When the international investment law and environmental law are in crossroads: how to protect investors and environment in tobacco control case

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Abstract. The focus of the research is to address question on the problem of how the chasm between international investment law and environmental law can be filled in, especially in tobacco control through enacting the Tobacco Plain Packaging Act 2011 adopted by Australia. Australia, as the first country to enact the Tobacco Plain Packaging Act 2011, was sued by many cigarette companies. They consider Australia does not protect their interests as investors. While one of the reasons why Australia enforces these rules is to protect the environment, in this matter is public health of the society, and both are closely correlate with climate change. From this case, there is difference views between international investment law and environmental law. On the one hand, the principles of international investment law require protection of foreign investors, while the principles of environmental law require the states to provide an adequate protection on its environment. This research is a normative legal research. Data is secondary ones consisting of primary, secondary, and tertiary legal materials. Data collection techniques uses library research, while data analysis technique uses legal interpretation. The result of this study show that it is needed to establish a new approach in balancing between economic interest and public health one that can contribute to the climate change through drafting provision relating to the environmental issues in bilateral investment treaty (BIT).

1. Introduction

Many people are paying attention to the health effects of tobacco use. On the contrary, only a few people have concerns about the impact of tobacco on the environment, specifically related to the climate change. All stages of tobacco production contribute to global climate change.

Based on the result of the World Health Organization (WHO) research, by 2030, there will be an increase in number of people who dying caused by tobacco by three million, from five million this year to eight million [1]. This issue become one of the reasons why the international law is used as an instrument to against the smoking through global tobacco control movement [2]. Many countries have become a party in the World Health Organization Framework Convention on Tobacco Control (FCTC) in order to encouraging public awareness on the danger of smoking [3], and promoting global public health [4].

The first country which adopted the FCTC was Australia. On November 11, 2011, the Tobacco Plain Packaging Act (TPP Act) was enacted by the Parliament of Australia [5]. The TPP Act requires the removal of colours, patterns, and features from packaging whereas permitting the trademark to
be showed in a standard font [5]. The Act also requires all cigarettes to be sale in ill-favoured olive-green packs. Health cautions in pictures of diseases due to smoking should be displayed 75 percent of the packaging space. Due to enact this Act, Australia sued by many tobacco companies. One of them is Philip Morris Asia Limited (PM Asia) which taken a suit against Australia in 2012, arguing that TPP Act reflected a taking-over of its investment in Australia [6]. The PM of Asia claims that the new rules regarding deleting logos and trademarks lead their cigarettes are not easily to be recognized by consumers because cigarette trademarks look similar to other competitors [7]. In 2015, this claim was unanimously dismissed.

The issue becomes interesting because a gap arises between international investment law and environmental law. The principles of international investment law require legal protection for investors who invest in a host country, on the contrary, the state has an authority to provide the healthy environment to its people. The connection with climate change issue in this case is that a healthy environment that is not polluted by cigarette smoke can prevent people from environmental risks to health. One concrete example is prevailing the TPP Act 2011 by Australia. This paper aims to address the issue on how to bridge the gap.

2. Review of the literatures

2.1. The framework convention on tobacco control and the tobacco plain packaging plain act 2011

The WHO has stressed that tobacco is a leading cause of death, illness and impoverishment [8]. In facing the threat of the global tobacco epidemic, in May 2003, the member states of the WHO adopted an international tobacco control agreement, namely the Framework Convention on Tobacco Control (FCTC) [9]. The FCTC is the first international agreement that has the legally binding nature stipulated by WHO after 55 years in its history which has never draft a legally binding international agreement [10], as the WHO had never adopted convention before, only non-hard law instruments as recommendations [3].

The FCTC has the important aim “to protect present and future generations from the health, social, and economic consequences of tobacco use” [3]. The range of this Convention encompasses a variety of matters including rules regarding reducing tobacco demand and supply. These rules include pricing and taxes, packaging, labels, education, and restrictions on cigarette advertising. Article 11.1(a) of FCTC gives mandate to the Parties to take “effective measures to ensure that…tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards, or emission…including any term, descriptor, trademark, figurative, or any other sign that directly or indirectly create the false impression that a particular tobacco product is less harmful than other tobacco products” [11]. Moreover, the State parties are requisite to “apply restrictions on all tobacco advertising, promotion, and sponsorship” [3]. The FCTC encourages parties to “implement measures beyond those required by the Convention” as well [11].

Regarding to Article 11.1(a), plain packaging is not regulated directly within the FCTC. Thus, FCTC adopted the Guideline to Article 11 (Packaging and Labelling of Tobacco Products) and Article 13 (Tobacco Advertising, Promotion, and Sponsorship) of the FCTC [12]. The Guidelines suggest to the State parties “to eliminate the effects of advertising or promotion on packaging”, and that “packaging…should carry on advertising or promotion, including design features that make products attractive”. Certainly, since consumers are fascinated with the colors and nice-looking packaging, plain pack could, conversely, “reduce the flair and appeal associated with smoking” [5].

Many countries regulate national legislation that reflect FCTC predominance. Australia, a pioneer country in public health, introduced Tobacco Plain Packaging Act 2011 (hereinafter TPP Act) [5]. The TPP Act received Royal Assent on December 1, 2011, and entered into forced on December 1, 2012 [13]. The Act bans logos, trademark, colors, and advertising text from packaging of cigarette such that “brand names will appear in a standardized font on olive-colored packet [14], and health warnings with graphic images of the harmful effects of smoking will cover 75% of the front of
any packaging, and 90% of the back” [15]. The prominent character of the glace packaging is astonishing health caution, [16] and the sole thing left as a concession for cigarette corporations is the brand name and the variants that are placed at the bottom of the package [24]. Prohibition is also imposed for the use of trademarks or any other distinctive brand that actually has function as a differentiator [16].

2.2. The understanding of international investment law and its relevance with the implementation of FCTC

International investment law is specific regime of international law that set relation between states and foreign investors. With no multilateral treaty, international customary law is the former source of international investment law [17]. The obligations of international investment come from International Investment Agreement (IIA), including both bilateral investment Treaty (BIT) and Preferential Trade Agreement (PTA) [18]. Nowadays, there are more than 3,200 BITs and investment chapters in PTA. These treaties are supplemented by a number of investment contracts between governments and foreign investors, as well as domestic investment legislation [19].

International investment law takes into consideration the rights of the investors and market access in the host state [18]. IIAs aim to encourage foreign investment in order to drive economic development in host state through establishing the new industries, enterprises, and employment opportunity [20]. IIAs provide protections to foreign investors and their investments, including some protections that go beyond those available to domestic investors [20]. These may include obligations on the home state to not expropriate property [21], not to discriminate against the investor [22], and to put on “fair and equitable” service to the investor [23].

Obligations under international investment law apply to a range of state action. They may have implications for the adoption of such measures to implement the public health relation like FCTC. In recent years, tobacco companies have used international investment law arguments to prevent, delay or weaken the implementation of the FCTC. These include launching litigation against tobacco packaging and labelling measures implemented by Australia as well as threats to bring claims against other countries.

3. Discussion

Behind the reasons for willing to improve public health, the implementation of the TPP Act by Australia raises various legal issues. In some BITs, there are often a conflict between the rights of investors to support foreign direct investor and enhance development with tobacco control policies in host country [24]. The conflict takes place when tobacco control measures taken by the host state violate the trademark protection rules of tobacco companies that have been regulated in BITs or other international treaties [24]. In addition, tobacco companies as investors can directly challenge tobacco control policy of the host state and seek compensation for losses suffered due to this policy because foreign investors have direct access to investment arbitration as stipulated in the investment agreement [24]. In the case of tobacco control in Australia, PM Asia as investor submitted the issue of violation of trademarks protection to the investor-state-arbitration forum on the grounds that the TPP Act violated the provisions of the 1993 Bilateral Trade Pact between Australia and Hong Kong [14]. With the enactment of the TPP Act, PM Asia requests compensation for the policy of limitation the employment of trademarks as a plain packaging result. This is based on the reason that BITs protect trademarks as intellectual property [24].

In particular, PM Asia argue that trademarks are the company’s most valuable assets. By imposing a TPP Act that prohibits the use of brand logos and other distinguishing characters on cigarette packaging, Australia has violated the trademark [12]. As an impact of the ban of trademark on packaging, tobacco corporations stand to lose a “powerful means of communication between them and consumers” and fash “what they see as a serious curtailment of their trade mark, trade-dress and goodwill-related rights could hit hard their flourishing businesses and decrease cigarette sales” [25]. In contrast, Australian Government expresses that state should be able to use the “flexibilities within
international trade agreement (investment agreement) to protect public health” [12] considering that deaths from tobacco-related diseases can be prevented in the long term through the application of TPP [25]. In this context, the TRIPS Agreement should be read to “allow Member broad discretion in designing their policy space to respond to the urgent health concern”. It means that TPP Act is a reasonable limitation on trademarks as a tools of controlling tobacco which cause the disease [26]. Moreover, it does not only aim to protect private property, but more than that, intellectual property law, especially trademark law, also promotes broader public concerns in allocating the true information to consumers, and in this context, it is also along with the public welfare justification behind the TPP Act [13].

Finally, various approaches are possible to fill in the different views between international investment law and environment one. Firstly, to adjust the content of IIA’s from an approach that mere goals to protect the monetary importance of investors towards an approach that also assures public interests including environmental concerns. Because many countries want to attract investors, they then offer disproportionate protection to investor assets. In this context, environmental issues become an issue that is often considered less important by investors than protection of their assets. Even though now, global public awareness is increasingly related to protecting the environment by providing space to host state to regulate national policies on the environment, but there is no uniform understanding of what needs to be done to align investor protection by maintaining a healthy environment in global scale. Secondly, it is necessary to improve the dispute resolution mechanism in the investment sector. One aspect that should be improved is in the selection of arbitrators. Arbitrators chosen by the parties should not only have expertise in investment law, but also have an excellent understanding in environmental law. This is very urgent since an arbitrator should be able to make decisions that can balance environmental and investment interests. There are two point of views regarding to this context. The “pro-investment view” requires that issues related to the environment excluded from the regulations of investment protection. On the other hand, the “pro-environment view” recommends that investment protection regulation needs to include in setting environmental matters at a national legislation. The solutions need to be found in a different way of treaty making and in dispute resolution.

4. Conclusion

In order to fulfil the gap between international investment law and environmental law, in this case regarding to the tobacco control, it is needed the new approach in drafting international investment treaty like BIT by the State. The State needs to conduct approach between economic interests and public health that can contribute to decrease of climate change through preventive measures as clauses in bilateral investment treaty. This new approach deals with the issue on how balancing between investment and environmental interest.

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