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Investment treaty claims - the case of Philip Morris vs Uruguay and Philip Morris vs Australia

What is international investment law?

- Governs relationships between states and foreign investors
- No single multilateral institution or treaty
- Network of mostly bilateral investment treaties
- Grant foreign investors the ability to bring claims directly against the state
- Claims heard by ad hoc arbitral tribunals

Why care about international investment law?

- Overlap in subject matter – both public health and international investment law deal with regulations
- Many companies that sell products that cause NCDs will be foreign investors
- Use of investment law arguments to challenge/delay regulations
- Important to be able to **critically examine** these claims – often unfounded





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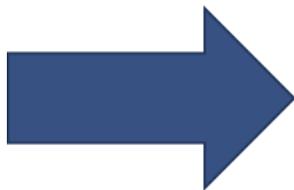
Philip Morris Brands SARL v Oriental Republic of Uruguay

Background

- Over time, Uruguay has introduced a comprehensive package of tobacco control measures, including restrictions on advertising, mandatory health warnings and increased taxation
- The tobacco industry challenged two measures introduced in 2008 and 2009

Larger Graphic Health Warnings

- GHW increased from 50% to 80% of the front and back external surfaces of cigarette packages



‘Single Presentation’

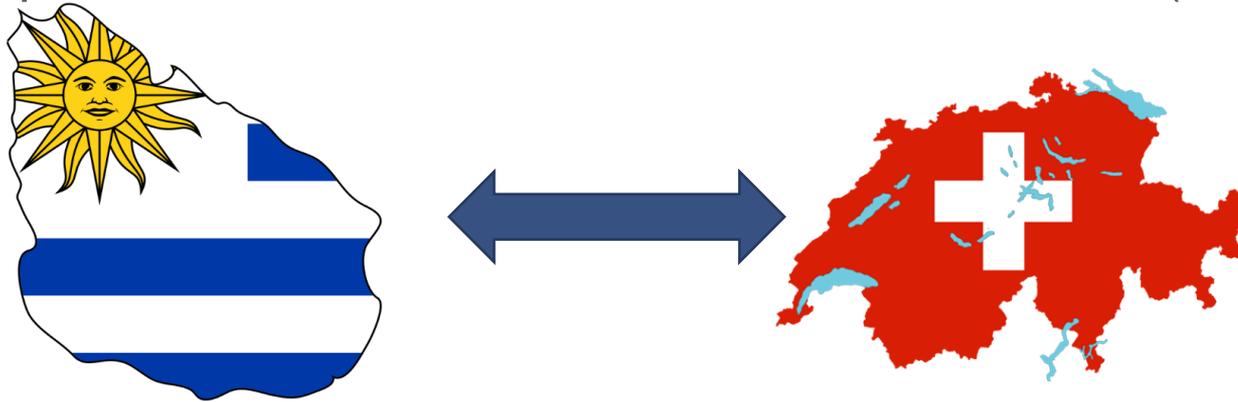
- Cigarette brands only permitted to have a ‘single presentation’ i.e. companies cannot produce more than one variant of a single brand family of cigarettes.
- The companies chose which variant remained on the market



The Claim

Claimants: Philip Morris Brand Sàrl (Switzerland) (“PMB”), Philip Morris Products S.A. (Switzerland) (“PMP”) and Abal Hermanos S.A. (“Abal”).

The BIT: The 1988 Switzerland – Uruguay Agreement on the Reciprocal Promotion and Protection of Investments (BIT).



Philip Morris' Claims

Five substantive claims

- Indirect expropriation
- Fair and equitable treatment
- Unreasonable or discriminatory measures
- ‘Umbrella clause’
- Denial of justice

Uruguay won on all five grounds

Expropriation

Tribunal found:

- There is no right to use a trademark that can be exercised against the state
- There was no expropriation of the investment:
 - No substantial deprivation of the value, use or enjoyment of the investment
 - Measures exercise Uruguay's sovereign right to regulate for public health

Fair and equitable treatment

Tribunal found that:

- Both measures adopted for public health reasons in good faith
- Both measures supported by WHO/WHO FCTC and PAHO amicus briefs
- Both measures aim to implement WHO FCTC and its guidelines, which are evidence-based
- Country with limited economic and technical resources – e.g. Uruguay – entitled to rely on international cooperation such as FCTC processes and extensive international evidence → no need for own studies

The measures are reasonable – therefore cannot be considered arbitrary under FET standard

Fair and equitable treatment

No breach of legitimate expectations/legal stability

- Legitimate expectations can only be created by specific undertakings – e.g. promises, contracts – and not by legislation of general application
- Uruguay had not made any specific undertakings
- No expectation that a state will not further regulate for public health – no requirement that a state freeze its laws in time

Result

- Neither measure is an expropriation
- Neither measure violates fair and equitable treatment standard
- Three other grounds fail
- Uruguay wins
- PM ordered to pay most of Uruguay's costs



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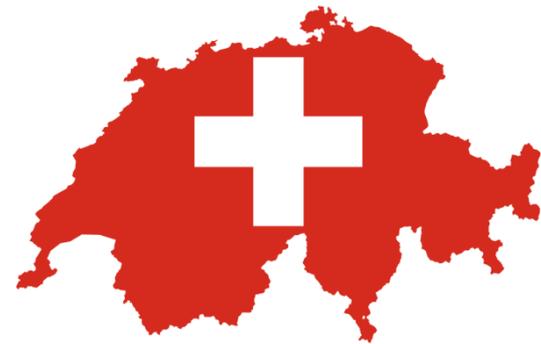
Philip Morris Asia Ltd v. Commonwealth of Australia

Plain packaging



What is the investment treaty?

—No investment treaty between Australia and Switzerland



Transfer of Philip Morris Australia

—Transferred Philip Morris Australia from Swiss HQ to Asian headquarters in Hong Kong



Australia's challenge to jurisdiction

- No jurisdiction
 - Tribunal should not hear claim

 - No case on the merits
 - If tribunal does hear the claim no breach of the BIT
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Finding of abuse of right

- ‘the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong’ (584)
 - ‘the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights’ (588)
-

Costs order

Philip Morris ordered to pay Australia millions in costs for plain packaging case



Adam Gartrell



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Tobacco giant Philip Morris has been ordered to pay the Australian government millions of dollars in legal costs after its failed bid to kill off plain packaging laws.



Questions:

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