Tobacco litigation

Panel presentation

On 1 September 2016 the ACT Law Society's International Law Committee organised a panel discussion in relation to the *Philip Morris Asia Limited (Hong Kong) v the Commonwealth of Australia* decision.

CIGARETTES, BY MATTHIAS OTT

The participants in the panel discussion were John Atwood and Chloe Baldwin (Office of International Law, Commonwealth Attorney-General's Department) and Patricia Holmes (Trade and Investment Law Branch, Department of Foreign Affairs and Trade).

Background

In 2011, Australia became the first country to pass laws mandating the plain packaging of tobacco products. This public health measure was quickly challenged in the High Court of Australia (subsequently dismissed), and in two separate international jurisdictions.

First, Philip Morris Asia utilised Australia's bilateral investment treaty with Hong Kong (the Australia-Hong Kong BIT) and sued Australia as a foreign investor under an investor-State dispute settlement (ISDS) mechanism in that treaty.

Second, five countries (Ukraine, Dominican Republic, Honduras, Indonesia, and Cuba) brought a claim against Australia in the World Trade Organisation, though Ukraine's claim was subsequently dropped.

The presentations at the panel discussion focused on these two international disputes, and then gave a broader overview of Australia's involvement with ISDS provisions more broadly.

Plain packaging

The first presenter, John Atwood, gave an overview of the tobacco plain packaging regime and contextualised this measure as part of a comprehensive suite of tobacco control measures adopted by Australia in the last decade.

He then briefly explained the merits of Philip Morris Asia's claim against Australia, including arguments that Australia had (through the introduction of tobacco plain packaging) expropriated Philip Morris Asia's investments, and failed to provide fair and equitable treatment.

Most significantly, the presentation outlined the three jurisdictional objections raised by Australia, including issues around admission of the investment in Australia, the argument that there was no 'investment' due to the structure of the company, and — most significantly — the question of whether there was a pre-existing dispute and consequently an abuse of right by Philip Morris Asia in bringing the claim.

In 2015, the Tribunal issued a unanimous decision finding that it had no jurisdiction to hear the claim, because the dispute had been foreseen by Philip Morris Asia at the time it was brought and thus was an abuse of process.

The first presentation closed with some observations about the unique aspects of the case, and the relevance of other tobacco measure arbitrations around the world (including the recent decision in *Philip Morris v Uruguay*).

International disputes

The next presenter, Chloe Baldwin, focused on the second set of international disputes on the tobacco plain packaging measure.

She gave an overview of the World Trade Organisation (WTO) and provided background on the basic rules underpinning international trade law. She then outlined the WTO dispute settlement system, which has both a political body (the 'Dispute Settlement Body', or DSB) and judicial bodies in the form of ad hoc panels, and a permanent Appellate Body. The presentation provided brief background on the four major steps of the WTO dispute settlement process, being consultations; panel proceedings; Appellate Body proceedings; and the process around implementation and enforcement.

Against this background, the second presentation gave an overview of the tobacco plain packaging disputes currently being heard before the WTO. The DSB established dispute settlement panels at the request of five members: Ukraine, the Dominican Republic, Honduras, Indonesia, and Cuba, and appointed the same panelists to jointly hear the disputes. Ukraine suspended its dispute settlement proceedings against Australia on 29 May 2015, and is no longer party to the proceedings. However, the remaining complainants claim that Australia's tobacco plain packaging measures violates WTO rules because it fails to protect intellectual property and is more trade restrictive than necessary. The disputes are currently being considered by the panel, and no decision has yet been handed down.

While WTO decisions are only binding on parties to the dispute, the judgment on the tobacco plain packaging measure's consistency with international trade law is being closely considered by a number of countries who have, or are in the process of, introducing tobacco plain packaging.

Investor-State dispute settlement (ISDS)

The final segment of the discussion, by Patricia Holmes, included an overview of Australia's bilateral

investment treaties and free trade agreements. There are over 3000 investment agreements world-wide, many of which include ISDS.

The Australian Government includes ISDS in agreements on a case-by-case basis, and has included ISDS in 21 bilateral investment treaties and seven free trade agreements (including the TPP).

The inclusion of ISDS provisions has been the subject of public discussion both in Australia and worldwide for a variety of reasons, with suggestions that there is a lack of transparency, an absence of an appellate mechanism, a lack of consistency between decisions and concerns as to the independence and objectivity of arbitrators. Free trade agreements usually address concerns regarding the experience, independence and objectivity of arbitrators. For example, the China-Australia free trade agreement includes an arbitrator roster system of 10 individuals who are not nationals of either party to act as chairperson of the tribunal as well as a Code of Conduct for arbitrators.

Australia includes a number of safeguards in agreements to ensure an appropriate balance between protecting investors and promoting and stable investment climate so as to promote inward foreign direct investment and ensure appropriate capacity to regulate in the public interest. Other proposals include the EU investment court in its free trade agreements with Canada and Vietnam and the UN Convention on Transparency in Treaty based Investor State Arbitration (the Mauritius Convention) which was adopted by the UN General Assembly in 2014.

The Australian Government is aware of three Australian-incorporated companies who have launched (separate) ISDS proceedings against the Governments of India, Pakistan and Indonesia. White Industries Australia was awarded compensation from India in November 2011. The two other disputes against the Government of Pakistan and Indonesia are ongoing.

White Industries was brought under the Australia-India bilateral investment treaty. In this case the tribunal held that the delay in India's domestic system breached the obligation to provide an effective means of asserting claims and enforcing rights.

Investment law has no international 'home' and the number and diversity of international investment agreements suggests that multilateral coordination may assist reform. However, the Multilateral Agreement on Investment was concluded within the OECD yet never entered into force due to public concern.

At this juncture there might be benefit for additional regional co-ordination and the TPP illustrates the potential for Australia to use regional agreements to both harmonise and update investment rules. Around the world, countries are reviewing their approach to ISDS in a range of forums (UNCTAD, OECD, G20, WTO, ICSID, and UNCITRAL) and Australia's discussions about reforms in this area are evolving.

Concluding observations

The international disputes on the tobacco plain packaging measure highlight the ongoing tension between a States' right to regulate, and trade and investment rights of States and industry. Successive Australian governments have concluded a plethora of bilateral, regional, and multilateral free trade agreements to encourage free trade and investment.

There remains, however, concerns about ISDS provisions included in some of these agreements and how governments across the globe can deal with international investment disputes.

The claims brought against Australia with respect to the tobacco plain packaging measure demonstrates the complexity of defending ISDS claims against large, multinational companies, and large WTO disputes with multiple complainants.

These types of disputes bring unique challenges to government, including coordination across relevant agencies, consideration of evidence and government processes, and developing and maintaining legal expertise in international trade and investment litigation.

Suzanne Howarth
SESSIONAL LECTURER,
UNIVERSITY OF CANBERRA
Suzanne is a member of the International Lawyers Committee of the ACT Law Society.

Running a litigation file

Seven tips for junior lawyers

Barrister Simon Grant provides his observations and tips for young lawyers running litigation files.

At the start

In the early years of your career, the point where the matter first enters your office will probably be a partner or senior solicitor delivering the good news that "this one is yours" while dropping three boxes on your desk.

However it comes to you, the first thing you need to do is assess what you actually have in front of you.

Tip 1: You need to actually *look*

Don't just accept the file note from the solicitor now departed the firm or team that says "everything is fine, the client has been asked to do a few things, and matters can wait until they get back to us."

If it isn't in some form of order, then your first question should be: "Is this a ticking bomb?"

The expectation on you (quite rightly) is that any issues will be identified early and dealt with. So **look**.

In some ways, it's simpler when you are the first person in the firm dealing with a matter. You can obtain the key information first hand. If you inherit a file, then get it in order.

Tip 2: Identify filing sections

My personal preference when running litigation files is for five basic sections: Court documents, correspondence, clients instructions and documents, research, and miscellaneous. These might be in one folder or many, but should always be easily identifiable. All the documents in each section should be in chronological order.

Court Documents

Every document either filed in or issued by a court, tribunal, commission or registry for the matter should be in this section. It is somewhat disconcerting to be reading something which refers to a particular order having been made and to not have a copy of that order. Don't leave it stuck to the back of the letter from the other side or the registry and file it somewhere else.

Correspondence

Every letter between you, your client, the other party and the Court should be placed in the correspondence section. Again, this sounds simple, but I can recall any number of times where a letter was referred to in one document on a file I had inherited, and that letter was nowhere to be found, despite being relevant to managing the matter.

Clients instructions and documents

This is the most complex section and proves the most difficult to bring order to. Ultimately the documents will need to be separated into individual documents for disclosure purposes. Do this from the beginning of your conduct of the file. Put them in chronological order.