

Australia wins Tobacco Plain Packaging ISDS case

18 December 2015

Media reports have announced that the ISDS claim brought by Philip Morris Australia (PMA) against Australia's tobacco plain packing measure has been unanimously dismissed by the tribunal deciding the case. This was the first ISDS claim against Australia and was brought under the bilateral investment treaty between Australia and Hong Kong. At an earlier stage the tribunal agreed to decide on two of Australia's preliminary objections before proceeding to decide the merits of the claim. In broad terms the two relevant objections were concerned with:

- 1) Whether PMA's claimed investment (the acquisition of the shares of an Australian subsidiary) was properly "admitted" by Australia as required by the treaty; and
- 2) Australia's allegations that the dispute between Philip Morris and Australia on plain packaging pre-existed PMA's alleged investment in Australia; and that Philip Morris had restructured its investments (through Hong Kong) in order to be able to bring a claim under the Australia – Hong Kong investment treaty for this pre-existing dispute.

To focus on the second of these objections, Australia argued that the dispute either fell outside the scope of the treaty; or in any case should be dismissed as an abuse of the right to bring an ISDS claim. Australia asserted that an investor should not be able to restructure its investments in order to make an ISDS claim under an investment treaty for pre-existing or reasonably foreseeable disputes as this would be an abuse of the system of investment protection.

The decision is not yet public and so we do not yet know the basis on which the tribunal dismissed the claim but they must have agreed with at least one, or perhaps both, of these preliminary objections. The result will be welcomed not only by Australia, but other governments who are introducing or considering adopting similar tobacco control measures.



Richard Braddock
Partner

richard.braddock@lexbridgelawyers.com