Recent developments...

- Extradition
- Climate change
- Global refugee crisis
- Cyber operations
- ‘Brexit’
- Targeting
- Racial discrimination
- Torture (OPCAT)
- Maritime delimitation – East Timor

Case Studies

1. **Investor-State Dispute Settlement - Tobacco**
2. **South China Sea Arbitration**
3. **International response to the Syrian crisis**
Tobacco Plain Packaging Arbitration
Philip Morris Asia v. Australia

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’

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.

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?
Syrian crisis – the international response

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
QUESTIONS?