

Regulatory chills: tobacco industry legal threats and the politics of tobacco standardised packaging in New Zealand

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ABSTRACT

AIMS: To describe the process of enacting tobacco standardised packaging (SP) amidst tobacco industry legal threats in New Zealand.

METHODS: Relevant government and NGO documents, and media items were reviewed. Policymakers and health advocates in New Zealand were interviewed. The data were triangulated and thematically analysed.

RESULTS: In 2011, the New Zealand Government announced the goal of becoming a smokefree country (reducing smoking prevalence to 5%) by the year 2025, and considered adopting SP. In April 2012, the Government announced it would introduce SP, but tobacco companies threatened the Government with litigation in international courts for violating investment and intellectual property rights. In response, the Government adopted a 'wait and see' approach, waiting until two legal challenges against Australia's SP law were resolved before it enacted its legislation in September 2016. Health advocates, limited due to funding constraints, attempted to alter the Government's approach to the legal threats without success. Interviews with policymakers and health advocates confirmed these threats helped produce a regulatory chill, delaying the policymaking process by three years.

CONCLUSION: The New Zealand case illustrates how the threat of a potential international lawsuit can create a chilling effect by helping delay the implementation of public health policies.

The constantly evolving nature of trade governance in the 21st century is increasingly having a profound impact on public health and the development of public health policies globally.¹ New rules governing international trade are increasingly affecting access to medicines,² alcohol control³ and nutrition regulations.⁴ In particular, these issues are highly contentious in trade and tobacco control.⁵

While much of the focus of the trade and tobacco control literature has concentrated on commercial aspects of trade liberalisation on tobacco consumption⁶ and legal implications of trade agreements on public health,⁷ recent studies have examined the political implications of trade agreements

on tobacco control policies.⁸ This emerging literature highlights how tobacco companies have used trade agreements to try and block innovative public health proposals,^{9,10} and how the *threat* of legal action can help dissuade governments from implementing progressive policies.^{11,12}

The 'regulatory chill' hypothesis suggests that governments may weaken or withdraw public policies due to concerns over capital flight or potentially costly trade and investment lawsuits.¹³ Some critics of this hypothesis argue policymakers are unaware of trade and investment law, and consequently do not take these laws into consideration when making legislative and regulatory decisions.¹⁴ Other critics argue

it is difficult to prove that legal threats alter the regulatory process and produce a chilling effect.¹⁵ However, recent studies illustrate policymakers are increasingly aware of trade and investment law and incorporate these understandings into the policymaking process.¹⁶

This article examines the politics of regulatory chill and the reactions of a nation-state to industry legal threats, by analysing the policy process for tobacco standardised packaging (SP) in New Zealand (2010–16). Instead of testing the regulatory chill hypothesis (whether a policy is enacted or weakened), this paper investigates the extent to which industry legal threats significantly contributed to political delays that have a profound impact on public health.

In September 2009, the Māori Affairs Select Committee of the New Zealand parliament started an inquiry into the tobacco industry and the disproportionate harm of tobacco use to the Māori population. In November 2010, the committee recommended New Zealand become ‘smokefree’ (interpreted as reducing smoking prevalence to 5%) by 2025.¹⁷ The committee recommended several policies to enable this goal, including SP. Over the next six years, tobacco companies pressured the New Zealand Government with legal threats to the SP proposal. We examine the effects of this pressure.

Methods

We reviewed New Zealand Government and health group documents, and New Zealand media items from official and media websites using standard snowball searches,¹⁸ beginning with search terms ‘plain packaging’, ‘standardised packaging’, ‘international trade’, ‘intellectual property’, ‘tobacco companies’, ‘threats’, as well as using key dates and specific actors. Between January and June 2015, we attempted to recruit via email and telephone 38 New Zealand interviewees closely involved in the SP process. Twenty-three agreed to be interviewed, 10 declined, and five never responded to multiple requests. Of the 23 interviewees, six were tobacco control advocates, four were academics, 11 were members of parliament (MPs) and one was a Health Ministry official. The interviewees agreed to waive their anonymity

in accordance with a protocol approved by the University of California, Santa Cruz Committee on Human Research. We also interviewed one official from the Ministry of Foreign Affairs and Trade who requested anonymity. In the Results below, interviewees are cited by initials, with a key to the initials given in the online supplementary material (Supplementary Table 1). Results from these sources were triangulated and thematically analysed through standard process tracing frameworks.¹⁹

Results

A series of delays to SP occurred from November 2010 to September 2016. All 23 interviewees (policymakers and advocates) confirmed that industry legal threats were either the most significant or a primary reason for delays (Supplementary Table 1). AI, BS, DS, LW, MF, FT, ILG, JS, KW, SS, SO, TUF, CB, EC, GL, JK, LR, PS, RB, SB, SE, ME, LD.

Introduction of standardised packaging (SP)

From November 2010, the Cabinet considered the SP recommendation and in April 2012 agreed in principle to introduce SP²⁰ (Figure 1). However, the New Zealand Government was divided on the issue of introducing SP. Associate Health Minister and Māori Party (an indigenous rights party within government) Member of Parliament (MP), Tariana Turia, was highly supportive of introducing SP, stating it was “a powerful tool” to reduce the appeal of tobacco products and smoking in general. Turia also stated SP would fulfill New Zealand’s commitment to the World Health Organization’s Framework Convention on Tobacco Control treaty (FCTC).²⁰ The National Party-led coalition Government had delegated responsibility for tobacco control to Turia, who was a Minister outside Cabinet. In New Zealand, an Associate Minister’s delegated authority is constrained, as policy decisions are controlled by the Health Minister and Cabinet.

Meanwhile some members of Cabinet were less optimistic and more cautious about SP, including Health Minister Tony Ryall, who lacked a demonstrated commitment to the Smokefree 2025 goal.²¹ Prime Minister Key told reporters that Government was “likely” able to introduce

SP legally, but that it was “not absolutely clear cut” and no “slam dunk”²² (Supplementary Table 2). National Party Trade Minister Tim Groser also said there were “some complexities” concerning the proposal’s legality needing to be addressed.²³

The Health Ministry, which is responsible for drafting and implementing the SP legislation, held a 60-day public consultation period on the draft (the interim version is called a ‘Bill’) between August and October 2012.

Tobacco industry initial opposition

British American Tobacco (BAT) (68.3% market share in New Zealand), Imperial Tobacco (20.0%) and Philip Morris International (PMI) (7.1%) opposed SP. As with the opposition against SP in other countries, including Australia, Ireland, France and the UK,²⁴ their comments centred around arguments that SP: 1) would not work, 2) would increase illicit tobacco trade, 3) would create unnecessary problems for retailers and 4) would violate domestic laws and international treaties governing intellectual property and investment.^{25–27}

The industry claimed the proposal would: a) deprive them of intellectual property rights by degrading the value of their trademarks and expropriate their investments, b) constitute an unnecessary barrier to trade and c) did not accord them fair and equitable treatment.^{25–27} In particular, they argued the proposal violated New Zealand’s Bill of Rights and its obligations under various trade and investment agreements, including the Paris Convention for the Protection of Industrial Property, and the World Trade Organization (WTO) Agreements on Trade-Related Aspects of the Intellectual Property Rights (TRIPS) and Technical Barriers to Trade (TBT). If SP was enacted, tobacco companies threatened to sue the Government for compensation, which they claimed would amount to billions of dollars.

BAT media campaign

In August 2012, BAT ran a multi-media campaign titled “Agree Disagree” opposing the SP Bill with the slogan “We agree that tobacco is harmful. We disagree that plain packaging will work.” The campaign ran media advertising on television, radio and print and had its own website (www.agree-

disagree.co.nz), which reiterated industry arguments submitted during the consultation period. Their television advertising achieved very high reach and frequency of exposure, and presented arguments that were either unsound or demonstrated fallacies.²⁸

Health group support

The main public health groups in New Zealand, and international health groups, lawyers, activists and academic scholars submitted comments supporting the Bill.²⁹ They argued SP reduced the appeal of tobacco products by removing the glamorisation and contributed to the de-normalisation of tobacco, especially for youth and vulnerable populations. Health groups also identified there may be domestic and international legal implications associated with SP, but did not see these as a reason not to proceed. Instead, they argued SP was a justified public health action and met the Government’s commitments to the FCTC.

Ministry of Health regulatory impact statement and reports to Cabinet

In November 2012, the Health Ministry presented their report on the submissions,²⁹ mentioning that several submitters argued SP violated several treaties. After consulting with other ministries, the Health Ministry also issued a regulatory impact statement (RIS) addressing potential impacts and risks of SP.³⁰ The RIS stated that the Ministry of Foreign Affairs and Trade (MFAT) warned there was “a reasonably high risk of trade litigation,”³⁰ (Supplementary Table 2). MFAT also noted that Australia, the first country to introduce SP, was facing two international legal challenges (one through WTO). MFAT estimated a 1.5–2 million NZD cost to defend a WTO case and potentially substantially more to defend an investment arbitration lawsuit.³⁰

As part of the executive policy process, Associate Health Minister Turia sent a report on SP on November 27, 2012 to the Cabinet Social Policy Committee. It expressed concerns over a potential legal challenge as a significant risk that “would require significant investment of resources”,³¹ estimating \$3–\$6 million for investment arbitration. The report acknowledged that risks would be significantly mitigated upon conclusion of the Australian

legal disputes. It therefore proposed developing “policy details to enable legislation to be considered for introduction by August/September 2013.”³¹ Consequently, the Government developed a ‘wait and see’ approach reliant upon the two Australian legal challenges for “greater legal certainty” before proceeding with SP in New Zealand.³²

Resuming the process of SP legislation

On 21 August 2013, Minister Turia issued another report proposing the Bill be introduced in parliament and sent to the Health Select Committee. In proposing SP, the report again took a cautious approach, stating the Bill “could be delayed if necessary”, reiterating the “uncertainty” of the timetable for the Australian legal challenges.³³

Although the Cabinet continued to consider legal challenges as a “high risk”, the August 2013 report addressed for the first time the issue of intellectual property rights. It acknowledged that the right to “register” trademarks did not grant tobacco companies the right to “use” the trademarks,³³ as acknowledged by domestic rulings outside New Zealand,³⁴ international rulings⁸ and the tobacco industry’s internal legal counsel.¹² Following the August 2013 report, Minister Turia introduced the SP Bill to parliament in December 2013.

SP first reading

On 11 February 2014, the parliament had their first reading of the SP Bill.³⁵ MPs in opposition to the Bill (from the small New Zealand First and ACT parties) reiterated the industry’s arguments by discussing the potential risk and cost to tax payers associated with a legal challenge. MPs in support of the Bill (from the Labour and Green parties) condemned these industry intimidation tactics and emphasised the importance of public health. The Bill was sent to the House Health Select Committee following a 142–1 vote.

Following the first reading, Associate Health Minister Turia and the National Party Cabinet disagreed on how the Bill should proceed. Turia congratulated the MPs for moving the Bill forward, and said that the Government should not be intimidated by tobacco companies or delay the legislation.³⁶ Prime Minister Key, however, stated the Government would continue

waiting for the Australian legal challenges before enacting legislation³⁶ (Supplementary Table 2). Despite the Government’s cautious approach, the Bill was allowed to proceed to the House Health Select Committee.

Health House Select Committee 2014

In February and March 2014, the Health Select Committee received 191 substantive submissions on the Bill. These included some from international legal experts who argued that the SP proposal was consistent with international law, including WTO obligations. Both tobacco companies^{25–27} and health groups³⁷ reiterated their positions on the Bill. In particular, health groups urged the Government to pass the Bill immediately without further delays.

Health Ministry response to Health Committee

On 18 June 2014, the Health Ministry gave their submission to the Health Select Committee in consultation with other ministries, especially MFAT.³⁸ The Health Ministry accepted the international legal advice on the Bill’s legal standing, stating it was consistent with New Zealand’s WTO obligations concerning intellectual property rights and was non-discriminatory under trade and investment agreements (Supplementary Table 2). The submission stated the legal analysis provided by opponents of the Bill was “incomplete”, “selective” and did not “provide credible evidence to support their claims”³⁸ (Supplementary Table 2).

Health Select Committee report

On 5 August 2014, the Health Select Committee submitted its report, which rejected the industry’s trademarks argument but did not address other legal issues pertaining to the Bill. The Health Select Committee also did not address whether the Bill should be delayed and instead recommended the Bill to the House for a second reading.³⁹

Two more years of cautious delay

On 20 September 2014, following the recommendation for a second reading, New Zealand held a general election. The National Party remained in government, however, Turia retired and the position of Associate Health Minister ‘responsible’ for tobacco control was filled by new Cabinet Minister Peta Sam Lotu-liga, from the National

Party. The Māori Party lost two seats in parliament and became less influential as a support party for the National Party.

Health advocates interviewed for this study felt this change represented a drastic shift in leadership (Supplementary Table 1). CB, EC, GL, JK, LR, PS, RB, SB, SE Along with several MPs also interviewed for this study (Supplementary Table 1), DS, LW, MF, FT, IL-G, KH, SS, SO, TUF they commented that former Minister Turia was a “bold” and “courageous” leader who had dedicated her political career to advancing Māori rights. While Lotu-liga did need agreement from senior ministers to prioritise the Bill, as did his predecessor, health advocates stated that, unlike Turia, he followed the caution of the National Party instead of challenging this approach.

In 2014, two former tobacco industry lobbyists, Christopher Bishop (Corporate Affairs Manager PMI, 2011–2013) and Todd Barclay (Corporate Affairs Manager PMI, 2013–2014) became National Party MPs in the new parliament. In 2012, Bishop was PMI’s lead New Zealand spokesperson, appearing on television programmes to oppose the SP proposal.⁴⁰ Health advocates noted a conflict of interest between their previous jobs and their duties as MPs, and worried they were contributing to delaying the Bill. Although there is no evidence to suggest these new MPs helped delay the process, their presence in government reflected long-term alliances between the National Party and the industry,^{41,42} and other strong contemporary links.⁴³

In February 2015, the UK and Ireland passed legislation requiring SP by May 2016.⁴⁴ In response, health advocates and MPs began calling on the New Zealand Government to call the Bill for its second reading and not continue waiting on the Australian legal disputes.^{44,45} In March 2015, Associate Health Minister Peseta Sam Lotu-liga replied to the demands, echoing the Government’s cautious ‘wait and see’ approach by stating it was “prudent to await the World Trade Organization decision”⁴⁶ on Australian SP.

In September 2015, the text of the Trans-Pacific Partnership Agreement (TPP), a regional trade agreement between New Zealand and 11 countries in the Asia-Pacific region, was finalised. It included a

semi-carve out for tobacco, meaning that governments would have the opportunity to prevent tobacco companies from using the investor-state dispute settlement (ISDS) mechanism to directly challenge public health policies under the TPP in future disputes. This prompted Labour Party MP Annette King to ask Lotu-liga when the Bill would be brought up for a second reading.⁴⁷ Minister Lotu-liga responded, stating the Government had a busy legislative programme for 2015.⁴⁸ Some health advocates felt this was a poor excuse, since the National Party was in its third term of government and its legislative agenda was the least busy it had been in 30 years (Supplementary Table 1). PS, RB, SE

On 18 December 2015, the international tribunal examining the Australia-PMI legal dispute dismissed PMI’s challenge, ruling that it did not have jurisdiction to hear PMI’s claim.⁴⁹ This tribunal ruled that initiation of the arbitration constituted an “abuse of right” because Philip Morris Asia did not have any relevant investment in Australia when the SP Bill was announced in April 2010, because PMI moved ownership of its Australian operations from Switzerland to Hong Kong in February 2011, 10 months after the Australian Government’s SP announcement. Since one of the two Australian trade law disputes had been settled and the Australian High Court had ruled SP did not constitute acquiring the property (trademark), but was merely restricting the use of the trademark on the *packaging and presentation* of tobacco products,⁵⁰ Prime Minister Key was questioned about the progress of SP. On 15 February 2016, he stated that the Government was “feeling a lot more confident.”⁵¹

Although Prime Minister Key did not identify a date for the Bill’s second reading in parliament, he stated he expected it to become law by the end of the year.⁵¹ On 19 February 2016, MP Annette King again asked Minister Lotu-liga to explain the Bill’s delay in the House. Minister Lotu-liga responded that the bill would progress as priorities permitted.⁵²

Three of the four MPs from the National Party and NZ First Party interviewed for this study felt it prudent and pragmatic to await the result of the Australian legal challenges

before enacting SP (Supplementary Table 1). SS,SO,BS They felt New Zealand, especially as a small nation, could learn from those cases and adopt the necessary adjustments to avoid any unnecessary and protracted legal battles. These MPs were concerned about the legal costs associated with trade disputes, which they argued required spending taxpayers' dollars (Supplementary Table 1).SS

On the other hand, MPs from the Labour Party, Green Party and Māori Party argued this 'wait and see' approach ignored health priorities and undermined New Zealand's sovereignty (Supplementary Table 1).DS,LW,MF,ILG,KH,TUF These MPs emphasised New Zealand's sovereign right to implement public health measures and said that it was alarming that a corporation could directly sue a government over attempts to advance public health. However, some MPs opposing the 'wait and see' approach empathised with the Government's desire to avoid risk, considering the legal uncertainty (Supplementary Table 1).LW,ILG

Constrained health groups (Health Ministry realignment)

Throughout 2015 and 2016, health advocacy groups urged the Government to move forward with the second reading, but were reluctant to pressure the Health Ministry from whom they received the majority of their funding (Supplementary Table 1).PS,EC,LR,SE In 2014, the Ministry of Health announced they would 'realign' their tobacco control services and priorities between April 2015 and June 2016 with more focus on tobacco use cessation rather than prevention.⁵³

More importantly, by June 2016, the government had cut funding for national tobacco control advocacy by 79% (from \$1.7 million to \$450,000) closing or largely curtailing the operations of several health groups.⁵⁴ These included the two most active and experienced advocacy groups, the Smokefree Coalition and ASH New Zealand. Advocates interviewed for this study in June 2015 were concerned the Health Ministry's realignment would affect their funding to perform adequate advocacy operations (Supplementary Table 1).PS,EC,LR,SE Some interviewees argued this realignment prevented and in some sense 'silenced' the public health voices

pressuring the Government to adopt a Bill that had high public approval and strong supporting evidence (Supplementary Table 1).PS,EC,LR,SE

SP second reading

On 31 May 2016 (World No Tobacco Day), Associate Health Minister Lotu-liga announced the SP Bill would finally have its second reading in parliament in June 2016. Prime Minister Key also confirmed that tobacco industry legal threats were the primary reason for delaying the Bill, stating it had been prudent to wait. He said, however, that his officials were now advising him that it was safer to proceed (Supplementary Table 2).

On 23 August 2016, parliament held its second reading of the SP Bill, followed by a discussion in the committee of the whole House. A few MPs addressed the tobacco industry's legal threats and accused the Government of unnecessarily delaying the process of SP.⁵⁵ MPs then voted on the Bill, which passed 108–13. The Bill had its third reading on 8 September 2016 and was given royal assent on 14 September 2016.

Discussion

The case of SP in New Zealand illustrates how an industry can use trade and investment agreements to delay the policy-making process for public health measures. Other possible contributing factors for political delays include the closeness of the Government to the tobacco industry, and the Government's reluctance to be seen regulating industry and acting against foreign investors.⁴¹ The government could also have been using the legal threats as an excuse not to pass SP for other reasons. While these factors may have contributed to the delay, litigation threats were prominent in government explanations for the delays of SP, indicating the integral role played by concerns over legal risks.

The six-year period for this legislation compares with less than one year for the law banning tobacco advertising in New Zealand (1990) and less than three years (2001–2003) for the next major tobacco legislation.

While the trade and health literature has primarily focused on the *direct* effects of trade agreements on public health policies,⁷ this paper demonstrates that trade agree-

ments can also have *indirect* effects by disrupting the policymaking process. The ability of transnational corporations to use the mere threat of challenging a public health proposal in international court forces governments at a minimum to consider trade and investment law into the decision-making process.¹¹ This can create legal risk and uncertainty for governments.

This paper broadens the regulatory chill literature by examining the chilling effect in terms of delay (time elapsed between introducing and enacting legislation) and its impact on public health. In comparison to the timeframes of other early adopters of SP—Australia (18 months), Ireland (22 months), the UK (35 months) and France (20 months)—New Zealand was by far the slowest (53 months). These political delays have substantial public health effects, including slowing the diffusion of best practices and delaying the effect of SP on smoking cessation and initiation. They also delay the reduction of government health expenditures and tobacco industry sales.

In February 2016, the Australian Department of Health released its Post-Implementation Review of SP, reporting significant health gains after two years of implementation, including delaying youth smoking initiation from 15.4 years to 15.9 years. Within the reduction of smoking prevalence over the two years from 19.4% to 17.2%, 0.55 of the drop was attributed to SP.⁵⁶ The Department of Health estimated SP would generate health costs savings of \$273 million over 10 years.⁵⁶

The New Zealand case also provides insight into how various political parties may react to industry legal threats and be more susceptible to regulatory chill. As in Australia,⁵⁷ tobacco regulations may share bi-partisan support, but the intersections of trade and health, and trade and tobacco can be a dividing issue along party lines. Some MPs within centre-right and right parties evoked industry legal concerns tied to SP, and those in centre-left and left parties rejected these arguments. The case of New Zealand was similar to the UK,⁵⁸ where the centre-right party leadership was cautious, and delayed enacting SP. In contrast, the centre-left and left leadership in Australia and Uruguay respectively was bold in rejecting the industry legal threats from the

outset, and emphasised the public health importance of SP. This boldness can be attributed to strong leadership in these two countries, but research in both cases indicates that there were significant differences across party lines.^{8,57}

Policy implications

The tobacco companies' threats to New Zealand highlight the industry's long-standing fear of New Zealand's tendency to adopt policies similar to Australia's,¹² and its fear of diffusion of best practices globally.⁵⁹ Internationally, such threats help explain the slow diffusion of pictorial health warnings exceeding 50% of the package, and of SP.

As of April 2018, other countries, including Georgia, Hungary, Norway, Romania, Slovenia and Thailand have enacted SP, and Canada, South Africa, Malaysia, Turkey, India, Panama, Brazil and Chile have announced plans to introduce SP.^{60,61} Health advocates and lawyers should inform governments, especially those that may have similar legal concerns, about the growing legal certainty of implementing these policies to avoid unnecessary delays in the regulatory process. Advocates can highlight the Australian,⁶² UK,⁶³ French⁶⁴ and Indian⁶⁵ High Court decisions to uphold strong packaging and labeling policies. Advocates can also highlight an international trade tribunal ruling in favor of Uruguay's strong tobacco packaging and labeling laws, also based on similar intellectual property, expropriation of trademark property and trade law, which can be applicable to SP and to wider public health policies.⁸ On 5 May 2017, news sources reported that the WTO dispute panel's interim report upheld the Australian SP laws.⁶⁶ Although the final ruling is expected in 2017, as of April 2018, it has not been made public. Given these favorable legal rulings governments should ignore any 'wait and see' arguments by the industry and their allies.

The New Zealand case also points to the importance of non-government funding resources in supporting tobacco control advocacy efforts,^{67–69} including legal expertise and support to help shape the Government's reaction and response to the industry legal threats. Due to their reliance on government funding, primarily from the Health Ministry, some New Zealand health

advocacy groups may have been constrained in challenging the Government's decision to delay SP. Although New Zealand has a well-established tobacco control network, it lacked the extent of domestic legal expertise or international legal support found in other contexts to counter the industry's pressure.^{8,57} Sustainable funding for independent advocacy and legal assistance can possibly help minimise legal fears and limit the effects of regulatory chill.

Although New Zealand has finally enacted SP, health advocates should expect continued industry interference during the implementation phase.^{70,71} Delays to progress in Georgia are reported to be due to industry interference,⁷² and in Thailand the Ministry of Commerce has raised trade concerns and it appears the Government is waiting until the results of the WTO dispute with Australia before moving forward.⁷³ In Uruguay⁸ and Australia,⁵⁷ following the enactment of strong packaging and labeling regulations, tobacco companies sued in international courts, almost forcing the Uruguay Government to weaken its regulations. Unless the New Zealand Government issues the necessary regulations without

undue delays, the Government runs the risk of not fulfilling its commitment to becoming smokefree by 2025. As of April 2017, it appears that the requirement for SP will not be implemented until June 2018.⁷⁴

Limitations

Cabinet politicians and some officials from MFAT declined requests to be interviewed for this study. Also, some information was withheld under Official Information Act provisions in the Regulatory Impact Statement and the reports to Cabinet, limiting a complete understanding of how the Key administration responded to the tobacco industry legal threats.

Conclusions

The New Zealand case illustrates how the threat of a potential international lawsuit can create a chilling effect by delaying public health policies. Other countries introducing or implementing similar policies should learn from these experiences and take steps to proactively avoid unnecessary political delays that have a profound impact on public health.

Appendix

Supplementary Table 1: Key for interviewees interviewed in New Zealand in June 2015.

Name of interviewee	Initials for interviewee	Date of interview	Location of interview
Anonymous interviewee at Ministry of Foreign Affairs and Trade	AI	18 June 2015	Wellington, New Zealand
Barbara Stewart	BS	18 June 2015	Wellington, New Zealand
Chris Bullen	CB	11 June 2015	Auckland, New Zealand
David Shearer	DS	18 June 2015	Wellington, New Zealand
Louise Delany	LD	16 June 2015	Wellington, New Zealand
Edward Cowley	EC	10 June 2015	Auckland, New Zealand
Fletcher Tabuteau	FT	17 June 2015	Wellington, New Zealand
George Laking	GL	12 June 2015	Auckland, New Zealand
Ian Lees-Galloway	ILG	17 June 2015	Wellington, New Zealand
James Shaw	JS	16 June 2015	Wellington, New Zealand
Jane Kelsey	JK	12 June 2015	Auckland, New Zealand
Kevin Hague	KH	17 June 2015	Wellington, New Zealand
Louisa Ryan	LR	10 June 2015	Auckland, New Zealand
Louisa Wall	LW	18 June 2015	Wellington, New Zealand
Marama Fox	MF	16 June 2015	Wellington, New Zealand
Matthew Everett	ME	18 June 2015	Wellington, New Zealand
Prudence Stone	PS	16 June 2015	Wellington, New Zealand
Robert Beaglehole	RB	11 June 2015	Auckland, New Zealand
Scott Simpson	SS	18 June 2015	Wellington, New Zealand
Shane Bradbrook	SB	17 June 2015	Wellington, New Zealand
Simon O'Connor	SO	16 June 2015	Wellington, New Zealand
Stephanie Erick	SE	10 June 2015	Auckland, New Zealand
Te Ururoa-Flavell	TUF	17 June 2015	Wellington, New Zealand

Supplementary Table 2: Standardised plain packaging (SPP) policy process in New Zealand (2010–2016).

Event	Time-frame	Response to tobacco industry trade threats	Key statements
Māori Affairs Select Committee Recommendation	November 2010	Acknowledged the threat but did not address the risks	Committee: "Tobacco companies have indicated they will legally challenge the plain packaging proposal. Imperial Tobacco told us that banning branded packaging was an infringement of their intellectual property, and they along with two other tobacco companies in New Zealand, opposed the move." ¹⁷
Cabinet review and proposal	November 2010 -April 2012 (17 months)	Same	Prime Minister John Key: "There are lots of things we need to consider—I wouldn't say it's a slam dunk by any chance that plain packaging will take place but nor would I rule it out. It really is, genuinely, a true consultation period. As the National Party, we haven't made the decision yet about whether we would support that any further." ²² Trade Minister Tim Groser: "I think it's getting a bit ahead of the play here because there are some complexities around this. Plain packaging could remove the tobacco companies' intellectual property. We need to listen carefully, especially to other companies that would be very concerned if we were setting a precedent on this. That might actually go against our own interests. We know what the real target is, but we need to consult the public and then we'll need to have some very careful decisions to make sure that if we are going to move forward with legislation in this area, is properly designed to deal with those legitimate concerns. I'm really thinking outside tobacco." ²³
Ministry of Health consultation	July 2012–November 2012 (4 months)	Same	Health Ministry consultation report: "Areas that submitters considered required attention in the RIS [Regulatory Impact Statement] included the need to...assess the actual impact of a WTO challenge, and that this should be focused broadly on the impacts for all of New Zealand's traded products (not just tobacco)." ²⁹
Cabinet reports formal introduction	November 2012–December 2013 (13 months)	Acknowledged high risk of potential litigation, and estimates of trade challenges	Regulatory Impact Statement (11/24/12): "The Ministry of Foreign Affairs and Trade (MFAT) considers that there is a reasonably high risk that if New Zealand implements plain packaging legislation, a World Trade Organization (WTO) dispute settlement case or investment arbitration may be brought against New Zealand. There is also the potential for challenges to be brought under regional or bilateral trade and investment agreements, particularly those containing investor-state dispute settlement clause. If a legal challenge was mounted against New Zealand by a tobacco company in relation to alleged breaches of international investment agreements, the remedy sought would include payment of compensation. Any claim for compensation would be based on the loss in value of the company's investments including its trademarks. The potential loss to tobacco companies, if any, is presently unable to be quantified and the consultation process was not able to shed any further light on this matter. However, it is expected that data will emerge from Australian disputes that will be useful in quantifying any potential losses." ³⁰ Cabinet paper (11/27/12): "There is a further risk of an international arbitration challenge from tobacco companies under bilateral investment treaties, such as that faced by Australia from Philip Morris Asia under Australia's bilateral investment treaty with Hong Kong. Regardless of the strength of New Zealand's case, the possibility of international dispute proceedings are a risk for New Zealand and defending them would require significant investment of resources. However, these risks will be significantly mitigated if the Australia disputes conclude prior to the enactment of New Zealand's legislation. In that regard, it is possible that the WTO cases will conclude in time but the investment arbitration is likely to take a longer period of time...There will also be financial implications for the Government if New Zealand is forced to defend a WTO challenge or international investment arbitration, as happened in Australia's case. The cost of defending such legal challenges is not known at this stage, but has been estimated to be in the order of \$1.5 million–\$2 million for a WTO challenge and \$3–6 million for an investment arbitration...If necessary, New Zealand could delay the making of regulations until the Australia cases conclude and certainty regarding WTO legal implications is obtained." ³¹ Cabinet paper (8/21/13): "Once the bill is introduced, its passage through the House can adhere to standard timelines. This allows time for greater legal certainty over Australia's plain packaging disputes at the World Trade Organization to emerge. As previously agreed, enacting the legislation, or at least bringing it into force through the subsequent regulations, could be delayed if necessary...Cabinet also noted that: the risk of international legal proceedings being brought against New Zealand under trade and investment agreements remains, but that greater legal certainty may be evident by the time that legislation is enacted in New Zealand if World Trade Organization (WTO) disputes against Australia advance in good time. If necessary, the enactment of the legislation or the making of regulations could be delayed until the Australian cases conclude and certainty regarding WTO legal implications is obtained." ³³

Supplementary Table 2: Standardised plain packaging (SPP) policy process in New Zealand (2010–2016) (continued).

<p>Parliament First Reading of Bill</p>	<p>11 February 2014</p>	<p>A majority of MPs rejected arguments against SPP and a few MPs addressed concerns</p>	<p>Hon. Tariana Turia (Māori): “We are convinced that plain packaging is a really important step on our path to being a smoke-free country by 2025, and that it will stack up against our World Trade Organization obligations. That is why we are pushing forward to take the legislation through the parliamentary processes without delay.”</p> <p>“New Zealand takes all of its international obligations seriously. Our plain packaging regime has been developed to be consistent with our trade obligations, and our approach to negotiating new trade agreements continues to protect our ability to take public health measures such as plain packaging. The agreements and treaties can, and should, work together to boost both international trade and public health, and this is a good example of where we can achieve both objectives.”</p> <p>“Although the tobacco industry may have laid down a threat if this legislation is passed, my message to it is that our country has a sovereign right and a legal right to protect its citizens. I am firmly of the opinion that it is not for any tobacco company to be telling us what we should be doing in our own land. Five thousand New Zealanders die from smoking a year, and that death toll places a responsibility on every politician to pass legislation in our land that will help save lives and increase well-being—legislation that makes a tangible, enduring impact on the lives of the people of this country. I commend this bill to the House for its first reading.”³⁵</p> <p>Ian Lees-Galloway (Labour): “Effectively, the Government gets to decide when this legislation comes into force. The reason for that, of course, is concerns around being sued by the tobacco industry as a result of a potential breach of trade agreements. The real concern is that the Trans-Pacific Partnership will foist upon New Zealand rules and regulations that stop us from doing exactly this, which is to legislate in the best interests of the public health of New Zealanders. We must be vigilant. We must be vigilant and ensure that any trade agreements we sign up to do not allow us to fall into that trap. We are watching Australia closely, but I want New Zealanders to understand that the agreement that Australia has with Hong Kong was poorly drafted in this area and left Australia exposed to the type of litigation that it is facing. New Zealand’s trade agreements, generally speaking...our right—our sovereign right—to legislate in the interests of the public health of New Zealanders. New Zealand is a sovereign nation that ought to be able to say that we do not accept that 5,000 of our citizens are killed every year by tobacco.”³⁵</p> <p>Dr Paul Hutchinson (National): “The issues around the World Trade Organization (WTO) are that every country has the sovereign right to protect the health of its people. I do not believe the problem is so much about free trade and the WTO; I believe it is much more about scurrilous tobacco companies colluding with tobacco-producing countries to bring in expensive, delaying court action.”³⁵</p> <p>Hon. Annette King (Labour): “I would have to say that I am a little disappointed that we have to wait for the passage of this legislation and that we are waiting to see what happens in the Australian court case. I think it is good on the Australians for having the courage to say to those big tobacco companies: ‘Bring it on.’ I am glad that they have got the money to be able to fund their legal—interruption—Well, that is a good point, Mr Banks. He just asked why we are waiting. It is a question that you need to put to the Prime Minister. The Prime Minister wants to wait to see what happens in the court case in Australia. I think the fear is probably that the tobacco companies might then take us to court. Well, I would give them the two-finger salute and say ‘Bring it on,’ because we as a Parliament will first of all want to protect the health of New Zealanders.”³⁵</p> <p>Kevin Hague (Green): “It is deeply disturbing, therefore, that the Government is proposing to delay the implementation of this bill until such time as the various court cases and actions against the Australian Government are settled...I agree with Dr Paul Hutchison, who said that every nation has the sovereign right to protect the health of its people. I agree with that, and the Greens say that if that sovereign right is threatened, then there is all the more reason for the Government to stand up and protect that sovereign right...Delaying the implementation of this legislation is caving in to the threats, extortion and delaying tactics of an evil industry.”³⁵</p> <p>Metiria Turei (Green): “We—the country, the Government, the community—are being threatened by the tobacco industry. We saw in today’s paper that there are further threats by the tobacco industry for the consequences of this policy. We are quite right in saying, so be it, bring it on. We are in the job of making good policy for the health and well-being of our country, and none of us make any apologies for that whatsoever.”³⁵</p> <p>Barbara Stewart (NZ First): “New Zealand would be the second country in the world to approve plain packaging, after Australia, and we are likely to meet the same legal challenges. I know that the <i>New Zealand Herald</i> article in December last year outlined it clearly: ‘New Zealand was also likely to face legal challenges if it followed Australia’s lead, and officials have estimated the cost of a legal dispute as between \$2 million to \$6 million, not including compensation if a case was lost.’ So that is something else to consider.”³⁵</p> <p>Clare Curran (Labour): “I want to say that the argument that is used by big tobacco—the apologists who pretend that this is a debate about intellectual property rights or removing barriers to trade—is wrong and that that has been proven...the companies decided to fight plain packaging on trade grounds because it provided them a more solid footing than allowing health issues to enter the debate. For this reason, they focused their energies on the Intellectual Property agreements governed by WIPO and the investment protection contained in NAFTA agreements...Despite being told repeatedly by WIPO—that they had no legal basis for their arguments, that there was no legal basis for any of those arguments, and—that their analysis was flawed, the companies persisted in telling the government—and this was Canada—and the public that plain packaging would be inconsistent with international intellectual property protections. Following the industry’s misrepresentation of international trade law, new health ministers in Canada and Australia forsook plain packaging as a tobacco control measure they mistakenly believed to be contrary to their countries’ obligations under international trade agreements. Finally, this battle is moving towards a conclusion. We are seeing it in Australia. We should not be taking notice of big tobacco’s argument that this is an intellectual property argument, because it is not. There is no basis in law for that argument.”³⁵</p> <p>Hon. Phil Goff (Labour): “I think that the Philip Morris case against the Australian Government is a disgrace. The Australian authorities tell me that they will succeed in that case. We should not lack the courage to confront the vested interests that promote for their own material benefit the peddling of tobacco as a lethal product. We should not be frightened to confront them. We should not be frightened to bring in this legislation on the date that we consider appropriate and to take on those corporates, because we would have the support of the World Health Organization. We would be aligned with the Framework Convention on Tobacco Control. That has been passed internationally by a responsible body, and I do not believe for a moment that another international body, the World Trade Organization, would in the end defend the right of companies to kill people with their products. It just does not stack up. It is not credible. I support this bill. I commend those with the courage to vote for this bill now, and I urge the Government to bring it into effect as soon as possible so we can stop that last bastion of promotion of a lethal product by the vested interests of big tobacco...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.”³⁵</p> <p>Hon. John Banks (National): “I ask my Māori Party and National Party colleagues to carefully consider the precedent they will set with this bill. This bill guts the intellectual property rights of tobacco companies. Some will ask: well, who cares? But do we want to gut the intellectual property rights of KFC or Red Bull sugar drinks? KFC and Red Bull sugar drinks are putting this country’s level of obesity up at the top of the OECD. They help to contribute to that. It may be seen as a long bow, but the removal of intellectual property rights to the names and brandings of their products from tobacco companies without compensation is wrong, because which international company selling products that are bad for our health will be the next target? The State is effectively seizing their property because it does not like the health effects of their still lawful business. It is still a lawful business.”³⁵</p>
<p>Media statements in response to First Reading</p>	<p>11 February 2014</p>	<p>Some MPs rejected arguments against SPP and some MPs addressed concerns</p>	<p>Hon. Tariana Turia (Māori): “While the tobacco industry may have laid down a threat that if this legislation is passed [it will be challenged] my message to them is that our country has a sovereign right and a legal right to protect its citizens. I am firmly of the opinion that it is not for any tobacco company to be telling us what we should be doing in our own land.”³⁶</p> <p>John Banks (ACT): “I don’t believe the State should seize property rights from legitimate companies selling legitimate products.”³⁶</p> <p>Prime Minister John Key: “I don’t really see the point in us finally passing the legislation until we see exactly what happens in the Australian court case. We have a slightly different system, but there might just be some learnings and if there are learnings out of that, it would be sensible to potentially incorporate those in either our legislation or avoid significant costs.”³⁶</p> <p>David Cunliffe (Labour): “If we have a legitimate health regulatory policy step, then we should pursue it in the public interest. The Government should not be running scared of tobacco interests because they’re worried about being sued.”³⁶</p>

Supplementary Table 2: Standardised plain packaging (SPP) policy process in New Zealand (2010–2016) (continued).

Ministry of Health report to Health Select Committee	18 June 2014	<ul style="list-style-type: none"> Rejected industry legal arguments Acknowledged government may delay passage of the Bill 	<p>P.7 “The Government has announced that it wishes to take account of the implications of Australia’s legal cases at the WTO before deciding to pass the Bill. The Government is confident that tobacco plain packaging can be implemented in a way that is consistent with trade agreement obligations, and New Zealand is supportive of Australia’s defense of the challenges it is facing at the WTO. However, the timing of these international legal processes is beyond the Government’s control. The Bill is now likely to become a matter for the next Parliament to consider. If the WTO process progresses sufficiently or if the international litigation risks are reassessed, it is possible the Bill could be passed early in the term of the new Parliament. Equally the passage of the Bill may be significantly delayed, if that is found to be necessary.”³⁸</p> <p>P.14 “The weight of expert legal opinion was that the international legal challenges against plain packaging were unlikely to succeed.”³⁸</p> <p>P.19 “The Bill provides for regulations to be promulgated that will significantly limit tobacco companies’ ability to use their trade marks on tobacco packaging. However, any such restrictions would be in accordance with domestic and international law.”³⁸</p> <p>P.20 “Officials consider that plain packaging will be shown to meet its intended objective and that it does not impair freedom any more than necessary for the achievement of public health objectives. This view has been confirmed by the Ministry of Justice.”³⁸</p> <p>P.25 “Officials agree with the submissions of the academic and NGO legal experts that the Bill is consistent with New Zealand’s WTO obligations. Tobacco company Philip Morris’s submission, which annexes a report by Professor Christopher Gibson, is the only submission by an opponent of the Bill that attempts a thorough analysis of the compatibility of tobacco plain packaging measures with New Zealand’s WTO obligations. It is noteworthy that Professor Gibson’s report does not conclude that the Bill violates the TRIPS Agreement or the TBT Agreement...The WTO analysis submitted by the other opponents of the Bill is incomplete and appears selective, and those submitters did not provide clear evidence to support their claims. Those submissions failed to refer the Committee to relevant WTO jurisprudence that does not support their interpretation of New Zealand’s WTO obligations.”³⁸</p> <p>P.26 “Officials agree with the academic legal expert submissions that indicate tobacco plain packaging is consistent with New Zealand’s investment obligations under the trade and investment agreements that New Zealand is a party to. Tobacco plain packaging is nondiscriminatory and is a legitimate exercise of sovereign regulatory power that restricts certain uses of trade marks in order to protect public welfare, namely public health. Philip Morris’s two paragraph submission on this issue focuses on the risk of litigation rather than providing analysis or evidence to support their view. BAT alleges plain packaging violates New Zealand’s investment obligations, but the analysis is incomplete and BAT does not provide credible evidence to support their claims.”³⁸</p>
Parliament Health Select Committee report	5 August 2014	Rejected industry legal arguments	<p>“The bill would not have any effect on intellectual property rights to register, own and enforce trademarks and copyright in designs; it is only the use of trademarks and copyrighted designs as promotional devices on tobacco products and packaging that would be controlled.”³⁹</p>
Parliament Second Reading of Bill and statements to the media	November 2014–June 2016	A few MPs complained the threats delayed the process	<p>Prime Minister John Key: It was waiting, and I think the view I initially took was, given Australia was in the middle of this court case it probably didn’t make sense for us to embark on that, and then potentially face exactly the same costs for the taxpayer in defending another legal action. Last year I asked for advice on that matter, and the advice I got back was that they felt we were on very firm ground and didn’t feel there was really any issues. A number of others have moved on plain packaging and were doing so without court cases being brought against them. We’re feeling a lot more confident about that and the bill’s now progressing through and it’s my expectation it will become law at some point.⁵¹</p> <p>Hon. Pesea Sam Lotu-Liga (National): Our stance remains the same that it is prudent to await the World Trade Organization decision.⁴⁶</p> <p>Hon. Annette King (Labour): What I will be critical of is the time that it has taken to get this bill here. We are talking almost two years—two years waiting to pass a piece of legislation that tightens the screws on tobacco control in New Zealand. Why did we wait two years? We waited because the Government refused to be a leader in the fight for tobacco control, with this measure. It wanted to wait to see what happened in Australia, because Australia had the guts to put in place plain packaging. It said: “We are an independent sovereign nation. We will make our own decisions about what we have in public health law.” And they went ahead, they passed their legislation, they brought in plain packaging, and they were sued by the tobacco companies. So rather than say “We are a sovereign nation. We are prepared to stand up for New Zealanders and pass our legislation.”, we sat there wringing our hands and saying: “We need to wait and see.”⁵⁵</p> <p>Simon O’Connor (National): I am conscious, too, of some of the counterarguments that have been put forward around intellectual and property rights. Although I can sort of understand that from one point of view, I think it is really important to make the distinction that, in this case, tobacco product owners still own the property rights, or the intellectual rights; they are just not allowed to use them for, I think, very good reason because, ultimately, the public good overrides it.⁵⁵</p> <p>Ian Lees-Galloway (Labour): Has that Government dragged the chain on this legislation and taken every single possible opportunity to slow the process down. So more than three years—more than three years—after the Government first decided it was going to introduce plain packaging, here we are, not passing the bill, not passing it into law, not actually beginning the regime of plain packaging—but here we are at the second reading... I have to say, of course, all of this is tied up in the business of the Trans-Pacific Partnership and free trade and investor-State dispute clauses, and the threat that the tobacco industry continues to make that it will try to sue the New Zealand Government if this Parliament enacts legislation designed to protect the health of New Zealanders. I have to say that if I was an exponent of the Trans-Pacific Partnership—which I certainly am not. But if I was someone who was a backer of the Trans-Pacific Partnership, and if I was someone who was an enthusiast for investor-State dispute settlement clauses, I would be really hacked off with the tobacco industry right now. This is because the tobacco industry, with its threat to sue the New Zealand Government if this legislation is passed, is actually playing into all the fears people have about what will happen to this country if we sign up to the Trans-Pacific Partnership and if we pass the legislation enabling the Trans-Pacific Partnership. The tobacco industry—the Minister looks confused. The Minister is trying to figure out how this is associated with this bill. He does not do his reading if he does not understand it. This legislation, if it passes, will trigger the tobacco industry’s suing the New Zealand Government under investor-State dispute settlement clauses. That is what people fear—this Parliament not having the sovereign right to legislate in the interests of the public health of New Zealanders because we fear being sued by the tobacco industry, or by any other industry for that matter. Sam Lotu-liga, Associate Minister of Health, this legislation—the tobacco industry is threatening to sue the New Zealand Government if this legislation is passed. I am sure the tobacco industry will sue the New Zealand Government if this legislation is passed. That is why the Government has said that it wanted to put this legislation on the back-burner. It is more concerned about business interests. It is more concerned about the tobacco lobby than it is about the public health of New Zealanders.⁵⁵</p> <p>David Seymour (ACT): What is in dispute is whether or not smoking cessation is the only value that New Zealand holds. I think that there are a number of other values that are important to New Zealand, including property rights and the right of a business to employ its brand... Nobody wants to defend the tobacco industry, but the principles behind New Zealand’s tradition of property rights, freedoms of trade and the freedom to do as you damn well please so long as you are not harming anyone else are also very important. That is why I am opposed to this bill, which will have a minimal effect on smoking behaviour, as demonstrated in Australia. But it is a major step in eroding our tradition of property rights and freedom to trade. That is something that every legitimate business in New Zealand and every business person listening tonight should be very, very concerned about.⁵⁵</p> <p>Poto Williams (Labour): This bill also looks at ensuring that the property rights issues that the tobacco companies raised during the submissions are continued, so that the tobacco companies can still have their logos on their tobacco products, but the idea is that they will be standard across all products. All tobacco companies will have the criteria for their logos on packaging determined by this legislation, so that in terms of the percentage or the proportion of the packaging itself the logos of the tobacco companies will be reduced.⁵⁵</p>
Final Vote and Approval in Full House	September 2016	N/A	N/A

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