

Corporate Attacks: Health

Case Study: Tobacco Regulation

Investor-State Dispute Settlement (ISDS) grants corporations shocking powers to attack the laws we rely on for a clean environment, financial stability, affordable medicines, safe food and decent jobs. The cases are decided by tribunals composed of three private attorneys, some of whom rotate between serving as “judges” and bringing cases against governments. The tribunalists are paid by the hour and are unaccountable to any court system or electorate. Under U.S. trade and investment pacts alone, corporations have already won more than \$3.6 billion in taxpayer money, with \$38 billion still pending.

Philip Morris v. Australia and Uruguay

Cases Pending

In November 2011, a Hong Kong subsidiary of the U.S.-based tobacco corporation Philip Morris International [launched an investor-state case](#) against a landmark anti-smoking law in Australia. Philip Morris is [challenging Australia’s plain packaging law](#), which requires tobacco products to be sold in packaging that is dominated by health warnings with the brand name of the product in standard font size at the bottom of the package. Phillip-Morris has not yet specified the amount of compensation it is demanding from the government, but has stated that the law could spell losses [“potentially amounting to billions of dollars.”](#) [Philip Morris argues](#) that the public health law “expropriated[] its valuable intellectual property” (by prohibiting the display of its logo, brand colors and the like) and violated its right to “fair and equitable treatment” as guaranteed under the Australia-Hong Kong Bilateral Investment Treaty (BIT). Philip Morris’ Hong Kong subsidiary had acquired shares in an Australian holding company at the same time that the plain packaging policy was announced. The Australian government argues that the corporation’s “investment” was [merely a tool for launching the BIT claim](#) against Australia.

Philip Morris also attacked the law in Australia’s domestic courts and pursued its challenge through the nation’s highest court. In 2012, Australia’s High Court ruled that the plain packaging law [did not result in an unconstitutional acquisition of property](#) and was justified as a public health measure. Regardless, Philip Morris continues to pursue its demand for compensation in the ISDS tribunal. The plain

packaging initiative was [one of a number of strengthened tobacco policies](#) the government introduced to meet its public health objectives. It has been [lauded by the World Health Organization](#) as a leading public health example for other countries to follow.

At Philip Morris's request, the ongoing proceedings will be largely non-transparent, with public hearings prohibited and the public release of most documents left up to the discretion of each party. While Australia had argued for open hearings and transparent filings, Philip Morris refused, arguing that even releasing documents after the conclusion of the arbitration [“would be a time-consuming process with minimal gains for the public interest.”](#)

Meanwhile, a Swiss subsidiary of Philip Morris International launched a similar case against Uruguay in February 2010 under the Switzerland-Uruguay BIT. Uruguay also implemented a slate of anti-smoking measures that featured a requirement that packaging for tobacco products include large, graphic public health warnings. Philip Morris is seeking compensation for lost profits, arguing that the labeling policies violate the BIT as expropriations of its trademarks and as “unreasonable” measures with no rational relationship to public health objectives. In July 2013, the investor-state tribunal in this case [ruled that it had jurisdiction](#) over the case and it is now weighing the merits of the tobacco corporation's arguments.

Regardless of the final outcomes in these cases, already the investor-state system has had a chilling effect on tobacco control policies. In February 2013, New Zealand's Ministry of Health announced that the government [planned to introduce its own plain packaging legislation](#), but that it would wait until the investor-state case against Australia is resolved, and that enactment of New Zealand's legislation could be delayed as a result. And, in 1994 R.J. Reynolds Tobacco Company threatened to bring a claim under NAFTA's investment chapter as part of its successful lobbying campaign against Canada's proposed “plain packaging” legislation, which would have required that all cigarettes be sold in standardized packaging without logos or trademarks. The [firm sent a memorandum](#) to the House of Commons arguing that plain packaging would constitute an illegal expropriation of a legally protected trademark, requiring Canada to pay hundreds of millions of dollars in compensation.