EXPROPRIATING PUBLIC HEALTH POLICY: TOBACCO COMPANIES' USE OF INTERNATIONAL TRIBUNALS TO SUE GOVERNMENTS OVER PUBLIC HEALTH REGULATION

Patricia Ranald

Supra-national legal institutions like Investor-State Dispute Settlement (ISDS) can be analysed through a critical analysis of their social origins and histories, and the power relationships between their advocates and critics. This involves analysis of different interests of social forces and their relationship to governments and other state and non-state institutions. These forces include corporations and business organisations on the one hand, and public health groups and other organisations which seek to defend the interests of the less powerful, on the other. Legal institutions at national and international levels are influenced, but not simply determined by dominant economic interests. Institutions also develop their own histories which in turn shape the development of policies. State policies towards these institutions can be influenced by contests between social forces. (Cox 1994; Schneiderman 2008, 2013).

Transnational corporations like tobacco companies exert powerful influences on states to support global regulatory frameworks and policies that create a favourable environment for their trade and investment strategies. However, the establishment of global institutions that can change or override national forms of regulation is not simply a matter of reducing the role of nation states relative to global corporations and institutions. The most powerful states like the US seek to use legally binding trade and investment agreements on behalf of their transnational corporations to achieve forms of global regulation that suit their interests. Other states may try to mediate the effects of supra-national regulation on their own national political constituencies. This resistance and differing state responses arise because supra-national institutions now seek to apply global rules to many areas previously regarded as the domain of national government regulation, including public health policies like regulation of tobacco. New forms of legally binding global regulation effectively remove key aspects of policy from national democratic processes. The attempted removal of policies from national democratic legitimation can itself provoke resistance from a range of social movements which can in turn influence governments (Schneiderman 2013:12; Cox 1994:52-3).

This article addresses these issues in four parts. It first presents the origins of ISDS and its development and growth through inclusion in trade and investment agreements into a supra national institution with its own culture and history. It then analyses the difference between ISDS legal principles and national legal principles and the growing critical literature about ISDS. The third part outlines the impact of critical opposition to ISDS and the responses from national governments, including Australian governments. Part Four analyses the Philip Morris tobacco company's use of ISDS as a strategy to oppose and prevent the regulation of tobacco advertising, before the conclusion discusses whether ISDS is facing a crisis of legitimacy which could limit its future.

The Origins and Development of ISDS

The regulation of transnational investment has always been controversial because it can be argued that 'foreign investment is essentially intrusive of the territorial sovereignty of the state' (Sornarajah 1995:105).

Historically there have been two major conflicting views about the regulation of transnational investment, based on different interests. The first approach stems from corporations and capital-exporting governments concerned to ensure that the host country affords foreign investors certain minimum standards of protection for persons and property. These can be traced back to agreements amongst European countries like the Treaty of Westphalia (1648), which recognised a reciprocal interest in protecting the trade and property rights of nationals in other countries. This approach sought international agreements to ensure free movement and protection of investment, and minimum standards of treatment, including compensation if property was expropriated (Raghaven 1990:143).

The second approach, based on economic nationalism, developed in some postcolonial Latin American states at the end of the 19th century. These governments were capital importers, and were mindful of the history of colonial exploitation. They wanted foreign investment, but wished to ensure that it contributed to local development. They argued against special legal rights for foreign investors compared with national investors on the grounds that 'the responsibility of governments towards foreigners cannot be greater than that which those governments have towards their own citizens' (Carlos Calvo, quoted in Tienhaara 2009:41)

The origins of ISDS are found in the post-World War Two decolonisation period, when some postcolonial regimes nationalised assets which had been owned by transnational investors, usually based in the former colonial power. Investors and former colonial governments, while striving to minimise the occurrence of nationalisation, sought to develop internationally agreed legally binding frameworks which would ensure that the expropriation of assets conformed to certain legally enforceable standards. In 1962 the Organisation of Economic Cooperation and Development (OECD), on behalf of its industrialised state members, drafted a Convention on the Protection of Foreign Property. This was never formally adopted, but became a model for future investor-state dispute processes. The Convention went further than protection from expropriation of assets by specifying that foreign investors must be accorded 'fair and equitable treatment,' 'constant protection and security' and that the exercise of rights relating to such property should not be 'impaired by unreasonable or discriminatory measures'. It also included recourse to international arbitration in the event of disputes and possible payment of damages (OECD 1962:8, 55).

International arbitration between investors and states was institutionalised in 1966 when the International Convention on the Settlement of Investment Disputes between states and nationals of other states (ICSID Convention) came into force, under the auspices of the World Bank. In 1976, the United Nations created another option for international arbitration, which became known as UNICITRAL (Tienhaara 2009:46, 123). Some other tribunals have since been developed, like those under the auspices of the International Chamber of Commerce, but these handle a relatively small number of disputes (UNCTAD 2013a).

Building on the OECD draft model, legally binding bilateral investment treaties between the industrialised capital-exporting states and capital–importing former colonies contained ISDS clauses. These were expanded in scope to protect the investor not only from nationalisation, but also from the risk of a range of what were perceived as arbitrary actions by the host government. These included, but were not confined to, the expropriation of assets. But they also introduced the concept of ‘indirect expropriation’ through laws or policies which impaired the investment. If the host government departed from the provisions in the agreement, the investor could seek monetary compensation through legally binding arbitration by an international tribunal, made up of experts in investment law. Bilateral investment treaties were initially limited by the willingness of developing country governments to sign them. Until 1991, the world was divided by the Cold War into two major competing trade blocs, with Western transnational investors having little or no access to centralised socialist economies, and limited access to countries which described themselves as nonaligned to either bloc.

The end of the Cold War and the beginning of the era of ‘globalisation’ meant that transnational investors, most of which were still based in industrialised countries, now had greater access to most national economies (Busch and Milner, 1994). There was a concerted attempt to devise uniform global rules for investment protection, initially through a growth in bilateral investment treaties. ISDS provisions were also increasingly included in investment chapters in bilateral and regional trade agreements, especially those initiated by the United States. The first of these was the North American Free Trade Agreement between the US, Canada and Mexico (NAFTA) which from its beginning in 1994 contained an investment chapter and ISDS provisions (NAFTA 1994).

NAFTA gave rise to increasing numbers of disputes, most of which were initiated by US companies against the governments of Mexico and Canada. Many of these used the provision for ‘indirect’ expropriation which enabled foreign investors to sue governments in an international tribunal on the grounds that regulation harmed their investment. These cases were reported in the media and made ISDS a subject for broader public discussion for the first time, as governments were sued for millions of dollars over what many perceived to be legitimate health or environmental regulation (Public Citizen 2014).

From 1994 the World Trade Organisation (WTO) developed legally enforceable trade agreements for both developing and industrialised countries. The aim of the WTO was to increase the scope of enforceable global rules through agreements for trade in agriculture, trade in services, trade related intellectual property rights and other agreements. However, there was no investment agreement, and disputes about the implementation of WTO agreements were settled by government-to-government dispute processes. There was an attempt by industrialised governments at the 1996 WTO Ministerial meeting to establish a WTO investment agreement, which would have included ISDS. This was fiercely resisted by the developing country governments, which would only agree to form a working party on investment (WTO 1996).

Another attempt to globalise ISDS occurred through the OECD in 1997 in the form of an investment agreement, known as the Multilateral Agreement on Investment (MAI), which contained ISDS provisions. The aim was to reach agreement amongst OECD states and then present the agreement on a take-it-or-leave-it basis for signature by developing countries in the WTO. The attempt was foiled because a draft of the agreement was leaked and became available on the Internet. Strong social movements against the agreement developed in France, the US, Canada, France, Australia and New Zealand. Social movements in developing countries also expressed opposition. Opponents argued that the draft unreasonably restricted the ability of governments in both industrialised and developing states to regulate foreign investment, and contained ISDS provisions which would enable investors to sue governments for damages over legitimate public interest regulation. The negotiations collapsed when France, the host government, withdrew from them (Goodman and Ranald 1999).

The defeat of the MAI did not prevent the OECD states from raising the issue again at Ministerial Meetings of the WTO at Seattle in 1999 and Cancun in 2003. However, both of these attempts were rejected by the capital-importing majority of WTO members (Steger, Goodman and Wilson 2013).

Following these defeats of attempts to introduce ISDS into the WTO as a global standard, the US has led the growth in bilateral investment treaties, bilateral trade agreements, and regional trade agreements containing ISDS over the past two decades. In addition to NAFTA, the Central American Free Trade Agreement (CAFTA) between the US and

Central American countries contains ISDS provisions, and such provisions are included in all US bilateral trade agreements, except its agreement with Australia, discussed below. The US is also insisting on ISDS provisions in the Trans-Pacific Partnership Agreement (TPPA) currently being negotiated between the US, Australia and 10 Asia-Pacific countries (Ranald 2011). Some rapidly growing developing countries are now becoming capital exporters, and may consider ISDS to be in their interest. China, for example, has agreed to include a severely modified form of ISDS in the China-ASEAN Free Trade Agreement (China Ministry of Finance 2009). Others like Brazil, Argentina, South Africa and Indonesia, which have been more frequent recipients of ISDS actions against themselves, continue to resist ISDS, as discussed below.

The last 20 years have seen a steep growth in known numbers of ISDS cases lodged each year, from less than five in 1993 to 58 in 2012. The cumulative number of known cases from 1993 to the end of 2012 is 514. The United Nations Committee on Trade and Development (UNCTAD) estimates that the total figure is probably much higher, because proceedings are not public, there are several different tribunal systems and no single system of recording of cases (UNCTAD 2013a:5).

UNCTAD reports that ISDS actions have been initiated most frequently by investors from the United States (123 cases or 24% of all known disputes), the Netherlands (50 cases), the United Kingdom (30 cases) and Germany (27 cases). The three investment instruments most frequently used as a basis for ISDS have been the NAFTA (49 cases), the European Energy Charter Treaty (29 cases), and the Argentina-United States bilateral investment treaty (17 cases). There are a very small number of cases from investors from developing countries (15 in 2012). ISDS cases are most frequently lodged against developing country governments, with a minority lodged against industrialised countries which are capital importers, like Canada and Australia (UNCTAD 2013a:4).

In summary, the development and growth of ISDS demonstrates the continuing contest between more powerful capital-exporting states on behalf of their investors, and less powerful capital-importing states, rather than a simple reduction in state powers versus supra-national institutions. ISDS emerged out of the postcolonial context in which industrialised capital-exporting states sought to protect the interests of their investors through the construction of a supranational, legally enforceable dispute system. This has expanded the scope of protections for investors from compensation for actual expropriation of property to include compensation for indirect expropriation, and for states failing to meet other standards like fair and equitable treatment. Although most disputes are between investors from industrialised capital-exporting states and developing economy states, there are also some examples of disputes against industrialised states which are capital importers, like Canada and Australia.

Attempts by capital exporting states to establish a consistent global ISDS system through the OECD and the World Trade Organisation have been successfully resisted by developing capital-importing states. Investors based in the United States, the world's largest economy and capital exporter, have been the most frequent users of ISDS, closely followed by investors from European states. The very low number of ISDS cases from investors in developing countries reflects the realities of global investment flows, which still come mostly from industrialised countries.

The ISDS Legal Framework and its Critics

Most ISDS disputes are concerned with 'indirect' expropriation which involves 'the effective loss of management, use or control or a significant depreciation of the value of the assets of a foreign investor' (UNCTAD 2000:11). UNCTAD defines indirect expropriation as 'those takings of property that fall within the police powers of the state, or otherwise arise from direct state measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country' (UNCTAD 2000:12).

ISDS tribunals focus on the effect of the regulation on the investor, in terms of its economic impact and duration. Tribunals have also taken into account the legitimate expectations of the investor, whether the investor has received 'fair and equitable treatment' in the development of the regulation, and whether the stated purpose of the regulation is proportional to the negative effect felt by the investor. Recently tribunals have increasingly focused not only on whether the substance of the regulation constituted indirect expropriation, but on procedural issues like the investor's expectations about the regulatory environment, and whether the investor received fair and equitable treatment in consultation about and the process of development of the regulation (UNCTAD 2013a:12-8). If these procedural issues are taken to the extreme, they can amount to an argument that any change in the regulatory environment which the investor perceives to be harmful could be compensable.

The definition of the scope of government regulatory powers and the difficulty of distinguishing regulation which could be compensable is problematic. Disputes have involved measures like health warnings on cigarette packaging, the use of dangerous chemicals, and regulation of mining projects in environmentally sensitive areas or on indigenous land. There is a growing body of academic and broader public opinion which argues that ISDS places unreasonable restrictions on the right of governments to regulate for legitimate health, environmental or other social policy objectives and thus erodes democratic process and national sovereignty (Capling and Nossal 2006; Schneidermann 2008; Tienhaara 2009; Gallagher 2010; van Harten 2012).

Over 70 cases have been filed under NAFTA, mainly by US-based investors. There have been a series of cases involving health and environmental regulation which have been won by investors. For example, the US Ethyl Corporation received US$13 million from the Canadian Government over the banning of petroleum additives for health reasons, and the Canadian Government agreed to reverse the ban as part of the settlement. The US SD Myers Corporation received US$5.6 million because of a ban on the transport and export of hazardous wastes (PCBs) harmful to the environment and human health. The US Metalclad company won US$16.2 million in damages from a Mexican municipal government because it refused a permit for a toxic waste disposal site for environmental reasons (Public Citizen 2014:11, 22).

In ongoing cases, the US Eli Lilley pharmaceutical company has recently claimed US$481 million damages against the Canadian Government because of a Canadian court refusal to grant a medicine patent on the grounds of lack of lack of evidence of medical effectiveness compared with existing medicines. The US Lone Pine resources company is claiming US$250 million damages against the Canadian Québec provincial government for a moratorium on the issue of a shale gas mining licence pending an environmental review (Public Citizen 2014:21).

A 2009 survey of ISDS cases found 33 cases involving claims of more than US$1 billion, the highest being a claim for US$50 billion, and more than 100 additional cases where claims were between $100 and $900 million (Productivity Commission 2010:272). The largest damages claim awarded to date is US$1.8 billion against Ecuador in 2012 (UNCTAD 2013a:1-3). Damages awards of this size are harmful to the budget of any government, but have a more devastating effect on smaller developing countries where they are a sizeable proportion of government expenditure, and can be equivalent to the health or education budget. Legal and arbitration fees are additional and can amount to millions of dollars even if a government wins the case. An OECD survey found in 2012 that costs were an average of US $8 million per case, with some cases costing up to US $30 million. Arbitration fees are split between the parties, with parties paying their own legal fees (Gaukrodger and Gordon, 2012:19).

The impact of these cases has led to an effect described as 'regulatory chill'. This is a situation in which governments are made aware of the threat and costs of both protracted litigation and damages, and are discouraged from legitimate regulation because of these threats. For example, Canada withdrew a proposal for tobacco plain packaging regulation following the threat of ISDS arbitration under NAFTA (Productivity Commission 2010:271).

There is no single investment institution which deals with ISDS disputes. As discussed above, the most commonly used tribunal systems are the ICSID tribunals of the World Bank, and the UNICITRAL tribunals of the United Nations. ISDS clauses in investment and trade agreements may specify one or another of these tribunals, or allow the parties to choose. The tribunals are made up of recognised experts in investment law, one chosen by the investor, one by the government and one mutually agreed.

Critics have identified a series of problems with ISDS processes compared with most national legal processes. Firstly, they lack transparency and public accountability compared with national legal processes. The proceedings are not public, and even the results of proceedings can remain secret. Until April 2014, there has been little public information about UNICITRAL disputes Provisions for increased transparency agreed by UNCITRAL will only apply to ISDS arrangements agreed after April 1, 2014. The new provisions can only apply to agreements before April 1, 2014 if both parties agree (UNICRAL, 2014). ICSID as part of the World Bank group has a website which lists disputes, and on which tribunal results and awards can be published, but only if the parties agree that they can be made public. This contrasts with most national legal proceedings, where proceedings themselves are public and records of proceedings and outcomes are publicly available (Productivity Commission:273).

Secondly, the arbitrators lack the independence of judges in national legal systems, who cannot also be advocates. The same individual can be an ISDS advocate one month and an arbitrator the next. Empirical studies of the composition of arbitration panels show that the majority are investment law experts from Western Europe and North America, many of whom have been and remain practising advocates on behalf of investors. Both advocates and arbitrators are paid fees at the highest levels of the legal profession. A study of 450 cases found that 15 top ranking arbitrators who were also advocates handled 247 or 55% of these cases (Eberhardt and Olivet 2012:36-8).

Critics argue that arbitrators are not independent and that ISDS litigation has become a global industry with its own momentum, dominated by large specialised firms which produce their own journals and newsletters, and promote their services by approaching and advising investors of possible cases. They also actively advocate for the expansion of ISDS and argue against critics (Appleton 2007; Uribe 2013).

Commercial third party funding of cases has also contributed to the momentum of the arbitration industry and the escalation of even larger claims. Third party funding of ISDS cases is described in an OECD publication as 'a new industry composed of institutional investors who invest in litigation by providing finance in return for a stake in a legal claim.' This has expanded rapidly over the last decade. The expansion of third-party funding of ISDS cases has occurred despite the fact that is controversial in many national legal jurisdictions, because of lack of transparency about the identity of the funders and possible conflicts of interest if funding firms have links with parties in cases they fund. The same publication reported that, in 2008, eight out of ten top London law firms involved in arbitration were using commercial third party funders, and a number of such funding firms were listed on stock exchanges. Legal claims were considered to represent diversification of investment risk compared with cyclical trends in stock and bonds (Gaukrodger and Gordon, 2012:36-7).

Thirdly, decisions are only binding on the parties involved in the dispute. Tribunals do not have to consider decisions of previous tribunals and there is no appeal system to ensure consistency. There have been cases where panels have reached very different conclusions based on similar facts (Productivity Commission 2010:273; UNCTAD 2013a:26).

In summary, ISDS has developed as a supra-national legal system with its own institutions, funding, history and culture, which has been constructed under the influence of transnational investors and lacks the independence of national legal systems. ISDS has expanded the scope of disputes from compensation for expropriation of property to a range of disputes which include public interest legislation on health, environment and other matters. ISDS disputes have not only contested legislation, but also national court decisions. ISDS exposes governments to the risk of expensive litigation and huge potential damages in a secretive process without the legal safeguards of transparency, an independent judiciary, precedent setting, appeals processes and consistency of decision-making. Juan Fernandez-Armesto, an arbitrator from Spain has observed:

> When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all. Three private individuals are entrusted with the power to review, without any restrictions or appeal procedure, all actions of the government, all decisions of the courts and all laws and regulations emanating from Parliament (Eberhardt and Olivet 2012:34).

The Impact of Critical Opposition to ISDS and the Responses from National Governments

The growth of critical studies of ISDS, opposition from social movements and the experience of governments in ISDS tribunals have led a number of governments to review, criticise and in some cases, renounce participation in ISDS processes. These include Brazil, Argentina and eight other Latin American countries, South Africa, India, Indonesia and Australia. France and Germany have also recently opposed the inclusion of ISDS in the Trans-Atlantic Trade and Investment Partnership between the EU and the US.

Brazil was an early critic of ISDS. Brazilian Governments signed 14 bilateral investment treaties between 1994 and 1999. However, case studies from NAFTA and the defeat of the OECD MAI prompted a lively civil society debate on ISDS from 1998, in the context of Brazil's emergence from a period of military dictatorship. This debate influenced the Brazilian Parliament, which refused to ratify ISDS provisions on the grounds that ISDS would restrain the state in its ability to pursue public policy (Filho 2007).

Other Latin American governments have been influenced by their experience of ISDS, as the number of cases and the scale of damages claimed escalated over the past decade. Argentina faced disputes when it terminated privatisation contracts with water companies which had not met the terms of contracts to supply water, and when the state took other measures to address its currency crisis after 2000 (UNCTAD 2013a:4). The Philip Morris tobacco company used ISDS to sue Uruguay over legislation for health warnings on tobacco packaging (O'Malley 2010; Davison 2010). Other governments faced disputes from mining companies, which contested national court decisions which held them responsible for environmental pollution and/or damage to human health, under the ISDS provisions in the Central American Free Trade Agreement, and bilateral agreements. The US Chevron company used ISDS to counter sue for damages against Ecuador because a national court ordered Chevron to pay damages for environmental pollution and disease caused by its oil operations in the Amazon region. The US Renco company sued the Peruvian Government after a national court decision that it should remediate pollution caused by a lead mine. Canadian company Pacific Rim Cayman claimed damages of $US200 million against El Salvador for refusing to issue a mining licence on environmental grounds (Public Citizen 2014: 32-33).

These experiences prompted a Ministerial meeting of 12 countries in Ecuador in April 2013, which produced a declaration on Latin American states affected by transnational interests.[1] This declared that:

> The recent events in various countries of Latin America, concerning disputes between states and transnational corporations, have shown that there are still cases where judgements violate international law and the sovereignty of the state, as well as legal institutions, due to the economic power of certain companies and deficiencies of the international system of

[1] Bolivia, Cuba, Ecuador, Nicaragua, Dominican Republic, St Vincent & Grenadine, and Venezuela, signed the Declaration, and Argentina, Guatemala, El Salvador, Honduras, and Mexico were also present at the meeting. Argentina joined the agreement at the subsequent October meeting.

> dispute settlement on investment, facts that must be evaluated in depth by states in intergovernmental forums establish for this purpose (Ministerial Meeting 2013).

A further meeting in October 2013 agreed to establish a regional centre as an alternative to ICSID and UNICTRAL, with an international monitor to provide oversight of cases and ensure fair mediation (Biron 2013; Uribe 2013).

In 2009-10 South Africa conducted a review of its first-generation bilateral investment treaties signed after 1994. The review found that the treaties extended too far into the policy sphere, were skewed towards investors and did not contain the necessary safeguards to preserve flexibility in a number of critical policy areas. This allowed challenges to regulatory changes which the government considered to be in the public interest. The South African Department of Trade and Industry recommended restructuring of the treaties to ensure they were 'harmonious with the country's broader social and economic priorities'. The government decided it would refrain from entering into any new investment treaties and would review all first generation treaties as they approach their expiry date, 'with a view to termination, and possible renegotiation on the basis of a new Model Bilateral Investment Treaty to be developed' (Carim 2013).

The Indian Government in January 2013 ordered a freeze of all Bilateral Investment Protection Agreements (BIPA) negotiations till a review of the model text is carried out and completed (Mehdudia, 2013). The Indonesian Government then announced in March 2014 that it would give notice to withdraw from all of its 67 bilateral investment treaties containing ISDS provisions (Bland and Donnan, 2014).

The inclusion of ISDS in negotiations for the Trans-Atlantic Trade and Investment Partnership Agreement between the US and the EU has prompted fierce public debate, resulting in a European Commission decision to pause the negotiations to allow for further public consultation. The French Government has raised objections to ISDS. The German government has announced it will oppose to the inclusion of ISDS in the agreement, partly based on its experience of being sued by a Swedish energy company over its policy of phasing our nuclear energy (Donnan and Wagstyl 2014; European Parliamentary Research Service 2014).

The Australian Liberal-National Coalition Government negotiated a free trade agreement with the US in 2004. The US sought to change a range of Australian health and social policies based on the agenda pursued in NAFTA and in other US bilateral agreements. Targets included the wholesale price controls on medicines through the Pharmaceutical Benefits Scheme, Australian content laws for audio-visual services, labelling of genetically engineered food and the Foreign Investment Review Board. These were all seen by the US as barriers to trade (Zoellick 2002). The US also wanted an ISDS clause in the agreement.

The Australia-US Free Trade Agreement prompted the biggest critical public debate held in Australia about a trade agreement (Ranald 2010; Capling 2004; Weiss *et al.* 2004). ISDS was a major topic in the debate. Critics used examples from NAFTA to argue that it would be a dangerous weakening of governments' ability to regulate for social and environmental goals (Australian Broadcasting Commission 2003; Henry 2003). The outcome of this debate was that ISDS was not included in the final agreement, making it the only bilateral US agreement which does not include ISDS.

The debate about ISDS was reignited in 2010 when, at the request of the then Australian Labor Party Government, the Productivity Commission produced a report on Australia's bilateral and regional trade agreements which included a review of ISDS. The report found no evidence that ISDS resulted in greater inflows of foreign direct investment, no evidence of market failure resulting from political risk to foreign investors, and no evidence that regulation is systematically biased against foreign investors (Productivity Commission 2010:269-70). The report concluded that 'experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions' (Productivity Commission 2010:274).

The review coincided with the commencement of the Trans-Pacific Partnership Agreement negotiations between the US, Australia and other Pacific Rim countries, in which the US was advocating the inclusion of ISDS. Submissions from legal experts and civil society organisations advocated against ISDS being included in the TPPA. A 2011 review of Australia's trade policy rejected ISDS, stating:

> The government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the government support provisions

> that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses (Emerson 2011:20).

The ALP Government implemented its policy against ISDS in trade negotiations in 2012-13. The Malaysia-Australia Free Trade Agreement completed in 2012 did not contain ISDS. Leaked documents in the TPPA negotiation in 2012 showed that the Australian government had opposed the application of ISDS to Australia in the TPPA negotiations (Department of Foreign Affairs and Trade 2102; TPPA 2012). However, this policy changed with the election of the Coalition Liberal-National Party Government in September 2013. The new government announced it would negotiate ISDS 'on a case-by-case basis'. It had previously described the ALP policy as too inflexible and as having the effect of delaying completion of free trade agreements, especially in relation to the Korea-Australia Free Trade Agreement and the TPPA (Condon 2013).

The Coalition Government has since agreed to the inclusion of ISDS in the Korea-Australia Free Trade Agreement. It has also announced that it is prepared to agree to ISDS in the TPPA in return for increased market access for Australian agricultural products to US and Japanese markets (Department of Foreign Affairs and Trade 2013; Kehoe 2013). The Government has defended this policy by claiming that more recent versions of ISDS, since revisions in 2002, have clauses which aim to safeguard health, environmental and public welfare policies. These clauses are contained in the Central American Free Trade Agreement and the US-Peru Free Trade Agreement. However critics have noted that the clauses in these agreements have not deterred investors from suing over environmental regulation. Examples include the Pacific Rim mining company case against El Salvador and the Renco mining company case against Peru described in part three (Public Citizen 2010, 2014).

The review or withdrawal of governments from ISDS agreements has prompted critical studies by a number of intergovernmental institutions which have assessed the ISDS system, including the UNCTAD, the OECD, and the European Parliament (UNCTAD 2013a and 2013b; Gaukrodger and Gordon 2012; European Parliamentary Library Service 2014).

In summary, the experience of escalating numbers of ISDS cases and growth in the value of damages awarded for disputes concerning health and environmental regulation have prompted social movement opposition and government reviews of ISDS on the grounds that ISDS is a threat to democratic policy process and national sovereignty. Governments in Europe, ten Latin American countries, South Africa, India, Indonesia and Australia have adopted policies against ISDS. However, in the case of Australia, this policy has been weakened and reversed by a more conservative government.

Tobacco Company Use of ISDS as a Strategy to Oppose the Regulation of Tobacco Advertising

The previous Australian Government policy of opposition to ISDS was strongly influenced by the debate over regulation of tobacco advertising. This began when the Philip Morris International tobacco company lodged an ISDS dispute in the World Bank ICSID investment tribunal in February 2010 against the Government of Uruguay.

This dispute claimed damages for the regulation requiring prominent health warnings on tobacco packaging (the step before plain packaging) which was based on the recommendations of the World Health Organisation (WHO) Framework Convention on Tobacco Control. The Convention was the result of years of campaigning by public health groups which had convinced national health ministers to support it in the WHO. The campaigns and national policies were based on the overwhelming medical evidence of the deadly effects of tobacco use, evidence which had long been denied by the tobacco companies. Many governments have ratified the Convention (WHO 2011; Chan 2012).

However, like all UN agreements, the Convention has no external enforcement mechanism beyond naming and shaming, and can only be enforced legally through the passage of domestic legislation. This contrasts with trade and investment agreements, which have supranational government–to-government dispute processes which are enforced by trade sanctions, and in the examples discussed above, can also have legally binding ISDS dispute processes.

This discrepancy between the legal enforceability of UN Conventions and the enforceability of trade and investment agreements has been used effectively by tobacco companies to develop strategies to undermine the implementation of the Convention. They have used bilateral, regional and WTO agreements to take legal action against Uruguay, Norway, Turkey and against Australia, which is discussed further below (Voon and Mitchell *et al*. 2012). The World Health Organisation Director General, Margaret Chan, commented on these cases in a speech to the 15th World Conference on Tobacco and Health in 2012:

> Tactics aimed at undermining anti-tobacco campaigns, and subverting the Framework Convention, are no longer covert or cloaked by an image of corporate social responsibility. They are out in the open and they are extremely aggressive.
>
> The high-profile legal actions targeting Uruguay, Norway, Australia, and Turkey are deliberately designed to instil fear in countries wishing to introduce similarly tough tobacco control measures (Chan 2012).

Philip Morris International is a US-based company, but the US did not have an investment agreement with Uruguay, to enable the use of ISDS. The company shifted some investment to Switzerland, and claimed that the measures violated the terms of the Switzerland-Uruguay bilateral investment treaty by reducing the value of its investment through impeding the display of its trademark. The case received media publicity in Australia (O'Malley 2010; Davison 2010).

The case was seen as part of the tobacco industry strategy to secure expansion of its markets into developing countries, and to counter reduced market size in industrialised countries caused by tobacco control measures taken as a result of the Convention. Uruguay, a small developing country, had a gross domestic product which was less than the net annual revenue of Philip Morris International, and was targeted as an example to discourage other developing countries. The Uruguayan Government initially acknowledged that it lacked the resources to fight the case. It would have had to withdraw the legislation and settle the case if the charitable foundation of the departing Mayor of New York, Michael R. Bloomberg, had not assisted with funding legal costs (Tavernese 2013).

Shortly after the Uruguay legal action, Philip Morris International made a submission to the US Trade Representative, advocating strongly for ISDS to be included in the TPPA (Philip Morris International 2010).

The Australian Government also responded to these actions specifically in its policy:

> The government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products (Emerson 2011:20).

In April 2011, the government announced it would introduce legislation for the mandatory plain packaging of all tobacco products. The scheme prescribed that packaging must be a plain dark colour, must contain graphic health warnings and that no trademarks, except the business or company name, could appear on the packaging. As with Uruguay, the legislation implemented Australia's international obligations as a party to the World Health Organisation Framework Convention on Tobacco Control (WHO 2011).

The legislation was also based on Australian research that showed that tobacco control measures, including restrictions on advertising, developed in Australia over the last 30 years, had been successful in reducing numbers of smokers to 18% of the population. However, tobacco smoking continued to kill more than 15,000 Australians per year, at a social cost of $31.5 billion per year. Research showed that most new smokers were young people, many under the age of 18. Research showed that brands and logos displayed on packaging were associated with glamorous images which attracted young people to become smokers (Parliament of the Commonwealth of Australia 2011).

The legislation was strongly supported by public health groups, all medical professional groups and consumer health organisations. As the first such legislation of its kind, it was also seen as setting a precedent that other governments could follow (Australian Health Care and Hospitals Association 2011; Cancer Council 2011a).

The tobacco industry, aware of the international impacts of such a precedent, immediately commenced a $20 million public campaign against the legislation, which included paid television advertisements and a public relations campaign with carefully placed opinion pieces in the media. The main argument used was the threat of legal action for damages for loss of intellectual property rights in brand names and trademarks on packaging, which would cost taxpayers millions if not billions of dollars. The industry threatened a constitutional case in Australian courts, an intellectual property dispute in the WTO, and the use of ISDS through other trade agreements (ABC 2011; Institute of Public Affairs 2011).

Despite the tobacco industry campaign, public opinion polls showed majority support (59%) for the legislation (Cancer Council 2011a). After some hesitation, the Liberal-National Opposition parties, influenced by public opinion, announced that they would support the legislation in principle (Thompson 2011). Encouraged by public support, the Government proceeded with the legislation, which was passed by the Australian Parliament in December 2011. The passage of the legislation received global news coverage, and several other governments announced they would consider similar legislation (ABC 2011).

The tobacco companies then implemented their strategy to mount national and international legal challenges to the legislation. A group of tobacco companies led by British American Tobacco lodged a constitutional challenge in the Australian High Court, which is the highest court in the Australian legal system (High Court of Australia 2012). Moreover, Philip Morris International rearranged its assets to become a Hong Kong-based investor in Australia and lodged a dispute in a UNICITRAL tribunal, under the terms of a 1993 Hong Kong-Australia investment agreement (Voon and Mitchell 2011).

The WTO dispute system allows only government-to-government disputes. The Governments of the Ukraine and Honduras were joined by the Dominican Republic and others in lodging a dispute in the WTO that the Australian government's plain packaging legislation was a violation of the WTO Trade-Related Intellectual Property Rights Agreement, because it prevented tobacco companies from using their trade marks. The governments are receiving funding and advice for this dispute from tobacco companies, and Philip Morris International referred to its support for this dispute as part of its legal strategy (Philip Morris 2012). This case is ongoing at the time of writing.

The tobacco companies' challenge to the legislation in the Australian High Court was argued on the grounds that the legislation violated section 51 (xxxi) of the Australian Constitution, which empowers the Parliament to make laws with respect to 'the acquisition of property on just terms'. The companies argued that the legislation was an acquisition of their intellectual property rights in trademarks without just compensation. The High Court announced its majority (6-1) decision on August 15, 2012, which found that the government's legislation did not violate the Constitutional provisions for the acquisition of property on just terms on various grounds, including that the legislation was a legitimate public health measure. The Court also awarded costs against the tobacco companies (High Court of Australia 2012).

On the day of the High Court decision, Philip Morris announced that it would proceed with the Hong Kong ISDS case, stating that the High Court decision had no bearing on the ISDS jurisdiction and the case was expected to take 2 to 3 years (Philip Morris Ltd 2012). Philip Morris International described itself as a US-based company when it made a submission in 2010 to the US Trade Representative supporting an ISDS process in the TPPA. However, it claimed to be a Swiss-based company when it used an ISDS process to sue the Uruguayan Government for damages under Uruguay-Swiss investment agreement. Philip Morris also claimed to be a Hong Kong company, because Philip Morris Asia, incorporated in Hong Kong, invested in Australia by becoming the sole shareholder of Philip Morris Australia on February 23, 2011, almost a year after the Australian government announced its intention to legislate for plain packaging of tobacco products (Voon and Mitchell 2011:22).

It would, therefore, be difficult for the company to maintain that at the time of its investment in Australia, it had a legitimate expectation that plain packaging would not be introduced. On the contrary, it appears that the investment of Philip Morris Asia in Australia was part of a forum-shopping strategy to enable the company to take action against Australia under the Hong Kong-Australia bilateral investment treaty. The timing was clearly part of the tobacco industry attempt to delay the legislation and/or prevent its passage through the Parliament (Philip Morris 2011; Kenny 2011).

There was a strong public reaction to the Philip Morris ISDS case from health and consumer organisations and academics who expressed outrage that the company was trying to over-ride both domestic legislation and a High Court decision, actions many saw as a threat to democracy and sovereignty (Heart Foundation and ASH Australia 2011; Cancer Council 2011b; Faunce and Tienhaara 2011). One legal commentator, a supporter of ISDS, lamented the fact that the case could give ISDS a bad name (Nottage 2011).

At the time of writing, the Philip Morris Uruguay case and the Hong Kong case were both ongoing. The current Australian government is still defending the Hong Kong case. Because of the arbitrary nature of the ISDS legal process, the outcomes of the cases are unpredictable.

In summary, the tobacco companies, led by Philip Morris, have practiced a consistent strategy to undermine the implementation of the UN Convention on Tobacco Control and prevent the development of stronger legislative controls on tobacco advertising, especially plain packaging legislation. They have used domestic advertising and public relations campaigns, challenged the legislation in domestic courts, and lodged ISDS disputes in bilateral and regional trade agreements. They have also influenced and funded some governments to lodge government-to-government disputes in the WTO. In the case of the previous Australian government, this strategy was counterproductive, as the tobacco companies' domestic public relations campaign failed in the face of public health community group responses. Public support for the legislation shored up Government and even Opposition support. Moreover, the persistence with the ISDS dispute in defiance of the High Court decision provoked widespread outrage and resistance and helped to provide evidence for the Government's policy of opposition to ISDS on the grounds that it was a challenge to democracy and sovereignty.

ISDS: A Crisis of Legitimacy?

In many ways, the very success of ISDS from an investor perspective has contributed to its de-legitimation. Popular resistance, critical literature and resistance from capital importing governments has grown as transnational investors have lodged and won more cases and been awarded huge damages over health and environmental legislation. Governments in significant economies in Europe, South America, Africa the Indian sub-continent and the Asia–Pacific have criticised and renounced ISDS on the grounds that it undermines legitimate democratic legislation. However, the development of government policy opposition to ISDS is not a simple linear process, as the recent Australian policy reversal shows.

The use of ISDS by tobacco companies is a cogent example of the ongoing contest between powerful transnational investors on the one hand, and social movements and governments which support public health regulation on the other. But the tobacco companies' own legitimacy has also been undermined by their history of denial of the health damage caused by their products. Tobacco companies have the resources to develop and follow persistent strategies which include massive advertising, restructuring of assets to find multiple platforms for ISDS claims, and the capacity to fund long legal disputes. But this obvious manipulation of ISDS rules can further undermine the legitimacy of the system. There is likely to be an ongoing contest as the social movements and states which have renounced ISDS try to limit its practice and the US and other capital exporting states attempt to spread its reach in trade agreements like the TPPA.

Dr Patricia Ranald is a Research Associate in the Department of Political Economy, University of Sydney and Convenor of the Australian Fair Trade and Investment Network.

patricia.ranald@sydney.edu.au

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