Philip Morris v Uruguay
Findings from the International Arbitration Tribunal

In February 2010, three subsidiary companies of Philip Morris International (PMI)[1], initiated an international law suit[2] at the International Centre for the Settlement of Investment Disputes (ICSID), an arbitration panel of the World Bank. PMI alleged that two of Uruguay's tobacco control laws violated a Bilateral Investment Treaty (BIT) with Switzerland[3]. PMI brought the claim after legal challenges in Uruguay's domestic courts by the Philip Morris subsidiaries had failed. The panel of three arbitrators published their **ruling on July 8, 2016**, dismissing all PMI's claims and awarding Uruguay its legal costs ($7million).

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 (eliminating brand families to address evidence that some variants can mislead consumers and falsely imply some cigarettes are less harmful than others) - known as the Single Presentation Requirement (SPR)[4].

The Claims: BITs are agreements between two states that are intended to encourage Foreign Direct Investment by providing certain protections and guarantees to investors from the other state. These treaties allow foreign investors to instigate international arbitration claims challenging government regulations. PMI alleged that the 80% health warnings left insufficient room on the packs for it to use its trademarks and branding as they were intended, and the SPR meant it could not market some of its brands such as Marlboro Gold. PMI therefore alleged that Uruguay had breached the terms of the BIT because:

1. the Challenged Measures *Expropriated* the property rights in PMI's trademarks without compensation;
2. the Challenged Measures were arbitrary because they were not supported by evidence to show they would work and so did not accord PMI with *Fair and Equitable Treatment*;
3. the Challenged Measures did not meet PMI's *Legitimate Expectations* of a stable regulatory environment or to be able to use their brand assets to make a profit;
4. the Uruguayan courts had not dealt properly or fairly with PMI's domestic legal challenges such that there was a *Denial of Justice.*

Philip Morris sought an order for the repeal of the Challenged Measures and for compensation in the region of $25 million.

THE TRIBUNAL'S 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. While there is no doctrine of binding precedent in international arbitration law, the development of an investment treaty case law and jurisprudence means that the wider value of each award can be very significant[5]. This ruling highlighted the importance of the WHO Framework Convention on Tobacco Control (FCTC) in setting tobacco control objectives and establishing the evidence base

for measures, and confirmed that states therefore need not recreate local evidence. It addressed the wide 'margin of appreciation' and deference provided to sovereign states in adopting measures or decisions concerning public health. The tribunal also identified that a state need not prove a direct causal link between the measure and any observed public health outcomes – rather that it was sufficient that measures are an attempt to address a public health concern and taken in good faith.

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.

Where the ruling is quoted directly, the paragraph number is given in square brackets [¶]. Emphasis is added with underlining.

The legal significance of the WHO FCTC (relevant for all tobacco control measures)

The tribunal granted leave for the WHO and FCTC Secretariat, and for the Pan American Health Organisation PAHO, to file *amicus curiae* briefs. The WHO/FCTC Secretariat brief stated that:

"*The action taken by Uruguay was taken in light of a substantial body of evidence that large graphic health warnings are an effective means of informing consumers of the risks associated with tobacco consumption and of discouraging tobacco consumption. There is also a substantial body of evidence [sic] that prohibiting brand variants is an effective means of preventing misleading branding of tobacco products*" [¶38]

The PAHO amicus brief stated that:

"*Uruguay's tobacco control measures are a reasonable and responsible response to the deceptive advertising, marketing and promotion strategies employed by the tobacco industry, they are evidence based, and they have proven effective in reducing tobacco consumption*."[¶43]

The tribunal found that the Challenged Measures were based on and were in furtherance of the obligations and recommendations of the FCTC and this was key in its determination that the Challenged Measures were not arbitrary (and so did not violate the *Fair and Equitable Treatment* clause of the BIT).

- The tribunal noted that Law 18,256 on Tobacco Control[6], under which the Challenged Measures were made, expressly states that it is adopted in accordance with Uruguay's obligations under the FCTC. The tribunal went on to say that "It should be stressed that the [Challenged Measures] have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health" [¶302]
- The Tribunal stated that "For a country with limited technical and economic resources, such as Uruguay, adhesion 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]
- And, highlighted that the FCTC is an evidence based treaty such that "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]

State's Rights to Regulate for public health, the evidence required and the margin of appreciation (relevant for all public health measures)

The 'right to regulate' in the public interest and the scope or flexibility given to states under the international investment legal regime is a contentious issue. This tribunal gave firm determinations that states are afforded a wide 'margin of appreciation' and are to be given great deference in relation to public health measures; and commented on what states are required to 'prove' in relation to public health measures.

- "It is true that it is difficult and may be impossible to demonstrate the individual impact of measures such as the SPR and the 80/80 Regulation in isolation. Motivational research in relation to tobacco consumption is difficult to carry out (as recognized by the expert witnesses on both sides). Moreover, the Challenged Measures were introduced as part of a larger scheme of tobacco control, the different components of which it is difficult to disentangle. But 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]
- "The remark of a general character relates to the "margin of appreciation" to be recognized to regulatory authorities when making public policy determinations. According to the Claimants, the "margin of appreciation" has no application in the present proceeding as being a concept applied by the [European Convention on Human Rights] ECHR for interpreting the specific language of Article 1 of the Protocol to the Convention, no analogous provision being contained in the BIT. The Tribunal agrees with the Respondent that the "margin of appreciation" is not limited to the context of the ECHR but "applies equally to claims arising under BITs," at least in contexts such as public health" [¶398]
- "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. In such cases respect is due to the "discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors" 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 end the Tribunal does not believe that it is necessary to decide whether the SPR actually had the effects that were intended by the State, what matters being rather whether it was a "reasonable" measure when it was adopted. 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]

Expropriation of property (relevant for plain packaging)

The tribunal dismissed the claim for expropriation for two reasons. The first was that the measures did not have the effect of substantially depriving the claimants of the value of their investment *overall* (because they were able to continue their business of selling tobacco in Uruguay) – and additionally because the regulations were a valid exercise of the state's right to regulate in the public good (police powers).

Value of the Claimant's property

- "The Tribunal believes that in order to determine whether the SPR had an expropriatory character in this case, Abel's business is to be considered as a whole since the measures affected its activities in their entirety." [¶283]

- "In the Tribunal's view, in respect of a claim based on indirect expropriation, as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation. As confirmed by investment treaty decisions, a partial loss of the profits that the investment would have yielded absent the measure does not confer an expropriatory character on the measure." [¶286]

Use of 'police powers' (or the State's right to regulate in the public interest)

- "In the Tribunal's view, the adoption of the Challenged Measures by Uruguay was a valid 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]

Tobacco companies' rights to *use* their trademarks (relevant for plain packaging)

In their legal challenges to strict packaging laws, including large health warnings, the SPR and plain packaging, the tobacco companies argue that registration of their trademarks provides them with a right to use those trademarks, even where that use is otherwise contrary to the public interest. This argument was put forward, and dismissed, in the UK High Court Challenge to plain packaging[7], and is part of the case against Australia's plain packaging in the World Trade Organisation dispute[8].

- "The Tribunal notes that there is nothing in the Paris Convention[9] that states expressly that a mark gives a positive right to use"[¶260] "nowhere does the TRIPS Agreement[10], assuming its applicability, provide for a right to use"[¶262] "The Claimants also argue that a trademark is a property right under Uruguayan law which thus accords a right to use. Again, nothing in their argument supports the conclusion that a trademark grants an inalienable right to use the mark."[¶266]

- "Ownership of a trademark does, in certain circumstances, grant a right to use it. It is a right of use that exists vis-à-vis other persons, an exclusive right, but a relative one. It is not

an absolute right to use that can be asserted against the State…Nothing in any of the legal sources cited by the Claimants supports the conclusion that a trademark amounts to an absolute, inalienable right to use that is somehow protected or guaranteed against any regulation that might limit or restrict its use. Moreover, as the Respondent has pointed out, this is not the first time that the tobacco industry has been regulated in such a way as to impinge on the use of trademarks"[¶267-268]

- "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]

Legitimate expectation of a stable regulatory environment (relevant for all public health measures)

Part of PMI's claim that it was not afforded *Fair and Equitable Treatment* was on the basis that they had a legitimate expectation that the regulatory environment would not drastically change, and in particular, that if they were permitted to lawfully register their trademarks, then they could expect to use them for the purpose they were registered.

- "Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed"[¶429]

- "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."[¶430]

Denial of Justice

PMI subsidiaries brought a number of legal challenges against the Challenged Measures in Uruguay's domestic courts, all of which failed. In the arbitration case, PMI claimed that two different courts gave contradictory reasons for the constitutionality of the 80% requirement. It also claimed that the court considering PMIs claim against the SPR relied too heavily on a separate ruling that had dismissed a claim by British American Tobacco against the same measure. The tribunal held that the domestic rulings "may appear unusual, even surprising", but that:

- "…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]

- "In general, when considering procedural improprieties arbitral tribunals have adopted a high threshold for a denial of justice. 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]

Dissenting opinion

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 in Uruguay, the SPR was manifestly arbitrary and disproportionate and so did not accord *Fair and Equitable Treatment*. The dissenting arbitrator took the view that "The documentary evidence is clear in demonstrating that no meaningful internal discussion or consideration of the single presentation requirement occurred within the Ministry of Public Health (or elsewhere in the Uruguayan government)."

However, in his dissenting ruling he states "I agree with almost all of the conclusions in the Tribunal's Award." He agreed that the 80% health warnings did not breach any of the terms of the BIT. He also agreed on the fundamental legal principles that apply to a state's ability to adopt public health measures. 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. While his view did not carry the day, it 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.

Use of this document:

This document is intended to provide a short summary of some of the key issues that have wider significance under international law to tobacco control or public health measures adopted by sovereign governments and to signpost the parts of the long ruling that could be looked at in more detail if required. It is not intended as a definitive legal analysis nor to provide a comprehensive summary of the ruling.

References

[1] 1. Philip Morris Products S.A. (Philip Morris International's Swiss affiliate), 2. Abal Hermanos S.A. (a Uruguayan tobacco company) 3. FTR Holdings S.A. (a Swiss conglomerate that owns Abal Hermanos S.A. - replaced in the claim by Philip Morris Brand Sarl)

[2] Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7). The request for arbitration, an expert opinion, the ruling on jurisdiction and procedural orders can be found here: http://www.italaw.com/cases/460

[3] The 1991 Switzerland – Uruguay Bilateral Agreement on the Promotion and Protection of Foreign Investments. A copy can be obtained here - http://investmentpolicyhub.unctad.org/Download/TreatyFile/3121

[4] Ministry of Public Health Ordinance 514 dated 18 August 2008

[5] Precedent in Investment Treaty Arbitration *A Citation Analysis of a Developing Jurisprudence* Jeffery P. Commission, Journal of International Arbitration 24(2) : 129–158, 2007.

[6] Law 18,256 dated 6 Mar. 2008 (C-33)

[7] R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin). https://www.judiciary.gov.uk/wp-content/uploads/2016/05/bat-v-doh.judgment.pdf

[8] The Australian government's summary of the dispute is here: http://dfat.gov.au/international-relations/international-organisations/wto/wto-dispute-settlement/Pages/wto-disputes-tobacco-plain-packaging.aspx

[9] The Paris Convention for the Protection of Industrial Property of 1883 was one of the first intellectual property treaties and remains in force.

[10] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property regulation as applied to nationals of other WTO Members.