

Philip Morris v Uruguay

Findings from the International Arbitration Tribunal

On July 8, 2016, an international arbitration tribunal gave its ruling on PMI's legal claim against Uruguay that two tobacco control measures violated the terms of a Bilateral Investment Treaty (BIT) between Uruguay and Switzerland. The two "Challenged Measures" required (1) large graphic health warnings covering 80% of the front and back of cigarette packets; and (2) that each cigarette brand be limited to just a single variant or brand type - known as the Single Presentation Requirement (SPR). Philip Morris sought an order for the repeal of the Challenged Measures and for compensation in the region of \$25 million. The Tribunal dismissed all PMI's claims and awarded Uruguay \$7 million for its legal costs.

THE TRIBUNAL'S KEY FINDINGS

This highly anticipated award addressed a number of fundamental legal issues concerning the balance between investor rights and the space available for states' to regulate for public health. The ruling sets an extremely high bar for any foreign investor seeking to bring an investment arbitration challenge against a non-discriminatory public health measure that has a legitimate objective and that has been taken in good faith. This paper sets out key passages from the ruling:

- "For a country with limited technical and economic resources, such as Uruguay, adherence to the FCTC and involvement in the process of scientific and technical cooperation and reporting and of exchange of information represented an important if not indispensable means for acquiring the scientific knowledge and market experience needed for the proper implementation of its obligations under the FCTC..."[¶393] "in these circumstances there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures" [¶396]
- The tribunal stated that it can be difficult or impossible to show the individual impact of a specific measure especially where it is part of a larger tobacco control scheme but that "... the fact remains that the incidence of smoking in Uruguay has declined, notably among young smokers, and that these were public health measures which were directed to this end and were capable of contributing to its achievement. In the tribunal's view, that is sufficient for the purposes of defeating a claim under Article 5(1) of the BIT." [¶306]
- "[It does not matter] whether or not the SPR was effective in addressing public perceptions about tobacco safety and whether or not the companies were seeking, or had in the past sought, to mislead the public on the point, it is sufficient in light of the applicable standard to hold that the SPR was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith." [¶409]
- "The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health...As held by another investment Tribunal "the sole inquiry for the Tribunal ... is whether or not there was a manifest lack of reasons for the legislation.""[¶399]
- "In the Tribunal's view, the adoption of the Challenged Measures by Uruguay was a valid

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exercise of the State's police powers" [¶287] "Protecting public health has long since been recognized as an essential manifestation of the State's police powers" [¶291]

- "It should be stressed that the SPR and the 80/80 Regulation have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health" [¶302]
- "The Tribunal concludes that under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power"[¶271]
- "Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed ... On the contrary, in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products. Nor is it a valid objection to a regulation that it breaks new ground." [¶429 - 430]
- "...arbitral tribunals should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving the judicial architecture of the State." [¶528] "For a denial of justice to exist under international law there must be 'clear evidence of... an outrageous failure of the judicial system' or a demonstration of 'systemic injustice'..." [¶500]

The arbitrator appointed by PMI, Gary Born, dissented on two issues - (1) the claim of denial of justice concerning the procedures of the Uruguayan courts; and (2) that the SPR was not required or contemplated by the FCTC and that on the factual background and evidentiary record, the SPR was manifestly arbitrary and disproportionate.

However, in his dissenting ruling he states "I agree with almost all of the conclusions in the Tribunal's Award." Therefore, on the fundamental principles that impact upon a state's ability to adopt public health measures the tribunal gave a unanimous ruling. He also agreed that 80% health warnings did not breach any of the terms of the BIT. Gary born disagreed with the other two arbitrators on the application of those principles to the SPR rather than on the formulation of the principles themselves. This emphasizes that public health measures will be more robust against legal challenge if governments make as strong a record as possible as to the justifying and supporting evidence and rationale.