



INVESTIGATING THE IMPACT OF CORPORATE COURTS ON THE GROUND – THE TRUTH IS OUT THERE!

CASE NAME:

PHILIP MORRIS V AUSTRALIA

SUMMARY:

Tobacco giant sues Australia over plain packaging for cigarettes

STATUS:

Australia won on a technicality

AT STAKE:

Unknown but in the billions

DETAILS:

Case started in November 2011 using an Australia-Hong Kong investment deal; arbitrators gave their decision in December 2015



Examples of the plain packaging used for Marlboro cigarettes in Australia in 2014. Photo courtesy of Dr. David Hammond at the University of Waterloo and Tobacco Labelling Resource Centre.

WHAT IS THE CASE ABOUT?

In April 2010, the Australian government announced that it was planning to introduce new rules to require plain packaging on cigarettes and other tobacco products to support public health. Similar to laws later introduced into the UK, this meant that while the brand name appears in a uniform font, all the rest of the packet would be health warnings on a drab colour. All logos and branding images would have to be stripped out.

Following this announcement, two things happened over the next couple of years: Australia went through its usual legislative processes to bring in the law and tobacco giant Philip Morris – who make Marlboro cigarettes – restructured its business.

Philip Morris's operations in Australia had been previously owned in Switzerland but as a result of the restructure it was now owned in Hong Kong. Hong Kong has an Investor-State Dispute Settlement (ISDS) deal with Australia, whereas Switzerland does not (technically there is one, but it is limited to the energy sector, so of no use to Philip Morris).

Australia passed the Tobacco Plain Packaging Bill in 2011 and the law came into effect in 2012, making Australia the first country in the world to introduce plain packaging.

On the same day as the bill was passed into law, Philip Morris brought an ISDS case against Australia.

CORPORATION'S COMPLAINT

Philip Morris complained that preventing it from displaying its trademarks would cause a substantial loss of market share, saying "Without branding, PML's products are not readily distinguishable to the consumer from the products of competitors". It claimed this was "tantamount to expropriation".

At the same time as the ISDS case, Philip Morris and other tobacco corporations also challenged the Australian law in the national courts. They lost, and that judgment makes many references to public health. An ISDS case however interprets a case through a much narrower lens.

Philip Morris's specific demand in bringing the case was for Australia to repeal the law. Otherwise it would claim "an amount to be quantified but of the order of billions of Australian dollars". ISDS is often implicitly used as a threat to make a government back down, but it is rarely said so openly and explicitly.

In 2015, Philip Morris lost the case on a technicality. The ISDS tribunal considered that Philip Morris's restructure was done solely in order to be able to bring the ISDS case and therefore rejected it. Had it been judged on the actual substance of the case, it is by no means sure that they would have lost.

The tobacco exception in the Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP, now known as CPTPP) is a trade deal between eleven Asia-Pacific countries, including Australia. The deal has ISDS in it, but at Australia's insistence there is a specific carve-out that excludes it being used for tobacco control measures.

This reveals the weakness of other, more general, clauses in such trade deals which are supposed to provide protection for the public interest. TPP includes mention that governments' 'right to regulate' should not be undermined by the deal. If this was a strong, enforceable part of the deal, Australia would have felt it was sufficient to rely on this, but it is not. It is just cosmetic. Having gone through the reality of the Philip Morris case, Australia didn't place any trust in flimsy rhetoric, and instead demanded a tough specific exception.

When there is political will, policies in the public interest can be protected from trade deals.

OUR VERDICT

Tobacco companies have been masters in using ISDS to bully countries into abandoning policies or laws, either through the threat or the reality of a case. This is known as 'regulatory chill' and Philip Morris has been at the forefront of this in the tobacco industry.

Plain packing was being discussed in the 1990s and it is thought that threats from Philip Morris and others caused Canada to drop the idea back then.

As well as suing Australia over plain packaging, Philip Morris also sued Uruguay in 2010 over its anti-smoking measures. These included new rules requiring health warnings on cigarettes, banning sports sponsorship and banning smoking in enclosed public spaces. Philip Morris eventually lost the case in 2016.

When Togo wanted to introduce images in health warnings on cigarettes, Philip Morris wrote to them threatening to bring an ISDS case. Togo's annual GDP is £3.4bn; Philip Morris' annual revenue is £64bn.

Often the effect of regulatory chill is not directly to the country being sued but is instead to scare other countries from doing the same. New Zealand started looking at plain packaging at the same time that Australia did. However, once the legal challenges came, the whole process in New Zealand slowed to a crawl. It only eventually introduced plain packaging in 2018, after Australia had won.

Regulatory chill is one of the toxic effects of ISDS on democracy in our societies and it has been used by corporations in many other industries as well.

MORE INFO

Last week tonight with John Oliver on tobacco
<https://www.youtube.com/watch?v=6UsHHOCH4q8>
(or search for 'tobacco John Oliver' on YouTube)

Investor-State Dispute Settlement (ISDS,) or 'corporate courts', gives corporations far reaching privileges and access to their own legal system to enforce them. This mechanism threatens society, democracy and the planet.
STOP ISDS!

