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Many of the concerns about the implications of international investment law for WHO FCTC...
implementation spring from two investor-state arbitrations brought by Philip Morris companies against tobacco packaging and labelling measures implemented by Australia and Uruguay respectively. Both of Philip Morris' claims were dismissed by the relevant investment tribunals. The sections below provide a brief summary of the two cases and links to further reading on the topic.

### 2. Philip Morris v. Uruguay

In 2010, three Philip Morris entities challenged two packaging and labelling requirements implemented by Uruguay: a requirement that all cigarette packages have large graphic health warnings covering 80% of the front and back external surfaces (the '80/80 requirement'); and a requirement that each brand family of cigarettes (e.g. Marlboro) contain only one brand variant (e.g. Marlboro Red) so as to prevent the use of comparative packaging design within a brand family to suggest that particular variants were 'healthier' than others ('single presentation requirement'). The claims were brought under a 1988 bilateral investment treaty between Uruguay and Switzerland. Philip Morris argued that these measures expropriated its intellectual property and denied it fair and equitable treatment, among a number of other claims.

In July 2016, the Tribunal constituted to hear the dispute rejected all of Philip Morris' arguments, finding in Uruguay's favour on all grounds. It affirmed that Uruguay's measures were not an expropriation, because they did not substantially deprive Philip Morris of its investment in its Uruguayan business, and because the measures fell within Uruguay's sovereign right to regulate for the public interest, including public health. It also ruled that the measures were not a breach of the fair and equitable treatment obligation because they were good faith, non-discriminatory, and evidence-based measures for the implementation of the WHO FCTC and its guidelines. For further reading, see our paper The Award on the merits in Philip Morris v Uruguay: implications for WHO FCTC implementation and our related post WHO FCTC implementation after Philip Morris v Uruguay: five key messages from the Award.

### 3. Philip Morris Asia v. Australia

In 2011, Philip Morris Asia challenged Australia's plain (or standardized) packaging measures under a 1993 bilateral investment treaty between Australia and Hong Kong. The measures require all tobacco products to be sold in standardized drab dark brown packaging without images, colours, scents, fonts or other branding, other than a brand and variant name, manufacturer information, and required health warnings and consumer disclosures in a standard size and font. The law also requires large graphic health warnings of 75% of the front and 90% of the back of the package. Prior to bringing this challenge, after plain packaging had been announced but before it had been enacted, Philip Morris’
Swiss headquarters had transferred ownership of its Australian business to its Hong Kong regional headquarters. There is no investment treaty between Switzerland and Australia, but there is an investment treaty between Australia and Hong Kong.

The Tribunal found that this restructure and the subsequent claim by Philip Morris Asia was an abuse of right, because the main (if not sole) purpose of restructuring the ownership of the Australian business was to take advantage of the treaty. For this reason, the Tribunal found that it did not have jurisdiction over the case. In a later decision, the Tribunal ordered Philip Morris Asia to reimburse Australia's costs for defending the case. For more on this decision, see our posts Investment tribunal dismisses Philip Morris Asia’s challenge to Australia’s plain packaging and Philip Morris ordered to pay Australia for costs of defending tobacco plain packaging investment challenge

20 default 4. Threats of litigation in other countries line Threats
While the Philip Morris investor-state arbitrations are the only two cases where the tobacco industry has brought an investment case against a measure implementing the WHO FCTC, the industry has also threatened other countries implementing measures with litigation. It is fairly common, for example, for the tobacco industry to send correspondence to governments claiming that a measure will ‘expropriate’ its intellectual property, or that it will be ‘arbitrary and unreasonable’, or that it will violate unspecified international investment obligations.

By understanding basic principles of international investment law, states can better evaluate and respond to threats by the industry, which are invariably unfounded.

The following pages will go through basic international investment law concepts in more detail, using the Uruguay and Australia cases to illustrate key principles.