR:



VINDLAR OG REYKTÖBAK:



NEFTÖBAK OG MINNYÖBAK:



Pant. = Pantone

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Figure 1: Pictorial HWLs first implemented in Iceland in 1985

Within one year sales of tobacco products declined by 3.5% and smoking prevalence dropped for men and women from 42.9% to 37.2% and 37% to 35.2% respectively.<sup>89</sup> In 1989, Sweden's National Board of Health and Welfare proposed introducing pictorial HWLs that almost covered 70% of the front of the package, arguing that, "the introduction of an

<sup>89</sup> Tobacco Institute. Info Log: Information Services. 10 December 1985. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/plhc0090>.

illustrative element substantially increases the attention value”, citing the success of Icelandic Tobacco Act of 1984.<sup>90</sup>

### **The emergence of trade and investment arbitration threats**

In response, tobacco companies began exploring new options at the international level that would help them counter the spread of progressive of HWLs globally. Previously secret internal tobacco industry documents reveal that in 1990, Philip Morris management in Europe considered the proposal in Sweden a “HWL crisis” and stated that “the key defense position is that the Swedish HWL proposals are in contradiction with EEC’s [European Economic Community] HWL rules.”<sup>91</sup> Their action plan consisted of filing a legal complaint, issuing a press release emphasizing their complaints with the proposal, mobilizing their allies, and extending these efforts to Norway and Finland to “counter the Swedish model in these countries.”<sup>92</sup>

In 1990 PMI filed a complaint with the Swedish Health Board arguing that the proposal violated the European Community’s 1989 Directive that only required textual warnings covering 4 to 8% of the cigarette package.<sup>93</sup> In its complaint, PMI cited a recently published article by Ulf Bernitz,<sup>94</sup> a Swedish law professor, who argued that governments could not restrict or prohibit the use of trademarks. Bernitz argued that this would violate Sweden’s international obligations under the Paris Convention for the Protection of Industrial Property, a treaty that protects intellectual property (patents, trademarks, copyright, etc). In particular, Bernitz argued that Article 7 in the Paris Convention granted

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<sup>90</sup> National Swedish Board Of Health and Welfare. New Warning Texts on Tobacco Packaging Proposals From A Reference Group. 12 January 1989. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/mtwv0126>.

<sup>91</sup> Philip Morris. Corporate Affairs. 1991/E 1991. Available at: <http://legacy.library.ucsf.edu/tid/vae42e00>.

<sup>92</sup> Ibid.

<sup>93</sup> Hammarskiold P, Stenshamn A. Philip Morris Aktiebolag, Appellant. Warning Texts for Tobacco. 30 January 1991. Available at: <http://legacy.library.ucsf.edu/tid/wvj53e00>.

<sup>94</sup> Bernitz U. Logo Licensing of Tobacco Products- Can it be Prohibited. February 1990. Available at: <http://legacy.library.ucsf.edu/tid/hru20a99>.



trademark holders the right to register a trademark, which implied the right to “use” the trademark. These actions by PMI represented the first known attempt by a tobacco company to use a trade agreement to make legal threats regarding violations of trademarks and investment to a government regarding its cigarette packaging proposals.

In January 1991, the Health Board dismissed PMI’s complaint concluding there was no conflict between Sweden’s effort to join the European Community and the HWL proposal.<sup>95</sup> In March 1991, Bernitz provided a “report from Philip Morris counsel to Philip Morris council [sic] regarding health warnings prepared in anticipation of litigation.”<sup>96</sup> (PMI has not released the report, claiming attorney-client privilege.) In March 1991, PMI obtained an opinion from Gunnar Karnell, another Swedish law professor, who argued that Sweden’s HWL proposal violated the Swedish Act on Trademarks by expropriating PMI’s trademark, which would require the Swedish government to compensate PMI.<sup>97</sup> In March 1991, PMI used these arguments in a second complaint to the Health Board,<sup>98</sup> and by December 1991, the Swedish Health Board dropped the proposal.<sup>99</sup> One possible explanation for the withdrawal of the HWL proposal is that Sweden was concerned about its pending membership in the European Community, but it is unknown what impact the trade threats had on this decision.

### ***Early developments of plain/generic packaging and the search for legal protection***

Meanwhile during the mid-to-late 1980s, the first known discussions for plain, or generic packaging of cigarettes began in Canada and New Zealand. In June 1986, the

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<sup>95</sup> Hammar skiold P, Stenshamn A. Philip Morris Aktiebolag, Appellant Warning Texts for Tobacco Case. 22 March 1991. Available at: <http://legacy.library.ucsf.edu/tid/omn87e00>.

<sup>96</sup> Bernitz U. Report from Philip Morris Counsel to Philip Morris Counsel Regarding Health Warnings Prepared in Anticipation of Litigation. 14 March 1991. Available at: <http://legacy.library.ucsf.edu/tid/rxk12a00>.

<sup>97</sup> Karnell G. Complementary opinion by Professor Jur. Dr. Gunnar Karnell. 15 March 1991. Available at: <http://legacy.library.ucsf.edu/tid/emn87e00>.

<sup>98</sup> Hammar skiold P, Appellant Warning, 1991.

<sup>99</sup> Hiilamo H, Crosbie E, Glantz SA. The evolution of health warning labels on cigarette packs: the role of precedents, and tobacco industry strategies to block diffusion. *Tobacco control*. Jan 2014;23(1):e2.

Canadian Medical Association adopted a motion proposed by Dr. Gerry Karr to have cigarettes sold “in the equivalent of plain brown wrappers,<sup>100</sup> which by January 1988 was recommended by health groups to the Health Committee in the Canadian Parliament as a regulatory option in future years.<sup>101</sup> In May 1989, the New Zealand Toxic Substances Board released a proposal to strengthen tobacco control, which included banning advertising and “the glamorous cigarette pack”.<sup>102</sup> In October 1989, researchers in New Zealand produced the first consumer research on the “promotional impact of the cigarette packaging”<sup>103</sup> concluding HWLs would have a greater impact when presented on plain-packs. In August 1990, the New Zealand Health Committee heard recommendations for generic packaging, but it was not included in the Smokefree Environments Act, which created smokefree environments and added restrictions on tobacco advertising.<sup>104</sup>

As discussions for plain or generic packaging progressed in the early 1990s, tobacco companies quickly recognized the threat these policies posed and began searching for legal protection of their trademarks under international treaties. In April 1992, the Australian Ministerial Council on Drug Strategy (MCDS), a committee of federal, state, and territory law and health enforcement ministers, proposed to implement textual HWLs covering 25% of the front and 50% of the back of the package, with the possibility of including generic packaging the following year.<sup>105</sup> Willis New Zealand, a subsidiary of British American Tobacco (BAT), fearing that New Zealand would follow Australia, characterized the

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<sup>100</sup> Porter AD. Letter from A.D. Porter to Plain Pack Group. 17 March 1995. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=hmxn0198>.

<sup>101</sup> Cunningham R. *Smoke & mirrors: the Canadian tobacco war*. Ottawa, Canada: International Development Research Centre; 1996.

<sup>102</sup> British American Tobacco. The Big Fight Begins. June 1989. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=rhwv0205>.

<sup>103</sup> Philip Morris. The Promotional Impact of Cigarette Packaging: A Study of Adolescent Responses to Cigarette Plain Packs. September 1989. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=rxkv0111>.

<sup>104</sup> British American Tobacco. Victory! Bill Passed in Strengthened Form. September 1990. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=xxwv0205>.

<sup>105</sup> Philip Morris. 2RF Presentation to W.H. Webb (Elongated Version). 27 May 1993. Available at: <http://legacy.library.ucsf.edu/tid/lfn32e00>.

Australian proposal as “the biggest battle to be fought by the industry.”<sup>106</sup> In response, BAT requested an opinion from its Australia law firm, Clayton Utz, on whether the HWLs would conflict with their right to use their trademarks on the cigarette packages. In May 1992, Clayton Utz told BAT that the Australian HWL proposal did not violate the Australian Trademarks Act and as a registered holder of the trademark, BAT only had the right to exclude others (e.g. third parties) from using it and did not guarantee BAT the right to “use” the trademark:

The [Australian] Trademarks Act does not purport to deal exhaustively or exclusively with the use of trademarks but only confers on the holder of a registered trademark certain rights in relation to goods or services. Accordingly, the Trademarks Act may be constructed so as to confer on the registered holder of the trademark the right to exclude others from the use of that trademark. *However it does not in our opinion, intend to control the circumstances in which the holder of a registered trademark may himself use that mark. Accordingly, we do not consider any inconsistency with the Trademarks Act as an avenue of challenging the [HWL] Regulations.*<sup>107</sup> [emphasis added]

BAT also asked Clayton Utz about using the Paris Convention to oppose the HWL proposal. In August 1992, BAT’s Chief Executive reported that the Paris Convention could not be used either:

The Company has also considered the issue of whether the proposed restrictions would be in breach of the Paris Convention on industrial property and the Australian Trade Mark Act. We are advised that there is no basis for any legal challenge against State and Territorial Governments on these grounds.<sup>108</sup>

In August 1992, BAT also asked Clayton Utz if the General Agreement on Tariffs and Trade (GATT), the main international treaty governing international trade at the time, could be used to block the HWL proposal. In December 1992, Clayton Utz replied, “In our opinion,

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<sup>106</sup> Owen J. Tobacco Control Regulations. 22 January 1993. Available at: <http://legacy.library.ucsf.edu/tid/tqs48a99>.

<sup>107</sup> Clayton Utz. Tobacco Control (Package Label) Regulations. 31 December 1992. Available at: <http://legacy.library.ucsf.edu/tid/nze78e00>.

<sup>108</sup> Johnston AC. Tobacco Sponsorship and Labelling in Australia. 6 August 1992. Available at: <http://legacy.library.ucsf.edu/tid/bim33a99>.

the Industry would not be able to rely on the provisions of the Paris Convention, [and] the General Agreement on Tariffs and Trade ... to challenge the proposed legislation.”<sup>109</sup>

In January 1993, Rothmans International examined the GATT as well as the then-pending Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), an international agreement established in 1994 as part of the newly-created World Trade Organization (WTO, a new revised version of the GATT), which protected intellectual property. In May 1993, W.D. & H.O. Wills, BAT’s Australian subsidiary, and Rothmans International wrote the British Consulate in Sydney, Australia, requesting that the Consulate ask the British Department of Trade and Industry whether Australia’s obligations under GATT and TRIPS would prohibit the proposed HWLs.<sup>110</sup> In July 1993, the British Consulate responded, again stating that these treaties did not protect the “use” of trademarks:

I have consulted my colleagues [who are responsible for protecting intellectual property] and their joint view is that *these claims do not hold water*. Restricting the printed matter on the cigarette packet to 75% of the surface area, as proposed, would not affect trade mark owners rights since registration does not normally entail any specification as to size, how it is used, or what proportion of the packet it occupies ... It is also true that Article 15.1 of the draft TRIPS text provides for the registration of the whole packet, and that Article 16 reiterates the Paris Convention provisions on well-known marks. However to proceed from these facts to the proposition that restrictions on the labeling are a potential breach of GATT *requires, in their view “several very large imaginative leaps.”* In the first place, registration of a trade mark does not confer the right to use it, in the words of Article 16.1 of the draft TRIPS Agreement, it confers the “exclusive right to prevent all third parties ... from using ... identical or similar signs”. *It would not be a breach of the TRIPS code for a country to have a complete ban on the sale of tobacco. Secondly, the registration of a trade mark for tobacco cannot prevent the operation of other regulations, for example, laws requiring health warning on packets.*<sup>111</sup> [emphasis added]

Thus, as of 1994, presumably all the advice that BAT and Rothmans had received indicated that HWLs were legal under international law (Table 2:1).

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<sup>109</sup> Clayton Utz, Tobacco Control, 1992.

<sup>110</sup> Hughes P. [Note from PJ Hughes to Martin Riordan regarding cigarette package]. 26 July 1993. Available at: <http://legacy.library.ucsf.edu/tid/tj143a99>.

<sup>111</sup> Ibid.

Table 2:1: Tobacco industry legal advice on intellectual property protection			
Date	Source	Authority	Legal Advice
March 1991	Ulf Bernitz	Paris Convention	Unknown <sup>112</sup>
March 1991	Gunnar Karnell	Swedish Act on Trademarks and Instrument of Governments Act	"The right to a trade mark is personal property. It is, like other intellectual property rights, encompassed by the protection of property against expropriation and the like without compensation ..." <sup>113</sup>
May 1992	Clayton Utz	Australian Trademarks Act	"The Trademarks Act may be constructed so as to confer on the registered holder of the trademark the right to exclude others from the use of that trademark. However it does not in our opinion, intend to control the circumstances in which the holder of a registered trademark may himself use that mark." <sup>114</sup>
Aug 1992	Clayton Utz	Paris Convention	"The Company has also considered the issue of whether the proposed restrictions would be in breach of the Paris Convention on industrial property and the Australian Trade Mark Act. We are advised that there is no basis for any legal challenge against State and Territorial Governments on these grounds." <sup>115</sup>
Dec 1992	Clayton Utz	GATT and Paris Convention	"In our opinion, the Industry would not be able to rely on the provisions of the Paris Convention, and the General Agreement on Tariffs and Trade to challenge the proposed legislation." <sup>116</sup>
July 1993	Department of Trade and Industry (DTI)	GATT and TRIPS	"Registration of a trade mark does not confer the right to use it ... It would not be a breach of the TRIPS code for a country to have a complete ban on the sale of tobacco. Secondly, the registration of a trade mark for tobacco cannot prevent the operation of other regulations, for example, laws requiring health warning on packets." <sup>117</sup>
Dec 1993	John Luik	GATT and TRIPS	"While I think the Gatt/Trips process provides a useful entre to this problem [intellectual property], I believe that its ultimate usefulness might well be limited." <sup>118</sup>
April 1994	Plain Pack Group	NAFTA	"There appears to be no direct redress available to companies under NAFTA as regards product labeling." <sup>119</sup>
May 1994	Plain Pack Group	GATT and TRIPS	"-Current conversations & treaties afford little protection -GATT/TRIPS little joy" <sup>120</sup>
July 1994	World Intellectual Property Organization (WIPO)	Paris Convention	"The countries of the Paris Union are bound to admit trademarks for registration notwithstanding the nature of the goods to which they are applied (Article 7). However, the Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted." <sup>121</sup>
August 1994	World Intellectual Property Organization (WIPO)	Paris Convention	"Countries party to the Paris Convention remain free to regulate or prohibit the sale of certain types of goods, and the fact that a mark has been registered for such goods does not give the right to the holder of the registration to be exempted from any limitation or prohibition of use of the mark decided by the competent authority of the country where the mark is registered ... In conclusion, it does not seem that Article 7 of the Paris Convention could serve as a basis for challenging existing or planned requirements of Paris Union member States regarding the plain packaging of tobacco products." <sup>122</sup>

<sup>112</sup> Bernitz U. Report from Philip Morris Counsel, 1991.

<sup>113</sup> Karnell G. Complementary opinion by Professor Jur. Dr. Gunnar Karnell, 1991.

<sup>114</sup> Clayton Utz. Tobacco Control (Package Label) Regulations, 1992.

<sup>115</sup> Johnston AC. Tobacco Sponsorship and Labelling in Australia, 1992

<sup>116</sup> Clayton Utz. Tobacco Control (Package Label) Regulations, 1992

<sup>117</sup> Smithson J. Plain Packs Meeting - Papers, 1994.

<sup>118</sup> Luik J. Letter from John Luik to Tony Wood regarding Gatt/Trips [sic] process, 1993.

<sup>119</sup> Smithson J. Plain Packs Meeting – Papers, 1994.

<sup>120</sup> Bacon D. [Note from David Bacon to A Andrade enclosing CBRC report], 1994.

<sup>121</sup> Latham DA. WIPO, 1994.

<sup>122</sup> Baeumer L. Letter from Ludwig Baeumer to Ralph Oman, 1994.

Yet, despite receiving this internal advice privately, tobacco companies publically argued HWLs were illegal under international law. In January 1994, W.D. & H.O. Wills in response to a motion passed by the Australian Parliament in November 1993 requesting that the Industry Commission conduct an inquiry into the tobacco industry's practices,<sup>123</sup> argued that the HWL proposal violated its trademark rights, stating:

The Company does not oppose a review of health warnings, only pack design regulations which take no account of registration of trade marks and pack designs, intellectual properties and rights advocated by GATT. The package proposals also ignore standards adopted for other consumer product industries in their labeling and packaging ... The Australian proposals would extinguish or critically diminish the Company's intellectual property.<sup>124</sup>

However, unlike the Swedish HWL proposal where trade litigation threats were issued to the Swedish government, these trademark claims were made at the last moment and were in response to a government inquiry. It is also possible that BAT and Rothmans were a little unsure how to attack the Australian HWL proposal on international grounds given the unfavorable internal legal advice they were told. As a result, in March 1994, the Australian Parliament gazetted the "Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations," which required the adoption of the MCDS HWL proposal (25% front, 33% back) by January 1995.<sup>125</sup>

### ***Tobacco industry international coordination: The Plain Pack Group***

In response to the industry's failure in Australia, tobacco companies looked to develop an internationally coordinated strategy to address concerns over the potential adoption of plain or generic packaging in multiple countries, most notably Canada and Australia. In May 1993, James Seddon, a Rothmans international lawyer wrote to all the

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<sup>123</sup> Industry Commission. *The Tobacco Growing and Manufacturing Industries*. November 1993. Available at: <http://legacy.library.ucsf.edu/tid/ppk33a99>.

<sup>124</sup> WD & HO Wills. *Submission to the Industry Commission Inquiry: The Tobacco Growing and Manufacturing Industries*. January 1994. Available at: <http://legacy.library.ucsf.edu/tid/kpk33a99>.

<sup>125</sup> Australian Parliament. *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations*. Australia: Minister for Consumer Affairs;; 29 March 1994.

major transnational tobacco companies suggesting a new internationally coordinated approach to HWLs with a main focus on avoiding plain or generic packaging.<sup>126</sup> By July 1993, the major tobacco companies (BAT, Rothmans, PMI, RJ Reynolds, Imperial Tobacco, Reemtsma, and Gallaher) created the Plain Pack Group to develop strategies to counter plain packaging.<sup>127</sup> During the group's second meeting in November 1993, the tobacco companies agreed to continue searching for protection of their trademarks under international treaties.<sup>128</sup>

In response to Canada's increasing interest in plain packaging, including a November 1993 study by the Centre for Health Promotion and the Canadian Cancer Society, which examined the effects of plain packaging among youth, the tobacco industry created Plain Pack Group examined the North American Free Trade Agreement (NAFTA), a free trade agreement between the US, Canada, and Mexico that contained provisions for investor rights and trademark protections, which took effect January 1, 1994. Unfortunately due to privilege claims, none of the internal legal opinions regarding investment and trademark protections under NAFTA were accessible in the Legacy Tobacco Documents Library. Despite access to the legal advice given to the Plain Pack Group, Rothmans International wrote to the Tobacco Documentation Centre (the industry's international lobbying and coordinating organization<sup>129</sup>) in April 1994 reporting, "The possibility of challenging such provisions in international trade would largely rest on the GATT, particularly as there

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<sup>126</sup> Seddon J. "Generic Packaging" Meeting. 23 August 1993. Available at: <http://legacy.library.ucsf.edu/tid/pqs48a99>.

<sup>127</sup> Philip Morris. 2RF Presentation to W.H. Webb. 27 May 1993. Available at: <http://legacy.library.ucsf.edu/tid/jfn32e00>.

<sup>128</sup> British American Tobacco. Plain Pack Group - A Meeting of the Plain Pack Group Held in Staines. 29 November 1993. Available at: <http://legacy.library.ucsf.edu/tid/kfn08a99>.

<sup>129</sup> McDaniel PA, Intinarelli G, Malone RE. Tobacco industry issues management organizations: creating a global corporate network to undermine public health. *Global Health*. 2008;4:2.

appears to be no direct redress available to companies under NAFTA as regards product labeling.”<sup>130</sup>

In April 1993, BAT’s lawyers also suggested contacting potential allies with the liquor and pharmaceutical industries since they also “may be vulnerable to packaging warnings which extinguish their intellectual property.”<sup>131</sup> In December 1993, John Luik, a longstanding industry apologist<sup>132</sup> and who was forced out of two Canadian colleges for academic fraud, mentioned to the Plain Pack Group that other industries were concerned about this area, calling for help “to contextualize the issue as a problem that other industries also face so as to eliminate the perception of tobacco industry isolation.”<sup>133</sup>

The Plain Pack Group contacted potential allies in alcohol, cosmetics, and pharmaceuticals industries, including Pepsi, Coca-Cola, Colgate and Unilever.<sup>134</sup> In May 1994, when the Plain Pack Group met again to review progress they had little success to report in finding protection of their trademarks under international treaties and recruiting support from other industries. During the meeting a slide presentation document noted that these efforts had failed:

- Current conversations & treaties afford little protection
- GATT/TRIPS little joy
- Other industry groupings little support<sup>135</sup>

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<sup>130</sup> Smithson J. Plain Packs Meeting - Papers. 12 April 1994. Available at: <http://legacy.library.ucsf.edu/tid/fxd28a99>.

<sup>131</sup> Pendelton MD. [Letter from Michael D Pendleton to Donna Staunton regarding initial academic advice]. 26 April 1993. Available at: <http://legacy.library.ucsf.edu/tid/eiv41a99>.

<sup>132</sup> Luik J. Pandora's Box: The Dangers Of Politically Corrupted Science For Democratic Public Policy. 16 November 1993. Available at: <http://legacy.library.ucsf.edu/tid/wlk22c00>. Also see Luik J. Letter from John Luik to Sharon Boyse. 27 July 1998. Available at: <http://legacy.library.ucsf.edu/tid/xem91d00>. and see McAtee E. Industry Information. 5 August 1999. Available at: <http://legacy.library.ucsf.edu/tid/brh50d00>.

<sup>133</sup> Luik J. Letter from John Luik to Tony Wood regarding Gatt/Trips [sic] process. 31 December 1993. Available at: <http://legacy.library.ucsf.edu/tid/dyd28a99>.

<sup>134</sup> Wells JK. [Letter from J Kendrick Wells to David Bacon regarding report on the November 29 meeting of the Plain Pack Group]. 6 December 1993. Available at: <http://legacy.library.ucsf.edu/tid/yps48a99>.

<sup>135</sup> Bacon D. [Note from David Bacon to A Andrade enclosing CBRC report]. 25 May 1994. Available at: <http://legacy.library.ucsf.edu/tid/vwd28a99>.



In addition to receiving unfavorable legal advice about using international trade and investment agreements to oppose HWLs and plain packaging, the Plain Pack Group was concerned that governments could use health exemptions in international treaties, including the GATT and TRIPS, to counter their legal claims. As a result, the Plain Pack Group commissioned John Luik to study this question. He confirmed the Plain Pack Group's fears:

While I think the Gatt/Trips process provides a useful entre to this problem, I believe that its ultimate usefulness might well be limited. This is because the antis [public health advocates] will soon argue that where health is involved, adopting minimal regulation as a basis for trade harmonization is not acceptable.<sup>136</sup>

Luik recommended examining other international treaties that did not contain health exemptions or provisions and advised the tobacco companies to contact the World Intellectual Property Organization (WIPO), the United Nations agency that promotes the protection of intellectual property and administers the Paris Convention (a treaty with no health exemptions), to obtain a favorable legal opinion from the treaty's administrative body. The Plain Pack Group designated David Latham, a lawyer at Lovell White Durrant (BAT's lawyers in London), to write the Director of WIPO's Industrial Property Law Department, seeking interpretation of Article 7 of the Paris Convention, telling WIPO:

We are particularly interested in the position which WIPO takes on the interpretation of Article 7 of the Paris Convention, and in particular how that differs from that adopted by Ulf Bernitz in his [Swedish<sup>137</sup>] article.<sup>138</sup>

Initially Latham did not receive a response so he sent another letter to WIPO in May 1994.<sup>139</sup> In July 1994 WIPO responded:

The countries of the Paris Union are bound to admit trademarks for registration notwithstanding the nature of the goods to which they are

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<sup>136</sup> Luik J. Letter regarding Gatt/Trips, 1993.

<sup>137</sup> Bernitz, U. Logo Licensing, 1990.

<sup>138</sup> Latham DA. Restrictions on the Use of Trade Marks. 29 June 1994. Available at: <http://legacy.library.ucsf.edu/tid/uvd28a99>.

<sup>139</sup> Latham DA. WIPO. 6 July 1994. Available at: <http://legacy.library.ucsf.edu/tid/awd28a99>.

applied (Article 7). However, *the Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted [emphasis added]*.<sup>140</sup>

Latham described WIPO's response to Rothmans International Public Affairs Manager as, "Certainly his letter does not take us further."<sup>141</sup> Despite this unfavorable opinion, in August 1994, Ralph Oman, former US Register of Copyrights (1985-1993), wrote WIPO asking whether parties of the Paris Convention are free to limit the "use" of a registered trademark. He also asked WIPO to address Hills' May 3 legal opinion that concluded that the Paris Convention could be used against plain packaging. In response, in August 1994, WIPO sent another letter confirming that the Paris Convention only pertained to the "registration" and not the "use" of the trademark and, more important, clearly stated that the Paris Convention could not be used to block plain packaging:

*Countries party to the Paris Convention remain free to regulate or prohibit the sale of certain types of goods, and the fact that a mark has been registered for such goods does not give the right to the holder of the registration to be exempted from any limitation or prohibition of use of the mark decided by the competent authority of the country where the mark is registered.*

Moreover, the argument that in many countries of the Paris Union a registered mark must be used in order for it to remain protected, does not support the thesis that regulations restricting the use violate Article 7, because Article 7 only concerns the initial registration but not the subsequent fate of the mark.

In conclusion, it does not seem that Article 7 of the Paris Convention could serve as a basis for challenging existing or planned requirements of Paris Union member States regarding the plain packaging of tobacco products.<sup>142</sup> [underline emphasis in original; italic emphasis added]

Due to this unfavorable legal advice that international treaties provided a legal justification for using trademarks, the industry led Plain Pack Group decided to generate its own body of research that argued the opposite and that HWL proposals would violate

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<sup>140</sup> Baeumer L. Letter from Ludwig Baeumer to David Latham. 5 July 1994. Available at: <http://legacy.library.ucsf.edu/tid/tek17b00>.

<sup>141</sup> Latham, DA. Letter to Jacqueline Smithson, 1994.

<sup>142</sup> Baeumer L. Letter from Ludwig Baeumer to Ralph Oman. 31 August 1994. Available at: <http://legacy.library.ucsf.edu/tid/brs60d00>.

international treaties. Luik proposed creating a book, which he called the “plain packs Bible”, which would serve as a credible and citable public resource for the industry to influence debates and accessible for policymakers when considering proposals for plain packaging.<sup>143</sup> As a result, the Plain Pack Group created a book titled, *Plain Packaging and the Marketing of Cigarettes*,<sup>144</sup> which argued that plain packaging would cause confusion among manufactures and retailers on distinguishing the cigarette packages, would not reduce the prevalence of smoking among adolescents, most importantly violate intellectual property standards established under international treaties.<sup>145</sup> Even though the book was not published until 1998, the tobacco companies and their allies used several of the arguments as threats issued during committee hearings and reports as well as in the media (see below).

### **Tobacco industry arbitration threats in action (1994-2015)**

By the fall of 1994, the legal advice the tobacco companies obtained consistently stated that national governments would not violate international treaties and could restrict or prohibit the use of trademarks and enact strong HWL policies, including plain packaging. However tobacco companies have never publically disclosed this unfavorable information and instead have continued to publically issue trade and investment arbitration threats to governments to block, weaken and delay HWLs. Here is a brief overview of tobacco industry trade threats issued to governments for introducing progressive HWL proposals over the past two decades. During the 1990s, the two biggest attacks were launched against Canada and Australia for attempting to implement plain and generic packaging respectively, thus more attention is paid to these cases.

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<sup>143</sup> Smithson J. Plain Packs Book Proposed. 13 April 1994. Available at: <http://legacy.library.ucsf.edu/tid/exd28a99>.

<sup>144</sup> Luik J, ed *Plain Packaging and the Marketing of Cigarettes*. Oxford, United Kingdom: Admap Publications; 1998.

<sup>145</sup> Ibid.

### ***Early attacks in Canada***

In February 1994, Canada's Prime Minister announced plans to compensate for lowering tobacco taxes the previous month by considering the adoption of plain packaging.<sup>146</sup> In April 1994, the House of Commons Standing Committee on Health began hearings on the plain packaging.<sup>147</sup>

In May 1994, Philip Morris and R.J. Reynolds hired Carla Hills, former US Trade Representative (1989-1993) and Julius Katz, former Deputy US Trade Representative (1989-1993), to testify against the Canadian plain packaging proposal during hearings for the Canadian Standing Committee on Health. Hills and Katz presented the committee with a legal opinion, written by Hills, arguing that the plain packaging proposal violated Canada's commitments under international treaties, including the Paris Convention, NAFTA, and TRIPS on the grounds that national governments did not have the right to restrict or prohibit the use of trademarks.<sup>148</sup> Hills and Katz only cited language from each treaty concerning trademark "registration" not "use." Hills and Katz did not mention the legal advice given to the tobacco companies since 1992 that the "registration" of a trademark does not grant the right to "use" it. Furthermore Hills and Katz argued that plain packaging would be "an unlawful expropriation of trademarks and investments," and threatened the Canadian government that "full compensation, in the hundreds of millions of dollars, would have to be paid" to the tobacco companies.<sup>149</sup> (Katz also wrote the chapter on international treaties in the Plain Packs Book, citing the same arguments.)

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<sup>146</sup> Chrétien J. Canada Lowers Tobacco Taxes to Fight Smuggling. 8 February 1994. Available at: <http://legacy.library.ucsf.edu/tid/lei28a99>.

<sup>147</sup> Standing Committee on Health. *Plain Packaging of Cigarettes*. Ottawa: 32nd Parliament; 12 April 1994.

<sup>148</sup> R.J. Reynolds. Plain Packaging of Tobacco Products Submission of R.J. Reynolds Tobacco Company. 30 July 1993. Available at: <http://legacy.library.ucsf.edu/tid/mrm97c00>.

<sup>149</sup> Ibid.

In June 1994, the Standing Committee on Health presented a report to the House titled “Toward Zero Consumption: Generic Packaging of Tobacco Products,” which stated that “serious concerns were raised about Canada’s international trade obligations, employment, counterfeiting, smuggling and marketing.”<sup>150</sup> As a result, the report recommended that the government establish a legislative framework required to address these issues and proceed with plain packaging.

Meanwhile tobacco companies recruited the International Chamber of Commerce (ICC) to write the Canadian Trade Minister in September 1994 claiming the same arguments about Canada’s obligation to respect the protections granted to businesses under international treaties including the Paris Convention, TRIPs, and NAFTA.<sup>151</sup> The ICC was also active in the media in October 1994, stating, “The federal government risks getting thrown out of an international trade body if it goes ahead with its plan to insist that cigarettes be sold only in plain packs.”<sup>152</sup>

In November 1994, the Canadian government dropped the plain packaging proposal due to uncertainty over the effectiveness of plain packaging, smuggling, and its international trade commitments, stating that “the Government recognizes that there are trademark and other obligations under international trade agreements such as NAFTA and the World Trade Agreement which might be relevant to a generic packaging proposal.”<sup>153</sup>

In March 1995, the health minister stated that there was still a need to “facilitate further examination of the legal, international trade, economic and contraband implications

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<sup>150</sup> Government of Canada. *Toward Zero Consumption: Generic Packaging of Tobacco Products* 21 June 1994.

<sup>151</sup> Rouher J-C. [Letter from Joan-Charles Rouher to Roy MacLaren regarding proposal for plain packaging of tobacco product in Canada]. 21 September 1994. Available at: <http://legacy.library.ucsf.edu/tid/kbw24a99>.

<sup>152</sup> Morton P. Ottawa Warned on Plain Packs. *The Financial Post*. 5 October, 1994.

<sup>153</sup> Marleau D. *Generic Packaging of Tobacco Products* November 1994.

of plain and generic packaging.”<sup>154</sup> As a result, health advocates did commission legal experts to analyze the trademark issue in May 1994, but the health minister did not pursue their own assessment about whether trademark claims under international trade and investment agreements would prohibit the government from adopting plain packaging. Due in part to this, the health ministry abandoned efforts to move forward on plain packaging.<sup>155</sup> In 1996 the health minister told the Standing Committee that trademarks would need to be allowed on packages, stating “we would be in violation both of trademark and of the [Canada’s] Charter of Rights and Freedoms because the product is not deemed to be an illegal product.”<sup>156</sup>

### ***Early attacks in Australia***

In May 1994, the Australian Ministerial Council on Drug Strategy (MCDS), created an Action Plan that continued to consider generic packaging,<sup>157</sup> which led the Australian Senate to hold hearings about generic packaging in November 1994.<sup>158</sup> In December 1994, the Western Australian Health Minister called for generic packaging to prevent tobacco companies from promoting “attractive images.”<sup>159</sup>

In response to proposals for generic packaging offered during public hearings of the Senate Standing Committee on Community Affairs, in February 1995 WD & HO Wills (BAT’s Australian subsidiary) issued submissions on generic packaging that once again asserted that generic packaging would violate their trademark rights under TRIPS and the Paris

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<sup>154</sup> Health Canada. *News Release: Expert Panel Report on Generic Packaging of Tobacco Products Released*. Ottawa, Canada 19 May 1995.

<sup>155</sup> House of Commons Standing Committee on Health. *Bill C-71, An Act to regulate the manufacture, sale, labelling and promotion of tobacco products*. Quebec City, Canada 6 December 1996.

<sup>156</sup> Riordan M. *Generics Rejected by Australian Health*. 24 July 1995. Available at: <http://legacy.library.ucsf.edu/tid/mrb81a99>.

<sup>157</sup> Chapman DJ. *Senate Inquiry*. 25 October 1994. Available at: <http://legacy.library.ucsf.edu/tid/lhm33a99>.

<sup>158</sup> British American Tobacco. *Senate Inquiry*. 25 November 1994. Available at: <http://legacy.library.ucsf.edu/tid/flu97h99>.

<sup>159</sup> Philip Morris. *PMI Corporate Affairs Weekly Highlights by Region*. January 1994. Available at: <http://legacy.library.ucsf.edu/tid/pqw72e00>.

Convention.<sup>160</sup> As in Canada, tobacco companies also argued that generic packaging would not reduce tobacco consumption. In July 1995, the Federal Health Minister responded stating, “Unfortunately [generic packaging] is just not feasible. We would have to buy the tobacco companies’ trademarks and that would cost us hundreds of millions of dollars.”<sup>161</sup> In December 1995, the Australian Senate Community Affairs References Committee dropped the proposal, concluding, “there is not sufficient evidence to recommend that tobacco products be sold in generic packaging.”<sup>162</sup>

### ***Other attacks***

Since the attacks in Canada and Australia in the mid-1990s, tobacco companies have issued trade and investment arbitration threats to numerous countries to prevent, weaken, and delay the global diffusion of progressive HWLs. While tobacco companies have issued several threats to governments over the last twenty years, documenting these cases lies outside the scope of this study. In one sense, a regulatory uptake in pictorial HWLs has exponentially grown since the creation of the FCTC in 2003, despite numerous attempts by tobacco companies to issue threats to governments. However it is unclear what impact these threats have had on weakening and delaying these proposals and ultimately constraining the regulatory development process. More importantly, as of May 2016, only a handful of governments have implemented strong HWLs covering 75% of the package, including plain packaging, thus further supporting the idea that the industry has succeeded to some degree in preventing the diffusion of strong HWLs, including plain packaging, and creating a regulatory chill on strong HWL regulations.

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<sup>160</sup> WD & HO Wills. Generic Packaging. February 1995. Available at: <http://legacy.library.ucsf.edu/tid/qnd14a99>.

<sup>161</sup> Riordan M. Generics Rejected by Australian Health. 24 July 1995. Available at: <http://legacy.library.ucsf.edu/tid/mrb81a99>.

<sup>162</sup> Australian Senate Community Affairs References Committee. *The tobacco industry and the costs of tobacco-related illness*. Sydney, Australia December 1995.

In summary, tobacco companies have issued what seem to be hollow trade threats to policymakers without ever actually having to go to international court for decades. It appears that policymakers, especially those from various health ministries, were either unaware of the legal ramifications of international treaties in relation to HWLs or were fearful of costly and lingering lawsuits against wealthy tobacco companies. Either way tobacco companies have been able to rely on threats of arbitration, which are cheap and very effective as opposed to actually challenging HWL regulations through international arbitration, which in contrast can be a high risk and high cost option. PMI finally challenged the Uruguayan and Australian governments over their strong HWL regulations in 2010 and 2011 respectively, but only after avoiding going to international court for almost two decades. As of May 2016, these trade disputes remained pending, but once completed the outcomes of these disputes will provide a great deal of clarity surrounding governments' rights to implement strong HWL regulations.

## **Section II: Typology for trade arbitration threats and challenges**

The brief information documented in Canada and Australia in the 1990s suggests that tobacco industry threats of arbitration influenced the decision of each government to withdraw their proposals for plain and generic packaging. For example, the threats issued in Canada based on NAFTA may have been credible to the Standing Committee since Hills and Katz were the chief negotiators for NAFTA. However the degree of this influence remains difficult to ascertain without an in-depth case-by-case examination, which will be provided in chapters 3-5. Before proceeding to the case studies, it is important to better understand the nature of these threats and challenges and how they are designed to constrain the authority of policymakers and preempt national level polities. Therefore this section first documents litigation threats and challenges at the domestic level and then



creates typology for *trade arbitration threats* and *trade arbitration challenges* at the international level that will be utilized in the case studies presented in chapters 3-5.

### **Tobacco industry domestic litigation threats and challenges**

Tobacco companies, known as some of the most aggressive litigators in the world, have used the threat of litigation at the domestic level to deter communities from passing state and local tobacco control regulations since the 1970s. The primary legal basis for these threats were related to the federal equal protection claims under the 14<sup>th</sup> Amendment and claims of state “implied preemption”<sup>163</sup> of local ordinances. Tobacco company litigation threats and challenges have consisted of direct attacks and funding third party front groups to intimidate local governments with costly lawsuits designed to block, weaken or delay public health policies.<sup>164</sup>

A close examination of domestic litigation challenges reveals that tobacco companies often lose these legal battles. In a study by Nixon and Glantz that examined twenty-eight communities in the US between 1987-2002 where a local government passed a tobacco control ordinance that was legally challenged in court or where legal threats existed, only nine ordinances were overturned.<sup>165</sup> In the early 2000s, tobacco companies also lost several litigation challenges against California media campaigns designed to educate the public about the dangers of secondhand smoke and the tobacco industry’s manipulation tactics.<sup>166</sup> In a more recent study by Steele et al. that examined tobacco industry domestic litigation challenges to advertising and packaging policies in Australia,

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<sup>163</sup> Explicit preemption occurs when specific preemptive language is written into the law whereas implied preemption occurs when a legislative body enacts legislation that is later interpreted by courts to occupy the entire field being regulated, and, therefore precludes local regulation.

<sup>164</sup> Samuels B, Glantz SA. The politics of local tobacco control. *Jama*. Oct 16 1991;266(15):2110-2117. Also see Dearlove JV, Bialous SA, Glantz SA. Tobacco industry manipulation of the hospitality industry to maintain smoking in public places. *Tobacco control*. Jun 2002;11(2):94-104.

<sup>165</sup> Nixon ML, Mahmoud L, Glantz SA. Tobacco industry litigation to deter local public health ordinances: the industry usually loses in court. *Tobacco control*. Mar 2004;13(1):65-73.

<sup>166</sup> Ibrahim JK, Glantz SA. Tobacco industry litigation strategies to oppose tobacco control media campaigns. *Tobacco control*. Feb 2006;15(1):50-58.

Canada and the United Kingdom between 2004-2014, the industry only won one of the six domestic cases.<sup>167</sup> This lone victory for the industry was granted in 1995 when the Supreme Court ruled that Canada's tobacco control advertising law violated the right to freedom of expression as it was considered unjustifiable. However in 2007, the Canadian parliament introduced stronger tobacco advertising restrictions and this time the Court rejected the tobacco industry's challenge. Unlike in 1995, the Attorney General produced a large amount of evidence surrounding the harmful effects of smoking and the impact of tobacco advertising on youth initiation, which played a pivotal role in the Court's judgment to overturn the previous 1995 ruling. Therefore the industry's only victory in these six cases was later overturned.

Despite losing a significant amount court cases, the mere threats of litigation have had a significant impact on preventing, or in some cases possibly creating a *regulatory chill*,<sup>168</sup> on the spread of progressive public health policies in multiple cities and states throughout the US. In 1994, the city council of Puyallup, Washington passed the first local smokefree ordinance in Washington. In response, RJ Reynolds financed one of the largest law firms in Seattle, Byrnes & Keller, to sue the city on behalf of restaurant owners arguing the Puyallup ordinance violated the state of Washington's Clean Indoor Air Act by preempting local governments from surpassing its provisions. Despite Puyallup's City Attorney General claiming that nothing would preclude the city from passing its ordinance, the city council voted to repeal the ordinance. Puyallup's decision to withdraw rather than

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<sup>167</sup> Steele SL, Gilmore AB, McKee M, Stuckler D. The role of public law-based litigation in tobacco companies' strategies in high-income, FCTC ratifying countries, 2004-14. *Journal of public health*. Jun 1 2015.

<sup>168</sup> Eric Neumayer first referred to regulatory chill as a situation when policymakers may lower environmental standards in fear of capital flight and competitiveness; Neumayer E. Do countries fail to raise environmental standards? An evaluation of policy options addressing "regulatory chill". *LSE Research Online*. 2001;4(3):231-244. Please also see views from political science about the threats of arbitration and the lack of regulation; Tienhaara K. Regulatory chill and the threat of arbitration: A view from political science. In: Brown C, Miles K, eds. *Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press; 2011:606-628.

defend its local smokefree restaurant ordinance according to Nixon and Glantz also deterred other communities from adopting smoking regulations in their restaurants, thus creating what appeared to be a *chilling effect*<sup>169</sup> of local smokefree ordinances.

### **Qualifying tobacco industry international trade and investment arbitration “threats”**

While tobacco companies have issued threats of litigation at the domestic level since the 1970s, tobacco industry threats of arbitration at the international level in many ways reflect a similar course of action in threatening governments and preempting subordinate jurisdictions but occur on a larger scale and outside the boundaries of the state. Tobacco industry trade and investment arbitration threats consist of five important components, including 1.) the general threat of violating intellectual property rights and international treaties, 2.) the legal and reputational costs of international arbitration and potential compensation, 3.) framing the health issue in terms of broad violations of business intellectual property rights and investments, 4.) recruiting business support and funding research to strengthen credibility and promote uncertainty and concern, and 5.) the magnitude of the threat (Table 2:2).

#### ***1.) General threats of violating intellectual property rights and international treaties***

Tobacco companies have generally threatened governments that their HWL proposals violate numerous international treaties that protect the companies’ intellectual property and investment rights. In particular, tobacco companies have argued that HWLs a.) violate the usage of trademarks under the Paris Convention for the Protection of Industrial Property and the World Trade Organization (WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS), b.) constitute a barrier to trade under the WTO Agreement on Technical Barriers to Trade (TBT), and c.) do not represent fair and equitable treatment and expropriation under various FTAs and BITs.

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<sup>169</sup> This is another way to express regulatory chill whereby governments weaken or lower standards and regulations due to concerns over international trade concerns.

Components	Explanations and examples	Comments from industry documents
1.) General threats of violating intellectual property rights and international treaties	-Strong pictorial HWLs a.) violate the usage of trademarks under the Paris Convention for the Protection of Industrial Property and the World Trade Organization (WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS), b.) constitute a barrier to trade under the WTO Agreement on Technical Barriers to Trade (TBT), and c.) do not represent fair and equitable treatment and expropriation under various free trade agreements (FTAs) and bilateral investment treaties (BITs).	"Any issue affecting cigarette packs should be treated as expropriation of Intellectual Property and contested politically on that basis. If this strategy is followed the industry has a greater chance of both setting its own agenda and avoiding the need to critique anti-smoking proposals from a back foot position...The industry should set the agenda in an effort to confine the argumentation to political, economic, international trade, and intellectual property issues." <sup>170</sup>
2.) Legal and reputational costs of international arbitration and potential compensation	-Potential legal costs for international arbitral proceedings are roughly \$4-5 million -Hourly rates to pay trade lawyers can range from \$400 to \$600 an hour -Median amount of arbitration awards for investors is around \$10-\$11 million -Potential adverse consequences for a country's international reputation as a trading partner or in terms of investment climate	"The foreign entity [tobacco companies] needs to be able to show any removal of the right to use its' trade mark gives rise to a legal dispute arising out of an investment...Any government which shields itself behind the need for [ICSID Arbitration] consent is unlikely to enhance its image as a host for investment" <sup>171</sup>
3.) Framing the health issue in terms of broad violations of business intellectual property rights and investments	-Framing HWLs as violating convoluted issues concerning intellectual property, expropriation, and fair and equitable treatment -Highlighting and exaggerating the costs of lawsuits to tax payers -Try to eliminate tobacco industry isolationism -Slippery slope argument-other industries will be targeted next through over-regulation in the form of a nanny state	"[It would] help to context the issue as a problem that other industries also face so as to eliminate the perception of tobacco industry isolation." <sup>172</sup> -"It would be to our advantage to broaden the issue away from tobacco to include prime international consumer brands." <sup>173</sup>
4.) Recruiting business support and funding research to strengthen credibility and promote uncertainty and concern	-Recruiting allies from food, alcohol, and pharmaceutical industries to support this trade over health approach -Hiring "independent" associates and contracting think tanks to publish industry funded research to strengthen credibility and create doubt about HWLs	"Presumably the liquor industry may be vulnerable to packaging warnings which extinguish their intellectual property. The pharmaceutical industry may face similar dilemmas. The unifying theme is extinguishment of intellectual property rather than regulation or restriction on sale and advertising of the goods in the name of public health." <sup>174</sup>
5.) Magnitude of threat	-Degree of generating this threat through publically funded research, lobbying, government submission, and media exposure as well as private pressure	N/A

These threats have been issued in submissions to government and argued in the media to create concern among policymakers.

<sup>170</sup> Thompson MJ. Protection of Intellectual Property, 1993.

<sup>171</sup> Ibid.

<sup>172</sup> Luik J. Letter from John Luik to Tony Wood regarding Gatt/Trips [sic] process, 1993.

<sup>173</sup> Owen J. Tobacco Control Regulations, 1993.

<sup>174</sup> Pendleton MD. [Letter from Michael D Pendleton to Donna Staunton regarding initial academic advice], 1993

## **2.) Legal and reputational costs of international arbitration and potential compensation**

Possibly the most important component of the threat is the potential legal costs a government could incur if it proceeds with its HWL proposal. The legal costs for international arbitral proceedings to defend HWL policies are roughly \$4-\$5 million,<sup>175</sup> which can be a daunting expense for any government, but especially developing countries as has been the case in Uruguay (see chapter 5). There are also costs associated with the legal defense, as developed countries typically have sufficient in-house expertise while developing countries may not. This is significant, as there exists disparities in the quality of legal representation between developing country defendants and investor claimants.<sup>176</sup> Furthermore, hourly rates for lawyers, especially for arbitral proceedings, can be quite costly as the top firms can range from \$400 to \$600 an hour.<sup>177</sup>

In addition to the costs associated with defending a policy position, there are also potentially high costs following an arbitral decision. The median amount of arbitration awards for investors is around \$10-\$11 million<sup>178</sup> and in some cases awards could go to one party or be divided, thus creating a partial win for the investor. For example, the investor (PMI) is seeking \$25 million<sup>179</sup> against the Uruguayan government (chapter 5), but may be awarded a partial amount of this request. There is also a reputational effect that arbitration

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<sup>175</sup> Hodgson M. *Counting the costs of investment treaty arbitration*. Global Arbitration Review: Allen & Overy; 24 March 2014.

<sup>176</sup> Gottwald EJ. Leveling the playing field: is it time for a legal assistance center for developing nations in investment treaty arbitration. *American University International Law Review*. 2007:237-275.

<sup>177</sup> Ibid.

<sup>178</sup> Hodgson M. *Counting the costs*. 2014.

<sup>179</sup> Philip Morris International. Uruguay Bilateral Investment Treaty (BIT) Litigation. 2014; [http://www.pmi.com/eng/media\\_center/company\\_statements/pages/uruguay\\_bit\\_claim.aspx#](http://www.pmi.com/eng/media_center/company_statements/pages/uruguay_bit_claim.aspx#). Accessed 5 August, 2015.

cases have on governments that regardless the outcome of the dispute there is a negative impact on the state's reputation from the perspective of foreign investors.<sup>180</sup>

This is in sharp contrast to tobacco companies, which are some of the wealthiest companies in the world, exceeding the gross domestic product of several countries, and more importantly can absorb the costs of arbitration. With that said, arbitration is still a high risk and high cost option for even investors like tobacco companies while the *threat* of arbitration is relatively cheap and potentially very effective. This is important to note because over the past 25 years, tobacco companies have threatened governments over their HWL proposals on numerous occasions, while they have only challenged two HWL policies (Uruguay and Australia) in international courts. As a result, it is safe to assume that tobacco companies prefer threatening governments with costly lawsuits rather than actually going to court.

### ***3.) Framing the health issue in terms of broad violations of business intellectual property rights and investments***

Framing the issue consists of a three-pronged approach; a.) framing a public health issue as a convoluted trade and investment issue, b.) highlighting and exaggerating the costs of lawsuits to tax payers, and c.) framing the issue as a broad violation of business intellectual property rights and investments. As noted, previous secret tobacco industry documents revealed that the companies decided in the early 1990s that any issue involving health warnings should not be treated as a public health issue but rather as a trade issue. This diverts attention away from tobacco companies as a target and the harmful effects of tobacco products and shifts the focus to complex legal disputes, which creates doubt and uncertainty about the HWL proposal. Portraying the issue in terms of trade rather than health also places greater attention on the broader impact these proposals could have on

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<sup>180</sup> Allee T. *Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment* 25 September 2008.

businesses and their investments. In particular, tobacco companies have tried to suggest that other industries will be targeted next and their investments will be seriously jeopardized. For example, in Australia tobacco companies ran media campaigns that warned that plain packaging of tobacco would start a dangerous precedent in violating investors rights and that soon alcohol and soda beverages could be sold with plain labels (see chapter 3).

The second part of framing HWLs as a trade and investment issue consists of highlighting the costs to taxpayers. In issuing their threats to governments, tobacco companies underscore the importance of government expenditures and how going to international court will waste time and taxpayers money. If a government is facing a trade deficit, tobacco companies also typically focus on a government's national debt and how these unnecessary expenditures will add more pressure on the government to reduce its deficit. This approach entails exaggerating the costs of lawsuits and the compensation that tobacco companies are seeking. As mentioned previously, the legal costs of arbitration are roughly \$3-\$6 million and there are considerable costs for hiring a strong legal defense, which are significant costs for any government to pay, especially developing countries. However tobacco companies greatly exaggerate these costs, estimating governments would have to spend not in the millions but "billions of dollars" in compensation. For example, in Uruguay PMI threatened the government that the costs would be in the billions, but in reality PMI is seeking \$25 million in compensation, which is a significant amount but grossly overestimates the costs associated with these legal challenges.

The final approach to framing HWLs involves framing the health issue in terms of broad violations to all business intellectual property rights and investments. In their attempts to frame the HWL issue as an attack on all businesses, tobacco companies have attempted to recruit other industries that may be strictly regulated regarding labeling.

While tobacco companies found little support from other industries in the 1990s, we can assume tobacco companies have not stopped their search for support, especially considering increased attention towards regulating food and alcohol labeling.

***4.) Recruiting business support and funding research to strengthen credibility and promote uncertainty and concern***

Operating as business that sells a legal product, even though it is projected to kill one billion people in the 21<sup>st</sup> century, tobacco companies have long-standing ties and are members of several business organizations, including trade organizations that are designed to protect and promote favorable regulatory environments. These include several U.S. organizations such as the U.S. Council for International Business, U.S. Chamber of Commerce, and the Business Roundtable as well as international organizations such as the International Trademark Association and most notably the International Chamber of Commerce (ICC). Tobacco companies have recruited these organizations to also issue reports and statements about how progressive HWL proposals, including plain packaging, violate the terms of trade and investment agreements and will require governments to pay a hefty compensation to tobacco companies if implemented. These organizations have also sent letters to ministers and submitted comments during the policymaking process of HWLs issuing similar remarks to support the tobacco industry's threats.

Fueling this uncertainty about the convoluted aspects of international trade and investment law, tobacco companies have created their own supporting research to create doubt among policymakers regarding HWLs and the use of their trademarks. Internal tobacco industry documents have now revealed that tobacco companies have had a long history of hiring crony scientists to create their own junk science to create doubt among policymakers about effects of smoking and secondhand smoke.<sup>181</sup> In a similar fashion,

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<sup>181</sup> Muggli ME, Hurt RD, Blanke DD. Science for hire: a tobacco industry strategy to influence public opinion on secondhand smoke. *Nicotine & tobacco research : official journal of the Society for Research*



tobacco companies have hired sympathetic “independent”<sup>182</sup> associates and contracted think tanks to publish their own funded research on the usage of trademarks under international law. This has involved publishing favorable pro-industry research, including the creation of a Plain Packs Book, on the legal aspects of HWLs, including plain packaging and cautions governments about the legal costs associated with international arbitration. Tobacco companies then cite this research during testimonials and in their submissions to government during congressional and parliamentary hearings in order to voice credible concerns. As a result, the industry’s own research attempts to provide an added credibility to the threats that are issued.

### **5.) Magnitude of threat**

The general legal threats, the legal and reputation costs, framing the health issue in terms of trade, and recruiting support are all components of tobacco industry trade and investment threats, but the delivery of this threat can vary quite drastically depending on the government and the HWL proposal. It is clear from the industry documents that tobacco companies have ratcheted up their efforts in countries with the most progressive HWL proposals to prevent diffusion of best practices, but within the sample of the most progressive HWL proposals, there still exists an important discrepancy in the delivery and magnitude of the threat. This discrepancy lies in the lobbying of policymakers, the number of submissions during committee hearings, the reports conducted on the issue, and how this threat is broadcasted and reiterated in media outlets, including newspapers, radio and television programs. Therefore a careful assessment of these components will be required to measure the magnitude of tobacco industry trade and investment arbitration threats.

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*on Nicotine and Tobacco*. Jun 2003;5(3):303-314. Also see Drope J, Chapman S. Tobacco industry efforts at discrediting scientific knowledge of environmental tobacco smoke: a review of internal industry documents. *Journal of epidemiology and community health*. Aug 2001;55(8):588-594.

<sup>182</sup> Most independent supporters of industry positions have been contracted by tobacco companies and or supported through conservative think tanks.

## **Qualifying tobacco industry trade and investment arbitration “challenges”**

For decades, tobacco companies resorted to threatening governments over their HWL proposals but never challenged them in international courts. However the global progress of pictorial HWLs inevitability forced them to take legal action in Uruguay and Australia. Similar to the trade threats, tobacco industry trade arbitration challenges also are comprised of multiple components, including legal costs, treaty and forum shopping, and global preemption and venue shifting (Table 2:3).

### ***1.) Actual legal costs of arbitration***

Although the legal costs were already discussed in the threats section, it is important to note that once the dispute is resolved there is a possibility that the investor (e.g. tobacco company) will have to cover the legal costs of arbitration. When issuing the threats, tobacco companies make it clear, and exaggerate that it will cost governments billions of dollars of taxpayer money to fund the legal defense. However the actual threat to governments never mentions the possibility that an arbitration panel can require the tobacco company to pay for the legal costs. In the BIT challenge between PMI and Australia, the media reports announced that the Australian government paid \$50 million to legally defend its plain packaging proposal, but then announced the arbitration panel ruled PMI had to cover the arbitration costs. It is unclear what the costs were since the arbitration proceedings and ruling have been private, but this does significantly reduce the amount the Australian government will have to pay. Also some researchers have claimed that this \$50 million figure reported in the media is probably a factoid generated by tobacco companies.

### ***2.) Treaty and forum shopping***

Traditionally disputes involving foreign trade and investment have occurred between governments as member states of the World Trade Organization.

Components	Explanations and examples	Comments from industry documents
1.) Actual legal costs of arbitration	-Instead of industry generated factoids \$50 or billions of dollars, actual legal costs can vary from \$4-\$5 million -Arbitration panel can require the investor (e.g. tobacco company) to pay for all or part of the legal fees	N/A
2.) Treaty and forum shopping	-As mobile actors, transnational corporations like tobacco companies can select from various bilateral and multilateral treaties to challenge HWLs -Searching for treaties that do not have health exemptions to avoid legitimate health measures being justified	While I think the Gatt/Trips process provides a useful entre to this problem, I believe that its ultimate usefulness might well be limited. This is because the antis [public health advocates] will soon argue that where health is involved, adopting minimal regulation as a basis for trade harmonization is not acceptable. <sup>183</sup>
3.) Global preemption and venue shifting	-Shifting decision-making authority outside the confines of the state and into international trade tribunals that are more business friendly -Diminishing the policy space for governments to choose, design and implement public policies with transparent consultation processes in health regulation and implementation	In summary, I believe that the latest moves to introduce packaging changes heralds the biggest battle to be fought by the industry. In the past, our opponents have worked on a domino theory of picking upon country after country in terms of smoking restrictions and advertising and other restrictions. I believe that we should shift the playing field by taking an international approach to brand protection. <sup>184</sup>

As mentioned previously, foreign investors (e.g. TNCs) would have to lobby and convince a WTO member state to file a trade dispute with another member state regarding a particular regulation, which is referred to as a state-state dispute. Trade disputes for implementing strict HWL regulations would be filed with WTO's dispute settlement bodies for violations with either the WTO's technical barriers to trade (TBT) agreement or the WTO's intellectual property (TRIPS) agreement. As a result, this is an attractive option for tobacco companies as the WTO has over 180 member states.

As mobile actors, TNCs like tobacco companies can also utilize other trade and investment agreements to challenge HWL regulations. Given that a country normally has multiple trade and investment agreements with other countries, it is difficult to pinpoint how TNCs shop for particular treaties and forums to challenge domestic regulations. Despite determining the precise treaty shopping approach, increasingly TNCs are using

<sup>183</sup> Luik J. Letter regarding Gatt/Trips, 1993.

<sup>184</sup> Owen J. Tobacco Control Regulations, 1993.

treaties that include an investor-state dispute settlement (ISDS) mechanism, which allows them to directly sue a national government over its regulations. In the Uruguayan case, Philip Morris International (PMI) used a bilateral investment treaty (BIT) between Uruguay and Switzerland to challenge the HWL regulations. While it is uncertain exactly why PMI chose to file a lawsuit with this particular treaty, some legal scholars have suggested that choosing Switzerland is important since the country has not ratified the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC) thereby possibly denying the reference of the FCTC as an international legal tool during arbitral proceedings.

In the Australian case, PMI actually moved its subsidiary, Philip Morris Asia, to Hong Kong to file a trade dispute under an Australian-Hong Kong BIT to challenge the plain packaging regulations. Similar to the Uruguayan lawsuit, China has not ratified the FCTC thus again denying any FCTC references during arbitration. Finally, unlike the WTO treaties (TBT and TRIPS), each of these BITs do not contain exemptions for health. As the industry documents have pointed out this could be important as health advocates could argue that where health is involved, exceptions can be made.

### ***3.) Global preemption and venue shifting***

While the tobacco companies pioneered preemption in the U.S. by shifting authority to higher jurisdictions, the tobacco companies' usage of trade and investment agreements represents a new form preemption at the international level, or what I call "global preemption". Global preemption, much like traditional preemption, seeks to transfer decision-making authority away from subordinate jurisdictions. However unlike traditional preemption, global preemption shifts authority completely outside of the state and into international trade tribunals, which are typically business friendly, non-transparent and have little accountability. The arbitrators in these panels often rotate from high-level positions in big corporate firms thus creating a conflict of interest, but with little oversight it

is difficult to hold these arbiters accountable. The arbitration process is also private, affording little transparency, and the dispute panel rulings may be kept secret and not released in ISDS challenges.

These institutional structures and procedures run in sharp contrast to the government regulatory process in domestic democratic settings, which despite having institutional constraints contain adequate policy space<sup>185</sup>, are relatively transparent, and through the electoral process can hold policymakers accountable. Whether at the local, state/provincial, or national level, there exists a certain degree of policy space for multiple stakeholders, including public health advocates, to influence the regulatory process. In terms of tobacco control, health advocates have used this space by participating and advancing much of the debate and discussion surrounding the advancement of progressive and innovative public health policies. The majority of this participation occurs during public comment periods, which allow health practitioners and advocates the opportunity to inform policymakers about the relevant scientific research in order to produce the most optimal public health policies. The regulatory process is also fairly transparent in democratically elected governments as there exists several freedom of information laws that permit access to legislation documents, committee hearings, legislative votes, etc. Policymakers are also held to certain degree of accountability for their actions and are subjected through the electoral process. For example, some tobacco control reports<sup>186</sup> have created policy scores

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<sup>185</sup> National policy space refers to the “the freedom, scope, and mechanisms that governments have to choose, design and implement public policies to fulfill their aims”. In development, policy space typically refers to how trade and investment agreements have restricted the sovereignty of states to make their own policy decisions. Similarly in health, this is the space and capacity to ensure a transparent consultation processes in health regulation and implementation. See Koivusalo M. Policy space for health and trade and investment agreements. *Health promotion international*. Jun 2014;29 Suppl 1:i29-47.

<sup>186</sup> Rosenbaum D, Barnes RL, Glantz SA. *A Few More Laps to Go: Tobacco Industry Political Influence, Public Health Advocacy and Tobacco Control Policy Making in Indiana* June 2011. Also see Kennedy A, Sullivan S, Hendlin Y, Barnes RL, Glantz SA. *Tobacco Control in Florida 1999-2011: The Good, The Bad, and The Ugly* September 2011.

for policymakers to indicate and target which politicians are receiving tobacco industry campaign contributions, or which have voted against pro-health legislation.

## **Conclusion**

Previously secret industry documents illustrate the major global tobacco companies formed an international coalition named the Plain Pack Group, which developed a sophisticated and multi-pronged strategy of using international trade and investment agreements to preempt strong HWL proposals. While these threats have been deployed over the past 25 years to threaten and intimidate governments, it still remains unclear how effective these threats have been in blocking, weakening or delaying the implementation of strong HWLs. Establishing a typology of tobacco industry trade threats and challenges offers a starting point to addressing the impact of threats and challenges on the regulatory development process of strong HWLs, but as Tienhaara argues, it is more crucial to analyze the government's *perception* of the threat of arbitration and how credible these threats are to policymakers.<sup>187</sup> As a result, I now turn to the empirical case studies of Australia, New Zealand, and Uruguay (chapters 3-5) to address the impact of industry trade threats to HWLs and test the regulatory chill hypothesis to see if these threats are causing a chilling effect.

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<sup>187</sup> Tienhaara K. Regulatory chill and the threat of arbitration: A view from political science. In: Brown C, Miles K, eds. *Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press; 2011:606-628.

### Chapter 3: A Chilling Example? Testing Awareness and Applicability of International Trade Law Among Policymakers in Australia and New Zealand

*"Tobacco companies are fighting to protect their profits; but we are fighting to protect lives...by not acting we are killing people."<sup>188</sup>*

Hon. Nicola Roxon, Health Minister of Australia  
Introducing Plain Packaging Bill to Parliament  
July 6, 2011

*"It [plain packaging] will almost certainly be introduced, have its first reading, then go off to the select committee, but it's very, very unlikely it will be passed. In fact, in my view it shouldn't be passed until we've actually had a ruling out of Australia. We think it's prudent to wait till we see a ruling out of Australia. If there's a successful legal challenge out of Australia, that would guide us how legislation might be drafted in New Zealand."<sup>189</sup>*

Hon. John Key, Prime Minister of New Zealand  
December 17, 2013

Tobacco companies have issued trade threats to governments since the late 1980s, but no research to date has thoroughly evaluated the deployment of these threats and consequently the government's reaction and reception of trade threats. Equally as important, legal scholars and political scientists studying the effects of regulatory chill, have argued that little evidence suggests that policymakers have taken into account potential trade and investment disputes by foreign investors when drafting and developing public policies. These authors who have argued against the regulatory chill hypothesis have claimed that 1.) regulators have little awareness or comprehension of trade and investment law,<sup>190</sup> and 2.) there is no evidence to suggest a chilling effect is indeed occurring.<sup>191</sup> This

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<sup>188</sup> Commonwealth of Australia. *Tobacco Plain Packaging Bill 2011 Second Reading Speech by Nicola Roxon*. Canberra, Australia: House of Representatives, 6 July 2011.

<sup>189</sup> Rutherford H. Key: Let Australia go first. *Dominion Post*. 17 December 2013.  
<http://www.stuff.co.nz/national/politics/9527389/Key-Let-Australia-go-first>.

<sup>190</sup> Côté C. *A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment*, February 2014. Also see Coe J, Rubins N. Regulatory expropriation and the Tecmed case: context and contributions. In: Weiler T, ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*. London: Cameron; 2005:597-667. Gottwald EJ. Leveling the playing field: is it time for a legal assistance center for developing nations in investment treaty arbitration. *American University International Law Review*. 2007:237-275.

<sup>191</sup> Lydgate EB. Biofuels, Sustainability, and Trade-Related Regulatory Chill. *Journal of Int Econ Law*. 15 March 2012;15(1):157-180. Also see Bernauer T, Caduff L. In Whose Interest? Pressure Group

chapter addresses the first critique and offers ample evidence that policymakers were indeed aware of international trade and investment law and took into account potential trade and investment disputes during the development of plain packaging in both countries. While an emerging literature on regulatory chill is beginning to highlight some awareness from high ranking officials,<sup>192</sup> and government lawyers,<sup>193</sup> the empirical evidence provided in this chapter demonstrates that officials from multiple government agencies and members from the legislative branch were fully aware of the industry trade threats and evaluated the implications of international trade law during the regulatory development process of plain packaging. By documenting the aggressiveness and magnitude of the industry trade threats in both Australia and New Zealand, these findings also build upon Harten and Scott's research that indicates an increased awareness potentially occurs when the trade threats are seen as more significant as officials have to pay attention and take them seriously.<sup>194</sup>

This chapter also advances the literature on regulatory chill by measuring the chill in terms of the time elapsed from introducing to implementing strong HWL regulations, thereby scoring the dependent variable in terms of "delay" instead of whether or not regulations are implemented or weakened. While the Australian government was able to overcome the industry trade threats and properly implement strong HWLs without being weakened or delayed, the New Zealand government has caved into the trade threats and delayed its HWL proposal. In measuring the dependent variable in terms of delay, this chapter also addresses the second critique of the regulatory chill hypothesis and illustrates that the trade threats had a significant impact on the regulatory development process and

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Politics, Economic Competition and Environmental Regulation. *J of Pub Policy*. Jan-Apr 2004;24(1):99-126. Gross S. Inordinate Chill: BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom-An Indonesian Case Study. *Mich. J. Int'l L.* Spring 2003;3(1):894-959.

<sup>192</sup> Harten GV, Scott DN. Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada. *Osgoode Legal Studies*. 7 December 2015;12(6):1-27.

<sup>193</sup> Dupont C, Schultz T. Towards a new Heuristic Model: Investment Arbitration as a Political System. *King's College London Research Paper Series*. 22 December 2015;7(1):1-29.

<sup>194</sup> Harten GV, Scott DN. Investment Treaties, 2015, pg. 22.



the divergent policy outputs, thus suggesting that a degree of a regulatory chill has occurred. However the importance of measuring policy outputs in terms of “delay” and the overall impact of the trade threats on whether strong HWLs or passed or delayed will be examined in a comparative analysis in chapters 4 and 5.

## **Section I: Historical and contextual background**

### **Australia**

Australia is a developed and high-income country with a robust economy and a gross domestic product (GDP) of about US\$1.1 billion.<sup>195</sup> Politically, Australia is a long established democracy that contains a constitutional monarchy and a bicameral parliamentary system. Since the 1920s, parliamentary elections have been dominated by two political groupings, the Australian Labor Party and the Coalition, which consists of the Liberal Party of Australia, the Liberal National Party and the National Party of Australia. The Labor Party is a center-left party characterized by democratic socialist principles (labor rights and protection), while the Liberal Party is a center-right party that advocates economic liberalism, the Liberal National and National Party are conservative parties and the Australian Greens are a progressive party.

In relation to tobacco control legislation, the Labor Party and the Greens have traditionally promoted and supported the adoption of progressive public health policies. The Liberal Party has introduced important tobacco control measures and participated in several bi-partisan efforts to advance public health, while the National Party and Liberal National Party have traditionally protected individual liberties and opposed government involvement and increased public health regulations. In 2004, the Labor Party banned

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<sup>195</sup> Central Intelligence Agency. The World Factbook: Australia. January 2015; <https://www.cia.gov/library/publications/the-world-factbook/geos/as.html>.

tobacco company donations (e.g. campaign contributions),<sup>196</sup> and in August 2013, Prime Minister and Leader of the Coalition (Liberal, Liberal-National, and National Party), asked Liberal Party members to no longer accept tobacco company donations,<sup>197</sup> but not both conservative parties (Liberal-National and National Party), who still accept donations. This is significant because the banning of tobacco company donations has been proven to show a decrease in influence in tobacco control policymaking.

### ***Public health and tobacco control in Australia***

Australia is one of the leading countries in the world in terms of public health with high life expectancy, low infant mortality, low health expenditure per capita, and strong national healthcare system.<sup>198</sup> In 2009, the Australian government announced that it wanted to be the healthiest country in the world by 2020 (see below) addressing issues related to alcohol, obesity and tobacco.

Australia has also been a global leader in tobacco control for decades. Since the 1970s Australia has led the fight against tobacco, adopting some of the world's first tobacco control initiatives, including health warning labels, restrictions on smoking in public places, and bans on tobacco advertising.<sup>199</sup> To further strengthen the government's commitment to reducing tobacco use, the Australian government signed the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) in 2003 and then ratified the convention in 2004.<sup>200</sup> The Australian government has utilized the FCTC as a legal tool to

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<sup>196</sup> Lee J. National Party accepts more than \$10,000 in tobacco donations. *Sydney Morning Herald*. 1 February 2016.

<sup>197</sup> Cassidy K. Tony Abbot Tells Liberal Party to stop accepting tobacco industry donations. *ABC News*. 22 August 2013. <http://www.abc.net.au/news/2013-08-22/liberal-party-kicks-habit-on-tobacco-industry-donations/4905366>.

<sup>198</sup> World Health Organization. *World Health Statistics 2015*. Geneva, Switzerland, January 2015. Also see Organization for Economic Co-Operation and Development. OECD Health Statistics Data Base. January 2015; [http://stats.oecd.org/index.aspx?DataSetCode=HEALTH\\_STAT](http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT).

<sup>199</sup> Campaign for Tobacco-Free Kids. Tobacco Control Laws: Country Details for Australia. January 2016; <http://www.tobaccocontrolaws.org/legislation/country/australia/summary>.

<sup>200</sup> United Nations. Treaty Collection: WHO Framework Convention on Tobacco Control. May 2016; [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IX-4&chapter=9&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en).

further advance tobacco control legislation in the areas of smokefree environments, tobacco advertising, sponsorship, and promotion (TAPS), tobacco taxes, and cigarette package health warning labels (HWLs). The adoption of these strong policies has led to an overall decrease in the prevalence of smoking in Australia over the last 40 years from 40% in 1970 to 35.4% in 1983 to 16.6% in 2007.<sup>201</sup> Part of the Australian governments' 2020 healthiest country included a goal to decrease the smoking prevalence to 10% of the population by 2018. As of 2016, Australia's smoking prevalence is estimated to be around 14%, one of the lowest in the world.<sup>202</sup>

### *Tobacco control advocacy*

Much of the success in tobacco control can be attributed to the scientific evidence produced in Australia regarding tobacco use and the advocacy work conducted by public health groups and a robust civil society. Some of the leading health researchers on tobacco control in the world reside in Australia conducting valuable health science in the areas of smokefree environments, TAPS, tobacco taxation, and HWLs, including plain packaging. Public health groups, including the Public Health Association, Australia (PHAA), the Cancer Council, the National Heart Foundation of Australia, which include some of these researchers, have utilized this wide-ranging evidence to influence the policymaking process. These health groups, which also consist of former government officials, have been instrumental in driving and shaping tobacco control legislation by producing media advocacy campaigns, issuing press releases, and issuing submissions during the policymaking process. The members of these health groups have also worked on issues related to tobacco control for decades so there is a high level of organization,

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<sup>201</sup> World Health Organization. Prevalence of tobacco use among adults and adolescents. January 2015; [http://gamapserver.who.int/gho/interactive\\_charts/tobacco/use/atlas.html](http://gamapserver.who.int/gho/interactive_charts/tobacco/use/atlas.html).

<sup>202</sup> Ibid.

communication, collaboration and trust among this robust civil society group for advocacy effects to achieve a common goal of reducing tobacco use in Australia.

Australia is also home to some of the leading legal scholars working on tobacco control, especially in the areas of international trade and investment. This most notably includes the McCabe Centre for Law and Cancer, which contributes to the use of law for cancer prevention and treatment. The McCabe Centre works closely with Cancer Council Victoria and conducts research, policy development and capacity building to connect legal scholars with cancer control researchers and advocates. The McCabe Centre also serves as a knowledge hub for advice on legal challenges to the implementation of the WHO FCTC. This hub center assists the FCTC Secretariat by providing technical assistance and facilitating the exchange of information and cooperation between FCTC Parties in relation to trade and investment law, including information on ongoing trade and investment challenges to implementing tobacco control policies. As we will see later in this chapter when discussing New Zealand and in chapter 5 when discussing Uruguay, the McCabe Centre has provided important legal advice to each government regarding their HWL proposals and the nature of their international treaty obligations.

### ***Tobacco company presence in Australia***

The main tobacco companies in Australia consist of British American Tobacco (BAT), Philip Morris International (PMI), and Imperial Tobacco. While tobacco companies had more of a visual presence and credible voice in the country during the 1970s, 1980s when tobacco manufacturing was produced in several states, this presence and credibility in Australia has considerably declined causing them to retreat from public debates on tobacco since the 1990s.<sup>203</sup> This is mostly due to three significant factors, the expansion of trade liberalization and the outsourcing cheap labor over seas through the rationalization of

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<sup>203</sup> Chapman S, Freeman B. *Removing the emperor's clothes: Australia and tobacco plain packaging*. Sydney, Australia: Sydney University Press; 2014.

tobacco farming and production, the decline in favorable public opinion of tobacco companies through awareness of tobacco company misconduct and deception and the decline in the social acceptability of smoking through increased public health science and regulations. Also, tobacco companies used to participate with Australian governments in joint ventures, in which the companies frequently met with regulators to draft and develop tobacco control proposals. The industry also implemented self-regulatory and voluntary measures, but since the implementation of the FCTC in 2004 and the exposure of tobacco industry deception, tobacco companies have been removed from the legislative drafting process. As mentioned above, several political parties have refused accepting tobacco company donations further weakening the tobacco companies' attempts to influence policymakers. As a result of very low public credibility, tobacco companies in Australia have had to increasingly resort to operating behind the scenes through front groups, independent think tanks, and hidden campaign contributions. While their visual presence and public credibility has substantially been diminished since the 1990s, the introduction of plain packaging and threat of best practices spreading globally caused the tobacco industry to resurface in an aggressive fashion in Australia once again. Yet despite this reemergence in the public eye, tobacco companies still remained much less visible since their early operations in the 1970s and 1980s (see below).

### **New Zealand**

Like Australia, New Zealand is a high-income country with a GDP of about US\$160 million.<sup>204</sup> Politically, New Zealand is also a long established democracy that contains a constitutional monarchy and unicameral parliamentary system. Since 1930, two political parties have dominated parliamentary elections, the Labour Party, a center-left party characterized by democratic socialist principles (universal rights and equal access) and the

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<sup>204</sup> Central Intelligence Agency. The World Factbook: New Zealand. January 2015; <https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html>.

National Party, a center-right party characterized by conservative and classical liberal principles. Other parties include the Green Party (progressive party), the Māori Party (indigenous party) and New Zealand First Party (conservative party).

In relation to tobacco control legislation, the Labour, Green, and Māori parties have traditionally promoted and supported the adoption of progressive public health policies. Although the National Party has not aggressively promoted the advancement of progressive tobacco control measures, they have supported public health regulations, while New Zealand First traditionally has opposed government regulations. No party in New Zealand has formally stopped receiving donations from tobacco companies, but it is highly unlikely that members from the Green or Māori Party have received donations given their staunch opposition to tobacco companies.

### ***Public health and tobacco control in New Zealand***

New Zealand is among the leading countries in the world in terms of general public health with high life expectancy, low infant mortality, low health expenditure per capita and strong national healthcare system.<sup>205</sup> New Zealand is also a progressive leader in addressing issues related to alcohol, obesity and drug abuse.

In terms of tobacco control, New Zealand, similar to Australia has been a global leader with some of most advanced tobacco control policies, including health warning labels, restrictions on smoking in public places, and bans on tobacco advertising. The New Zealand government was also one of the first countries in the world to sign the WHO FCTC in 2003 and then ratify the convention in 2004.<sup>206</sup> The New Zealand government has utilized the FCTC as a legal tool to further advance tobacco control legislation in the areas of smokefree environments, TAPS, tobacco taxes, and HWLs. This progress has led to an overall decrease in the prevalence of smoking in New Zealand over the last 40 years from

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<sup>205</sup> WHO World Health Statistics 2015.

<sup>206</sup> United Nations Treaty Collection 2016.

40% in 1970 to 19% in 2008.<sup>207</sup> In 2008, the New Zealand government announced an ambitious goal of becoming the first country in the world to be smokefree by the year 2025, which aims to reduce the smoking prevalence level not to zero but 5% (see below). As of 2016, New Zealand's smoking prevalence is estimated around 15%, one of the lowest in the world.<sup>208</sup>

### *Tobacco control advocacy*

Some of the leading tobacco control research in the world has been produced in New Zealand by public health groups and civil society. Public health groups, including Action on Smoking and Health (ASH), New Zealand Heart Foundation, New Zealand Cancer Society, and Smokefree Coalition have been instrumental in initiating and guiding tobacco control legislation by producing media advocacy campaigns, issuing press releases, and issuing submissions during the policymaking process. There is also some very important work being done by Māori health groups such as Tala Pacifica, which aim to reduce smoking in Māori populations, especially women who have some of the highest smoking prevalence levels in the world. Health groups although strong in terms of research and advocacy do receive the majority of their funding from the government thereby constraining their independent voice.

New Zealand is also home to some of the leading legal scholars in tobacco control and international trade. Although New Zealand is a smaller country with not as many legal scholars, due to proximity and close history and collaboration with Australia, New Zealand has been a great benefactor of Australia's leading role in trade and tobacco.

### ***Tobacco company presence in New Zealand***

The main tobacco companies in New Zealand consist of British American Tobacco (BAT), Philip Morris International (PMI) and Imperial Tobacco. Similar to Australia,

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<sup>207</sup> WHO Prevalence of tobacco use 2015.

<sup>208</sup> Ibid.

tobacco companies produced and manufactured tobacco in New Zealand during the 1970s and 1980s, but since the 1990s have rationalized their tobacco farming and manufacturing and shipped production over seas. This shift, along with public awareness of tobacco company misconduct and deception and the decline in social acceptability of smoking through increased public health science and regulations has hurt the credibility of tobacco companies. As a result, the credible voice of tobacco companies has declined in public debate thereby diminishing their visual presence in New Zealand. Tobacco companies used to participate with New Zealand governments in joint ventures and implemented self-regulatory measures, but since the adoption of the FCTC in 2004, tobacco companies have been removed from the legislative drafting process. While the visual presence and public credibility of tobacco companies have significantly declined in New Zealand, tobacco companies still operate behind the scenes to influence the regulatory process by operating through front groups and independent think tanks.

## **Section II: Tobacco company trade threats and challenges and reaction by policymakers**

### **Australia:**

While the historical success of tobacco reforms over decades helped eventually lead to the introduction of plain packaging in Australia, the regulatory development process of plain packaging began with the National Preventative Health Taskforce. In April 2009, the government commissioned the Taskforce, which consisted of health scholars and advocates to address the prevention of obesity, alcohol, and tobacco. This Taskforce reviewed the scientific evidence surrounding these three areas of health and comprised a report that outlined recommendations for the government to advance public health in Australia. On June 30, 2008 the Taskforce delivered its final report to the Department of Health and Ageing, which released the report in September 2009 that outlined a strategic vision to become the healthiest country by 2020, with one of its targets aimed at reducing the



smoking prevalence from 17% to 10%.<sup>209</sup> In order to achieve this target, the Taskforce made several recommendations to reduce tobacco consumption, including increased tobacco taxes, the prohibition of tobacco products on the Internet, and the adoption of plain packaging of tobacco products. In reference to plain packaging the Taskforce concluded, “there can be no justification for allowing any form of promotion for this uniquely dangerous and addictive product-including the



**Figure 3:1: Proposed plain packaging of cigarette packages in Australia**

package.”<sup>210</sup> Between September 2009 and April 2010, the government reviewed the policy recommendations by the Taskforce and on April 29, 2010, Prime Minister Kevin Rudd and Health Minister Nicola Roxon announced that Australia would introduce a series of tobacco control measures including a 25% tobacco tax increase and plain packaging, which would require all cigarette packs to be completely covered with drab olive and green colors.<sup>211</sup> Although labeled as “plain” packaging, the proposal required cigarette packages to be sold with pictorial health warning labels and would only include the brands and variants in plain font on the front and top of the package (Figure 1).

### **Tobacco industry trade and investment arbitration threats**

Once the Preventative Health Taskforce submitted their report with the recommendations of plain packaging, tobacco companies once again began evoking concerns of the government’s obligations to international treaties and the usage of their trademarks. As they had done previously in Australia in the 1990s and in other countries,

<sup>209</sup> National Preventative Health Taskforce. *Australia: The Healthiest Country By 2020: National Preventative Health Strategy-the roadmap for action*. Canberra, Australia, 30 June 2009.

<sup>210</sup> Ibid, pg. 179.

<sup>211</sup> CNN Wire Staff. Australia moves to ban logos on cigarette packs. *CNN*. 29 April 2010. <http://www.cnn.com/2010/WORLD/asiapcf/04/29/australia.cigarette.packaging/>.

the tobacco industry's trade attacks consisted of a multi-pronged approach to threaten the Australian government into withdrawing the proposal or significantly weakening it. This multi-pronged strategy, which was detailed in chapter 2, consists of five important components of the threat, including 1.) the general threat of violating intellectual property rights and international treaties, 2.) the legal and reputational costs of international arbitration and potential compensation, 3.) framing the health issue in terms of broad violations of business intellectual property rights and investments, 4.) recruiting business support and funding research to strengthen credibility and promote uncertainty and concern, and 5.) the magnitude of the threat. These series of threats were issued throughout the regulatory development process and are documented here first and then assessed on how they were received by policymakers.

### **1.) General threats of violating intellectual property rights and international treaties**

Throughout the regulatory development process in Australia the tobacco companies issued submissions to parliament,<sup>212</sup> and argued in the media<sup>213</sup> that the plain packaging proposal would violate their intellectual property rights (trademarks) under Australia's constitution and several of Australia's international trade and investment treaties. In particular, tobacco companies argued the plain packaging proposal a.) violated the usage of trademarks under the Australian constitution, the Paris Convention for the Protection of Industrial Property and the World Trade Organization (WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS), b.) constituted a barrier to trade under the WTO

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<sup>212</sup> British American Tobacco Australia Limited. *Submission to the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 July 2011. Imperial Tobacco Australia Limited. *Inquiry into Plain Tobacco Packaging*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 July 2011.

<sup>213</sup> [unknown author]. New-look cigarette packaging draws fire from big tobacco-but will it work? *Sydney Morning Herald*. 7 April 2011. Also see Fenner R, Schneider J. Philip Morris Says Australia Plain-Pack Law Violates Treaty. *Bloomberg*. 27 June 2011. <http://www.bloomberg.com/news/articles/2011-06-26/philip-morris-starts-legal-action-on-australian-tobacco-package-law-plans>.

Agreement on Technical Barriers to Trade (TBT), and c.) did not represent fair and equitable treatment and expropriation under various free Australian free trade agreements (FTAs) and bilateral investment treaties (BITs), (Table 3:1).

*Violated the use of trademarks*

Tobacco companies threatened that prohibiting the “use” of trademarks violated the intellectual property of their products and investments. Tobacco companies claimed that the plain packaging proposal would violate section 51(xxxi) of the Australian Constitution, Article 7 of the Paris Convention and Article 20 of the WTO TRIPS Agreement. In particular, tobacco companies argued these protections prohibited governments from unjustifiably encumbering the trademarks by imposing special requirements in relation to their “use”. The companies argued that plain packaging would go beyond a mere “encumbrance” and extends to a virtual extinguishment of trademark rights and use of those marks. As a result, prohibiting the use of the trademark would constitute an acquisition of property, which would require compensation.

*Constituted a barrier to trade*

The tobacco companies also threatened that plain packaging would violate Article 2.2 of the WTO TBT Agreement, which prohibits member countries from implementing regulations that could create unnecessary obstacles to international trade. As a result, the plain packaging proposal would have to be proven necessary, otherwise known as passing “necessity test”, in terms of public health in order to not constitute a barrier to trade.

*Violated fair and equitable treatment on investments*

Finally the tobacco companies threatened that plain packaging would violate various FTAs and BITs, which provide investors fair and equitable treatment on their investments.

Table 3:1: Tobacco industry general trade threats			
Proposed violation	Intellectual property (use of trademarks)	Barrier to trade	Fair and equitable treatment on investments
Agreements	-Australian Constitution -Paris Convention -WTO TRIPS	-WTO TBT	-BITs and FTAs
Articles	-Constitution section 51(xxxi) -Paris Convention Article 7 -TRIPS Article 20	-Article 2.2	-Varies -Ex. Australia-Hong Kong BIT Articles 2(2) and 6
Arguments	-Constitutes an acquisition of property -"Use" of trademark shall not be unjustifiably encumbered to deny distinguishing an entity's goods	-Prohibits members from imposing technical regulations that create "unnecessary" obstacles to international trade	-Requires fair and equitable treatment of investments -Constitutes an expropriation of investments
BIT: Bilateral Investment Treaty FTA: Free Trade Agreement TBT: Technical Barriers to Trade TRIPS: Agreement on Trade Related Intellectual Property Rights WTO: World Trade Organization			

While tobacco companies cited violations of various FTAs and BITs, PMI specifically claimed that the plain packaging proposal would violate a 1993 Australia-Hong Kong BIT. In particular, PMI argued that plain packaging constituted a breach in fair and equitable treatment of its investments under Article 2(2) and constituted an expropriation (the value of investment) of its investments under Article 6. As a result of violating their intellectual property investments, tobacco companies threatened that these discriminatory measures would amount to compensation claims of expropriation.

**2.) Legal and reputational costs of international arbitration and potential compensation**

In general tobacco companies threatened that the plain packaging proposal would create significant legal costs for the Australian government. These threats of legal costs

were framed as serious risks for the government and based on creating a large degree of uncertainty. Tobacco companies highlighted these risks by arguing that taxpayers' dollars would be wasted on the legal fees associated with defending plain packaging. In addition, tobacco companies argued that plain packaging could lead to significant compensation due to intellectual property and investment violations that they claimed would be "in the vicinity of \$3 billion" or arguing it would cost "billions of taxpayers' dollars".<sup>214</sup>

Tobacco companies also argued that breaches of international agreements would be detrimental to Australia's international reputation on matters concerning intellectual property. The tobacco companies argued that plain packaging would lead to adverse consequences for Australia's international reputation thereby diminishing its international stature and reduce its negotiating ability. Tobacco companies highlighted the concerns expressed by individual governments and leading international business and trade groups that had publically opposed plain packaging and cautioned that these actions may lead to members states in WTO using retaliatory countermeasures.

### ***3.) Framing the health issue in terms of broad violations of business intellectual property rights and investments***

In chapter 2, previously secret tobacco industry documents revealed that during the 1990s due to the public awareness of tobacco industry racketeering and deception, the tobacco companies were advised to no longer debate issues related to health warnings, including plain packaging in the context of public health. Instead they were advised to shift the debate away from public health and frame plain packaging as a convoluted intellectual property and investment issue. This effective component of the threat was again applied in Australia as tobacco companies framed the plain packaging proposal as an attempt by the

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<sup>214</sup> Lamont L. Big Tobacco blocked on bid to see government plain pack advice. *The Sydney Morning Herald*. 24 August 2011.

Australian government to confiscate the trademarks of a legitimate business selling a legal product.

This framing not only attempted to shift the debate away from public health but also aimed to shift the concentration away from tobacco companies and towards all businesses. The tobacco companies recognized in the 1990s that they needed to eliminate the perception of tobacco industry isolation and contextualize the issue in a manner that was an attack on all businesses. As a result, in several submissions to parliament and in statements to the media, tobacco companies claimed the plain packaging proposal was setting a dangerous precedent for all companies, particularly alcohol and food industries. The tobacco companies complained that the government was running the risk of following a slippery slope, a libertarian designed argument referring to what industry would be targeted next with plain packaging. In an attempt to resonate among general defenders of libertarian and business principles, the slippery slope argument was also supported by general nanny state arguments, which argued the government was looking to overly intrude and regulate legal businesses. British American Tobacco (BAT) also ran advertisements with soda cans and beer bottles covered in plain packaging with headlines stating, “What company would stand for this?” and “Will plain packaging cost taxpayers billions?”, (Figure 2). The advertisements went on to state:

The Tobacco Plain Packaging Bill could destroy brands that are worth millions, if not billions, of dollars. No company would stand for having its brands taken away and we're not different. And it may infringe international trademark and intellectual property law. The Government could also end up spending millions in legal fees defending an idea unproven anywhere in the world. Don't let the taxpayer foot the bill for a bad Bill.<sup>215</sup>

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<sup>215</sup> British American Tobacco Australia. Don't let the taxpayer foot the bill for a bad Bill. 2011; <http://www.plainpack.com/home.html>. Accessed 5 May, 2015.

## WHAT COMPANY WOULD STAND FOR THIS?



The Tobacco Plain Packaging Bill could destroy brands that are worth millions, if not billions, of dollars.

No company would stand for having its brands taken away and we're no different. And it may infringe international trademark and intellectual property law.

The Government could also end up spending millions in legal fees defending an idea unproven anywhere in the world.

Don't let the taxpayer foot the bill for a bad Bill  
PlainPack.com

British American Tobacco  
Australia Limited

## WILL PLAIN PACKAGING COST TAXPAYERS BILLIONS?



The Tobacco Plain Packaging Bill could destroy brands that are worth millions, if not billions, of dollars.

No company would stand for having its brands taken away and we're no different. And it may infringe international trademark and intellectual property law.

The Government could also end up spending millions in legal fees defending an idea unproven anywhere in the world.

Don't let the taxpayer foot the bill for a bad Bill  
PlainPack.com

British American Tobacco  
Australia Limited

Figure 3:2: British American Tobacco plain packaging media campaign in Australia

While these advertisements aimed to shift the attention towards the general attack on all businesses and the confiscation of trademarks by the government the advertisements also reinforced the idea that the implementation of plain packaging would entail potentially expensive legal consequences that would require compensation by tax payers.

#### ***4.) Recruiting business support and funding research to strengthen credibility and promote uncertainty and concern***

These threats were further promoted by businesses and trademark associations, and supported in research studies by pro-libertarian think tanks. For decades tobacco companies have utilized major international businesses and trademark associations, predominately U.S. based companies, to lobby governments on their behalf for issues related to trade and tobacco.<sup>216</sup> Most notably, the tobacco companies have financially

<sup>216</sup> Crosbie E, Glantz SA. Tobacco industry argues domestic trademark laws and international treaties preclude cigarette health warning labels, despite consistent legal advice that the argument is invalid. *Tobacco control*. May 2014;23(3):e7. Also see Neuman M, Bitton A, Glantz S. Tobacco industry

supported business groups, including the International Chamber of Commerce (ICC), the U.S. Chamber of Commerce, the International Trademark Association, the National Foreign Trade Council (NFTC), and the United States Council for International Business (USCIB). Throughout the regulatory process, these groups reiterated similar complaints concerning general violations of trademarks and international treaties, the potential legal and reputational costs associated with plain packaging, and the dangerous precedent this would set for other businesses.<sup>217</sup> Tobacco companies have also been long time funders pro-libertarian think tanks, including the Washington Legal Foundation, the Democracy Institute, and the Institute of Public Affairs, which during the policy process also reiterated similar arguments in reports, media releases, and in submissions to parliament.<sup>218</sup>

While tobacco companies had the support of these long standing allies, it should be noted that tobacco companies seemingly failed to recruit broad support from alcohol and food industries. Although several arguments attempted to link tobacco plain packaging with the potential plain packaging of alcohol and food, no company from either industry endorsed this approach by tobacco companies probably fearing they would be targeted next in terms of pictorial health warning labels on their products. Some companies even publically denounced any association with the tobacco companies. For example, the

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strategies for influencing European Community tobacco advertising legislation. *Lancet*. Apr 13 2002;359(9314):1323-1330.

<sup>217</sup> International Chamber of Commerce. *ICC BASCAP comments on Tobacco Plain Packaging Bill 2011 and Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 July 2011. United States Chamber of Commerce. *Submission to the Plain Packaging Bill*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 21 July 2011. International Trademark Association. *Submission to the Plain Packaging Bill*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 July 2011. National Foreign Trade Council Inc. *Submission to the Plain Packaging Bill*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 14 July 2011.

<sup>218</sup> Democracy Institute. *Inquiry Into Tobacco Plain Packaging: Submission to the Health and Ageing Committee*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 21 July 2011.



Australian Olive Association was upset when former Health Minister Roxon originally described the packaging in “olive green” and stated:

To associate any food with cigarettes is a thoughtless thing to do, especially one that’s had a very good reputation as being a healthy product. You could have called it ‘drab green’ or ‘khaki green’ or, better still, not used green at all.<sup>219</sup>

In addition, the alcohol industry, and in particular the Winemakers Federation of Australia immediately criticized BAT’s campaign trying to link tobacco with alcohol, stating, “our industry does not like any association between tobacco and alcohol.”<sup>220</sup>

### **5.) Magnitude of the threat**

During the regulatory development process of plain packaging, tobacco companies issued trade threats in an intensified manner through parliament and in the media. Tobacco companies submitted extensive submissions each with sizable sections dedicated to their multi-component trade threats to the House of Representatives Health and Ageing Committee and the Senate Legal and Constitutional Affairs Committee. BAT spokesperson David Crowe also spoke during public hearings in the health committee emphasizing these legal concerns.<sup>221</sup> Tobacco companies also held press conferences, ran media campaigns, and made several comments in the media throughout the regulatory process. These threats were multiplied by the number of businesses and trademark associations that echoed these concerns in submissions to parliament and in the media. As a result, it is clear to say that the tobacco companies in Australia, which had been for the most part out of the public eye since the 1990s, were extremely aggressive in threatening the government over issues related to trade and investment. Therefore the magnitude of the trade threats was high and this does

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<sup>219</sup> Stark J. Seeing red over olive ciggie packs. *The Age*. 8 May 2011.

<sup>220</sup> Metherell M. Tobacco loses ally over ads. *The Sydney Morning Herald*. 28 June 2011.

<sup>221</sup> Commonwealth of Australia. *To inquire and report on: Plain Packaging Bill 2011, Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 4 August 2011.

not include the private activities of the tobacco companies to lobby and privately negotiate with policymakers, which are difficult to measure.

### **Australian government response to tobacco trade threats**

Following the recommendation of the National Preventative Health Taskforce to adopt plain packaging, the policy process involved subsequently a series of steps to passing and then implementing the regulation, which involved the governments' proposal to introduce the legislation, committee hearings and reports, and parliamentary debates in both the House and the Senate. Throughout the political process, in the media and in interviews for this study, it is clear that policymakers were highly aware of the tobacco company trade threats and took into account the implications of international trade agreements during the regulatory development process of plain packaging.

### ***Internal discussions in Cabinet to introduce plain packaging***

Before Prime Minister Kevin Rudd and Health Minister Nicola Roxon announced the introduction of plain packaging on April 29, 2010, the government reviewed the Taskforce's policy recommendations. While it is difficult to assess the original reaction of Cabinet to the tobacco companies' legal threats as Cabinet meetings and decisions are private, it is clear that both Prime Minister Rudd and Health Minister Roxon were fully cognizant of the trade threats and remained bold in their approach. When introducing plain packaging, Rudd told reporters:

Now the big tobacco companies are going to go out there and whinge, whine, complain, consider every form of legal action known to man. That's par for course, We, the government, will not be intimidated by any big tobacco company trying to get in the road of doing the right thing.<sup>222</sup>

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<sup>222</sup> CNN Australia cigarette packs 2010.

Health Minister Roxon also told reporters that the legislation would be drafted to withstand legal challenges from tobacco companies, stating, “We have firm advice that this action can be taken. Our legislation will be very carefully drafted.”<sup>223</sup>

In an interview with former Health Minister Roxon for this study, Minister Roxon confirmed this bold and courageous approach to not backing down to tobacco industry trade threats.<sup>224</sup> When asked about her personal perception of the trade threats, Minister Roxon stated that she viewed the threats as a bit of a stretch since there were clearly health carve outs in trade agreements and that the tobacco companies were such bullies for a long time that if these actions were new they may have been more credible. Minister Roxon also confirmed that the tobacco companies’ reputation in the country was very low and their frantic attempts to fight the proposal illustrated how desperate the companies appeared thereby weakening the credibility of their trade threats. Minister Roxon was also trained as a lawyer and went on to become the attorney general so her legal background provided an important perspective and understanding of the legal threats.

With that said, Minister Roxon stated that the government was not naive and still remained committed to providing a strong legal case for the proposal. When discussing obstacles and challenges to the plain packaging proposal, she stated how initial Cabinet meetings and decisions to prioritize particular legislation can be quite challenging logistically both in terms of drafting and consulting. However she mentioned that in drafting the plain packaging bill she made clear that everyone in the Cabinet from finance to trade clearly understood the health implications of the legislation. Minister Roxon also stated that she had lengthy conversations with the trade ministry and attorney general’s office about the tobacco company trade threats and how to draft the proper legislation. Minister Roxon claimed that everyone in Cabinet was on the same page in terms of the legal

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<sup>223</sup> Ibid.

<sup>224</sup> Nicola Roxon. Interview by Eric Crosbie. Melbourne, Australia; 2 July 2015.

issues, as she claimed that any government measure requires a “whole government approach.” She admitted that a few times she had to explain things a little more, but noted that the Cabinet had good chemistry and that she received favorable legal advice. As a result of this chemistry and legal analysis, Minister Roxon stated in the interview, as she had done throughout the policymaking process, that the government felt very confident they were on strong legal grounds.

Former Trade Minister Craig Emerson also confirmed the government’s bold approach, which rested on strong legal grounds. In an interview for this study, Minister Emerson claimed that lawyers from both the attorney general’s office and the Department of Foreign Affairs and Trade confirmed that the health measure was consistent with Australia’s international trade obligations.<sup>225</sup> In reviewing potential trade threats and legal challenges, Minister Emerson mentioned that the government was confident in its legal position and that the plain packaging policy once implemented would not be overturned. He also added that he was not worried that this proposal would harm Australia’s trade reputation as suggested by the tobacco companies’ trade threats because the health measure did not violate Australia’s international trade commitments. Finally Minister Emerson recognized Health Minister Roxon’s leadership in regards to this proposal and her ability to communicate the health justifications of the bill.

#### ***Department of Health and Ageing consultation response***

After the government introduced the plain packaging bill, the Department of Health and Ageing, which is responsible for drafting and implementing the legislation, held a 60-day public consultation period on the exposure draft of the bill. Between April 7, 2011 and June 6, 2011 stakeholders, including tobacco companies, business groups, health groups, and health advocates, were invited to offer comments and suggestions on the plain

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<sup>225</sup> Craig Emerson. Interview by Eric Crosbie. Sydney, Australia; 8 July 2015.

packaging proposal. In the Department of Health and Ageing's consultation paper, which outlined the government's approach to implementing plain packaging, it responded that to the industry's claim that the bill would acquire their property, or in other words prevent them from using their trademarks, stating:

It is not anticipated that the Bill will result in any acquisition of property other than on just terms which would be contrary to section 51(xxxi) of the Constitution. However, out of an abundance of caution, section 11 provides that the Bill does not apply to the extent that it would cause an acquisition contrary to section 51 (xxxi). Some tobacco manufacturers have argued that legislation preventing the use of their trade marks on packaging would be an acquisition of property other than on just terms. The Government considers that this argument is incorrect.<sup>226</sup>

In response to the consultation session, Health Minister Roxon announced an amendment bill, the Trade Marks Amendment (Tobacco Plain Packaging) Bill to address the restrictions on the use of trademarks on tobacco products. Minister Roxon stated:

This Bill, the Trade Marks Amendment (Tobacco Plain Packaging) Bill, is being introduced to amend the Trade Marks Act 1995 (Trade Marks Act) so that, if necessary in the future, the government can quickly remedy any unintended interaction between the Tobacco Plain Packaging Bill 2011 and the Trade Marks Act that can't be dealt with under the Tobacco Plain Packaging Bill 2011. This Bill amends the Trade Marks Act to allow regulations to be made in relation to the operation of the Tobacco Plain Packaging Bill 2011. The objective of any such regulations would be to ensure that the practical operation of the Tobacco Plain Packaging Bill 2011 does not prevent businesses from registering new trade marks, or from protecting registered trade marks against infringement.<sup>227</sup>

In other words, the Trade Marks Amendment allowed synchronization with the Tobacco Plain Packaging Bill to prevent any ambiguity between the interpretations of the two pieces of legislation. The decision to introduce the amendment also reflected the government's awareness of the tobacco industry trade threats and its ability to circumvent and navigate any potential loopholes or legal tricks the tobacco companies would try to use. Overall the

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<sup>226</sup> Biotext Pty Ltd. *Public consultation on the exposure draft of the Tobacco Plain Packaging Bill 2011*. Canberra, Australia: Australia Department of Health and Ageing, 18 September 2011.

<sup>227</sup> Commonwealth of Australia. *Tobacco Plain Packaging Bill 2011 Second Reading Speech by Nicola Roxon*. Canberra, Australia: House of Representatives, 6 July 2011.

government was fully aware of the legal arguments at hand and remained bold and committed to implementing both bills.

### ***House of Representatives Health and Ageing Committee***

Between July 13, 2011 and July 22, 2011, the House of Representatives Health and Ageing Committee received 63 submissions on the plain packaging proposal and on August 22, 2011 the Health committee reported the bill to the House of Representatives.<sup>228</sup> The Health Committee report recognized the submissions by tobacco companies and overseas-based organizations regarding intellectual property concerns and the suggestions that compensation would have to be provided if tobacco companies were unable to use their trademarks on packaging. The report also acknowledged that these same companies and organizations suggested that the plain packaging bill was inconsistent with international obligations and domestic intellectual property policies. However the committee recommended the House of Representatives pass the bills, concluding, “it considers these issues to be beyond the purview of a Committee formed to consider matters directly related to health and/or ageing.”<sup>229</sup> As a result, the health committee essentially recommended for both the House and Senate to debate these issues further, including the legal context of the bills.

### ***House of Representatives parliamentary debate***

On July 6, 2011, Health Minister Roxon introduced the plain packaging bill to the House of Representatives with a captivating speech that stressed the importance of reducing tobacco use in Australia, stating:

This is a world-first initiative, designed to remove the last vestige of glamour from tobacco products. We are taking this action because tobacco is not like any other legal product. When used as intended – it is lethal...Big Tobacco is

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<sup>228</sup> Commonwealth of Australia. *Advisory Report on the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 August 2011.

<sup>229</sup> *Ibid*, 19.

fighting so vigorously against this legislation for one very simple reason – because they know, as we do, that it will work. Tobacco companies are fighting to protect their profits; but we are fighting to protect lives.<sup>230</sup>

She also announced that the Department of Health and Ageing received fierce opposition from the big tobacco companies, stating:

The most recent advertising campaign aims to scare the public into believing that plain packaging will cost taxpayers and the government billions of dollars in legal action...These claims are becoming increasingly hysterical and increasingly desperate. Because not only do they know plain packaging will work; big tobacco know that if we are successful in implementing these measures in Australia, other countries will follow. I conclude by saying again that the Gillard government are absolutely determined to do all we can to tackle the harm caused by smoking.<sup>231</sup>

These statements further cemented that the government was not backing down to the tobacco industry trade threats and remained determined in their approach.

On August 24, 2011, the Australian House of Representatives had their second reading of the plain package bill,<sup>232</sup> which represents the stage of the regulatory process where the main debate occurs on a particular bill. During the debate in the House, the members of parliament (MPs) voiced their general support and opposition (see chapter 4) for the plain packaging bill and subsequently the Trade Marks bill but this section aims again to understand the *perception* of tobacco industry trade threats by policymakers. Contrary to scholars who reject the notion of regulatory chill, several MPs were highly aware of international trade and investment law as it pertained to plain packaging. More importantly, the debate in the House suggests that not only were MPs cognizant of international trade and investment law, but MPs from the Coalition were very receptive to the tobacco company's trade threats as they voiced their opposition to the plain packaging

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<sup>230</sup> Commonwealth of Australia. *Tobacco Plain Packaging Bill 2011 Second Reading Speech by Nicola Roxon*. Canberra, Australia: House of Representatives, 6 July 2011.

<sup>231</sup> *Ibid*, 7711.

<sup>232</sup> Commonwealth of Australia. *Tobacco Plain Packaging Bill 2011 Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 Second Reading*. Canberra, Australia: House of Representatives, 24 August 2011.

proposal. In particular, MPs responded to the multitude of aspects of the tobacco industry trade threats, including general threats of violating intellectual property rights and international treaties, the legal and reputational costs of international arbitration and potential compensation, and the direct attack on all businesses and trademark owners (Table 3:2). Although it appears from chapter 2 that the trade threats seem hollow, the international court cases have not issued a ruling on HWLs. As a result, there still exists a legal uncertainty that a majority of policymakers from the right tend to perceive as more worrisome.

In response to the general threats of violating intellectual property rights and international treaties, several MPs from the Coalition expressed legal concerns with the legislation. Several MPs reiterated the tobacco industry concerns surrounding the acquisition of property and the violation of the Australian constitution, the WTO and various FTAs. Some MPs went on to directly cite the particular articles from the trade agreements that would be in question. For example, some MPs argued that the plain packaging proposal would violate article 20 of the WTO TRIPS Agreement while others read direct language from the agreement by stating, “Article 20 states that the ‘use of a trademark in the course of trade shall not be encumbered by special requirements.’”<sup>233</sup> Some MPs even specifically mentioned that the proposal would violate a 1993 Australia-Hong Kong BIT reflecting PMI’s threat of using this particular agreement to directly sue the government. Other MPs stressed general legal concerns, citing the potential “legal barriers”, “legal consequences”, and the “inherent legal risks” associated with the bill and that Australia needed to respect its “world trade obligations.”

Several MPs from the Coalition also expressed concerns in relation to the legal and reputational costs of international arbitration and potential compensation.

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<sup>233</sup> Ibid, 9253.



Issue	Speaker	Quote
1.) Accepting legal advice at face value	Mr. Southcott	“The minister’s office has on many occasions assured the opposition that its legal advice surrounding their plain packaging proposal is robust and that they are on strong legal ground. We have accepted the government’s assurance on face value. We have had to accept the government’s assurance on this, as they have refused to release or provide us with a copy of their legal advice”
	Mr. Alexander (Bennelong)	“The coalition has been forced to accept on face value the minister’s claims that the legal advice surrounding her plain packaging proposal is robust as the government has refused to provide us with a copy of the legal advice on which these assertions are based. I can only assume that the government does indeed have some doubts about the robustness of the advice as they have felt it necessary to include a specific provision in this bill to assert that it will not apply to the extent that it will cause acquisition of property on other than just terms under section 51 of the Australian Constitution.”
	Mr. Chester (Gippsland)	“We have exposed ourselves to legal action, and I am not given much comfort from the reassurances from this government, given this government’s long history of mishaps, to say the least.” “So I am not filled with great confidence when I am reassured by those opposite that they have got legal advice that everything will be okay in relation to this issue.” “I have the overarching concern that I am not convinced that this government actually has its legal advice in place”
	Mr. Irons (Swan)	“In response to these concerns, the government and the minister have on many occasions assured the opposition that its legal position on the plain packaging proposal is ‘robust’ and on ‘strong legal ground’. We in the coalition have accepted this assurance at face value because the last thing this country needs is more waste and more debt from a protracted legal dispute from some of the world’s wealthiest companies. However, despite the government’s reassurances about its legal position, it is clear that the minister has some concerns, particularly in relation to trademarks.”
	Mr. Billson (Dunkley)	“The government have repeatedly said that they have taken account of those constitutional issues and have also taken account of the TRIPS agreement and are on ‘robust and strong legal ground’—I think those are the words—to proceed down the course they are proposing. We would like to accept on face value those reassurances, but this is

		<p>difficult because we cannot actually access this legal advice to see whether or not it is more political speak from the government, which has used as a political strategy this issue that was once pursued in a bipartisan spirit. We have not seen that legal advice to learn how robust and dependable it is”</p> <p>“That setup seems to point to some legal doubts about the strength of the advice the government has received”</p>
	Mr. Christensen (Dawson)	<p>“Have they considered what the tobacco companies will do? Will the tobacco companies be too scared of the government to take legal action? Will they balk at the cost of such legal action? This government, and certainly the member for New England, would have us believe that they are here to stop us from smoking, but they are not willing to buy the trademarks from the tobacco companies.”</p>
	Mr. John Cobb (Calare)	<p>“I must mention the fact that it would seem that, as previous speakers have said, there are legal issues surrounding this bill. If the government believes they can deal with those, that is their business. But, obviously, it would seem that there are legal issues.”</p> <p>“The conundrum I have in this debate is that, if this is so bad that we are going to risk trademark rights, intellectual rights and treaty rights, and bring all these legal issues up—if smoking is so bad that we are willing to do that—why not just ban it?”</p>
2.) General legal concerns	Mr. Alexander (Bennelong)	<p>“There have been some legal concerns raised about this bill. These relate to the legislation equating to an acquisition of property on other than just terms, which contravenes section 51 of the Australian Constitution, article 20 of the Trade Related Aspects of the Intellectual Property Rights Agreement, to which Australia is a party, through to World Trade Organisation claims that 'The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements.' There is dispute on whether this legislation is covered by the health exception to this agreement. Also, is it a violation of the 1993 Australia-Hong Kong investment treaty?</p>
	Mr. Irons (Swan)	<p>“The second concern floated is that the legislation may violate article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, a multilateral agreement made under the World Trade Organisation on intellectual property. Article 20 states that the 'use of a trademark in the course of trade shall not be encumbered by special requirements', and there is contention over whether the health exception would apply in these circumstances.”</p>

		<p>“-“The third legal point of contention is that this legislation may violate the 1993 Australia-Hong Kong investment treaty.”</p>
	Mr. Slipper (Fisher-Deputy Speaker)	<p>“There have been some concerns and objections regarding the right of any commercial company to display its company logo on its products and this issue has been addressed in part in the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011. Under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the TRIPS agreement, administered by the World Trade Organisation, the 'use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements'. However, the obvious concerns in relation to plain packaging are somewhat allayed as the WTO agreement does include exceptions based on health reasons. This bill aims to address the concern by overriding any tobacco company concerns with the Tobacco Plain Packaging Bill 2011.”</p>
	Mr. Christensen (Dawson)	<p>“Any legal consequences that arise out of the bill will rest solely on this government. These bills, although they provide a doubtful benefit, also come with an inherent legal risk. Even before this bill came up for debate, there had been significant discussions about potential legal action from the tobacco companies.”</p> <p>“The fact that there are other legal barriers associated with these bills is of great concern. I refer of course to the Paris Convention for the Protection of Industrial Property and, as the Minister for Trade tends to go on about, the World Trade Organisation's Agreement on the Trade-Related Aspects of Intellectual Property Rights 1994”</p>
3.) These are legal corporations	Mr. Hawke (Mitchell)	<p>“For us as a parliament to take away the intellectual property of legal corporations and entities in Australia today, I think we ought to pause and think very seriously about the ramifications of doing this sort of thing by law”</p> <p>“The government wants this revenue and it cannot say no to it. That is the hideous position we are in in passing a law removing the intellectual property rights of corporations in this country, legal corporations providing legal products”</p> <p>“ Without property rights, there is no law—that is a famous quote—and if we attack intellectual property rights in a way that is not justified, and I do not believe it is justified under this legislation, we are undermining the rule of law in our country today”</p>
	Mr. Alexander (Bennelong)	<p>“We need to be very careful that we do not infringe upon the commercial rights of those pursuing a legitimate business activity that we permit through regulation”</p>

	Mr. Christensen (Dawson)	"I can understand why a company that invests millions of dollars into their brand and their trademark would be upset when they can no longer legally use it"
4.) Governments have already rejected plain packaging	Mr. Hawke (Mitchell)	-Canada considered this in 1995 but did not proceed with plain packaging because "they believed it would violate Canada's international trade obligations with respect to intellectual property"
5.) This is an intellectual property issue	Mr. Hawke (Mitchell)	"Amen to that. She makes great sense. This is an intellectual property issue."
6.) Legal action will be taken	Mr. Hawke (Mitchell)	"The intellectual property questions relating to this bill will be tested at law. We have heard from tobacco companies that there will be legal action taken in relation to our WTO obligations—and, yes, Australia has world trade obligations. Of course these should be tested at law. It is not outrageous that a company having its intellectual property and branding removed by the government should take this to the court and have it tested. In fact, when you look at the Paris convention in 1883, the rounds that the WTO has been engaged in around the world, the North American Free Trade Agreement and all the different agreements and pieces of legislation around the world protecting intellectual property, you can see that this is a serious question for consideration."
7.) Compensation	Mr. Hawke (Mitchell)	I would certainly stand up for the right of any farmer, any landholder and any property owner in this country not to have a government remove their property rights, whether they be physical or intellectual property rights, without just compensation. Yet we are proposing a bill here today that is in effect removing the intellectual property rights of these corporations."
	Mr. Chester (Gippsland)	"I am also concerned that, in going down this path, the government has exposed Australian taxpayers to potentially expensive legal action. This issue has been raised by other members in terms of the intellectual property of the big tobacco companies and the value they place on their brands." "I fear it is exposing the Australian taxpayers to a costly legal action for very little gain."
	Mr. Laming (Bowman)	"So you have bipartisan support. We will give it a go. We will see if it works. There should be no problem so long as IP is not extinguished. If it is extinguished, our only fear is not that tobacco companies are going to make a swag of money; our fear is that the Australian people have to pay for it"
	Mr. Irons (Swan)	"One of the major issues raised to date has been the legal impact of this legislation, with concern centred on the possibility that a protracted legal dispute involving the High Court might develop, potentially costing the taxpayer"

		millions of dollars in legal fees”
	Mr. Christensen (Dawson)	“There is a serious question about whether or not the government will be liable to compensate for the acquisition of this property in this case.”
8.) Slippery slope for other industries	Mr. Hawke (Mitchell)	“If any member of this place thinks that this is the last time we will see such a proposal, I think that is complete and utter nonsense. I warn every member here: we will see this again. Not only will the public health lobby move on alcohol and fast food if this works but they will continue to seek the removal of intellectual property rights from corporations engaged in the production of other things in our society today including fast food and alcohol. I do not believe that that is the right approach either.”
	Mr. Chester (Gippsland)	“Another concern that I would like to raise in the time I have left is this: what is next? What is next from this government in relation to this plain packaging approach? We already have members opposite murmuring about products which are high in fat. Are we going to end up with plain packaging for all fast food outlets? We have a lot of pressure developing in the community at the moment in relation to alcohol products. Is that going to be the next target of the nanny state?” “But I am concerned about what is next. Are we going to head down the path of eroding the rights of legal companies? What will this government take on next? Will it be the fast food industry or the alcohol industry?”

The concerns over legal costs centered on exposing taxpayers to costly legal challenges. Some MPs voiced general concerns about the costs to taxpayers, while others cited that the legal challenges could cost “the taxpayer millions of dollars in legal fees.”<sup>234</sup> These comments also stressed concerns about the potentially high compensation fees to tobacco companies. In these statements, MPs also cautioned that the proposal would damage Australia’s international reputation in terms of trade and providing adequate protections for intellectual property.

Finally several MPs viewed the plain packaging of tobacco as a direct attack on all businesses and trademark owners. During the debate, MPs cautioned that the proposal would create a slippery slope for other industries to be regulated in a similar fashion in regards to not being able to use their trademarks on packaging, often saying, “what is next.” In particular, some MPs cautioned that alcohol and food would be targeted next with a “nanny state” approach and too much government involvement that would “head down the path of eroding the rights of legal companies.”

### ***Senate’s Legal and Constitutional Affairs Committee***

Between August 18, 2011 and September 2, 2011 the Senate’s Legal and Constitutional Affairs Committee received 42 submissions on the Trade Marks Amendment (Tobacco Plain Packaging) Bill. While the committee received trade threats in the submissions and during a public hearing on September 13, 2011,<sup>235</sup> the committee was only asked to assess the legal consequences of the Trade Marks Amendment and not the legal consequences of Tobacco Plain Packaging Bill. As a result, the committee assessed the usage on the Henry VIII clauses, which allows a minister under an act of parliament to modify the

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<sup>234</sup> Ibid, 9254.

<sup>235</sup> Commonwealth of Australia. *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*. Canberra, Australia: Senate Legal and Constitutional Affairs Legislation Committee, 13 September 2011.

legislation. On September 19, the committee concluded in its report back to the Senate that the Trade Marks Amendment fell “within the set of limited circumstances where such a clause may be justifiably used,” and recommended that the Senate should pass the bill.<sup>236</sup>

### ***Australian Senate parliamentary debate***

On November 10, 2011, the Australian Senate had their second reading of the plain package bill,<sup>237</sup> which offered a continuation of general support and opposition (see chapter 4) for the proposed legislation. More importantly, the debate in the Senate also suggests that not only were MPs cognizant of international trade and investment law, but MPs from the Coalition were very receptive to the tobacco company’s trade threats as they voiced their opposition to the plain packaging proposal. As a result, the Senate debate was a continuation of MPs, mostly from the Coalition, responding to the multitude of aspects of the tobacco industry trade threats, including general threats of violating intellectual property rights and international treaties, the legal and reputational costs of international arbitration and potential compensation, and the direct attack on all businesses and trademark owners (Table 3:3).

### ***Interviews with Members of Parliament***

While the interviews for this study focused on a range of questions pertaining to tobacco control and trade in Australia (see questionnaire appendix), this section further highlights the MPs’ awareness and perception of tobacco industry trade threats. It should be noted that the majority of the interviews conducted were MPs from the Australian Labor Party or the Australian Greens during the plain packaging process, which actually provide a complementary assessment of the parliaments’ perception of trade threats since the

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<sup>236</sup> Commonwealth of Australia. *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 [Provisions]*. Canberra, Australia: Senate Legal and Constitutional Affairs Legislation Committee, 19 September 2011.

<sup>237</sup> Commonwealth of Australia. *Tobacco Plain Packaging Bill 2011 Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 Second Reading*. Canberra, Australia: Senate, 10 November 2011.

majority of the remarks concerning trade threats in both the House and Senate debates were from members of the Coalition (Australian Liberal Party and Australian National Party). Furthermore these policymakers acknowledged that they reached out to health advocates for information and advice pertaining to not only the scientific evidence surrounding plain packaging but also the international legal ramifications concerning the plain packaging, thus illustrating that state actors, especially those from left leaning parties, see the advocates as allies in pursuing public health objectives.

In discussing the general obstacles to implementing plain packaging, all of the MPs were fully aware of both the domestic constitutional and the international trade threats issued by the tobacco companies.<sup>238</sup> Several of the MPs felt strong about national sovereignty and understood Australia's international obligations to the WTO and other trade agreements but also referenced Australia's international commitments to the WHO FCTC. Due to strong opinions about national sovereignty, many MPs were opposed to mechanisms in trade agreements such as investor-state dispute settlement (ISDS) that allows corporations to directly challenge government regulations, thus further illustrating their awareness of trade agreements and their implications on domestic regulations.

The majority of the MPs felt that the threats were not as convincing because the government was on strong legal ground, tobacco companies' credibility had diminished, and Australia had rebounded well from the global financial crisis. Several interviewees recognized the bold stance of former Health Minister Nicola Roxon, who they claimed was courageous, confident and determined in her approach and her defense of plain packaging

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<sup>238</sup> Richard Di Natale. Interview by Eric Crosbie. Canberra, Australia; 23 June 2015. Andrew Southcott. Interview by Eric Crosbie. Canberra, Australia; 24 June 2015. Jan McLucas. Interview by Eric Crosbie. Canberra, Australia; 24 June 2015. Anne McEwen. Interview by Eric Crosbie. Canberra, Australia; 22 June 2015. Rachel Siewert. Interview by Eric Crosbie. Canberra, Australia; 24 June 2015. Peter Whish-Wilson. Interview by Eric Crosbie. Canberra, Australia; 25 June 2015. Rob Mitchell. Interview by Eric Crosbie. Canberra, Australia; 26 June 2015. Warren Snowdon. Interview by Eric Crosbie. Canberra, Australia; 26 June 2015.



Issue	Speaker	Quote
1.) Accepting legal advice at face value	Senator Birmingham (South Australia)	“It is a pity that the government was not willing to engage in sensible discussions that could have seen an extension of the graphic warnings applied under the Howard government so that they overwhelmed the packaging, but would not have exposed Australia to the hypocrisy of undermining our longstanding position on strong intellectual property rights”
	Senator Williams (New South Wales)	“Minister Roxon claims the government has strong legal advice and is on strong legal ground on this issue, but let’s look at the government’s record on the Malaysia solution. The High Court ruled against the government’s legal advice.” “So I do hope this time the government’s legal advice is strong and does hold water, because it certainly did not for the Malaysia solution for asylum seekers, as the High Court proved.” “And I do hope the government have their legal advice correct.”
	Senator Cash (Western Australia)	“The legislation in its present form raises a number of significant issues on the question of trademark law and intellectual property rights. The government and the minister have on many occasions assured the opposition that its legal advice surrounding their plain-packaging proposal is robust, saying that they are ‘on strong legal ground’. In agreeing that we will not be opposing this legislation in this place, the coalition—the opposition—has accepted the government’s assurances regarding its legal advice at face value. However, despite accepting those assurances, we note that when you go to the text of the bill there are a number of alarm bells.” “But, as I said, the government has given assurances to the coalition that its legal advice is robust and that it is ‘on strong legal ground’ and the coalition has accepted those assurances coming from the Labor Party. However, given the tenor of a number of the submissions on the potential infringement of intellectual property rights and given that the second bill is supposedly designed to overcome any infringement of trademark laws, the coalition is not necessarily convinced that the government has overcome all of the potential issues relating to intellectual property.”
	Senator Fawcett (South Australia)	“One of the concerns the coalition has raised around this legislation is that we have not had access to the government’s legal advice. The government assure us that they are on very strong ground in relation to trademarks.”

		<p>"We can only take the government on their word that they are on strong ground."</p> <p>"As I say, we have not seen the advice, so we cannot comment on that. But we will give the government the benefit of the doubt and trust that that is the case."</p>
	Senator Bernardi (South Australia)	<p>"The government and the minister responsible have on many occasions assured the opposition that their legal advice surrounding plain paper packaging is 'robust' and that they are on strong legal ground. Despite past experience, we accept the government's assurance at face value. But we are concerned because we have no proof of this. The government have refused to provide a copy of their legal advice to the opposition."</p> <p>"We will give the government the benefit of the doubt on this legislation"</p>
2.) General legal concerns	Senator Xenophon (South Australia)	<p>"Mr Acting Deputy President, I note the concerns that have been raised by the tobacco companies about the impact this policy will have on Australia's international obligations with respect to trade marks. But ultimately, I believe we need to do whatever we can to reduce smoking rates in Australia."</p>
	Senator Birmingham (South Australia)	<p>"The consequences of this legislation on business are clear and are meaningful and do apply an element of compulsion—in this case, a ban on companies using trademarks, branding, logos et cetera on their products. This is an extraordinary step for government to take. It is not that in passing this legislation the government is making these products, cigarettes, illegal. It is not that in passing this legislation the government is acquiring the trademarks or brands from the companies in question. It is that this legislation effectively extinguishes these trademarks and logos by banning their use. This raises some serious questions around intellectual property rights and the rights of companies in terms of established logos. Companies, in whatever sector, argue that such branding is important for product differentiation. Because no steps have been taken by government to regulate this product or make it illegal for manufacture and sale, it remains a competitive market with different companies seeking to maximise their individual market share. That is right and they will continue to seek to maximise their market share. But stripping all of them of their branding and logos and trademarks means their capacity to do so is minimised."</p> <p>"Intellectual property law has built up over a long and sustained period of time in Australia. It has an important role to play in all our dealings, particularly as in emerging</p>

		<p>economies and some of our major trading partners like China we go to great lengths to urge them to impose stricter, tougher and tighter intellectual property laws. By undermining our own, we undermine that argument in those places.”</p> <p>“But there is a real threat, and it is an unnecessary threat. If the government wished to make tobacco products less attractive they could have increased the size of the warnings. They could have largely overtaken the packets with warnings. They could have stripped trademarks and logo use on the packaging right back to the absolute bare minimum: simply the top of the packet, the bottom of the packet—a very small, 10 per cent, portion of the packet.”</p> <p>“it seems to me to be a significant and unnecessary step, in overtaking the packaging with these health warnings, to take away the trademark and logo and extinguish their use in the process.”</p>
	Senator Williams (New South Wales)	<p>“ I am very concerned about the removal of the property rights for one reason only—and that is because the Australian government may get sued. It is no secret that members of the National Party and members of the coalition believe in property rights.”</p>
	Senator Cash (Western Australia)	<p>“For example, despite the government’s assurances, proposed section 15 of the Tobacco Plain Packaging Bill provides that the bill would not apply to the extent that it would cause acquisition of property on other than just terms under section 51 of the Australian Constitution. The only conclusion that one can draw from the inclusion of this clause in the legislation is that the government itself does have some doubts about the strength and veracity of its legal advice.”</p>
	Senator Bernardi (South Australia)	<p>“The legal issues associated with this bill are actually reflected in the Australian Constitution, a document which I believe more Australians should be knowledgeable about and more governments should be mindful of, because there are often encroachments on the separation of powers and some of the freedoms in our Constitution. There is a suggestion that plain paper packaging would constitute acquisition of property on other than just terms according to section 51 of the Australian Constitution. It may also violate article 20 of the TRIPS agreement, the World Trade Organisation’s multilateral agreement on international property, which says: The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements ... However, there is a health exemption in the</p>

		TRIPS agreement, and this is where the legal contention lies.”
	Senator Edwards (South Australia)	<p>“Further to the potential rise in the illicit tobacco trade is the uncertainty surrounding the legal foundation upon which this bill sits.”</p> <p>“Across the world, it is fundamental that trademarks should be protected. Laws are enshrined, as they are here in this country, to protect people’s proprietary rights in trademarks. My concern with these bills rests upon the possible interpretation that they acquire trademarks, which are unquestionably property rights. There is much contestation about the impact of these bills. We must proceed with caution when legislating for this type of action. Currently, trademarks and intellectual property rights are provided for under the Trade Marks Act 1995 and a number of international agreements, such as the Paris convention and the World Trade Organisation’s Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, refer to them. Trademarks are an important way for businesses to differentiate their product from others in the marketplace, effectively making it easier for consumers to make decisions about which products to purchase. Plain packaging takes away the ability for companies to differentiate and market a legal product through the use of their trademarks and, as a consequence, takes away their right to their personal property.”</p> <p>“The tobacco industry states that the introduction of plain packaging regulations would contravene minimum obligations for the protection of intellectual property rights under trade agreements in general, and under article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 in particular. While there is debate about how broadly the industry has chosen to interpret article 20, the point is that there is significant uncertainty over the impact of this legislation”</p>
	Senator Eggleston (Western Australia)	<p>“The coalition generally supports the Tobacco Plain Packaging Bill, but with some reservations, as some of my colleagues have mentioned today. There are issues, of course, about trademarks—and they are quite legitimate issues of a legal nature. These things have to be given due consideration.”</p>
	Senator Fierravanti-Wells (New South Wales)	<p>“Also, are you confident that you are on strong legal grounds on all potential avenues for legal challenges over this legislation and not just under a claim for acquisition of property on other than just terms?”</p> <p>“has the government sought legal advice on their position</p>

		under the Australia-Hong Kong bilateral investment treaty? I ask that question because this was one of the very important issues raised by the Senate Legal and Constitutional Affairs Legislation Committee. In particular, they were concerned that the legislation may violate the 1993 Australia-Hong Kong investment treaty. The possibility was raised that Philip Morris may sue the Commonwealth over plain packaging under the expropriation and investor state dispute settlement provisions of the treaty."
3.) These are legal corporations	Senator Williams (New South Wales)	"Now, let's get onto property rights and this bill. Like it or not, it is legal to sell cigarettes in Australia and these companies have a property right, a trademark." "You know what I believe about property rights. You may dislike the product—ban it if you wish; make it illegal—but the tobacco companies have a legal product as it stands and they have a property right"
4.) Governments have already rejected plain packaging	Senator Birmingham (South Australia)	"I am not usually inclined to quote journalists but Barrie Cassidy made a very valid point with regard to the legal advice that the government relies on. Speaking on the <i>7PM Project</i> in September he said: I mean that is the really scary thing, that they felt they had a really strong case— speaking of the government's migration amendments— and clearly they didn't. The same office, by the way, is advising the government on the plain packaging of cigarettes"
5.) This is an intellectual property issue	Senator Birmingham (South Australia)	"this is a big deal because the big cigarette companies around the world have got deep pockets and they are taking on the government and they want this to be an international test case. If the government loses that one we'll all suffer. You won't get your pension until you are 80.
6.) Legal action will be taken	Senator Williams (New South Wales)	"I find it most alarming that Philip Morris Asia has lodged a claim for compensation of some \$67.5 billion. I do not know where the government will get that money if it is not successful. Tobacco companies are wealthy, which means they can employ good solicitors, the best barristers and the best senior counsel." "Unfortunately it looks like the government is pushing us down that path. So already the tobacco industry are taking up the legal challenge; there is no question about that. As I said, they are wealthy" "They will be able to finance, as I said, the best solicitors, the best barristers and the best senior counsel to take on this case."
	Senator Fawcett (South Australia)	"We certainly trust so, because the tobacco companies have indicated that they will be prosecuting these anti-smoking measures in the courts"

	Senator Eggleston (Western Australia)	<p>"I have read that the tobacco industry plans to challenge this legislation through the courts in Hong Kong on issues to do with trademarking, and it will be very interesting to see what the decisions of the courts are when this matter is tested. Even if, in fact, the tobacco industry is successful in the Hong Kong courts in objecting to this legislation, I think the health education campaigns which are being followed in Australia, and this legislation to require plain packaging, will do a great deal to continue the reduction in the consumption of tobacco in this country."</p>
7.) Compensation	Senator Birmingham (South Australia)	<p>"Taking away this intellectual property has been cited by many as raising the potential risk of compensation claims from these companies."          "And we potentially expose Australian tax-payers to the ridiculous situation where, if tobacco companies challenged this legislation in the courts and are successful, they could end up having to pay significant sums of money to those tobacco companies. I would think everyone in this chamber would not wish to see occur."          "Instead, they have taken the extra step that imperils the taxpayer because of the potential for challenge and, in doing so, creates the situation where the arguments Australia has historically made in favour of a strong and robust recognition of intellectual property are undermined. That is what concerns me about this legislation"          "would not have potentially exposed the Australian taxpayer to claims over the loss of brand as a result of this legislation"          "Senator Bilyk may shake her head. Is she going to shake her head when she comes in here in two years time to say, 'We've just had to fork out for a \$67 billion bill because of a court hearing'? She will not be grinning about it then, Mr Acting Deputy President. Those opposite will be saying: 'Where are we going to get the money from? Of course! The Australian taxpayers will pay it. We will sell off some assets. We will add it onto the debt of \$215 billion.'"</p>
	Senator Williams (New South Wales)	<p>"My concern is that if the government makes a mess of these property rights, these trademarks, it will cost Australian taxpayers billions and billions. So let's hope the government does have it right, because if it has it wrong and the court rules in favour of the tobacco companies for having their trademarks, their property rights, removed—and I know that some in this chamber do not care about property rights, as I just showed with the history lesson of Kim Yeadon in New South Wales—it is going to be at huge cost. If we get sued and the government loses the case—and of course</p>

		<p>there will be challenges and it will probably end up in the High Court—how many billions is it going to cost the Australian taxpayer?”</p> <p>“Just today a tobacco industry spokesman, Scott McIntyre, predicted that the government is going to have to spend millions of dollars of taxpayers' money fighting challenges in court followed by a potentially billions of dollars in compensation to the tobacco industry. That is my concern. He said: We've invested billions of dollars into these brands.”</p> <p>“I do hope that this does reduce smoking but I also hope that it does not cost the nation billions and billions of dollars.”</p>
	Senator Fawcett (South Australia)	<p>“there is potential for the taxpayer to be exposed to a large cost to defend that action. We would certainly hope that that would not be money spent in vain, that the government's position would indeed be validated.”</p>
	Senator Bernardi (South Australia)	<p>“Also, we have heard that people are concerned about the intellectual property rights which may be lost by companies and about the fact that the bill could subject our people or our government to significant compensation claims.”</p> <p>“we have serious concerns about its legal implications for the Australian government, to the tune of billions of dollars, and about its effectiveness in reducing smoking rates.”</p>
8.) Slippery slope for other industries	Senator Fawcett (South Australia)	<p>“The concern that has been raised by the coalition and other players is whether this legislation's treatment of intellectual property and trademarks will set a precedent that will affect other areas.”</p>
	Senator Edwards (South Australia)	<p>“However, in considering this proposed legislation I cannot support the erosion of property rights in any form, whether it be for chewing gum, cheese, soap powder or motor cars. My fear is that parts of this legislation will be the thin end of the wedge. This, colleagues, is one of my primary concerns: that measures like plain packaging could creep into other legitimate, legal goods and services sold and consumed in our society. Do we prevent the use of trademarks for all products that pose a risk or are perceived to have a negative impact on society? Is plain packaging for tobacco simply the start? What is further down the road of political correctness? It was floated around this place last month, and Senator Bernardi referred to it earlier, that we should have an extra tax on fast food and health warnings on potato chips. Should all food come in drab brown packaging with a warning saying that this product may cause obesity? I suspect not.”</p>

The interviewees also noted that she provided a level of legal certainty given her background as a trained legal expert and her ability to stare down tobacco company legal attacks provided noteworthy leadership and reassurance that Australia was on safe legal grounds. Furthermore, the MPs mentioned that the government was steadfast in its approach and were not going to back down. This confidence was exuberated during the parliamentary debates when several members of the opposition claimed that they were willing to accept the Minister Roxon's assurance of government's robust legal advice "at face value".

In addition to government leadership, all of the MPs acknowledged that the public opinion of tobacco and public credibility of tobacco companies had waned dramatically over the previous decades. One MP argued that the tobacco companies "did not have the legs to stand on for decades."<sup>239</sup> As a result, several MPs did not view the trade threats as credible and suggested that the tobacco companies decision to challenge the plain packaging proposal in international courts seemed like a desperate measure and that it seemed to suggest that the tobacco companies were caught off guard. Furthermore, a couple of MPs regarded PMI's BIT challenge (see below) to Australia's plain packaging proposal and eventual implementation as a sneaky, frantic and desperate attempt by tobacco companies.

Other MPs felt that since Australia rebounded quickly from the global financial crisis that the tobacco companies' threat of costly litigation was not as powerful. These MPs argued that during the financial crisis there was big scrutiny of government on every dollar spent and Australia's quick rebound combined with the fact that plain packaging was a low cost measure to implement helped minimize the concerns over the costs of these trade threats.

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<sup>239</sup> Anne McEwen. Interview by Eric Crosbie. Canberra, Australia; 22 June 2015.



Finally when asked about what lessons could be learned regarding trade threats for other governments, some MPs simply argued governments should not be intimidated and frightened by tobacco companies. These MPs first suggested that Australians in general do not like being pushed around or bullied and think highly of national sovereignty but suggested that other governments need to stare down tobacco companies and pass legislation related to public health because it is the right thing to do. Or as one MP point it, “you need to have the balls to just do it and it’s our sovereign right to do it.”<sup>240</sup>

### **Tobacco industry legal challenges**

On November 21, 2011, the Australian parliament passed both the Tobacco Plain Packaging Bill and Trade Marks Amendment.<sup>241</sup> However after the bills were passed the tobacco companies legally challenged the plain packaging proposal both domestically in the High Court of Australia and internationally through the WTO and an Australian-Hong Kong BIT.

#### ***Australia High Court challenge***

In December 2011, five tobacco companies (PMI, BAT, Imperial Tobacco, JT International SA, Nelle Tabak Nederland BV) sued the Australian government over the plain packaging regulation. In challenging the regulation, tobacco companies again argued that this constituted an acquisition of property and prohibiting the use of their trademarks. However in October 2012, the Australian High Court ruled 6:1 against the tobacco company claims, arguing the plain packaging policy did not constitute a violation of Australia’s constitution. The court’s judgment stated:

A majority of the High Court held that the Act was valid as it did not acquire property. It therefore did not engage s 51 (xxxi) of the Constitution, which requires any acquisition of property effected by a Commonwealth law to be on just terms...Although the Act regulated the plaintiffs’ intellectual property

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<sup>240</sup> Warren Snowdon. Interview by Eric Crosbie. Canberra, Australia; 26 June 2015.

<sup>241</sup> Commonwealth of Australia. *Tobacco Plain Packaging Act 2011 No. 148*. Canberra, Australia, 21 November 2011.

rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Commonwealth or any other person. As a result, neither the Commonwealth nor any other person acquired any property and s 51 (xxxii) was not engaged.<sup>242</sup>

In other words the High Court ruled that the government was not acquiring the property (trademark) for personal use but was merely restricting the use of the trademark on the packaging and presentation of tobacco products. While this was a huge win for the Australian government and public health advocates, the victory, similar to upholding tobacco advertising laws in Canada and the U.K., was in domestic courts, but did not answer the question if strong HWLs violated various international treaties.

### ***World Trade Organization challenges***

In the World Trade Organization, trade disputes occur through a state-state dispute settlement system in which one WTO member state can challenge another member state's regulation. As a result, tobacco companies cannot directly challenge a state's regulations through the WTO but can lobby member states to file a trade dispute. However several governments challenged the plain packaging measure in the WTO, including the Ukraine (9/28/12), Honduras (9/25/13), Indonesia (3/26/14), Dominican Republic (4/25/14), and Cuba (4/25/14).<sup>243</sup> These governments are arguing that Australia's plain packaging policy is inconsistent with its WTO obligations under the TRIPS Agreement and TBT Agreement. It has been reported that PMI is financially supporting the Dominican Republic and that BAT is supporting the Ukraine and Honduras.<sup>244</sup> Outside of Indonesia, none of the complainants are significant trading partners with Australia, which is one reason why the Ukraine

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<sup>242</sup> High Court of Australia. *Japan International SA and British American Tobacco Australiasia v. the Commonwealth of Australia*. Canberra, Australia, 5 October 2011.

<sup>243</sup> World Trade Organization. *Australia-Certain measures concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging*. Geneva, Switzerland: Dispute Settlement Body, 27 October 2014.

<sup>244</sup> Martin A. Philip Morris Leads Plain Packs Battle in Global Trade Arena. *Bloomberg*. 21 August 2013. <http://www.bloomberg.com/news/articles/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena>.

government dropped its trade complaint in the WTO in June 2014,<sup>245</sup> as the country does not export any tobacco to Australia. As of May 2016, these trade disputes were still pending.

### ***Australia-Hong Kong Bilateral Investment Treaty challenge***

Unlike the trade disputes in the WTO, which contain a state-state dispute settlement process, the Australia-Hong Kong bilateral investment treaty (BIT) contains an investor-state dispute settlement (ISDS) mechanism, which allows investors (e.g. corporations) to directly sue governments over their regulations. As a result, on November 21, 2011, the same day the Australian parliament passed plain packaging, PMI, through its subsidiary Philip Morris Australia in Hong Kong filed a dispute with the Australian government through the Australia-Hong Kong BIT over the plain packaging policy.<sup>246</sup> PMI argued that Australia's plain packaging regulation expropriated (value loss of investment) its intellectual property and that it was not granted fair and equitable treatment. More importantly, on February 23, 2011, PMI engaged in treaty and forum shopping by moving its Australian operation to Hong Kong to file the legal dispute against Australia. In its defense, the Australian government argued that tribunal did not have jurisdiction to hear the case as the dispute fell outside the scope of the treaty.<sup>247</sup> The Australian government argued that PMI did not have any relevant investment in Australia when the plain packaging bill was announced on April 29, 2010 because PMI moved its operation on February 23, 2011, 10 months after the government's announcement. On December 18, 2015, the tribunal dismissed PMI's challenge claiming it did not have jurisdiction to hear PMI's

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<sup>245</sup> Miles T. Ukraine drops WTO action against Australian tobacco-packaging laws. *Reuters*. 3 June 2015. <http://www.reuters.com/article/wto-tobacco-idUSL5N0YP3S420150603>.

<sup>246</sup> United Nations Commission on International Trade Law. *Philip Morris International Limited v. Commonwealth of Australia (Procedural Order No.4)*. Geneva, Switzerland: 1993 Australia-Hong Kong Bilateral Investment Treaty, 30 November 2012.

<sup>247</sup> United Nations Commission on International Trade Law. *Philip Morris International Limited v. Commonwealth of Australia (Procedural Order No.8)*. Geneva, Switzerland: 1993 Australia-Hong Kong Bilateral Investment Treaty, 14 April 2014.

claim.<sup>248</sup> In response, PMI international senior vice president and general counsel, Marc Firestone, stated: “There is nothing in today’s outcome that addresses, let alone validates, plain packaging in Australia or anywhere else.”<sup>249</sup> On the one hand, this ruling saved the Australian government a great deal of money and time to defend the case but on the other hand without a ruling, questions surrounding the legal certainty of strong HWLs under international remain untested and unresolved.

### **New Zealand**

Similar to the Australian experience, the historical success of tobacco reforms over decades helped eventually lead to the introduction of plain packaging in New Zealand but the regulatory development process of plain packaging began with the 2008 general election and the Māori Affairs Select Committee. In the 2008 election, the National Party, a center-right party, won the largest votes and seats but did not secure a majority of overall seats in parliament so they needed to include the Māori Party, an indigenous rights party, to form a coalition government. As part of the new coalition government the National Party assigned the portfolio of Associate Minister of Health to the Honorable Tariana Turia, a member of the Māori Party and staunch supporter for Māori indigenous rights, including public health and tobacco control. In order to address some of these public health issues, in September 2009 the government commissioned the Māori Affairs Select Committee, which conducted an inquiry into the tobacco industry in Aotearoa (Māori north) and the disproportionate harm of tobacco causes to the Māori population. In November 2010, the committee issued their report, which adopted a 14-year goal for New Zealand to become

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<sup>248</sup> Taylor R. Philip Morris Loses Latest Case Against Australia Cigarette-Pack Laws. *Wall Street Journal*. 18 December 2015. <http://www.wsj.com/articles/philip-morris-loses-latest-case-against-australia-cigarette-pack-laws-1450415295>.

<sup>249</sup> Ibid.

smokefree by 2025.<sup>250</sup> The committee set several commitments to become smokefree by 2025, including investigating options to reduce tobacco supply to New Zealand, reducing inequalities caused by tobacco, and the consideration for sizable tobacco tax increases, regulations on ingredients in tobacco products and plain packaging. Between November 2010 and April 2012 the government reviewed the policy recommendations by the committee and on April 4, 2012, the government agreed in principle to introduce plain packaging,<sup>251</sup> which mirrored Australia's plain packaging proposal.

### **Tobacco industry trade and investment threats**

Once the Māori Affairs Select Committee submitted their report with the recommendations of plain packaging, tobacco companies similar to Australia evoked concerns of the government's obligations to international treaties and the usage of their trademarks. Again tobacco companies used the multipronged strategy that included 1.) the general threat of violating intellectual property rights and international treaties, 2.) the legal and reputational costs of international arbitration and potential compensation, 3.) framing the health issue in terms of broad violations of business intellectual property rights and investments, 4.) recruiting business support and funding research to strengthen credibility and promote uncertainty and concern, and 5.) the magnitude of the threat. While the multipronged strategy consisted of very similar attacks, they were framed in the New Zealand context and in comparison to Australia. Again these series of threats were issued throughout the regulatory development process and are documented here first and then assessed on how they were received by policymakers.

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<sup>250</sup> Māori Affairs Committee. *Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Māori*. Wellington, New Zealand: House of Representatives, November 2010.

<sup>251</sup> Turia T. Moving towards plain packaging of tobacco products. *beehive.govt.nz*. 19 April 2012. <https://www.beehive.govt.nz/release/moving-towards-plain-packaging-tobacco-products>.

### **1.) General threats of violating intellectual property rights and international treaties**

Throughout the regulatory development process in New Zealand the tobacco companies issued submissions to parliament,<sup>252</sup> and argued in the media<sup>253</sup> that the plain packaging proposal would violate their intellectual property rights (trademarks) under New Zealand's Bill of Rights Act 1990 and several of Australia's international trade and investment treaties. Similar to Australia, tobacco companies argued that the plain packaging proposal 1.) violated the usage of trademarks under the Paris Convention for the Protection of Industrial Property and the World Trade Organization (WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS), 2.) constituted a barrier to trade under the WTO Agreement on Technical Barriers to Trade (TBT), and 3.) did not represent fair and equitable treatment and expropriation under various free Australian free trade agreements (FTAs) and bilateral investment treaties (BITs). Although the arguments were essentially the same ones used in Australia, tobacco companies also referenced that Australia was being challenged in both the WTO by member states and through an Australia-Hong Kong BIT by PMI to further underscore the seriousness of these threats and that New Zealand would likely face similar arbitration claims. Finally, although tobacco companies opposed the introduction of plain packaging, they suggested that the government adopt a "wait and see" approach by waiting for the Australian disputes to be resolved before moving forward.

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<sup>252</sup> British American Tobacco New Zealand. *Submission opposing the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 28 March 2014. Imperial Tobacco New Zealand Limited. *Submission on Smokefree Environments (Tobacco Plain Packaging) Amendment Bill*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 9 April 2014. Philip Morris (New Zealand) Limited. *Submission on the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 28 March 2014.

<sup>253</sup> Johnson M. Push for plain packet cigarettes. *New Zealand Herald*. 19 April 2012. Also see Backhouse M. NZ to introduce plain packaging of tobacco products. *New Zealand Herald*. 19 February 2013.

## ***2.) Legal and reputational costs of international arbitration and potential compensation***

Tobacco companies again threatened that the plain packaging proposal would create significant legal costs for the government. These threats of legal costs were again framed as serious risks for the government, based on creating a large degree of uncertainty, and would waste taxpayer dollars. The tobacco companies also argued that plain packaging could lead to significant compensation due to intellectual property and investment violations. While tobacco companies in New Zealand offered more accurate legal costs claiming they would be around NZ\$6-20 million, they continued to argue, as they did in Australia, that plain packaging would cost “billions of taxpayers’ dollars”.

Tobacco companies also argued that breaches of international agreements would be detrimental to New Zealand’s international reputation on matters concerning intellectual property. The tobacco companies argued that plain packaging undermined the certainty created by trade agreements and the risks associated with undermining New Zealand’s international reputation. Tobacco companies also highlighted that since Australia had notified its plain packaging policy to the WTO TBT Committee, 16 countries had raised concerns in the WTO and that five countries (Cuba, Dominican Republic, Honduras, Indonesia and Ukraine) had filed claims with the WTO TRIPS and TBT Agreements. As a result, the tobacco companies cautioned that these actions may lead to member states in WTO using retaliatory countermeasures. For example, tobacco companies cited former Indonesia trade minister who argued they would have to retaliate and apply similar treatment to wine and other alcoholic beverages, which is a main export of New Zealand.

## ***3.) Framing the health issue in terms of broad violations of business intellectual property rights and investments***

Similar to Australia, tobacco companies framed the plain packaging proposal as an attempt by the New Zealand government to confiscate the trademarks of a legitimate

business selling a legal product instead of addressing this as a public health issue. These efforts also attempted to shift the concentration and the perception of tobacco industry isolation away from tobacco companies and towards all businesses. Again, in several submissions to parliament and in statements to the media, tobacco companies claimed the plain packaging proposal was setting a dangerous precedent, or a slippery slope, for all companies, particularly wine and alcohol industries. British American Tobacco (BAT) also ran a media campaign titled “agree-disagree” (Figure 3) highlighting the dangerous precedent of tobacco plain packaging for other industries with images of beer bottle labels reading, “I don’t mind if alcohol is next” and captions stating, “Agree-Disagree. We agree tobacco is harmful. We disagree with plain packaging because banning branding sets a troubling precedent for legal products.”<sup>254</sup> Consistent with the “agree-disagree” approach, BAT ran another advertisement with a an image of a wine bottle label reading “our wine exports aren’t worth protecting” and with captions stating, “Agree-Disagree. We agree that tobacco is harmful. We disagree with plain packaging because if New Zealand doesn’t respect international brands, why should other countries respect ours?”<sup>255</sup> Overall these advertisements aimed to shift the attention towards the general attack on all businesses.

#### ***4.) Recruiting business support and funding research to strengthen credibility and promote uncertainty and concern***

Similar to Australia, these threats were further promoted by businesses and trademark associations, and supported in research studies by pro-libertarian think tanks. Tobacco companies again received support from groups, including the ICC, NFTC, USCIB, U.S. Chamber of Commerce, and the International Trademark Association and pro-libertarian think tanks such as the Washington Legal Foundation and Cato Institute, which throughout the regulatory process reiterated similar complaints concerning violations of

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<sup>254</sup> British American Tobacco New Zealand. Agree Disagree. 2012; <http://www.agreedisagree.co.nz/home.html>.

<sup>255</sup> Ibid.



trademarks and international treaties, the potential legal and reputational costs associated with plain packaging, and the dangerous precedent this would set for other businesses.<sup>256</sup> These threats additionally addressed the pending Australian legal challenges, in attempts to again further emphasize the point that New Zealand would likely face similar arbitration claims.

While tobacco companies received support from these allies, the tobacco companies seemingly failed to recruit broad support from others industries such as the alcohol and food industries. Although several arguments attempted to link tobacco plain packaging with the potential plain packaging of alcohol and food, no company from either industry endorsed this approach by tobacco companies again probably fearing they would be targeted next in terms of pictorial health warning labels on their products. Unlike in Australia, no company publically denounced an association with the tobacco companies but their lack of endorsement or public comments suggests they did not want to participate or support this approach publically.

### **5.) Magnitude of the threat**

During the regulatory development process of plain packaging, tobacco companies again issued trade threats in an intensified manner through parliament and in the media. Tobacco companies submitted extensive submissions dedicated to their multi-component trade threats to the Ministry of Health's public consultation period, and to the Standing Committee on Health.

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<sup>256</sup> U.S. Chamber of Commerce. *Submission on the Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. United States Council for International Business. *Submission on the Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. National Foreign Trade Council. *Submission on the Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. International Trademark Association. *Submission on the Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Canberra, Australia: House of Representatives Standing Committee on Health, 27 March 2014.



Figure 2:3: British American Tobacco "agree-disagree" campaign in New Zealand

Tobacco companies also held press conferences, ran media campaigns, and made several comments in the media throughout the regulatory process. These threats were multiplied by the number of businesses and trademark associations that echoed these concerns in submissions to parliament and in the media. Similar to Australia, tobacco companies were extremely aggressive in threatening the government over issues related to trade and investment. This high magnitude also does not include the private activities of the tobacco companies to lobby and privately negotiate with policymakers.

### **New Zealand government response to tobacco trade threats**

Following the recommendation of the Māori Affairs Select Committee to adopt plain packaging, the policy process has, as of May 2016, involved subsequently a series of steps to passing the regulation, which have involved the governments' proposal to introduce the legislation, health committee hearings and reports, and the first reading parliamentary

debate. Throughout the political process, in the media and in interviews for this study, it is clear that policymakers were highly aware of the tobacco company trade threats and suggests that the threats helped delay the regulatory development process of plain packaging, which as of May 2016 is still awaiting its second reading in parliament.

### ***Internal discussions in Cabinet to introduce plain packaging***

Before Prime Minister John Key and Associate Health Minister Tariana Turia announced in principle to introduce plain packaging on April 4, 2012, the government reviewed the Māori Affairs Select Committee's policy recommendations. While it is difficult to assess the original reaction of Cabinet to the tobacco companies' legal threats as Cabinet meetings and decisions are private, there was a cautionary approach from the beginning due to the legal challenges with Australia. Unlike in Australia where both the Prime Minister and Health Minister presented the introduction of plain packaging with bold statements that they were on strong legal grounds, Prime Minister Key mentioned that the government felt it was "likely" to be able introduce plain packaging legally, but that it was "not absolutely clear cut" and that it was no "slam dunk."<sup>257</sup> Former Trade Minister Tim Groser from the National Party, who supported plain packaging, also expressed a cautionary approach stating, "We need to listen carefully, especially to other companies that would be very concerned if we were setting a precedent on this."<sup>258</sup> He mentioned there were "some complexities" and that he was "thinking really outside tobacco", which not only illustrated a cautious approach but in a sense agreed that tobacco was not a unique product.

On the other hand, Health Minister Turia seemed more optimistic and stated plain packaging was "a powerful tool" to reduce the appeal of tobacco products and smoking in general. She also mentioned that plain packaging would meet all of New Zealand's

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<sup>257</sup> Hartevelt J. Plain-packaged tobacco no sure thing. *Dominican Post*. 23 July 2012.

<sup>258</sup> Hartevelt J. Government Not in a Hurry on Plain Packaging *Scoop Independent News*. 8 July 2012. <http://www.scoop.co.nz/stories/PO1207/S00087/government-not-in-a-hurry-on-plain-packaging.htm>.

international commitments, including the FCTC and a range of trade and investment agreements.<sup>259</sup> Minister Turia did mention though that final decisions on whether to introduce plain packaging would not be made until a consultation process was completed to review all of the evidence and allow the interested stakeholder to address the bill.

***New Zealand Ministry of Health consultation and regulatory impact statement***

After the government introduced the plain packaging bill, the Ministry of Health, which is responsible for drafting and implementing the legislation, held a 60-day public consultation period on the exposure draft of the bill. Between July 23, 2012 and October 5, 2012 stakeholders, including tobacco companies, business groups, health groups, and health advocates, were invited to offer comments and suggestions on the plain packaging proposal. On November 21, 2012, the Health Ministry presented their report on the submissions to inform the Government's decision on how to proceed after the consultation.<sup>260</sup> In the report, the Health Ministry mentioned that several submitters argued plain packaging would violate several international treaties in regards to intellectual property rights and investment but did not address issue until consulting with the other ministries of government.

After consulting with the other ministries, including the Ministry of Foreign Affairs and Trade (MFAT), the Health Ministry issued a regulatory impact statement (RIS) on November 24, 2012, which addressed the potential impacts and risks of plain packaging.<sup>261</sup> The RIS addressed the tobacco company trade threats by stating that MFAT warned there was a "reasonably high risk that litigation, such as a World Trade Organization (WTO)

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<sup>259</sup> Turia T. Moving towards plain packaging of tobacco products. *Scoop Independent News*. 19 April 2012. <http://business.scoop.co.nz/2012/04/19/moving-towards-plain-packaging-of-tobacco-products/>.

<sup>260</sup> Allen and Clarke Policy and Regulatory Specialists Limited. *Submissions analysis on the proposal to introduce plain packaging of tobacco products in New Zealand*. Wellington, New Zealand: Ministry of Health, 21 November 2012.

<sup>261</sup> Commonwealth of New Zealand. *Regulatory Impact Statement: Plain Packaging of Tobacco Products*. Wellington, New Zealand: Ministry of Health, 24 November 2012.

dispute settlement case or an international investment arbitration, may be brought against New Zealand.”<sup>262</sup> MFAT also noted the two legal challenges against Australia and estimated that it could cost NZ\$1.5-\$2 million to defend a WTO case and “at least as high and potentially substantially higher due to the need for specialist legal and financial advice”<sup>263</sup> to defend an international investment arbitration. This reaction also speaks to the added complexity and costs associated with defending a health measure against potential trade challenges (see blow).

The RIS also mentioned the positive reputational impact for “implementing a bold and innovative tobacco control measure” and a potentially negative reputational impact in the “global investment market for interference with intellectual property.” However the RIS noted that the latter would be seen in the context of “an industry that internationally is being intentionally targeted by domestic governments and international bodies for increased restriction and discouragement.”<sup>264</sup> These statements did not entirely reject the tobacco company’s threat about international reputation but more convincingly understood the concept of tobacco industry isolation and the unique targeting on this industry.

### ***Cabinet Paper responses***

After releasing the RIS, Health Minister Turia issued a Cabinet Paper on plain packaging on November 27, 2012 to communicate the government’s next steps towards introducing plain packaging. The Cabinet paper mentioned consultations occurred with various departments of government, MFAT to address the legality of the plain packaging amidst tobacco industry trade threats and stated:

Regardless of the strength of New Zealand’s case, the possibility of international dispute proceedings are a risk for New Zealand and defending them would require significant investment of resources. However these risks will be significantly mitigated if the Australia disputes conclude prior

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<sup>262</sup> Ibid, 4.

<sup>263</sup> Ibid, 7.

<sup>264</sup> Ibid, 10.

to the enactment of New Zealand's legislation. In that regard, it is possible that the WTO cases will conclude in time but the investment arbitration is likely to take a longer period of time. In order to incorporate any possible changes to the plain packaging regime that might be desirable in light of the final outcome of the WTO challenges to Australia's legislation, it is proposed that regulations, provided under the proposed amending legislation, not be made until after conclusion of the Australian WTO dispute process.<sup>265</sup>

The Cabinet Paper made final recommendations, including addressing the trade threats concluding:

If necessary, New Zealand could delay the making of regulations until the Australia cases conclude and certainty regarding WTO legal implications is obtained...It is therefore proposed that the Government agree to introduce a plain packaging regime for tobacco products in alignment with Australia, and proceed to develop policy details to enable legislation to be considered for introduction by August/September 2013.<sup>266</sup>

As a result, the government solidified its "wait and see" approach by waiting for the two Australian legal challenges to provide "greater legal certainty" before proceeding forward with plain packaging. Instead of introducing plain packaging in the House, the government decided to delay the introduction for almost a year until August 2013 in reaction to the two Australian legal challenges. The Cabinet Paper again estimated that the cost of defending legal challenges would be approximately \$1-\$2 million in the WTO but offered a more concrete estimate of \$3-\$6 million for an investment arbitration. The Cabinet Paper also addressed the slippery slope argument and the tobacco plain packaging setting a dangerous precedent for other industries such as alcohol by more concretely recognizing uniqueness of tobacco and stating, "This measure is specifically for tobacco products, and is predicated on the unique harms caused by tobacco."<sup>267</sup> As a result, the Cabinet Paper issued a stronger statement than the previous RIS on the uniqueness of tobacco, but it is unclear why this change occurred. Finally some information was withheld under Official

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<sup>265</sup> Commonwealth of New Zealand. *Plain Packaging of tobacco products proposal*. Wellington, New Zealand: Cabinet Social Policy Committee, 27 November 2012.

<sup>266</sup> *Ibid*, 5.

<sup>267</sup> *Ibid*, 3.

Information Act provisions, but it was clear that the government was going to delay introducing plain packaging and adopt a wait and see approach.

By August 21, 2013, Associate Health Minister Turia issued another Cabinet Paper regarding the status of plain packaging, which announced that the plain packaging bill would be introduced as legislation in the House and referred to the Health select committee. In proposing the legislation, the Cabinet paper again addressed the trade threats and took a cautionary approach stating:

Once the bill is introduced, its passage through the House can adhere to standard timelines. This allows time for greater legal certainty over Australia's plain packaging disputes at the World Trade Organization to emerge. As previously agreed, enacting the legislation, or at least bringing it into force through the subsequent regulations, could be delayed if necessary...This timeline will depend in part on emerging clarity over the possibility of having to defend the legislation against legal challenge from tobacco companies or tobacco-producing countries. Further developments in Australia's WTO challenges while the Bill is progressing through Parliament should help inform this assessment.<sup>268</sup>

The Cabinet Paper went on further to reinforce the legal "uncertainty" about when Australia's WTO challenges may be resolved, stating, "the enactment of the legislation or the making of regulations could be delayed until the Australian cases conclude and certainty regarding WTO legal implications is obtained."<sup>269</sup> As a result, the proposal for plain packaging would be allowed to be introduced but still have to wait on the two Australian legal challenges. Although the Cabinet continued to consider the legal challenges as a "high risk" this August 2013 Cabinet Paper first addressed the issue of intellectual property rights as it pertained to the plain packaging proposal, stating:

Intellectual property rights to register, own and enforce trade marks and copyright in designs will continue to be protected – it is only the use of the trade marks and copyrighted designs as promotional devices on tobacco products and packaging that is being restricted...Note that tobacco plain packaging legislation is not intended to have any detrimental impact on

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<sup>268</sup> Commonwealth of New Zealand. *Tobacco Plain Packaging: Approval for Drafting*. Wellington, New Zealand: Cabinet Social Policy Committee, 21 August 2013.

<sup>269</sup> *Ibid*, 5.

intellectual property rights other than to the extent necessary and warranted to achieve the health purposes.<sup>270</sup>

Some information was withheld under Official Information Act provisions in the RIS and the Cabinet Papers but this statement acknowledges at least the first time publically that the government did not accept the tobacco industry's argument that plain packaging would prohibit the use of their trademarks. Again this decision reiterates the arguments put forth in Australia to defend the proposal in that the "use" in question of the trademark pertains to the packaging and not the complete prohibitive use of trademarks, which would still be allowed in a non-promotional manner on letterheads, memorandums, websites, etc. While this Cabinet Paper rejected the trademarks argument, the government still did not publically address whether plain packaging constituted a barrier to trade under the WTO TBT Agreement, or if it represented fair and equitable treatment under FTAs and BITs.

Following the Cabinet Paper in August 2013, Minister Turia formally introduced plain packaging in December 2013, which unlike in Australia where the legislation was a new bill, this proposal was an amendment bill to the 1990 smokefree-free environments bill, which restricted tobacco advertising.<sup>271</sup> New Zealand had prohibited tobacco advertising, promotion and sponsorship by 2013, except for on the package so this represented the last form of advertising that needed to complete the total prohibition of tobacco advertising.

### ***New Zealand parliament debate***

On February 11, 2014, the New Zealand parliament had their first reading of the plain package bill,<sup>272</sup> which represents the stage of the regulatory process where the first debate occurs on a particular bill. While the main debate for any bill occurs during the

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<sup>270</sup> Ibid, 6.

<sup>271</sup> Turia T. First Reading For Tobacco Plain Packaging Bill Early 2014. *beehive.govt.nz*. 17 December 2013. <https://www.beehive.govt.nz/release/first-reading-tobacco-plain-packaging-bill-early-2014>.

<sup>272</sup> New Zealand Parliament. *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill-First Reading*. Wellington, New Zealand: House of Representatives, 11 February 2014.



second reading, during the first reading, members of parliament (MPs) voiced their general support and opposition (see chapter 4) for the plain packaging bill but this section aims again to understand the *perception* of tobacco industry trade threats by policymakers. Again contrary to scholars who reject the notion of regulatory chill, several MPs were highly aware of international trade and investment law as it pertained to plain packaging. More importantly, the debate during the first reading suggests that not only were MPs cognizant of international trade and investment law, but MPs from the center left (Labour Party) and left (Green Party) rejected notions of tobacco industry trade threats while MPs from the center right (National) and right (ACT and NZ First) were more receptive to threats as they voiced their opposition to the plain packaging proposal. In particular, MPs responded to the multitude of aspects of the tobacco industry trade threats, including general threats of violating intellectual property rights and international treaties, the legal and reputational costs of international arbitration and potential compensation, and the direct attack on all businesses and trademark owners (Table 3:4).

In response to the general threats of violating intellectual property rights and international treaties, several MPs stressed that the plain packaging proposal should not be delayed due potential legal challenges and recognized New Zealand's sovereign right to implement public health issues while others expressed legal concerns with the legislation. Several MPs highlighted that New Zealand should not be intimidated by tobacco companies and delay the legislation out of fear of being sued like the Australia. Some MPs expressed their disappointment that the legislation would have to wait on the Australian legal challenges with one MP stating, "delaying the implementation of this legislation is caving in to the threats."<sup>273</sup>

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<sup>273</sup> Ibid, 5.

Issue	Speaker	Quote
1.) General threats of violating intellectual property rights and international treaties	Hon. Tariana Turia (Associate Minister of Health)	<p>“ We are convinced that plain packaging is a really important step on our path to being a smoke-free country by 2025, and that it will stack up against our World Trade Organization obligations. That is why we are pushing forward to take the legislation through the parliamentary processes without delay.”</p> <p>“New Zealand takes all of its international obligations seriously. Our plain packaging regime has been developed to be consistent with our trade obligations, and our approach to negotiating new trade agreements continues to protect our ability to take public health measures such as plain packaging. The agreements and treaties can, and should, work together to boost both international trade and public health, and this is a good example of where we can achieve both objective”</p> <p>“- Although the tobacco industry may have laid down a threat if this legislation is passed, my message to it is that our country has a sovereign right and a legal right to protect its citizens. I am firmly of the opinion that it is not for any tobacco company to be telling us what we should be doing in our own land. Five thousand New Zealanders die from smoking a year, and that death toll places a responsibility on every politician to pass legislation in our land that will help save lives and increase well-being—legislation that makes a tangible, enduring impact on the lives of the people of this country. I commend this bill to the House for its first reading.”</p>
	Mr. Iain Lees-Galloway (Labour-Palmerston North)	Effectively, the Government gets to decide when this legislation comes into force. The reason for that, of course, is concerns around being sued by the tobacco industry as a result of a potential breach of trade agreements. The real concern is that the Trans-Pacific Partnership will foist upon New Zealand rules and regulations that stop us from doing exactly this, which is to legislate in the best interests of the public health of New Zealanders. We must be vigilant. We must be vigilant and ensure that any trade agreements we sign up to do not allow us to fall into that trap. We are watching Australia closely, but I want New Zealanders to understand that the agreement that Australia has with Hong Kong was poorly drafted in this area and left Australia exposed to the type of litigation that it is facing. New Zealand’s trade agreements, generally speaking, have

		<p>avoided that, and we need to ensure that should the Trans-Pacific Partnership go ahead, it avoids this, as well. That is why we are asking the Government to be transparent about the Trans-Pacific Partnership. That is why we are asking that when the text is finalised, it be published so that New Zealanders can see what is in it before the National Government signs us up to it. We need to know whether the Trans-Pacific Partnership will have any bearing on the implementation of this legislation, and we on this side of the House are concerned that the reason the Government does not want this legislation to be implemented as soon as it is passed by Parliament, and instead is handing that right over to itself, the Government, is that it wants to keep in the back pocket the opportunity not to enforce this legislation, in the event that it sells off to American interests that are pushing their agenda through the Trans-Pacific Partnership our right—our sovereign right—to legislate in the interests of the public health of New Zealanders. New Zealand is a sovereign nation that ought to be able to say that we do not accept that 5,000 of our citizens are killed every year by tobacco</p>
	<p>Dr. Paul Hutchinson (National-Hunua)</p>	<p>“Good on the Aussies. Unfortunately, it has bitten them in terms of the way that they are now embroiled in a very difficult court case, through those countries that are producing tobacco and, of course, the tobacco companies, which are doing everything they can in the Third World to encourage and promote smoking, which is very much against the public health in those countries. There is no doubt in my mind that although we do not know exactly when this legislation will be enacted, the majority of the Parliament is very much for it. But the issues around the World Trade Organization (WTO) are that every country has the sovereign right to protect the health of its people. I do not believe the problem is so much about free trade and the WTO; I believe it is much more about scurrilous tobacco companies colluding with tobacco-producing countries to bring in expensive, delaying court action. In respect of the issues regarding the Trans-Pacific Partnership, we have clearly signalled that that legislation will come through this Parliament. We have clearly signalled that we will not compromise our sovereign right to protect the public health of our people. This legislation is another step in protecting the public’s health from the proven harms of tobacco. I commend it to the House”</p>
	<p>Hon Annette King (Labour-Rongotai)</p>	<p>I would have to say that I am a little disappointed that we</p>

		<p>have to wait for the passage of this legislation and that we are waiting to see what happens in the Australian court case. I think it is good on the Australians for having the courage to say to those big tobacco companies: "Bring it on." I am glad that they have got the money to be able to fund their legal – interruption – Well, that is a good point, Mr Banks. He just asked why we are waiting. It is a question that you need to put to the Prime Minister. The Prime Minister wants to wait to see what happens in the court case in Australia. I think the fear is probably that the tobacco companies might then take us to court. Well, I would give them the two-finger salute and say "Bring it on.", because we as a Parliament will first of all want to protect the health of New Zealanders.</p>
	Kevin Hague (Green)	<p>"It is deeply disturbing, therefore, that the Government is proposing to delay the implementation of this bill until such time as the various court cases and actions against the Australian Government are settled. Others have mentioned this. Iain Lees-Galloway spoke about the commencement process—on a date appointed by an Order in Council, or during a period up to 18 months after the date on which the bill is passed. I do not believe that that is acceptable. In the face of the size of this problem and the role that this measure can play in solving that problem, I do not believe that that kind of delay can possibly be acceptable."</p> <p>"So the Government's caution in terms of implementation is inconsistent with that need for dramatic action. What we need instead is a clear and urgent timetable to enact this legislation."</p> <p>"I agree with Dr Paul Hutchison, who said that every nation has the sovereign right to protect the health of its people. I agree with that, and the Greens say that if that sovereign right is threatened, then there is all the more reason for the Government to stand up and protect that sovereign right."</p> <p>"Delaying the implementation of this legislation is caving in to the threats, extortion, and delaying tactics of an evil industry. Thirteen deaths every day demands urgent action, it demands the exercise of that core Government sovereignty, and it demands that this bill is brought into law as soon as it possibly can be."</p>
	Hon Phil Goff (Labour-Mt Roskill)	<p>"New Zealand, as every country does, must have the sovereign right to legislate and to regulate for the public good. There is some question about what the Trans-Pacific Partnership might do in regard to this legislation. I want to say that I have got a letter in front of me signed by the Minister of Trade, and he makes the point—and I rely on his</p>

		assurance and will hold him to it—that our Trans-Pacific Partnership agreement will be based on the trade agreements that I negotiated with China and with ASEAN, which do not allow companies, corporates, to succeed in suing New Zealand when we regulate or legislate for the public good, whether it be for the environment, for health, or to do the things that are for the well-being of New Zealanders.”
	Metiria Turei (Co-Leader-Green)	“We—the country, the Government, the community—are being threatened by the tobacco industry. We saw in today’s paper that there are further threats by the tobacco industry for the consequences of this policy. We are quite right in saying, so be it, bring it on. We are in the job of making good policy for the health and well-being of our country, and none of us make any apologies for that whatsoever.”
2.) Legal and reputational costs of international arbitration and potential compensation	Barbara Stewart (NZ First)	“New Zealand would be the second country in the world to approve plain packaging, after Australia, and we are likely to meet the same legal challenges. I know that the <i>New Zealand Herald</i> article in December last year outlined it clearly: “New Zealand was also likely to face legal challenges if it followed Australia’s lead, and officials have estimated the cost of a legal dispute as between \$2 million to \$6 million, not including compensation if a case was lost.” So that is something else to consider.”
	Hon Phil Goff (Labour-Mt Roskill)	“I think that the Philip Morris case against the Australian Government is a disgrace. The Australian authorities tell me that they will succeed in that case. We should not lack the courage to confront the vested interests that promote for their own material benefit the peddling of tobacco as a lethal product. We should not be frightened to confront them. We should not be frightened to bring in this legislation on the date that we consider appropriate and to take on those corporates, because we would have the support of the World Health Organization. We would be aligned with the Framework Convention on Tobacco Control. That has been passed internationally by a responsible body, and I do not believe for a moment that another international body, the World Trade Organization, would in the end defend the right of companies to kill people with their products. It just does not stack up. It is not credible. I support this bill. I commend those with the courage to vote for this bill now, and I urge the Government to bring it into effect as soon as possible so we can stop that last bastion of promotion of a lethal product by the vested interests of big tobacco.”
3.) Framing the health issue in terms of broad violations of	Hon John Banks (Leader-ACT)	“I ask my Māori Party and National Party colleagues to

<p>business intellectual property rights and investments  -Slippy slope-dangerous precedent for others  -Nanny state-too much government involvement</p>		<p>carefully consider the precedent they will set with this bill. This bill guts the intellectual property rights of tobacco companies. Some will ask: well, who cares? But do we want to gut the intellectual property rights of KFC or Red Bull sugar drinks? KFC and Red Bull sugar drinks are putting this country's level of obesity up at the top of the OECD. They help to contribute to that. It may be seen as a long bow, but the removal of intellectual property rights to the names and brandings of their products from tobacco companies without compensation is wrong, because which international company selling products that are bad for our health will be the next target? The State is effectively seizing their property because it does not like the health effects of their still lawful business. It is still a lawful business"</p> <p>"It is a fundamental tenet of our common law that citizens should not be denied their property rights without just compensation. You would not let it happen to the neighbour in your street if the local council was just as cavalier with its seizure of some of the property on your front garden. It is a property right. It is a property right. I know the Opposition does not talk about property rights. The common law is not only the gift of our British forebears but also of Māori, who believe in a country under the rule of law where property is rightfully protected. We will have debates in this Parliament this month, next month, and for the next 10 years about property rights for the indigenous people of this country. The property rights for the indigenous people of this country are the same as the property rights for international companies lawfully trading in a lawful product in this nation."</p> <p>"The pain and loss caused by tobacco is heartbreaking, but this is a battle of the lawyers about freedom of expression. The second principle is that we should protect the freedom of expression of which the names of products, their branding, and their intellectual property are part. If we do not like it, then increase the price of tobacco over the next 5 years by 100 percent, use the money that we raise to buy the property rights of the international tobacco companies, get rid of them for ever, and become smoke-free in 2018."</p>
	Barbara Stewart (NZ First)	<p>"And, as Mr Banks pointed out, what about alcohol? What about fast foods? What about sugar products? They are all causing harm to our people, so when are we going to take the next step?"</p>
	Hon Phil Goff (Labour-Mt Roskill)	<p>"They may pretend that the debate is about intellectual property. They may pretend that the debate is about</p>

		removing barriers to trade. I am a believer in reasonable protection for intellectual property and I am a strong believer that we should remove barriers to trade, but neither argument stacks up to defend the promotion of a product that kills people if used as the manufacturer intends. Neither argument stands up. They are red herrings. Those councils, those vested interest groups, should butt out of our debate.”
	Clare Curran (Labour-Dunedin South)	“I want to say that the argument that is used by big tobacco—the apologists who pretend that this is a debate about intellectual property rights or removing barriers to trade—is wrong and that that has been proven. The sovereign right of Parliament to make its own laws on matters of public interest should be something that we should all fight for. I want to refer quickly to a paper called <i>Packaging Phoney Intellectual Property Claims: How multinational tobacco companies colluded to use trade and intellectual property arguments they knew were phoney to oppose plain packaging and larger health warnings. And how governments fell for their chicanery.</i> I urge everybody to track down this paper and to read it. The synopsis states: “It shows that the companies decided to fight plain packaging on trade grounds because it provided them a more solid footing than allowing health issues to enter the debate. For this reason, they focused their energies on the Intellectual Property agreements governed by WIPO and the investment protection contained in NAFTA agreements ... Despite being told repeatedly by WIPO”—that they had no legal basis for their arguments, that there was no legal basis for any of those arguments, and—“that their analysis was flawed, the companies persisted in telling the government”—and this was Canada—“and the public that plain packaging would be inconsistent with international intellectual property protections. Following the industry’s misrepresentation of international trade law, new health ministers in Canada and Australia forsook plain packaging as a tobacco control measure they mistakenly believed to be contrary to their countries’ obligations under international trade agreements. Finally, this battle is moving towards a conclusion. We are seeing it in Australia. We should not be taking notice of big tobacco’s argument that this is an intellectual property argument, because it is not. There is no basis in law for that argument.”
4.) Recruiting business support and funding research to strengthen credibility and promote uncertainty and concern	Kevin Hague (Green)	“I signal thanks to the US Chamber of Commerce and its fellow traveller organisations for putting out just so clearly their intention—that those international agreements ought

		to undermine this country's sovereignty—with their threats to this country over the last couple of days.”
	Hon Phil Goff (Labour-Mt Roskill)	“It is a condemnation of not only the tobacco industry but the fellow travellers and the apologists for that industry, who would pretend that they can dictate to this country about what we should do in terms of tobacco promotion. It is a long list: the Emergency Committee for American Trade, the National Association of Manufacturers, the National Foreign Trade Council, the US-ASEAN Business Council, the US Chamber of Commerce, and the United States Council for International Business. Shame on those groups, which in many other aspects of their work do responsible work, that they should act as apologists for a product that kills people.”



Instead these MPs emphasized New Zealand's sovereign right to implement the public health measure and argued if tobacco companies wanted to fight then to it "bring it on." Despite this sentiment, a few MPs expressed concerns about the potential legal challenges and the extent to which tobacco companies will go to great lengths to protect their investments. These discussions also raised concerns about the Trans-Pacific Partnership Agreement (TPP), a pending trade agreement between New Zealand and 12 other countries, and the ability of future trade agreements to further constrain governments from implementing similar legislation. As a result, some MPs urged the government to avoid delays and move quickly before the TPP would impose new rules and regulations on New Zealand's sovereignty.

Some MPs also expressed concerns in relation to the legal costs of international arbitration and potential compensation. A few members expressed concerns about the potential legal costs similar to the Australian legal challenges. Some MPs even cited rough estimates of a legal challenge ranging from "\$2 million to \$6 million" and stressed that these legal costs did not include the cost of compensation if the case was lost. Although concerns over legal costs were expressed, the effects on reputational costs were not directly mentioned during the first reading.

Several MPs also viewed the plain packaging of tobacco as a direct attack on all businesses and trademark owners. During the debate, MPs cautioned that the proposal would create a slippery slope for other industries to be regulated in a similar fashion in regards to not being able to use their trademarks on packaging, saying, who "will be the next target?" In particular, some MPs cautioned that alcohol and food would be targeted next with one MP saying, "what about alcohol? What about fast foods? What about sugar

products? They are all causing harms to our people, so when are we going to take the next step?"<sup>274</sup>

On the other hand, some MPs rejected the idea that the plain packaging of tobacco should be a debate about intellectual property rights. These MPs tried to refocus the issue around public health and emphasize that the promotion of tobacco essentially kills people. One MP also highlighted a report that illustrated that the tobacco industry's own documents revealed that the tobacco companies decided to fight "plain packaging on trade grounds because it provided them a more solid footing than allowing health issues to enter the debate,"<sup>275</sup> which were also described in more detail in this dissertation (see chapter 2).

Finally a few MPs condemned the tobacco company allies for interfering in the process to evoke concerns over intellectual property. One MP denounced these groups actions and said it was a shame "that they should act as apologists for a product that kills people."<sup>276</sup>

After the debate concluded, MPs voted to pass the plain packaging amendment bill and send it to the House Health Select Committee. Following the debate, Minister Turia congratulated the MPs for passing the bill and told media reporters:

It's important for us to be bold and have some courage and not be dictated to by the tobacco companies and other countries ... While the tobacco industry may have laid down a threat that if this legislation is passed [it will be challenged] my message to them is that our country has a sovereign right and a legal right to protect its citizens. I am firmly of the opinion that it is not for any tobacco company to be telling us what we should be doing in our own land.<sup>277</sup>

In response to whether the government would continue to wait on the two Australian legal challenges before completing the legislation, the Minister Turia told media reporters:

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<sup>274</sup> Ibid, 4.

<sup>275</sup> Ibid, 3.

<sup>276</sup> Ibid, 4.

<sup>277</sup> Rutherford H. Cigarette plain packaging closer. *Dominican Post*. 2 February 2014.

Our legislation's quite different, the rules around tobacco are quite different, and there is still a brand on these cigarettes, so I don't know what the delay would be. We've got thirteen people who die a day in this country, five thousand a year-why would we wait?"<sup>278</sup>

However despite Minister Turia's bold stance to complete the legislation, Prime Minister John Key told media reporters that government was going to continue with its "wait and see" approach in reference to the Australian legal challenges, stating:

I don't really see the point in us finally passing the legislation until we see exactly what happens in the Australian court case. We have a slightly different system, but there might just be some learnings and if there are learnings out of that, it would be sensible to potentially incorporate those in either our legislation or avoid significant costs.<sup>279</sup>

Despite the government's cautionary approach, the plain packaging amendment bill was allowed to be sent off to the House Health Select Committee.

### ***New Zealand Ministry of Health response to Health Committee***

Between February 14, 2014 and March 28, 2014 the Ministry of Health received 191 substantive submissions on the bill and on June 18, 2014, the Ministry of Health issued their submission to the Health Select Committee detailing their support for the bill. In their submission, which consulted with the other ministries, especially MFAT, the Health Ministry addressed the tobacco company trade threats by acknowledging the government was going to continue to wait on the Australian legal challenges, stating:

The Government has announced that it wished to take account of the implications of Australia's legal cases at the WTO before deciding to pass the Bill. The Government is confident that tobacco plain packaging can be implemented in a way that is consistent with trade agreement obligations, and New Zealand is supportive of Australia's defense of the challenges it is facing at the WTO. However, the timing of these international legal processes is beyond the Government's control.<sup>280</sup>

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<sup>278</sup> Radio News New Zealand. Plain packaging bill passes first hurdle. 11 February 2014; <http://www.radionz.co.nz/news/political/235845/plain-packaging-bill-passes-first-hurdle>.

<sup>279</sup> Ibid.

<sup>280</sup> New Zealand Ministry of Health. *Smoke-Free Environments (Tobacco Plain Packaging) Amendment Bill Departmental Report*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 18 June 2014.

Although the Health Ministry report recognized the government's approach to continue waiting on the Australian legal challenges, it further clarified the legal standing of plain packaging against the potential legal challenges. In direct response to violations of the WTO, officials agreed in the report that the bill was consistent with New Zealand's WTO obligations by not preventing unnecessary obstacles to international trade, non-discriminatory treatment of goods, services, and intellectual property rights, and minimum standards in respect to intellectual property rights. The Health Ministry officials also mentioned in the report that only one submission by PMI provided a through analysis of the New Zealand's WTO obligations but did not conclude that the bill violated the WTO TRIPS or WTO TBT Agreement. In respect to the other submissions by opponents of the bill, the Health Ministry claimed that their analysis was incomplete, selective and failed to refer to the relevant jurisprudence to support their interpretation of New Zealand's WTO obligations.

In direct response to investment violations of FTAs and BITs, officials agreed in the report that the bill was consistent with New Zealand's investment obligations under New Zealand trade and investment agreements as it was "non-discriminatory and was a legitimate exercise of sovereign regulatory power that restricts certain uses of trade marks in order to protect public welfare, namely public health."<sup>281</sup> The Health Ministry went on to state:

Philip Morris's two paragraph submission on this issue focuses on the risk of litigation rather than providing analysis or evidence to support their view. BAT alleges plain packaging violates New Zealand's investment obligations, but the analysis is incomplete and BAT does not provide credible evidence to support their claims. If an ISDS proceeding was brought against New Zealand, and in the unlikely event that an arbitral tribunal concluded that plain packaging constitutes an indirect expropriation of a tobacco company's trade mark rights, then New Zealand might be obliged to pay compensation for expropriating those rights. However, the claimant would have to submit detailed evidence that establishes the quantum of the damage or the

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<sup>281</sup> Ibid, 26.

financial loss they have incurred...The weight of expert legal opinion was that the international legal challenges against plain packaging were unlikely to succeed.<sup>282</sup>

The Health Ministry also addressed the issue that tobacco plain packaging would set a dangerous precedent for regulating other products (particularly food and alcohol) and would cause potential trade retaliations by other countries. The Health Ministry responded by arguing that the legislation did not consider extending the measure to other products and that any future packaging proposals would have to consider the relevant evidence and be treated on a case by case basis. Also the Health Ministry claimed that the possibility of a WTO member retaliating against New Zealand in terms of suspending trade concessions was deemed as “highly unlikely under the WTO agreements.”

Finally the Health Ministry addressed the issue of the PMI trade challenge against Australia noting that several submissions in support of the bill argued that the legislation was consistent with international trade obligations, the PMI-Australia case could take years to complete and that the benefits in terms of public health were too important to justify any delay. Despite acknowledging for the first time publically that the plain packaging amendment bill was consistent with New Zealand’s international trade obligations and that the tobacco companies were unlikely to succeed with legal challenges, the Health Ministry concluded:

The Bill is now likely to become a matter for the next Parliament to consider. If the WTO process progresses sufficiently or if the international litigation risks are reassessed, it is possible the Bill could be passed early in the term of the new Parliament. Equally the passage of the Bill may be significantly delayed, if that is found to be necessary.<sup>283</sup>

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<sup>282</sup> Ibid, 26.

<sup>283</sup> Ibid, 7.

### ***Health Select Committee response***

On August 5, 2014, the Health Select Committee submitted its report, which recommended the bill to the House for a second reading.<sup>284</sup> The report briefly addressed the issue on tobacco company trade threats by simply rejecting the trademarks argument but did not address the other legal issues pertaining to the bill.

### ***New Zealand Parliament Second Reading***

Following the Health Select Committee recommendation for a second reading, New Zealand had a general election on September 20, 2014, in which the National Party remained in government. However former Associate Health Minister Tariana Turia retired and was replaced by Peseta Sam Lotu-liga from the National Party since the Māori Party lost 2 seats in parliament in the election. During the beginning of the new term for parliament in February 2014, the United Kingdom and Ireland each passed legislation requiring that plain packaging of tobacco products by May 2016. In response MPs began calling on the New Zealand government to move forward as well. In February 2015, Maori Party Co-leader, the Honorable Te Ururoa Flavell stated that:

Waiting on the World Trade Organization decision means more people die or are sick from smoking-related illnesses...All it takes is courage and the same resolve that Tariana had to halt the decline in health.<sup>285</sup>

In March 2015, Ururoa Flavell also stated:

The Government has committed to a Smokefree Aotearoa by 2025. If we're going to reach this target we need to show some courage. Other countries have already shown the way-they're not waiting for the WTO decision. We

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<sup>284</sup> New Zealand Parliament. *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill: As reported from the Health Committee*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 5 August 2014.

<sup>285</sup> The Maori Party. Ireland shows the way with plain packaging tobacco law. *Scoop Independent News*. 28 February 2015. <http://www.scoop.co.nz/stories/PA1502/S00380/ireland-shows-the-way-with-plain-packaging-tobacco-law.htm>.

should be doing everything we can to reduce the harm of this highly addictive substance.<sup>286</sup>

However in March 2015, Associate Health Minister Peseta Sam Lotu-Liga replied to demands by stating that:

Our stance remains the same, that it is prudent to await the World Trade Organization decision, but as minister I am always looking for ways to bring down the incidence of smoking.<sup>287</sup>

As mentioned previously, on December 18, 2015, the international tribunal examining the Australia-PMI legal dispute dismissed PMI's challenge arguing it did not have jurisdiction to hear PMI's claim. On February 15, 2016, Prime Minister Key told media reporters at a press conference:

It was waiting, and I think the view I initially took was given Australia was in the middle of this court case it probably didn't make sense for us to embark on that, and then potentially face exactly the same costs for the taxpayer in defending another legal action...Last year I asked for advice on that matter, and the advice I got back was that they felt we were on very firm ground and didn't feel there was really any issues. A number of others have moved on plain packaging and were doing so without court cases being brought against them. We're feeling a lot more confident about that and the bill's now progressive through and it's my expectation it will become law at some point.<sup>288</sup>

Although Primer Minister Key did not mention an exact date when the bill would have its second reading in parliament, he expected it become law "sooner as opposed to later" and probably by the end of the year. As of May 2016, the plain packaging amendment bill was still awaiting its second reading.

### ***Interviews with Members of Parliament***

Although the interviews focused on a range of questions pertaining to tobacco control and trade in New Zealand (see questionnaire appendix), this section further

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<sup>286</sup> Voxy. Māori Party congratulates England on plain cigarette packaging. 12 March 2015; <http://www.voxy.co.nz/politics/m%C3%A4%C2%81ori-party-congratulates-england-plain-cigarette-packaging/5/216091>.

<sup>287</sup> Johnston M. Pressure to bring in tobacco plain-packaging. *New Zealand Herald*. 2 March 2015.

<sup>288</sup> Kirk S. Tobacco plain packaging likely to be law by end of year-John Key. *Dominican Post*. 15 February 2016.

highlights the MPs' awareness and perception of tobacco industry trade threats. Interviews were conducted with MPs from various political parties and seemed to reflect similar statements that were offered during the first reading for plain packaging in the House. Additionally, these policymakers also acknowledged that they reached out to health advocates for information and advice pertaining to not only the scientific evidence surrounding plain packaging but also the international legal ramifications concerning the plain packaging, confirming again that state actors see the advocates as allies in pursuing public health objectives.

In discussing the general obstacles to implementing plain packaging, all of the respondents were fully aware of the international trade threats issued by the tobacco companies.<sup>289</sup> In particular, all of the MPs knew that Australia was being challenged by members of the WTO and by Philip Morris and saw this as the biggest or one of main obstacles to delaying the plain packaging in New Zealand. As a result, most of the dialogue centered around their opinions regarding whether New Zealand should wait on the Australia legal challenges. Most of the MPs from the center-right (National Party) and right (NZ First) felt it was prudent and pragmatic to continue to wait and see what happens with the Australian legal challenges before enacting plain packaging. They felt that New Zealand, especially as a small nation, could learn from those cases and adopt the necessary adjustments to avoid any unnecessary and protracted legal battles. In doing so, these MPs were concerned about the legal costs associated with trade disputes, which they argued

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<sup>289</sup> Marama Fox. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015. James Shaw. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015. Kevin Hague. Interview by Eric Crosbie. Wellington, New Zealand; 17 June 2015. Ian Lees-Galloway. Interview by Eric Crosbie. Wellington, New Zealand; 17 June 2015. Fletcher Tabuteau. Interview by Eric Crosbie. Wellington, New Zealand; 17 June 2015. Te Ururoa-Flavell. Interview by Eric Crosbie. Wellington, New Zealand; 17 June 2015. Barbara Stewart. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015. Louisa Wall. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015. David Shearer. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015. Scott Simpson. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015.



would require spending taxpayers' dollars to defend the proposal. Therefore they contended that it was in the best interest of the country to wait until there was more certainty coming out of the Australian legal challenges. Additionally some MPs stated that this approach was not due to fear but instead based on a "cautious" and "careful" approach.

On the other hand, the MPs from the center-left (Labour Party) and left (Green Party and Māori Party) argued that this "wait and see" approach ignored the health priorities of the bill and undermined New Zealand's sovereignty. These MPs stressed the importance of public health and argued the government needed to be bold and stare down these threats. This approach included adopting good strategies to minimize the threat such as international solidarity regarding plain packaging and addressing the international obligations of the FCTC. Other MPs opposing the "wait and see" approach emphasized New Zealand's sovereign right to implement public health measures and stated that it was ridiculous that a corporation could directly sue a government over attempts to advance public health. Even a MP from NZ First, argued that the trade threats were undermining New Zealand's sovereignty and compromising their ability to move the plain packaging legislation forward. These MPs understood the risk and threat of legal challenges but argued for the need to stare down these threats and implement health measures for the greater good of society. However some of those who opposed the wait and see approach could understand why the government was taking a cautionary approach and not wanting to take the risk considering the legal ambiguity.

These concerns regarding national sovereignty also led to several discussions regarding pending trade negotiations and the ability of corporations seeking new ways to impact the regulatory process. Several MPs stressed concerns over the proposed TPP agreement and the inclusion of the investor-state dispute settlement (ISDS) mechanism, which allows corporations to directly sue governments. In addition to recognizing that the

delay of plain packaging was allowing time for tobacco companies to recruit new smokers, some MPs also expressed concerns that the legal challenges could take years to be completed causing unnecessary extended delays in implementation. Several MPs also argued that longer delays would allow time for the TPP to come into effect and set up new avenues for tobacco companies to challenge domestic public health regulations.

All of the MPs acknowledged that the public opinion of tobacco and public credibility of tobacco companies had declined dramatically over the previous decades, which caused several MPs to question the credibility of the threats. MPs described tobacco companies as “defending an indefensible position”<sup>290</sup> and “not really welcome as corporate citizens”<sup>291</sup> in New Zealand but recognized the tobacco companies were trying to frame the issues as attacks on other industries and general intellectual property rights. Although some MPs rejected the slippery slope argument that other industries would be targeted next, some MPs were concerned that government regulations were heading in this direction. For example, one MP stated “the concern is that heavily regulating tobacco will lead overly regulating other industries.”<sup>292</sup>

Finally, and possibly most important, several MPs referenced the notion of a chilling effect and argued the delay in implementation was a classic chilling effect. Without mentioning the concept of a chilling effect during the interviews, several MPs alluded to the concept of a chilling effect and specifically referred to the Australia legal challenges and the New Zealand government’s wait and see approach as explanations to describe the regulatory chill. While some MPs argued that there was a lack of political will, they still mentioned that the tobacco company trade threats had a significant impact on delaying plain packaging.

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<sup>290</sup> Scott Simpson. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015.

<sup>291</sup> Kevin Hague. Interview by Eric Crosbie. Wellington, New Zealand; 17 June 2015.

<sup>292</sup> Simon O'Connor. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015.

## **Conclusion**

This chapter set out to provide the first thorough examination of tobacco industry trade threats and the impact they have had on the regulatory development process. In examining Australia and New Zealand, this chapter demonstrated how tobacco companies are employing sophisticated and well-planned trade threat attacks directed at policymakers from multiple branches of governments. The empirical findings demonstrate that policymakers from multiple branches of government were aware of international trade and investment law and took into account potential trade and investment disputes during the development of plain packaging in both countries. Additionally, several policymakers were highly aware of mechanisms in trade and investment agreements such as ISDS and pending trade and investment agreements such as the TPP, which pose potential risks to national sovereignty. The findings suggest that in Australia, even though the government withstood the trade threats, they had to critically examine the international trade aspects, amend the Trademarks 1995 law, and spend millions of dollars defending their plain packaging policy in international courts. In New Zealand, it appears that the government delayed their plain packaging proposal due to concerns over the trade threats and also had to critically examine the implications of international trade on plain packaging, which involved more government agencies and complexity surrounding the issue. As a result, this analysis demonstrated that tobacco company trade threats had a significant impact on the regulatory development process in both countries. In order to more accurately measure the effect of these trade threats in delaying (chilling) plain packaging, I now turn to using a most-similar systems design to compare Australia and New Zealand.

#### **Chapter 4: Defending a Strong Legislative Bill to Overcome Regulatory Chill: A Deeper Examination of Plain Packaging in Australia and New Zealand**

Chapter 3 documented the tobacco industry's aggressive trade attacks on plain packaging in both Australia and New Zealand and demonstrated how policymakers from multiple branches of each government evaluated these threats during the regulatory development process. While it appears that the Australian government was able to overcome the tobacco industry trade threats and the New Zealand government caved into the threats to delay its plain packaging proposal, it remains unclear how much of an impact these threats contributed to these divergent policy outcomes. Furthermore, it is unclear if regulatory chill actually occurred and if these trade threats caused a chilling effect to delay plain packaging in New Zealand.

This chapter addressing these issues by first offering a detailed account of the significance of “delay” as a tobacco industry tactic and how delaying plain packaging (dependent variable) dramatically minimizes the effectiveness to reduce smoking initiation, smoking cessation, government health expenditures, tobacco industry profits, and the diffusion of best practices regionally and internationally. Then to test the second critique of the regulatory chill hypothesis, which claims there is no evidence to suggest a chilling effect is indeed occurring, a most-similar systems design (MSSD) is applied to demonstrate that despite being similar in several regards, the Australian government has implemented plain packaging, while New Zealand has delayed its proposal. The chapter argues that the main difference that helps explain this divergence is the government's *reception* of tobacco industry trade threats, which has been influenced by the partisan identification of government, bureaucratic leadership and capacity in the Health Ministry and tobacco control advocacy on tobacco and trade.

**Section I: Explaining the dependent variable:  
“Delay” in the regulatory process of plain packaging**

The regulatory process to enact public policies is often defined by whether legislation is adopted or not thereby measured in policy outputs. However in public health, the regulatory process to enact tobacco control policies is increasingly defined if the policy is weakened or delayed due to the growing difficulty for tobacco companies to influence policymakers in completing rejecting a policy. As a result, even if the policy is enacted, which is often heralded as a win for public health, tobacco companies can still score big victories by weakening or delaying legislation. Tobacco companies employed this dynamic of delay tactics during the plain packaging process in Australia and New Zealand. In Australia, the government introduced plain packaging in September 2009 and enacted the legislation in November 2011, a typical timeframe of 18 months (1 year and 6 months). In New Zealand, the government introduced plain packaging in April 2012 and as of May 2016 the proposal remained waiting on its second reading in parliament (Table 4:1).

While the tobacco companies have been unable to weaken the plain packaging proposal in New Zealand by reducing the size of HWLs covering the package from 100% (plain packaging) to 80% or 50%, they have succeeded in delaying the enactment of the proposal. The policymaking process for plain packaging in New Zealand has already surpassed 49 months (4 years and 1 month) since its introduction and more importantly has already been delayed by 31 months (2 years and 7 months) and counting compared to the process in Australia. This section explores the importance of this delay (dependent variable) by first explaining the general importance of preventing, weakening, and delaying tobacco control legislation followed by detailing the significance of delaying plain packaging.

Table 4:1: Plain packaging regulatory process timeframe in Australia and New Zealand		
	Australia	New Zealand
Proposal	September 2009	April 2012
Passage	November 2011	Pending...(May 2016)
Timeframe	18 months (1 year and 6 months)	Pending...49 months (4 years and 1 month)
Delay	----	Pending...31 months (2 years and 7 months)

### **Tobacco industry trio of strategies (block, weaken, and delay)**

In the literature on tobacco control, tobacco industry tactics consist of a trio of strategies (block, weaken, and delay) when opposing public health regulations.<sup>293</sup> For decades, tobacco companies were able to block tobacco control regulations by creating doubt about the harms of smoking and secondhand smoke.<sup>294</sup> Before the public became truly aware about the deception of the tobacco industry and the harms of smoking, tobacco companies were able to create doubt the scientific evidence regarding smoking and prevent restrictions on smoking in public places, workplaces, restaurants, and bars.<sup>295</sup> This lack of strong scientific evidence surrounding harmful effects of smoking extended to preventing regulations on tobacco taxes, tobacco advertising, and health warnings throughout the 1960s, 1970s and 1980s.<sup>296</sup>

By the 1990s, the public became more conscious of the harmful effects of tobacco and the deception of tobacco companies, which caused increasing concerns by parents

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<sup>293</sup> World Health Organization. *Tobacco industry interference with tobacco control*. Geneva, Switzerland, February 2008. Also see Mandal S, Gilmore AB, Collin J, Weishaar H, Smith KE. *Block, amend, delay: tobacco industry efforts to influence the European Union's Tobacco Products Directive (2001/37/EC)*, June 2009.

<sup>294</sup> Hirschhorn N, Bialous SA. Second hand smoke and risk assessment: what was in it for the tobacco industry? *Tobacco control*. Dec 2001;10(4):375-382.

<sup>295</sup> Drope J, Chapman S. Tobacco industry efforts at discrediting scientific knowledge of environmental tobacco smoke: a review of internal industry documents. *Journal of epidemiology and community health*. Aug 2001;55(8):588-594. Also see Barnoya J, Glantz S. Tobacco industry success in preventing regulation of secondhand smoke in Latin America: the "Latin Project". *Tobacco control*. Dec 2002;11(4):305-314.

<sup>296</sup> Glantz S, Balbach ED. *Tobacco War: Inside the California Battles*. San Francisco: University of California Press; 2000. precedents, and tobacco industry strategies to block diffusion. *Tobacco control*. Jan 2014;23(1):e2.

about the impact of smoking on children, especially in relation to tobacco advertising. Due to increasing public scrutiny the industry was forced to alter its image and as a result, in the late 1990s began rolling out corporate social responsibility campaigns, which aimed to portray the companies as responsible corporate citizens.<sup>297</sup> These efforts helped tobacco companies introduce weaker private regulations and voluntary measures, which essentially preempted and blocked governments from implementing productive tobacco control regulations.

However since the adoption of the World Health Organization Framework Convention on Tobacco Control (FCTC) in May 2003 by 168 countries,<sup>298</sup> and it coming into force in February 2005, tobacco companies have been increasingly removed from the drafting and negotiation process, which has dramatically diminished their ability to implement self-regulations and outright block tobacco control measures. As a result, tobacco companies have had to increasingly either weaken or delay legislation.

The primary purpose of weakening and delaying legislation has been to minimize the impact on tobacco consumption and sales by reducing the effectiveness of public health regulations. For any given regulation there is an optimal outcome whether it is completely prohibiting tobacco advertising or completely prohibiting smoking in public places or plain packaging. Tobacco companies have understood this for decades and have worked aggressively to weaken or delay these optimal outcomes. For example, when proposals have been introduced to 100% completely prohibit smoking in all public places (workplaces,

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<sup>297</sup> Lee S, Ling PM, Glantz SA. The vector of the tobacco epidemic: tobacco industry practices in low and middle-income countries. *Cancer causes & control : CCC*. Mar 2012;23 Suppl 1:117-129. Also see Otanez M, Glantz SA. Social responsibility in tobacco production? Tobacco companies' use of green supply chains to obscure the real costs of tobacco farming. *Tobacco control*. Nov 2011;20(6):403-411. Cavalcante T, Carvalho Ade M, Rangel EC. [Social responsibility argument for the tobacco industry in Brazil]. *Salud publica de Mexico*. 2006;48 Suppl 1:S173-182. Otanez MG, Muggli ME, Hurt RD, Glantz SA. Eliminating child labour in Malawi: a British American Tobacco corporate responsibility project to sidestep tobacco labour exploitation. *Tobacco control*. Jun 2006;15(3):224-230.

<sup>298</sup> World Health Organization. *WHO Framework Convention on Tobacco Control*. Geneva, Switzerland, May 2003.

restaurant, bars, hotels, etc) tobacco companies have attempted to weaken these proposals by lobbying for smoking sections in some of these settings.<sup>299</sup> In similar situations, tobacco companies have also tried to delay the implementation of these optimal policies to slow down the process of the altering social norms surrounding smoking.<sup>300</sup> Ultimately weakening and delaying legislation slows down the diffusion of best practices as previous studies have shown that once the particular policy is implemented in several countries, momentum grows and reaches a tipping point where the spread of best practices diffuse at an exponential rate.<sup>301</sup>

### **The significance of delaying plain packaging**

A delay in the regulatory process to implement plain packaging has important implications for the costs and benefits associated with smoking. In particular, the delay in implementing plain packaging significantly minimizes the effectiveness of the regulation to reduce smoking initiation, smoking cessation, government health expenditures, tobacco industry profits, and the diffusion of best practices regionally and internationally (Table 4:2).

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<sup>299</sup> Sebrie EM, Glantz SA. "Accommodating" smoke-free policies: tobacco industry's Courtesy of Choice programme in Latin America. *Tobacco control*. Oct 2007;16(5):e6. Also see Crosbie E, Sebrie EM, Glantz SA. Strong advocacy led to successful implementation of smokefree Mexico City. *Tobacco control*. Jan 2011;20(1):64-72. Dearlove JV, Bialous SA, Glantz SA. Tobacco industry manipulation of the hospitality industry to maintain smoking in public places. *Tobacco control*. Jun 2002;11(2):94-104.

<sup>300</sup> Hiilamo H, Crosbie E, Glantz SA. The evolution of health warning labels on cigarette packs: the role of precedents, and tobacco industry strategies to block diffusion. *Tobacco control*. Jan 2014;23(1):e2.

<sup>301</sup> Sanders-Jackson AN, Song AV, Hiilamo H, Glantz SA. Effect of the Framework Convention on Tobacco Control and voluntary industry health warning labels on passage of mandated cigarette warning labels from 1965 to 2012: transition probability and event history analyses. *Am J Public Health*. Nov 2013;103(11):2041-2047. Also see Lee JG, Goldstein AO, Kramer KD, et al. Statewide diffusion of 100% tobacco-free college and university policies. *Tobacco control*. Aug 2010;19(4):311-317. Nykiforuk CI, Eyles J, Campbell HS. Smoke-free spaces over time: a policy diffusion study of bylaw development in Alberta and Ontario, Canada. *Health & social care in the community*. Jan 2008;16(1):64-74.



Table 4:2: The significance of delaying plain packaging		
Minimizing the effectiveness to reduce...	Effects of delay	Initial evidence from plain packaging in Australia
1.) Smoking initiation	-Maintains appealing brands and brand association -Maintains last form of tobacco advertising -Allows tobacco companies more time to recruit new smokers	-Positive impact on “reducing the appeal of tobacco products, reducing the potential for tobacco packaging to mislead consumers, and enhancing the effectiveness of graphic health warnings” -Youth are significantly delaying the age from when they initiate smoking from 15.4 years in 2010 to 15.9 years in 2013.
2.) Smoking cessation	-Minimizes impact on reducing smoking prevalence levels	-Reduced the average smoking prevalence by 0.55 percentage points from 19.4% to 17.2% (2.2% decline), and the 0.55% of that drop (or about 25%) was from plain packaging. -Daily smoking prevalence significantly dropped from 15.1% in 2010 to 12.8% in 2013, a drop of 15%.
3.) Government health expenditures	-Delays significant reductions in health costs	-Estimated total cost to government-\$12.69 million over ten years (\$1.27 million annually) -Full-benefits expected to be realized in the long term but drop in smoking prevalence of 0.07 percentage points (or 15,057 people) would generate savings of \$273 million over ten years (\$27.3 million annually)
4.) Tobacco industry profits	-Minimizes impact on cigarette sales	-Tobacco companies did not provide data on the impact of plain packaging on their sales or profits -Estimated costs for the regulatory burden for the entire industry (including manufacturers, importers, wholesalers, and retailers) is about \$73.87 million over ten years (\$7.39 million annually)
5.) Diffusion of best practices	-Delays domino effect -Minimizes impact of (#1-#4) at the regional and global level (aka regulatory chill)	-Plain packaging enacted: -2011: Australia -2012-2014: No enactment -2015: UK, Ireland, and France -Proposals: (New Zealand, Canada, Norway, India, Turkey, Hungary, Panama, Chile)

### ***Smoking initiation***

The scientific evidence surrounding pictorial HWLs, including plain packaging, overwhelmingly demonstrates that the larger and more graphic the HWLs, the more effective they are in preventing youth from beginning to smoke.<sup>302</sup> In particular, plain packaging, which completely removes the branding of the package, eliminates in some cases the last form of advertising and the ability of any brand connection associated with the package. Although plain packaging has never been implemented, several trial studies have shown that youth are increasingly discouraged to begin the initiation of smoking given the absence of appealing images and the positive connotations associated with smoking.<sup>303</sup> As a result, delaying plain packaging allows tobacco companies more time to continue to use the package as a “mobile billboard”<sup>304</sup> to market to impressionable young individuals. In this sense, the delay in legislation creates important marketing opportunities for tobacco companies to recruit new smokers that will have a high chance of becoming addicted to their products for several years, if not a lifetime. This is especially important in emerging markets for tobacco companies (e.g. Brazil, Russia, Indonesia, and China) where more time is essential to recruiting the next generation of smokers.

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<sup>302</sup> Thrasher JF, Rousu MC, Hammond D, Navarro A, Corrigan JR. Estimating the impact of pictorial health warnings and "plain" cigarette packaging: evidence from experimental auctions among adult smokers in the United States. *Health Policy*. Sep 2011;102(1):41-48. Also see Thrasher JF, Hammond D, Fong GT, Arillo-Santillan E. Smokers' reactions to cigarette package warnings with graphic imagery and with only text: a comparison between Mexico and Canada. *Salud publica de Mexico*. 2007;49 Suppl 2:S233-240. Also see Hammond D. Health warning messages on tobacco products: a review. *Tobacco control*. Sep 2011;20(5):327-337.

<sup>303</sup> Moodie C, Mackintosh AM, Hastings G, Ford A. Young adult smokers' perceptions of plain packaging: a pilot naturalistic study. *Tobacco control*. Sep 2011;20(5):367-373. Hoek J, Wong C, Gendall P, Louviere J, Cong K. Effects of dissuasive packaging on young adult smokers. *Tobacco control*. May 2011;20(3):183-188.

<sup>304</sup> When a smoker pulls out a cigarette package, the package becomes a marketing tool that is visible and transportable from setting to setting.

### ***Smoking cessation***

The scientific evidence surrounding pictorial HWLs, including plain packaging, also illustrates significant increases in current smokers quitting smoking.<sup>305</sup> For decades the public has been often misled about the impact of smoking on their health, thinking smoking may only cause lung disease but pictorial HWLs and most importantly plain packaging visually communicate the multiple effects of smoking, including heart disease, eye disease, gangrene, oral cancer, etc. Studies have shown that the more aware smokers are of these effects the more likely they are to quit smoking or significantly reduce the amount of cigarettes they smoke. Therefore if plain packaging is delayed, it minimizes the impact of governments to reduce the smoking prevalence levels, which causes not only important financial costs for the government but also social costs in terms of additional life years that could be gained by ex-smokers and eliminating the social norms and acceptability of smoking.

### ***Government health expenditures***

Several studies have also shown that pictorial HWLs are more effective in reducing tobacco consumption, which ultimately translates into less government expenditures spent on the treatment of patients who are smokers.<sup>306</sup> The declines in the smoking prevalence levels, even small declines, can equate to significant monetary savings for the government. These savings come from big declines in hospital admissions, healthcare costs, and overall

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<sup>305</sup> Mannoce A, Colamesta V, Mipatrini D, et al. From directive to practice: are pictorial warnings and plain packaging effective to reduce the tobacco addiction? *Public health*. Dec 2015;129(12):1563-1570. Also see Yong HH, Borland R, Hammond D, Thrasher JF, Cummings KM, Fong GT. Smokers' reactions to the new larger health warning labels on plain cigarette packs in Australia: findings from the ITC Australia project. *Tobacco control*. Mar 2016;25(2):181-187. Agaku IT, Filippidis FT, Vardavas CI. Effectiveness of text versus pictorial health warning labels and predictors of support for plain packaging of tobacco products within the European Union. *European addiction research*. 2015;21(1):47-52.

<sup>306</sup> Barendregt JJ, Bonneux L, van der Maas PJ. The health care costs of smoking. *The New England journal of medicine*. Oct 9 1997;337(15):1052-1057. Also see Sebrie EM, Sandoya E, Bianco E, Hyland A, Cummings KM, Glantz SA. Hospital admissions for acute myocardial infarction before and after implementation of a comprehensive smoke-free policy in Uruguay: experience through 2010. *Tobacco control*. Nov 2014;23(6):471-472.

treatment of patients. A delay in plain packaging would minimize the government's effort to dramatically reduce financial and social costs associated with smoking.

### ***Tobacco industry profits***

Due to the fact that young people are less likely to begin smoking and current smokers are more likely to quit or smoke fewer cigarettes when stronger HWLs are implemented, tobacco companies end up losing a significant amount of profits. While tobacco industry profits are difficult to measure since the companies are selective in which information they are willing to share to the public, studies have shown that the introduction of pictorial HWLs have resulted significant declines in the cigarette sticks sold, which is a direct reflection of cigarette sales and profits.<sup>307</sup> As a result, a delay in plain packaging allows the tobacco companies the time to continue to market to their products to consumers, including recruiting future smokers, which ultimately leads to more cigarettes sold and more profits for the companies.

### ***Diffusion of best practices***

As mentioned in chapter 2, tobacco industry documents reveal that tobacco companies have approached the issue of HWLs from an international approach since the 1970s and have attempted to prevent the diffusion of progressive and innovative HWLs for decades. In chapter 2, it was also evident that global tobacco companies coordinated at the international level in search for legal protection in international treaties to prevent the global diffusion of plain packaging during the 1990s. Internal tobacco industry documents reveal that corporate managers discussed using international trade agreements, which “could tie up legislators in litigation over a long period.”<sup>308</sup> In attempts to block Canada's push for strong HWLs in the early 1990s, tobacco companies were informed that there was

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<sup>307</sup> MacKenzie TD, Bartecchi CE, Schrier RW. The human costs of tobacco use (2). *The New England journal of medicine*. Apr 7 1994;330(14):975-980.

<sup>308</sup> Owen J. Tobacco Control Regulations. 22 January 1993. Available at: <http://legacy.library.ucsf.edu/tid/tqs48a99>.

“a slim chance of using the GATT mechanism for consultation in order to delay proceedings,”<sup>309</sup> but in the end realized trade agreements could be used to delay HWLs as one industry member commented, “Our experience with the GATT Technical Barriers to Trade procedure can therefore be said to have contributed to a postponement of 11 months of planned implementation.”<sup>310</sup> Furthermore, in attempts to block Australia’s push for strong HWLs in the early 1990s, tobacco companies internally discussed a fall back position, stating, “Using GATT procedures and technicalities it is possible to delay the implementation of the MCDS proposal.”<sup>311</sup>

Essentially the issue of plain packaging is not so much about one particular country such as Australia or New Zealand but the potential domino effect that could occur once more and more governments implement this best practice. Since the late 1980s and early 1990s Australia and New Zealand pioneered ideas for plain or generic packaging and the industry understood that if one country adopted plain packaging the other would surely follow. This was clear in 1993 when tobacco company executives in New Zealand warned colleagues about Australia’s recently adopted HWLs and plans for plain packaging by stating, “If past experience is anything to go by, similar initiatives in New Zealand cannot be far away.”<sup>312</sup> Overall tobacco companies understood early on that delaying plain packaging in one country or a couple countries meant stopping the diffusion of this optimal policy.

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<sup>309</sup> Clutterbuck J. Canadian Labelling-GATT. 8 April 1993. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=slxg0202>.

<sup>310</sup> Ibid.

<sup>311</sup> [unknown author]. Health Warnings in Australia. 14 July 1993. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=rkbv0200>.

<sup>312</sup> Owen, 1993.

### ***Impact of plain packaging in Australia as a reference point***

In February 2016, the Department of Health released its Post-Implementation Review (PIR) of plain packaging,<sup>313</sup> which was conducted since a regulatory impact assessment was not completed before the enactment of plain packaging. While the PIR of plain packaging is from Australia, it offers a glimpse into how well the regulation has done in the past 2.5 years, which is about how long the New Zealand government has delayed plain packaging. The PIR assessed the wide information collected from stakeholders, the peer-reviewed evidence, other publicly available data and estimates from their Regulatory Burden Measurement framework to analyze the effectiveness and efficiency of the plain packaging regulation.

#### ***Smoking initiation***

Overall the PIR concluded that plain packaging was having a positive impact on “reducing the appeal of tobacco products, reducing the potential for tobacco packaging to mislead consumers, and enhancing the effectiveness of graphic health warnings”<sup>314</sup> and that the regulation was “resulting in positive changes to smoking behaviors.”<sup>315</sup> Data from the National Drug Strategy Household Survey showed that the youth were significantly delaying the age from when they initiate smoking from 15.4 years in 2010 to 15.9 years in 2013. Since plain packaging is still in its early stages, it was difficult to accurately measure the full benefits in preventing smoking initiation, but the PIR explained the reasons this by stating:

It will take a longer time period for the full impact of the tobacco plain packaging measure – particularly on the next generation of children who will have never been exposed to tobacco advertising and promotion on tobacco packaging – to be reflected in initiation rates and then in smoking prevalence rates. This is because changes to initiation rates are slower to be fully reflected in prevalence statistics.<sup>316</sup>

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<sup>313</sup> Australia Department of Health. *Tobacco Plain Packaging Post-Implementation Review*. Canberra, Australia, 26 February 2016.

<sup>314</sup> *Ibid*, 56.

<sup>315</sup> *Ibid*, 32.

<sup>316</sup> *Ibid*, 33.

### *Smoking cessation*

The PIR revealed that all of the major data sources showed substantial declines in the smoking prevalence following the implementation of plain packaging. In particular, the Department of Health worked with Analysis Group Inc. and Dr. Tasneem Chipty to analyze the Roy Morgan Research data set, which documented prevalence rates from January 2001 to September 2015, to see what impact plain packaging had made in this early stage. Dr. Chipty used a regression analysis to account for the impact of other tobacco control measures (e.g. increases in tobacco taxes) and estimated that plain packaging reduced the average smoking prevalence by 0.55 percentage points and noted that the estimated “effect is likely understated and is expected to grow over time.”<sup>317</sup> The analysis illustrated that in the 34 months (2 years and 10 months) after plain packaging was implemented the smoking prevalence dropped from 19.4% to 17.2% (2.2% decline), and the 0.55% of that drop (or about 25%) was from plain packaging. Most importantly, Dr. Chipty concluded that plain packaging succeeded “in reducing smoking prevalence beyond trend.” Other data from the National Drug Strategy Household Survey shows that daily smoking prevalence significantly dropped from 15.1% in 2010 to 12.8% in 2013, a drop of 15%.

### *Government health expenditures*

The PIR estimated that the total cost to government to implement plain packaging was about \$12.69 million over ten years (\$1.27 million annually) for compliance and enforcement and communications materials. Benefits of the measure were unable to be monetized precisely because the full-benefits are expected to be realized in the long term but “even a drop in smoking prevalence of 0.07 percentage points (or 15,057 people) evenly distributed over ten years would generate an estimated monetary value equivalent of \$273

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<sup>317</sup> Ibid, 36.

million,”<sup>318</sup> (\$27.3 million annually). If we apply Dr. Chipty’s analysis that the smoking prevalence dropped by 0.55 percentage points in 34 months (0.19% annually) that would be equivalent to \$74.1 million in annual savings and \$72.83 million in annual net savings (\$74.1 million savings-\$1.27 million costs). The PIR concluded, “This illustrative example shows how small decreases in smoking rates can have sizable monetized impacts.”

#### *Tobacco industry profits*

The tobacco companies did not provide data on the impact of plain packaging on their sales or profits, but other potential impacts on tobacco companies were identified, including the potential impacts on production costs. Estimated costs for the regulatory burden for the entire industry (including manufacturers, importers, wholesalers, and retailers) was about \$73.87 million over ten years (\$57.37 million for packaging compliance costs, \$11.42 million for plant and machinery costs, \$2.1 million in transitional costs, and 1.95 million for retailer education costs). However in the long run, manufactures admitted that standardized plain packs would be substantially cheaper to produce.

The PIR also revealed that the data collected all showed declines in the volume of tobacco sales. The Australian Treasury data, which does include the increases in tobacco excise taxes, shows that net tobacco clearances (an indicator of tobacco volumes) dropped by 11% from 2012 to 2014. The Australian Bureau of Statistics released figures that showed a reduction in household expenditure of over 20% from 2012 to 2015, a drop from \$4,227 billion to \$3,366 billion.

#### *Diffusion of best practices*

Of course the PIR did not examine the diffusion effect, as it would be impossible to quantify the impact of delaying the diffusion of plain packaging regionally and globally due to all of the various explanatory variables in a complex world. At the very least we can still

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<sup>318</sup> Ibid, 54.



say that the delay in each country would amount to similar minimized effects of reducing smoking initiation, smoking cessation, government health expenditures, and tobacco industry profits as in Australia. However once plain packaging is implemented in more countries and a tipping point is reached, we will likely see the rapid diffusion of plain packaging globally. Previous experiences in relation to HWLs have demonstrated this diffusion effect. For example, in the 1960s following the enactment of textual warnings in the U.S. several countries were soon to follow at an exponential rate,<sup>319</sup> and similarly in the 2000s following the ratification of the FCTC several countries were quick to implement pictorial HWLs.<sup>320</sup> Therefore plain packaging is expected to follow a similar pattern.

## **Section II: Similarities between Australia and New Zealand**

### **Similar policy environments conducive for plain packaging**

In comparing Australia and New Zealand we can see several similarities between both countries where we would expect similar timeframes for enacting and implementing plain packaging. Both countries provide policy environments conducive for introducing and implementing plain packaging in a reasonable timeframe (2 years) in parliament. These similarities include governance and development, bi-partisan support for tobacco control, the effectiveness of tobacco control, and the industry's presence and credibility (Table 4:3).

#### ***Governance and development***

Both countries are developed, high-income countries with long established democracies under a constitutional monarchy and parliamentary system.

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<sup>319</sup> Hiilamo H, Crosbie E, Glantz SA. The evolution of health warning labels on cigarette packs: the role of precedents, and tobacco industry strategies to block diffusion. *Tobacco control*. Jan 2014;23(1):e2.

<sup>320</sup> Canadian Cancer Society. *Cigarette Package Health Warnings: International Status Report*, September 2014.

Table 4:3: Australia and New Zealand similarities		
Background control variables	Australia	New Zealand
Governance and development	<b>Very high</b> -Voice and accountability: Very high -Political stability: Very high -Government effectiveness: Very high -Economic development: Very high -Income level: Very high	<b>Very high</b> -Voice and accountability: Very high -Political stability: Very high -Government effectiveness: Very high -Economic development: Very high -Income level: Very high
Bi-partisan support for tobacco control	<b>High</b> -Center-left and left progressive approach: Very high -Center-right bi-partisan support: High	<b>High</b> -Center-left and left progressive approach: Very high -Center-right bi-partisan support: High
The effectiveness of tobacco control	<b>Very high</b> -General public health: Very high -Smoking prevalence: Very low -Public support for tobacco control: Very high -Effective tobacco control regulations: Very high -Tobacco control advocacy: Very high -International health support: Moderate	<b>Very high</b> -General public health: Very high -Smoking prevalence: Very low -Public support for tobacco control: Very high -Effective tobacco control regulations: Very high -Tobacco control advocacy: High -International health support: High
Tobacco industry presence and credibility	<b>Very low</b> -Farming & manufacturing: Very low -Public credibility: Very low -Public presence: Very low -Political donations: Very low	<b>Very low</b> -Farming & manufacturing: Very low -Public credibility: Very low -Public presence: Very low -Political donations: Low
Regulatory process control variables		
Magnitude of tobacco industry trade threats	<b>Very high</b> -General threats: Very high -Legal and reputational costs: Very high -Framing as trade issue: Very high -Recruiting and funding: Very high	<b>Very high</b> -General threats: Very high -Legal and reputational costs: Very high -Framing as trade issue: Very high -Recruiting and funding: Very high
Magnitude of “other” tobacco industry arguments	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High
The effectiveness of tobacco control against “other” industry arguments	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High
Government reception of tobacco industry (non-trade) arguments	<b>Very low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low	<b>Very low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low
<b>-Scale: Very low, low, moderately low, moderate, moderately high, high, very high</b>		

In measuring governance, the World Bank’s Worldwide Governance Indicators, which includes six key dimensions of governance (government effectiveness, rule of law, voice and accountability, political stability and lack of violence, regulatory quality, and control of

corruption) score Australia and New Zealand both in the 90-100<sup>th</sup> percentile.<sup>321</sup> In measuring democracy, the Economist Intelligence Unit's Democracy Index, which is based on 60 indicators that measure pluralism, civil liberties, and political culture, recognize both Australia and New Zealand as "full democracies".<sup>322</sup>

### ***Bi-partisan support for tobacco control***

Although several political parties exist, each country has essentially a two-party system that has been either governed by center-right or center-left parties since the 1930s. Whereas center-left parties are ideologically inclined to increasingly involve the government to regulate tobacco advertising and smoking in public places, center-right parties favor less government involvement and focus more on prevention strategies through educational programs but view increases in tobacco taxes as important revenue sources. Yet despite these ideological differences, both center-left and center-right parties recognize the dangers of smoking and the diminishing perception of tobacco companies, which has increasingly resulted in political parties rejecting tobacco company donations and participation.

Broadly speaking, center-left parties in both countries have been more aggressive in promoting and producing tobacco control legislation, while center-right parties have been less aggressive but have been supportive in bi-partisan efforts to reduce tobacco use. Sometimes though center-right parties have helped introduce and implement progressive tobacco control policies. For example, in Australia, the center-right party introduced graphic pictorial HWLs while in New Zealand, the center-right party introduced bans on tobacco advertising, both world leading and progressive tobacco control policies. This cross-bench

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<sup>321</sup> World Bank. *Worldwide Governance Indicators: Country Data Report for Australia, 1996-2014*. Geneva, Switzerland, January 2014. World Bank. *Worldwide Governance Indicators: Country Data Report for New Zealand, 1996-2014*. Geneva, Switzerland, January 2014.

<sup>322</sup> The Economist Intelligence Unit. *Democracy Index 2014: Democracy and its discontents*. New York, January 2014.

support from center-right parties is also due to the fact that some policymakers were former medical practitioners, who have directly treated patients affected by tobacco use. Additionally, some policymakers from these parties have lost close family members and friends from tobacco use and as a result have experienced first hand the effects of tobacco. These policymakers understand the health implications from tobacco and for the most part have felt that the scientific evidence has been sufficient to support the advancement of progressive public health policies to reduce tobacco use.

### ***The effectiveness of tobacco control***

In terms of public health and in particular tobacco control, both countries have been global leaders. Each country has high life expectancy, low infant mortality, low health expenditure per capita, and a strong national healthcare system. Both governments have adopted some of the world's first tobacco control initiatives, including health warning labels, restrictions on smoking in public places, and bans on tobacco advertising. Additionally, both governments were early signatories to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) in 2003 and then ratified the convention in 2004. Following commitments to the FCTC, both governments before embarking on their plain packaging proposals established long term health goals. In 2009, the Australian government adopted a goal to be the healthiest country in the world by 2020, which included decreasing the smoking prevalence to 10% of the population by 2018. In 2010, the New Zealand government adopted a goal to become smokefree by 2025 by lowering the smoking prevalence in the country to 5%.

Much of the success in tobacco control can be attributed to the scientific evidence produced regarding tobacco use and the advocacy work conducted by public health groups in both countries. Public health groups have been instrumental in driving and shaping tobacco control legislation by producing media advocacy campaigns, issuing press releases,

and issuing submissions during the policymaking process. Overall public health groups have assisted policymakers in implementing strong tobacco control regulations in the areas of smokefree environments, tobacco advertising, tobacco taxation, and HWLs. As a result, tobacco control efforts helped shape the policy environment and position each government to introduce plain packaging as the “next logical step” in regulating tobacco. Meanwhile these efforts have altered the social acceptability of smoking and have led to strong decreases in the smoking prevalence in both countries. Although each Australia and New Zealand continue to face challenges with reducing tobacco consumption with indigenous groups, both lead the world in overall smoking prevalence at 14% and 15% respectively.

### ***Tobacco industry presence and credibility***

The main tobacco companies in Australia and New Zealand consist of British American Tobacco (BAT), Philip Morris International (PMI), and Imperial Tobacco. Tobacco production and the overall presence of tobacco companies in each country has dramatically declined since the 1990s. This shift has coincided with the changing social norms surrounding smoking and tobacco company behavior as favorable attitudes and public credibility of tobacco companies has dramatically waned since the 1990s. Furthermore, since the ratification of the FCTC in both countries in 2004, tobacco companies have been increasingly removed from political legislative drafting process and some political parties have refused accepting tobacco company donations further weakening the tobacco companies’ attempts to influence policymakers. As a result, tobacco companies have had to operate behind the scenes, often supporting front groups and funding industry-inspired “independent” research to oppose government regulations.

### **Similarities during the regulatory process of plain packaging**

Throughout the policy process of plain packaging there also existed several similarities between both countries where one would expect similar timeframes for

enacting and implementing plain packaging. The tobacco companies mounted similar opposition to plain packaging, health groups were similarly effective in countering all non-trade arguments, and both governments similarly rejected all non-trade arguments.

### ***Tobacco industry opposition to plain packaging***

The main tobacco companies in Australia and New Zealand, Philip Morris, British American Tobacco, and Imperial Tobacco mounted similar opposition to the plain packaging proposal, including the deployment of trade threats and arguments complaining that plain packaging would not work at reduce smoking rates, would lead to an increase in illicit tobacco, and would cause problems for retailers (Table 4:4 and Table 4:5). The tobacco companies presented these arguments in their submissions to parliament,<sup>323</sup> in press releases, media campaigns, and in comments to the media throughout the policymaking process in both countries.

### ***Tobacco industry trade threats***

As described in detail in chapter 3, the magnitude of tobacco industry trade threats in both countries has been high and consisted of a multi-pronged approach. This approach included, 1.) the general threat of violating intellectual property rights and international treaties, 2.) the legal and reputational costs of international arbitration and potential compensation, 3.) framing the health issue in terms of broad violations of business intellectual property rights and investments, and 4.) recruiting business support and

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<sup>323</sup> British American Tobacco Australia Limited. *Submission to the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 July 2011. Imperial Tobacco Australia Limited. *Inquiry into Plain Tobacco Packaging*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 July 2011. British American Tobacco New Zealand. *Submission opposing the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 28 March 2014. Philip Morris (New Zealand) Limited. *Submission on the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 28 March 2014. Imperial Tobacco New Zealand Limited. *Submission on Smokefree Environments (Tobacco Plain Packaging) Amendment Bill*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 9 April 2014.

funding research to strengthen credibility and promote uncertainty and concern. Although in New Zealand the trade threats made references to the Australian experience, the multi-pronged strategy, the arguments, and the magnitude of the threat were very similar.

*“Plain packaging will not work” argument*

In Australia, tobacco companies consistently argued that plain packaging had never been implemented and that there was no evidence that it would work. Tobacco companies complained that the government had not released any real or credible evidence that the plain packaging proposal would discourage youth smoking initiation or cause increases in cessation of existing smokers. Instead the government relied on bodies of literature that addressed the potential effect on consumer purchasing power, which the tobacco companies complained was irrelevant to the issue of plain packaging. In addition, tobacco companies repeatedly stated that no country had implemented plain packaging due to a lack of an accurate and calculated impact assessment on the reduction in smoking rates. Similar to the legal threats, the companies recited statements by previous Australian governments and other governments, which rejected plain packaging to illustrate that there was no real evidence and that proponents of plain packaging relied on estimated calculations that were unproven.

In New Zealand, tobacco companies argued that plain packaging in Australia had caused an increase in tobacco sales and did not lower the prevalence level of smoking. Tobacco companies argued that despite consecutive years of decline in legal domestic tobacco sales, during the first year following the implementation of plain packaging the legal market volume increased by 0.3% or approximately 59 million sticks. Tobacco companies also claimed that not one study had been produced showing that the prevalence level of smoking had declined. They also argued that no evidence existed to show that youth smoking prevalence rates had dropped, which they argued was the design of the policy to

prevent smokers from initiating. Overall these arguments centered on the Australian experience and that plain packaging was not reducing the number of people who smoke or who begin smoking in Australia and that it would not work in New Zealand.

*“Plain packaging will lead to an increase in illicit tobacco” argument*

The tobacco companies in Australia argued that plain packaging would make counterfeiting easier and overall increase contraband and consumption of illicit tobacco. The tobacco companies argued that the majority of counterfeit cigarettes are in simple and plain packages so the introduction of plain packaging would make it relatively easier to counterfeit. The companies emphasized that counterfeiting is an increasing problem globally as tobacco products are one of, if not the mostly smuggled product in the world. They claimed that with the increase in the consumption of illicit tobacco and contraband that the government would lose substantial tax revenues. They cited an industry-funded report by Deloitte that “taxpayers are losing out on almost \$1.1 billion in excise revenue.”<sup>324</sup> Finally tobacco companies argued that due to low sale prices and increased availability, an increase in illicit tobacco could increase smoking prevalence rates.

In New Zealand, tobacco companies again used the Australian experience to claim that since the implementation of plain packaging, illicit trade had increased to record levels. In particular, tobacco companies cited a study by KPMG that found that illicit tobacco consumption had increased from 8.3% in 2007 to 13.3% and most importantly up from 1.5% since the plain packaging law came into effect in Australia in 2012. The tobacco companies also claimed that with the increase in illicit trade and contraband that the government was losing substantial tax revenues and could lead to increased smoking prevalence rates due to low sale prices.

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<sup>324</sup> British American Tobacco New Zealand Submission, 18.



	Policy recommendation	Cabinet review and proposal	Department of Health & Age consultation	House Health & Ageing Committee	House Second Reading	Senate's Legal Affairs Committee	Senate Second Reading	Final Vote and Approval in Full House	Implementation
Timeframe	9/1/09	9/09-4/29/10 (7 months)	4/7/11-6/6/11 (2 months)	7/13/11-8/22/11 (1 month)	8/24/11	8/18/11-9/19/11 (1 month)	10/11/11	11/21/11	12/1/12
Will not work	Rejected argument and offered supporting evidence	Rejected argument and offered supporting evidence	Rejected argument and offered supporting evidence	Rejected argument and offered supporting evidence	Labor & Greens MPs rejected argument and offered supporting evidence -Some Coalition MPs agreed	Did not address	Labor & Greens MPs rejected argument and offered supporting evidence -Some Coalition MPs agreed		
Will increase consumption of illicit tobacco	Acknowledged but argued that FCTC draft protocol mandate tax markings to combat illicit trade	Did not address	Acknowledged arguments but also acknowledged that industry routinely exaggerates illicit trade	Rejected argument as government figures are reliable and industry estimates were overstated	Labor & Greens MPs rejected argument and offered supporting evidence -Some Coalition MPs agreed	Did not address	Labor & Greens MPs rejected argument and offered supporting evidence -Some Coalition MPs agreed		
Will create problems for retailers	Did not address	Did not address	Acknowledged arguments but also acknowledged packs will print variant names	-Acknowledged arguments but considered issues beyond the purview of the committee	Labor & Greens MPs rejected argument and offered supporting evidence -Some Coalition MPs agreed	Did not address	Labor & Greens MPs rejected argument and offered supporting evidence -Some Coalition MPs agreed		
Will violate international treaties	Acknowledged but argued that international agreements provide flexibilities and exceptions to protect public health	Rejected argument and responded by saying they had received firm legal advice -Rejected negative reputational impact	-Rejected use of trademark arguments -Introduced Trade Marks Amendment bill to prevent any ambiguity between	-Acknowledged arguments but considered issues beyond the purview of the committee	Labor & Greens MPs questioned argument -Several Coalition MPs raised concerns	-Acknowledged trade arguments but only addressed authority of Trade Marks Amendment bill	Labor & Greens MPs questioned argument -Several Coalition MPs raised concerns		

Table 4:5: Plain packaging regulatory development process in New Zealand									
	Policy recommendation	Cabinet review and proposal	Ministry of Health consultation	Cabinet papers and formal introduction	House First Reading	House Select Committee	House Second Reading	Final Vote and Approval in Full House	Implementation
Timeframe	11/10	11/10-4/4/12 (17 months)	7/23/12-11/24/12 (4 months)	11/27/12-12/17/13 (13 months)	2/11/14	2/14/14-8/5/14 (6 months)	Pending...	Pending...	Pending...
Will not work	Rejected argument and offered supporting evidence	Rejected argument and offered supporting evidence	Rejected argument and offered supporting evidence	Rejected argument and offered supporting evidence	Majority of MPs rejected argument and offered supporting evidence Only two MPs agreed	Rejected argument and offered supporting evidence			
Will increase consumption of illicit tobacco	Did not address	Did not address	Did not address	Did not address	Did not address	Rejected argument as no credible evidence to support an increase			
Will create problems for retailers	Did not address	Did not address	Acknowledged adjustments but did not accept them as problems	Acknowledged adjustments but did not accept them as problems	Only one MP (NZ First) addressed argument and agreed	Rejected argument as estimates were overstated			
Will violate international treaties	Acknowledged but did not address	Acknowledged but did not address	Acknowledged high risk of potential litigation, positive and negative reputational impact, and estimates of trade challenges	-Acknowledged high risk of potential litigation, positive and negative reputational impact, and estimates of trade challenges -Rejected slippery slope and use of trademark arguments	Majority of MPs rejected arguments and argued against delay and government "wait and see" approach -Some MPs addressed concerns	-Acknowledged Australia trade challenges -Agreed that bill was consistent with international obligations and bill could move on if risks were reassessed -Rejected slippery slope and use of trademark arguments			

*“Plain packaging will cause problems for retailers” argument*

In Australia, tobacco companies argued that plain packaging would lengthen transaction times, and confuse consumers. Tobacco companies argued that if all of the packages looked the same except by brand and variant name at the bottom then it would take the retailer considerably longer time to identify and retrieve the requested cigarette pack. More importantly, the Alliance of Australian Retailers (AAR), a tobacco industry funded front group (see below), emphasized these concerns and offered “independent” research (also funded by the tobacco companies) to support these claims. The tobacco companies and AAR continued to argue that these problems would lead to inevitable delays and thus increase the transaction times for customers, ultimately effecting customer service and sales. At the same time the consumers would also be confused to navigate and select the correct blend or style of tobacco they prefer. As a result, tobacco companies and their front groups argued that both the retailers and the consumers would be frustrated and plain packaging would only cause unnecessary problems.

In New Zealand, the arguments again shifted towards the Australian experience and how retailers have raised serious concerns about the impact on their businesses. Tobacco companies referred to retailer complaints about the implementation costs and the added complexity of what otherwise would be simple transactions. Philip Morris funded an Australian based research group, Roy Morgan Research, to survey small retailers in Australia nine months after the law was implemented to assess the impact of plain packaging on their businesses. These surveys reported that high percentages of retailers claimed that plain packaging had a negative impact on their business, increased the time to serve customers, and that the Australian government did not at all consider the needs of

small business in tobacco regulation. Tobacco companies also highlighted that the New Zealand Association of Convenience Stores was issuing the same concerns.

***Tobacco control support for bill passage and counter efforts***

Health groups in both countries were instrumental in initiating and guiding proposals for plain packaging by producing important media advocacy campaigns, issuing press releases, identifying political champions in tobacco control and presenting policymakers with concrete scientific evidence regarding plain packaging. Additionally, health groups applied similar strategies to counter tobacco industry opposition to the plain packaging proposals. While tobacco control advocates in New Zealand do not have the same high level of organization, communication, collaboration and trust among a robust civil society that has worked on tobacco control for decades, they have greatly benefited from the advocacy work done in Australia and their assistance during the policymaking process that strengthened their efforts to support the bill's passage and counter tobacco industry (non-trade) arguments.

*Countering industry "will not work" argument*

As mentioned earlier Australia is home to some of the leading tobacco control researchers in the world and throughout the policy process these researchers produced several Australian studies that illustrated that removing the standardizing colors and wording from tobacco packages significantly reduced the false beliefs about the harmfulness of tobacco. Other studies demonstrated that presenting tobacco products in plain packaging had less appeal and conveyed less positive connotations about the typical smoker. This robust scientific evidence was then used by tobacco control advocates and

cited in parliamentary submissions,<sup>325</sup> and in the media to convince policymakers the plain packaging proposal would reduce tobacco use and discourage youth smoking initiation.

While tobacco control researchers and advocates in New Zealand have not produced as many studies or have the depth of advocates, they have benefited from the close proximity to Australia, the international research on health warnings, and the support they have received from Australian tobacco control colleagues. As a result, tobacco control advocates were able to use this evidence and leverage this assistance in parliamentary submissions,<sup>326</sup> and in the media to also convince policymakers the plain packaging proposal would reduce tobacco use and discourage youth smoking initiation.

#### *Countering industry "illicit tobacco" argument*

In Australia, tobacco control advocates used evidence gathered internationally that tobacco companies have a long history of greatly distorting and exaggerating issues related to illicit tobacco and referred to official government data to refute such exaggerations. Several studies now exist that have used previously secret tobacco industry documents to reveal that tobacco companies exaggerate claims about illicit tobacco and illicit trade of tobacco in attempts to create concerns with policymakers about unintended

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<sup>325</sup> Action on Smoking and Health Australia. *Submissions on the Tobacco Plain Packaging Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 July 2011. Cancer Council Australia et al. *Submissions on the Tobacco Plain Packaging Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 26 July 2011. Public Health Association Australia. *Submissions on the Tobacco Plain Packaging Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 26 July 2011.

<sup>326</sup> Cancer Society of New Zealand. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. Heart Foundation New Zealand. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 25 March 2014. Smokefree Coalition. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. ASPIRE 2025. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. Action on Smoking and Health New Zealand. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014.

consequences.<sup>327</sup> Advocates used these studies to expose the tobacco company's consistent strategy and then referenced official government data from border security that illicit tobacco was a minor issue. For example, advocates pointed out that government data revealed that illicit tobacco has never reached higher than 3% of the cigarette market and that the industry was claiming illicit trade represented about 10-15%. Tobacco control advocates in New Zealand used these same studies and applied similar counter strategies in parliament submissions and in the media to refute the exaggerated claims by tobacco companies.

#### *Countering industry "retailer problem" argument*

In February 2011 in the middle of the policymaking process and before the parliamentary debates, a representative of the tobacco companies leaked documents to one of the tobacco control advocates that revealed that the tobacco companies had created the front group AAR and were funding their operations.<sup>328</sup> The documents also revealed that these operations were being run from London and New York and informing retailers on what arguments should be made in parliament and in the media. The tobacco control advocates shared these documents with ABC TV's Lateline, a popular television program, which ran the story and exposed the tobacco companies' sneaky tactics. Several tobacco control advocates stated that if this campaign and subsequently these arguments had

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<sup>327</sup> Joossens L, Lugo A, La Vecchia C, Gilmore AB, Clancy L, Gallus S. Illicit cigarettes and hand-rolled tobacco in 18 European countries: a cross-sectional survey. *Tobacco control*. May 2014;23(e1):e17-23. Also see Gilmore AB, Rowell A, Gallus S, Lugo A, Joossens L, Sims M. Towards a greater understanding of the illicit tobacco trade in Europe: a review of the PMI funded 'Project Star' report. *Tobacco control*. May 2014;23(e1):e51-61. Joossens L, Gilmore AB, Stoklosa M, Ross H. Assessment of the European Union's illicit trade agreements with the four major Transnational Tobacco Companies. *Tobacco control*. May 2016;25(3):254-260.

<sup>328</sup> Lloyd P. The tobacco files. *Lateline*. 10 September 2010. <http://www.abc.net.au/lateline/content/2010/s3008987.htm>.

gained any momentum and traction, it was lost due to the leaked documents and this exposure.<sup>329</sup>

In New Zealand, even though tobacco control advocates were acutely aware of the exposure of this tactic in Australia, the advocates pointed to the success in Australia of assisting retailers with adjusting to the new policy. This included advocates emphasizing suggestions for organization methods and stocking practices that would reduce transaction times and improve customer service (see below).

### ***Government reception and rejection of tobacco industry (non-trade) arguments***

Throughout the policymaking process, policymakers acknowledged the efforts by tobacco control advocates in providing concrete scientific evidence in support of plain packaging and admitted that they were not that impressed with tobacco industry (non-trade) arguments. As a result these arguments and strategies were not very influential in preventing, weakening, or delaying plain packaging in either country.

### ***Government rejection of industry “will not work” argument***

Throughout the regulatory process in Australia, the government rejected the notion that plain packaging would not reduce tobacco use. The Australian Cabinet, Department of Health, Health Select Committee and several MPs acknowledged that studies have shown that packaging plays a significant role in the marketing of tobacco products and these products sold in plain packaging were perceived as less appealing and attractive. The government recognized that plain packaging had never been introduced but considered that introducing plain packaging “demonstrates Australia’s willingness to take the lead in

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<sup>329</sup> Rob Moodie. Interview by Eric Crosbie. Melbourne, Australia; 30 June 2015. Simon Chapman. Interview by Eric Crosbie. Sydney, Australia; 10 July 2015. Michael Moore. Interview by Eric Crosbie. Canberra, Australia; 23 June 2015.

tobacco control, a role that Australia has taken in the past.”<sup>330</sup> The government also realized that tobacco companies had employed the same arguments that they were using to oppose plain packaging but recognized that “research has shown that over time many of these tobacco control measures have been effective in reducing the smoking rate.”<sup>331</sup> There were some MPs from center-right and right parties that argued during the parliamentary debates in the House and Senate and in the media that the proposal would not work, but the overwhelmingly majority did not object to the scientific evidence surrounding branding and plain packs.

Similarly during the regulatory process in New Zealand, the government consistently dismissed industry arguments that plain packaging would not work at reducing smoking rates. The government noted that “the weight of evidence is strongly in support of plain packaging”, that it reduced the “false beliefs about the harmfulness of tobacco products,” was “part of the Government’s wider, comprehensive package of tobacco control measures,” and helped “New Zealand meet its international obligations and commitments under the WHO Framework Convention on Tobacco Control.”<sup>332</sup> Other government reports added that officials considered the evidence in favor of plain packaging to be robust while the analysis presented and submitted by tobacco companies was “more piecemeal, of demonstrably lower quality, and of less direct relevance to the objectives of the Bill.”<sup>333</sup> There were a few MPs from center-right and right parties that argued during the

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<sup>330</sup> Commonwealth of Australia. *Advisory Report on the Tobacco Plain Packaging Bill 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 22 August 2011.

<sup>331</sup> *Ibid*, 18.

<sup>332</sup> Commonwealth of New Zealand. *Tobacco Plain Packaging: Approval for Drafting*. Wellington, New Zealand: Cabinet Social Policy Committee, 21 August 2013.

<sup>333</sup> New Zealand Ministry of Health. *Smoke-Free Environments (Tobacco Plain Packaging) Amendment Bill Departmental Report*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 18 June 2014.



parliamentary debates and in the media that the proposal would not work, but the overwhelmingly majority did not object to the scientific evidence surrounding plain packs.

*Government rejection of industry “illicit tobacco” argument*

Throughout the regulatory process in Australia, the government rejected the argument that plain packaging would lead to an increase in illicit tobacco. This dismissal was based on the government’s confidence in its own official data from the border protection and customs agency. The government recognized that the commissioned research from the tobacco companies was considerably higher than the government’s official figures, which they claimed, “to be more reliable due to the rigour of research undertaken.”<sup>334</sup> The government also noted consistently that it had a strong customs and quarantine regime and that counterfeit tobacco products could be solved through the adoption of sophisticated anti-counterfeiting measures. Although some MPs voiced concerns about potential increases in illicit tobacco during parliamentary debates, overall these arguments were not found to be convincing.

Similarly in New Zealand, the government also discarded industry arguments about potential increases in illicit tobacco. The New Zealand government also felt confident in their own official data, which showed that illicit tobacco represented a very small proportion of tobacco consumption at about 1-2%. Also the government claimed that there was no credible evidence that it would be worse with plain packaging. This was in stark contrast to the industry’s figures, which placed illicit tobacco around 10-15%. Finally the allowance of identification codes and anti-counterfeiting markings were mentioned as strategies to minimize illicit tobacco use. Again a few MPs expressed concerns about illicit tobacco but this argument did not gain traction in New Zealand.

*Government rejection of industry “retailer problem” argument*

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<sup>334</sup> Advisory Report on the Tobacco Plain Packaging Bill 2011, 18.

In Australia, the government dismissed that plain packaging would cause problems for retailers but did attempt to assist retailers with suggestions on how to adjust to the new policy. There was some concerns expressed during parliamentary debates in the House and Senate, but the majority of MPs did not find the argument to be convincing. In addition, a few MPs claimed that the exposure and shame of AAR as a “body set up by big tobacco” which was funded by “a mass media counter campaign.”<sup>335</sup> However instead of completely dismissing the concerns by retailers, the government worked with retailers with adjusting to the new policy, including suggestions of organization stocking methods and practices. For example, the government suggested organizing the cigarette packages in alphabetic order to reduce transaction times and improve customer service.

In New Zealand, the government also dismissed industry arguments about problems for retailers. The government questioned the claims of increased transaction times and stated on several occasions that, “the impact on business has been overstated, both in retailer opinion surveys and in industry submissions.”<sup>336</sup> The New Zealand government also advised retailers on organization stocking methods and practices. Furthermore the issue was not raised during the entire parliamentary debate suggesting that these arguments were not gaining any traction.

Overall we can conclude that these other arguments and mounted opposition from the tobacco companies did not have a significant impact in either Australia or New Zealand in preventing, weakening, or delaying plain packaging. Therefore when holding all of these similar variables constant, it becomes increasingly clear that the divergence (delay or no delay) in the policy process of plain packaging was a direct result from the reception of tobacco industry trade threats.

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<sup>335</sup> Commonwealth of Australia. *Tobacco Plain Packaging Bill 2011 Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 Second Reading*. Canberra, Australia: House of Representatives, 24 August 2011.

<sup>336</sup> New Zealand Ministry of Health Report, 32.

### **Section III: Explaining the divergence in the dependent variable: “Delay” in plain packaging**

The fundamental difference in these two similar case studies that helps explain the delay of plain packaging in New Zealand in relation to Australia is the reception of tobacco industry trade threats. As demonstrated in chapter 3, Australia took a bold and determined stance against tobacco companies and viewed the trade threats as desperate, frantic, and a direct attack on national sovereignty, while New Zealand took a more cautious and pragmatic stance viewing the threats as credible and plausible, which has allowed a significant delay in the development process of plain packaging. The reception of the tobacco industry trade threats in both contexts was driven by three key factors, the partisan identification of government, the ministerial leadership and capacity of the Health Ministry, and tobacco control advocacy on tobacco and trade (Figure 1). This section highlights the variance in these three variables and how they shaped the reception of the trade threats, which ultimately led to a reasonable timeframe to complete plain packaging in Australia but has caused an important delay in the process in New Zealand.

#### ***Partisan identification of government (partisanship on tobacco and trade)***

In the literature on partisanship and social policy, left leaning parties have tended to drive progressive labor, health, and environmental measures and regulations through expansive government efforts, while right leaning parties have tended favor more private led efforts with less government involvement.<sup>337</sup> While several scholars have demonstrated the impact of partisan preferences on policy formation and pointed to sharp partisan differences and divergence in policy content,<sup>338</sup> the enactment and results of social policies

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<sup>337</sup> Garrett G. *Partisan Politics in the Global Economy*. New York City, United States: Cambridge University Press; 1998. Also see Gerber E. Partisanship and Local Climate Policy. *Journal of Policy Development and Research*. 2013;15(1):107-124. Shipan C, Lowry W. Environmental Policy and Party Divergence in Congress. *Political Research Quarterly*. June 2001;54(2):245-263.

<sup>338</sup> Hartman S. *Partisan Policy-Making in Western Europe: How Ideology Influences the Content of Government Policies*. Mannheim, Germany: Springer VS; 2015. Also see Huber E, Stephens JD.

are less clear often ushering mixed results, especially when measuring social expenditures and preservation of welfare programs.<sup>339</sup> Tobacco control to a degree exemplifies this as left-leaning parties often propose and implement progressive policies such as plain packaging, while right leaning parties focus on educational lead efforts and raising tobacco taxes as important revenue measures,<sup>340</sup> which are extremely effective in reducing tobacco consumption and smoking prevalence levels.

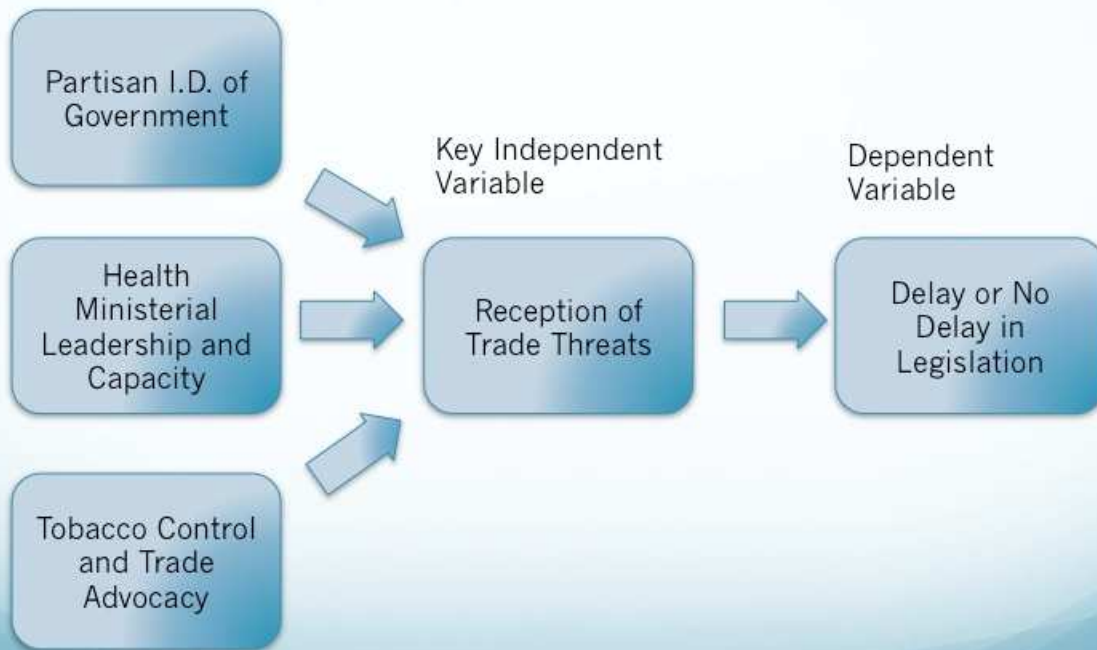
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*Democracy and the Left: Social Policy and Inequality in Latin America*. Chicago, United States: University of Chicago Press; 2012.

<sup>339</sup> Rueda D. *Social Democracy Inside Out: Partisanship and Labor Market Policy in Industrialized Democracies*. New York City, United States: Cambridge University Press; 2007.

<sup>340</sup> Glantz S, Balbach ED. *Tobacco War: Inside the California Battles*. San Francisco: University of California Press; 2000.

Independent Variables



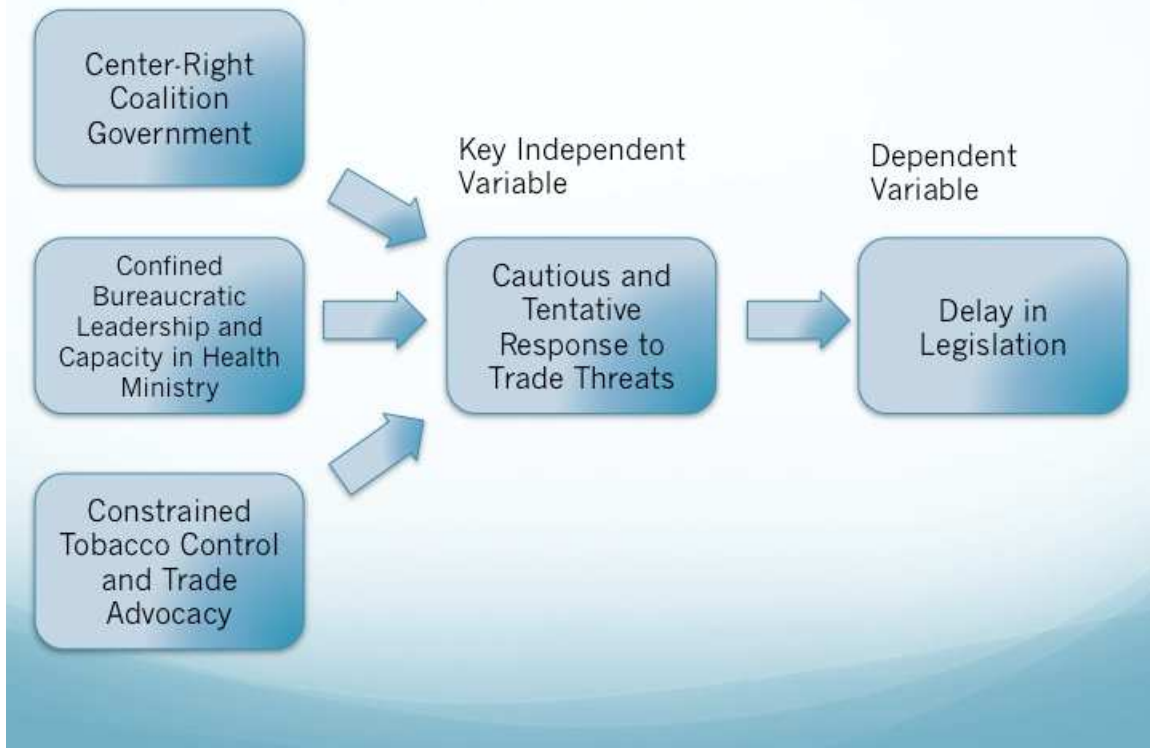
Independent Variables

## Australia



Independent Variables

## New Zealand



While there has been a rising convergence towards bi-partisan support for tobacco control measures due to the increased public awareness about the effects of smoking and the exposure of tobacco industry misconduct, there still remains a stark divergence in partisanship in relation to trade and health and more specifically trade and tobacco. Similar to the literature on partisanship and social policy, the literature on partisanship and trade policy illustrates there are important partisan divisions on trade policy formation.<sup>341</sup> Typically left-leaning parties favor protectionist policies or more restrictive free trade policies whereas right-leaning parties advocate for strong neoliberal trade policies, although as some authors have pointed out globalization has forced some left-leaning parties towards more expansionary free trade positions.<sup>342</sup> Voting records of policymakers

<sup>341</sup> Milner H, Judkins B. Partisanship, Trade Policy, and Globalization: Is There a Left-Right Divide on Trade Policy? *International Studies Quarterly*. 2004;41(1):95-119.

<sup>342</sup> Ibid.

tend to confirm these positions as trade policies are typically passed across party lines and thus mostly driven by partisan preferences.

Given the lack of convergence on international trade and health governance, parties have also had a difficult time converging on trade and health issues, especially in an era of rapidly altering international governance structures. Therefore it is difficult to imagine strong bi-partisan support on matters concerning trade and health at the domestic level, when several issues at the international level are still emerging and remain unresolved. As a result, it is easier to see why right leaning parties, which have strongly embraced neoliberal trade policies, have been more susceptible to trade threats by tobacco companies, whereas left leaning parties, which have gradually promoted free trade policies, albeit more restrictive and protectionist toward safeguarding public health, have been able to more forcefully reject these threats. As demonstrated in the previous chapter, sharp partisan divisions concerning trade and health were on full display during parliamentary debates in both countries. More importantly, the partisan identification of government, including the Prime Minister and his top officials in Cabinet, which are responsible for the overall direction of government and government policy, has important control on the direction of public health regulations like plain packaging, especially as they pertain to international trade relations. As a result, this position and control of government played a pivotal role in the reception of tobacco industry trade threats in both countries.

#### *Labor government leadership in Australia*

Consistent with the approach outlined above that left leaning parties typically introduce progressive public health policies, the Australian Labor Party, under the leadership of Kevin Rudd following the federal election win in 2008, prioritized advancing public health at the top of its agenda. Part of this agenda included the introduction of progressive plain packaging proposal, which several public health advocates and

policymakers interviewed for this study claimed would have not been introduced under a Coalition (Liberal Party and National Party) run government.<sup>343</sup> Members from the Australian Greens also agreed that the Labor Party was more progressive on the issue of tobacco control and better positioned to introduce plain packaging. More importantly, the Rudd administration with the guidance of former Health Minister Roxon (see below) from the beginning with its announcement to implement plain packaging set the tone that they would not be intimidated by tobacco industry trade threats. When introducing plain packaging, former Prime Minister Rudd told reporters:

Now the big tobacco companies are going to go out there and whinge, whine, complain, consider every form of legal action known to man. That's par for course, We, the government, will not be intimidated by any big tobacco company trying to get in the road of doing the right thing.<sup>344</sup>

In May 2010, Prime Minister Rudd also told reporters that “the new branding for cigarettes will be the most hard-line regime in the world and cigarette companies will hate it”<sup>345</sup> Following this lead, the government consistently stated in parliament and in the media that it had received strong legal advice and that the plain packaging proposal was consistent with its international trade and investment obligations. Even with the 2010 federal election and the change in leadership in the Australian Labor Party to new Prime Minister Julia Gillard, the government remained committed to enacting and implementing plain packaging, despite a continued onslaught of industry trade threats. In June 2011, former

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<sup>343</sup> Simon Chapman. Interview by Eric Crosbie. Sydney, Australia; 10 July 2015. Rob Moodie. Interview by Eric Crosbie. Melbourne, Australia; 30 June 2015. Michael Moore. Interview by Eric Crosbie. Canberra, Australia; 23 June 2015. Richard Di Natale. Interview by Eric Crosbie. Canberra, Australia; 23 June 2015. Rachel Siewert. Interview by Eric Crosbie. Canberra, Australia; 24 June 2015. Rob Mitchell. Interview by Eric Crosbie. Canberra, Australia; 26 June 2015. Nicola Roxon. Interview by Eric Crosbie. Melbourne, Australia; 2 July 2015.

<sup>344</sup> CNN Wire Staff. Australia moves to ban logos on cigarette packs. *CNN*. 29 April 2010. <http://www.cnn.com/2010/WORLD/asiapcf/04/29/australia.cigarette.packaging/>.

<sup>345</sup> Massola J, Vasek L. Julia Gillard and Nicola Roxon are standing firm on plain packaging measures for tobacco, despite legal threat. *The Australian*. 27 June 2011. <http://www.theaustralian.com.au/national-affairs/big-tobacco-ignites-legal-war/story-fn59niix-1226082593650>.



Prime Minister Gillard in direct response to questions about PMI's notification to file a potential legal challenge told reporters:

We are not going to be intimidated by big tobacco's tactics, whether they're political tactics, whether they're public affairs kind of tactics out in the community or whether they're legal tactics. We're not taking a backward step. We've made the right decision and we'll see it through...There is no compromise, we are going to deliver cigarette packages in that drab green.<sup>346</sup>

In addition to proposing the innovative HWL regulations, several health advocates and policymakers claimed that Labor government leadership was needed to counter the industry trade threats as the interviewees stated that the Rudd and Gillard administrations were not intimidated by tobacco industry trade threats and remained committed to defending plain packaging proposal throughout the policymaking process. They argued that a Coalition led government would have caved into the threats, arguing that the majority of Coalition members remained committed to their liberal principles, protected big business interests, and voiced strong concerns regarding the trade threats during the parliamentary debates. While members of the Coalition interviewed for this study denied this apt description, citing their leadership in advancing progressive tobacco control policies in the past (e.g. pictorial HWLs in 2006), they did admit that defending an extremely progressive public health policy like plain packaging against deep-rooted liberal principles, including limited government, and broad commercial interests and rights protected in international treaties, would have made it difficult for the Coalition to overcome trade threats.<sup>347</sup> As one Coalition member stated, it is difficult to deny the scientific evidence surrounding tobacco, but there still remains a high degree of legal uncertainty around plain packaging and potential violations of international trade law. Overall from positions expressed in

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<sup>346</sup> [unknown author]. Gillard stands firm on plain tobacco packaging. *The Sydney Morning Herald*, . 27 June 2011. <http://www.smh.com.au/national/gillard-stands-firm-on-plain-tobacco-packaging-20110627-1gmgc.html>.

<sup>347</sup> Andrew Southcott. Interview by Eric Crosbie. Canberra, Australia; 24 June 2015.

parliament and in the media along with interviews with policymakers and advocates, the Labor government's bold stance was a necessary condition in denying the tobacco companies from using trade threats to either block, weaken or delay the plain packaging proposal.

#### *National coalition government caution in New Zealand*

At first glance it appears that contrary to the notions of left leaning parties typically introducing progressive public health policies, a center-right led coalition government introduced plain packaging in New Zealand. However because the National Party could not secure a majority government, the indigenous Māori Party joined the National Party to form a minority government and in exchange was granted a ministerial position in health. This then provided the Māori Party the opportunity to address public health issues in indigenous communities, including smoking, which led to the introduction of plain packaging. Therefore even though a center-right led coalition government introduced plain packaging, consistent with partisan approach to progressive public health policies, the policy formation and content of plain packaging was largely driven by a leftist party, the Māori Party.

Following the general election of the National Party in 2008, the Key administration from the beginning with its announcement to implement plain packaging consistently took a cautionary approach to implementing plain packaging due to concerns of potential international legal battles with tobacco companies. When introducing plain packaging, Prime Minister Key mentioned in media statements that the government felt it was "likely" to be able introduce plain packaging legally, but that it was "not absolutely clear cut" and that it was no "slam dunk."<sup>348</sup> Advocates and policymakers interviewed for this study argued that either the National Party was never keen on the idea of introducing plain

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<sup>348</sup> Hartevelt J. Plain-packaged tobacco no sure thing. *Dominican Post*. 23 July 2012.

packaging or that their interests aligned with general trade practices resulting in a cautious approach of not wanting to disturb particular industries.

In particular, the government took notice of Australia's two legal challenges and adopted a wait and see approach by waiting on the outcomes of these cases before moving forward with plain packaging. Throughout the regulatory development process the National Party leadership made it clear in parliament and in the media that government wanted to wait until the legal challenges were settled to offer more clarity on potential legal challenges New Zealand might face. Even as the plain packaging legislation heard its first reading in parliament, Prime Minister Key told media reporters that government was going to continue with its "wait and see" approach in reference to the Australian legal challenges, stating:

I don't really see the point in us finally passing the legislation until we see exactly what happens in the Australian court case. We have a slightly different system, but there might just be some learnings and if there are learnings out of that, it would be sensible to potentially incorporate those in either our legislation or avoid significant costs.<sup>349</sup>

Following the eventual loss of PMI's legal challenge against Australia, coupled with other countries, including the U.K., Ireland and France moving forward and enacting plain packaging, Prime Minister Key reportedly requested more advice on the legality of plain packaging amidst tobacco industry trade threats in December 2015. On February 15, 2016, Prime Minister Key told media reporters at a press conference:

It was waiting, and I think the view I initially took was given Australia was in the middle of this court case it probably didn't make sense for us to embark on that, and then potentially face exactly the same costs for the taxpayer in defending another legal action...Last year I asked for advice on that matter, and the advice I got back was that they felt we were on very firm ground and didn't feel there was really any issues. A number of others have moved on plain packaging and were doing so without court cases being brought against them. We're feeling a lot more confident about that and the bill's

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<sup>349</sup> Radio News New Zealand. Plain packaging bill passes first hurdle. 11 February 2014; <http://www.radionz.co.nz/news/political/235845/plain-packaging-bill-passes-first-hurdle>.

now progressive through and it's my expectation it will become law at some point.<sup>350</sup>

Although Primer Minister Key did not mention an exact date when the bill would have its second reading in parliament, he expected it become law “sooner as opposed to later” and probably by the end of the year. As of May 2016, the plain packaging amendment bill was still awaiting its second reading. Overall the Key administration has viewed the trade threats as more credible and has taken a cautionary approach to implementing plain packaging, which has delayed the process in comparison to Australia by an extra 32 months as of May 2016.

Several interviewees confirmed the National government's cautious approach to enacting plain packaging and argued that possibly if the Labour Party had been in power they probably would have withstood the trade threats and implemented the policy by now.<sup>351</sup> Health advocates and members from the Green Party, Māori Party, and Labour Party agreed that the National Party has taken an extremely cautious approach, which they argue has been the primary factor for stalled progression of plain packaging. Similar to Australia, interviewees partially attributed this cautious approach to partisan differences on trade and health. While members of the National Party admitted this cautionary approach to the trade threats has delayed the plain packaging process, they characterized the approach much like the Prime Minister, as pragmatic and wanting to be 100% sure the country will not be dragged into international courts costing significant amounts of taxpayer dollars.<sup>352</sup> All of the policymakers interviewed for this study agreed that the trade concerns were causing a

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<sup>350</sup> Kirk S. Tobacco plain packaging likely to be law by end of year-John Key. *Dominican Post*. 15 February 2016.

<sup>351</sup> Stephanie Erick. Interview by Eric Crosbie. Auckland, New Zealand; 10 June 2015. Prudence Stone. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015. George Thomson. Interview by Eric Crosbie. Wellington, New Zealand; 19 June 2015. Marama Fox. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015. Kevin Hague. Interview by Eric Crosbie. Wellington, New Zealand; 17 June 2015. Ian Lees-Galloway. Interview by Eric Crosbie. Wellington, New Zealand; 17 June 2015.

<sup>352</sup> Scott Simpson. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015. Simon O'Connor. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015.

chilling effect but several of the members from left and center-left parties suggested that the government used these concerns as a shield and excuse for not wanting to implement plain packaging. As one Labour MP put it “there is only a chilling effect if you let it chill,”<sup>353</sup> implying the lack of political will by the government to allow the unnecessary delays. Overall from positions expressed in parliament and in the media along with interviews with policymakers and advocates, the National Party coalition government’s cautionary stance played a pivotal role in accepting tobacco industry trade threats, which ultimately contributed to delaying the plain packaging proposal.

### ***Sustained bureaucratic leadership and capacity in the Health Department/Ministry***

In the literature on bureaucratic leadership, leaders can emerge from all levels of a department to promote an issue that is aligned to their personal values.<sup>354</sup> While leaders can help promote change, political champions typically have an intrinsic commitment and motivation and typically exert confidence, persistence, and enthusiasm to drive policy change more forcefully and rapidly.<sup>355</sup> Given the importance of political champions to drive policy change, sustaining this leadership is crucial in enacting and implementing progressive policies. However sustaining this leadership can be difficult because the political window for ministers can be relatively short due to portfolio changes or short election cycles. Therefore maximizing these commitments requires a high degree of urgency before these champions move into other positions or areas.

In the literature on ministerial capacity, in which bureaucrats can take actions that yield their intended outcomes with relative ease, the capacity of ministers to implement their preferred policies can be hindered due to the influence of the institutional context. In

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<sup>353</sup> David Shearer. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015.

<sup>354</sup> Markham S, Green S, Basu R. Champions and antagonists: Relationships with R&D project characteristics. *Journal of Engineering and Technology Management*. 1991;8(1):217-242.

<sup>355</sup> Howell J, Shea C, Higgins C. Champions of product innovations: Defining, developing, and validating a measure of champion behavior. *Journal of Business Venturing*. 2005;20(1):641-661.

minority governments, in which a cabinet is formed despite the main governing party does not have a majority of seats in parliament, the policymaking capacity increases when the distance between the farthest parties of the cabinet decreases.<sup>356</sup> For example, if a coalition government is led by center-right party and the ministerial position is represented by a member from a right party then the ministerial capacity would increase whereas if the member was from a leftist party this capacity would decrease. In addition to institutional capacity, in minority governments, there also exists issue-related capacity for ministers.<sup>357</sup> Depending if the policy is redistributive, distributive, constitutive or regulatory can limit the ministerial capacity.<sup>358</sup> For example, regulatory policies tend to involve more government expansion and involvement, which tends to be a partisan issue and this divide in a minority government can limit ministerial capacity.

While the target of tobacco industry trade threats are aimed at all branches and sectors of government, arguably the attack is most directed at the Department/Ministry of Health, which is typically responsible for drafting and introducing tobacco control regulations. This approach has been consistent in Australia and New Zealand, as tobacco companies in both contexts have aggressively used trade threats to intimidate both the Department/Ministry of Health. In response, both the Department of Health in Australia and the Ministry of Health in New Zealand have demonstrated the ability to stand strong against trade threats, as the bureaucratic leadership in the Department/Ministry of Health played a crucial role in responding to tobacco industry trade threats. However while the bureaucratic leadership in the Department of Health remained bold and committed throughout the policy process in Australia, the leadership in the Health Ministry has been courageous for only part of the process in New Zealand. Furthermore the ministerial

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<sup>356</sup> Cevipof SB. *Do parties matter for policymaking*, January 2012.

<sup>357</sup> Ibid.

<sup>358</sup> Lowi T. American Business, Public Policy, Case-Studies, and Political Theory. *American Business and Public Policy*. July 1964;16(4):677-715.

capacity of the Health Minister in New Zealand has been constrained due to the ministerial position belonging to a minority party in a coalition government.

In the literature on tobacco control, the bureaucratic leadership in the Health Ministry has been crucial in promoting or defending tobacco control measures. Often times, the most progressive and innovative tobacco control policies involve Health Ministers who are political champions and leaders in convincing other members of parliament or congress about the significance of a particular issue.<sup>359</sup> These leaders either are initially staunch drivers and supporters of a particular public health cause or are very receptive to informed discussions with civil society about the importance in reducing tobacco use. For example, the former Health Minister in Jamaica used an emergency clause in the constitution that allowed him to use his executive powers to enact strong restrictions on smoking in public places and progressive HWLs.

On the other hand, the lack of leadership in the Health Ministry has been detrimental to the progress of tobacco control in some contexts. In some extreme cases, officials have been caught taking bribes from tobacco companies,<sup>360</sup> while others have been caught privately negotiating with the tobacco companies.<sup>361</sup> In other cases, leadership in the Health Ministry has been aimed at tackling other health related issues (HIV, obesity, drug abuse, etc) and not as committed to tobacco control or the political will may be present but the tendency of the leadership remains timid, cautious and unaware of industry tactics. For example, former Health Minister in Costa Rica, threatened by tobacco companies and unaware of the implications of trade agreements, issued a directive that repealed the

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<sup>359</sup> Crosbie E, Sebrie EM, Glantz SA. Strong advocacy led to successful implementation of smokefree Mexico City. *Tobacco control*. Jan 2011;20(1):64-72.

<sup>360</sup> British Broadcasting Company. The secret bribes of big tobacco paper trail. *BBC*. 30 November 2015. <http://www.bbc.com/news/business-34944702>.

<sup>361</sup> Crosbie E, Sebrie EM, Glantz SA. Tobacco industry success in Costa Rica: the importance of FCTC article 5.3. *Salud publica de Mexico*. Jan-Feb 2012;54(1):28-38.

banning of tobacco advertising at the point of sale.<sup>362</sup> Overall the bureaucratic leadership in the Health Ministry plays an essential role in the direction of public health policies, which remained the case in Australia and New Zealand.

*Bold bureaucratic leadership in the Department of Health in Australia*

As mentioned previously, the magnitude of the trade threats in Australia were high and several personal attacks were waged against former Health Minister Nicola Roxon. Instead of being intimidated, former Minister Roxon was incredibly bold, courageous and determined in her approach to see plain packaging enacted and implemented thus reflecting the characteristics of a true political champion. Throughout the policy process Minister Roxon gave several powerful speeches in the media and to parliament confirming that the government was on strong legal grounds and was not going to be intimidated by tobacco companies.

Several policymakers and health advocates claimed in interviews for this study that her leadership and continued commitment to defend the plain packaging proposal was unquestionably pivotal in championing this piece of legislation. Additionally, several interviewees stated that Minister Roxon's legal background solidified her strong approach and provided reassurance from not only her colleagues but even members of the opposition that the government was on strong legal grounds to defend the case against potential legal challenges by the tobacco companies. Furthermore several interviewees stated that Minister Roxon had a personal conviction to reduce tobacco use because her father had died from smoking and that staunch leadership and support was deeply rooted in her before embarking on plain packaging.

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<sup>362</sup> Crosbie E, Sosa P, Glantz SA. The importance of continued engagement during the implementation phase of tobacco control policies in a middle-income country: the case of Costa Rica. *Tobacco control*. Feb 8 2016.



In addition to having strong bureaucratic leadership, the ministerial capacity of the Department of Health was allowed to negotiate the terms of the plain packaging proposal within the Labor Party. All ministerial roles are limited to the priority of Prime Minister and top officials in government, but the Labor Party enjoyed a majority control in parliament, which allowed ministerial roles to remain within the Labor Party. As a result, Health Minister Roxon operated in a space with her colleagues from her own party that were very receptive to the plain packaging proposal. More importantly, she was not confronted with any strong institutional or issue-related constraints. In an interview for this study, Minister Roxon admitted that sometimes initial Cabinet meetings and discussions to prioritize particular legislation can be quite challenging logistically both in terms of drafting and consulting but argued that Labor Party members, especially former Prime Ministers Rudd and Gillard shared similar perspectives and goals and were thus more receptive to implementing progressive public health policies.<sup>363</sup> In the context of plain packaging, Minister Roxon acknowledged that a few times she had to explain things a little more but argued that it was crucial that she was allowed the capacity and ability to communicate these concerns and negotiate the terms of the proposal. Overall the bureaucratic leadership and ministerial capacity of the Department of Health was an important variable to help explain why Australia was able to implement plain packaging and withstand the onslaught of tobacco industry trade threats.

*Contrived bureaucratic leadership in the Ministry of Health in New Zealand*

In New Zealand, former Associate Health Minister Tariana Turia was also bold, outspoken, and determined in her approach to see plain packaging enacted and implemented but her ministerial capacity was constrained by being a minority party member of the coalition government. Minister Turia demonstrated a strong commitment to

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<sup>363</sup> Nicola Roxon. Interview by Eric Crosbie. Melbourne, Australia; 2 July 2015.

introducing and enacting plain packaging throughout her tenure as Minister with strong statements in parliament and to the media. Following the passage of first reading of the plain packaging bill Minister Turia congratulated the MPs for passing the bill and told media reporters:

It's important for us to be bold and have some courage and not be dictated to by the tobacco companies and other countries ... While the tobacco industry may have laid down a threat that if this legislation is passed [it will be challenged] my message to them is that our country has a sovereign right and a legal right to protect its citizens. I am firmly of the opinion that it is not for any tobacco company to be telling us what we should be doing in our own land.<sup>364</sup>

Although the National Party gave Minister Turia the portfolio of public health in an exchange to run a coalition government her ministerial capacity was limited by the National Party to implement plain packaging. Consistent with the literature on bureaucratic capacity, Minister Turia faced both institutional and issue-area constraints to increase her policymaking capacity as she was a member of the Māori Party (leftist party), which is a far distance on the political spectrum from National (center-right party) that was governing. Unlike Minister Roxon in Australia who was part of the Labor Party governing Cabinet, Minister Turia, as a member of the Māori Party, had to operate outside the National Party Cabinet and negotiate the terms of the plain packaging proposal. In certain respects this configuration of a coalition government helped position the Māori Party under the leadership of Minister Turia to highlight the dangers of smoking to New Zealanders, especially indigenous Māori populations, and introduce progressive measures such as plain packaging. However when confronted with issues of international trade and potentially costly legal disputes with tobacco companies, Minister Turia's position was compromised to an outside voice pressuring the government rather than internally discussing and consulting with her own colleagues on the matter. Some of Minister Turia's remarks to the

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<sup>364</sup> Rutherford H. Cigarette plain packaging closer. *Dominican Post*. 2 February 2014.

media seemed to suggest she was isolated or perhaps relegated to her minority position, as she seemed somewhat disconnected with government's ultimate decision to wait and see what happened in Australia before moving forward. For example, after Prime Minister Key mentioned that New Zealand would wait on the Australian trade disputes, Minister Turia told media reporters:

Our legislation's quite different, the rules around tobacco are quite different, and there is still a brand on these cigarettes, so I don't know what the delay would be. We've got thirteen people who die a day in this country, five thousand a year-why would we wait?"<sup>365</sup>

Despite these constraints Minister Turia drove the policy agenda and helped plain packaging reach its first reading in parliament and go through the Health Select Committee, as she remained committed throughout the policy process while in office.

Unfortunately in August 2014, Minister Turia retired and she was replaced by a new Associate Health Minister, Peseta Sam Lotu-Liga, who was from inside the National Party, but not as bold and courageous as former Minister Minister Turia. Several tobacco control advocates admitted that Minister Lotu-Liga is a well-intentioned politician but was new to plain packaging saga. To exemplify this contrast in approach Minister Turia argued countless that New Zealand should not be threatened by tobacco companies and that the government had the sovereign right to implement plain packaging, while Minister Lotu-Liga reiterated the Cabinet's position that it would be prudent to await the conclusion of the Australian legal disputes before moving forward.

Several policymakers and advocates interviewed for this study also agreed that the bureaucratic leadership of former Minister Turia was bold but compromised and Minister Lotu-Liga's leadership has been more cautious. These policymakers and advocates credited the Māori Party and the leadership of former Minister Turia with driving New Zealand's

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<sup>365</sup> Radio News New Zealand. Plain packaging bill passes first hurdle. 11 February 2014; <http://www.radionz.co.nz/news/political/235845/plain-packaging-bill-passes-first-hurdle>.

2025 smokefree initiative and the introduction and staunch support for plain packaging amidst tobacco industry trade threats. They also argued that despite these strengths, the ministerial capacity of Minister Turia was constrained by being a minority party member in government. Advocates also admitted that Minister Lotu-Liga being a mid-career politician has been overly cautious in his approach, which represented a stark contrast from Minister Turia, who was brave and had less to lose as she was ending her career. Some interviewees suggested that if Minister Turia remained as Associate Health Minister plain packaging would have already been passed but others suggested that her pressure would have been limited in capacity to convince the government in reversing its wait and see approach to plain packaging.

### ***Tobacco control advocacy efforts to counter trade threats***

In the literature on NGOs and social policy, strong led coalitions and networks of NGOs and civil society groups that have expanded capacity building and networked structures have been successful in pressuring and assisting governments to enact and implement progressive and innovative social policies.<sup>366</sup> One important source that has fueled these advocacy efforts has been the establishment and maintenance of financial resources, which provide important funding investments to facilitate the institutionalization of network structures, strengthen the organization and capacity of organizations, and advance the knowledge and technical skills among advocates.<sup>367</sup> Sustaining these funding mechanisms are also important as short-term funding pledges can

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<sup>366</sup> Thomas A. NGO Advocacy, democracy and policy development: Some examples relating to environmental policies in Zimbabwe *Journal of Commonwealth & Comparative Politics*. 1996;2(1):38-65.

<sup>367</sup> Champagne BM, Sebrie E, Schoj V. The role of organized civil society in tobacco control in Latin America and the Caribbean. *Salud publica de Mexico*. 2010;52 Suppl 2:S330-339.

leave NGOs vulnerable to relentless attacks by powerful TNCs, which have a high amount of resources.<sup>368</sup>

One important source of funding for NGOs can come from government revenues, including taxes on particular products (e.g. tobacco). Through revenue streams, governments can create foundations aimed at promoting social agendas and enhance the ability of NGO operations by providing funding grants.<sup>369</sup> For example, governments have used taxes from alcohol and tobacco to create health promotion foundations, which aim to promote and advance public health through education, communication and intervention strategies.<sup>370</sup> The major advantages for NGOs receiving government funding include building leadership and capacity, facilitating networks and partnerships and expanding overall NGO operations. However these advantages are also met with important constraints, which include direct ministerial control that may limit freedom or independence to be more innovative, political pressures to fund programs that are not high priority and limitations in capacity to respond quickly to new opportunities or challenges facing public health.<sup>371</sup> Mandates from funders can also strictly control operational roles and shape the objectives, goals, structures and scope of activity. As a result, there is less flexibility and autonomy in the decision making of NGOs.

Funding sources also play a critical role for tobacco control NGOs in their ability to effectively influence the policymaking process and ultimately reduce tobacco consumption and advance public health. Tobacco control NGOs that have received government funding through tobacco taxes have succeeded in effectively promoting, monitoring, and creating

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<sup>368</sup> International Union Against Tuberculosis and Lung Disease. *Sustainable Funding Models for Tobacco Control: a Discussion Paper*, September 2014.

<sup>369</sup> Scollo M, Younie S, Wakefield M, Freeman J, Icasiano F. Impact of tobacco tax reforms on tobacco prices and tobacco use in Australia. *Tobacco control*. Sep 2003;12 Suppl 2:ii59-66.

<sup>370</sup> ThaiHealth. *Health Promotion Fund-Sustainable Finance and Governance*: Thai Health Promotion Foundation, February 2013.

<sup>371</sup> International Union Against Tuberculosis and Lung Disease. *Sustainable Funding*, 2014.

awareness about the harms of smoking, especially among the youth.<sup>372</sup> Tobacco taxation generated funds can also support NGOs in providing the necessary funding to build leadership and capacity, facilitate networks and partnerships and expand tobacco control operations. Tobacco taxes that are earmarked specifically for tobacco control, where the income stream is separate from the main health budget, provide more sustainable funding, as the funds are usually not altered even during government budget cuts.<sup>373</sup> Unless taxes are earmarked specifically for tobacco control efforts, funds can be easily targeted by politicians and others looking to access extra funds to support their own portfolios and electorates, which can greatly constrain the efforts of tobacco control NGOs.

Yet, despite establishing earmarked taxes for tobacco control, tobacco control NGOs remain constrained by government funding and limited in their freedom and independence to be more innovative in their approach and critical of government decisions. These funding constraints make it difficult for NGOs to criticize government actions and force them at times to take a cautious approach to pressing government bodies and agencies to aggressively resolve public health concerns.<sup>374</sup> Most of the caution is out of fear of losing funding to continue working on tobacco control issues, as NGOs can become too reliant on funding from these government bodies and agencies to effectively continue their operations and achieve their goals. As a result, these NGOs sometimes lack the independent voice that is needed to progressively push the introduction and enactment of progressive tobacco control proposals as well as hold government agencies accountable for not acting or not following through on their commitments to reducing tobacco use. This lack of an independent voice and the ability to address an emerging issue like tobacco control and

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<sup>372</sup> Crosbie E, Sosa P, Glantz SA. The importance of continued engagement during the implementation phase of tobacco control policies in a middle-income country: the case of Costa Rica. *Tobacco control*. Feb 8 2016.

<sup>373</sup> International Union Against Tuberculosis and Lung Disease. Sustainable Funding, 2014.

<sup>374</sup> International Union Against Tuberculosis and Lung Disease. Sustainable Funding, 2014.

trade has proved to be a decisive difference in the ability of NGOs in both Australia and New Zealand to shape the governments' reception of tobacco industry trade threats during the regulatory process of plain packaging. Even though tobacco industry trade threats are primarily targeted at government officials, the reception of these threats can be greatly influenced by the efforts of tobacco control advocacy groups.

*Independent and confident tobacco control and trade advocacy in Australia*

In Australia the main public health groups receive only a small portion of their funding from government grants to conduct research and support advocacy efforts.<sup>375</sup> Instead these health groups source their funding from multiple non-governmental agencies and donors. As a result, consistent with the literature on NGOs and social policy, these groups experience a high degree of flexibility and independence to openly criticize government actions unfavorable to public health, as their advocacy efforts are not as constrained by government agencies. During the policymaking process for plain packaging, advocates did not necessarily need to criticize the government but had the freedom to respond quickly to new challenges of trade on tobacco control. Additionally, they recognized this emerging challenge as a top priority and devoted significant resources and time to examining the legal issues regarding plain packaging and international trade and investment agreements. Confirming what the industry's own lawyers had told them privately (see chapter 2) these scholars found that the tobacco industry's legal arguments surrounding intellectual property and the use of trademarks under international treaties were invalid and that governments had the right to prohibit the use of trademarks on cigarette packages.<sup>376</sup> In addition, some legal scholars argued that plain packaging did not

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<sup>375</sup> Lynn Roberts. Interview by Eric Crosbie. Melbourne, Australia; 2 July 2015.

<sup>376</sup> McGrady B. TRIPs and Trademarks: the case of tobacco. *World Trade Review*. 2004;3(1):53-82. Also see Mitchell A. Australia's Move to the Plain Packaging of Cigarettes and its WTO Compatibility. *International Health Law and Policy*. 2010;5(2):401-419.

constitute an unnecessary obstacle to international trade or constitute a breach in fair and equitable treatment of the tobacco companies' investments.<sup>377</sup>

During the policymaking process tobacco control advocates aggressively targeted proponents and opponents of the bill and educated them on the tobacco industry trade threat tactics and the legality of plain packaging under international treaties.<sup>378</sup> These positions were both expressed to policymakers during private meetings and submitted in comments during parliamentary hearings to support the legal standing of the plain packaging proposal against tobacco industry trade threats and potential trade challenges. Interviews with policymakers also reveal that those from left leaning parties reached out to tobacco control NGOs for advice and evidence to support the legality of plain packaging under international trade and investment law, confirming again that policymakers look to NGOs for innovative ideas and information, which gives their public decisions more credibility and legitimacy. Given the opportunity to enjoy a high degree of independence from the government by not relying on government funding, the main public health groups in Australia responded quickly and aggressively to help shape the reception of trade threats by providing policymakers with a confident legal stance against the trade threats.

*Constrained and timid tobacco control and trade advocacy in New Zealand*

In sharp contrast to the Australian experience, funding sources in New Zealand are much more limited and as a result, public health groups have had to rely on the majority of their funding from government grants, particularly from the Ministry of Health.<sup>379</sup> Again

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<sup>377</sup> Voon T, Mitchell A. Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia. *Journal of Int Econ Law*. 2011;14(3):515-552.

<sup>378</sup> Mark Davison. Interview by Eric Crosbie. Melbourne, Australia; 29 June 2015. Tania Voon. Interview by Eric Crosbie. Melbourne, Australia; 3 July 2015. Also see Mitchell AD, Voon T. *Submissions on the Tobacco Plain Packaging Bill 2011*. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing, 21 July 2011.

<sup>379</sup> Edward Cowley. Interview by Eric Crosbie. Auckland, New Zealand; 10 June 2015. Prudence Stone. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015. George Thomson. Interview by Eric Crosbie. Wellington, New Zealand; 19 June 2015.



consistent with the literature on NGOs and social policy, this main source of funding from the government has constrained the ability of these public health groups to prioritize the trade threats to plain packaging as an urgent and emerging area to address. This is not to suggest that these groups did not engage in the trade and tobacco control debate as they commented on the trade threats in submissions to parliament, and issued statements in the media questioning the government's delay on plain packaging by generally claiming these forestalling efforts were weakening the government's original commitment for New Zealand to become smokefree by 2025 and its international commitments to international health treaties such as the FCTC.<sup>380</sup> They argued that the government should not be bullied by tobacco companies and that the government had the sovereign right to implement plain packaging.<sup>381</sup> In addition, tobacco control advocacy in New Zealand once again benefited from the assistance of legal scholars in Australia, who also submitted comments to parliament supporting New Zealand's sovereign right to implement plain packaging,<sup>382</sup>

However due to funding constraints, public health NGOs could not prioritize sufficient resources to fund international trade lawyers to address the industry trade threats. Unlike in Australia, there are only a few legal scholars in New Zealand that are trained in international trade law and that have examined the legality of plain packaging.

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<sup>380</sup> Kelsey J. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 13 March 2014. Action on Smoking and Health New Zealand Submission. Smokefree Coalition Submission. Cancer Society of New Zealand Submission. Johnston M. Pressure to bring in tobacco plain-packaging. *New Zealand Herald*. 2 March 2015. Also see Heather B. Anti-smoking group urges NZ to adopt plain tobacco packaging. *Dominion Post*. 2 March 2015.

<sup>381</sup> Prudence Stone. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015. Stephanie Erick. Interview by Eric Crosbie. Auckland, New Zealand; 10 June 2015. Robert Beaglehole. Interview by Eric Crosbie. Auckland, New Zealand; 11 June 2015.

<sup>382</sup> Cancer Council Western Australia. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. Rimmer M. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014. Davison M, Liberman J, Mitchell AD. *Submission on Smoke-free Environments (Tobacco Plain Packaging) Amendment*. Wellington, New Zealand: House of Representatives Standing Committee on Health, 27 March 2014.

One scholar in particular operated outside the apparatus of the NGOs and raised concerns about potential lawsuits from tobacco companies by cautioning that if the government moved forward on plain packaging they would inevitably be sued, in which the government “could have to pay hundreds of millions of dollars [in] damages and/or withdraw the law.”<sup>383</sup> Some advocates interviewed for this study claimed that although these remarks addressed the manipulative nature of tobacco companies to use trade agreements to threaten public health policies, they stressed that some of these concerns enhanced the government’s cautionary approach, which inevitably led to a forestalling of the plain packaging policy.<sup>384</sup> As a result, advocates stated that without the funding constraints they could have prioritized funding towards the legality of plain packaging and produced a more comprehensive approach to aggressively counteract the trade threats.

Due to their defined roles of advocacy, which include assisting the Health Ministry by providing evidence surrounding tobacco use, tobacco control advocates were also constrained from directly criticizing the government. Some advocates admitted these funding constraints limited their ability to aggressively target the government while others claimed there was not a sense of urgency to pressure and question the government’s approach. For example, on one hand Prime Minister Key told parliament and the media that New Zealand should not be worried about the pending Trans-Pacific Partnership Agreement and being sued by a transnational corporation because a corporation had never sued New Zealand.<sup>385</sup> Yet on the other hand his administration took a cautionary approach to plain packaging partly due to concerns about being challenged by tobacco companies in

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<sup>383</sup> Kelsey J. Tobacco Industry Will Use Offshore Courts to Attack Plain Packaging Laws. *Scoop Independent News*. 20 April 2012. <http://www.scoop.co.nz/stories/HL1204/S00134/jane-kelsey-tobacco-industry-will-use-offshore-courts.htm>.

<sup>384</sup> Robert Beaglehole. Interview by Eric Crosbie. Auckland, New Zealand; 11 June 2015. Prudence Stone. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015.

<sup>385</sup> [unknown author]. PM to TPP critics: 'We've never been sued'. *National Business Review*. 4 October 2015.

international trade tribunals. One advocate stated that this direct contradiction was not deeply exposed by the advocates and as a result was a lost opportunity.<sup>386</sup>

Public health NGOs were also constrained in criticizing the Health Ministry where they receive the majority of their funding. The Health Ministry has stated that the plain packaging proposal has been proceeding through Parliament on normal timeframes without delay. An advisor at the Ministry of Health stated that decisions over when legislation will proceed through Parliament are political decisions and that the Health Ministry is essentially limited to two roles, offering policy advice to government before decisions are taken (which includes developing proposals for legislation) and acting to implement policies once decided (including when legislation is enacted.)<sup>387</sup> While this is true, the Health Minister possesses the ability to recommend a proposal as a top priority on the legislative agenda for discussion in parliament and plain packaging has not reached that priority list. Instead of creating urgency and pressuring Health Minister Lotu-Liga to prioritize the bill, health advocates have taken a cautious approach and have tried to build a strong relationship to influence the government to move on the plain packaging issue.

A major reason NGOs were forced to take this cautionary approach again relates back to funding issues. As discussed previously, without long term sustainable funding, NGOs are vulnerable to relentless attacks by powerful TNCs and continuing their objectives and goals. Due to budgeting changes, the Health Ministry in 2015 announced a realignment of tobacco control services, which re-prioritized issues related towards tobacco in order to achieve New Zealand's smokefree 2025 goal.<sup>388</sup> For example, greater priority was given to address smoking among Māori women, which have some of the highest smoking prevalence

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<sup>386</sup> Prudence Stone. Interview by Eric Crosbie. Wellington, New Zealand; 16 June 2015.

<sup>387</sup> Matthew Everett. Interview by Eric Crosbie. Wellington, New Zealand; 18 June 2015.

<sup>388</sup> Ministry of Health NZ. Realignment of tobacco control services. January 2016; <http://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/smokefree-2025/realignment-tobacco-control-services>.

levels in the world. In order to achieve this re-alignment, the Health Ministry re-allocated funding to the various public health NGOs based on these new priorities, which did not emphasize the importance of tobacco control and trade in helping secure the rapid enactment of plain packaging. According to some interviewees off the record, this scramble for funding exacerbated the inability of the NGOs to strongly criticize the government's wait and see approach or the Health Ministry's inability to prioritize the bill for a second reading in parliament. Some interviewees argued that this realignment has really prevented and in some sense "silenced" the public health voices in pressuring the government to adopt a bill that has high public approval and strong supporting evidence. As a result, this cautious approach by tobacco control advocates due to funding constraints has limited their ability to alter the government's reception of tobacco industry trade threats and pressure the government to enact plain packaging.

## **Conclusion**

In further examining Australia and New Zealand, this chapter used a most-similar systems design to analyze how similar cases have had divergent policy processes for enacting and implementing plain packaging. This analysis demonstrated that when controlling for similar variables, the *reception* of the trade threats proved to be key variable in explaining why Australia was able to enact plain packaging in a reasonable timeframe without being weakened or delayed while New Zealand, although not weakening, has delayed its proposal for more than 2 years in comparison to Australia. More broadly speaking, the results of this chapter illustrate that not only are policymakers aware of international trade agreements and have taken into account the legal implications of these agreements when drafting and developing regulations but that the threats of potential trade lawsuits can actually cause a regulatory chill by delaying the enactment of strong HWL regulations.

These results suggest that governments are more vulnerable to trade threats and that regulatory chill, as expressed in delaying HWL regulations, is more likely to occur in settings with a center-right led government, where there is a lack of continued bureaucratic leadership and capacity in the Health Ministry, and where tobacco control advocates are constrained on the issue. On the other hand, governments are more resistant to trade threats and regulatory chill is less likely to delay HWL regulations in settings with a center-left led government, where there is continued bureaucratic leadership and capacity in the Health Ministry, and where tobacco control advocates are independent and confident on the issue. Now let us turn to Uruguay, which is different than both of these countries in many respects, but was also able to withstand tobacco industry trade threats and implement their strong HWLs much like Australia.

## Chapter 5: The Strength of Transnational Tobacco Control Advocacy: The Case of Uruguay

*“Philip Morris wants to make an example to Uruguay and intimidate other countries that are implementing tobacco control public policies...smoking, like war, kills many but also enriches some. Obviously that is to say this tobacco company, like all of the tobacco companies, cares little about the health of consumers.”<sup>389</sup>*

Dr. Tabaré Vázquez, President of Uruguay  
November 15, 2010

As a small country in the southern cone of South America, Uruguay has been gaining worldwide recognition in the public health community for its ability to overcome tobacco industry trade threats and implement strong HWL regulations similar to Australia. This has also caused several public health scholars and advocates to pause and wonder why a small and developing country such as Uruguay has been able to achieve remarkable success, while developed countries, including New Zealand have struggled to implement similar public health policies. To address this puzzle and again to test the regulatory chill hypothesis, this chapter provides further empirical evidence to illustrate that policymakers from multiple government agencies were aware of the industry trade threats and evaluated the implications of international trade law during the regulatory development process. These findings also demonstrate this awareness and evaluation of international trade law does occur in developing countries, despite some of the skeptics of the regulatory chill hypothesis that argue this unawareness is worse in developing countries due to a lack of resources and affordable access to legal expertise.<sup>390</sup>

To further evaluate the empirical reach and analytical leverage of the findings from the comparative analysis between Australia and New Zealand in chapter 4, this chapter

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<sup>389</sup> *Elespectador.com*. Tabaré Vázquez acusa a la Philip Morris de querer dar un “escarmiento” a Uruguay. *El Espectador*. 15 November 2010. <http://www.elespectador.com/noticias/actualidad/tabare-vazquez-acusa-philip-morris-de-querer-dar-un-esc-articulo-234944>.

<sup>390</sup> Gottwald EJ. Leveling the playing field: is it time for a legal assistance center for developing nations in investment treaty arbitration. *American University International Law Review*. 2007:237-275.

applies a most-different systems design (MDS) to compare Uruguay and Australia, which are fairly different but have had similar policy outputs. In doing so, this comparative analysis attempts to increase the number of observations for more accurate and efficient predictions in explaining how governments can overcome tobacco industry trade threats to properly implement strong HWLs without being weakened or delayed. The chapter argues that the key factor that helps explain how both of these different countries implemented strong HWL regulations is again the government's *reception* of tobacco industry trade threats, which has been influenced by the partisan identification of government, bureaucratic leadership and capacity in the Health Ministry and tobacco control advocacy on tobacco and trade.

### **Section I: Historical and contextual background**

Uruguay is a developing country that has a gross domestic product (GDP) of US\$71.5 million,<sup>391</sup> and was a middle-income country for several decades, but in 2014 the World Bank classified Uruguay as a high-income country. Politically, Uruguay is a representative democratic republic with a unicameral presidential system. Since the 1860s, a two-party system has existed with the Partido Nacional (National Party), a right-wing conservative party, and the Partido Colorado (Colorado Party), a center-left/center-right party characterized by liberalism (united moderate and liberal groups), which has for the most part dominated general elections. However since 2005, Frente Amplio (Broad Front), a progressive party based on democratic socialism, has dominated the political sphere winning the last three general elections.

In relation to tobacco control legislation, the Broad Front has led the fight for promoting and adopting the majority of progressive public health polices, due to the progressive efforts under the administration of President Tabaré Vazquez (2005-2010, and

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<sup>391</sup> Central Intelligence Agency. The World Factbook: Uruguay. January 2015; <https://www.cia.gov/library/publications/the-world-factbook/geos/uy.html>.

2015-present), and the continuation of efforts under former President José Mujica (2010-2015). However most of this progress has come under the leadership of President Vazquez (see below), who is a trained oncologist and has a deep commitment to improving public health in the country. Although the National Party and the Colorado Party have not aggressively promoted the advancement of progressive tobacco control measures, they have supported public health regulations, especially over the past ten years. It is difficult to decipher if political parties still receive donations from tobacco companies because even though campaign financing laws were implemented in 2009, they are not adequately enforced.<sup>392</sup>

### **Public health and tobacco control in Uruguay**

Uruguay is emerging as a leader in public health, but remains in the middle of the pack in the world in terms of general public health with semi-high life expectancy, high health expenditure, moderate infant mortality, and an emerging healthcare system.<sup>393</sup> However when compared to other countries in Latin America, Uruguay ranks very high in these health indicators.

In terms of tobacco control, Uruguay has emerged as regional leader and in some respects a global leader with some of the most advanced tobacco control policies, including HWLs, restrictions on smoking in public places, and bans on tobacco advertising. Uruguay was the first country to adopt 100% smokefree laws in Latin America and the Caribbean and the first country in the world to adopt HWLs covering 80% of the front and back of the package.<sup>394</sup> The Uruguayan government was also one of the first countries in the world to sign the World Health Organization's (WHO) Framework Convention on Tobacco Control

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<sup>392</sup> Ferris L. How dominant parties stay dominant in Uruguay. *Sunlight Foundation*. 4 November 2014. <https://sunlightfoundation.com/blog/2014/11/04/how-dominant-parties-stay-dominant-in-uruguay/>.

<sup>393</sup> World Health Organization. *World Health Statistics 2015*. Geneva, Switzerland, January 2015.

<sup>394</sup> Executive Decree No. 287, 2009.



(FCTC) in 2003 and then ratify the convention in 2004.<sup>395</sup> The Uruguayan government has utilized the FCTC as an important legal tool to further advance tobacco control legislation in the areas of smokefree environments, tobacco advertising, tobacco taxes, and HWLs. This progress has led to an overall decrease in the prevalence of smoking in Uruguay over the last 10 years from 33.5% to 23.5% (males from 39% to 28%, and females 28% to 19%).<sup>396</sup>

#### *Tobacco control advocacy*

Tobacco control advocacy in Uruguay has been very strong and productive with the assistance of a robust civil society that has grown over time. Public health groups, including the Centro de Investigacion para la Epidemia del Tabaquismo (CIET, Tobacco Epidemic Research Center) and the Sociedad Uruguaya de Tabacología (SUT, Uruguayan Tobacco Society) have been instrumental in initiating and guiding tobacco control legislation by producing media advocacy campaigns, issuing press releases, and issuing submissions during the policymaking process.

In addition to a strong local base and community of strong tobacco control researchers and advocates, international health groups have played a significant role in assisting both the Uruguayan government and local health groups. The Pan American Health Organization (PAHO), the WHO's regional office for the Americas, has provided technical assistance to the Uruguayan government on how to properly implement the WHO's FCTC. For example, in 2006 PAHO advised Uruguayan government officials on how to draft smokefree legislation that would comply with Uruguay's international commitments under the FCTC.<sup>397</sup> Other international health organizations, including the

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<sup>395</sup> United Nations. Treaty Collection: WHO Framework Convention on Tobacco Control. May 2016; [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IX-4&chapter=9&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en).

<sup>396</sup> International Tobacco Control. *ITC Policy Evaluation Project: Uruguay's Tobacco Control Policies Reducing Smoking Rates, Encouraging, Encouraging Quitting, Finds Six-Year Survey*. Waterloo, Canada, 20 August 2014.

<sup>397</sup> Pan American Health Organization. *Six Years That Changed Tobacco Control in Uruguay: Lessons Learned* Washington D.C., United States, January 2007.

Campaign for Tobacco Free Kids (TFK), Corporate Accountability International (CAI), the Framework Convention Alliance (FCA) and the International Union Against Tuberculosis and Lung Disease (the Union) have all assisted local health groups in Uruguay with financial, technical and legal assistance in promoting and defending tobacco control policies. For example, the Union measured air nicotine levels of smoking in public places before and after the 2006 smokefree law to provide local groups with scientific evidence on assessing compliance with the smokefree law.<sup>398</sup>

International health groups have also helped Uruguay emerge recently as a leader in tobacco and trade due to the legal challenges by PMI. The attention towards the PMI trade threats and challenges in Uruguay has prompted prominent legal scholars from Australia and from international health groups and organizations to examine the case. Meanwhile this focus has resulted in a high degree of training of both local academic legal scholars and legal representatives in the Health Ministry about tobacco control policies and their interaction with international trade law.<sup>399</sup> Due to this transformation, in 2014, Uruguay was added as one of the FCTC knowledge hubs along with Australia, and Norway, which focuses on networking and implementing the FCTC with a particular aim on trade and tobacco.<sup>400</sup>

### ***Tobacco industry presence in Uruguay***

Unlike various countries throughout the world, in which one of the main global tobacco companies has a majority market share, Uruguay's domestic tobacco company Compañía Industrial de Tabacos Monte Paz (Monte Paz Industrial Tobacco Company) is the main tobacco company in Uruguay and controls roughly 75% of the market. Philip Morris

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<sup>398</sup> Blanco-Marquizo A, Goja B, Peruga A, et al. Reduction of secondhand tobacco smoke in public places following national smoke-free legislation in Uruguay. *Tobacco control*. Jun 2010;19(3):231-234.

<sup>399</sup> Silvina Echarte. Interview by Eric Crosbie. Montevideo, Uruguay; 27 July 2015.

<sup>400</sup> Bianco E. Uruguay's FCTC Knowledge Hub holds first meeting. *Framework Convention Alliance*. 4 September 2014. <http://www.fctc.org/fca-news/opinion-pieces/183-news/1212-uruguay-s-fctc-knowledge-hub-holds-1st-meeting>.

International (PMI) and its subsidiary Abal Hermanos own about 20% and British American Tobacco (BAT) owns about 5%.<sup>401</sup> Although Monte Paz holds a dominant position in the marketplace in Uruguay simply relying on its popular brands of cigarettes and locally producing tobacco on a small scale, the company has maintained a low profile and has not spent much money in lobbying and countering tobacco control policies. On the other hand PMI and BAT, which hold small market shares and produce very little tobacco in Uruguay, have been a little more visible with tobacco advertising campaigns and vocal in challenging tobacco control policies both in congress and in the media in Uruguay. Similar to other countries, tobacco companies had more of a visual presence and credible voice in the country in the 1970s, 1980s, and 1990s when tobacco companies used to participate with Uruguayan governments in joint ventures and implemented self-regulatory and voluntary measures.

However since the implementation of the FCTC in 2004 and the leadership of President Vazquez since 2005, tobacco companies have been removed from the legislative drafting process. There have been some instances of tobacco companies privately meeting with government officials, which violates FCTC Article 5.3 that calls for transparent meetings between governments and tobacco companies, but overall tobacco company presence has been on the decline. Since 2004, public opinion of tobacco companies has also dropped as local health group awareness campaigns and government regulations have altered the culture surrounding smoking and attitudes towards tobacco companies.<sup>402</sup> Overall the visual presence and public credibility of tobacco companies has declined but not rapidly diminished as it had in Australia and New Zealand.

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<sup>401</sup> Euromonitor International. *Tobacco in Uruguay*, August 2015.

<sup>402</sup> Bianco E. Celebrating 10 years of smoke-free Uruguay. February 2016; <http://www.fctc.org/fca-media/opinion-pieces/1406-celebrating-10-years-of-smoke-free-uruguay>.

## Section II: Tobacco company trade threats and challenges and reactions by policymakers

While the momentum of tobacco control success began in 2005 and continued with the adoption of very progressive tobacco control policies, in 2008 the Health Ministry decided to improve its HWLs. At the time, Uruguay was only one of a few countries in the world that had already adopted pictorial HWLs that covered 50% of the front and back of the package, but research from other countries indicated that branding cigarettes across multiple variants deceived the public into believing that particular variants were less harmful for their health. For example, Philip Morris, which supplies Marlboro cigarettes, typically has multiple variants of cigarettes, including Marlboro Reds, Marlboro Lights, Marlboro 100s, and Marlboro Menthol (Figure 5:1), which are each targeted and marketed to particular groups of society. In particular, many smokers perceive that Marlboro Lights are less harmful than Marlboro Reds because the “light” descriptor signifies these cigarettes are low in tar and feel smoother, but in reality they are equally as harmful to someone’s health.<sup>403</sup> As a result, on August 18, 2008, the Ministry of Health issued public ordinance N. 514, which prohibited tobacco companies from using descriptor words such as “light”, “ultralight”, “mild”, and “menthol” on cigarette packages.<sup>404</sup> This ordinance came into effect on February 14, 2009.

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<sup>403</sup> Elton-Marshall T, Fong GT, Yong HH, et al. Smokers' sensory beliefs mediate the relation between smoking a light/low tar cigarette and perceptions of harm. *Tobacco control*. Nov 2015;24 Suppl 4:iv21-27. Also see Mutti S, Hammond D, Borland R, Cummings MK, O'Connor RJ, Fong GT. Beyond light and mild: cigarette brand descriptors and perceptions of risk in the International Tobacco Control (ITC) Four Country Survey. *Addiction*. Jun 2011;106(6):1166-1175.

<sup>404</sup> Oriental Republic of Uruguay. *Public Ordinance N. 514*. Montevideo, Uruguay: Ministry of Public Health, 18 August 2008.



**Figure 5:3: Philip Morris brand variants for Marlboro cigarettes**

Following the Health Ministry's resolution to ban variant descriptors, on June 15, 2009, President Vazquez issued executive decree N. 287, which increased the size of the pictorial HWLs on cigarette packages from 50% to 80% of the front and the back of the package, which at the time represented the largest and most progressive HWL policy in the world.<sup>405</sup> This decree came into effect on December 12, 2009. The decision to increase the pictorial HWLs was also based on growing scientific evidence that consistently revealed that the larger the images on the pack, the more effective HWLs were at discouraging youth smoking initiation and increasing the cessation attempts for existing smokers.

### **Tobacco industry trade and investment arbitration threats**

Immediately following the Health Ministry's proposed public ordinance to eliminate the labeling of single variants on cigarette packages, the tobacco companies once again began evoking concerns of the government's obligations to international treaties and the usage of their trademarks.<sup>406</sup> These threats continued after President Vazquez increased the

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<sup>405</sup> Oriental Republic of Uruguay. *Executive Decree N. 287*. Montevideo, Uruguay: Office of the President, 15 June 2009.

<sup>406</sup> Abal Hermanos. *Letter from Abal Hermanos to Ministry of Public Health concerning Public Ordinance N. 514*, 10 September 2008. Abal Hermanos. *Letter from Abal Hermanos to Ministry of Public Health concerning Public Ordinance N. 514*, 23 September 2008. Abal Hermanos. *Letter from Abal Hermanos to Ministry of Public Health concerning Public Ordinance N. 514*, 26 December 2008.

HWLs from 50% to 80%,<sup>407</sup> and intensified after he left office.<sup>408</sup> These trade attacks again consisted of a multi-pronged approach to threaten the Uruguayan government into withdrawing the proposals or significantly weakening them. This multi-pronged strategy, which was detailed in chapter 2, consists of five important components of the threat, including 1.) the general threat of violating intellectual property rights and international treaties, 2.) the legal and reputational costs of international arbitration and potential compensation, 3.) framing the health issue in terms of broad violations of business intellectual property rights and investments, 4.) recruiting business support and funding research to strengthen credibility and promote uncertainty and concern, and 5.) the magnitude of the threat. These series of threats were issued throughout the regulatory development process and are documented here first and then assessed on how they were received by policymakers. In particular,

***1.) General threats of violating intellectual property rights and international treaties***

Throughout the regulatory development process in Uruguay PMI and Abal officials sent letters to the Ministry of Health, had meetings with policymakers,<sup>409</sup> and argued in the media<sup>410</sup> that the HWL proposals and eventual policies would violate their intellectual property rights (trademarks) under Uruguay's constitution and several of Uruguay's international trade and investment treaties. In particular, PMI/Abal argued the HWL proposals violated 1.) the usage of trademarks under the Uruguayan constitution, the Paris Convention for the Protection of Industrial Property and the World Trade Organization

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Abal Hermanos. *Letter from Abal Hermanos to Ministry of Public Health concerning Public Ordinance N. 514*, 3 February 2009.

<sup>407</sup> Abal Hermanos. *Letter from Abal Hermanos to Ministry of Public Health concerning Executive Decree N. 287*, 5 June 2009.

<sup>408</sup> Philip Morris and Abal Hermanos Notice of Intent.

<sup>409</sup> Paolillo C. Part III: Uruguay vs. Philip Morris: Tobacco giant wages legal fight over South America's toughest smoking controls. *The Center for Public Integrity*. 15 November 2010. <https://www.publicintegrity.org/2010/11/15/4036/part-iii-uruguay-vs-philip-morris>.

<sup>410</sup> Tiscornia F. Tabacalera demanda a Uruguay en el exterior. *El Pais*. 10 February 2010. Also see Peterson LE. Philip Morris Files First-Known Investment Treaty Claim Against Tobacco Regulations. *Investment Arbitration Reporter*. 3 March 2010. <http://www.iareporter.com/articles/20100303>.

(WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS), and 2.) did not represent fair and equitable treatment and expropriation under a Uruguay-Switzerland BIT.

### ***2.) Legal and reputational costs of international arbitration and potential compensation***

In general PMI threatened that the HWL proposals would create significant legal costs for the Uruguayan government. These threats of legal costs were framed as serious risks for the government and based on creating a large degree of uncertainty. PMI highlighted these risks by arguing that the HWLs could lead to significant compensation due to intellectual property and investment violations that they claimed would cost taxpayers billions of dollars. PMI later clarified on their website that the amount they were seeking was \$25 million,<sup>411</sup> but sources inside the government claimed PMI was threatening the government with billion dollar claims. PMI also argued that breaches of international agreements would be detrimental to Uruguay's international reputation on matters concerning investment and intellectual property. PMI argued that the HWLs would lead to adverse consequences for Uruguay's international reputation thereby diminishing its international stature and reduce its negotiating ability.

### ***3.) Framing the health issue in terms of broad violations of business intellectual property rights and investments***

As in Australia and New Zealand, PMI attempted to frame the health issue as a convoluted intellectual property and investment issue with important ramifications under international trade agreements. PMI claimed that the 80% size of HWLs "leaves virtually no space on the pack for the display of legally protected trademarks" and that the banning of descriptors by only allowing the single presentation of cigarettes "restricts competition to the detriment of foreign investors."<sup>412</sup> PMI not only attempted to shift the debate away from

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<sup>411</sup> Philip Morris International. Uruguay Bilateral Investment Treaty (BIT) Litigation. 2014; [http://www.pmi.com/eng/media\\_center/company\\_statements/Pages/uruguay\\_bit\\_claim.aspx](http://www.pmi.com/eng/media_center/company_statements/Pages/uruguay_bit_claim.aspx).

<sup>412</sup> Ibid.

public health but also aimed to shift the concentration away from tobacco companies and towards all businesses. PMI characterized the HWLs as excessive for a legitimate business selling legal products, arguing that, “the measures unjustifiably restrict legitimate businesses from selling their products and using their trademarks.”<sup>413</sup> Although PMI attempted to frame the issue as an attack on all businesses, they did not make any arguments publically about these HWLs setting a dangerous precedent (the slippery slope argument) for other companies, particularly alcohol and food industries like they did in Australia and New Zealand. Also PMI reframed from publically using any nanny state arguments of the government being overly intrusive in regulating cigarette packages.

#### ***4.) Recruiting business support and funding research to strengthen credibility and promote uncertainty and concern***

Unlike in Australia and New Zealand, there was no evidence found to support that PMI recruited business support or funded research to strengthen credibility of the threat and promote uncertainty and concern with the Uruguayan government. PMI made some references to arguments published from their own funded research but did not actively involve think tanks or other business groups. Typically tobacco companies work with international businesses such as the U.S. Chamber of Commerce to send threatening letters to government officials. For example, in 2014, the U.S. Chamber of Commerce did send a threatening letter to the Uruguayan President of the Senate concerning proposed legislation to completely prohibit tobacco advertising,<sup>414</sup> but no public records show such letters concerning HWLs in Uruguay.

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<sup>413</sup> Philip Morris International. Philip Morris International Welcomes Decision by World Bank Tribunal to Hear Treaty Challenge to Uruguay's Excessive Tobacco Measures. 3 July 2013; <http://investors.pmi.com/phoenix.zhtml?c=146476&p=irol-newsArticle&ID=1835071>.

<sup>414</sup> U.S. Chamber of Commerce. *Letter from U.S. Chamber of Commerce to Honorable Danilo Astori President of Senate of Uruguay concerning prohibiting tobacco products from being displayed by retailers*, 24 April 2014.



### ***5.) Magnitude of the threat***

Unlike the trade threats in Australia and New Zealand, the threats issued in Uruguay were perceivably not deployed in an intensified manner due to the lack of participation by legislators in congress, and possibly that threats were made by only one tobacco company, PMI. Since the executive branch, the Health Ministry and the president, introduced the HWL proposals, there was no formal process in the legislative branch. As a result, PMI could not issue threats in health committee submissions or testify during committee hearings. Furthermore, since legislators were essentially excluded from the executive process, PMI had less recourse to target their threats at legislators. Essentially this process also denied other businesses and trademark associations to echo these concerns in submissions to congress.

Due to local tobacco company Monet Paz's dominant market share of about 75% in Uruguay, and lack of strong international tobacco company presence in the country, PMI presumably was the only known tobacco company issuing trade threats in Uruguay. The other global tobacco companies, Imperial Tobacco and Japan Tobacco International do not sell cigarettes in Uruguay, and British American Tobacco has less than 5% of the market share. Although these companies did not issue any threats to the Uruguayan government publically they may have worked behind the scenes to threaten policymakers as these companies do share an interest in preventing the diffusion of best practices. The lack of the proposal being discussed in the legislative body and the absence of multiple tobacco companies issuing threats may help also explain why there were no media campaigns targeted against the HWLs like they were in Australia and New Zealand.

Yet despite the less magnified approach, the Uruguayan case illustrates that tobacco companies can continue to threaten governments with trade threats after the policy is implemented. After PMI failed to threaten the Vazquez administration (2005-2010) into

withdrawing, weakening or delaying the HWLs, PMI once again tried threatening the new Mujica administration (2010-2015) after the HWLs had already been implemented. As a result, during the regulatory process of the HWLs in Uruguay (drafting, developing, and implementing) PMI's threats consisted of two separate sets of trade threats, first targeted at the Vazquez administration and then at the Mujica administration. The initial threats to the Vazquez administration, mainly consisted of threatening letters that if the HWLs were implemented the government be sued in international trade tribunals. The second set of threats directed at the Mujica administration were heightened, consisting of PMI filing a notice for arbitration, framing the issue in the media as a trade and investment concern, and privately meeting with top officials in government. Therefore even though the scale of the threat may have not been high publically it is somewhat unclear how intensive these threats were privately.

### **Uruguayan government response to PMI trade threats**

Following a series of advancements in tobacco control, the policy process of HWLs involved subsequently a series of steps of drafting the regulations, internal ministerial conversations, enacting decrees, change in leadership and working with international organizations. Throughout the political process, in the media and in interviews for this study, it is clear again that contrary to the critics of regulatory chill hypothesis policymakers were aware of international trade agreements and that they had to take into account these agreements when drafting, developing and implementing the HWLs. The Uruguayan government response to the PMI trade threats illustrates the difficult decisions governments face when confronted with trade threats and the potential financial burden of going to international court with a powerful transnational corporation.

### ***Vazquez administration's response to PMI's first set of threats (2008-2010)***

While it is difficult to assess the original reaction to the ministries and the president's office to PMI's legal threats as ministerial meetings and discussions are private, President Vazquez and his administration were aware of the trade threats and remained firm in their stance to implementing the HWLs. President Vazquez's defensive stand can be mostly attributed to his strong commitment to tobacco control as trained oncologist who has had first-hand experience as a medical professional working on the prevention, diagnosis and treatment of cancer. Due to confidentiality reasons surrounding the pending PMI trade challenge against Uruguay, policymakers in the Health Ministry and the Ministry of Foreign Affairs could not discuss the legal advice that was given to the President by the Ministry of Foreign Affairs and the president's office. Also policymakers were unable to discuss the actual or threatened legal costs therefore it is unknown if policymakers determined how much the legal costs would be if they were challenged. However policymakers spoke generally about considering the trade threats when developing the HWLs.

In an interview with former Health Minister Dr. Maria Julia Muñoz (2005-2010), Minister Muñoz admitted that discussions about the trade threats were discussed with the other ministries but that there did not exist a big legal panic over the HWLs.<sup>415</sup> Minister Muñoz recollected that there was strong communication, participation and support from all of the ministries and that there were no strong legal objections to the HWLs. She personally felt that it was Uruguay's sovereign right to implement public health policies and communicated the importance of public health in Uruguay, including Uruguay's international commitments to the FCTC, which she mentioned was favorably received by the other ministries. Minister Muñoz also considered President Vazquez's leadership and

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<sup>415</sup> Maria Julia Muñoz. Interview by Eric Crosbie. Montevideo, Uruguay; 21 July 2015.

support as a vital component to defending the HWLs against PMI's attacks, as officials followed his lead in defending Uruguay's national sovereignty. In the media, former Minister Muñoz said that the actions by PMI were "fictitious" because the "first law of all countries and ours is the Constitution of the Republic" which she argued "requires defending the right to life and the right to health is enshrined by law in our country."<sup>416</sup> Minister Muñoz considered that the trade complaints by PMI were "a threat, and blackmail to be tested in a small country like ours, when there are other larger countries that are also implementing these regulations."<sup>417</sup> As a result, Minister Muñoz viewed PMI's threats as an intimidating tactic that attempted to single out and pick on Uruguay since it was a small country.

In interviews with other members of the Health Ministry, officials could not speak specifically on some of the issues because the PMI trade lawsuit is still pending, but generally commented about the discussions of international trade when drafting the HWL regulations. These officials admitted that they had productive conversations about the other ministries about the international legal implications of the HWLs.<sup>418</sup> Although these officials did not go into great detail to explain particular mechanisms of trade agreements (e.g. ISDS) like in Australia and especially in New Zealand, they did admit that trade agreements presented all sorts of new complexities and areas that the Health Ministry needed to address when drafting and developing the HWLs. These officials stated that unlike other health regulations (e.g. prohibiting smoking in public places), HWLs require an added complexity of examining international law and having to discuss the health implications

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<sup>416</sup> [unknown author]. Muñoz y el juicio de Philip Morris. *La Red 21*. 13 August 2010. <http://www.lr21.com.uy/politica/420221-munoz-y-el-juicio-de-philip-morris>.

<sup>417</sup> Ibid.

<sup>418</sup> Winston Abascal. Interview by Eric Crosbie. Montevideo, Uruguay; 23 July 2015. Ana Lorenzo. Interview by Eric Crosbie. Montevideo, Uruguay; 23 July 2015. Silvina Echarte. Interview by Eric Crosbie. Montevideo, Uruguay; 27 July 2015. Enrique Soto. Interview by Eric Crosbie. Montevideo, Uruguay; 28 July 2015.

more thoroughly to other ministries like the Ministry of Economy or the Ministry of Foreign Affairs. These policymakers also confirmed that given the shortage of expertise and funding that they reached out to health advocates for information and advice pertaining to not only the scientific evidence surrounding strong pictorial HWLs but also the international legal ramifications concerning the HWLs, which local NGOs through transnational networks reached out to international NGOs to provide the requested information to policymakers (see below). Additionally, these policymakers admitted that they have reached out to NGOs during FCTC negotiations to update the treaty, illustrating that they look to NGOs for advice not only at the state level but also at the international level.

In an interview with Uruguay's Ambassador to the U.S. Carol Gianelli (2005-2012, 2015-present), Minister Gianelli confirmed that the Health Ministry's approach to HWLs was supported by all of the ministries.<sup>419</sup> Minister Gianelli commented on the productive relations between the ministries, which he claimed was a necessity when discussing economics, trade and health because each ministry has their own priorities and stakeholders. He argued that the culture of tobacco control had changed in the country under the leadership of President Vazquez so there was a stronger understanding from the Ministry of Foreign Affairs on the importance of public health. In particular, Minister Gianelli referenced articles from the FCTC and the importance of Uruguay's international commitments to public health treaties similar to trade treaties. In directly referencing the HWLs and PMI's trade threats, Minister Gianelli generally spoke about PMI's efforts to intimidate a small country like Uruguay and argued that Uruguay enacted reasonable laws that he claimed were "regulations" and not an "elimination" of tobacco. Generally speaking, Minister Gianelli also felt it was the sovereign right of Uruguay to implement the strong

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<sup>419</sup> Carlos Gianelli. Interview by Eric Crosbie. Montevideo, Uruguay; 28 July 2015.

HWLs and that the government was on strong legal grounds, especially when considering the government's international commitments to the FCTC.

***Mujica administration's response to PMI's second set of threats (2010-2015)***

President Mujica entered office on February 14, 2010 and within a week of becoming president, PMI intensified the seriousness of trade threat by lodging a complaint with the World Bank's International Center for Settlement of Investment Disputes (ICSID) arguing that the HWLs violated a 1991 BIT between Uruguay and Switzerland. In addition, the threats were magnified in the media as PMI made statements concerning intellectual property and investment in trade agreements, which hit the front pages of the major newspapers in Uruguay.<sup>420</sup> Initially officials from the Mujica administration downplayed the issue in the media and only offered general comments, stating that they were reviewing the issue and the international implications.

In the meantime, in April 2010, local tobacco company Monte Paz filed a dumping complaint to the government that PMI and BAT were slashing prices and selling cigarettes much lower than the Uruguayan brands.<sup>421</sup> In their complaint, Monte Paz also mentioned that this would increase illicit tobacco. As a result, some officials stated off the record that top officials privately met with PMI and BAT to negotiate a compromise of returning to normal pricing. Therefore between May and June 2010, supposedly officials from Mujica's administration met with PMI and BAT to discuss the HWLs and the slashing of cigarette prices. Government officials and advocates mentioned off the record that during these private meetings that PMI was ratcheting up the fears over costly litigation, exaggerating to the top officials that if Uruguay decided to defend the case that it would cost them billions of

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<sup>420</sup> Tiscornia F. Tabacalera demanda 2010. Also see Cotelo E. Philip Morris versus Uruguay: Contacto con Roberto Porzecanski, corresponsal de En Perspectiva en Estados Unidos. *El Espectador*. 9 March 2010. <http://www.espectador.com/internacionales/176011/philip-morris-versus-uruguay>.

<sup>421</sup> Paolillo C. Part III: Uruguay vs. Philip Morris.

dollars. Top officials denied to be interviewed for this study and PMI denied these allegations and reported that the company is seeking \$25 million in investment damages.

While it is unclear what exactly occurred during these meetings, on July 26, 2010, former Health Minister Daniel Olesker (2010-2015) publicly announced on a radio station that the government was going to amend the HWLs by eliminating the banning of single brand variants and reducing the size of HWLs from 80% to 65%.<sup>422</sup> Initially it appeared that PMI's trade threats had worked and that the Uruguayan government was going to weaken its HWLs to avoid being challenged in international courts. However the government never actually weakened the HWLs due to pressure and support over the next couple of months from domestic and international health groups to defend the regulations.

*Response from former President Vazquez*

On July 27, 2010, the day after Health Minister Olesker made the announcement to weaken the HWLs, former President Vazquez went on television and accused the Mujica administration of caving into PMI's trade threats, stating:

I fully support the activities, thoughts and actions of our dear comrade Mujica, but in this I cannot accompany him...I really want to express my thorough, public rejection of this.<sup>423</sup>

Two days later, President Mujica responded by stating he was unhappy that he was not warned that former President Vazquez would publically criticize his actions. Luis Almagro, former Minister of Foreign Affairs then followed up by telling reporters that the government remained committed to fighting tobacco and had been analyzing the HWLs to ensure that the measures were consistent with Uruguay's international trade agreements.

Almagro told reporters:

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<sup>422</sup> [unknown author]. Cambios a política antitabaco en manos de Mujica. *El Pais*. 26 July 2010. [http://historico.elpais.com.uy/10/07/26/ultmo\\_504258.asp](http://historico.elpais.com.uy/10/07/26/ultmo_504258.asp).

<sup>423</sup> Castillo F. Vázquez habló y el gobierno rebobinó. *El Pais*. 27 July 2010. [http://historico.elpais.com.uy/10/07/27/pnacio\\_504417.asp](http://historico.elpais.com.uy/10/07/27/pnacio_504417.asp).

On some arguments, Uruguay is very strong from a legal point of view and changes aren't necessary. On other points, we need to make changes to the law or come up with a new law.<sup>424</sup>

This statement not only demonstrated that the government was aware of the implications of international trade agreements, but that officials were still evaluating the legal aspects of the HWL regulations during the implementation phase.

A few days later, President Mujica addressed the issue in a radio interview claiming that his decision on the HWLs had been “no simple thing” and that his government faced “a clever and powerful enemy.”<sup>425</sup> Mujica went on further to state that his administration was going to continue call for collaboration and to look at other options that specifically did not require the government to “contract lawyers at \$1,500 an hour for several years.” Again even though it is unclear what exactly occurred in private meetings with tobacco companies in May and June, 2010, these comments reveal that former President Mujica and his administration was clearly concerned with the legal costs of a potential trade arbitration challenge from PMI.

A week later President Mujica visited former President Vazquez at his home and had a private meeting to discuss PMI's trade threats and the HWLs. Reports surfaced that Vazquez urged Mujica to defend the HWLs against PMI's trade threats.<sup>426</sup> Mujica reportedly acknowledged that Vazquez made some convincing arguments but that he will still concerned about the legal costs of trade challenge by PMI. Following the meeting, Mujica's administration continued to tell reporters in August and September they were still evaluating the situation.

#### *International support to the Uruguayan government*

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<sup>424</sup> Carroll R. Uruguay bows to pressure over anti-smoking law amendments: Tobacco giant Philip Morris accused of corporate bullying following government's decision to water down legislation. *The Guardian*. 27 July 2010. <http://www.theguardian.com/world/2010/jul/27/uruguay-tobacco-smoking-philip-morris>.

<sup>425</sup> Paolillo C. Part III: Uruguay vs. Philip Morris.

<sup>426</sup> Ibid.



During the spring and summer of 2010, local tobacco control groups, CIET and SUT were closely monitoring the government's developments in relation to HWLs. The same day that former Health Minister Olesker announced the potential weakening of the HWLs on the radio on June 26, 2010, local tobacco control groups contacted former President Vazquez and international health groups for help.<sup>427</sup> CIET and SUT had established close ties with the former president and had worked closely with international health groups for years so these local groups informed them about the recent events and requested both to try to intervene in anyway possible. As mentioned above, Vazquez initiated the pressure by calling out Mujica on television and then having a personal meeting, in which reportedly Vazquez encouraged Mujica to defend the HWLs. Meanwhile, CIET reached out to international health groups to send letters to petition and urge President Mujica to defend the HWLs. This support and encouragement from both Vazquez and the international health groups in a matter of a couple of weeks in late July and early August 2010 helped Mujica change his position from potentially weakening the HWLs to possibly defending the regulations.<sup>428</sup> However despite the change in attitude and approach in the Mujica administration, the concerns over the financial burden of potentially going to international court with PMI remained looming in August and September 2010.

While the Mujica administration reconsidered its options in August and September 2010, local health groups continued working with international health groups to find a supportive solution. Some local tobacco control advocates interviewed for this study were worried that the Uruguayan government had only discussed the legality of the HWLs under the Uruguay-Switzerland BIT with their own internal legal counsel but had not yet

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<sup>427</sup> Eduardo Bianco. Interview by Eric Crosbie. Montevideo, Uruguay; 22 July 2015.

<sup>428</sup> Framework Convention Alliance. Victory! Uruguay keeps warning labels. 3 August 2010; <http://www.fctc.org/fca-news/packaging-and-labelling/395-victory-uruguay-keeps-warning-labels>.

commissioned external legal opinions from international groups.<sup>429</sup> Therefore these advocates reached out to international health groups for their expertise on international trade and tobacco to legally examine the prospects of the Uruguayan government defending the HWL regulations against PMI. Local advocates communicated the willingness of the government to defend the HWLs and that if they received legal and possibly financial support they could solidify their position and defend the HWLs.

In response, several international health groups and philanthropy donors offered assistance, most notably former Mayor of New York Michael Bloomberg and his Washington D.C. based non-governmental organizations (NGOs). In 2006, former mayor of New York City, Michael Bloomberg began a new global initiative titled the Bloomberg Initiative to Reduce Tobacco Use in low and middle-income countries. This initiative provides financial assistance to government ministries and agencies, and NGOs in low and middle-income countries to “support projects that develop and deliver high-impact, evidence based tobacco control interventions.”<sup>430</sup> In particular, non-governmental organizations in the U.S. contracted through Bloomberg, most notably the Campaign for Tobacco Free Kids (TFK), provide technical and legal assistance to governments to reduce tobacco use. For example, TFK provided legal advice to the Colombian government to defend a health policy that prohibited tobacco advertising in the country.<sup>431</sup> TFK’s legal team evaluated PMI’s trade threats to Uruguay and the potential trade challenge under the Uruguay-Switzerland BIT and communicated to the Mujica administration that Uruguay had a very strong case legally

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<sup>429</sup> Eduardo Bianco. Interview by Eric Crosbie. Montevideo, Uruguay; 22 July 2015. Elba Esteves. Interview by Eric Crosbie. Montevideo, Uruguay; 23 July 2015. Beatriz Goja. Interview by Eric Crosbie. Montevideo, Uruguay; 23 July 2015.

<sup>430</sup> Bloomberg. Bloomberg Initiative To Reduce Tobacco Use Grants Program. 2009; <http://tobaccocontrolgrants.org/>.

<sup>431</sup> Bloomberg Initiative. Bloomberg Initiative to Reduce Tobacco Use Grants Program: What we fund. January 2016; <http://tobaccocontrolgrants.org/Pages/40/What-we-fund>.

to defend the HWL regulations.<sup>432</sup> In addition, both local and international tobacco control advocates recognized that if PMI succeeded in bullying Uruguay to weaken its policy, it could make an example out of Uruguay, which would set a dangerous precedent for the other governments in the Latin American and Caribbean region looking to implement similar progressive and innovative health regulations.

*Significance of the Conference of the Parties meeting in Punta del Este, Uruguay*

In October 2010, the WHO held its bi-annual meeting on the FCTC's Conference of the Parties (COP), which provided further international attention and assistance to Uruguay. The COP is the governing body of the WHO FCTC comprised of all Parties to the Convention that consistently reviews the implementation of the FCTC and makes decisions and adopts protocols, annexes, and amendments to improve the treaty's implementation. These meetings not only consist of government officials but also include several NGOs, providing a unique opportunity for NGOs to contribute the negotiation and decision-making process to implement the FCTC. This advocacy work by NGOs was on full display during the COP 4 meetings, as several international health groups discussed PMI's attempts to intimidate Uruguay with trade threats.<sup>433</sup> Additionally, due to the fact that the COP 4 meetings were in Punta del Este, Uruguay, the international spotlight was on Uruguay's HWL regulations. As a result, the international health community, consisting of government health departments and agencies, and NGO health groups worked together to develop a protocol that aimed at protecting health against trade. Uruguay tabled a position, known as the Punta del Este Declaration that was supported by all of the FCTC Parties, which declared the rights of sovereign countries to prioritize public health regulations over international

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<sup>432</sup> Cotelo E. ONGs anti-tabaco: La posición uruguaya en el litigio contra Philip Morris es muy fuerte. *El Espectador*. 27 August 2010. <http://www.espectador.com/politica/191038/ongs-anti-tabaco-la-posicion-uruguaya-en-el-litigio-contra-philip-morris-es-muy-fuerte>.

<sup>433</sup> WHO Framework Convention on Tobacco Control. *Fourth Session of the Conference of the Parties to the WHO FCTC*. Punta Del Este, Uruguay, 15-20 November 2010.

trade agreements. Specifically the declaration recognized the concerns of Parties “regarding actions taken by the tobacco industry that seek to subvert and undermine government politics on tobacco control,” and their “right to define and implement national public health policies pursuant to compliance with conventions and commitments under WHO, particularly with the WHO FCTC” (FCTC 2010a:2).<sup>434</sup> This international support sent a loud message and a clear signal that Uruguay was not alone in defending its HWLs against PMI. At the COP meeting Former President Vazquez said, “we are not afraid, and we aren’t going to sell out. Uruguay is not alone.”<sup>435</sup> President Mujica also addressed the COP meeting by stating that PMI’s trade threats attempted to “complicate the life and sovereignty of a small nation that has the boldness to defend itself and try to defend the health of its people.”<sup>436</sup>

#### *Bloomberg financial support*

After a couple of months of negotiations, in November, 2010 Bloomberg formally announced in a press release he would financially support the Uruguayan government stating that the money:

will assist Uruguayan government officials by providing legal research and expertise, launching public education mass media campaigns, and galvanizing world support and public opinion.<sup>437</sup>

Bloomberg has not publically announced the exact financial contribution to Uruguay but some have estimated that about \$200,000 is now being given to the Uruguayan government to help finance the legal costs associated with defending the HWLs against the trade challenge by PMI. The Uruguayan government selected Foley Hoag, a prominent law firm in

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<sup>434</sup> Russell A, Wainwright M, Mamudu H. A Chilling Example? Uruguay, Philip Morris International, and WHO’s Framework Convention on Tobacco Control. *Medical anthropology quarterly*. Jun 2015;29(2):256-277.

<sup>435</sup> Ibid.

<sup>436</sup> Garces R. World Health Organization takes on tobacco lobby. *Bloomberg*. 15 November 2010. <http://www.businessweek.com/ap/financialnews/D9JGR7300.htm>.

<sup>437</sup> Wilson D. Bloomberg Backs Uruguay’s Anti Smoking Laws. *New York Times*. 15 November 2010. [http://prescriptions.blogs.nytimes.com/2010/11/15/bloomberg-backs-uruguays-anti-smoking-laws/?\\_r=0](http://prescriptions.blogs.nytimes.com/2010/11/15/bloomberg-backs-uruguays-anti-smoking-laws/?_r=0).

Washington D.C. with an impressive track record in defending governments against corporate lawsuits, to legally defend the HWLs against PMI. Paul Reichler, one of the firm's partners had recently represented Uruguay in a successful defense against Argentina in the International Court of Justice on environmental grounds for attempting to close a Uruguayan paper mill.

### **PMI trade challenge**

PMI lodged a complaint against the Uruguayan government in the International Centre for Settlement of Investment Disputes (ICSID) under a bilateral investment treaty between Uruguay and Switzerland on February 19, 2010,<sup>438</sup> but proceeded to formally go through with the challenge on November 10, 2010.<sup>439</sup> PMI challenged the HWLs on three separate accounts, 1.) the prohibition of marketing one tobacco product under each brand, 2.) the requirement of health warnings covering 80% of the package, and 3.) the obligation to include overly graphic images on the package. PMI argued that the requirement for single presentation HWLs constituted an expropriation of their trademarks by prohibiting the use of multiple brands. PMI also argued that the HWLs violated their investments by not providing "fair and equitable treatment" and invoked arguments that the HWLs violated the World Trade Organization's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). As a result, PMI is seeking approximately \$25 million in damages, which they argue, "include respecting and protecting investments such as intellectual property rights."<sup>440</sup> In addition to seeking monetary damages, PMI also requested to the

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<sup>438</sup> World Bank International Centre for Settlement of Investment Disputes. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay Notice of Intent*. Washington D.C., United States: Switzerland-Uruguay Bilateral Investment Treaty, 19 February 2010.

<sup>439</sup> World Bank International Centre for Settlement of Investment Disputes. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay No. ARB 10/7*. Washington D.C., United States: Switzerland-Uruguay Bilateral Investment Treaty, 10 November 2010.

<sup>440</sup> Philip Morris International. Uruguay Bilateral Investment Treaty (BIT) Litigation.

tribunal to overturn the HWLs, which is not typical in investor-state disputes, which primarily award monetary damages. As of May 2016, this case remained pending.

### **Adopting a Most-Different Systems Design to compare Uruguay and Australia**

#### **Differences between Uruguay and Australia**

In comparing Uruguay and Australia we can see several differences between both countries where we would expect divergent policy processes to implementing strong HWLs. These differences include governance and development, bi-partisan support for tobacco control, the effectiveness of tobacco control, and the industry's presence and credibility (Table 5:1).

#### ***Governance and development***

Uruguay, at the time of introducing and implementing strong HWLs was a developing, middle-income (as of 2014 high-income) country that has been governed by a presidential system. On the other hand Australia is a developed, high-income country with a long established democracy that is governed by a constitutional monarchy and parliamentary system. In measuring governance, the World Bank's Worldwide Governance Indicators, which includes six key dimensions of governance (government effectiveness, rule of law, voice and accountability, political stability and lack of violence, regulatory quality, and control of corruption) scores Uruguay in the 75-90<sup>th</sup> percentile,<sup>441</sup> and Australia in the 90-100<sup>th</sup> percentile.<sup>442</sup> In measuring democracy, the Economist Intelligence Unit's Democracy Index, which is based on 60 indicators that measure pluralism, civil liberties,

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<sup>441</sup> World Bank. *Worldwide Governance Indicators: Country Data Report for Uruguay, 1996-2014*. Geneva, Switzerland, January 2014.

<sup>442</sup> World Bank. *Worldwide Governance Indicators: Country Data Report for Australia, 1996-2014*. Geneva, Switzerland, January 2014.

and political culture, recognize Uruguay as a “flawed democracy” and Australia as a “full democracy”.<sup>443</sup>

### ***Bi-partisan support for tobacco control***

Before 2005, a two party political system existed in Uruguay between the National Party and (right-wing) and the Colorado Party (center-left/right) and very little progress was made in tobacco control. It was not until the election of Tabaré Vazquez and the Broad Front Party that tobacco control really accelerated. Since 2005, tobacco control has received some bi-partisan support from the Colorado Party and a little from the National Party, but it is clear Broad Front has taken the initiative to introduce progressive health policies. Increasingly as tobacco control regulations have been introduced and the social norms around smoking have changed, more bi-partisan support has occurred but this is still an emerging trend.

On the other hand in Australia, this shift towards bi-partisan support began in the late 1980s and early 1990s. The Labor Party (center-left party) has been more aggressive in promoting and producing tobacco control legislation, while the Coalition (center-right and right parties) have been less aggressive but supportive in bi-partisan efforts to reduce tobacco use. Additionally, the Coalition has gone a step further in their bi-partisan support by increasingly introducing progressive policies such as pictorial HWLs in 2006. Although there remains ideological differences between the parties in the approach to tobacco control there is high bi-partisan support on the issue.

### ***The effectiveness of tobacco control***

In terms of public health and in particular tobacco control, Uruguay is emerging as a regional leader and in some areas as a global leader, while Australia has been a global leader for decades.

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<sup>443</sup> The Economist Intelligence Unit. *Democracy Index 2014: Democracy and its discontents*. New York, January 2014.

Table 5:1: Australia and Uruguay differences		
Background control variables	Uruguay	Australia
Governance and development	<b>Moderately high</b> -Voice and accountability: Moderately high -Political stability: High -Government effectiveness: Moderately high -Economic development: Moderate -Income level: Moderate	<b>Very high</b> -Voice and accountability: Very high -Political stability: Very high -Government effectiveness: Very high -Economic development: Very high -Income level: Very high
Bi-partisan support for tobacco control	<b>Moderate</b> -Center-left approach: Moderate -Left progressive approach: Very high -Center-right bi-partisan support: Moderate	<b>High</b> -Center-left and left progressive approach: Very high -Center-right bi-partisan support: High
The effectiveness of tobacco control	<b>Moderately high</b> -General public health: Moderate -Smoking prevalence: Moderate -Public support for tobacco control: High -Effective tobacco control regulations: High -Tobacco control advocacy: High -International health support: Very high	<b>Very high</b> -General public health: Very high -Smoking prevalence: Very low -Public support for tobacco control: Very high -Effective tobacco control regulations: Very high -Tobacco control advocacy: Very High -International health support: High
Tobacco industry presence and credibility	<b>Moderately low</b> -Farming & manufacturing: Low -Public credibility: Moderately low -Public presence: Moderate -Political donations: Moderate	<b>Very low</b> -Farming & manufacturing: Very low -Public credibility: Very low -Public presence: Very low -Political donations: Very Low
<b>Regulatory process control variables</b>		
Magnitude of tobacco industry trade threats	<b>Moderately high</b> -General threats: Moderately high -Legal and reputational costs: High -Framing as trade issue: High -Recruiting and funding: Moderate	<b>Very high</b> -General threats: Very high -Legal and reputational costs: Very high -Framing as trade issue: Very high -Recruiting and funding: Very high
Magnitude of “other” tobacco industry arguments	<b>Very Low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High
Annual revenues to defend HWLs against trade threats	<b>Low</b> -Revenues: Low (\$13.6 billion) -Production: Low (GDP: \$32 billion)	<b>Very high</b> -Revenues: Very high (\$487 billion) -Production: Very high (\$1 trillion)
The effectiveness of tobacco control against “other” industry arguments	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High
Government reception of tobacco industry (non-trade) arguments	<b>Very low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low	<b>Very low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low
-Scale: Very low, low, moderately low, moderate, moderately high, high, very high		



Uruguay, which has semi-high life expectancy, moderately infant mortality, and moderate health expenditure per capita, has improved all of these areas since 2005, while Australia ranks as a global leader in all of these categories. The same characterization can be said for tobacco control, as Uruguay is an emerging leader while Australia remains as the global model for the rest of the world.

In the context of each country introducing strong HWLs, Australia's move to plain packaging was the "next logical step" because they had already banned advertising but Uruguay's move to strong HWLs reflected an ambitious move that illustrated the country was emerging as a regional and global leader in tobacco control. Both governments were early signatories to the FCTC in 2003 and then ratified the convention in 2004 and in 2006 Uruguay became the first country in Latin America to establish 100% smokefree environments and implement pictorial HWLs. Australia already had established strong tobacco control regulations before the FCTC but continued to lead the world by increasing the size of HWLs, increasing tobacco taxes, completing banning tobacco advertising, and extending smokefree environments to outdoor parks, bus stops, and multi-unit housing. Since 2014, Uruguay has adopted similar advancements to their regulations by increasing tobacco taxes and completing banning tobacco advertising,<sup>444</sup> but these advancements occurred several years after the proposal for strong HWLs.

Continuing with the context of when the proposals were made, Uruguay's civil society was increasingly growing while Australia's tobacco control advocacy has been solidified for decades. Since 2006, tobacco control groups in Uruguay have grown in terms of members and activities, and their lobbying efforts and impact on the policymaking process has helped Uruguay emerge as a leader in tobacco control advocacy. The strength of these tobacco control groups has also really benefited from the assistance of international

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<sup>444</sup> Campaign for Tobacco-Free Kids. Tobacco Control Laws: Country Details for Uruguay. January 2016; <http://www.tobaccocontrolaws.org/legislation/country/uruguay/summary>.

health groups and the financial and technical assistance they have received from international philanthropies and donors, most notably Michael Bloomberg. Meanwhile in Australia tobacco control advocacy embodies the pinnacle of high level of organization, communication, and collaboration between longtime advocates that have worked on issues related to tobacco control for decades. This multi-disciplinary network of advocates has continued to expand, encompassing some of the leading legal scholars in the world examining tobacco and trade. These efforts in both countries have helped to dramatically reduce the smoking prevalence rates, but Uruguay continues to still have a prevalence level of about 23% while Australia's level has been reduced to 14%. Overall Uruguay is emerging as a regional and in some respects a global leader in tobacco control while Australia remains as a global leader in health and in tobacco control.

### ***Tobacco company presence and credibility***

As mentioned in previous chapters, the presence and credibility of tobacco companies in a country plays a significant role in how they are able to participate in the policymaking process and ultimately how they are regulated. In Uruguay, the main global tobacco companies make up a small part of the market but have strong lobbying power. Even though the global tobacco companies do not produce much tobacco locally, their physical presence is much more apparent with advertisements and sponsorships and their ability to penetrate policymakers and lobby their positions. In terms of credibility, tobacco companies have not been fully exposed in Uruguay. The public is increasingly skeptical of tobacco companies but among policymakers tobacco companies are still for the most part perceived as legitimate companies selling a legal product.

In contrast to Uruguay, global tobacco companies make up a large part of the market in Australia but typically lobby through front groups. In Australia, global tobacco companies also do not produce much tobacco locally and their physical presence and influence has

been relegated to using these front groups to oppose tobacco control measures. In terms of credibility, tobacco companies have been fully exposed and their credibility is so damaged that they have retreated from public debates and have resorted to using front groups to make their arguments. As discussed in chapter 3, even when tobacco companies resurfaced to combat plain packaging, several center-right and right-wing policymakers, including other industries did not want to be compared or associated with tobacco companies. As a result, tobacco company presence and credibility are quite different in Uruguay and Australia where one would expect different outcomes but in terms of strong HWLs, both governments have succeeded in implementing these regulations without being weakened or delayed.

### ***Regulatory development process***

The regulatory development process to enact and implement strong HWLs in Uruguay and Australia also was quite different. In Uruguay, the process to introduce and implement the strong HWLs was only conducted by the executive branch, the Health Ministry and the President without involving the legislative branch. In Uruguay it has been common for the executive branch to enact tobacco control decrees first and then enact similar policies through the legislative branch. For example, in 2006 the executive branch first enacted decrees to prohibit smoking in all public places and require pictorial HWLs covering 50% of the package, and then in 2008 the legislative enacted similar policies. Advocates interviewed for this study stated that a similar path would have been followed to enact strong HWL regulations in the legislature but due to the PMI challenge, this process has remained stalled. Despite increasing the institutionalization of the policy, several advocates mentioned that the decrees are implemented and enforced the same as legislative policies and some advocates considered this path of enacting decrees first more effective in expediting the advancement of tobacco control policies when the legislative branch is

divided on an issue and altering the social norms around smoking before increasing the institutionalization of the policy.<sup>445</sup> Unlike in Uruguay, the Australian process did involve the legislative branch, which increased the institutionalization of the policy but also allowed the tobacco companies to target and pressure policymakers in the legislative branch (see below).

### ***Magnitude of tobacco industry trade threats***

As mentioned in chapter 2, the magnitude of the threat can play a crucial role in pressuring governments due to the opportunities tobacco companies have to target policymakers and the exposure these threats can generate. Due to the process in Uruguay only including the executive branch, the Health Ministry and the President, tobacco companies could not target and pressure policymakers in the legislative branch to block, weaken or delay the strong HWL proposal. This included not being able to offer testimonials during committee hearings or present submissions to the legislative body regarding international legality of the proposal. Instead tobacco companies had to heighten their attack on the executive branch, which they did by sending threatening letters to the Health Ministry and the President and then having private meetings with top officials. Although much of this information is private due to the confidentiality surrounding the pending trade dispute with PMI, the publically accessible briefs of the case document PMI's threatening claims concerning international trade.

In Australia, the regulatory process did involve the legislative branch so tobacco companies were able to send in submissions, speak during committee hearings and target legislators with trade threats. In addition, tobacco companies issued several press conferences and spoke to members of the media much more frequently. More importantly,

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<sup>445</sup> Eduardo Bianco. Interview by Eric Crosbie. Montevideo, Uruguay; 22 July 2015. Elba Esteves. Interview by Eric Crosbie. Montevideo, Uruguay; 23 July 2015. Adriana Rodriguez. Interview by Eric Crosbie. Montevideo, Uruguay; 27 July 2015.

in Australia, it was three tobacco companies (PMI, BAT, and Imperial) issuing these multi-pronged series of threats, while in Uruguay it was primarily PMI. It may be possible that BAT was also threatening top officials privately but there is no proof publically to suggest otherwise. As a result, the magnitude of the threat in Australia was much higher than in Uruguay. This is not to suggest that the forcefulness of the threat was stronger but rather that the scale of the threat was much higher in Australia, which in the past typically led to generating more pressure on governments to withdraw or weaken its proposal.

### ***Tobacco industry opposition to strong HWLs***

One of the biggest differences between Uruguay and Australia was the overall arguments presented by tobacco companies to counter these strong HWLs. In Uruguay, there is little to no evidence to suggest that PMI used any arguments to oppose the HWL proposals other than the trade threats. PMI mentioned on their website that these HWL regulations will not work and lead to an increase in illicit tobacco and it was suggested that these arguments were made in private meetings with government officials but these comments were not found in any of the news sources or legislative documents examined, or from any of the interviews conducted for this study. PMI also mentioned in their letters and in the media that the proposed regulations were “excessive” but this argument hinged on the fact that they were arguing that this excessiveness relied on the violations of international trade and that they went beyond what the FCTC recommended. The FCTC guidelines recommend governments to implement HWLs covering at least 30% of the package and encourage governments to go further, including implementing plain packaging but tobacco companies interpret 30% and sometimes 50% as the ceiling of this recommendation rather than the floor.

As mentioned earlier in this chapter, PMI strategically waited for a change in leadership before intensifying the threat in the hopes of bullying the new Mujica

administration that may not be as committed to the issue as the previous Vazquez administration. However PMI underestimated the response of civil society groups both domestically and especially internationally in supporting the government against the trade threats. As a result, apparently PMI was overly confident in its pursuit to pressure the government and possibly made a mistake by primarily focusing on the trade attacks instead of employing a variety of attacks and generating pressure from other industry groups and partners to pressure the government. While it is difficult to tell if tobacco companies have learned from the Uruguay experience and employed more comprehensive attacks in other developing countries which are proposing strong HWLs, wide-ranging opposition in developed countries is definitely countries such as the U.K. and Ireland (see chapter 7).

However in Australia the tobacco industry's opposition included a wide range of arguments that included plain packaging would not work, it would lead to an increase illicit tobacco and it would cause problems for retailers. These arguments were also magnified in submissions to parliament, press releases and in comments to the media. Furthermore tobacco company front groups and business supporters magnified this pressure by also offering submissions to parliament, producing studies, and making comments in the media. Overall it is clear that the tobacco industry's opposition mostly consisted of the trade threats in Uruguay while there was a comprehensive approach developed in Australia. Although the differences here are apparent publically, it is difficult to measure the private activities of tobacco companies in opposing these strong HWL proposals.

### ***Annual revenues to defend HWLs against trade threats***

As mentioned in the previous chapters, the potential cost for governments to defend their HWL policies against trade challenges can be quite expensive. Therefore governments have to work with the budgets they have to pay international lawyers and the fees associated with the arbitration process, which average around \$3-\$6 million. In examining

each government's financial ability to defend their strong HWLs, Australia's annual revenues (\$487 billion) are almost 36 times greater than Uruguay's annual revenues (13.6 billion). As a result, Australia was in a much stronger position than Uruguay to reject costly legal battles, when tobacco companies employed the trade threats. In Australia, Health Minister Roxon admitted that the government had allocated money to defend the case before introducing plain packaging. However in Uruguay, former President Mujica raised concerns about the legal costs to defend the HWLs against a potential legal challenge. Furthermore, at the time Uruguay was threatened by PMI in 2009, PMI's revenues that year were \$62 billion, which was almost double Uruguay's GDP in 2009, which was about \$32 billion.<sup>446</sup>

### ***The effectiveness of tobacco control advocacy and the reception of government to non-trade arguments***

Due to the fact that publically the Uruguayan government experienced little to no non-trade opposition from tobacco companies, their response and the response of tobacco control advocates was pretty much non-existent. In Australia, the tobacco control advocates produced important media advocacy campaigns, issued press releases, identified political champions in tobacco control and presented policymakers with concrete scientific evidence regarding plain packaging, which assisted the government in forcefully rejecting the tobacco industry's arguments. Therefore the difference in these two cases lies in the fact that in Uruguay non-trade arguments did not really exist, while they were completely rejected in Australia.

### **Similarities between Uruguay and Australia**

In comparing Uruguay and Australia given all of these differences the one key variable that helps explain why each government was able to withstand the trade threats from tobacco companies and implement strong HWLs without being weakened or delayed

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<sup>446</sup> Paolillo C. Part III: Uruguay vs. Philip Morris.

(dependent variable) was the “reception” of the trade threats. In both contexts, the government was bold, confident and determined in its approach to not be intimidated by the trade threats. This reception of the threat was influenced by three similar variables, the partisan identification of government, bureaucratic leadership and capacity of the Health Ministry and tobacco control advocacy (Figure 5:2). Furthermore in utilizing a MSSD and a MDSD to compare all three cases (New Zealand, Uruguay, and Australia) these explanations become more apparent in explaining how New Zealand has delayed its proposal, while Uruguay and Australia have implemented strong HWLs without being weakened or delayed (Table 5:2).

***Partisan identification of government (partisanship on tobacco and trade)***

In Uruguay and Australia, the position and control of government played a crucial role in the reception of tobacco industry trade threats. In Uruguay, the Broad Front Party under the leadership of President Vazquez dramatically transformed the country’s outlook and performance in tobacco control. This process continued with the proposal and introduction of strong HWLs. When threatened by PMI, President Vazquez rejected these trade threats insisting it was Uruguay’s sovereign right to implement public health regulations and that corporations had no right to tell a government how to run their country. As a result, President Vazquez remained committed to defending the HWLs throughout his tenure as president. Former President Mujica, although initially a bit timid and unsure how to react to the trade threats due to financial concerns, grew to be the biggest supporter and defender of the HWLs. Increasingly Mujica echoed Vazquez’s statements and argued that Uruguay should not be intimidated by tobacco companies. During an official visit to the White House in May 2014, former President Mujica told President Obama about PMI’s attempt to intimidate Uruguay with a \$25 million dollar trade lawsuit.



Independent Variables

## Australia



Independent Variables

## Uruguay



Table 5:2: Comparison of Uruguay, Australia and New Zealand			
Background control variables	Uruguay	Australia	New Zealand
Governance and development	<b>Moderately high</b> -Voice and accountability: Moderately high -Political stability: High -Government effectiveness: Moderately high -Economic development: Moderate -Income level: Moderate	<b>Very high</b> -Voice and accountability: Very high -Political stability: Very high -Government effectiveness: Very high -Economic development: Very high -Income level: Very high	<b>Very high</b> -Voice and accountability: Very high -Political stability: Very high -Government effectiveness: Very high -Economic development: Very high -Income level: Very high
Bi-partisan support for tobacco control	<b>Moderate</b> -Center-left approach: Moderate -Left progressive approach: Very high -Center-right bi-partisan support: Moderate	<b>High</b> -Center-left and left progressive approach: Very high -Center-right bi-partisan support: High	<b>High</b> -Center-left and left progressive approach: Very high -Center-right bi-partisan support: High
The effectiveness of tobacco control	<b>Moderately high</b> -General public health: Moderate -Smoking prevalence: Moderate -Public support for tobacco control: High -Effective tobacco control regulations: High -Tobacco control advocacy: High -International health support: Very high	<b>Very high</b> -General public health: Very high -Smoking prevalence: Very low -Public support for tobacco control: Very high -Effective tobacco control regulations: Very high -Tobacco control advocacy: Very High -International health support: High	<b>Very high</b> -General public health: Very high -Smoking prevalence: Very low -Public support for tobacco control: Very high -Effective tobacco control regulations: Very high -Tobacco control advocacy: High -International health support: High
Tobacco industry presence and credibility	<b>Moderately low</b> -Farming & manufacturing: Low -Public credibility: Moderately low -Public presence: Moderate -Political donations: Moderate	<b>Very low</b> -Farming & manufacturing: Very low -Public credibility: Very low -Public presence: Very low -Political donations: Very Low	<b>Very low</b> -Farming & manufacturing: Very low -Public credibility: Very low -Public presence: Very low -Political donations: Low
Regulatory process control variables			
Magnitude of tobacco industry trade threats	<b>Moderately high</b> -General threats: Moderately high -Legal and reputational costs: High -Framing as trade issue: High -Recruiting and funding: Moderate	<b>Very high</b> -General threats: Very high -Legal and reputational costs: Very high -Framing as trade issue: Very high -Recruiting and funding: Very high	<b>Very high</b> -General threats: Very high -Legal and reputational costs: Very high -Framing as trade issue: Very high -Recruiting and funding: Very high
Magnitude of “other” tobacco industry arguments	<b>Very Low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High	<b>High</b> Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High
Annual revenues to defend HWLs against trade threats	<b>Low</b> -Revenues: Low (\$13.6 billion) -Production: Low (GDP: \$32 billion)	<b>High</b> -Revenues: High (\$60 billion) -Production: High (\$160 billion)	<b>Very high</b> -Revenues: Very high (\$487 billion) -Production: Very high (\$1 trillion)
The effectiveness	<b>High</b>	<b>High</b>	<b>High</b>

of tobacco control against “other” industry arguments	Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High	Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High	Tobacco industry arguments -Won't work: High -Illicit trade: High -Retailer complaints: High
Government reception of tobacco industry (non-trade) arguments	<b>Very low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low	<b>Very low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low	<b>Very low</b> Tobacco industry arguments -Won't work: Very low -Illicit trade: Very low -Retailer complaints: Very low
<b>Independent variables</b>			
Government reception of tobacco industry trade threats	<b>Very low</b> -Partisan Identification leadership: Very high -Ministerial leadership and capacity: High -The effectiveness of tobacco control against industry trade threats: Very high	<b>Very low</b> -Partisan Identification leadership: Very high -Ministerial leadership and capacity: Very high -The effectiveness of tobacco control against industry trade threats: High	<b>Very high</b> -Partisan Identification leadership: Low -Ministerial leadership and capacity: Moderate -The effectiveness of tobacco control against industry trade threats: Low
Partisan Identification leadership	<b>Very high</b> -Left party government support: Very high	<b>Very high</b> -Center-left party government support: Very high	<b>Moderately low</b> Center-right coalition government support: Moderately low
Ministerial leadership and capacity	<b>High</b> -Leadership: High -Capacity: High	<b>Very high</b> -Leadership: Very high -Capacity: Very high	<b>Moderate</b> -Leadership: High -Capacity: Low
The effectiveness of tobacco control against industry trade threats	<b>Very high</b> -Independent voices: High -International funding: Very high	<b>Very high</b> -Independent voices: High -International funding: Low	<b>Low</b> -Independent voices: Low -International funding: Low
<b>Dependent variable</b>			
Impact of trade threats on regulatory process	<b>Low</b> -HWLs implemented -HWLs not weakened -HWLs not delayed	<b>Low</b> -HWLs implemented -HWLs not weakened -HWLs not delayed	<b>High</b> -HWLs not implemented -HWLs not weakened -HWLs delayed by at least 2 years
Scale: Very low, low, moderately low, moderate, moderately high, high, very high			

In speaking to media reporters after the visit with Obama, Mujica mentioned that he told Obama, “Governments must not be involved in private litigation, but here we’re fighting for life. Nobody must be distracted in this fight for life, because out of all values, the most important one is life itself.”<sup>447</sup>

<sup>447</sup> Smialowski B. Uruguay's Mujica to Obama: Tobacco is 'murder'. *Tico Times*. 12 May 2014. <http://www.ticotimes.net/2014/05/12/uruguays-mujica-to-obama-tobacco-is-murder>.

The Labor government in Australia also exhibited this leadership and commitment to continuously defend the strong HWLs against tobacco industry trade threats. Similar to Uruguay, consecutive governments under the leadership of the Labor party consistently rejected the trade threats. Both the Rudd and Gillard governments characterized the threats as worried attempts by tobacco companies and repeatedly argued that the government would not be intimidated by the trade threats. While in Uruguay, the leadership framed the threats as a desperate attempt to make an example or “test case” out of Uruguay, the leadership in Australia uttered similar remarks referring to the threats as desperate attempts by tobacco companies. Both governments demonstrated incredible leadership and remained determined in their approach to not be intimidated by tobacco companies and implement these strong HWL policies.

***Bureaucratic leadership and ministerial capacity of the Health Department/Ministry***

The bureaucratic leadership in the Ministry of Health in Uruguay and the Department of Health in Australia each remained bold and committed throughout the policy process. In both cases this strong leadership led to rejection of tobacco industry trade threats on the basis of national sovereignty and the unwillingness to be intimidated by tobacco companies. In Uruguay, former Health Minister María Julia Muñoz (2010-2015) was confident and outspoken in protecting public health throughout the process. She described the trade threats by PMI to the media as “fictitious” and part of “blackmail” to test a small country like Uruguay. Although former Health Minister Daniel Olesker much like former President Mujica was initially a bit timid and unsure how to react to the trade threats due to financial concerns, he grew to be very supportive of the HWLs. In Australia, it is difficult to match the sheer determination and boldness of former Health Minister Nicola Roxon’s committed efforts to see plain packaging properly implemented. From Minister Roxon’s captivating speeches in parliament and to the media to her ability to neutralize the

industry's attempt to frame the issue in terms of trade and investment by refocusing the issue on health and the impact on children, Minister Roxon's courageous and unwavering approach has been heralded as truly the ideal standard for a Health Minister.

In both contexts, the ministerial capacity of the Ministry and Department of Health were allowed to negotiate the terms of the strong HWL proposals within their respective parties. All ministerial roles are limited to the priority of the President or Prime Minister and his/her top officials in government, but in both cases the Health Ministers operated in spaces with their colleagues from their own parties that were very receptive to the strong HWL proposals. This capacity gave them free range to develop and implement progressive health policies with few constraints. As a result, the bureaucratic leadership and ministerial capacity of the Ministry of Health in Uruguay and the Department of Health in Australia was an important variable in helping explain why both countries were able to implement strong HWLs and withstand tobacco industry trade threats.

### ***Tobacco control advocacy efforts to counter trade threats***

The tobacco control advocacy efforts in both countries played a vital role in helping shape the reception of the trade threats. In both contexts, tobacco control advocates were relatively independent in their position from government to help counter the tobacco industry trade threats. In Uruguay, local tobacco control groups were extremely quick to denounce and criticize the Mujica administration for potentially weakening the HWLs. While local tobacco control groups did not necessarily have the financial or technical resources to counter the trade threats, they immediately reached out to former President Vazquez and the international health community for assistance. These initial efforts initially included requesting Vazquez to interject and international health groups to help sign petitions letters requesting the Mujica administration to defend the HWL regulations. Then due to the transnational tobacco control networks that have been established, local NGOs

worked with international NGOs to provide legal and eventually financial assistance to help defend the HWL regulations. These efforts also led to NGOs exerting private entrepreneurial authority<sup>448</sup> by collaborating with other NGOs from the international health community to update the FCTC treaty to better assist issues related to tobacco and trade that in turn generated global support for Uruguayan's sovereign right to defend its HWLs.

In Australia, tobacco control advocacy also projected an independent and confident voice that supported the legal justification for implementing plain packaging and rejected the tobacco industry trade threats. Australia is home to some of the leading legal scholars in the world on tobacco control and trade so they were able to confidently reject the threats publically, despite any disagreements privately. Although in Australia the primary strength of tobacco control advocacy on trade came from local advocates while in Uruguay it was a balance of local and international advocates, in both situations these independent and confident advocacy efforts led to a strong rejection of the trade threats and reinforced support for each respective government to implement the strong HWL regulations.

## **Conclusion**

The Uruguayan case illustrates that policymakers in a developing country were also aware of international trade and investment law as it pertained to HWLs and had to take into account and evaluate trade agreements while drafting and developing the HWL regulations. By employing a MDSO to control for several differences, the key factor in explaining the HWL outcomes was again the reception of the trade threats, which was influenced by three key variables, the partisan identification of government, the bureaucratic leadership and capacity in the Health Ministry and the tobacco control advocacy on trade and tobacco. These results increase the number of observations for more accurate and efficient predictions in explaining how governments can overcome tobacco

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<sup>448</sup> Green JF. Private Standards in the Climate Regime: The Greenhouse Gas Protocol. *Business and Politics*. 2010;12(3):1-37.

industry trade threats to properly implement strong HWLs without being weakened or delayed.

This chapter further advances the literature on regulatory chill by demonstrating that policymakers continue to have to consider the implications of trade agreement threats and potential challenges during the implementation phase after proposals have already been enacted. The Uruguayan case demonstrates that trade threats can intensify and the reaction to these threats can alter with a change in leadership. Although the Mujica administration appeared more vulnerable to the trade threats than the previous Vazquez administration, Mujica's position changed and grew over time to support the HWLs due to conversations with Vazquez and support from international health organizations. This also raises questions about the financial burden for developing countries to defend progressive health policies against potential trade challenges and highlights the importance of the international health community and how international NGOs and philanthropy groups can balance the playing field against powerful transnational corporations. Given the limitations of using international trade agreements to block, weaken or delay strong HWLs in Uruguay and Australia, tobacco companies are seeking to alter new trade deals to strengthen their authority against governments to further constrain government regulatory authority and globally preempt the global diffusion of strong public health policies. As a result, we now turn to how tobacco companies are attempting to influence pending trade negotiations, including the Trans-Pacific Partnership Agreement.

## **Chapter 6: The Vigorous Struggle Between TNCs and NGOs to Shape Global Trade Governance: A Brief Examination of the Transpacific Partnership Agreement**

Recognizing some of the limitations and shortcomings of using existing international trade and investment agreements to globally preempt strong HWL regulations, tobacco companies have been aggressively trying to alter new trade governance structures and rules to counter the diffusion of strong HWLs globally. In particular, tobacco companies, part of a collective effort with other powerful transnational corporations (TNCs), have been actively lobbying trade negotiations for the Trans-Pacific Partnership Agreement (TPP), a pending regional trade agreement between 12 countries in the Pacific region, including two of the case study countries for this dissertation, Australia and New Zealand. These efforts include developing new rules governing intellectual property and investment and expanding on existing trade rules to more jurisdictions, which would make it easier for tobacco companies to directly challenge governments and potentially further constrain governments from implementing strong HWL regulations.

Meanwhile non-governmental organizations (NGOs), particularly public health NGOs, have also been targeting trade negotiators during the TPP negotiations to provide adequate safeguards for public health and carve-out tobacco entirely. Understanding the grave impacts of legally being able to directly challenge governments in international courts as well as using trade agreements as legal weapons to threaten governments over implementing strong public health policies, public health advocates have lobbied trade negotiators to provide adequate policy space for governments to properly develop, design, and implement public health policies without being heavily restricted by international trade rules. In particular, public health NGOs have lobbied to exclude the investor-state dispute settlement (ISDS) mechanism in the TPP, which would effectively deny tobacco companies the ability to directly challenge tobacco control regulations in international courts like in



Australia and Uruguay, but also to deny their ability to successfully threaten governments to delay their proposals like in New Zealand.

This chapter demonstrates the increasingly vigorous struggle between TNCs and NGOs to influence international trade governance in relation to public health in the 21<sup>st</sup> century by examining the trade negotiations for the TPP. The chapter first explains how tobacco companies have historically captured the United States Trade Representative (USTR) for favorable trade agreements by establishing a continual revolving door of executives and gaining privileged access to trade negotiators and policymakers. This includes successfully lobbying for trade promotion authority, also known as fast track authority, in 2015, which helps expedite future trade agreements such as the TPP by only allowing the U.S. congress to vote yes or no for trade agreements without amendments. Although limited in their access to trade negotiators, public health NGOs have countered these efforts by exposing private meetings between tobacco companies and trade negotiators, advocating for more transparency and policy space for debate and discussion, and lobbying for health exemptions and safeguards to protect public health in the TPP. As of May 2016 the TPP remains pending, but it appears that public health advocates have won a slight victory as the TPP has excluded tobacco companies from using ISDS to challenge tobacco control regulations in the TPP member states. However this semi-carve out of tobacco still allows for the reduction of trade barriers of tobacco and other public health regulations, including alcohol, food, and medicine, remain susceptible to industry ISDS threats and challenges.

## Section I: Tobacco industry efforts to influence trade agreements

### Early internal discussions to increase trade liberalization, gain market access, and extend corporate protections

During the late 1970s and early 1980s, the tobacco industry documents reveal that tobacco companies became increasingly interested in accessing closed tobacco markets and their interest in supporting the U.S.'s push for bilateral investment treaties (BITs) became one of the industry's top priorities. In December 1978, Hugh Cullman, Executive Vice President of Philip Morris in a speech at the World Affairs Council and the International Business Forum stressed to members the importance of international investment. Despite concerns over uncertainty deterring investment in developing countries, Cullman claimed that some executives of U.S. corporations were "reluctant to attribute enough importance to international affairs" as they worried about "political stability in overseas markets," and found it "easier to focus attention on more easily understood domestic concerns."<sup>449</sup> He acknowledged that there were proposals for an international institution that would establish rules on foreign investment for businesses and government but that in the meantime U.S. corporations should "also continue to present their views on trade and investment at home."<sup>450</sup> This approach included supporting BITs as Cullman claimed that, "they define the treatment host governments will accord foreign investment, and include such guarantees as equitable treatment and protection consistent with international law, fair compensation and recourse to arbitration in the event of expropriation and free transferability of capital."<sup>451</sup>

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<sup>449</sup> Cullman H. Philip Morris. Remarks at a joint meeting of the World Affairs Council and the International Business Forum. December 1978. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=xnkd0084>.

<sup>450</sup> Ibid, 5.

<sup>451</sup> Ibid, 8.

In an October 1985 British American Tobacco (BAT) document, executives also discussed the importance of supporting the U.S. in pushing for BITs. BAT executives mentioned how BITs could benefit TNCs “as a vehicle to solve current investment problems” and “as a means to provide clear ground rules for treatment of investment for at least 20 years in a BIT ratifying nation.”<sup>452</sup> These executives concluded that in the long term BITs would serve as a step toward building an international consensus on investment rules favorable to private enterprise.

In a March 1986 RJ Reynolds (RJR) document, Public Affairs Executive Marshall B. Bass sent a “confidential” report to other executives that also addressed the importance of supporting BITs. The document mentioned the importance of protecting their foreign investments and establishing dispute settlement procedures and that they had important allies, including the U.S. Chamber of Commerce and the National Association of Manufacturers to help push for successful BITs. The document mentioned that “successful negotiations would remove restrictions on foreign direct investment, and ease RJR’s entry into foreign markets,” and went on further to state that the company should continue to support the BIT program “by sharing our business experiences with treaty negotiators, and advocating for the ratification of treaties when they are before the Senate in areas where we have or could have interest.”<sup>453</sup> Overall these internal discussions led to intensifying efforts to influence the U.S. government about increasing trade liberalization and accessing foreign markets.

### **Regulatory capture of the United States Trade Representative (USTR)**

The United States Trade Representative (USTR) is the U.S. agency responsible for conducting trade negotiations and developing trade policy in coordination with the

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<sup>452</sup> British American Tobacco. BATCO Press Cuttings Index. 14 October 1985. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=y1kg0205>.

<sup>453</sup> Bass M. RJ Reynolds. 1986 Federal Public Affairs Issues. 6 March 1986. Available at: <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=fsgx0087>.

president. The USTR claims that trade liberalization and the expansion of trade agreements are critical to America's prosperity defined by expansion in economic growth, raising living standards, and increasing American jobs.<sup>454</sup> While these issues are subject to debate, especially the creation of domestic jobs, the USTR is charged with regulating trade practices to act in the public interest, but often times USTR decisions reflect commercial interests, constituting a regulatory capture.<sup>455</sup> The regulatory capture of the USTR in relation to health is exhibited in the USTR's disregard for health provisions in enacted trade agreements. Instead of ensuring America's prosperity by raising living standards in terms of health, U.S. trade agreements not only allow U.S. companies to export harmful products to foreign countries, but also allow foreign companies greater access to export harmful products to U.S. citizens.

Regulatory capture occurs in numerous ways, but for this short section it is important to highlight two mechanisms of regulatory capture that tobacco companies have employed to capture the USTR; lobbying, and institutional design/revolving door. Utilizing George Stigler's economic theory of regulation, tobacco industry lobbying had information and organizational cost advantages to engage in lobbying for beneficial regulations.<sup>456</sup> These advantages have helped secure privileged access to trade representatives as tobacco companies have directly lobbied the USTR for favorable trade policies as well as used the USTR as a vehicle to help structure global trade governance by formulating international trade rules that reflect their commercial interests.

During the 1980s, the major U.S. tobacco companies, Philip Morris, Brown and Williamson, and RJ Reynolds formed the U.S. Cigarette Exporters' Association and lobbied

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<sup>454</sup> United States Trade Representative. Benefits of Trade. 2014; <http://www.ustr.gov/about-us/benefits-trade>.

<sup>455</sup> Baker A. Restraining regulatory capture? Anglo-America, crisis politics and trajectories of change in global financial governance. *International Affairs*. 2010;86(3):647-663.

<sup>456</sup> Stigler G. The theory of economic regulation. *Bell Journal of Economics and Management Science* 2. 1971;3(2):3-21.

the USTR to use BITs and section 301 of the 1974 Trade Act to put pressure on countries to lower their trade barriers and open their markets. In particular, tobacco companies were looking to expand into previously closed markets in Asia and lobbied the USTR arguing that the U.S. had increasing trade deficits with Japan and other Asian nations and that cigarette exports would help reverse those negative trends.<sup>457</sup> Throughout the 1980s, the USTR threatened Japan, Thailand, Taiwan and South Korea with trade sanctions to open up their markets to foreign tobacco companies and the Asian countries eventually complied, except for Thailand, which refused to alter its 1966 Tobacco Act that placed severe limitations on foreign companies in terms of market share and advertising. In response tobacco companies lobbied the USTR, who in 1989 challenged Thailand's law under the General Agreement on Tariffs and Trade (GATT) for creating a barrier to trade.<sup>458</sup> In 1990, a GATT panel upheld the U.S. challenge, forcing Thailand to open its market to tobacco companies, but permitted the Thai government to enact and implement strong tobacco control policies. As a result, GATT dispute settlement mechanism was limited in forcing governments to withdraw or weaken their public health regulations.

The regulatory capture of the USTR by tobacco companies also involves the "revolving door" of individuals who occupy positions in industries and government working as lobbyists and then lawmakers and vice versa. There are a handful of U.S. trade representatives that have either worked for tobacco companies prior to entering the USTR or after leaving government (Table 6:1). The most prominent examples include Carla Hills (US Trade Representative 1989-1993) and Julius Katz (Deputy US Trade Representative 1989-1993) who were the primary negotiators of the North American Free Trade

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<sup>457</sup> Lambert A, Sargent JD, Glantz SA, Ling PM. How Philip Morris unlocked the Japanese cigarette market: lessons for global tobacco control. *Tobacco control*. Dec 2004;13(4):379-387.

<sup>458</sup> MacKenzie R, Collin J. "Trade policy, not morals or health policy": the US Trade Representative, tobacco companies and market liberalization in Thailand. *Global social policy*. Aug 2012;12(2):149-172.

Agreement (NAFTA), a free trade agreement between the U.S., Canada, and Mexico. In 1994, U.S. tobacco companies RJ Reynolds and Philip Morris hired Hills and Katz to lobby the Canadian congress to withdraw its proposal for the plain packaging of cigarettes, citing violations of trade agreements (see below), including NAFTA, which they negotiated a year earlier.<sup>459</sup>

### **Tobacco industry support for fast track authority**

In January 1975, Congress enacted the Trade Act of 1974,<sup>460</sup> which initiated “fast-track” presidential authority (renamed trade promotion authority in 2002)<sup>461</sup> a mechanism that grants the president the authority to negotiate international trade agreements that Congress can only approve or deny but cannot not amend. This authority granted to president was set to expire in 1980, but was extended in 1979,<sup>462</sup> and then renewed again from 1988-1993,<sup>463</sup> 1993-1994,<sup>464</sup> 2002-2007 and then again in 2015.<sup>465</sup>

Each time Congress approved fast track authority, it ceded authority to the executive branch to negotiate and sign trade agreements without congressional oversight and approval. Once trade agreements are signed, congress can then only vote to pass or defeat trade agreement without amending the text of the proposed agreement. Fast track authority thus serves as a vital mechanism in expediting trade negotiations as it can bypass congressional oversight, including debates and discussions about the agreements. Fourteen

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<sup>459</sup> Crosbie E, Glantz SA. Tobacco industry argues domestic trademark laws and international treaties preclude cigarette health warning labels, despite consistent legal advice that the argument is invalid. *Tobacco control*. May 2014;23(3):e7.

<sup>460</sup> United States Congress. *U.S. Trade Act of 1974, Public Law 93-617*. Washington D.C., United States, 3 January 1975.

<sup>461</sup> United States Congress. *U.S. Trade Act of 2002 (U.S. Trade Promotion Authority Act), Public Law 107-210*. Washington D.C., United States, 6 August 2002.

<sup>462</sup> United States Congress. *U.S. Trade Agreements Act of 1979, Public Law 96-39*. Washington D.C., United States, 26 July 1979.

<sup>463</sup> United States Congress. *U.S. Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418*. Washington D.C., United States, 23 August 1988.

<sup>464</sup> United States Congress. *Extension of U.S. Omnibus Trade and Competitiveness Act of 1988, Public Law 103-49*. Washington D.C., United States, 2 July 1993

<sup>465</sup> United States Congress. *U.S. Trade Promotion Authority*. Washington D.C., United States, 29 June 2015.

of the fifteen U.S. FTAs enacted between 1974 and 2013 were developed under fast-track authority (Table 6:1), illustrating its importance.

Tobacco industry documents reveal that tobacco companies began to recognize the importance of fast track in the early 1990s and then lobbied for this mechanism during the negotiations for NAFTA and the WTO. In the early 1990s, the Tobacco Institute (TI), the U.S. tobacco companies' main research and lobbying organization, funded the Washington Legal Foundation (WLF), a conservative pro-business legal organization, to research legal issues, including trade issues and produce legal studies and publications with an annual \$30,000 grant. In August 1992, WLF discussed the issue of fast track authority in a letter requesting the renewal of the grant from TI.<sup>466</sup> In the request letter WLF briefly discussed the importance of protecting international trade, which had "direct concern to the Tobacco Institute." In this section of the letter, WLF highlighted a paper they published written by Carla Hills, U.S. Trade Representative (1989-1993), which discussed the importance of fast track authority in order to pass NAFTA. Hills argued that fast track was "vital to the economy's continued growth, to their jobs, and to their standard of living," and stressed the importance of U.S. exports by stating that "our domestic economy is in temporary downturn, but our exports continue to hit new records to pick up the slack."<sup>467</sup> Hills then used these arguments during congressional hearings to help lobby congressman to extend fast track. On May 15, 1991, congress voted to extend fast track, which helped pass both NAFTA and the WTO (Table 6:2).

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<sup>466</sup> Washington Legal Foundation. A Proposal to the Tobacco Institute Requesting a Renewal Charitable Grant for the Washington Legal Foundation's Litigation and Legal Studies Programs. 12 August 1992. Tobacco Institute. Available at: <http://legacy.library.ucsf.edu/tid/ppf40c00>.

<sup>467</sup> Hills CA. Legal Wrangle Over "Fast Track" Imperils U.S. Economy. 26 April 1991. Tobacco Institute. Available at: <http://legacy.library.ucsf.edu/tid/mek24b00>.

<b>Official</b>	<b>USTR position</b>	<b>Previous &amp; subsequent private sector posts</b>
Clayton Yeutter	US Trade Representative (1985-1989)	-Served as Director of British American Tobacco during the 1990s -Currently a senior advisor at Hogan Lovells LLP that represents Philip Morris International
Carla Hills	US Trade Representative (1989-1993)	-Her law firm Hills & Company represented Philip Morris and RJ Reynolds to fight plain packaging in Canada
Julius Katz	Deputy US Trade Representative (1989-1993)	-He worked for the law firm Hills & Company that represented Philip Morris and RJ Reynolds to fight plain packaging in Canada
Mickey Kantor	US Trade Representative (1993-1997)	-His law firm of Manatt, Phelps, Rothenberg and Phillips (1976-1993) represented Philip Morris to fight Beverly Hills smokefree ordinance
Ron Kirk	US Trade Representative (2009-2013)	-Former Philip Morris consultant and his law firm of Vinson & Elkins LLP defends tobacco companies
Miriam Sapiro	Deputy US Trade Representative (2013-2016)	-Her former communication firm VeriSign Inc defends tobacco companies

By the late 1990s, the U.S. looked to extend NAFTA to all of the countries in the Western Hemisphere, except Cuba, in the proposed Free Trade Area of the Americas (FTAA) and looked to renew fast track authority, which was not renewed in 1994. In response, Philip Morris joined other U.S. businesses to form a coalition called “America Leads on Trade” (ALOT) to promote the renewal of fast track.



Table 6.2: History of fast track authority and implementation of U.S. free trade agreements			
Fast track/trade promotion authority	US free trade agreements	US presidential signing date	US implementation date
1974-1980 fast track	No FTAs		
1980-1988 renewed	US-Israel FTA	22 April 1985	1 September 1985
1988-1991 renewed	US-Canada FTA	2 January 1988	9 September 1988
1991-1994 renewed	NAFTA (Mexico and Canada)	17 December 1992	1 January 1994
1994-2002 (no fast track)	US-Jordan FTA	24 October 2000	17 December 2001
2002-2007 renewed (fast track renamed Trade Promotion Authority)	US-Singapore FTA US-Chile FTA AUSFTA* US-Morocco FTA US-Bahrain FTA DR-CAFTA US-Oman FTA US-Peru TPA US-Colombia TPA US-Panama TPA US-South Korea FTA	6 May 2003 6 June 2003 18 May 2004 17 June 2004 14 September 2004 2 August 2005 19 January 2006 12 April 2006 22 November 2006 28 June 2007 30 June 2007	1 January 2004 1 January 2004 1 January 2005 1 January 2006 1 August 2006 1 January 2009 1 January 2009 1 February 2009 15 May 2012* 21 October 2011* 15 March 2012*
2007-2014 (no fast track)	TPP US-EU Transatlantic FTA	Pending† Pending†	
AUSFTA: Australia-United States Free Trade Agreement (does not include investor-state provision) DR-CAFTA-Dominican Republic-Central American Free Trade Agreement FTA: Free Trade Agreement NAFTA: North American Free Trade Agreement TPA: Trade Promotion Agreement TPP: Trans-Pacific Partnership Agreement *These were implemented under the Obama Administration, but were negotiated and signed by President George W. Bush under fast track, so Congress could not make any amendments. †As of May 2016.			

In a 1997 internal document, Philip Morris discussed their involvement with ALOT, which included “attending briefings for member companies, and keeping abreast of developments through newsletters and other materials.”<sup>468</sup> On October 9, 1997, the Wall Street Journal reported that ALOT planned a big push to persuade undecided lawmakers to support fast track by spending “\$600,000 over the next week airing television and radio advertisements

<sup>468</sup> Philip Morris. [Summary of Positions on Various Topics]. 1997. Philip Morris. Available at: <http://legacy.library.ucsf.edu/tid/qrv89h00>.

in 104 congressional districts, as well as dispatching troops to the districts of undecided lawmakers.”<sup>469</sup> On November 4, 1997, the New York Times reported that ALOT announced that it would run newspaper advertisements that week in “43 cities identifying 67 members of Congress who are undecided or against granting the [fast track] authority.”<sup>470</sup> On the same day, William H. Webb, PMI President and CEO 1993-1997, sent a memorandum addressed to “All U.S.-Based Employees” discussing ALOT and the importance of fast track by stating, “Without the ‘fast track’ negotiating authority, the United States could find itself at a competitive disadvantage.”<sup>471</sup> The memorandum also listed a toll free number and a flyer stating, “To boost American exports, create jobs and protect America’s future, renew the President’s traditional trade negotiating authority.”<sup>472</sup> Then on November 13, 1997, James T. Christy, ALOT Chairman, issued a memorandum to Samuel Chilcote, Tobacco Institute Executive, and ALOT members that their efforts were “instrumental in adding GOP Representatives to the fast track supporter list” but that “very little progress was made in adding to the list of Democratic supporters in the House.”<sup>473</sup> As a result, Christy provided a list of uncommitted Republican and Democratic Members and requested that it was critical that everyone contact these individuals to support fast track. However these efforts were unsuccessful as fast track was defeated in congress.<sup>474</sup>

By the early 2000s, the Bush Administration declared a strong commitment for FTAs as one of its top priorities,<sup>475</sup> and again discussed the possibility of renewing fast track authority. On October 3, 2001, Congressman Philip Crane introduced HR Bill 3005 to extend

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<sup>469</sup> Davis B. Fast Track Clears House Panel, but Fight Looms. *Wall Street Journal*. 9 October 1997.

<sup>470</sup> Mitchell A. Clinton Wins Support on His Trade Authority. *New York Times*. 4 November 1997.

<sup>471</sup> Webb W. Fast-Track Debate. 4 November 1997. Philip Morris. Available at: <http://legacy.library.ucsf.edu/tid/bnn27d00>.

<sup>472</sup> Ibid.

<sup>473</sup> Christy JT. Fast Track Update-Status Report. 13 November 1997. Tobacco Institute. Available at: <http://legacy.library.ucsf.edu/tid/zxv45b00>.

<sup>474</sup> Conconi P, Facchini G, Zanardi M. *Fast Track Authority and International Trade Negotiations*: Center for Economic Policy Research, October 2007.

<sup>475</sup> Tucker T, Wallach L. *The Rise and Fall of Fast Track Trade Authority*. New York: Public Citizen; 2009.

fast track authority, which was renamed as trade promotion authority (TPA). Two weeks later, Philip Morris sent out a memorandum to business partners and farmers stressing the importance of passing TPA, by stating, "We believe that it is time for this country to reclaim its place as a leader in the effort to remove barriers to international trade," and that if TPA is passed it would "empower the President to negotiate trade agreements that will open more markets, increase choices, and lower costs for American farmers, workers, consumers and businesses."<sup>476</sup> The memorandum went on again to provide a toll free number for business partners and farmers to contact congressmen about passing TPA. This time congress passed the bill, and on August 6, 2002, President Bush signed the bill, which granted the president TPA for five years (2002-2007).

### **Tobacco industry attempts to influence the Trans-Pacific Partnership Agreement (TPP)**

The Trans-Pacific Partnership Agreement (TPP) is a pending trade agreement between 12 Pacific Rim countries that aims to lower trade barriers and establish new trade rules governing intellectual property and investment. The TPP is an expansion of the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP), which was signed by New Zealand, Chile, Brunei and Singapore in 2005. Since 2008, eight more countries, the U.S., Australia, Canada, Japan, Mexico, Peru, Malaysia and Vietnam have held meetings and conversations to expand TPSEP and create the TPP. After seven years of negotiations, the 12 countries signed the TPP on February 4, 2016,<sup>477</sup> and each government will need to ratify the agreement before coming into force. Similar to previous trade agreement negotiations, tobacco companies submitted comments to the USTR, held private meetings with trade

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<sup>476</sup> Philip Morris. Trade Promotion Authority. 2001. Philip Morris. Available at: <http://legacy.library.ucsf.edu/tid/dhs00i00>.

<sup>477</sup> British Broadcasting Company. Trans Pacific Partnership trade deal signed in Auckland. 4 February 2016. <http://www.bbc.com/news/business-35480600>.

negotiators, and lobbied for the fast track mechanism to expedite trade agreement negotiations.

Overall the TPP experience suggests that the regulatory capture of the USTR in terms of lobbying and securing privileged access to trade representatives continued during the trade negotiations for the TPP. In general, business groups dominated the comments that were submitted to the USTR during the negotiations for the TPP. 955 out of the total 978 comments were from nongovernmental entities (92% by business groups, 7% by environmental and public health groups, and 1% by individuals).<sup>478</sup> Furthermore 91% of the comments were in favor of the TPP while only 9% opposed the TPP. This analysis offers a glimpse into how deeply involved TNCs have been, either directly or as members of business groups, during trade negotiations for the TPP.

Tobacco companies were again represented by large business groups but also submitted comments to the USTR about the TPP on their own behalf. On December 16, 2009, PMI submitted comments to the USTR on the TPP that generally advocated for freer trade in goods, services, and investments and protection of investor and intellectual property rights. PMI specifically presented concerns related to “restrictions on use of trademarks” and referenced the Australian government’s decision to introduce plain packaging, stating:

By imposing severe restrictions – restrictions tantamount to expropriation – on the use of long-held and extremely valuable intellectual property rights, plain packaging would unduly limit the freedom of commercial speech, significantly restrict competition and breach Australia’s obligations under the WTO TRIPs 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 the upcoming TPP negotiations.<sup>479</sup>

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<sup>478</sup> Mamudu H, Maynard G. *International trade and Public Health: An analysis of public comments on the Trans-Pacific Partnership Agreement*, 18 November 2014.

<sup>479</sup> Philip Morris international. *Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement* Washington D.C., United States: United States Trade Representative, 16 December 2009.

PMI also presented comments in favor of including the investor-state dispute settlement (ISDS) mechanism, which allows investors to directly challenge government regulations, in the TPP. PMI supported the inclusion of ISDS in the TPP and stressed stronger investor protections “must be a critical element of the TPP and any future U.S. Free Trade Agreements,” which they claimed was “a vital aspect of protecting its foreign investments” and would grant the right for investors “to submit disputes to independent international tribunals.”<sup>480</sup> This is especially important in the context of plain packaging in both New Zealand and Australia because the U.S. does not have a FTA with New Zealand and its FTA with Australia does not contain an ISDS mechanism. PMI’s recent trade dispute loss to the Australian government on jurisdictional accounts demonstrated the shortcomings of treaty shopping and the protections current trade and investment agreements afford to tobacco companies. As a result, PMI is aggressively pushing for the adoption of ISDS in the TPP to extend this dispute resolution process against TPP member states, most notably New Zealand and Australia.

While it is quite probable that tobacco companies have had close dialogue and held numerous private meetings with trade representatives from several of the TPP countries, leaked information through media sources has been able to document some of these private meetings. On February 24, 2012, PMI co-sponsored an event with some of the largest TNCs in the world, including Microsoft, General Electric, Pfizer, Chevron, Walmart and Target, to discuss the TPP with several U.S. congressmen, trade representatives and ambassadors from the TPP countries.<sup>481</sup> The private meeting also included the major business groups that tobacco companies are members of including the Business Roundtable and the U.S.

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<sup>480</sup> Ibid.

<sup>481</sup> Washington International Legal Association. Governors and Ambassadors World Trade Reception. 24 February 2012; <https://web.archive.org/web/20120226034326/http://www.wita.org/en/cev/1146>.

Chamber of Commerce. The announcement for the event again indicated that these TNCs, including tobacco companies secured privileged access to trade representatives and continued to develop and strengthen relationships with highest levels of government. The announcement read:

This exclusive reception is a unique gathering of Governors and other top state officials, select US trade officials, Ambassadors and key embassy personnel from large US trade partners, and businesses reliant on the expansion of international trade. This reception is designed to establish and strengthen the critical personal connections at the highest levels of state government with embassy and industry representatives to lay the foundations for growth in two-way trade, foreign direct investment, and strengthened economic ties.

On October 5-7, 2013, PMI's Indonesian subsidiary Sampoerna co-sponsored with Chevron, Microsoft, FedEx, and Johnson and Johnson the Asia-Pacific Economic Cooperation) APEC summit meetings in Bali, Indonesia.<sup>482</sup> Although APEC summit meetings generally involve heads of state and trade representatives that engage with the business community to promote free trade throughout the Asia-Pacific region, the 2013 summit had a particular focus on finishing the TPP negotiations. While it is difficult to speculate how much influence tobacco companies had at this summit, their sponsorship indicates they at least had the access to again discuss lobby top administration officials about their priorities with the TPP.

As the TPP progressed, the Obama administration began discussing efforts to again renew trade promotion authority (TPA), aka fast track authority, which had ended in 2007. Once again, tobacco companies joined large business groups, including the Business Roundtable, the U.S. Chamber of Commerce, the National Association of Manufactures, the National Foreign Trade Council, and the U.S. Council for International Business, who formed

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<sup>482</sup> Asia-Pacific Economic Cooperation. Sponsors for APEC CEO Summit Indonesia. 2013; <http://www.apec2013ceosummit.com/sponsors.html>.

a coalition-lobbying group titled the “Trade Benefits America”<sup>483</sup> to push for the renewal of TPA. In addressing the importance of renewing TPA in securing the TPP, this coalition has lobbied congressmen claiming that several trade issues have evolved or emerged, including intellectual property and investment rights, since the expiration of TPA in 2007 and that TPP would help address the important trade issues in the 21<sup>st</sup> century and ensure that pending and new U.S. trade negotiations are completed.<sup>484</sup> It was also disclosed that PMI spent \$1.75 million in 2014 in lobbying for pending U.S. trade agreements, trade obligation issues related to excessive regulatory proposals, and discussions related to trade matters in Vietnam, regulatory policies in Russia and potential legislation related to TPA.<sup>485</sup> These efforts helped the U.S. Senate pass TPA on May 21, 2015,<sup>486</sup> and then helped the House of Representatives pass TPA on June 18, 2015.<sup>487</sup> All of the TPP countries agreed upon the text on October 5, 2015,<sup>488</sup> and then signed it on February 3, 2016.<sup>489</sup> As of May 2016, the TPP still needs to be passed in congress and then signed and ratified by the president before it enters into force.

### **NGOs push back against trade and investment agreements**

As international trade governance transitioned during the 1980s and 1990s from primarily focused on lowering trade barriers to incorporating new areas such as services, capital, and intellectual property, NGOs became increasingly alarmed about the effects of privately negotiated trade agreements on labor standards, environmental protection, public

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<sup>483</sup> Trade Benefits America. Trade agreements are good for the U.S. economy. 2014; <http://www.tradebenefitsamerica.org/>.

<sup>484</sup> Trade Benefits America. *Trade Promotion Authority: An Important Tool for U.S. Economic Growth and Jobs*, July 2014.

<sup>485</sup> U.S. House of Representatives. *Lobbying Report: PMI Global Services Inc.*, July 2014.

<sup>486</sup> Mauldin W, Peterson K. Fast-Track Trade Bill Survives Key Senate Vote. *Wall Street Journal*. 21 May 2015.

<sup>487</sup> Hughes S. House Passes Fast-Track Trade Bill, but Senate Outcome Uncertain. *Wall Street Journal*. 18 June 2015.

<sup>488</sup> Calmes J. Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress. *New York Times*. 5 October 2015.

<sup>489</sup> Mauldin W. Dozen Nations Sign Pacific Trade Deal, Kicking Off Battle for Ratification. *Wall Street Journal*. 3 February 2016.

health, human rights and overall the social well-being of citizens. During the negotiations for the North American Free Trade Agreement (NAFTA), a regional trade agreement between the U.S., Canada, and Mexico, NGOs participated in protests to block the agreement.<sup>490</sup> This also included the uprising of the Zapatista revolution, which protested the Mexican government for signing NAFTA that would further increase the gap between the rich and poor people in Chiapas, Mexico.<sup>491</sup>

While NGO efforts failed to stop NAFTA's passage or include adequate safeguards for labor, the environment, public health, and human rights, protests by NGOs and civil society groups escalated during the late 1990s and early 2000s to disrupt and prevent similar proposed trade agreements. In 1998, following leaked drafts of a proposed Multilateral Agreement on Investment (MAI), which aimed at advancing corporate rights and decision-making authority among investors in the Organization for Economic Cooperation and Development (OECD) countries, NGOs and civil society groups around the world participated in international protests to condemn the private negotiations and succeeded in defeating the MAI.<sup>492</sup> In 1999, in what is now known as the Battle in Seattle, NGOs protested a WTO Ministerial Conference to highlight the problems trade agreements and globalization and again to prevent the further advancement of corporate rights at the expense of society.<sup>493</sup> These protests again continued in the late 1990s and early 2000s to prevent the adoption of the Free Trade Agreement of the Americas, which would have extended NAFTA like rules to all of the countries in the Americas. While bilateral agreements and small regional trade agreements continued to be enacted in the 2000s, NGO

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<sup>490</sup> Bandy J, Smith J, eds. *Coalitions across Borders: Transnational Protest and the Neoliberal Order*. Lanham, Maryland: Rowman & Littlefield Publishers Inc.; 2005.

<sup>491</sup> Cleaver Jr. HM. The Zapatista Effect: The Internet and the Rise of an Alternative Political Fabric. *Journal of International Affairs*. Spring 1998;51(2):621-640.

<sup>492</sup> Walter A. NGOs, Business, and International Investment: The Multilateral Agreement on Investment, Seattle, and Beyond. *Global Governance*. 2001;7(1):51-73.

<sup>493</sup> *Ibid*, 52.



protests were able stall pending WTO negotiations and defeat large proposed multinational treaties such as MAI and FTAA.

### **Tobacco control NGOs attempts to influence the TPP**

As mentioned in the introduction, public health advocates and scholars have only begun recently to seriously address the impact of trade agreements on tobacco control and as a result have only recently participated in U.S. trade negotiations. These efforts have noticeably increased during the trade negotiations for the TPP as major public health NGOs, including the American Cancer Society, the American Lung Association and the American Heart Association have begun to aggressively lobby U.S. policymakers and trade negotiators to provide adequate safeguards to protect public health in pending trade deals. Similar to the tobacco companies participating with numerous TNCs to alter international trade governance during the negotiations for the TPP, tobacco control NGOs, including Campaign for Tobacco Free Kids (TFK), and the Center for Policy Analysis on Trade and Health (CPATH) have participated with various public health NGOs in attempts to help craft explicit and specific provisions in the TPP to protect public health. This has included lobbying policymakers and trade negotiators to not grant TNCs further authority and to ensure the policy space for governments to properly develop, design, and implement public health policies through transparent consultation processes without being restricted by international trade rules.

In particular, tobacco control NGOs in the U.S. and in the other TPP member states proposed completely removing tobacco from the TPP agreement to avoid further contributing to the global tobacco epidemic.<sup>494</sup> Given the uniqueness of tobacco as the only product that kills half of its users, public health NGOs sent letters to trade negotiators arguing that tobacco needed to be treated differently and as a result needed to be excluded

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<sup>494</sup> American Academy of Pediatrics. *Letter from Gena Lewis to President Obama and Trade Representative Michael Froman to exclude tobacco from the TPP* 12 November 2013.

from the TPP agreement entirely. This proposal, referred to as a “tobacco carve-out”, would 1.) stop the elimination of tariffs on tobacco and 2.) prevent tobacco companies from using the ISDS mechanism to directly challenge tobacco control regulations in each of the TPP member states. By stopping the elimination of tariffs on tobacco, the tobacco carve-out would avoid further contributing to the tobacco epidemic globally as trade liberalization increases tobacco consumption.<sup>495</sup> Given the recent challenges by PMI against Uruguay and Australia, denying tobacco companies the ISDS mechanism would prevent them from directly using the TPP to challenge tobacco control policies in TPP member states or indirectly using the TPP to threaten governments and cause a chilling effect to delay progressive public health policies like in New Zealand.

Pressured by public health groups to be more transparent and to recognize the unique status of tobacco, the USTR responded by publicly announcing a draft proposal for tobacco in the TPP. In May 2012, the USTR issued a statement detailing the draft proposal’s three aims, which proposed to recognize tobacco’s unique status, but to continue to allow the elimination of tobacco tariffs, and to only permit “general exceptions” that would allow governments to adopt public health regulations that “impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health.”<sup>496</sup> In other words, if challenged in international trade tribunals governments would have to perform a “necessity test” by scientifically proving that each measure enacted is *necessary* for public health without violating the TPP agreement, which we have seen in the previous chapters can be an expensive and long drawn out process.

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<sup>495</sup> Gilmore AB, McKee M. Exploring the impact of foreign direct investment on tobacco consumption in the former Soviet Union. *Tobacco control*. Feb 2005;14(1):13-21. Also see Lee S, Lee K, Holden C. Creating demand for foreign brands in a 'home run' market: tobacco company tactics in South Korea following market liberalisation. *Tobacco control*. Nov 14 2012.

<sup>496</sup> United States Trade Representative. *Fact Sheet: TPP Proposal*, May 2012.

While the USTR considered the language in this draft proposal to create a “safe harbor” for governments to regulate tobacco, public health NGOs argued that the proposal did not go far enough and considered the proposal a semi carve-out of tobacco. While public health NGOs appreciated the recognition of tobacco’s uniqueness as a harmful product they again wrote trade negotiators to argue that by continuing to permit the elimination of tobacco tariffs in the TPP would result in increases in tobacco consumption. They also complained that exempting tobacco instead of excluding it still left open the opportunity for tobacco companies to easily threaten and challenge public health regulations like we have seen in the previous chapters in Australia, New Zealand, and Uruguay. As some lawyers have characterized it, an “exception” for tobacco still involves a high risk to litigation and arbitration, while an “exclusion” of tobacco limits it considerably.<sup>497</sup>

As the negotiations for the TPP continued to progress into 2013 and the USTR considered these demands by public health NGOs, new versions of leaked chapters indicated that the USTR was abandoning even its proposal for a semi carve-out of tobacco.<sup>498</sup> The newly leaked draft version of the TPP indicated that the USTR had walked back its proposal of creating a “safe harbor” for governments to regulate tobacco and was not going to recognize tobacco as a “uniquely” harmful product. In response, public health groups wrote to trade representatives and complained in the media that the USTR had abandoned its proposal.<sup>499</sup> While the USTR denied this position, the leaked chapters

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<sup>497</sup> Stumberg R. Safeguards for tobacco control: options for the TPPA. *Am J Law Med.* 2013;39(2-3):382-441.

<sup>498</sup> WikiLeaks. Secret Trans-Pacific Partnership Agreement IP Chapter. 13 November 2013; <https://wikileaks.org/tpp/pressrelease.html>.

<sup>499</sup> Campaign for Tobacco-Free Kids, American Cancer Society, Cancer Action Network, American Heart Association, American Lung Association, American Academy of Pediatrics. USTR Abandons Plan to Protect Tobacco Control Measures under Trans-Pacific Partnership Trade Agreement. 19 August 2013; <http://www.lung.org/about-us/media/press-releases/ustr-abandons-plan-under-trans-pacific-partnership-trade-agreement.html?referrer=https://www.google.com/>.

combined with increasing media exposure increased the pressure to address the tobacco carve-out issue in the TPP.

In August 2013 during the 19<sup>th</sup> round of negotiations for the TPP, this pressure intensified as public health NGOs in Malaysia, most notably the South-East Asia Tobacco Control Alliance (SEATCA), successfully convinced one of the TPP member states, the Malaysian government, to table the tobacco carve-out position.<sup>500</sup> As recommended by public health NGOs from various TPP member states, the Malaysian proposal recognized tobacco as a uniquely harmful product and recommended that tobacco be completely excluded (carved-out) of the TPP thereby 1.) not permitting the elimination of tobacco tariffs and 2.) preventing tobacco companies to use the ISDS mechanism to directly challenge tobacco control regulations. Following Malaysia's lead, public NGOs throughout 2014 and 2015 continued to pressure their governments to adopt this proposal,<sup>501</sup> but none of the TPP member states publicly committed to signing the Malaysian proposal.

As the TPP negotiations finished in September 2015, reports surfaced that the U.S. tabled a proposal that again would semi carve-out tobacco by still allowing the elimination of tobacco tariffs but now explicitly removing the ISDS mechanism to challenge tobacco control regulations in the TPP member states.<sup>502</sup> Some public health NGOs praised the USTR efforts to remove ISDS challenges against tobacco control regulations as a historic step forward in helping resolve the trade and health divide in international trade and health

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<sup>500</sup> Southeast Asia Tobacco Control Alliance. *Excluding Tobacco from Trade and Investment Agreements: Transpacific Partnership Agreement (TPPA)*, August 2013.

<sup>501</sup> Center for Policy Analysis on Trade and Health, American Academy of Family Physicians, American Academy of Pediatrics, American College of Physicians, American Congress of Obstetricians and Gynecologists. *Letter from public health groups to President Obama recommending the tobacco carve-out in the TPP*, 11 September 2013.

<sup>502</sup> Hughes K. U.S. submits compromise on anti-tobacco laws under Pacific trade deal. *Reuters*. 1 October 2015.

governance,<sup>503</sup> while other NGOs complained the proposal still allowed for eliminating tariffs on tobacco and did not provide similar safeguards to protect other areas of public health, including food, alcohol and medicine, which are all still susceptible to industry trade attacks. As the final draft text of the TPP was released to the public, some public health NGOs also questioned the proposed language of the removal of the ISDS for tobacco, which stated that a TPP party “may elect to deny the benefits of Investor-State dispute settlement with respect to a claim challenging a tobacco control measure of the Party.”<sup>504</sup> The NGOs opposed argued that this loose wording could potentially create a loophole for governments to still allow tobacco companies to use the ISDS instead of conclusively rejecting ISDS and protecting governments from tobacco industry challenges.<sup>505</sup> As of May 2016, the TPP remains pending and these debates continue.

## **Conclusion**

While the focus of this dissertation has been on examining how tobacco companies are using existing trade and investment agreements to threaten and challenge strong HWL regulations, this chapter provided a brief examination in how tobacco companies are continuing their efforts to aggressively expand and extend global trade governance. The tobacco companies’ comments during trade negotiations and their strong push to pass the TPP suggests they are not only seeking to expand their authority vis-à-vis states but that they are also limited with existing trade agreements in directly challenging governments over their public health regulations. On the other hand, public health NGOs have been able

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<sup>503</sup> Campaign for Tobacco-Free Kids. In Historic Step for Public Health, Trans-Pacific Partnership Protects Health Measures from Tobacco Industry Attack. 5 October 2015; [https://www.tobaccofreekids.org/press\\_releases/post/2015\\_10\\_05\\_trade](https://www.tobaccofreekids.org/press_releases/post/2015_10_05_trade).

<sup>504</sup> United States Trade Representative. Summary of the Trans-Pacific Partnership Agreement. 4 October 2015; <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>.

<sup>505</sup> Center for Policy Analysis on Trade and Health. *Trading Views: Real Debate on Key Issues in the TPP: CPATH submission to U.S. House of Representatives regarding the Trans-Pacific Partnership Agreement*. Washington D.C., United States: U.S. House of Representatives Committee on Ways and Means, 9 December 2015.

to thwart some of this progress, including preventing the MAI and FTAA agreements and helped lobby for a semi-tobacco carve out from the TPP. However health groups still face big challenges ahead as TNCs continue to enjoy privileged access to trade negotiators and top officials, trade practices are still mostly private and non-transparent, and particular trade mechanisms such as fast track authority have further limited the policy space for governments to amend trade agreements.

## **Chapter 7: Conclusion**

The ability of a transnational corporation (TNC), Philip Morris International (PMI), to use international trade and investment agreements to directly challenge domestic public health regulations in Australia and Uruguay has highlighted a growing concern across multiple disciplines about the increased authority TNCs are commanding vis-à-vis the state. In addition to using trade and investment agreements as legal weapons to globally preempt and constrain government regulatory authority, TNCs have been aggressively lobbying governments for added protections and legal mechanisms during trade negotiations to increase their authority against the state. These changes have forced scholars of legal studies, business, public health and political science to confront intersecting issues of international law, global health governance and corporate activity to address the constant evolving nature of the regulatory environment both at the domestic and international level in the 21<sup>st</sup> century.

This dissertation has set out to examine these debates concerning the rise of non-state actors and state autonomy and the impact of international trade and investment agreements on domestic policymaking by examining the regulation of cigarette package health warning labels (HWLs). In what would appear as a typical public health regulation has turned out to be a classic battle of TNCs versus the state, the intersection of international trade and health governance, and an inside look into the constant evolving nature of the regulatory environment of tobacco in the 21<sup>st</sup> century. The results of this dissertation will not only provide much needed research and analysis concerning these multi-disciplinary issues, but will also have important policy implications that can be utilized by advocates and policymakers around the world to help promote and protect public health in the 21<sup>st</sup> century.

## **Global preemption and the intersection of trade and health**

The dissertation began by outlining the history of the tobacco companies' usage of international trade agreements to threaten and legally challenge progressive cigarette package HWL regulations. The goal was to illustrate from the industry's own formally secret documents how tobacco companies approached the issue of HWLs, how legal threats over international trade and investment emerged and how these threats were initially deployed against governments, which would serve as a basis for understanding how tobacco companies are currently threatening governments over their HWL proposals. By analyzing the industry documents found in the archive library, two important discoveries were made.

First, analyzing these documents revealed that tobacco companies have always approached countering HWLs from an international perspective and have tried to prevent the global diffusion of these best practices for decades. As one of the tobacco company executives explained "a sneeze in one country today, causes international pneumonia tomorrow." This international approach and fear of diffusion continued in the late 1980s and early 1990s as tobacco companies became increasingly alarmed by the prospects of governments implementing very progressive HWL policies with graphic pictorial images, and possibly generic or plain packaging, which would completely remove their branding that they understood was "their major asset." In response the main global tobacco companies formed an international coalition, the Plain Pack Group, which began a deep search into new areas such as international trade and investment for legal protection to counter the progressive nature of HWLs, which they considered at the time as "their biggest threat." As a result, in the early 1990s the main global tobacco companies developed a systematic and methodical approach to counter the possibility of plain packaging in Canada and Australia, which included using international treaties to globally preempt domestic HWL regulations. This multi-pronged trade attack included highlighting the legal and



reputational costs of international arbitration and potential compensation, framing the health issue in terms of broad violations of business intellectual property rights and investments, and recruiting business support and funding research to strengthen credibility and promote uncertainty and concern, which has served as the foundation for current trade attacks on HWL proposals.

Second, analyzing these documents also revealed that despite privately receiving unfavorable legal advice from their own lawyers that the usage of international treaties could not prohibit governments from enacting and implementing HWLs, including plain packaging, publically the tobacco companies argued that governments could not implement these health regulations. In doing so, tobacco companies discovered that the mere threat of arbitration could help deter governments from enacting these progressive health regulations as both Canada and Australia withdrew their proposals to enact plain and generic packaging in the 1990s. Tobacco companies also realized that these trade threats could delay decisions to implement progressive HWLs and ultimately prevent the diffusion of best practices by essentially using international treaties to create a chilling effect (see below).

These findings expand the literature on tobacco industry preemption by coining the term “global preemption” to illustrate that tobacco companies are operating at the international level to preempt domestic tobacco control policies. Traditionally preemption has occurred domestically as the tobacco industry has attempted to secure legislation by removing authority from subordinate jurisdictions where tobacco companies are weak and transfer it to jurisdictions where they are strong. For example, tobacco companies attempted to preempt strong state tobacco control laws with weak national laws, and strong local laws with weak state laws. This research demonstrates that tobacco companies understood two decades ago that if governments implemented strong national laws, they

had no more recourse domestically and had to look internationally to shift authority and globally preempt these strong national laws. Furthermore traditional preemption has documented how tobacco companies have also used threats of litigation to deter governments from passing strong local public health policies. In a similar fashion, global preemption, which occurs on a larger scale and outside the boundaries of the state, consists to tobacco companies using trade and investment arbitration threats to deter governments from passing strong domestic public health policies.

These findings also expand the literature on trade and health and more importantly trade and tobacco control, which has primarily focused on the economic and legal implications of international trade and trade agreements on public health but has neglected to examine the *political implications* of these agreements on public health policymaking. It is well understood that trade liberalization has led to increases in market shares for global tobacco companies and an increase in tobacco consumption worldwide. Scholars have also increasingly examined the legal provisions in trade agreements and have debated whether or not they impede the enactment of public health policies. However it has been unclear how tobacco companies have developed and deployed these trade threats and what implications they are having on the policymaking process. The analysis of the industry documents presented in chapter 2 provides important insight into how tobacco companies collaborated and threatened policymakers with concerns over international trade and investment. During the 1990s this onslaught of trade threats suggests that policymakers, especially from the Health Ministry in both Canada and Australia were concerned about the legal consequences of implementing plain and generic packaging. These trade threats probably prevented plain packaging in the 1990s, but at the very least these threats added increased complexity to the regulatory process by forcing policymakers to evaluate the legal risks involved with enacting strong HWL regulations. These threats were periodically

deployed in the late 1990s and early 2000s but were never thoroughly investigated to understand what degree of impact they were having on the regulatory development process.

### **The rising authority of non-state actors vis-à-vis the state**

Chapters 3-5 investigate these questions by providing empirical data on how tobacco industry trade threats and challenges were employed and how they influenced the regulatory development process of progressive HWLs in Australia, New Zealand and Uruguay. I have sought to make two distinct, but interrelated, arguments. First, non-state actors, both transnational corporations (TNCs) and non-governmental organizations (NGOs) are increasingly and aggressively commanding authority vis-à-vis states by operating at the international level to force new openings for decision making rather than be delegated authority by states to do so. The analysis presented in chapters 3-5 demonstrates how Philip Morris International (PMI) as a mobile TNC was able to maneuver around the state and shop around through different treaties and forums and eventually challenge the strong HWL policies in both Australia and Uruguay through bilateral investment treaties (BITs). PMI's could not directly challenge the plain packaging proposal through the Australia-U.S. Free Trade Agreement (AUSFTA) because there did not exist an investor-state dispute settlement (ISDS) mechanism in the agreement. Yet despite this recourse with AUSFTA, PMI was able and decided to move its Asian operations from Australia to Hong Kong to file a trade against the Australian government's plain packaging policy under a 1993 Australia-Hong Kong BIT. Eventually after years of deliberation the international tribunal ruled that PMI's treaty shopping occurred after the plain packaging proposal was introduced and as a result was rejected on jurisdictional grounds.

On the one hand, proponents of international trade and investment who contend that mechanisms such as ISDS should not be a concern for governments, have argued that

TNCs, although mobile actors who can conduct forum shopping, remain limited in commanding authority against governments as that the ultimate decision-making rests with the sovereignty of nation-states. After all, policymakers in Australia remained confident in their approach to implementing plain packaging because they viewed the treaty shopping by PMI to challenge the health regulations as a desperate and frantic attempt that would eventually fail. However what these proponents of trade and investment and some policymakers fail to realize and what this dissertation has attempted to argue is that even though the TNC, in this case PMI, eventually lost the case they were able to force the government to spend a significant amount of money to defend the case, disrupt and complicate the regulatory development process, and possibly create a chilling effect on similar HWL proposals elsewhere. While the later two of these effects will be explained below, the ability of non-state actor TNCs to force a nation-state to spend millions of dollars to defend a public health regulation speaks volumes in how TNCs are able to leverage new global trade rules against the state. In all three case studies, ample evidence was presented to demonstrate that these progressive HWL proposals had very high public approval, received high bi-partisan support and that policymakers rejected oppositional arguments. Therefore the mere ability of TNCs to use international treaties to challenge public health regulations not only transfers authority to private tribunals that are business friendly but also seeks to override the consensus among policymakers and the public regarding a given public policy.

In addition to using existing trade and investment agreements to threaten and challenge government regulatory authority, Chapter 6 illustrates that TNCs have been aggressively lobbying governments for added protections and legal mechanisms during U.S. trade negotiations to increase their authority against the state. In particular, tobacco companies for decades have been lobbying the United States Trade Representative (USTR)

for favorable trade mechanisms, including trade promotion authority, also known as fast track authority, which expedites trade agreements and bypasses congressional oversight by only allowing congress to vote for or against trade agreements thereby eliminating the amendment process. During the current negotiations for the Trans-Pacific Partnership Agreement (TPP) tobacco companies have also held private meetings with trade representatives and lobbied the USTR to extend corporate protections and legal mechanisms to more jurisdictions under the TPP. Specifically tobacco companies have lobbied for the inclusion of investor-state dispute settlement (ISDS) mechanisms, which would allow investors to directly challenge government regulations. This research illustrates that TNCs such as tobacco companies are still limited in directly challenging government regulations in particular countries and are looking to avoid potential treaty shopping by extending these rules to cover more jurisdictions. While the current draft of the signed TPP has eliminated the ISDS mechanism to member states that choose to reject ISDS challenges by tobacco companies, as of May 2016, trade negotiations for the TPP remain pending.

Although much of the dissertation has focused on the ability of TNCs to aggressively command authority vis-à-vis the state, NGOs have also increasingly played a vital role at the international level to force new openings for decision-making. During the late 1990s and early 2000s NGOs played a critical role in drafting and developing the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), the world's first and only global health treaty, but have also aggressively participated in implementing and revising the treaty since its inception in 2003. These ongoing efforts by NGOs were again on display during the 4<sup>th</sup> FCTC Conference of the Parties (COP) as NGOs contributed to the negotiation and decision-making process to implement the FCTC by drafting the Punta del Este Declaration, which declared the rights of sovereign countries to prioritize public health

regulations over international trade agreements. The location and timing of the COP meeting could have not been more significant as it was in Punta del Este, Uruguay and PMI had recently heightened its trade threats to Uruguay. NGOs from all over the world offered their support and helped convince all of the Parties to the Convention to sign the Declaration, sending a loud and clear message that the international health community would support Uruguay in defending its HWL regulations against PMI. As a result, the case of Uruguay illustrates that the FCTC is not merely a binding legal instrument for states to consider, but is a powerful tool that NGOs can use as leverage in combating TNC activity at both the domestic and international level. In this sense NGOs are utilizing international treaties to bring pressure on governments to implement progressive public health policies while tobacco companies are using international treaties to transfer this decision-making authority away from governments.

Finally the case of Uruguay also demonstrates how international NGOs and philanthropy donors can help assist developing countries defend their public health regulations against wealthy TNCs such as tobacco companies who are trying to intimidate and bully smaller and financially vulnerable countries. While tobacco companies can absorb the costs of litigation and arbitration, defending progressive HWL policies against potential trade lawsuits are extremely costly for developing countries. Therefore the ability of Bloomberg and other NGOs to provide financial, technical, and legal assistance to the Uruguayan government supplanted the lack of the expertise and funding required to defend their HWL regulations against the PMI trade challenge. As a result, international NGOs and donors were able level the playing field by providing important resources and expertise to help the Uruguayan government counter the trade threats and challenges by PMI.

## **Measuring regulatory chill**

The second component of the argument focuses more on the threat of potential legal challenges and how these threats have altered the regulatory development process, which has had a significant impact on public health. This dissertation examined three countries (Australia, New Zealand, and Uruguay), which were each threatened by tobacco companies who attempted to enact and implement strong HWLs, to finally test how these threats have influenced the regulatory development process. Contrary to critics of regulatory chill hypothesis, ample evidence from media statements, parliamentary speeches, and interviews for this study demonstrates that policymakers in all three countries were highly aware of the implications of international trade agreements and took into account and assessed the legal risks of these agreements throughout the regulatory development process. Policymakers admitted that the threats of potential legal action added increased complexity to the regulatory process even if the policy was eventually implemented. For example, in Australia, the government defended the policy in international courts, but had to overcome the obstacle of amending a 1995 Trademarks Act to avoid any misinterpretations between the two laws. Policymakers also admitted that addressing the trade threats required the involvement of more departments and agencies to establish a general consensus on a public health issue that also had significant international trade implications.

More importantly, this dissertation provides a thorough account to support the regulatory chill hypothesis and argue that indeed a chilling effect has occurred. Even though the triangulation of media statements, parliamentary speeches, and interviews suggest that the tobacco industry trade threats have had a chilling effect, adopting a most-similar systems design (MSSD) provided the ability to more accurately measure this effect. In comparing the similar case studies of Australia and New Zealand, applying the MSSD was

able to hold constant several independent variables and eliminate other potential explanatory variables for why the Australian government was able to implement plain packaging, while New Zealand delayed its plain packaging proposal for more than 2 years in comparison to Australia. As Tienhaara states, the key independent variable was not the tobacco industry trade threats themselves but reception and reaction of these threats by government, which was influenced by partisan identification of government, the bureaucratic leadership and capacity of the Health Ministry, and tobacco control advocacy on trade and tobacco.

These results advance the literature on regulatory chill in five important ways. First, this dissertation provides the first attempt to conduct a detailed analysis of multiple case studies in a comparative analysis to test the regulatory chill hypothesis. Previous legal studies have primarily examined the legal aspects of international arbitration on domestic policymaking, and previous political science analyses have either adopted a case study approach or systematic approach that have each lacked an in-depth analysis that truly explores the domestic politics and contextual issues of a given government. The research presented in this dissertation not only involves a triangulation of sources, including reviewing industry documents, media sources, and government documents, but it also involves interviews with policymakers from several government agencies and departments that were closely involved in the process and direct recipients of the trade threats. Most importantly, this is the first study that uses the comparative method, particularly a MSSD and MDSD to more accurately measure regulatory chill as an explanatory variable.

Second, the literature on regulatory chill assumes that the implementation of public policies only involves the regulators from the designed ministry or agency assigned with drafting and developing the policy and whether or not these regulators evaluate the risks associated with international trade agreements. Surprisingly scholars of regulatory chill



have neglected to consider the multiple branches and agencies of government that play a critical role during the different stages of the regulatory development process. This research provides the first known attempt to thoroughly analyze the effect of regulatory chill by examining not only the drafting and development stages but the enactment and implementation phases of the process that involve different sets of policymakers. During the drafting and development stage, not only was the Department or Ministry of Health, which is responsible for tobacco control policies, involved in evaluating the risks associated with international trade agreements but several ministries were involved, most notably the Ministry of Trade or Foreign Affairs and Cabinet or the president's office. As mentioned above the added complexity of having to assess the legal risks associated with international trade agreements required legal advice from the Ministry of Trade or Foreign Affairs and Cabinet or the president's office resulting in added discussions and debates between policymakers from different departments of government. In both Australia and New Zealand, after the bill was proposed and introduced in parliament, members of parliament were also faced with evaluating the potential risks of international trade agreements when discussing, debating and voting for the plain packaging legislation. While members of parliament who were in opposition to plain packaging in both Australia and New Zealand did not secure a majority vote to reject the proposals, and legislators in Uruguay were excluded from the process, these legislative bodies will continue to be targeted by tobacco industry trade threats and may potentially vote to reject similar proposals in other countries.

Third, the results here expand on Tienhaara's notion that the government's perception of the threat of arbitration is more important than the actual threat itself by explaining how this perception is formed. Tienhaara demonstrated through two case studies in Costa Rica that regulatory chill was more likely to occur when the government

viewed the threat as palpable rather than hollow. The analysis presented in this dissertation expands this characterization of whether the threats were credible or not by explaining the key variables that have shaped the reception of these trade threats. Again adopting a MSSD helped explain that governments are more vulnerable to trade threats and that regulatory chill, as expressed in delaying HWL regulations, is more likely to occur in settings with a center-right led government, where there is a lack of continued bureaucratic leadership and capacity in the Health Ministry, and where tobacco control advocates are divided and constrained on the issue. On the other hand, governments are more resistant to trade threats and regulatory chill is less likely to delay HWL regulations in settings with a center-left led government, where there is sustained bureaucratic leadership and capacity in the Health Ministry, and where tobacco control advocates are independent and confident on the issue of tobacco control and trade.

Fourth, instead of measuring whether or not regulations are implemented due to concerns over international arbitration, this analysis provides a new way to critically analyze the chilling effect by measuring the time elapsed or the delay in enacting and implementing regulations. To date, regulatory chill has primarily focused on measuring policy outputs to determine the chilling effect of international trade on domestic policies and government regulatory authority. However in measuring the impact of tobacco control regulations, policy outputs are not the only indicator in assessing the impact of these regulations on public health. In the field of tobacco control, tobacco companies have increasingly had to resort to either weakening or delaying instead of outright blocking public health policies due to increased public scrutiny and the adoption of the FCTC, which increasingly removes their participation in the drafting of regulations. As a result, measuring the impact of trade threats and challenges in terms of delay offers not only another crucial lens to examine regulatory chill but provides another important measure of

the influence of tobacco companies and the impact they have had on public health. This dissertation demonstrated that delaying plain packaging will have tremendous effect on public health by significantly minimizing the effectiveness of the regulation to reduce smoking initiation, smoking cessation, government health expenditures, tobacco industry profits, and the diffusion of best practices regionally and internationally. The early success of plain packaging on public health in these areas in Australia during its first couple of years suggests that similar positive effects would have happened in New Zealand if the government had not delayed their proposal to implement plain packaging. As a result, tobacco industry trade threats and challenges to public health regulations can cause a chilling effect measured in terms of time elapsed or delay, which is extremely consequential in terms of protecting public health and health outcomes.

Fifth and finally, while this dissertation analyzed the first two successful countries (Uruguay and Australia) in overcoming tobacco industry trade threats to implement strong HWLs covering 80% or more of the package without delaying or weakening the regulations, it demonstrates how a chilling effect occurred in New Zealand and suggests a similar effect is continuing to occur internationally. Critics of regulatory chill hypothesis would argue that if tobacco companies are deploying trade threats and challenges and HWL policies continue to be implemented then a chilling effect indeed is not occurring. This is the approach Côté has taken by using a systematic approach to argue that there has been an exponential growth in pictorial HWLs in the last 10 years despite these trade threats and challenges. While this is true, the overwhelmingly majority of these pictorial HWLs cover only 50% or less of the package.

However if we measure the optimal increase to plain packaging (100%) or the very progressive Uruguayan example of 80% we can see that during the same time period very few countries have adopted pictorial HWLs covering more than 60% of the package. Since

2009 when Australia proposed plain packaging, several countries have held discussions to introduce plain packaging, including New Zealand, United Kingdom, Ireland, France, Canada, Norway, Sweden, Finland, India, Turkey, South Africa, Hungary, Panama, Brazil, and Chile. Australia enacted plain packaging in 2011, but none of these governments enacted plain packaging between 2012 and 2014. Beginning in 2015, the U.K., Ireland, and France enacted legislation for plain packaging, which has helped to start the momentum towards an eventual tipping point and diffusion of these best practices in the near future but during the first 6 years since Australia's proposal no legislation was passed to enact plain packaging.

Equally as important since 2008 when Uruguay proposed its progressive HWLs, several countries have held discussions to introduce similar progressive HWLs, including Thailand, Brunei, Jamaica, Honduras, Colombia, Nepal, Togo, Sri Lanka, and Namibia. Uruguay enacted strong HWLs covering 80% of the package in 2009, but none of these governments enacted similar regulations between 2010 and 2013. Beginning in 2014, Thailand, Brunei, and Nepal enacted legislation for strong HWLs covering more than 75% of the package, which has also helped to start the momentum towards a tipping point and diffusion of best practices but during the first 5 years since Uruguay's proposal no legislation was passed to enact similar strong HWL regulations. This delay is significant because the industry's own documents reveal that they have aggressively attempted to prevent, weaken and delay the most progressive HWLs because they have understood for decades, much like the scientific evidence reported today, that the larger and more graphic the HWLs, the more effective they are at increasing smoking cessation and decreasing smoking initiation. As a result, even though tobacco companies are to an extent losing the battle over pictorial HWLs, they have succeeded in delaying the diffusion of the most progressive HWLs globally.

## **Applying the theoretical model to governments proposing strong HWLs**

After applying a MSSD and MDSO to controlling for various explanatory variables, this research demonstrated that the key factor in determining the implementation of strong HWLs lies in the governments' *reception* to tobacco industry trade threats. The findings suggest that leftist governments, continued bureaucratic leadership and capacity in the Health Ministry, and independent tobacco control and trade advocacy are necessary conditions in explaining how governments can shape the reception of tobacco industry trade threats and properly implement progressive HWL policies without being weakened or delayed. To test this theory and the possibility of a chilling effect globally here is a brief overview of other governments that have recently proposed to implement strong HWL regulations (Table 7:1).

### ***Properly implemented strong HWLs without being weakened or delayed (Australia, Uruguay, Ireland, France, and Nepal)***

Similar to Australia and Uruguay, Ireland, France and Nepal have each implemented strong HWL regulations without being weakened or delayed. In France, it is unclear what role the Health Minister and tobacco control advocates had in shaping the governments' reception of the trade threats but it is clear that a center-left government presided during the regulatory process. Similarly in Nepal a center-left government was in power, but while it is unclear what role the Health Minister played, it appears that tobacco control advocates were effective in countering the industry threats and promoting the health benefits of the HWLs. Similar to Uruguay, Nepal received international funding from the Bloomberg Initiative to strengthen local capacity, help secure strong HWLs regulations, and defend and implement the HWLs.<sup>506</sup> Ireland's enactment of plain packaging is unique as it represents the only center-right government to date that has implemented strong HWL regulations.

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<sup>506</sup> Bloomberg. Bloomberg Initiative To Reduce Tobacco Use Grants Program. 2009; <http://tobaccocontrolgrants.org/>.

Table 7:1 Applying theoretical model to governments proposing strong HWLs					
Countries	HWL proposal	Government in power	Continued bureaucratic leadership & capacity in Health Ministry	Independent and confident tobacco control and trade advocacy	Impact of trade threats on regulatory process
Uruguay	Pictorial HWLs (80%)	<b>Left</b>	<b>High</b>	<b>Very high</b>	<b>Low</b> -Implemented -Not weakened -Not delayed
Australia	Plain packaging (100%)	<b>Center-left</b>	<b>Very high</b>	<b>Very high</b>	<b>Low</b> -Implemented -Not weakened -Not delayed
Ireland	Plain packaging (100%)	Center-right	<b>Very high</b>	<b>High</b>	<b>Low</b> -Implemented -Not weakened -Not delayed
France	Plain packaging (100%)	<b>Center-left</b>	???	???	<b>Low</b> -Implemented -Not weakened -Not delayed
Nepal	Pictorial HWLs (90%)	<b>Center-left</b>	???	<b>High</b>	<b>Low</b> -Implemented -Not weakened -Not delayed
United Kingdom	Plain packaging (100%)	Center-right	Low	<b>High</b>	High -Implemented -Not weakened -Delayed
Canada	Pictorial HWLs (75%)	Center-right	Moderate	???	High -Implemented -Not weakened -Delayed
Thailand	Pictorial HWLs (85%)	Center-right	???	???	??? -Implemented -Not weakened -Delayed
Honduras	Pictorial HWLs (80%)	Center-right	Very low	Very low	Very high -Implemented -Weakened to 50% -Not delayed
Jamaica	Pictorial HWLs (75%)	<b>Center-left</b>	<b>Very high</b>	Low	High -Implemented -Weakened to 60% -Not delayed
New Zealand	Plain packaging (100%)	Center-right	Moderate	Low	High -Not implemented -Not weakened -Delayed
Malaysia	Plain packaging (100%)	Center-right	Low	Low	High -Not implemented -Not weakened -Delayed

While again there exists an independent tobacco control and trade advocacy that has helped strong oppose the industry trade threats, it appears that Irish Health Minister James Reilly played a pivotal role in helping combat the industry's trade threats by remaining extremely bold and determined in his approach, often telling reporters that the government "won't be intimidated by external forces."<sup>507</sup> In March 2015, while being honored at the World Conference on Tobacco or Health for his leadership, Minister Reilly offered a powerful speech titled "Ireland refused to be bullied by Big Tobacco", in which he revealed that that all of the major tobacco companies aggressively threatened the government with legal challenges. In response to these threats, Reilly stated:

If we do nothing, the tobacco industry will delay and thwart public health legislation. If we stand up to them – if we meet them head on – we will defeat them. Because their only aim is to protect their profits. Our aim is to protect the health of our people, especially that of our children. We have the truth on our side.<sup>508</sup>

These remarks not only illustrate the importance of the bureaucratic leadership and capacity to operate in the Health Ministry, but demonstrate that not all three variables are necessary in properly implementing strong HWLs

***Implemented strong HWLs without being weakened but delayed (United Kingdom, Canada, and Thailand)***

In the United Kingdom, Canada and Thailand, each government enacted strong HWLs but the regulations were delayed. All three countries had center-right governments and it appears that there was lack of leadership in the Health Ministry in each country and possibly a constrained tobacco control advocacy in Thailand. The story seems more clear in the U.K. where the process to enact plain packaging was delayed, eventually taking 35 months (April 2012-March 2015) to be completed, which in comparison to Australia (18 months, September 2010-November 2011) took 17 months (1 year and 5 months) longer to

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<sup>507</sup> O'Brien T. Legal threat will not halt tobacco packaging plan, says Reilly. *The Irish Times*. 17 February 2015.

<sup>508</sup> Reilly J. Ireland refused to be bullied by Big Tobacco. *Irish Examiner*. 20 March 2015.

complete. Some media reports indicate the tobacco companies made aggressive trade threats to the government and that the reception of these threats by the government contributed to the delay in enacting plain packaging. Although there exists an independent tobacco control and trade advocacy, the presence of a center-right government combined with lack of leadership in the Health Ministry combined to cave into the trade threats by tobacco companies. It appears that similar to New Zealand, the U.K. government adopted a “wait and see” approach by choosing to wait for the outcome of the trade disputes against Australia before proceeding with their plain packaging proposal. On July 12, 2013, the U.K. Minister of Health, Jeremy Hunt stated, “The government has decided to wait until the emerging impact of the decision in Australia can be measured before we make a final decision on this policy in England.”<sup>509</sup>

***Implemented strong HWLs without being delayed but weakened (Honduras and Jamaica)***

In both Honduras and Jamaica, the governments enacted strong HWLs but the regulations were weakened. Honduras had a center-right government and it appears that there was lack of leadership in the Health Ministry and a constrained tobacco control advocacy.

In Honduras, the government in June 2009 enacted HWLs covering 80% of the package, but 10 months later the government amended the law by reducing the size of HWLs from 80% to 50%. In its decision, the government referenced concerns with international trade agreements by stating:

The approval of health warning labels in connection with the sale, distribution and consumption of tobacco must be brought into line with the obligations contracted by Honduras under international treaties such as GATT and, in particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) negotiated during the Uruguay Round. Certain circumstances justify restrictions on the right to freedom of

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<sup>509</sup> James W. UK government delays decision on cigarette branding ban. *Reuters*. 12 July 2013. <http://www.reuters.com/article/us-britain-cigarettes-packaging-idUSBRE96B0P820130712>.



expression and intellectual property rights, but only when there is an urgent social need, in this case the protection of public health; any restriction must be necessary and proportionate.<sup>510</sup>

In Jamaica, the tobacco companies issued trade threats to the Health Minister and the Prime Minister over the Health Ministry's decision to enact HWLs covering 75% of the package in June 2013. The Health Minister allowed a parliament health select committee to review the HWLs and the members of the committee voted to reduce the HWLs from covering 75% of the package to 50%, citing concerns about international trade. In December 2013, the Health Minister eventually weakened the HWLs by reducing the size from 75% to 60%.

***Pending proposals for strong HWLs without being weakened but delayed (New Zealand and Malaysia)***

In Malaysia, the Health Ministry discussed introducing plain packaging but due to threats from tobacco companies has put the proposal on pause. Health Minister Datuk S. Subramaniam told reporters that until they could ensure that the proposed legislation did not violate any intellectual property laws, they could not move forward, stating

This is being discussed so that the efforts of the government, for the health of the public, will not be seen by the industry as an infringement on their intellectual property rights and after this issue can be resolved, the government will continue with our efforts to carry that out.<sup>511</sup>

**Policy implications**

The results of this research will help reverse a two decade long trend, which saw tobacco companies intimidate governments with trade lawsuits to prevent the diffusion of best practices globally and help begin a new trend of identifying how health advocates and policymakers can overcome trade threats and implement strong HWL regulations without

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<sup>510</sup> Campaign for Tobacco-Free Kids. Tobacco Control Laws: Country Details for Honduras. January 2016; <http://www.tobaccocontrolaws.org/legislation/country/honduras/summary>.

<sup>511</sup> Lin MM. Health Ministry hits pause on plain tobacco packaging plan. *Malay Mail Online*. 21 March 2016. <http://www.themalaymailonline.com/malaysia/article/health-ministry-hits-pause-on-plain-tobacco-packaging-plan>.

being weakened or delayed. This research not only exposes the tobacco industry's efforts to publically threaten governments over international legality of strong HWL regulations, despite their own lawyers advising them privately that their legal arguments were invalid, but it also reveals how tobacco companies are deploying these multi-pronged trade attacks so that health advocates and policymakers can anticipate and counteract these strategies. In particular, this research demonstrates that a government's reception of the tobacco industry trade threats is the key independent variable that helps explain if governments can properly enact and implement strong HWL regulations without being delayed or weakened. If a government takes a bold and determined approach against the trade threats, strong HWL proposals have a much higher chance to be enacted in normal legislative timeframes but if a government takes a cautionary approach, they run the risk of the HWL proposals being delayed and possibly weakened. Tobacco control advocacy groups, both domestically and internationally play a pivotal role in either helping to strengthen or alter the government's reception of the tobacco industry's trade threats. For successful tobacco control advocacy against trade threats, it is imperative that tobacco control advocates try to overcome funding constraints to progressively push the introduction and enactment of progressive tobacco control proposals as well as hold government agencies accountable for not acting or not following through on their commitments to reducing tobacco use.

Tobacco control advocates should also communicate to policymakers the importance of the FCTC when confronted with issues of tobacco industry trade threats. It is important for policymakers to understand that as much as tobacco companies stress the importance of government's honoring their commitments and obligations to international trade and investment agreements, it is important for governments to also adhere to their commitments and obligations to international health treaties, including the FCTC. More importantly, health advocates should communicate to policymakers that Parties to the FCTC

convention signed the Punta del Este Declaration, which declared the rights of sovereign countries to prioritize public health regulations over international trade agreements.

### ***Broader implications for health and trade governance***

Given the increased intersection of global health and trade governance in the 21<sup>st</sup> century, more attention will need to be given to how existing trade and investment agreements can constrain government regulatory authority to enact and implement progressive public health policies. Also more attention needs to focus on how public health NGOs can take proactive steps to alter future trade agreements to ensure governments have adequate policy space to effectively regulate public health policies. The results of this research provide important insights into the trade and health debate for the regulation of tobacco, which can be applied to other areas of public health including food, alcohol and medicine. Here is quick look at how trade agreements are currently impacting each sector and broadly endangering public health.

### ***Providing proper food and beverage nutrition regulations***

Given the global rise of diet-related non-communicable diseases (NCDs), governments will increasingly need to improve the food environment by implementing nutrition regulations in the form of food taxes, product labeling, and marketing restrictions. Although governments have been typically challenged by other governments through import restrictions (e.g. restrictions on beef to prevent diseases), food and beverage companies, similar to tobacco companies, could use ISDS mechanisms in trade and investment agreements to directly challenge progressive nutrition policies that may constitute an expropriation of their investments or not provide fair and equitable treatment.<sup>512</sup> Although to date no publicly known investment arbitration disputes

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<sup>512</sup> Thow AM, McGrady B. Protecting policy space for public health nutrition in an era of international investment agreements. *Bulletin of the World Health Organization*. Feb 1 2014;92(2):139-145.

concerning food, nutrition, or agriculture have been reported,<sup>513</sup> increased attempts by governments to target the food and beverage industries and strengthen nutrition regulations will only intensify in the near future provoking inevitable trade and investment challenges.

#### *Alcohol control regulations*

Similar to tobacco control and food nutrition, alcohol control regulations include alcohol taxes, product labeling, and marketing restrictions to reduce access and consumption of alcohol. Trade and investment agreements challenge effective alcohol control policies by reducing trade barriers, lowering prices, increasing competition, and promoting the consumption of alcohol.<sup>514</sup> More importantly, trade agreements can constrain government regulatory authority to implement progressive alcohol control regulations.<sup>515</sup> Similar to food regulations, alcohol regulations have not yet been directly challenged by the alcohol industry, but industry threats and challenges are expected to occur in the near future as alcohol is also a leading contributor to NCDs worldwide.

#### *Access to medicines*

Access to affordable medicines is also critical in preventing and controlling NCDs and increasingly international trade and investment agreements have included strong intellectual property protections that are attempting to make it increasingly difficult to access and afford medications. This is mostly due to extended and exclusive patent terms and data exclusivity terms that allow pharmaceutical companies to challenge listing and pricing decisions. The danger is that trade agreements, including the TPP could extend these patent terms to pharmaceutical companies that would undermine the regulation of

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<sup>513</sup> Oxford. Investment Claims. 2016; <http://oxia.ouplaw.com/>.

<sup>514</sup> Zeigler DW. The alcohol industry and trade agreements: a preliminary assessment. *Addiction*. Feb 2009;104 Suppl 1:13-26.

<sup>515</sup> Kelsey J. New-generation free trade agreements threaten progressive tobacco and alcohol policies. *Addiction*. Oct 2012;107(10):1719-1721.

drug prices, restrict domestic pharmaceutical programs and delay the introduction of generic drugs.<sup>516</sup> In particular, these added protections would undermine the ability of successful pharmaceutical benefits programs such as Australia's Pharmaceutical Benefits Scheme, and New Zealand's Pharmaceutical Management Agency to continue facilitating affordable access to medicines through a combination of purchasing mechanisms and aggressive price negotiations.<sup>517</sup> Constraining these programs would likely reduce access to affordable medicines and increase costs as well as contribute to inequalities.

As a result of these increasing pressures from TNCs and international trade governance placed on safeguarding and protecting public health, public health advocates must take proactive approaches during trade negotiations like the TPP to ensure the proper policy space for governments to design, develop, enact and implement progressive and innovative public health policies. This should include helping clarify the meaning of fair and equitable trade and indirect expropriation, and lobbying for general exceptions in each of these areas of public health to better equip governments with the proper tools and mechanisms to withstand inevitable industry trade and investment threats and challenges. Meanwhile public health NGOs in each of these areas should look to the global tobacco control movement and the creation and implementation of the FCTC and the as a model to expand transnational advocacy networks and expand global health governance through new international protocols and frameworks that in turn can be utilized by advocates to assist governments in properly implementing public health regulations.

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<sup>516</sup> Gleeson D, Friel S. Emerging threats to public health from regional trade agreements. *Lancet*. Apr 27 2013;381(9876):1507-1509.

<sup>517</sup> Gleeson D, Lopert R, Reid P. How the Trans Pacific Partnership Agreement could undermine PHARMAC and threaten access to affordable medicines and health equity in New Zealand. *Health Policy*. Oct 2013;112(3):227-233.

## **Limitations and future research**

Although this dissertation to date provides the most extensive penetration of policymakers and provides an in-depth analysis using multiple methods to test the regulatory chill hypothesis, there still exists important limitations to the study. There were limitations on the documents found in the tobacco industry archive library, but the biggest limitations were in accessing particular policymakers and internal legal advice given to governments. This dissertation was successful in interviewing several policymakers from different political parties and different branches and department of government. However gaining access to interview officials from the Ministries of Trade or Foreign Affairs and in Cabinet or the president's office was extremely difficult. Since the trade disputes are still pending against Australia and Uruguay, several policymakers interviewed for this study were unable to speak on particular issues pertaining to the trade challenges. Additionally, several government documents were available through freedom of information requests but some documents had sections pertaining to the legal advice given to the government that were redacted for confidentiality purposes thus limiting the ability to document some of the legal concerns expressed by various departments related to the HWL proposals.

Future research to should attempt to build on this body of work and attempt to achieve greater access to key individuals inside the Ministries of Trade and Foreign Affairs and possibly the Cabinet and the president's office. Once these trade disputes are resolved, researchers should attempt to locate and analyze these decisions and continue to use freedom of information acts to request previously confidential internal government advice. Future research should also attempt to build upon the case studies analyzed in this dissertation to more accurately measure if the trade threats are indeed helping cause a global chilling effect. To test this effect, future studies should examine governments' reception of trade threats and the variables outlined in this dissertation that shape this

reception to determine if similar strong HWL proposals are being enacted on normal legislative timeframes or being delayed or weakened. The most likely cases to begin with would be with some of the countries mentioned above that have proposed strong HWL proposals and comparing those countries that have enacted strong HWLs to those who have not. It would also be interesting to test earlier cases that proposed plain packaging with more recent cases to document if there has been a learning curve both on the part of the industry and governments and if indeed momentum is starting to pick up and create a tipping point in the direction of diffusion of best practices. Better understanding when and how that tipping point occurs would also provide a better indicator for how public health advocates can help trigger the diffusion of other progressive public health policies.

## **Conclusion**

In a new era of multiple authorities and emerging arenas and battlegrounds this dissertation analyzed some of the earliest battles to be fought by TNCs challenging government regulations through international investment and trade agreements. These early battles not only signify the increasing authority non-state actors are commanding against the state, but also reflect how TNCs can use the mere threat of suing countries as leverage to deter governments, especially smaller and financially vulnerable governments, from properly implementing public health policies. More importantly, contrary to proponents of free trade and scholars who utilize policy outputs as the sole indicator in assessing the impact of trade agreements on public health regulations, this dissertation has demonstrated that trade threats by tobacco companies can disrupt the domestic regulatory development process and delay the enactment and implementation of progressive and innovative public health policies, which have detrimental effects on public health.

The results of this dissertation also offer a glimpse into the future intersection of global trade and health governance and the constant evolving nature of regulatory

environment in the 21<sup>st</sup> century. TNCs continuously lobby trade representatives to rewrite the rules governing international trade and investment that allow for favorable regulatory environments and grant more authority against the state by constraining governments from implementing public health regulations. Meanwhile NGOs are constantly drafting and developing new frameworks and protocols at the international level that help shape global health governance and provide states with the tools necessary to properly implement progressive public health regulations. As global trade governance expands globally and global health governance transitions into placing a greater emphasis on preventing the spread of non-communicable diseases (NCDs), we should expect to not only witness more attention paid towards the intersection of trade and tobacco but also a greater attention placed on the intersection of trade and public health more broadly, including the increased targeting and regulation of food and alcohol industries.



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