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**PLAIN PACKAGING FOR THE PACIFIC RIM:
TOBACCO CONTROL AND THE *TRANS-PACIFIC PARTNERSHIP***

DR MATTHEW RIMMER

PROFESSOR OF INTELLECTUAL PROPERTY AND INNOVATION LAW

FACULTY OF LAW

QUEENSLAND UNIVERSITY OF TECHNOLOGY

Queensland University of Technology

2 George Street GPO Box 2434

Brisbane Queensland 4001 Australia

Work Telephone Number: (07) 31381599

Executive Summary

This submission draws upon research done in relation to the *Trans-Pacific Partnership* and tobacco control – including:

Matthew Rimmer, 'Price and Trade: World No Tobacco Day 2015', (2015) 24 *Tobacco Control* e123-124.

Matthew Rimmer, 'New Zealand, Plain Packaging, and the Trans-Pacific Partnership', *InfoJustice*, 28 March 2014, <http://infojustice.org/archives/32570>

Matthew Rimmer, 'Ireland, Plain Packaging, and the Olive Revolution', *InfoJustice*, 24 March 2014, <http://infojustice.org/archives/32484>

Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues*, London and New York: Routledge, 2014, 337-360.

Matthew Rimmer, 'Plain Packaging for the Pacific Rim: the Trans-Pacific Partnership and Tobacco Control', in Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013, 75-105.

Matthew Rimmer, 'Cigarettes will Kill You: The High Court of Australia and the Plain Packaging of Tobacco Products' (2013) 1 *WIPO Magazine* 20-23 http://www.wipo.int/wipo_magazine/en/2013/01/article_0005.html

Becky Freeman, Simon Chapman, and Matthew Rimmer, 'The Case for the Plain Packaging of Tobacco Products' (2008) 103 (4) *Addiction* 580-590.

There have, of course, been some important resolutions in the final text of the *Trans-Pacific Partnership*, after extensive negotiations over the topic of tobacco control. The issue remains problematic. Rather than provide for complete protection of tobacco control measures, the *Trans-Pacific Partnership* instead offers limited and partial protection, particularly in respect of investor-state dispute settlement. There is still scope for state-to-state dispute resolution in respect of tobacco control under the *Trans-Pacific Partnership*. The text reaches quite an uneasy compromise in the end on intellectual property, trade, and tobacco control.

Recommendation 1

Countries across the Pacific Rim should support and implement the *WHO Framework Convention on Tobacco Control*.

Recommendation 2

Countries involved in the Pacific Rim should follow the lead of Australia, and adopt graphic health warnings, and the plain packaging of tobacco products. New Zealand and Canada, in particular, should press ahead, with such tobacco control measures, given the evidence from Australia about the efficacy of the regime.

Recommendation 3

The Australian Government has successfully defended plain packaging of products in the High Court of Australia, and in an investor-state dispute settlement matter with Philip Morris. The Australian Government is currently defending plain packaging of tobacco products in the World Trade Organization. Australia has made a strong case about the legitimacy of tobacco control measures – such as plain packaging of tobacco products – under international law.

Recommendation 4

There is a need to protect tobacco control measures from possible intellectual property challenges under the *Trans-Pacific Partnership*, given Australia's past experiences in domestic litigation and in the World Trade Organization.

Recommendation 5

There is a long history of tobacco companies deploying investor clauses to challenge tobacco control measures – such as graphic health warnings and plain packaging of tobacco products. The *Trans-Pacific Partnership* provides protection against investor actions in respect of tobacco control measures – but only if nation states elect to do so. A broader exclusion for tobacco control would have been a better approach. Overall, it would have been preferable to excise the regime on investor-state dispute settlement from the *Trans-Pacific Partnership* altogether.

Recommendation 6

There have been concerns about how Technical Barriers to Trade will operate in respect of tobacco control measures under the *Trans-Pacific Partnership*.

Recommendation 7

There remain larger concerns about the use of State-to-State dispute resolution in respect of tobacco control measures under the *Trans-Pacific Partnership*.

Recommendation 8

The World Health Organization remains concerned about how tobacco companies have sought to deploy intellectual property, investor clauses, and trade agreements against public health measures.

Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the *Trans-Pacific Partnership*, the *Trans-Atlantic Trade and Investment Partnership*, and the *Trade in Services Agreement*. His work is archived at SSRN Abstracts and Bepress Selected Works.

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on *The Pirate Bazaar: The Social Life of Copyright Law* (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.

Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, "Gene Patents In Australia: Options For Reform" (2003-2005), an Australian Research Council Linkage Grant, "The Protection of Botanical Inventions (2003), and an Australian Research Council Discovery Project, "Promoting Plant Innovation in Australia" (2009-2011). Rimmer has participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

Rimmer is a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He has undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

Rimmer is the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-

Prizes. Rimmer is currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

Rimmer has also a research interest in intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015).

Rimmer has supervised four students who have completed Higher Degree Research on the topics, *Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere* (2007); *Intellectual Property and Applied Philosophy* (2010); *The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines* (2012); and *Marine Bioprospecting: International Law, Indonesia and Sustainable Development* (2014). He has also supervised sixty-seven Honours students, Summer Research Scholars, and Interns, and two graduate research unit Masters students.

Plain packaging for the Pacific Rim – tobacco control and the Trans-Pacific Partnership (2013)

Matthew Rimmer

Kids today don't just start smoking for no reason. They're aggressively targeted as customers by the tobacco industry. They're exposed to a constant and insidious barrage of advertising where they live, where they learn, and where they play.¹ (United States President Barack Obama)

Introduction

Big Tobacco has been engaged in a dark, shadowy plot and conspiracy to hijack the Trans-Pacific Partnership Agreement (TPP) and undermine tobacco control measures – such as graphic health warnings and the plain packaging of tobacco products. The tobacco industry has long considered the use of trade agreements as a means of delaying, blocking and frustrating the introduction of tobacco control measures.² In the 1990s, internal documents highlight that the tobacco industry considered whether the use of trade actions under the World Trade Organization (WTO) may delay the introduction of measures, such as the plain packaging of tobacco products. However, there was an admission in the internal memos that such action would provide ‘little joy’ for the tobacco companies.³ A number of countries

¹ President Barack Obama, ‘Remarks by the President’ (Speech delivered at the signing of the *Family Smoking Prevention and Tobacco Control Act*, White House Rose Garden, 22 June 2009) <<http://www.whitehouse.gov/the-press-office/remarks-president-signing-family-smoking-prevention-and-tobacco-control-act>>.

² Becky Freeman, Simon Chapman and Matthew Rimmer, ‘The Case for the Plain Packaging of Tobacco Products’ (2008) 103(4) *Addiction* 580.

³ British American Tobacco, *DB Presentation to GM's Conference* (21 July 1994) Legacy Tobacco Documents Library <<http://legacy.library.ucsf.edu/tid/hpp34a99>>.

allied to the tobacco industry have challenged Australia's plain packaging of tobacco products regime under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS)⁴ and the *Agreement on Technical Barriers to Trade*.⁵ British American Tobacco has lobbied the United States Trade Representative on intellectual property and trade.⁶ In the course of the *Anti-Counterfeiting Trade Agreement* (ACTA)⁷ discussions, British American Tobacco argued: 'We would strongly advocate tobacco and tobacco products being prioritized in the course of the negotiations when specific areas of concern are being addressed.'⁸

The TPP is a blockbuster, plurilateral free trade agreement, spanning the Pacific Rim.⁹ There has been concern that tobacco companies have been seeking to use this trade agreement to undermine tobacco control measures – such as graphic health warnings and the

⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*').

⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*').

⁶ See, e.g., Office of the United States Trade Representative, *Vol. 1 Anti-Counterfeiting Trade Agreement Public Comments* (7 August 2008) 18.

⁷ *Anti-Counterfeiting Trade Agreement*, signed 1 October 2011, [2011] ATNIF 22, not yet in force.

⁸ Office of the United States Trade Representative, above n 6, 18.

⁹ See *Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Development: Outlines of the Trans-Pacific Partnership Agreement* (November 2011) Office of the United States Trade Representative <<http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>>; *The Trans-Pacific Partnership Agreement Negotiations*, Australian Government, Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/fta/tpp/index.html>>. For an overview, see Ian Fergusson et al., 'The Trans-Pacific Partnership Negotiations and Issues for Congress' (CRS Report for Congress No R42694, Congressional Research Service, 15 April 2013) <<http://www.fas.org/spp/crs/row/R42694.pdf>>.

plain packaging of tobacco products – and the implementation of the *WHO Framework Convention on Tobacco Control*.¹⁰ Philip Morris made a submission to the United States Trade Representative on the TPP, emphasising: ‘We strongly support U.S. participation in the TPP negotiations, and welcome the future expansion of this initiative to include additional countries in the Asia-Pacific region.’¹¹ The company has even sponsored a trade reception, involving many of the participants in the negotiations.¹² The treaty negotiations have included members of the Pacific Rim – such as Australia, New Zealand, Brunei Darussalam, Malaysia, Singapore, Vietnam, Peru, Chile, Canada, Mexico and the United States. In April 2013, Japan was included in the TPP negotiations.¹³ Thailand has been approached by the United States Government to join the negotiations. In this context, there has been concern about the extent to which tobacco control measures of negotiating nations will be affected by the TPP (see Table 5.1).

Table 1. World Health Organization Tobacco Control Profiles for Participants in the TPP

Country	Ratification of <i>WHO Framework Convention on Tobacco Control</i>	Adult Prevalence, Smoking Current	Health Warnings	Health Warnings Include Picture or Graphic	Plain Packaging
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¹⁰ *WHO Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).

¹¹ Philip Morris International, Submission No USTR-2009-0041-0016 to Office of the United States Trade Representative, *Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement*, 22 January 2010, 2.

¹² Hayden Donnell, ‘Ambassador to US “Should be Sacked”’, *The New Zealand Herald*, 27 February 2012 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10788367>.

¹³ Office of the United States Trade Representative, ‘Obama Administration Notifies Congress of Intent to Include Japan in Trans-Pacific Partnership Negotiations’ (Press Release, 24 April 2013) <<http://www.ustr.gov/about-us/press-office/press-releases/2013/april/congressional-notification-japan-tpp>>.

United States	Not Ratified	27.0%	Yes	Yes	No
Canada	26 November 2004	19.5%	Yes	Yes	No
Mexico	28 May 2004	15.9%	Yes	Yes	No
Peru	30 November 2004	NA	Yes	Yes	No
Chile	13 June 2005	35%	Yes	Yes	No
Australia	27 October 2004	16.6%	Yes	Yes	Yes (as of 2012)
New Zealand	27 January 2004	19.9%	Yes	Yes - cigarettes	Under review (2012)
Malaysia	16 September 2005	26%	Yes	Yes - cigarettes	No
Singapore	14 May 2004	21%	Yes	Yes	No
Vietnam	17 December 2004	23.8%	Yes	No	No
Brunei Darruslam	3 June 2004	18 %	Yes	Yes - cigarettes	No
Japan	8 June 2004	27%	Yes	No	No
Thailand (possible member)	8 November 2004	24%	Yes	Yes - cigarettes	No
The Philippines (possible member)	6 June 2005	28%	Yes	No	No

Data compiled from World Health Organization country profiles: see World Health Organization, *Tobacco Control Country Profiles* <http://www.who.int/tobacco/surveillance/policy/country_profile/en/index.html>.

There has been debate as to whether the TPP has undermined democratic decision-making processes by elected representatives – particularly in respect of public health.¹⁴ There has been much concern about the lack of transparency, due process, and public participation in the TPP.¹⁵ Lori Wallach of Public Citizen has described the proposed agreement as ‘NAFTA on Steroids’, saying: ‘Think of the TPP as a stealthy delivery mechanism for policies that could not survive public scrutiny.’¹⁶ A number of those with inside access to the

¹⁴ Inside Story Americas, ‘Will the Pacific Trade Deal Protect Workers?’, *Al-Jazeera*, 5 December 2012 <<http://www.aljazeera.com/programmes/insidestoryamericas/2012/12/2012125101118819500.html>>.

¹⁵ Carolina Rossini, ‘Congress Members Demand USTR Tell the American People What’s Going on with the Trans-Pacific Partnership and its Impact on Digital Freedom’ on *Deeplinks Blog* (5 September 2012) <<https://www.eff.org/deeplinks/2012/09/congress-demand-ustr-reveal-tpp>>.

¹⁶ Lori Wallach, ‘NAFTA on Steroids’, *The Nation* (New York), 16 July 2012 <<http://www.thenation.com/article/168627/nafta-steroids>>.

TPP have an interest in tobacco and tobacco control – including Roger Quarles of the Burley Tobacco Growers Cooperative Association Inc, Clyde N. Wayne Jr. of Tobacco Associates Inc, and Monique Muggli of the Campaign for Tobacco-Free Kids.¹⁷ Although trade officials and members of trade committees have had access to the texts, the texts have not been made available to politicians, civil society, or the wider public. Wallach has argued that civil activists should pursue a ‘Dracula’ strategy to bring the TPP out of the twilight and into the sunshine of public debate.¹⁸

The Kentucky delegation in the United States Congress has lobbied the United States Trade Representative on behalf of tobacco companies.¹⁹ In October 2011, a number of United States Congressmen and women from Kentucky – led by Representative Geoff Davis and Senator Mitch McConnell – wrote to Ambassador Kirk, expressing their ‘strong opposition to requests to exclude products, specifically tobacco, from the Trans-Pacific Partnership Agreement negotiations’.²⁰ The submission emphasised: ‘Excluding specific products from

¹⁷ *Agricultural Technical Advisory Committee for Trade*, Office of the United States Trade Representative <<http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/agricultural-technical-advisory-committee-tra>>.

¹⁸ Lori Wallach, ‘Can a “Dracula” Strategy Bring Out the Trans-Pacific Partnership into the Sunlight’ on *Truthout* (30 November 2012) <<http://truth-out.org/news/item/13061-can-a-dracula-strategy-bring-trans-pacific-partnership-into-the-sunlight>>.

¹⁹ See, for instance: *Tobacco’s Status in the Trade Transaction is Disputed* (14 March 2012) Tobacco Facts <<http://www.tobacco-facts.net/2012/03/tobaccos-status-in-the-trade-transaction-is-disputed>>; Paul Hornback and Wilson Stone, ‘Plan to Exclude Tobacco from Trade Pact Unfair to State of Kentucky: Farm Families Deserve Level Playing Field’, *Kentucky.com*, 2 April 2012 <<http://www.kentucky.com/2012/04/02/2135891/plan-to-exclude-tobacco-from-trade.html>>.

²⁰ Letter from Representatives Geoff Davis, Harold Rogers, Ed Whitfield, Ben Chandler, John Yarnruth and Ben Guthrie and Senators Mitch McConnell and Rand Paul to the United States Trade Representative (7 October 2011) <http://waysandmeans.house.gov/uploadedfiles/sfr_tpp_david.pdf>.

the TPPA could have a serious impact on future trade agreement negotiations and significantly damage Kentucky's economy.'²¹ The Kentucky delegation made a crude slippery slope argument that the exclusion of tobacco would lead to the exclusion of other products, such as alcohol and dairy products: 'Excluding tobacco from the TPP would establish a broad and possibly economically debilitating precedent potentially applicable to any industry.'²² The Kentucky politicians maintained that there was a need to include tobacco trade in the TPP in order to protect American jobs:

As over eighty percent of tobacco grown in Kentucky is exported to other countries, the exclusion of tobacco products from the TPPA threatens our growers' business and could have the communities where they live and employ Kentuckians.²³

Similarly, Congressman Sanford Bishop from Georgia – along with other representatives and senators for Georgia – wrote a letter to Ambassador Kirk, urging him to 'ensure that Georgia's tobacco farmers are not excluded from taking advantage of trade protections offered under the Trans-Pacific Partnership Agreement'.²⁴

In May 2012, Congresswoman Renee Ellmers, a Republican from North Carolina, also published in support of trade in tobacco under the TPP.²⁵ She maintained that the

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Congressman Sanford D. Bishop, Jr, 'Bishop Seeks Trade Protections for Georgia's Tobacco Farmers' (Press Release, 2 December 2011) <<http://bishop.house.gov/press-release/bishop-seeks-trade-protections-georgias-tobacco-farmers>>.

²⁵ Tom Doheny, *Ellmers Calls for Responsible Treatment of Tobacco Farmers in Trans-Pacific Partnership* (15 May 2012) Congresswoman Renee Ellmers <<http://ellmers.house.gov/latest-news/ellmers-calls-for-responsible-treatment-of-tobacco-farmers-in-transpacific-partnership/>>.

tobacco industry had been the victim of unfair prejudice: ‘Tobacco farmers deserve the same recognition and consideration as any other legal agricultural commodity.’²⁶ Congressman Mike McIntyre, also from North Carolina, argued: ‘Including a safe harbor provision in the trade deal will treat tobacco unfairly, and the Administration needs to hear from the farming and business community that opposes this effort.’²⁷

In the context of this heavy lobbying by Big Tobacco and its proxies, this chapter provides an analysis of the debate over trade, tobacco, and the TPP. This discussion is necessarily focused on the negotiations of the free trade agreement – the shadowy conflicts before the finalisation of the text. This chapter contends that the trade negotiations threaten hard-won gains in public health – including international developments such as the *WHO Framework Convention on Tobacco Control*, and domestic measures, such as graphic health warnings and the plain packaging of tobacco products. It maintains that there is a need for regional trade agreements to respect the primacy of the *WHO Framework Convention on Tobacco Control*. There is a need both to provide for an open and transparent process regarding such trade negotiations, as well as a due and proper respect for public health in terms of substantive obligations. Part I focuses on the debate over the intellectual property chapter of the TPP, within the broader context of domestic litigation against Australia’s plain tobacco packaging regime and associated WTO disputes. Part II examines the investment chapter of the TPP, taking account of ongoing investment disputes concerning tobacco control and the declared approaches of Australia and New Zealand to investor–state dispute

²⁶ Ibid.

²⁷ Congressman Mike McIntyre, ‘USTR Heeds McIntyre’s Call, Holds off Introduction of Tobacco Text in TPP to gather input from tobacco community’ (Press Release, 15 May 2012) <http://mcintyre.house.gov/index.php?option=com_content&view=article&id=627:-ustr-heeds-mcintyres-call-holds-off-introduction-of-tobacco-text-in-tpp-to-gather-input-from-tobacco-community&catid=1:2010-press-releases&Itemid=26>.

settlement. Part III looks at the discussion as to whether there should be specific text on tobacco control in the TPP, and, if so, what should be its nature and content. This chapter concludes that the plain packaging of tobacco products – and other best practices in tobacco control – should be adopted by members of the Pacific Rim.

I. Intellectual Property

In a number of contexts, the tobacco companies and their confederates have argued that the plain packaging of tobacco products amounts to a violation of their intellectual property rights.²⁸ Such arguments have been framed in terms of constitutional law, trade law, and investment law. The United States Chamber of Commerce's statements about the plain packaging of tobacco products are typical in this regard:

We believe that the lack of distinguishing trade dress and labelling may ultimately result in an increased risk of consumer deception and confusion; may paradoxically result in unintended harm to public health; and would deny the property rights of companies and their workers who have invested in building their brand's reputation.²⁹

This position represents an extremely aggressive form of intellectual property maximalism, which presumes that intellectual property rights can block government health regulation. Such a stance fails to recognise that intellectual property law is intended to serve larger public objectives – including the protection of public health.

²⁸ Freeman, Chapman and Rimmer, above n 2.

²⁹ United States Chamber of Commerce, Submission to the Department of Health and Ageing, *Public Consultation on the Exposure Draft of the Tobacco Plain Packaging Bill 2011*, 26 May 2011 <<http://www.health.gov.au/internet/yourhealth/publishing.nsf/Content/Myron-Brilliant>>.

A The High Court of Australia

Professor Tania Voon has observed: ‘Plain packaging of cigarettes and other tobacco products represents a crucial focal point for industry, government, and public health across the world today.’³⁰

In order to support the *WHO Framework Convention on Tobacco Control*, the Australian parliament passed the *Tobacco Plain Packaging Act 2011* (Cth), with the support of all the main political parties. In response, Japan Tobacco International³¹ and British American Tobacco³² brought legal action in the High Court of Australia, complaining that the *Tobacco Plain Packaging Act 2011* (Cth) amounted to an acquisition of property on less than just terms under s 51(xxxi) of the *Australian Constitution* 1901. Philip Morris Ltd and Imperial Tobacco intervened in the case, supporting their fellow tobacco companies. The Australian Government defended the constitutionality of the *Tobacco Plain Packaging Act 2011* (Cth).³³ The Australian Government was supported by the Cancer Council Australia and the governments of the Australian Capital Territory, the Northern Territory, and Queensland.

³⁰ Tania Voon, ‘Introduction’ in Tania Voon et al. (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar Publishing, 2012) 1, 1.

³¹ *Case S409/2011: JT International SA v Commonwealth of Australia*, High Court of Australia <<http://www.hcourt.gov.au/cases/case-s409/2011>>.

³² *Case S389/2411: British American Tobacco Australasia Limited and Ors v The Commonwealth of Australia*, High Court of Australia <<http://www.hcourt.gov.au/cases/case-s389/2011>>.

³³ Matthew Rimmer, ‘Big Tobacco’s Box Fetish: Plain Packaging at the High Court’, *The Conversation* (20 April 2012) <<http://theconversation.edu.au/big-tobaccos-box-fetish-plain-packaging-at-the-high-court-6518>>.

Having announced its ruling in August 2012, the High Court of Australia published the reasons for its decision on the tobacco companies' challenge to Australia's regime for the plain packaging of tobacco products in October 2012.³⁴ By a majority of six to one, the High Court of Australia rejected the arguments of the tobacco companies that there had been an acquisition of property under the *Australian Constitution* 1901. After listening to extensive arguments, the court closely considered the public health objectives of the *Tobacco Plain Packaging Act* 2011 (Cth) and related regulations. Hayne and Bell JJ observed: 'Legislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the *Plain Packaging Act*, effect no acquisition of property.'³⁵ The judges ruled that 'The *Plain Packaging Act* is not a law by which the Commonwealth acquires any interest in property, however slight or insubstantial it may be.'³⁶ The judges concluded: 'The *Plain Packaging Act* is not a law with respect to the acquisition of property.'³⁷

Kiefel J emphasised: 'Many kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm.'³⁸ Her Honour noted that labelling is required for medicines, poisonous substances as well as some food 'to both protect and promote public health'.³⁹ Discussing the history of tobacco regulation in Australia, she

³⁴ *JT International SA v Commonwealth of Australia* (2012) 291 ALR 669 ('*JT International*'). This discussion draws upon my piece: Matthew Rimmer, 'The High Court and the Marlboro Man: The Plain Packaging Decision', *The Conversation* (18 October 2012) <<http://theconversation.edu.au/the-high-court-and-the-marlboro-man-the-plain-packaging-decision-10014>>.

³⁵ *JT International* (2012) 291 ALR 669, 713.

³⁶ *Ibid.*, 714.

³⁷ *Ibid.*

³⁸ *Ibid.*, 746.

³⁹ *Ibid.*

summarised the cumulative impact of public health measures and suggested plain packaging was but the latest of a long line of tobacco control measures in Australia.

Noting the links between smoking tobacco and fatal diseases, Crennan J observed that the regime implemented international health law: ‘The objects of the *Packaging Act* are to improve public health and to give effect to certain obligations that Australia has as a party to the *WHO Framework Convention on Tobacco Control*.’⁴⁰ She insisted: ‘Legislative provisions requiring manufacturers or retailers to place on product packaging warnings to consumers of the dangers of incorrectly using or positively misusing a product are commonplace.’⁴¹

French CJ emphasised the public policy dimensions of intellectual property law, noting that trade mark legislation has ‘manifested from time to time a varying accommodation of commercial and the consuming public’s interests’.⁴²

Gummow J commented that ‘trade mark legislation, in general, does not confer a “statutory monopoly” in any crude sense’.⁴³ The judge emphasised that the *Trade Marks Act* 1995 (Cth) did not confer ‘a liberty to use registered trade marks free from restraints found in other statutes’.⁴⁴

In his dissent, Heydon J complained generally about the government encroaching upon the acquisition of property clause.⁴⁵

The decision of the High Court of Australia will encourage other countries to join an ‘Olive Revolution’, introducing plain packaging of tobacco products.⁴⁶ New Zealand,

⁴⁰ Ibid.

⁴¹ Ibid., 729.

⁴² Ibid., 679, quoting *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, 65.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

Scotland, India, Uruguay, and Norway are particularly keen to follow Australia's lead.⁴⁷ Under the leadership of David Cameron's Conservative Party, England and Wales have equivocated upon whether they will adopt the plain packaging of tobacco products.⁴⁸

B The WTO

⁴⁶ Matthew Rimmer, 'The Olive Revolution: Australia's Plain Packaging Leads the World', *The Conversation* (15 August 2012) <<https://theconversation.edu.au/the-olive-revolution-australias-plain-packaging-leads-the-world-8856>>.

⁴⁷ On New Zealand, see New Zealand Ministry of Health, *Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand: Consultation Document* (23 July 2012) <<http://www.health.govt.nz/publication/proposal-introduce-plain-packaging-tobacco-products-new-zealand>>; Tariana Turana, 'Government Moves Forward with Plain Packaging of Tobacco Products' (19 February 2013) New Zealand Government <<http://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>>; International Centre for Trade and Sustainable Development, 'New Zealand Confirms Plans for Introducing Cigarette Packaging Law' (27 February 2013) 17(7) *Bridges Weekly Trade News Digest* <<http://ictsd.org/i/news/bridgesweekly/156105/>>. On Scotland, see *Ministers Aim to Make Scotland "Tobacco Free" by 2034* (27 March 2013) BBC News <<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21954909>>.

⁴⁸ On England and Wales, see *Standardised Packaging of Tobacco Products* (2012) The United Kingdom Department of Health <http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products/consult_view>; Patrick Wintour, 'Government to Legislate for Plain Cigarette Packaging this Year', *The Guardian*, 5 March 2013 <<http://www.guardian.co.uk/society/2013/mar/05/government-legislate-plain-cigarette-packaging>>; Marita Hefler and Stan Shatenstein, 'UK: Government Condemned for Bowing to Tobacco Industry Over Plain Packs' on *Tobacco Control* (7 May 2013) <<http://blogs.bmj.com/tc/2013/05/07/uk-government-condemned-for-bowing-to-tobacco-industry-over-plain-packs/>>; Tanya Gold, 'Death is Tobacco Companies' Business', *The Guardian*, 5 May 2013 <<http://www.guardian.co.uk/commentisfree/2013/may/05/death-tobacco-companies-business-packaging>>.

Australia's Minister for Trade in 2012, Craig Emerson, stressed that the victory in the High Court of Australia will strengthen Australia's defence of the plain packaging of tobacco products in international fora.⁴⁹ He emphasised that the Australian Government would vigorously defend challenges against the regime brought by Ukraine, Honduras, the Dominican Republic through the World Trade Organization.⁵⁰ Emerson maintained: 'Australia will strongly defend its right to regulate to protect public health through the plain packaging of tobacco products.'⁵¹ Both TRIPS and the *Agreement on Technical Barriers to Trade* have long recognised that WTO Members can take measures necessary to protect public health. Emerson has also stressed that Australia will defend plain packaging in other arenas: 'Australia will strongly defend its plain packaging legislation in all forums.'⁵² Cuba

⁴⁹ Craig Emerson, 'High Court Ruling Bolsters Australia's WTO Case for Plain Packaging' (Media Release, 20 August 2012) <http://trademinister.gov.au/releases/2012/ce_mr_120820.html>.

⁵⁰ World Trade Organization, *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (18 December 2012) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm>; World Trade Organization, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (20 November 2012) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm>; World Trade Organization, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (18 December 2012) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm>.

⁵¹ Craig Emerson, 'High Court Ruling Bolsters Australia's WTO Case for Plain Packaging' (Media Release, 20 August 2012) <http://trademinister.gov.au/releases/2012/ce_mr_120820.html>.

⁵² Ibid.

and Indonesia have announced in 2013 that it will join the challenges to Australia's plain packaging regime in the World Trade Organization.⁵³

C The TPP

There has also been concern that Big Tobacco is trying to use the TPP as a Trojan horse to attack tobacco control measures.⁵⁴ In a revealing submission to the United States Trade Representative, Philip Morris expressed concern about 'government-sponsored initiatives that would effectively cancel or expropriate valuable trademark rights'.⁵⁵ The company supported 'the inclusion of a comprehensive "TRIPs-plus" intellectual property chapter that includes a high standard of protection for trademarks and patents'.⁵⁶ In particular, Philip Morris objected to Australia's regime of plain packaging of tobacco products: 'The consequences of the introduction of plain packaging in Australia are far-reaching and should be examined in the broader context of U.S.–Australia trade relations and in the upcoming TPP

⁵³ David Jolly, 'Cuba Challenges Australian Tobacco Rules'. *The New York Times*, 6 May 2013 <<http://www.nytimes.com/2013/05/07/business/global/07iht-smoke07.html>>; World Trade Organization, 'Cuba Files Dispute Against Australia on Tobacco Plain Packaging' (News Item, 3 May 2013) http://www.wto.org/english/news_e/news13_e/ds458rfc_03may13_e.htm; 'Indonesia Becomes Fifth to File WTO Case Against Australia Tobacco Plain-Packaging', *Intellectual Property Watch*, 22 September 2013, <<http://www.ip-watch.org/2013/09/22/indonesia-becomes-fifth-to-file-wto-case-against-australia-tobacco-plain-packaging/>>

⁵⁴ Peter Martin, 'Plain Packs: The New Lines of Attack. Big Tobacco tries the WTO and TPPA', *The Sydney Morning Herald* (Sydney), 20 August 2012.

⁵⁵ Philip Morris International, above n 11.

⁵⁶ Ibid.

negotiations.’⁵⁷ The company also made objections to Singapore’s *Smoking (Control of Advertisements & Sale of Tobacco) Act*.⁵⁸

There has been concern about the intellectual property chapter of the TPP.⁵⁹ There was a leak of the draft text of the intellectual property Chapter of the TPP in 2011.⁶⁰ The United States has promoted an ambitious intellectual property chapter with standards above and beyond those in TRIPS, the *Australia–United States Free Trade Agreement*,⁶¹ and even ACTA.⁶² The chapter will cover copyright law, trade mark law, patent law, customs and border measures, and intellectual property enforcement. There have been particular concerns about tight parallel importation restrictions, the evergreening of drug patents, and draconian penalties for piracy and counterfeiting.

Sean Flynn and his colleagues provided a comprehensive analysis of the text, observing:⁶³

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Matthew Rimmer, ‘A Mercurial Treaty: The Trans-Pacific Partnership and the United States’, *The Conversation* (15 June 2012) <<http://theconversation.edu.au/a-mercurial-treaty-the-trans-pacific-partnership-and-the-united-states-7471>>.

⁶⁰ ‘The Complete Feb 10, 2011 Text of the US Proposal for the TPP IPR Chapter’ on *Knowledge Ecology International* (10 March 2011) <<http://keionline.org/node/1091>>.

⁶¹ *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

⁶² *Anti-Counterfeiting Trade Agreement*, signed 1 October 2011, [2011] ATNIF 22 (not yet in force).

⁶³ Sean Flynn et al., ‘Public Interest Analysis of the US TPP Proposal for an IP Chapter’ (Research Paper No 21, Program on Information Justice and Intellectual Property, American University Washington College of Law, 6 December 2011) 54–55 <<http://digitalcommons.wcl.american.edu/research/21/>>.

The U.S. proposals, if adopted, would create the highest intellectual property protection and enforcement standards in any free trade agreement to date. If adopted, the TPP would predictably lead to higher prices and decreased access to a broad range of consumer products in many TPP member countries, from medicines to textbooks to information on the internet, with little or no benefit to any TPP member in the form of increased innovation, creativity or local economic activity.⁶⁴

The leaked version of the intellectual property chapter lacks appropriate safeguards with respect to public health – particularly with regard to tobacco control measures contemplated under the *WHO Framework Convention on Tobacco Control*.

Inside US Trade has reported that Australia, New Zealand, and Singapore have proposed replacing some elements of the United States proposal on intellectual property enforcement with language drawn from ACTA.⁶⁵ This is also disturbing. The European Parliament and its various committees overwhelmingly rejected ACTA.⁶⁶ The United Nations Special Rapporteur on the Right to Health, Anand Grover, applauded this decision: ‘ACTA’s defeat in Europe is a welcome blow to the flawed agreement that has failed to address numerous concerns related to access to medicines.’⁶⁷

⁶⁴ Ibid.

⁶⁵ ‘Countries Offer ACTA Language To Replace U.S. IPR Proposal’ (18 May 2012) 30 *Inside US Trade* (online).

⁶⁶ Stephanie MacDonald, ‘ACTA Dead and Buried’, *Computerworld* (5 July 2012) <http://www.computerworld.com.au/article/429588/acta_dead_buried_europe/>.

⁶⁷ ‘UN Expert on Health Hails European Parliament’s Rejection of Anti-Counterfeiting Agreement’ on *United Nations Regional Information Centre for Western Europe* (9 July 2012) <<http://www.unric.org/en/latest-un-buzz/27676-un-expert-on-health-hails-european-parliaments-rejection-of-anti-counterfeiting-agreement->>.

In June 2012, the Australian Parliament's Joint Standing Committee on Treaties recommended delaying and postponing ratification of ACTA.⁶⁸ The Committee recommended:

that the *Anti-Counterfeiting Trade Agreement* not be ratified by Australia until the:

- Joint Standing Committee on Treaties has received and considered the independent and transparent assessment of the economic and social benefits and costs of the Agreement referred to in Recommendation 2;
- Australian Law Reform Commission has reported on its Inquiry into *Copyright and the Digital Economy*; and
- the Australian Government has issued notices of clarification in relation to the terms of the Agreement as recommended in the other recommendations of this report.⁶⁹

There were concerns about the impact of the treaty upon Australia's health-care system – particularly in respect of tobacco control and access to essential medicines.⁷⁰ It is notable that ACTA did not provide proper recognition for the *WHO Framework Convention on Tobacco Control*.

Comparing ACTA and the TPP, Professor Peter Yu has written about the 'alphabet soup of transborder intellectual property enforcement'.⁷¹ He contended that the United States has greater political and economic leverage in the TPP: 'Without the European Union at the

⁶⁸ Joint Standing Committee on Treaties, Parliament of Australia, *Report 126: Treaty Tabled on 21 November 2011* (2012).

⁶⁹ Ibid., x.

⁷⁰ Matthew Rimmer, 'Opening Pandora's Box: Secret Treaty Threatens Human Rights', *The Conversation* (4 April 2012) <<http://theconversation.edu.au/opening-pandoras-box-secret-treaty-threatens-human-rights-6092>>.

⁷¹ Peter Yu, 'The Alphabet Soup of Transborder Intellectual Property Enforcement' (2012) 60 *Drake Law Review Discourse* 16.

negotiation table, the United States is able to rely more on its sheer economic and geopolitical strengths to push for provisions that are in the interest of its intellectual property industries.’⁷² Yu worries: ‘Because of the different value negotiating parties place on trade and trade-related items, some parties may be willing to concede more on intellectual property protection and enforcement in exchange for greater benefits in other trade or trade-related areas.’⁷³ He fears that the ‘TPP, therefore, could include more stringent obligations in the intellectual property area’.⁷⁴

There is a need for the TPP to instead support a development agenda – which allows for countries to take measures to address public health concerns, such as tobacco control.

II Investment

There has been controversy over Big Tobacco using investor–state dispute resolution mechanisms to challenge public health measures – such as graphic warnings and the plain packaging of tobacco products.

A. Ongoing Investment Challenges

After moving the shares of its Australian subsidiary to Hong Kong, Philip Morris has brought a contrived investor–state arbitration claim under the *Australia–Hong Kong Agreement on the Promotion and Protection of Investments*.⁷⁵ The economist, Peter Martin, notes:

⁷² Ibid., 26.

⁷³ Ibid., 27.

⁷⁴ Ibid., 27.

⁷⁵ *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, signed 15 September 1993, 1748 UNTS 385 (entered into force 15 October 1993); *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* <<http://www.pca->

The almost comic attempt to get mileage out of the treaty (moving from Australia to Hong Kong in order to complain that it was being discriminated against because it was from Hong Kong) masks a broader, more serious attempt to turn trade treaties into instruments that allow corporations to sue governments.⁷⁶

There has been much academic criticism of the investment action by Philip Morris.⁷⁷

Philip Morris has also used international investment rules to challenge Uruguay's restrictions on cigarette marketing.⁷⁸ In particular, the tobacco company has complained about graphic health warnings being used by the Uruguayan Government, lamenting that: 'The 80 per cent health warning coverage requirement unfairly limits Abal's right to use its

cpa.org/showpage.asp?pag_id=1494>; Attorney-General's Department, *Investor-State Arbitration – Tobacco Plain Packaging* *Plain Packaging*
<<http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx>>.

⁷⁶ Martin, above n 54.

⁷⁷ Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14(3) *Journal of International Economic Law* 1.

⁷⁷ Mark Davison, 'Big Tobacco vs. Australia: Philip Morris Scores an Own Goal', *The Conversation* (20 January 2012) <<http://theconversation.edu.au/big-tobacco-vs-australia-philip-morris-scores-an-own-goal-4967>>; Kyla Tienhaara, 'Government Wins First Battle in Plain Packaging War', *The Conversation* (13 August 2012) <<https://theconversation.edu.au/government-wins-first-battle-in-plain-packaging-war-8855>>; Thomas Faunce, 'An Affront to the Rule of Law: International Tribunals to Decide on Plain Packaging', *The Conversation* (29 August 2012) <<http://theconversation.edu.au/an-affront-to-the-rule-of-law-international-tribunals-to-decide-on-plain-packaging-8968>>.

⁷⁸ *FTR Holding SA et al v Uruguay (Request for Arbitration)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 19 February 2010).

legally protected trademarks, and not to promote legitimate health policies.’⁷⁹ Benn McGrady provides a thoughtful analysis of the ramifications of the dispute.⁸⁰

In the context of the TPP discussions, there has been concern that tobacco companies would use investment clauses to challenge public health measures – such as tobacco control.

B Australian Policy

In a trade policy, the Australian Labor Party Government has disavowed the inclusion of investor–state dispute resolution clauses in any future free trade agreements – including the TPP.⁸¹ The statement notes:

Some countries have sought to insert investor-state dispute resolution clauses into trade agreements. Typically these clauses empower businesses from one country to take international legal action against the government of another country for alleged breaches of the agreement, such as for policies that allegedly discriminate against those businesses and in favour of the country’s domestic businesses.⁸²

The policy document states: ‘The Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.’⁸³ The

⁷⁹ Ibid.

⁸⁰ Benn McGrady, ‘Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: *Philip Morris v Uruguay*’ in Tania Voon et al. (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar Publishing, 2012) 173.

⁸¹ Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (Commonwealth Government, 12 April 2011) <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html>>.

⁸² Ibid.

⁸³ Ibid.

trade statement emphasises that: ‘The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.’⁸⁴ Moreover, the policy document observes: ‘If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.’⁸⁵

A number of industry groups and trade lawyers have been irked by the policy of the Australian Government to refuse to sign trade agreements with state–investor dispute resolution clauses. The Australian Chamber of Commerce and Industry has lobbied for the inclusion of investment clauses in free trade agreements – including the TPP. The law firm Clifford Chance has argued: ‘It is Australian companies investing offshore that will perhaps suffer most from the Australian government’s new approach.’⁸⁶ Trade lawyer Leon Trakman has protested: ‘Australian investors abroad probably will suffer.’⁸⁷ Arbitrator Michael Pryles has observed that: ‘We have the recent example of tobacco companies saying their trademarks have been expropriated, but it’s unusual.’⁸⁸

The Conservative Coalition won the Australian election in September 2013. The Minister for Foreign Affairs, Julie Bishop, has written that she will reconsider including investment clauses in the TPP.⁸⁹ The Minister for Trade and Investment, Andrew Robb, had

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Chris Merritt, ‘Change in Treaty Policy Detrimental to Aussie Companies: Clifford Chance’, *The Australian* (Australia), 7 September 2012.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Julie Bishop, ‘Free Trade Focus’, *Online Opinion* (28 March 2013) <<http://www.onlineopinion.com.au/view.asp?article=14855>>. For a critique, see Greens Senator Peter Wish-

emphasized that the Coalition is open to utilising investor-state dispute settlement clauses as part of Australia's negotiating position.

Such advocacy for investment clauses is weak and unconvincing. The abuse of investment clauses by tobacco companies is not unusual or exceptional. It is commonplace. The involvement of Philip Morris in the TPP highlights this problem.

C The TPP

A key chapter of the TPP relates to investment. Philip Morris has been a strong supporter of the inclusion of an investor–state dispute resolution mechanism in the TPP:

Philip Morris International has made significant investments in many countries, including the identified U.S. TPP partners. For that reason, we believe strong investor protections must be a critical element of the TPP and any future U.S. Free Trade Agreements.

PMI supports the inclusion in the TPP of an investor–state dispute settlement mechanism. The strong investment chapter of the yet-to-be ratified U.S.–South Korea Free Trade Agreement should be used as a model for negotiating a similar chapter in the TPP.

PMI considers the availability of an investor–state dispute settlement mechanism, including the right for investors to submit disputes to independent international tribunals, a vital aspect of protecting its foreign investments.⁹⁰

Under such a mechanism, Philip Morris would be able to challenge government regulations – much like they have done in disputes with Australia and Uruguay.

Wilson, 'Past is not the Future for Trade', *Online Opinion* (8 April 2013) <<http://www.onlineopinion.com.au/view.asp?article=14879>>.

⁹⁰ Philip Morris International, above n 11, 2–3.

There has been much concern about the investment chapter of the TPP – especially since a draft of the text has been leaked in 2012.⁹¹ The regime provides that no party may expropriate or nationalise a covered investment except for a public purpose, and with prompt, adequate, and effective compensation. The chapter also establishes an investor–state dispute settlement system: one that enables corporations from one country to take legal action against the government of another country for alleged breaches of the agreement. Professor Thomas Faunce of the Australian National University has observed of this text: ‘Such proposals give foreign investors (such as tobacco multinationals) greater rights than domestic investors.’⁹² There are only vague safeguards in respect of public health – such as ‘the parties recognise that it is inappropriate to encourage investment by relaxing its health, safety or environmental measures’.⁹³ There is no specific, explicit recognition in this draft regime for the *WHO Framework Convention on Tobacco Control*.

With the leak of the investment chapter, the Obama Administration stands accused of breaking its 2008 campaign promise:

We will not negotiate bilateral trade agreements that stop the government from protecting the environment, food safety, or the health of its citizens; give greater rights to foreign investors than to U.S. investors; require the privatization of our vital public services; or prevent developing country governments from adopting humanitarian licensing policies to improve access to life-saving medications.⁹⁴

⁹¹ Zach Carter, ‘Obama Trade Document Leaked, Revealing New Corporate Powers and Broken Campaign Promises’, *The Huffington Post*, 13 June 2012 <http://www.huffingtonpost.com/2012/06/13/obama-trade-document-leak_n_1592593.html>.

⁹² Faunce, above n 77.

⁹³ Citizens Trade Campaign, *Investment* <<http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>>.

⁹⁴ Faunce, above n 77.

D New Zealand

Taking a principled stance, the Australian Government has thus far refused to submit to the investor–state dispute resolution clause. However, the New Zealand Prime Minister John Key has argued that there should not be special treatment for Australia: ‘An exclusion solely for Australia, not for everybody else, is unlikely to be something that we would support.’⁹⁵ His position is misguided. Professor Jane Kelsey from the University of Auckland has commented: ‘The global multi-billion-dollar commercial players that dominate the alcohol and tobacco industries can afford to fund lengthy and costly arbitration to stop precedent-setting policies, even where their legal case is weak.’⁹⁶ She has written a report on international trade law and tobacco control.⁹⁷ She has commented:

The proposed TPPA poses the most serious imminent risk to New Zealand’s ability to design, introduce and implement the innovative tobacco control policies needed to achieve the 2025 goal, as it

⁹⁵ Radio New Zealand News, NZ ‘Unlikely’ to Support Special TPP Deal for Australia (14 June 2012) <<http://www.radionz.co.nz/news/political/108189/nz-%27unlikely%27-to-support-special-tpp-deal-for-australia>>.

⁹⁶ Jane Kelsey, ‘New-Generation Free Trade Agreements Threaten Progressive Tobacco and Alcohol Policies’ (2012) 107(10) *Addiction* 1719.

⁹⁷ Jane Kelsey, ‘International Trade Law and Tobacco Control: Trade and Investment Law Issues Relating to Proposed Tobacco Control Policies to Achieve an Essentially Smoke Free Aotearoa New Zealand by 2025’ (Report, New Zealand Tobacco Control Research Tūranga, May 2012) <<http://www.turanga.org.nz/sites/turanga.org.nz/files/Kelsey%20Trade%20Law%20Tobacco%20Control%20Report.pdf>>.

would legally guarantee the tobacco industry and supply chain stronger, enforceable legal rights and the opportunity to influence domestic policy.⁹⁸

The New Zealand Prime Minister John Key has struggled with questions on investment and the TPP in the New Zealand Parliament.⁹⁹ The New Zealand Greens co-leader, Metiria Turei, asked John Key: ‘Will New Zealand open itself up to litigation from firms based in the Trans-Pacific Partnership countries should we sign up to the investor–State dispute settlement procedures, which Australia has rejected?’¹⁰⁰ In response, John Key mischaracterised the approach of the Australian Government to the question of investment:

Well for a start-off, I do not think it is actually correct to say that Australia has rejected them. What is true to say is that there are different countries bringing different perspectives to the negotiation, but when a final Trans-Pacific Partnership agreement is agreed, all parties are likely to sign up.¹⁰¹

Under further questioning, Prime Minister Key was unfamiliar with a number of investment disputes – such as the action against Germany’s environmental controls on coal-fired power stations;¹⁰² the action by the Renco Group against Peru in respect of regulations designed to stop lead poisoning;¹⁰³ and the action by Chevron Oil under investor–state procedures against

⁹⁸ Ibid., 62.

⁹⁹ ‘The Trans-Pacific Partnership – Investor-State Dispute Provisions’, New Zealand, *Parliamentary Debates*, House of Representatives, 4 December 2012, 6996 (John Key, Prime Minister) <http://www.parliament.nz/en-NZ/PB/Business/QOA/c/a/8/50HansQ_20121204_00000004-4-Trans-Pacific-Partnership-Investor-State.htm>.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² *Vattenfall v Germany (Award)* (ICSID Arbitral Tribunal, Case No ARB/09/6, 11 March 2011).

¹⁰³ The Renco Group, Inc, *Claimant’s Notice of Intention to Commence Arbitration* (29 December 2010) Investment Treaty Arbitration <<http://italaw.com/sites/default/files/case-documents/ita0713.pdf>>.

Ecuador in respect of clean-costs for toxic waste.¹⁰⁴ Prime Minister Key insists more generally upon the existence of ‘safeguards’ in the TPP: ‘I can tell you the way that New Zealand legislates and goes about these free-trade agreements, and it is very careful to give itself the safeguards that we would think make sense.’¹⁰⁵ However, the leaked text from the draft investment chapter would suggest that such ‘safeguards’ are not particularly safe.

The New Zealand Prime Minister John Key was particularly non-plussed by questions over tobacco control and the TPP. The New Zealand Greens co-leader, Metiria Turei, asked John Key:

Does the Prime Minister have any concerns that Philip Morris could use the investor-State procedures in the Trans-Pacific Partnership to sue New Zealand, given its actions in Australia and the veiled threats made by its spokesperson in New Zealand, Chris Bishop; if not, why not?¹⁰⁶

In response, John Key argued:

The member will be aware that Australia as of 1 December went into its programme of plain packaging. It is not in any way concerned about doing that and continuing to be part of the officials group and continuing to negotiate as part of the Trans-Pacific Partnership. That tells you that it must believe that the two policies are compatible.¹⁰⁷

¹⁰⁴ See ChevronToxico, *About the Campaign* <<http://chevrontoxico.com/about/>>.

¹⁰⁵ Key, above n **Error! Bookmark not defined.**, 6996.

¹⁰⁶ ‘The Trans-Pacific Partnership – Investor-State Dispute Provisions’, New Zealand, *Parliamentary Debates*, House of Representatives, 4 December 2012, 6996 (Metiria Turei, Co-Leader, Greens) <http://www.parliament.nz/en-NZ/PB/Business/QOA/c/a/8/50HansQ_20121204_00000004-4-Trans-Pacific-Partnership-Investor-State.htm>.

¹⁰⁷ Key, above n **Error! Bookmark not defined.**, 6998.

Again, the New Zealand Prime Minister is incorrect on this point. The Australian Government has indeed expressed concerns about interference by Big Tobacco in the TPP negotiations. Similarly, United States Members of Congress – like Henry Waxman – have also been concerned by the approach of the United States Trade Representative to the question of tobacco control and the TPP.

In 2013, the New Zealand Government announced that it would adopt the plain packaging of tobacco products in 2013 – while still pursuing the TPP.

III. Tobacco Control

The United States Trade Representative, Ambassador Ron Kirk, has been equivocal on the question of tobacco control and the TPP.¹⁰⁸ In February 2012, the Ambassador appeared before the United States Congress, and said: ‘We have not tabled any proposal to exclude any product.’¹⁰⁹ Kirk has said: ‘There are people who are fanatically opinionated on both sides.’¹¹⁰ He observed: ‘Our job is to follow U.S. law. Strike that balance. But on this one we’ll sometime have to make a decision.’¹¹¹ There has been a concern that the United States Trade Representative has been willing to appease or placate the representatives of the tobacco industry. There has also been discussion of the United States Trade Representative having

¹⁰⁸ Geoff Davis, *Congressman Davis Questions USTR Ron Kirk on Possible Tobacco Exclusions* (29 February 2012) YouTube <<http://www.youtube.com/watch?v=n1mgsx3YcPs>>.

¹⁰⁹ Ibid.

¹¹⁰ Franco Ordonez, ‘Tobacco Growers Fear Trade Deal will Harm Exports’, *McClatchy*, 28 February 2012 <<http://www.mcclatchydc.com/2012/02/28/140249/tobacco-growers-fear-trade-deal.html>>.

¹¹¹ Ibid.

ties with the tobacco industry – having been a partner of Vinson & Elkins LLP which defended the tobacco industry, and a consultant to the tobacco company, Philip Morris.¹¹²

A The Family Smoking Prevention and Tobacco Control Act of 2009

In the TPP negotiations, the United States Trade Representative's objective is to create a 'safe harbour' for the United States Food and Drug Administration to regulate tobacco products under the *Family Smoking Prevention and Tobacco Control Act of 2009*. There is a need to understand the nature of the Obama Administration's tobacco control measures.

On 22 June 2009, President Barack Obama signed into law the *Family Smoking Prevention and Tobacco Control Act of 2009*. The President reflected upon the significance of the legislative reform: 'Since at least the middle of the last century, we've known about the harmful and often deadly effects of tobacco products.'¹¹³ He lamented: 'More than 400,000 Americans now die of tobacco-related illnesses each year, making it the leading cause of preventable death in the United States.'¹¹⁴ President Obama observed: 'This legislation will not ban all tobacco products, and it will allow adults to make their own choices.'¹¹⁵ He noted

¹¹² See *Ron Kirk* (19 December 2008) Source Watch <http://www.sourcewatch.org/index.php/Ron_Kirk>; Mark Drajem, 'Ex-Dallas Mayor Kirk Said to be Obama's Trade Pick', *Bloomberg*, 18 December 2008 <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aV1huzewQ4gY&refer=us>>; Todd Gillman, 'Lobbyist Record of Texas Democratic Senate Hopeful Kirk Draws Scrutiny', *The Dallas Morning News* (Texas), 4 April 2002.

¹¹³ President Barack Obama, above n 1.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

that this legislation ‘will force these companies to more clearly and publicly acknowledge the harmful and deadly effects of the products they sell’.¹¹⁶

The tobacco industry has brought a range of lawsuits against the *Family Smoking Prevention and Tobacco Control Act of 2009*.¹¹⁷ President Obama reflected upon such litigation:

Today, some big tobacco companies are trying to block these labels because they don’t want to be honest about the consequences of using their products. Unfortunately, this isn’t surprising. We’ve always known that the fight to stop smoking in this country won’t be easy.¹¹⁸

There have been variations between how circuit courts in the United States have addressed the challenges by the tobacco industry to graphic health warnings – most notably between Kentucky,¹¹⁹ which dismissed a challenge to graphic health warnings, and the District of Columbia, where the tobacco industry’s challenge was upheld.¹²⁰

In December 2012, the United States Court of Appeals denied the request by the United States Government for the full court or panel to rehear the case in the District Court of Columbia.¹²¹ The United States Government considered appealing the decision to the

¹¹⁶ Ibid.

¹¹⁷ See *Discount Tobacco City & Lottery Inc v United States*, 674 F 3d 509 (6th Cir, 2012) and *RJ Reynolds Tobacco Co v Food and Drug Administration*, 696 F 3d 1205 (DC Cir, 2012).

¹¹⁸ Jim Kuhnhen, ‘Obama Scolds Tobacco Companies For Fighting New Cigarette Warning Labels’, *The Huffington Post*, 17 November 2011 <http://www.huffingtonpost.com/2011/11/17/barack-obama-tobacco_n_1099274.html>.

¹¹⁹ *Discount Tobacco City & Lottery Inc v United States*, 674 F 3d 509 (6th Cir, 2012).

¹²⁰ *RJ Reynolds Tobacco Co v Food and Drug Administration*, 696 F 3d 1205 (DC Cir, 2012).

¹²¹ Associated Press, ‘Appeals Court Denies Rehearing on Decision Blocking Graphic Health Warnings on Cigarette Packets’, *The Washington Post*, 6 December 2012 <<http://www.washingtonpost.com/business/appeals->

Supreme Court of the United States.¹²² In the end, the Department of Justice sent a letter to the House speaker, saying that it would not ask the Supreme Court of the United States to review the ruling.¹²³

However, the tobacco industry's challenges to the *Family Smoking Prevention and Tobacco Control Act of 2009* have not necessarily been successful, either. In April 2013, the Supreme Court of the United States refused to hear a challenge to the regime by tobacco companies such as R.J. Reynolds Tobacco Co.¹²⁴

Such domestic conflict may help explain the focus of the United States Trade Representative's proposal on tobacco control.¹²⁵ Such litigation demonstrates that the tobacco industry has increasingly tried to co-opt and appropriate the language of freedom of speech in legal debates. Professor Kevin Outterson has warned that 'powerful corporations are increasingly using an expanding definition of the First Amendment to challenge public health regulations'.¹²⁶ He has observed that: 'For public health advocates, one lesson is that the

court-denies-rehearing-on-decision-blocking-graphic-health-warnings-on-cigarette-packs/2012/12/05/ec8e99f4-3ef1-11e2-8a5c-473797be602c_story.html>.

¹²² Richard Craver, 'Successful Appeal of Graphic Cigarette Labels Likely Headed for U.S. Supreme Court', *Winston-Salem Journal*, 5 December 2012 <http://www.journalnow.com/news/local/article_751e2000-3f2e-11e2-b08c-001a4bcf6878.html>.

¹²³ Steve Almasy, *FDA Changes Course on Graphic Warning Labels for Cigarettes* (20 March 2013) CNN <<http://edition.cnn.com/2013/03/19/health/fda-graphic-tobacco-warnings>>.

¹²⁴ *American Snuff v United States*, 12-521 (2013); Greg Stohr, 'Tobacco Industry Spurned by Top Court on Package Warnings', *Bloomberg*, 22 April 2013 <<http://www.bloomberg.com/news/2013-04-22/tobacco-industry-spurned-by-top-court-on-package-warnings.html>>

¹²⁵ *Fact Sheet: TPP Tobacco Proposal* (May 2012) Office of the United States Trade Representative <<http://www.ustr.gov/about-us/press-office/fact-sheets/2012/may/tpp-tobacco-proposal>>.

¹²⁶ Kevin Outterson, 'Smoking and the First Amendment' (2011) 365 *The New England Journal of Medicine* 2351.

purpose and mechanism for new regulations must be carefully articulated and documented, especially if any conceivable First Amendment issue can be raised.’¹²⁷

B The United States Trade Representative’s Proposal on Tobacco Control

In 2012, the United States Trade Representative has published a statement on its proposal on tobacco control on its website.¹²⁸ The statement notes that the Obama Administration sought input from ‘health advocates, farmers, industry stakeholders, and others’ on tobacco and the TPP.¹²⁹ The United States Trade Representative observed that: ‘The [Obama] Administration also considered the increasing effort both in the United States and around the world over the past several years to regulate tobacco products.’¹³⁰ Particular reference is made to the *Family Smoking Prevention and Tobacco Control Act of 2009* (US).

While not making the draft proposal publicly available, the United States Trade Representative has published a limited summary, emphasising that the draft proposal has three elements. First, the proposal ‘would explicitly recognize the unique status of tobacco products from a health and regulatory perspective’.¹³¹ Second, ‘the proposal would make tobacco products (like other products) subject to tariff phase-outs, thus avoiding putting U.S. tobacco products at a competitive disadvantage and avoiding a precedent for excluding tobacco or other products from future U.S. tariff negotiations’.¹³² Third, the proposal would ‘include language in the “general exceptions” chapter that allows health authorities in TPP

¹²⁷ Ibid.

¹²⁸ *Fact Sheet: TPP Tobacco Proposal*, above n 125.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

governments to adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health'.¹³³

Focusing upon the United States, the United States Trade Representative commented:

This language will create a safe harbor for FDA tobacco regulation, providing greater certainty that the provisions in the TPP will not be used in a manner that would prevent FDA from taking the sorts of incremental regulatory actions that are necessary to effectively implement the *Tobacco Control Act*, while retaining important trade disciplines (national treatment, compensation for expropriations, and transparency) on tobacco measures.¹³⁴

A number of former United States Trade Representatives have written to the current United States Trade Representative, Ambassador Ron Kirk, urging him not to propose a tobacco-specific exception.¹³⁵ The authors portrayed the provisions creating policy space as open to abuse by recalcitrant trading partners. The authors stated:

While we are confident that the United States would not adopt or impose measures that restrict trade or investment without a sound basis to do so, we have witnessed over the years other governments attempting to justify their protectionist measures in the name of health or safety, especially in agriculture.¹³⁶

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Benn McGrady, 'The Tobacco Specific Trans-Pacific Partnership Exception and Customary International Law' on O'Neill Institute for National and Global Health Law, *Trade, Investment & Health* (27 June 2012) <<http://www.oneillinstitutetradeblog.org/the-tobacco-specific-tpp-exception-and-customary-international-law/>>.

¹³⁶ Ibid.

At the Auckland talks in November 2012,¹³⁷ the United States Trade Representative refused to table the proposal on tobacco control, because the agency was still apparently reviewing input from stakeholders. A spokeswoman for the office said: ‘We are still reflecting on what we’ve heard from stakeholders on our TPP tobacco proposal, and will be continuing consultations beyond the December 3–12 Auckland round to determine the right balance on this issue.’¹³⁸ Matthew Myers, president of the Campaign for Tobacco-Free Kids, has been displeased by this prevarication: ‘USTR consulted fully before it crafted its proposal. There is nothing that will satisfy the tobacco companies.’¹³⁹ His concern was that the United States Trade Representative was retreating from its proposal to protect tobacco control measures.

This proposal seems rather parochial, modelled upon United States domestic law and political exigencies. Benn McGrady comments: ‘It seems worth adding that the proposal appears more responsive to the outcome of *US–Clove Cigarettes* and preserving the regulatory powers of the FDA than to contemporary developments, such as ongoing claims against Australia and Uruguay.’¹⁴⁰

By 2013, the USTR had retreated from its proposal for a safe harbour in respect of tobacco control, to the dismay of public health advocates.

C United States Congressman Henry Waxman’s Critique

¹³⁷ ‘USTR Holding Off on Tabling TPP Tobacco Proposal at Auckland Round’ (22 November 2012) 30(46) *Inside US Trade* (online).

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Benn McGrady, ‘Tobacco in the Trans-Pacific Partnership: Trade, Tobacco, Health’ on O’Neill Institute for National and Global Health Law, *Trade, Investment & Health* (29 November 2012) <<http://www.oneillinstitutetradeblog.org/tobacco-in-the-trans-pacific-partnership-agreement/>>.

Senior United States Congressman Henry Waxman has raised significant reservations about the proposed text on tobacco control.¹⁴¹ He commented:

In light of recent trade challenges to U.S. and Australian tobacco control laws, I am concerned that the exemption contemplated in the U.S. proposal emphasizes regulatory measures and fails to also explicitly exempt statutory tobacco control measures that otherwise meet the origin-neutral and science-based criteria set forth in the Proposal.¹⁴²

Congressman Waxman stressed that in his view: ‘it is essential to safeguard countries’ sovereign authority to take the most appropriate and most feasible action to protect the health of their citizens.’¹⁴³ Waxman was also ‘deeply troubled that the U.S. Proposal fails to exclude tobacco products from tariff schedule reductions’.¹⁴⁴ He observed: ‘This element of the Proposal is contrary to the intent and the spirit of the “Doggett Amendment” and Executive Order 13193 issued by President Clinton, both of which prohibit the U.S. government from promoting the sale or export of tobacco products.’¹⁴⁵ Congressman Waxman emphasised the need for the United States Trade Representative to respect local laws: ‘In the case of the United States, this would safeguard the implementation of the *Tobacco Control Act*, legislation that is critically important in addressing our country’s ongoing problem with tobacco addiction.’¹⁴⁶

¹⁴¹ Letter from Representative Henry Waxman to the United States Trade Representative (22 May 2012) <http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Kirk_05.22.12.pdf>.

¹⁴² Ibid., 2.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid., 3.

D Further Criticism of the Tobacco Control Text

In a letter to Ambassador Ron Kirk, United States health groups observed: ‘There is a global consensus that governments should be doing everything possible to reduce consumption of tobacco products and the resulting harms from that consumption.’¹⁴⁷ The organisations maintain that ‘Trade agreements should not undermine the authority of governments to [reduce tobacco use].’¹⁴⁸ The groups note that ‘This consensus is reflected in the world’s first public health treaty, the World Health Organization’s Framework Convention on Tobacco Control, under which 175 countries have made legally binding commitments to enact effective tobacco control measures.’¹⁴⁹ The health groups comment that ‘the global goal of reducing tobacco usage is in contrast to the usual free trade goal of expanding access to and consumption of products.’¹⁵⁰ The submission emphasised: ‘Tobacco products killed 100 million people in the 20th century and will kill one billion people in the 21st century unless governments take urgent action.’¹⁵¹

Chris Bostic, deputy director for policy at the Action on Smoking and Health, has commented that the United States regime is parochial, and very focused upon domestic

¹⁴⁷ Letter from the American Academy of Family Physicians, American Academy of Pediatrics, American Association for Cancer Research, American Association for Respiratory Care, American Cancer Society – Cancer Action Network, American Heart Association, American Lung Association, American Thoracic Society, Campaign for Tobacco Free Kids, National Latino Tobacco Control Network, Oncology Nursing Society, and Partnership for Prevention to the United States Representative (22 May 2012) <<http://www.prevent.org/data/images/public%20health%20letter%20to%20ustr%20re%20tpp.pdf>>.

¹⁴⁸ Ibid., 1.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

United States law.¹⁵² He has noted that officials from the United States Trade Representative ‘recognize the weaknesses ... in that it won’t apply to a lot of the ways that other countries do tobacco control regulations’.¹⁵³

Dr Margaret Chan of the World Health Organization has warned: ‘The incentive for industry to use international trade or investment agreements in lobbying or litigation is especially high when potentially trend-setting measures are at stake.’¹⁵⁴ She stressed: ‘This is true for very large health warnings on packs in Uruguay, legislation mandating plain packaging in Australia, and a ban on point-of-sales advertising in Norway.’¹⁵⁵

There is a failure to acknowledge or recognise the primacy of international law on tobacco control. Conspicuously, the summary of the proposed text on the TPP fails to mention the *WHO Framework Convention on Tobacco Control*, and its accompanying guidelines. This omission is regrettable and lamentable. There is a need to ensure that the TPP does not affect the comprehensive range of tobacco control measures contemplated by the *WHO Framework Convention on Tobacco Control* – such as the plain packaging of tobacco products. Furthermore, there is also a need to ensure that any future tobacco control initiatives under the *WHO Framework Convention on Tobacco Control* – or by any enterprising governments – are not stymied by the TPP.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Margaret Chan, ‘Global Governance of Tobacco in the 21st Century’ (Speech delivered at the Harvard University Conference on Governance of Tobacco in the 21st Century: Strengthening National and International Policy for Global Health and Development, Cambridge, MA, 26 February 2013) <http://www.who.int/dg/speeches/2013/tobacco_20130226/en/index.html>

¹⁵⁵ Ibid.

Conclusion

In conclusion, there are deep concerns about both the process and the substance of the TPP – particularly as it pertains to public health. The pernicious secrecy surrounding the negotiations of the treaty has been unacceptable. The submissions of parties, the negotiating texts and the talks should be open and transparent. Politicians, health advocates, civil society groups, and the wider public should be able to participate in the discussions, particularly given the sweeping nature of the agreement. A number of the chapters of the TPP have implications for tobacco control measures – particularly graphic health warnings and the plain packaging of tobacco products. The intellectual property chapter should not adopt ‘TRIPs–Plus’ or ‘TRIPs–Double Plus’ standards. There is a need to ensure that member states can take a range of measures to address public health concerns, without interference from tobacco companies under the guise of intellectual property rights. The investment chapter of the TPP should be abandoned, especially given the weak protections for public health. There is a need to internationally address the abuse of state–investor dispute settlement clauses by tobacco companies. Technical barriers to trade could also be an issue.¹⁵⁶ The United States Trade Representative’s text on tobacco control is lamentably

¹⁵⁶ ‘International Trade and Standards: An Interview with Jeff Weiss, Office of the U.S. Trade Representative’ (May/June 2011) *ASTM Standardization News* <http://www.astm.org/SNEWS/MJ_2011/provocative_mj11.html>; World Trade Organization, *World Trade Report 2012* (July 2012). Countries have raised issues on technical barriers to trade in a number of WTO disputes including: Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/R (2 September 2011); Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarette*, WTO Doc WT/DS406/AB/R (4 April 2012). See also World Trade Organization, *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (18 December 2012)

parochial. There is a need to ensure that the TPP in no way curtails, or confines, tobacco control measures as contemplated by the *WHO Framework Convention on Tobacco Control* – either in its present form or in future revisions. Moreover, there is a need to be wary that the TPP is a mercurial treaty – a ‘living agreement’ which can be updated to ‘address trade issues that emerge in the future as well as new issues that arise with the expansion of the agreement to include new countries’.¹⁵⁷ Future iterations of the treaty must not undermine global efforts to combat the tobacco epidemic.

Laurent Huber, the executive director of Action on Smoking and Health in Washington, DC, makes an eloquent case for why tobacco should be excluded from the TPP altogether:

Responsible trade policy acknowledges what we’ve known for decades: Tobacco is a uniquely dangerous product that causes death and disease from ordinary use. Tobacco is not just another agricultural product that deserves promotion through U.S. trade policy. It is the target of the world. The World Health Organization’s first and only treaty – which all of the TPPA countries, except for the United States, have ratified – recognizes the devastating effects of tobacco and its increasing threat to global health and welfare. Including tobacco in the TPPA would undermine the success of this treaty in preventing tobacco-related disease around the world.¹⁵⁸

<http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm>; World Trade Organization, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (20 November 2012)

<http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm>; World Trade Organization, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (18 December 2012)

<http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm>.

¹⁵⁷ Rimmer, ‘A Mercurial Treaty’, above n 59.

¹⁵⁸ Laurent Huber, ‘Tobacco from all Nations Excluded in Trade Pact’, *Kentucky.com*, 30 April 2012 <<http://www.kentucky.com/2012/04/30/2169551/tobacco-from-all-nations-excluded.html>>.

Susan Liss, the executive director of the Campaign for Tobacco-Free Kids, reflects that: ‘Reforms to specific parts of the TPPA such as the technical barriers to trade, intellectual property, or investment chapters may address part of the problem, but even that would not prevent second guessing of legitimate efforts as being more trade restrictive than necessary.’¹⁵⁹ She insists that: ‘Anything other than exclusion of tobacco products may continue the chilling effect of threatened lawsuits, preventing countries from enacting public health protections for their citizens.’¹⁶⁰ As such, there is a need to ensure that the TPP is not hijacked by Big Tobacco for the purposes of encouraging the trade in tobacco, and warding off the introduction of tobacco control measures.¹⁶¹

The plain packaging of tobacco products – and other best practices in tobacco control – should be embraced by all members of the Pacific Rim.

¹⁵⁹ Susan Liss, *Campaign for Tobacco-Free Kids Urges Trans Partnership Agreement Negotiators to Exempt Tobacco Products from the Proposed Free Trade Agreement*, Campaign for Tobacco Free Kids <http://www.tobaccofreekids.org/content/what_we_do/federal_issues/trade/TPP.pdf>.

¹⁶⁰ Ibid.

¹⁶¹ Mike Bloomberg, ‘Why is Obama Caving on Tobacco?’, *The New York Times*, 22 August 2013, <<http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html>>; The Editorial Board, ‘The Hazard of Free-Trade Tobacco’, *The New York Times*, 31 August 2013, <<http://www.nytimes.com/2013/09/01/opinion/sunday/the-hazard-of-free-trade-tobacco.html>>; Ellen Shaffer, ‘Stop TPP Protections for Big Tobacco’, *The Huffington Post*, 9 September 2013, <http://www.huffingtonpost.com/ellen-r-shaffer/stop-tpp-protections-for-big-tobacco_b_3886771.html> and Eric Mar, ‘U.S. Must Take Tobacco Out of Global Trade Talks’, *San Francisco Chronicle*, 24 September 2013, <<http://www.sfgate.com/opinion/openforum/article/U-S-must-take-tobacco-out-of-global-trade-talks-4819528.php>>

New Zealand, Plain Packaging, and the Trans-Pacific Partnership

InfoJustice (2014)

Dr Matthew Rimmer



The New Zealand Parliament is considering the adoption of plain packaging of tobacco products with the introduction of the [Smoke-Free Environments \(Tobacco Plain Packaging\) Amendment Bill 2014 \(NZ\)](#). There has been strong support for the measure amongst the major parties – including the National Party; the Maori Party; the Labor Party; and the Greens. The [New Zealand parliamentary debate](#) has considered matters of public health and tobacco control; the role of intellectual property law; and the operation of international trade and investment law.

The Minister of Health, Tony Ryall, a member of the National Party, has been proud of the New Zealand Government's work in respect of tobacco control and plain packaging: 'We have created a turning point in the campaign against tobacco with more effective action than ever before on an unprecedented scale - annual tobacco excise increases, systematic screening and cessation support, the end of retail displays, and the inevitability of plain packaging.'

The Associate Minister of Health, Tariana Turia, an MP for the Maori Party, has been a driving force behind the introduction of the legislative regime. In her first reading speech, she emphasized the need to address the brand imagery deployed by Big Tobacco to recruit consumers to use their addictive products:

In essence, the decision to introduce plain packaging for tobacco products in New Zealand is all about the branding. It takes away the last means of promoting tobacco as a desirable product. When tobacco manufacturers push tobacco, they are not simply selling a stick of nicotine; they are selling status, social acceptance, and adventure. The design and appearance of tobacco products and, in particular, the way they are packaged influence people's perceptions about these products and the desirability of smoking. Brand imagery demonstrably increases the appeal of tobacco brands, particularly to youth and young adults, helping to attract new smokers and also implying wider social approval for tobacco use.

Tariana Turia observed: 'For too long tobacco companies have been creating brands in advertising to persuade us to think that smoking is glamorous, fun, cool, sophisticated, and a part of life, knowing that they had to sell only the myth, and the nicotine addiction would take over.'

In her speech, Tariana Turia emphasized that the introduction of plain packaging would protect the ‘health of future generations while at the same time taking prudent responsibility for the use of taxpayer funds.’ She stressed that plain packaging would support and complement existing tobacco control measures as part of a comprehensive public health strategy:

This bill is about sending a very clear message to tobacco companies that this Government is serious about ending unnecessary deaths and poor health outcomes related to tobacco use. The intent of the legislation is to prevent the design and appearance of packaging and of products themselves from having any visual or other effect that could serve to promote the attractiveness of the product or increase the social appeal of smoking.

The plain packaging regime will tightly control the design and appearance of tobacco product packaging and of the products themselves by allowing the brand name and certain other manufacturer information to be printed on the pack, but with tight controls—for example, on the font used, its size, its colour, and its position on the pack. It will standardise all other design elements of tobacco product packaging, such as the materials, colours, and type faces or fonts that may be used. It will require the packaging to carry larger, more prominent, and more pertinent warning messages and graphic images, controlling the design and appearance of individual cigarettes and other products.

The colouring and wording used on tobacco packaging has been shown to create misconceptions that tobacco products are less harmful and that it is easier to quit than is in fact the case.

Tariana Turia noted the global tobacco epidemic identified by the World Health Organization: ‘Internationally, smoking remains the largest cause of preventable death’. She was concerned that tobacco use ‘contributes to profound health and social inequalities, and outcomes for Māori and Pasifika peoples’. Tariana Turia emphasized: ‘There is no other consumer product that is so widely used and that directly poses such a high level of health

risk to users, particularly long-term users.’ She commented: ‘Quitting smoking or, even better, never smoking is the key to enjoying a longer and healthier life with loved ones.’

Moreover, the Associate Minister for Health emphasized that the legislative regime was consistent with New Zealand’s international obligations: ‘This bill will support New Zealand in meeting its international obligations and commitments under the *World Health Organization Framework Convention on Tobacco Control*, and it will align the tobacco plain packaging legislation in Australia consistent with the *Trans-Tasman Mutual Recognition Agreement*’.

Dr Paul Hutchison – of the National Party – added that ‘the purpose of this legislation indeed is to introduce plain packaging for tobacco products, but particularly the aim is to reduce the tobacco uptake particularly among young people.’ He noted: ‘As the Hon Tariana Turia mentioned in her speech, branding can be very appealing to young people in its many forms and sorts, and in fact it can be very appealing to all people’. Hutchinson emphasized: ‘The whole aim of the tobacco companies is to induce that Pavlovian dog reflex whereby the person who sees the brand just cannot help but get stuck into the goodies, and the whole idea of this legislation is indeed to help reduce the glamorisation of packaging that the tobacco companies have been just so very happy to use, despite the harm tobacco causes.’ Dr Paul Hutchison vowed that his party would defend the tobacco control measures in international trade debates: ‘We have clearly signalled that we will not compromise our sovereign right to protect the public health of our people.’ He stressed: ‘This legislation is another step in protecting the public’s health from the proven harms of tobacco.’

Iain Lees-Galloway – representing Labour for Palmerston North – welcomed the introduction of plain packaging of tobacco products. He emphasized that the Labour Party had a proud record on public health and tobacco control: ‘It goes right back, of course, to 1989-90, when the *Smoke-free Environments Act*, the Act that this bill amends, was first passed by the Labour Government under then health Minister Helen Clark’. He noted: ‘This is just another step in a long line of measures that have over the last three decades moved us towards a smoke-free future, but now we have the absolute goal that we want New Zealand to be smoke-free by 2025’. Lees-Galloway commented that plain packaging would be a useful, effective measure:

There is no reason for branding to be used to differentiate cigarettes, because tobacco is tobacco is tobacco. It does not matter what you wrap it up in; it kills. Five thousand people are killed every year as a result of tobacco-related diseases. It kills around half its users. That is not a normal product that ought to be treated normally like any other consumable. It does not belong in dairies next to the bread and the milk and the lollies. And it does not deserve to have branding designed to entice young people to use this lethal product.

Lees-Galloway observed: ‘The tobacco industry wails and cries every time a measure like this is implemented, and the more it wails, the more I am convinced that we are doing the right thing’. He supported the *Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill 2014 (NZ)*: ‘What it seeks to do is to get rid of the last bastion of tobacco advertising.’

In a powerful speech, Clare Curran – representing Labour in Dunedin South – noted the insidious influence of marketing by the tobacco industry: ‘That is why we have so many people in our country and in our world who smoke—because of the really clever marketing

and because the product is so addictive.’ She applauded the introduction of plain packaging of tobacco products in Australia, and the ruling of the High Court of Australia that the regime was constitutional. Clare Curran offered a devastating critique of Big Tobacco’s arguments about trade and intellectual property:

I want to say that the argument that is used by big tobacco—the apologists that 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 ‘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 urge everybody to track down this paper and to read it, because 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.

Highlighting the ruling of the High Court of Australia, Clare Curran concluded: ‘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.’

Phil Goff – representing Labour in Mt Roskill – provided a critique of the trade arguments of Big Tobacco and its fellow travellers.

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. They may pretend that the debate is about intellectual property. They may pretend that the debate is about 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. New Zealand, as every country does, must have the sovereign right to legislate and to regulate for the public good.

Goff encouraged the New Zealand Parliament: ‘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.’ He emphasized that the regime is aligned with the *World Health Organization Framework Convention on Tobacco Control*: ‘We should not be frightened to bring this legislation in on the date that we consider appropriate and to take on those corporates, because we would have the support of the World Health Organization.’ He was rightly sceptical of challenges to Australia’s plain packaging regime under the World Trade Organization: ‘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.’ Goff highlighted the need to ensure that tobacco control measures – such as the plain packaging of tobacco products – were not undermined by the *Trans-Pacific Partnership*.

Lees-Galloway emphasized the need for transparency in respect of the Trans-Pacific Partnership: ‘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’. He warned of the danger of investor-state dispute settlement regimes: ‘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’.

Lees-Galloway observed: ‘We need to know whether the Trans-Pacific Partnership will have any bearing on the implantation 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.’ He concluded: ‘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, and that we do not accept that the tobacco industry has the right to push its product on to youngsters to try to get them hooked at an early age so that when they do make the decision that they want not to smoke any more, they are addicted to nicotine and unable to get away from the habit’. The politician stressed: ‘We do not want the tobacco industry to be able to do that, and we do not want to give up our right to regulate in the interests of New Zealanders.’

Metiria Turei – the co-leader of the New Zealand Greens – expressed her concern about the health impacts of tobacco: ‘For every person I love who smokes cigarettes, that cigarette is a direct threat to their life’. She observed: ‘That cigarette increases their chances of dying of some horrible disease much, much younger than they would otherwise’. She was also concerned that tobacco had a particularly significant and harmful impact on Maori

communities. Turei commented: ‘What is most important to me about this legislation is that it controls the industry.’ She emphasized:

We do have controls on advertising and other forms of regulatory control over the industry, but more is needed and this is a great first step. 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. If that causes a cost to an industry that peddles a drug that kills, well then so be it. They bear that cost. They are in that industry. That is a cost that they have to take.

Turei dismissed the arguments of Big Tobacco about plain packaging of tobacco products. She noted: ‘Actually, the argument by them really was: we want to keep our branding, we want to keep control of the industry.’

Kevin Hague – the spokesperson on Health for the New Zealand Greens – emphasized that nothing is ‘more fundamental to the role of a Government than to prevent the death of its citizens’. He hoped that the New Zealand Government implemented plain packaging of tobacco products, without delay or hesitation:

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. Tobacco companies are scared of this bill. They are scared of this measure. Indeed, it falls into a pattern that has existed for every one of the tobacco control measures that has been implemented in every country every time. Tobacco companies have fought them tooth and nail and the ferocity of their fighting has been proportional to the likely effectiveness of the measure being considered. Their sole motivation is profit maximisation. That is not a goal that our State, our Parliament ought to share.

Kevin Hague stressed that ‘every nation has the sovereign right to protect the health of its people.’ He warned that ‘Delaying implementation is caving in to the threats, extortion, and delaying tactics of an evil industry.’

Barbara Stewart of NZ First expressed uncertainties about the legislation, and its impact upon public health. She noted: ‘This is a very thought-provoking piece of legislation. I am not a smoker.’ She observed: ‘It is important, we believe, to get the views of the submitters on a bill such as this, because it can have unintended consequences, both positive and negative.’

John Banks – the leader of ACT – provided some opposition to the introduction of plain packaging of tobacco products. He asserted that the plain packaging of tobacco products violated the intellectual property rights of tobacco companies:

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.

Such arguments are misconceived and ill-founded. In a decisive 6-1 majority, the High Court of Australia emphasized that intellectual property was designed to serve larger public interests – such as the protection of public health. The High Court of Australia held that plain packaging did not constitute an acquisition of property. Rejecting ‘slippery slope’ arguments

by the tobacco industry, the High Court of Australia also observed that its decision was focused upon tobacco control, rather than any other field of regulation – such as food labelling or soft drink labelling.

In light of this debate, the New Zealand Parliament should introduce the plain packaging of tobacco products in order to protect the public health of its citizens. Such a measure would help fulfil New Zealand's obligations under the *World Health Organization Framework Convention on Tobacco Control* 2003 – in particular, Articles 11 and 13 of the agreement, and the accompanying guidelines. The New Zealand Parliament should introduce plain packaging of tobacco products without delay or prevarication. The Australian Government has a strong case in defending the plain packaging of tobacco products under both the *TRIPS Agreement* 1994 and the *Agreement on Technical Barriers to Trade* 1994. Australia's opponents have been engaged in dilatory tactics, and have been seeking to stall or delay the disputes.

The New Zealand Parliament should take note of the debate in the Australian Parliament over the plain packaging of tobacco products, and emulate the Australian legislative model of *The Tobacco Plain Packaging Act* 2011 (Cth). The New Zealand Parliament should also take heed of the decisive ruling of the High Court of Australia – which decisively rejected the intellectual property arguments of Big Tobacco about the plain packaging of tobacco products. The New Zealand Parliament should also ensure that its plain packaging regime is not exposed to challenge by tobacco companies under investor-state dispute settlement clauses. There is a need to guarantee that the *Trans-Pacific Partnership* does not undermine tobacco control measures in the Pacific Rim. New Zealand should play a leadership role in

the Pacific, and promote the adoption of measures, such as graphic health warnings, and the plain packaging of tobacco products in the region.

[In December 2015, New Zealand nurses called upon the New Zealand Government to implement plain packaging of tobacco products, after Australia’s victory in an investor-state dispute settlement battle with Philip Morris. NZNO Kaiwhakahaere Kerri Nuku commented:

The New Zealand Government has been very clear that it was ‘wait and see’ for plain packaging over here, depending on the outcome of the Philip Morris case in Australia. Today the court proved the tobacco giant had no leg to stand on, and there is no further reason to delay introducing plain packaging in New Zealand. Time lost is lives lost. I’m calling on the Government to announce plain packaging laws here immediately. Those lured to smoke by tobacco companies’ marketing are predominantly young, Māori and female. Any further delays will be responsible for more grieving whānau missing out on years with their daughters, sisters and mums. The best Christmas present the Government could give whānau is announcing plain packaging today.¹⁶²

In 2016, New Zealand Prime Minister John Key indicated that he would finally implement plain packaging of tobacco products by the end of the year].¹⁶³

¹⁶² Fuseworks Media, ‘NZNO Calls for Tobacco Plain Packaging in NZ’, 18 December 2015, <http://www.voxy.co.nz/politics/nzno-calls-tobacco-plain-packaging-nz/5/240450>

¹⁶³ Stacey Kirk, ‘Tobacco Plain Packaging Likely to Be Law by End of Year – John Key’, *Stuff.co.nz*, 15 November 2016, <http://www.stuff.co.nz/national/politics/76917027/tobacco-plain-packaging-likely-to-be-law-by-end-of-year--john-key>

CANADA (2016)



The Heart and Stroke Foundation

The New Canadian Government has promised the introduction of plain packaging of tobacco products.¹⁶⁴ The Prime Minister Justin Trudeau has requested his Minister for Health Dr Jane Philpott to ‘Introduce plain packaging requirements for tobacco products, similar to those in Australia and the United Kingdom.’¹⁶⁵

The *Montreal Gazette* applauded the move by the new Trudeau Government:

¹⁶⁴ Prime Minister of Canada Justin Trudeau, ‘Minister of Health Mandate Letter’, <http://pm.gc.ca/eng/minister-health-mandate-letter> See also Mark Kennedy, ‘Tobacco Packaging, Trans Fats to Be Part of Government’s “Activist” Health Agenda’, *Ottawa Citizen*, 19 November 2015, <http://ottawacitizen.com/news/national/tobacco-packaging-eliminating-trans-fats-to-be-part-of-governments-activist-health-agenda>

¹⁶⁵ Ibid.

The federal government's plan to impose plain packaging on cigarettes is a welcome addition to the long list of measures already taken to make smoking unattractive, inconvenient, expensive and socially unacceptable. And the plan, coupled with Quebec's latest anti-smoking legislation — adopted unanimously by the National Assembly in November — promises to make this province a leader in the fight against tobacco use.

Under the federal initiative, tobacco companies will be forced to remove their logos and colours from cigarette packs, leaving only the brand name in uniform lettering along with large, graphic health warnings already mandated by the government. Quebec's law, meanwhile, extends the ban on smoking to places that include bar and restaurant terrasses, and cars containing children, and sets restrictions on the size of cigarette packs so they cannot be made to look like iPods or lipstick, among other measures. The federal and provincial measures have been applauded by anti-smoking advocates and health groups.

It's unclear when the new federal rules will kick in, though the sooner, the better, given that smoking is responsible for one-third of cancers in Canada. Any move that stands to help smokers kick the habit — and prevent young people from picking it up — warrants urgent action. Anti-smoking groups say existing cigarette packs serve as colourful “mini-billboards” for tobacco that find their way into schoolyards, and that every day there are young people who take up smoking despite the large health warnings on the packaging. It's a promising sign that Prime Minister Justin Trudeau has mandated Health Minister Jane Philpott to make the file one of her top priorities.¹⁶⁶

¹⁶⁶ Editors, 'Plain Packaging for Cigarettes Makes Sense in Canada and Beyond', *Montreal Gazette*, 6 January 2016, <http://montrealgazette.com/opinion/editorials/editorial-plain-packaging-for-cigarettes-makes-sense-in-canada-and-beyond>

The Canadian Cancer Society is also enthusiastic about the Liberal Pledge to demand plain packaging of tobacco products.¹⁶⁷ The Heart and Stroke Foundation has encouraged the adoption of plain and standardised packaging.¹⁶⁸

The Canadian Government has put out a tender to explore the introduction of plain packaging of tobacco products.¹⁶⁹ Rob Cunningham, a senior policy analyst with the Canadian Cancer Society, observed:

It's very positive that the government is moving ahead. The sooner we have tobacco plain packaging, the sooner we can have the health benefits. Plain packaging will reduce the appeal of tobacco packages and brands. Right now, tobacco companies are using brand colours and logos to make cigarettes more attractive. That might include mountain scenes or feminine pastels, it might include super-slim packages targeted at women.¹⁷⁰

Cunningham observed that the legal actions by Big Tobacco have failed elsewhere: 'The tobacco companies may threaten, or take the Canadian government to court, but the tobacco companies will lose.'¹⁷¹ He observed: 'The fact that the companies oppose this is a further

¹⁶⁷ Gloria Galloway, 'Liberal Pledge to Demand Plain Cigarette Packaging Draws Cheers', *The Globe and Mail*, 30 October 2015, <http://www.theglobeandmail.com/news/politics/liberal-pledge-to-demand-plain-cigarette-packaging-draws-cheers/article27054353/>

¹⁶⁸ Heart and Stroke Foundation, 'Tobacco Position Statement', http://www.heartandstroke.com/site/c.ikIQLcMWJtE/b.3799307/k.E453/Position_Statements_Tobacco_Position_Statement.htm

¹⁶⁹ Monique Muise, 'Plain Cigarette Packaging Likely Coming to Canada', *Global News*, 14 March 2016, <http://globalnews.ca/news/2576338/plain-cigarette-packaging-likely-coming-to-canada/>

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

signal of its impact'.¹⁷² Cunningham noted: 'If it wasn't going to work, why would they oppose it?'¹⁷³

The evidence from Australia has been that plain packaging of tobacco products has been an effective means of reducing tobacco consumption.¹⁷⁴

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Australian Government, *Post-Implementation Review Tobacco Plain Packaging 2016*, Canberra: Australian Government, 2016, <https://ris.govspace.gov.au/files/2016/02/Tobacco-Plain-Packaging-PIR.pdf>

CODA (2016)

In the end, the final text of the *Trans-Pacific Partnership* deals with tobacco control in quite a minimalist way.

The United States Trade Representative provides this overview of its approach to the topic of tobacco control:

Tobacco is a product that poses unique public health challenges, as is reflected in each Party's tobacco control regulations. In order to ensure that each Party has the ability to regulate manufactured tobacco products and protect public health, TPP, for the first time in any trade agreement, builds on structures established in the agreement to give each Party the right to decide that its tobacco control measures for manufactured tobacco products cannot be challenged by private investors under Investor-State Dispute Settlement (ISDS). Other provisions of the agreement, including state-to-state dispute settlement procedures by governments, will continue to apply. This provision does not apply to tobacco leaf; under TPP, U.S. tobacco farmers will have enhanced opportunities to compete fairly in foreign markets by the elimination of foreign tariffs on tobacco leaf.¹⁷⁵

Article 29.5 of the *Trans-Pacific Partnership* provides:

Article 29.5: Tobacco Control Measures [12]

A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure^[13] of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a

¹⁷⁵ United States Trade Representative, 'The Trans-Pacific Partnership: Chapter 29 – General Exceptions – Chapter Summary', <https://medium.com/the-trans-pacific-partnership/exceptions-1299fbf34b76#.jcdbrbnhe>

claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.¹⁷⁶

Footnote 12 provides: ‘For greater certainty, this Article does not prejudice: (i) the operation of Article 9.14 (Denial of Benefits); or (ii) a Party’s rights under Chapter 28 (Dispute Settlement) in relation to a tobacco control measure’.¹⁷⁷ Footnote 13 provides: ‘A tobacco control measure means a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labeling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure.’¹⁷⁸

Reading this text, it seems that only limited protection is afforded to tobacco control in respect of investor-state dispute settlement (if parties elect to use such protection). There is still scope for country-to-country disputes over tobacco control under Chapter 28 of the *Trans-Pacific Partnership*. The text does not provide for an over-arching recognition of the *WHO Framework Convention on Tobacco Control*.

¹⁷⁶ Article 29.5 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

¹⁷⁷ Article 29.5 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

¹⁷⁸ Article 29.5 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Katherine Shats at the O'Neill Institute for National and Global Health Control provided a commentary upon the text on tobacco control in the *Trans-Pacific Partnership*.¹⁷⁹ She noted: 'This kind of tobacco-specific carve-out is certainly unprecedented in the history of trade and investment agreements and sets a strong precedent for tobacco control and public health'.¹⁸⁰ Shats recognised: 'An international trade treaty expressly recognizing tobacco products as uniquely harmful and tobacco control measures as requiring specific protection is an incredibly important step which, ideally, would set a floor for future agreements.' Nonetheless, she questioned whether the text was adequate, sufficient, and comprehensive.¹⁸¹

Katherine Shats highlights the prospect of state-to-state disputes over tobacco control under the *Trans-Pacific Partnership*:

This carve-out may stop future suits by tobacco companies, but it unfortunately that's only a part of the story. As a footnote to the provision makes clear, it only applies to corporations suing countries, not one country suing another. And as **I've written about before**, convincing and funding a government to file a lawsuit on their behalf is something Big Tobacco is very good at. For example, despite not actually being an exporter of tobacco to Australia, the **Ukraine was one of five countries** that sued Australia alleging that its plain packaging laws breach WTO law. Why? Well we now know that British American Tobacco and Philip Morris **paid the legal costs** of at least three of the countries involved in that dispute. Still, the state-state dispute process does make it harder for a tobacco company to initiate claims than being able to sue a state directly. Many governments (including those party to the TPP)

¹⁷⁹ Katherine Shats, 'Is the Trans-Pacific Partnership a win for Tobacco Control? A First Look at the Tobacco Carve-Out', O'Neill Institute for National and Global Health Law, 11 May 2015, <http://www.oneillinstituteblog.org/is-the-trans-pacific-partnership-a-win-for-tobacco-control-a-first-look-at-the-tobacco-carve-out/#.VjzgOFH21WA.twitter>

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

may not agree to bring such actions, and would face significant criticism or ridicule for agreeing to act for Big Tobacco so blatantly (in fact, Ukraine ended up eventually **withdrawing from the lawsuit**).¹⁸²

Shats warned: ‘Unfortunately, it still doesn’t seem like this carve-out will do anything to prevent these kinds of practices if they were to occur’.¹⁸³ She noted: ‘Even more frightening is the prospect that industry could also try to dissuade some governments from opting in and “electing” to trigger this provision in the first place’.¹⁸⁴ Shats makes the important point: ‘This entire provision rests entirely on what a government chooses to do.’¹⁸⁵ She suggested: ‘Maybe TPP negotiators weren’t ready to carve-out *all* claims related to tobacco, regardless of whether they are brought by a tobacco company or a state’.¹⁸⁶ Shats noted: ‘Though it’s very difficult to believe that any government that isn’t being manipulated and funded by Big Tobacco would genuinely want to sue another country for trying to protect its citizens from tobacco-related disease and death.’¹⁸⁷

Ted Alcorn has also discussed trade-offs for public health under the *Trans-Pacific Partnership* in *The Lancet*.¹⁸⁸

Philanthropists Mike Bloomberg and Bill Gates recently launched a joint legal fund to assist developing countries in legal battles with the tobacco industry over trade and investment. The

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ted Alcorn, ‘TPP: Trade-Offs for Health Behind Closed Doors’ (2016) 387 (10022) *The Lancet* 929-

930 <http://www.sciencedirect.com/science/article/pii/S0140673616006322>

Anti-Tobacco Trade Litigation Fund aims 'to combat the tobacco industry's use of international trade agreements to threaten and prevent countries from passing strong tobacco-control laws'.¹⁸⁹

In late 2015, Australia was successful in defending its plain packaging of tobacco products in an investor-state dispute settlement dispute with Philip Morris.¹⁹⁰ Minister Fiona Nash commented:

We welcome the unanimous decision by the tribunal agreeing with Australia's position that it has no jurisdiction to hear Philip Morris' claim. Smoking does untold harm to Australians, causing deaths from cancer, lung and heart disease, and hurting families. The Coalition government has powered ahead with plain packaging and invested in reducing smoking rates across the board.¹⁹¹

Labor's Health spokeswoman, Catherine King, has paid tribute to the Labor politicians who brought in the laws: 'This is a great vindication of the work by (former Labor Attorney-General) Nicola Roxon and Tanya Plibersek to promote world leading health.'¹⁹² She

¹⁸⁹ Bloomberg Philanthropies and the Bill and Melinda Gates Foundation, Bloomberg Philanthropies and the Bill and Melinda Gates Foundation Launch Anti-Tobacco trade Litigation Fund, Press Release, 18 March 2015. <http://www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund/>

¹⁹⁰ Gareth Hutchens, 'Australian Government wins Plain Packaging Case against Philip Morris Asia', *The Canberra Times*, 18 December 2015, <http://www.canberratimes.com.au/federal-politics/political-news/australian-government-wins-plain-packaging-case-against-philip-morris-20151218-glqo8s.html>

¹⁹¹ Ibid.

¹⁹² Karen Barlow, 'Trade Pact Tested, Australia Wins Big Tobacco Fight', *The Huffington Post*, 18 December 2015, http://www.huffingtonpost.com/2015/12/17/australia-plain-packaging-big-tobacco_n_8834270.html?utm_hp_ref=australia

emphasized: This is a fantastic public health win.’¹⁹³ The details of the dispute’s resolution remain murky, though.¹⁹⁴

The Greens’ Trade spokesman Senator Peter Whish-Wilson reflected upon the significance of the dispute:

Plain packaging has proven to be an effective public policy tool to reduce smoking rates in Australia. Unfortunately as a nation we have signed up to trade and investment treaties that have given corporations the right to sue us for making laws that might impinge on a foreign corporation’s profits. In this case particular case Australia has dodged a bullet because the tribunal has decided they don’t have jurisdiction to decide on this piece of litigation. However, because Australia has signed up to ISDS mechanisms with China, Korea and the United States (via the Trans-Pacific Partnership) we are going to see so much more of this from now on. The Liberal Government has exposed Australia to a spate of claims as all the major multinationals with investments in Australia now have company headquarters located in countries with access to ISDS.¹⁹⁵

He concluded: ‘ISDS is the Damocles Sword hanging over Australia's sovereignty and our right to legislate in the public interest. We have reportedly spent over \$50 million of taxpayer

¹⁹³ Ibid.

¹⁹⁴ Jarrod Hepburn and Luke Eric Peterson, ‘Australia Prevails in Arbitration with Philip Morris Over Tobacco Plain Packaging Dispute’, Investment Arbitration Reporter, 17 December 2015, <https://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/>

¹⁹⁵ Senator Peter Whish-Wilson, ‘Plain Packaging Victory is Outstanding for Public Health but ISDS still Hangs like a Damocles Sword over Australian Democracy’, Press Release, 18 December 2015, <http://peter-whish-wilson.greensmps.org.au/content/media-releases/plain-packaging-victory-outstanding-public-health-isds-still-hangs-damocles-s>

dollars to successfully defend our democratic decisions in this plain packaging case, who knows what the result will be next time.’¹⁹⁶

Dr Kyla Tienhaara said that the decision was good news for the Australian Government.¹⁹⁷ Professor Tania Voon from Melbourne Law School has warned of the danger of further investor disputes against the Australian Government.¹⁹⁸ Glyn Moody commented that, just because Australia won its plain packaging case against Philip Morris does not mean that corporate sovereignty is not a threat.¹⁹⁹ Lori Wallach observed that ‘Australians saw more than \$50 million of their tax dollars go to legal costs to defend against the attack, according to World Health Organization Director General Margaret Chan’.²⁰⁰

¹⁹⁶ Ibid.

¹⁹⁷ Kyla Tienhaara, ‘The Dismissal of a Case against Plain Cigarette Packaging is Good News for Taxpayers’, *The Sydney Morning Herald*, 20 December 2015, <http://www.smh.com.au/comment/the-dismissal-of-a-case-against-plain-cigarette-packaging-is-good-news-for-taxpayers-20151218-glr53.html>

¹⁹⁸ Stephen Easton, ‘Sovereign Risk: First ISDS Dispute Won, But It Won’t Be The Last’, *The Mandarin*, 23 December 2015, <http://www.themandarin.com.au/58636-australia-defends-regulatory-sovereignty-challenges-come/?pgnc=1>

¹⁹⁹ Glyn Moody, ‘Just Because Australia Won Its Plain Packaging Case Against Philip Morris Doesn’t Mean Corporate Sovereignty Isn’t A Threat’, *TechDirt*, 23 December 2015, <https://www.techdirt.com/articles/20151221/10582033149/just-because-australia-won-plain-packaging-case-against-philip-morris-doesnt-mean-corporate-sovereignty-isnt-threat.shtml>

²⁰⁰ Lori Wallach, ‘Public Interest Takes a Hit Even When Phillip Morris’ Investor-State Attack on Australia is Dismissed’, *The Huffington Post*, 1 May 2016, http://www.huffingtonpost.com/lori-wallach/public-interest-takes-a-h_b_8918010.html

Australia has said that it will avail itself of the protection for tobacco control against investor-state dispute settlement under the *Trans-Pacific Partnership*.²⁰¹ The nation state said: ‘Pursuant to Article 29.5 of the *Trans-Pacific Partnership Agreement* (TPP) signed in Auckland, New Zealand on 4 February 2016, Australia hereby elects to deny the benefits of Section B (Investor-State Dispute Settlement) of Chapter 9 (Investment) of the TPP with respect to any claim in relation to its tobacco control measures. Accordingly, no claim can be submitted to arbitration under the TPP’s investor-state dispute settlement mechanism in respect of any tobacco control measure of Australia.’ Clearly, other participants in the *Trans-Pacific Partnership* should do likewise.

Alfred de Zayas, the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, has been concerned about the use of investor clauses in respect of tobacco control.²⁰² He emphasized: ‘There is no justification for the existence of a privatised system of dispute settlement that is neither transparent nor accountable’.²⁰³ Alfred de Zayas stressed: ‘Investors can have their day in court before national jurisdictions, often with multiple opportunities for appeal.’²⁰⁴ He stressed: ‘Investors can also rely on diplomatic protection and state-to-state dispute settlement procedures.’ In his view, ‘The ISDS cannot be reformed. It must be abolished.’²⁰⁵ Alfred de Zayas maintained that ‘respect for human rights

²⁰¹ ‘Draft Notification by Australia in respect of Article 29.5 of the *Trans-Pacific Partnership Agreement*’, <https://t.co/F6kyyuyqZP>

²⁰² Alfred de Zayas, ‘How Can Philip Morris Sue Uruguay Over Its Tobacco Laws’, *The Guardian*, 16 November 2015, http://www.theguardian.com/commentisfree/2015/nov/16/philip-morris-uruguay-tobacco-isds-human-rights?CMP=share_btn_tw

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

must prevail over commercial laws'.²⁰⁶ In his view, 'It is time for the UN general assembly to convene a world conference to put human rights at the centre of the international investment regime. In this context, a binding treaty on business and human rights is long overdue.'²⁰⁷

For its part, the Big Tobacco company Philip Morris has protested that it should be able to bring investor actions under trade agreements against tobacco control measures.²⁰⁸ He has maintained that 'there is no inherent tension in protecting fundamental rights of the private sector while protecting human rights.'²⁰⁹ The Big Tobacco company protests: 'The implication that our case has "chilled" governments from enacting tobacco control rules is erroneous'.²¹⁰ Philip Morris argued: 'Governments that respect the rule of law have nothing to fear from the possibility of independent, objective review of regulatory measures.'²¹¹

There remains a real and present danger that tobacco companies will bring further investor actions in the future, or ask states to bring trade actions to protect their interests.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Marc Firestone, 'Philip Morris – We are Defending Our Business, Not Attacking Human Rights', The Guardian, 17 November 2015, <http://www.theguardian.com/business/2015/nov/19/philip-morris-we-are-defending-our-business-not-attacking-human-rights>

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.