



## **International treaty examination of the Free Trade Agreement between New Zealand and the Republic of Korea**

# INTRODUCTION

This submission reflects one of our key policy roles of the Association of Salaried Medical Specialists (ASMS) of promoting policies which support the development and maintenance of a high quality public health service and a healthy population. Time and resources have not allowed for the submission to cover all matters on which we have a view. It concentrates specifically on the Investor State Dispute Settlement (ISDS) chapter as it is this chapter that presents the most serious risks to New Zealanders' health.

We note that the New Zealand-Republic of Korea Free Trade Agreement (NZRKFTA) must be considered alongside the proposed Trans-Pacific Partnership Agreement (TPPA) since even if the Republic of Korea is not a party to that agreement it will have access to many of its provisions through the Most Favoured Nation rights provided in the NZRKFTA. (If the Republic of Korea joins the TPPA, as it has applied to do, then this agreement will become largely redundant.) Our comments concerning the ISDS therefore should be read as applying to any free trade agreement that includes such a chapter, including the TPPA.

## BACKGROUND

The ASMS is the union and professional association of salaried senior doctors and dentists employed throughout New Zealand. We were formed in April 1989 to advocate and promote the common industrial and professional interests of our members and we now represent more than 4,000 members, most of whom are employed by District Health Boards (DHBs) as medical and dental specialists, including physicians, surgeons, anaesthetists, psychiatrists, oncologists, radiologists, pathologists and paediatricians. Over 90% of all DHB-employed senior doctors and dentists eligible to join the ASMS are in fact members.

Although most of our members work in secondary and tertiary care (either as specialists or as non-vocationally registered doctors or dentists) in the public sector, a small but significant number work in primary care and outside DHBs. These members are employed by the New Zealand Family Planning Association, ACC, hospices, community trusts, Iwi health authorities, union health centres and the New Zealand Blood Service.

The ASMS promotes improved health care for all New Zealanders and recognition of the professional skills and training of our members, and their important role in health care provision. We are committed to the establishment and maintenance of a high quality, professionally-led public health system throughout New Zealand.

The ASMS is an affiliate of the New Zealand Council of Trade Unions. The NZCTU has made a more extensive submission, which the ASMS supports.

## SUBMISSION

The ASMS calls on the Government to fulfil its responsibilities “to achieve for New Zealanders...the improvement, promotion, and protection of their health”, as set out in the New Zealand Public Health and Disability Act 2000, and not sign a New Zealand-Republic of Korea Free Trade Agreement (NZRKFTA) - or any other trade agreement - that includes an Investor State Dispute Settlement (ISDS) chapter.

This chapter allows overseas investors to sue the New Zealand government if their profits are threatened by laws, regulations or other central or local government actions. It is a corporate Trojan horse providing opportunities for multinational interests to enter New Zealand’s domestic policy and legislative domain and influence decisions in their favour.

ASMS members have expressed grave concerns about how such corporate incursions would potentially severely limit the ability of the New Zealand Government to protect the health of its citizens through adoption of sensible health policies relating to significant issues such as smoking, obesity, diabetes, dental health and access to pharmaceuticals, to name a few. There is no shortage of examples of where transnational corporations have sued states on account of their social legislation, labour laws, minimum wage provisions, and environmental and health protection measures.<sup>i</sup>

We find it a profoundly sad irony that at a time when western democracies such as New Zealand have been vociferously promoting the importance of the principles of democracy in foreign policy, our Government is attempting to trade away its sovereignty to profit-seeking multinational corporations.

We note that the definition of corporate ‘investment’ in the NZRKFTA (and the TPPA) is open-ended. Its characteristics include investment of capital or other resources, the expectation of gain or profit, or assumption of risk.

An investment, then, could include among many other things intellectual property rights, such as trademarks on cigarette packets, or a direct or financial investment in food products with high fat or high sugar content. ISDS could also provide an avenue for pharmaceutical companies to challenge, in international tribunals, domestic pharmaceutical policies and decisions that they consider affect the value of their investments.<sup>ii</sup>

Many attempts by the New Zealand Government to introduced health policies that promote reduction of smoking, or of sugar or fat consumption, or reduction in spending on pharmaceuticals could therefore be challenged by multinationals that see such policies as impacting on their bottom line.

While the NZRKFTA includes measures aiming to balance the promotion of foreign investment by protecting investors while recognising the Government's right to regulate and its responsibility to public health, safety and the environment, those measures are full of loop-holes and open to challenge in international tribunals; further, they do not include products such as high sugar or high fat food and drinks, nor do they apply to advertising, which is a likely area for regulation to prevent ill health.

The loopholes leave open the possibility of tobacco companies challenging domestic policies such as plain packaging of tobacco products, such as the present ISDS case brought by tobacco multinational Philip Morris against Australia (and a similar one against Uruguay) to oppose its tobacco plain-packaging laws.

The effect of these cases can be far reaching. In the Philip Morris case, the New Zealand Government has reacted by delaying implementation of our own plain packaging laws until the case is decided, which could take years.<sup>iii</sup>

According to the World Health Organisation (WHO), plain packaging is effective in preventing smoking uptake and relapse as it serves three functions:

- It reduces the appeal of packaging or product
- It increases the salience and effectiveness of health warnings
- It takes away the perception of products strength and harm.<sup>iv v</sup>

The corporate challenge to Australia which has led to New Zealand's delay in introducing a plain packaging policy is therefore already causing avoidable ill health in this country.

An example of the kinds of arguments raised against policies to reduce tobacco use is illustrated in the submission by the Korea Tobacco and Ginseng Corporation to the World Health Organisation prior to the establishment of the WHO Framework Convention on Tobacco Control, which came into force in 2005 (see Appendix 1).

In response to WHO's proposed control measure, Korea Tobacco called for the upholding of human rights (the rights of smokers): "The tobacco consumers deserve fair treatment as they are the principal source of financing for the tobacco control and public health promotion programmes." In response to arguments for raising prices or taxes on tobacco, the corporation said the consequences would be potential rise in social problems and crime. Korea Tobacco also raised issues of the industry's rights to engage in a minimum level of advertising or marketing, and infringement of tobacco manufacturers' proprietary rights (regarding disclosure of information on tobacco product ingredients).

As has been found overseas, such challenges – often raising spurious arguments concerning a state's broader economic and social responsibilities – can tie up government

resources, delay or block the implementation of sensible health policies and can cost many millions of dollars of taxpayer money.

To exacerbate the corporate attacks on domestic policy-making, the international tribunals that hear these cases are gaining an increasingly poor reputation for balance. Many of their arbitrators are corporate lawyers, who may act as both arbitrators and on behalf of complainants whose independence has been put into question on grounds of conflict of interest, and whose decisions are not subject to appeal or to other forms of accountability.

It is for the above reasons and more that many other countries are rejecting ISDS provisions.<sup>vi</sup> This submission focuses on just one area – health – which alone provides a compelling case for New Zealand to do the same.

Finally, senior doctors and dentists have thrown their weight behind growing calls for formal independent health assessments of trade agreements such as this one, before they are signed off.<sup>vii</sup>

We conclude this submission by emphatically repeating that call.

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<sup>i</sup> *Submission of the New Zealand Council of Trade Unions to the Foreign Affairs, Defence and Trade Select Committee on the Free Trade Agreement Between New Zealand and the Republic of Korea*, April 2015.

<sup>ii</sup> D Gleeson, R Lopert, P Reid. "How the Trans-Pacific Partnership Agreement could undermine PHARMAC and threaten access to affordable medicines and health equity in New Zealand". *Health Policy*. Article in press.

<sup>iii</sup> J Kelsey. "The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?" *American Journal of Law and Medicine*, 39 (2013): 237-264.

<sup>iv</sup> Hoek J, Wong C, Gendall P, Louviere J, K C. Effects of dissuasive packaging on young adult smokers. *Tobacco Control* 2011;20(3):183-188.

<sup>v</sup> McCool J, Webb L, Cameron LD, Hoek J. Graphic warnings labels on plain cigarette packs: Will they make a difference to adolescents? *Social Science & Medicine* 2012;74(2012):1269-1273

<sup>vi</sup> *Submission of the New Zealand Council of Trade Unions to the Foreign Affairs, Defence and Trade Select Committee on the Free Trade Agreement Between New Zealand and the Republic of Korea*, April 2015.

<sup>vii</sup> ASMS. "Senior doctors support call for independent health assessment of TPPA," media statement, 28 November 2014. Available at: <http://www.asms.org.nz/news/asms-news/2014/11/28/senior-doctors-support-call-independent-health-assessment-tppa/>