January 28, 2015

Ms. Cecilia Malmström
European Commission
Rue de la Loi/Wetstraat 200
1049 Brussels
BELGIUM

Dear Commissioner Malmström,

We are writing as EU and US based public health organisations dedicated to ending the global tobacco epidemic. We warmly congratulate you on your recent appointment as Trade Commissioner.

As you know, the recent public debate about investment protections in trade agreements, most notably the investor-state dispute settlement (ISDS) mechanism, has particular relevance for tobacco control. We strongly support steps recently taken by the European Commission to address concerns with the ISDS mechanism in the Trans-Atlantic Trade and Investment Partnership (TTIP). We are deeply
concerned about the potential for the tobacco industry to misuse international trade and investment agreements to infringe on the ability of sovereign governments to enact effective non-discriminatory tobacco control policies, including those related to packaging, to protect the health of their citizens. Without such policies, tobacco will kill one billion people in this century.

We write specifically to address statements made by Philip Morris International (PMI) in its December 8, 2014 letter on ISDS and its use of this mechanism to challenge tobacco control measures. PMI’s letter seeks to diminish its abuse of trade and investment agreements, with reference to its proceedings against Uruguay and Australia. While PMI makes only passing reference to its case against Uruguay, it makes misleading statements about the Australian case, and seeks to obscure the chilling effect of these cases on efforts by nations to reduce the number of their citizens who die from tobacco use and the number of their youth who become addicted to tobacco, issues that directly impact public health.

First, PMI asserts that its unsuccessful constitutional challenge to Australia’s law in the High Court somehow supports its subsequent ISDS challenge under the Hong Kong – Australia bilateral investment treaty. It does not. The Australian government comprehensively won the High Court case. PMI brought the ISDS challenge against the government notwithstanding its loss in a robust, respected and independent judicial system.

Secondly, PMI seeks to evade legitimate public criticism of its treaty shopping to bring its ISDS case against Australia. In its letter, PMI states that its subsidiary, Philip Morris Asia (PM Asia) made its so-called ‘investment’ in Australia in 2011, pre-dating the passage of the plain packaging law through Parliament. The fact is that prior to its ‘investment’ in February 2011, PM Asia had no interest in Australia; rather, a Swiss company, Philip Morris Brands Sàrl, owned the relevant shares. The ‘investment’ was made after Australia’s announcement on 29 April 2010 of its decision to implement plain packaging, and in the context of a pre-existing debate between PM Asia and the Australian Government about the merits of the policy.

Finally, PMI cannot escape from the fact that these cases, in addition to threats to use ISDS against countries seeking to implement non-discriminatory tobacco control policies, cause regulatory chill and harm public health. For example, New Zealand has expressly announced that it will defer plain packaging until the Australian case is resolved, while many other countries closely watch the proceedings and may not be acting due to PMI’s pending litigation. Further, tobacco companies and their allies send bullying letters to countries where they aim to grow their market, like Namibia, successfully delaying and/or weakening tobacco control efforts. Even delay is a benefit to the tobacco industry, giving it additional time to recruit a new generation to its addictive and deadly product.

We welcomed your recent statements regarding ISDS and the need to address weaknesses to prevent cases like those against tobacco plain packaging. More generally, we urge the Commission to protect efforts to improve public health and to ensure that the TTIP cannot be used to challenge non-discriminatory policies, including those aimed at tackling the significant harms caused by tobacco.

Sincerely,

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