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Australia tobacco clash reverberates in EU trade talks

Tribunal decision could undermine opposition to TTIP.

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The end of a complex court case on the other side of the world could wreak havoc on a campaign in Europe against a proposed trade deal between the EU and the United States.

An international arbitration tribunal in December 2015 wound up a four-year dispute between the Australian government and tobacco company Philip Morris by announcing it was unable to rule on the matter — effectively siding with Australia’s position in the dispute.

The case has resonated in Europe, where for some time opponents of the proposed Transatlantic Trade and Investment Partnership (TTIP) have used the legal challenge as a cautionary tale against signing investment deals.

Philip Morris used an obscure investment agreement which Australia signed with Hong Kong in 1993 in an attempt to scuttle Australia’s “plain packaging” tobacco legislation, which has removed all branding from cigarette packets sold in the country.

But Australia’s ability to fend off the legal challenge could undermine the argument that legal provisions contained in international investment agreements leave legitimate legislative reform vulnerable to big corporations.

“It will be back to the drawing board for anti-TTIP campaigners,” said Hosuk Lee-Makiyama, director of the European Center for International Political Economy, adding that the parallels between Australia’s deal with Hong Kong and TTIP had always been overstated.

“Philip Morris was only able to sue Australia because of a technicality,” Lee-Makiyama said. “In free-trade agreements you always include an exception for public health, which Australia forgot to do. This entire case was the result of a drafting error by Australian negotiators.”

However, anti-tobacco campaigners in Brussels say the decision by the Permanent Court of Arbitration in Singapore does nothing for TTIP’s credibility.

“The arbitration court declined to hear the case on the grounds that it was not competent, as Philip Morris had shifted its commercial identity during the course of the case,” said Catherine Hartmann, vice president of the European Public Health Alliance.

“There is nothing in the outcomes of the arbitration attempt that validates or questions plain packaging in Australia or anywhere else,” Hartmann said.

Tobacco wars

The clash between Philip Morris and the Australian federal government began in 2011, when health authorities in Canberra drafted legislation to remove all branding from tobacco packets. The laws, designed to discourage people from taking up smoking, were implemented at the end of 2012.

The legislation was a world first and Philip Morris Asia Limited, a Hong Kong-based subsidiary of the tobacco company, launched a legal challenge. The company argued that the laws “forced removal of trademarks and other valuable intellectual property.”

The legal action was possible because the agreement between Australia and Hong Kong contained an “investor-state dispute settlement” provision (ISDS), an arbitration mechanism which enables investors to take legal action if they feel their interests have been harmed by government policy.

In 2012 the High Court of Australia, the country’s supreme court, found against Philip Morris, arguing the plain packaging legislation was not in violation of the constitution. The tobacco company then took its concerns to the international arbitrator, which effectively ruled against Philip Morris.

Yet Nina Renshaw, the secretary general of the European Public Health Alliance, is adamant the risks of industry using ISDS to challenge health reforms remain.

“The inclusion of an ISDS ... in an EU agreement could raise the likelihood of such cases being brought against all kinds of public interest and health protecting policies in the future,” Renshaw said.

In an unusual alliance, Philip Morris agreed with anti-tobacco campaigners. Company vice president Marc Firestone argued that the Australian government’s win was “entirely procedural” with no bearing on either the merits of plain packaging legislation or the ISDS itself.

However, Lee-Makiyama said opposition in Europe to both ISDS and TTIP is based not on fact but misconceptions about American corporate culture.

“This is coming from business interests that are concerned with American market share and from outdated ideas of multinational corporations which may have been OK in the 1920s but are meaningless today,” Lee-Makiyama said.

“Opposition to the ISDS in Europe is also coming from national governments like Germany, which do not want a legal mechanism to stop them discriminating against foreign investors,” he said.

Packaging problems

The controversy has fed into a broader lobbying clash between the tobacco industry and anti-smoking campaigners in Europe, where plain packaging legislation is being hotly contested.

The EU’s revised Tobacco Products Directive, which entered into force in 2014, steered clear of plain packaging reforms after the European Commission came under pressure from the tobacco industry. However, the directive allowed EU member countries to adopt national plain packaging laws.

A number of EU governments have now done so. In December 2015, France passed tobacco legislation and will start to introduce plain packaging in May 2016.

However, the tobacco industry is maintaining its opposition to such laws. Australia’s legislation is also being challenged by a number of tobacco-producing countries at the World Trade Organization.

Meanwhile, on the other side of the Atlantic the EU’s soul-searching over the implications of an ISDS is being observed with interest by those opposing the inclusion of an arbitration mechanism in TTIP on the grounds that it is unnecessary.

“A company entering into a contract with a foreign government can accomplish the same objectives as an ISDS simply by insisting on including an arbitration clause,” said Dan Pearson from the Washington-based Cato Institute, a libertarian think-tank.

“Business associations in the U.S. would support TTIP without an ISDS because the reality is that they don’t need it,” Pearson said. “It mystifies me that the Obama administration has placed so much emphasis on an ISDS.”