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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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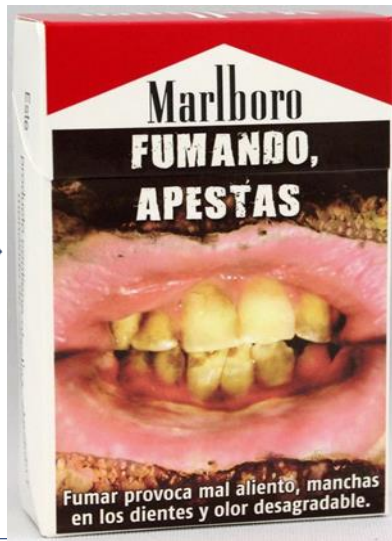
# Philip Morris Brands SARL v Oriental Republic of Uruguay

# 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’

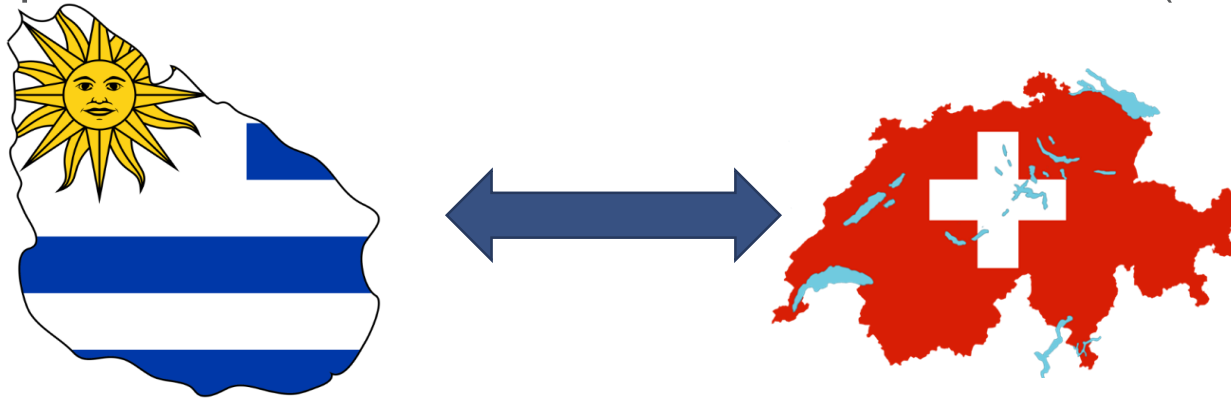
- Cigarette brands only permitted to have a ‘single presentation’ i.e. companies cannot produce more than one variant of a single brand family of cigarettes.
- The companies chose which variant remained on the market



# 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
-

# 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)
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# Costs order

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

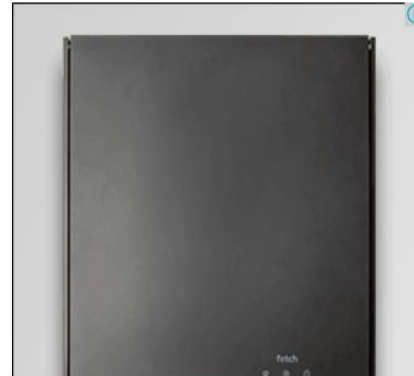


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Tobacco giant Philip Morris has been ordered to pay the Australian government millions of dollars in legal costs after its failed bid to kill off plain packaging laws.



# Questions:

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