Case Comments

A Procedural Win for Public Health Measures

Philip Morris Asia Ltd v. Commonwealth of Australia, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility, 17 December 2015 (Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler, Donald M. McRae)

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Keywords

This case has been a flashpoint for recent debates over investor-state dispute settlement (ISDS). For Australia, subjected to its first ISDS claim, the Case triggered extensive public discussion over whether to continue including ISDS clauses in future bilateral investment treaties (BITs) and investment
chapters of free trade agreements (FTAs). More broadly, this Case has been seen as epitomising all that is wrong with treaty-based ISDS: an unlikeable, pseudo-American multinational invoking a little-known treaty and an opaque arbitral procedure to claim billion-dollar damages arising from legislation enacted to protect public health. This distasteful image is likely to remain, especially in the public consciousness, despite the claim eventually being dismissed for treaty-shopping, and even though the Award deserves to be analysed in broader context. Notably, the Case is a rare successful invocation of abuse of right under general international law and even lowers the threshold for such an argument. The Case may also encourage states to enhance their screening processes specifically to assess and manage litigation risks flowing from admitting a particular foreign investment.

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The Case stemmed from a law adopted by Australia in November 2011 requiring all packaging of tobacco products to consist solely of a uniform olive-green colour and certain prescribed health warnings taking up most of the package surface area. Australia justified the new law as a public health measure, intended to ‘reduce the appeal of tobacco products to consumers [and] increase the effectiveness of health warnings.’ Philip Morris, the international tobacco group now headquartered in Switzerland, objected that the new law interfered with the firm’s intellectual property rights, transforming its products into unbranded commodities and ‘substantially diminishing’ the value of its investment in Australia (para 7).

Following discussions throughout 2010, Philip Morris implemented a corporate restructure in February 2011, under which a Hong Kong-registered affiliate, Philip Morris Asia Ltd (PMA), had acquired the firm’s Australian business. Subsequently, on 21 November 2011, the same day as the plain packaging law’s enactment, PMA commenced arbitration against Australia. The

Kurtz and Leon Trakman. The authors thank Professor Kurtz for helpful feedback on an earlier draft, and Kirsten Gan for research and editorial assistance.


2 The Award and other documents, such as Procedural Orders cited below, are available via <www.pcacases.com/web/view/5> accessed 17 October 2016.

3 While the brand and variant of tobacco product (such as ‘Marlboro Red’) could be stated on the packet in a uniform font, the law prohibited the display of any trademarks, including corporate logos, pictures or branding, on packaging. See <www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain> accessed 17 October 2016.

4 Ibid.