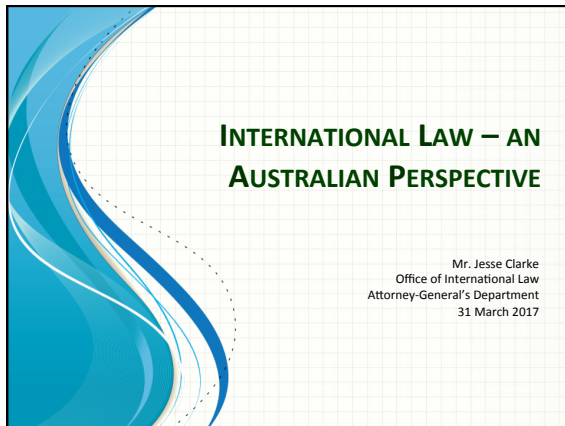








TOBACCO PLAIN PACKAGING
ARBITRATION
PHILIP MORRIS ASIA V. AUSTRALIA

[illegible]

Historical context

- International law – rights and obligations between states
- Early protections of nationals abroad – treaties of ‘amity and commerce’
- ‘Exhaustion of local remedies’ and ‘espousal of claims’

The image shows a historical document, a treaty titled "TRAITE DE COMMERCE, NAVIGATION & MARINE" between the Netherlands and the Republic of San Marino. The document is dated 1799 and includes handwritten notes in French and Italian. It is signed by the Ambassadors of the Netherlands and the Republic of San Marino.

- 55-16-57
- W 4477 1005
- TRAITE
ET
COMMERCE.
NAVIGATION ET MARINE.
- Fais, conde & archevêque de Rijswijk en Hollan-
de, le Bureau de September, 1699. Enrichi les An-
tiquitairiens & Remontrances de Sa Majesté
Ferdinand Charles, d'Autriche.
- Les Ambassadeurs & Plenipotentiaires des
Seigneurs d'Etat Generaux des Provinces Unies de
Pais-Bas, de l'autre part.
- (signature) Traite
n° 36 305
- N. Ned.
1697.2
- Digitized by Google
- coll. EHB

[illegible]

Investment Treaties

- Network of bilateral treaties (over 3,000)
- Protection of foreign direct investment
- Interests of capital-exporting states
- General (vague?) standards of treatment
- Direct recourse to arbitration

-

Tobacco Plain Packaging regulation



Philip Morris starts arbitration

- Long-standing tobacco industry opposition to tobacco plain packaging
- Arbitration started under the Hong Kong – Australia bilateral investment treaty
- Claim: by barring the use of intellectual property on tobacco products, the measures breached the treaty's requirements regarding 'expropriation' and 'fair and equitable treatment'
- Sought repeal or suspension of measures or compensation 'in the order of billions of dollars'
- Tribunal constituted in June 2012

Expropriation

Article 6: *Investors ... shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation ... except under due process of law, for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, and against compensation ...*

Fair and Equitable Treatment

Article 2(2): Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment

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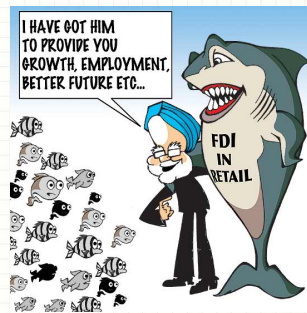
Australia opposes jurisdiction – Abuse of right

- Philip Morris is an international group of companies with US HQ
- No US-Australia treaty
- Before the arbitration, Philip Morris transferred its Australian business to Philip Morris Asia
- Hong Kong – Australia treaty
- Why? Legitimate business motivations?



Observations

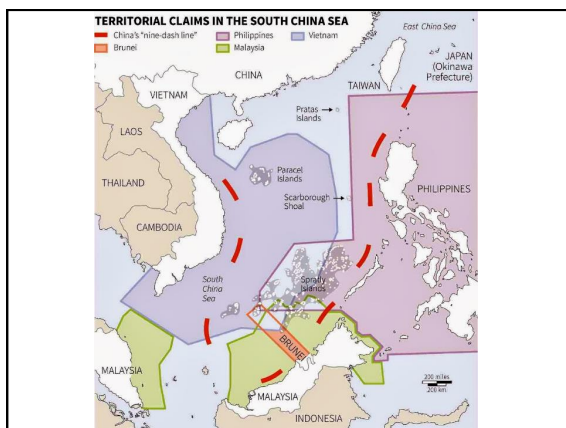
- New actors – companies able to enforce international legal rights directly
- International law penetrating ever-deeper into domestic public policy
- To what degree should states protect foreign investment?





Context...

- Competing sovereignty claims
- 'Chinese militarisation'
- Chinese construction of artificial islands
- Trade and resources
- Regional and global security





Role of international law?

- Sovereignty over territory
- Creation of maritime zones
- Sovereign rights in maritime zones
- Delimitation
- Settlement of disputes



China's arguments

- 9-dash line: 'historic rights'
- China has sovereignty over the islands within the 9-dash line
- China has 'rights' over the waters within the 9-dash line
- The tribunal has no jurisdiction over the dispute:
  - Cannot determine sovereignty over the islands
  - China's 'declaration' precludes the tribunal from delimiting China's maritime boundaries



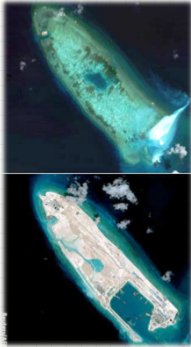


Philippines' arguments

- Not about territorial sovereignty
- Not about delimitation of maritime zones
- 'Historic rights' extinguished by the UN Convention on the Law of the Sea UNCLOS
- Features and their maritime entitlements
- Construction of islands
- Compulsory dispute settlement



Tribunal's findings on jurisdiction



- UNCLOS - compulsory dispute settlement - binding
- China's non-appearance did not matter
- Case was about the interpretation and application of UNCLOS, not sovereignty
- Jurisdiction to determine maritime zones
- No jurisdiction to delimit overlapping maritime claims

Tribunal's findings on the merits

- 'Historic rights' extinguished where inconsistent with UNCLOS
- Low tide elevations
- 'Islands' vs – 'rocks'
- None of the features claimed by China generated an 'exclusive economic zone' (EEZ)
- No need to delimit overlapping claims
- China had violated Philippines' sovereign rights in its EEZ by constructing artificial islands and interfering with fishing and petroleum exploration
- China's construction of the artificial islands violated its obligations to preserve and protect the marine environment
- The decision is binding on the parties

What next?

- China rejects the ruling
- Change of government in Philippines
- ASEAN response
- Freedom of navigation operations?





International efforts

- Political negotiation
- Chemical weapons
- Humanitarian assistance
- International criminal responsibility



Lessons?

- Enforcement of international law remains a challenge
- The meaning and nature of 'sovereignty' is contested
- The UN continues to establish new norms
- The UN can work with other international actors to achieve its objectives



