The Award on the merits in *Philip Morris v Uruguay*: implications for WHO FCTC implementation

1. Introduction

On 8 July 2016 the arbitral tribunal constituted to hear Philip Morris' (PM) challenge to Uruguay's tobacco packaging and labelling measures under a 1988 bilateral investment treaty between Switzerland and Uruguay handed down its Award, dismissing all of PM's claims.

The Award of the Tribunal strongly affirms the right of states to regulate in the public interest, including for public health. It accords significant weight to the WHO Framework Convention on Tobacco Control (WHO FCTC) as a reflection of a state's duty and right to protect public health, as a source of evidence-based best practices, and as a means of assisting developing states in particular to implement effective tobacco control measures. The Award is part of a growing body of jurisprudence rejecting arguments made by tobacco companies to prevent, delay or weaken implementation of the WHO FCTC, which we collate and analyse on our WHO FCTC Knowledge Hub website.

The *PM v Uruguay* Award finds that Uruguay's laws did not 'expropriate' PM's intellectual property or constitute a breach of Uruguay's obligation to provide PM with fair and equitable treatment under the Switzerland-Uruguay BIT. The tobacco industry routinely argues that tobacco control measures breach such obligations, both in the international investment law context and in analogous international, regional and domestic law contexts. The *PM v Uruguay* decision rejects these arguments in the international investment law context, and contains much reasoning that will be relevant to other legal challenges both under investment law and in other fora.

We have prepared this paper to help draw out those aspects of the decision that will be most relevant to WHO FCTC implementation in other jurisdictions, as well as those that provide lessons on the relationship between international investment law and public health more generally. In addition to summarising the Award and key points from the dispute's procedural history, we annotate excerpts from the judgment which we think illustrate important principles for other disputes of this nature, both in the application of substantive investment standards to public health regulations, and in the way in which the tribunal conceived and approached its task.

This paper will focus on the Tribunal's statements regarding expropriation, fair and equitable treatment, and intellectual property, which have the widest applicability to other investment claims concerning regulatory measures for public health. It will also examine cross-cutting themes of interest for other public health disputes, including the appropriate level of deference to be accorded to sovereign regulatory judgments, the treatment of evidence, the status of the WHO FCTC and its Guidelines for Implementation, the importance of public health as a normative value, and the role of amicus curiae briefs.

2. Background

PM, a company headquartered in Switzerland, and its Uruguayan subsidiary, Abal Hermanos S.A. ('Abal'),[1] challenged two tobacco control packaging and labelling requirements implemented by Uruguay in 2009 and 2008 respectively:

- A requirement for large graphic health warnings covering 80% of the front and back external surfaces of cigarette packages (the '80/80 Regulation'), increased from the previous requirement of 50% of the front and back external surfaces (Award, paras 121-123).
- A requirement that cigarette brands have a single presentation, meaning that tobacco manufacturers may not produce more than one variant of a single brand family of cigarettes (the 'single presentation requirement'). The single presentation requirement is aimed at preventing the 'false impression that a particular tobacco product is less harmful than other tobacco products' in line with the obligation in WHO FCTC art 11.1(a), by preventing the use of colour variations within a brand family to suggest that certain cigarettes are healthier than others (e.g. blue or white packaging for 'mild' or 'light' cigarettes) (Award, paras 112, 403-404).

The claimants alleged that Uruguay had breached the Switzerland-Uruguay BIT, negatively affecting PM's investments in Abal. They claimed that by implementing the two measures, Uruguay had:

- Indirectly expropriated PM's investment, by reducing the space available for its trademarks on cigarette packaging and by preventing the sale of 7 out of 13 of Abal's brand variants.
- Failed to provide PM with fair and equitable treatment (FET), because the measures were arbitrary and because PM had a legitimate expectation that its intellectual property would be respected and/or that Uruguay would maintain a stable legal system.
- Failed to protect PM's investment and impaired the use and enjoyment of the investment by unreasonable or discriminatory measures.
- Did not guarantee the observance of commitments to investors, because Uruguay had not respected 'commitments' that purportedly attached to PM's trademark rights.
- Had denied justice to PM due to the treatment of PM's domestic challenge to the legislation in Uruguayan courts. PM had brought a constitutional challenge in the Supreme Court of Justice and an administrative challenge in the Tribunal de lo Contencioso Administrativo, both of which had upheld the measures, but for differing reasons.

The relevant provisions of the BIT provide as follows:

> **'Article 2**

[1] Note that several different PM entities in Switzerland were parties to the dispute; for simplicity, this paper refers to all of the Swiss-headquartered entities collectively as Philip Morris or PM.

Promotion, admission

(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its law. The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.

…

Article 3

Protection and treatment of investments

(1) Each Contracting Party shall protect within its territory investments made in accordance with its legislation by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.

(2) Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.

…

Article 5

Dispossession, compensation

(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto.

…

Article 11

Observance of Commitments

Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.'

3. The proceedings

A. Appointment of arbitrators

PM issued its notice of arbitration on 19 February 2010, and the proceedings were registered by the International Centre for Settlement of Investment Disputes (ICSID) on 26 March 2010. The Tribunal was constituted on 15 March 2011, consisting of Gary B. Born, the arbitrator appointed by PM; Professor (now Judge) James R. Crawford, the arbitrator appointed by Uruguay; and Professor Piero Bernardini as the president of the Tribunal, appointed by the Secretary-General of ICSID.

B. Jurisdiction

On 24 September 2011, Uruguay challenged the jurisdiction of the Tribunal, arguing that PM had not satisfied the jurisdictional requirements of the Switzerland – Uruguay BIT because:

- It had not met the treaty's requirement that it negotiate for 6 months and litigate in domestic courts for 18 months prior to bringing a claim;
- Article 2 of the BIT placed health measures outside the scope of the BIT; and
- The relevant activities did not constitute an investment under the terms of the ICSID Convention, primarily on grounds that they did not, taken as a whole, make an economic contribution to the country.

On 2 July 2013, the Tribunal issued a decision dismissing Uruguay's jurisdictional objections. The Tribunal held that:

- Philip Morris had met the jurisdictional requirements to negotiate and litigate through its communications with the Uruguayan Government and its domestic challenges to the measures.
- Article 2 applied only to the pre-establishment phase of an investment and not to investments that have already been admitted.
- There is no specific requirement that an investment contribute to a party's economic development for it to constitute an 'investment' for the purposes of the Tribunal's jurisdiction.

The case proceeded to the merits.

C. Amicus curiae submissions

In February 2015, the Tribunal granted permission to the World Health Organization and the Secretariat to the WHO FCTC to file a joint amicus curiae brief in support of Uruguay, providing evidence in support of Uruguay's measures and information about the WHO FCTC. In March 2015, the Tribunal granted permission to the Pan-American Health Organization to file an amicus curiae brief, focusing on tobacco control in the region of the Americas.

In admitting the amicus briefs, the Tribunal stated:

> "The Tribunal believes that the Submission may be beneficial to its decision-making process in this case considering the contribution of the particular knowledge and expertise of [the qualified entities] regarding the matters in dispute. It considers that in view of the public interest involved in this case, granting the Request would support the transparency of the proceeding and its acceptability by users at large." (Procedural Order No 3, para 28, Procedural Order No 4, para 30)

The WHO/WHO FCTC Secretariat's amicus curiae brief was published after the Award was handed down, and is available at http://www.italaw.com/cases/460

D. Merits

On 8 July 2016, the Tribunal handed down its Award on the merits. The case was decided in favour of Uruguay on all points. The Tribunal found that:

- Neither measure constituted an expropriation, because (1) they did not substantially deprive the investor of its property and (2) even if such a deprivation had occurred, the measures were a valid exercise of police powers, in that they were bona fide non-discriminatory regulations for the purpose of protecting public health.
- Neither measure constituted a breach of the FET standard, because the measures were not arbitrary and PM could not have had any legitimate expectation that Uruguay would not implement more onerous tobacco regulation.
- There was no breach of the protection of investments obligation for the same reasons that there was no breach of the fair and equitable treatment obligation.
- No commitments were made to the investor which would be covered by the observance of commitments clause.
- Justice had not been denied, because the differing treatment of PM's claim in the Supreme Court of Justice and the Tribunal de lo Contencioso Administrativo was simply a feature of the Uruguayan legal system.

Arbitrator Born issued a Concurring and Dissenting Opinion, agreeing with the majority on most points but dissenting on the application of the fair and equitable treatment standard to the single presentation requirement and on the denial of justice claim.

4. The Tribunal's findings on the application of substantive investment law to Uruguay's measures

The Tribunal made a number of findings outlining the scope of substantive investment law obligations and their application to regulatory measures aimed at protecting public welfare. The Tribunal's approach to these standards strongly affirms state regulatory sovereignty for public health, and leaves very little, if any, room for claimants to successfully challenge non-discriminatory regulatory measures adopted for good faith public health purposes.

This paper focuses on two main obligations, expropriation and fair and equitable treatment, which are the obligations most commonly invoked in investment challenges to regulatory measures, and were most extensively discussed in the Award. It also discusses the Tribunal's

findings on the nature of trademark rights in Uruguayan and international law. It does not discuss the claims regarding the protection of investments obligation, the observance of commitments clause, or denial of justice.

A. Expropriation

The Tribunal found that neither the 80/80 Regulation nor the single presentation requirement constituted an indirect expropriation[2] under the BIT, because:

- An indirect expropriation requires 'a substantial deprivation of the value, use or enjoyment of [PM's] investments' (Award, para 284), and neither of Uruguay's measures involved such a 'substantial deprivation' (para 276-287)
- Even if they did involve a substantial deprivation, the measures were a non-discriminatory and proportionate exercise of police powers for the bona fide purpose of protecting public welfare, and were thus not expropriations (para 294-307).

'Substantial deprivation'

The legal test

The Tribunal stated that an indirect expropriation must involve a '"substantial deprivation" of the value, use or enjoyment of the Claimant's investments' (para 284). It found that 'as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation' (para 286), and that 'a partial loss of the profits that the investment would have yielded absent the measure does not confer an expropriatory character on the measure' (para 286). Whether the deprivation is to be assessed by reference to identifiable distinct assets comprising the investment or the investor's investment as a whole depends on the facts of the case (para 280).

Application to the 80/80 Regulation

Applying these principles to the 80/80 Regulation, the Tribunal held that 'there is not even a *prima facie* case of indirect expropriation … The Marlboro brand and other distinctive elements continued to appear on cigarette packs in Uruguay, recognisable as such'. Limiting the space available for such purposes on the front and back of the pack to 20% of the external surface 'could not have a substantial effect on the Claimants' business since it consisted only in a limitation imposed by the law on the modalities of use of the relevant trademarks' (para 276).

Application to the single presentation requirement

The Tribunal held that whether the single presentation requirement had an expropriatory character was to be considered by reference to Abal's business as a whole, rather than individual assets, as the measure 'affected its activities in their entirety'. This was confirmed by the fact that Abal resorted to countermeasures involving its business as a whole to mitigate the effects of the measure (para 283). The Tribunal found that the effects 'were far from

[2] An indirect expropriation occurs when legal ownership of property does not transfer to the State, but a State takes measures that are 'tantamount' to a direct expropriation, such as when the action results in the effective loss of the investor's control or enjoyment of property.

causing a "substantial deprivation" of the value, use or enjoyment of the Claimants' investments'. The Claimants had stated that Abal had grown more profitable since 2011, but that it 'could have been even more profitable' if Uruguay had not adopted the measure (para 284-285).

Comments

Here, the Tribunal emphasises that the protection against indirect expropriation is not designed to, and does not operate to, insure investors against any loss or diminution of profits. To succeed in a claim of indirect expropriation, an investor must show that it has been 'substantially deprived' of the value, use or enjoyment of its investment – not simply that it has suffered some loss.

Police powers

The Tribunal held that the fact that the measures did not constitute a 'substantial deprivation' was sufficient in itself to defeat the expropriation claim. However, it went on to find that Uruguay's measures also fell within the police powers doctrine, which recognises that measures taken within the sovereign right of states to regulate in the public interest do not constitute an expropriation.

The legal test

The Tribunal noted that '[p]rotecting public health has since long been recognized as an essential manifestation of the State's police power' (para 291). It found that there was significant recognition in international law that measures taken in the exercise of police powers do not entitle investors to compensation.

This included a 'consistent trend' since 2000 to differentiate the exercise of police powers from indirect expropriation (para 295), including in *Methanex v United States*, *Tecmed v Mexico*, *Chemtura v Canada* and *Saluka v Czech Republic* (para 296-299), as well as more longstanding recognition in customary international law as evidenced by state-state arbitral awards and in academic and institutional attempts to codify the customary law on state responsibility for the treatment of foreign nationals (paras 292-299). Notably, the Tribunal also cited provisions in newer BITs with more precise definitions of expropriation as 'evidence of the evolution of the principles in the field' (para 300). It held that these provisions 'reflect the position under general international law', 'whether or not introduced *ex abundanti cautela*' (out of an abundance of caution) (para 301).

The Tribunal stated that 'expropriation' in the Swiss-Uruguay BIT was to be interpreted in light of 'relevant rules of international law applicable between the parties', including customary international law, in accordance with the rules of interpretation codified in article 31 of the Vienna Convention on the Law of Treaties. The term 'expropriation' in the Swiss-Uruguay BIT therefore needed to be interpreted consistently with general international law in relation to police powers. As such, valid exercises of police powers did not constitute expropriations and did not require compensation under the BIT (paras 290-305).

In order to constitute a valid exercise of police powers, a State's action must meet the following conditions (para 305):

- It must be a bona fide exercise of regulatory powers for the purpose of protecting the public welfare
- It must be non-discriminatory
- It must be proportionate

Application to either/both measures

The Tribunal considered both measures together, and found that they were bona fide, non-discriminatory, and proportionate measures for the purpose of protecting public welfare, and therefore valid exercises of police powers.

It noted that both measures 'have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health' (para 302) and that they were adopted in good faith, proportionate to their objectives, and non-discriminatory (para 306).

The Tribunal acknowledged some of the evidentiary complexities involved in assessing the individual impact of the measures. It noted that the incidence of smoking in Uruguay had declined, particularly among young smokers. It found that it was sufficient for the purposes of defeating the expropriation claim to demonstrate that a measure was 'directed' to a public health end and 'capable of contributing to its achievement':

> '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.' (para 306)

Comments

The Tribunal's approach can be expected to be significant in the interpretation of other 'first-generation' BITs, which, like the Switzerland-Uruguay BIT, are broadly worded and do not define the concept of 'expropriation'. The Tribunal, rather than suggesting that 'older' BITs do not contain the same regulatory space as newer treaties that define investment law standards more precisely and explicitly reinforce regulatory space, finds that these newer treaties embody standards that are already part of customary international law.

The decision also indicates the standard of proof required to show that a measure is an exercise of police powers – which can broadly be described as a rational basis standard. It is enough that the measure is 'directed to achieving th[e] aim' of reducing smoking and 'capable of contributing to its achievement'

B. Fair and equitable treatment

The Tribunal also found that neither measure breached the obligation to provide FET, because

- they were not arbitrary; and
- PM could not have had any legitimate expectations that Uruguay would not impose stricter tobacco regulation

Arbitrator Born partially dissented, finding that the single presentation requirement breached the obligation to provide FET.

General approach

The Tribunal noted that the 'precise content' of the FET standard 'is far from being settled', and that 'whether a particular treatment is fair and equitable depends on the circumstances of the particular case'. It considered that principles covered by FET include: '[t]ransparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith' (paras 319-320, from Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice (2005) 6 *Journal of World Investment and Trade* 3).

The Tribunal cited several tests for a breach of the FET standard, considering the aspects of State conduct mentioned to be indicative of a breach of the standard.

- '[A]cts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith' (para 321, from *Genin v Estonia*)
- Where the host state 'act[s] in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)' (para 322, from *Saluka v Czech Republic*)
- Conduct that is 'arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice' (para 323, from *Waste Management v Mexico (No. 2)*)

The Tribunal examined arbitrariness, legitimate expectations, and legal stability as aspects of the FET standard in more detail.

Arbitrariness

The Tribunal adopted the definition of arbitrariness set forth by the International Court of Justice in the *Elettronica Sicula S.p.A. (ELSI)* case: 'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety' (Award at para 390).

It held that a measure that was 'reasonable' at the time of adoption would not be arbitrary (para 409). This was to be determined by reference to whether

- The measure was an attempt to address a real public health concern
- The measure taken by the state was 'not disproportionate' to that concern
- The measure was adopted in good faith

It was not necessary to decide whether or not the measure actually had the effect intended by the state in hindsight (para 409).

The Tribunal also outlined the appropriate standard of review. It noted that substantial deference was required for matters of public policy regarding 'acknowledged and major public health problems' and that only measures that were 'entirely lacking in justification' or 'wholly disproportionate' would breach FET.

> 'In the Tribunal's view, the present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco. Substantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem. The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal. (418)

> 'In the end, the question is whether the 80% limit in fact set was entirely lacking in justification or wholly disproportionate, due account being taken of the legitimate underlying aim – viz., to make utterly clear to consumers the serious risks of smoking. … How a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk, is a matter of public policy, to be left to the appreciation of the regulatory authority.' (para 419)

In adopting this approach, the Tribunal applied the 'margin of appreciation' concept as developed by the European Court of Human Rights (paras 398-400).

Legitimate expectations and legal stability

The Tribunal noted that 'the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.' (para 422).

The Tribunal also noted that FET was not intended to address 'changes to general legislation' within a state's 'normal regulatory power'.

> 'changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment "outside of the acceptable margin of change"' (para 423)

Finally, the Tribunal stated that an investor can only rely on legitimate expectations if specific undertakings were made to that investor. Legitimate expectations do not derive from generally applicable legislation (para 422-426):

> 'It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on *specific* undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.' (para 426)

Application to either/both measures

The Tribunal considered neither measure breached the FET standard. In so deciding, it noted that:

- The measures were 'implemented by the State for the purpose of protecting public health' (para 391)
- The 'connection between the objective … and the utility of the two measures [was] recognized by the WHO and PAHO Amicus Briefs' (para 391)
- Both measures were 'adopted in an effort to give effect to general obligations under the FCTC' (para 401)
- The Guidelines to the WHO FCTC were, as indicated in the joint WHO/WHO FCTC Secretariat amicus brief, 'evidence-based', and there was 'no requirement for Uruguay to perform additional studies or to gather further evidence' in light of the support offered by the WHO FCTC and its Guidelines (paras 394-396)
- There was evidence available at the international level, including the tobacco industry's own documents, regarding the use of 'health reassurance' cigarettes to mislead consumers, and of 'consumers' misperceptions of the health risks attached to "light" and "lower tar" cigarettes'. (para 392)
- A country with limited technical and economic resources such as Uruguay was entitled to rely on 'adhesion to the FCTC and involvement in the process of scientific and technical cooperation and reporting and of exchange of information', which was '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 and for ensuring the fulfilment of its tobacco control policy.' (para 393)

The Tribunal also considered that PM had no legitimate expectations in relation to either measure, because no specific undertakings had been made in relation to them:

> 'The Claimants have provided no evidence of specific undertakings or representations made to them by Uruguay at the time of their investment (or, for that matter, subsequently). The present case concerns the formulation of general regulations for the protection of public health. There is no question of any specific commitment of the State or of any legitimate expectation of the Claimants vis-à-vis Uruguayan tobacco control regulations. Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed, and certainly no commitments of any kind were given by Uruguay to the Claimants or (as far as the record shows) to anyone else.
>
> 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. Provisions such as Article 3(2) of the BIT do not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory. Article 3(2) does not guarantee that nothing should be done by the host State for the first time.' (para 429-430)

Finally, neither measure modified the stability of Uruguay's legal framework, particularly given the limited impact on Abal's business (para. 433)

Application to 80/80 Regulation

The Tribunal found that Uruguay's large graphic health warnings were designed to implement the WHO FCTC, based on an internationally accepted principle of having large health warnings to inform consumers of the risks of smoking, and supported by behavioural research regarding the effects of the increased warning size on thoughts of quitting (paras 412-420).

It found that the WHO FCTC and its Guidelines, while leaving the final determination of the size of health warnings to each individual government, recommended that health warnings be as large as possible:

> 'Article 11(1)(b)(iv) of the FCTC requires health warnings on cigarette packages which "*should be* 50% or more of the principal display areas but *shall be* no less than 30% of the principal display areas" (emphasis added). In other words, the principle of large health warnings is internationally accepted; it is for governments to decide on their size, and they are encouraged to require health warnings of 50% or more. It is worth noting that Decree 287/009 was issued after Article 11 Guidelines had recommended that health warnings should cover "more than 50% of the principal display area and aim to cover as much of the principal display area as possible."' (para 412)

The Tribunal also considered that, beyond the principle in the WHO FCTC that they should be 'large', the ultimate size of health warnings was a matter for government, unless the limit set was 'entirely lacking in justification or wholly disproportionate':

> 'Article 3(2) does not dictate, for example, that a 50% health warning requirement is fair whereas an 80% requirement is not. In one sense an 80% requirement is arbitrary in that it could have been 60% or 75% or for that matter 85% or 90%. *Some* limit had to be set, and the balance to be struck between conflicting considerations was very largely a matter for the government. … In the end, the question is whether the 80% limit in fact set was entirely lacking in justification or wholly disproportionate, due account being taken of the legitimate underlying aim – viz., to make utterly clear to consumers the serious risks of smoking … How a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk, is a matter of public policy, to be left to the appreciation of the regulatory authority.' (para 418-419)

It concluded that that the 80% requirement 'was a reasonable measure adopted in good faith to implement an obligation assumed by the State under the FCTC' (para 420).

Application to the single presentation requirement

By a 2-1 majority, the Tribunal found that the single presentation requirement was not a breach of the FET standard. Arbitrator Born dissented on this point.

Majority

The majority noted that the objective of the measure was 'to address the false perception, plausibly said to be created by the use of colours and their association with earlier packaging and labelling, that some brand variants, including those previously advertised as "low tar," "light," "ultra-light," or "mild," are healthier than others' (para 404).

It acknowledged that at the time of adoption, no other state had adopted a single presentation requirement, and that the measure was not specifically mentioned in the WHO FCTC or its guidelines (para 404). The Tribunal found that the requirement was 'in the nature of a "bright idea" in the context of a policy determination to discourage popular beliefs in "safer" cigarettes', which had not been the subject of 'detailed prior research' concerning its actual effects before it had been adopted – such research 'would in any case have been difficult to conduct since it involved a hypothetical situation'. (para 407). It noted, however, that the rationale for the measure was supported by evidence available at the international level, including the tobacco industry's own documents, regarding the use of 'health reassurance' variants cigarettes to mislead consumers, and of 'consumers' misperceptions of the health risks attached to "light" and "lower tar" cigarettes', (para 392), and by the joint WHO/WHO FCTC Secretariat amicus curiae brief, and that Uruguayan authorities had undertaken internal discussions and consultations regarding the measure, although 'the paper trail of these meetings was exiguous' (para 392, 407).

The majority held that ultimately, the test was whether the single presentation requirement was a reasonable measure at the time that it was adopted, and held that it was, because it was adopted in good faith to address a real public health concern and was proportionate to that concern:

> "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. The effect of the SPR was to preclude the concurrent use of certain trademarks, without depriving the Claimants of the negative rights of exclusive use attached to those trademarks." (para 409)

It found that the single presentation requirement was therefore not a breach of FET.

Dissent

Arbitrator Born dissented on this point, noting that the single presentation requirement was not included in the WHO FCTC or its Guidelines and had never been tried by any other state, and finding that it was not the subject of significant consultations or studies by the Uruguayan Government (Concurring and Dissenting Opinion, paras 99-101, 119-128). He placed significant emphasis on the fact that the WHO FCTC and its Guidelines did not specifically require or recommend a single presentation:

> In the course of extensive study and consultation, and compilation of a very extensive and thorough list of mandatory and recommended tobacco control measures, the drafters of the FCTC and its Guidelines did not choose to recommend or require a single presentation requirement. That omission gives rise to the natural inference that the requirement was not regarded as useful or supported by the studies associated with the Convention. In these circumstances, I cannot agree that the FCTC and its preparatory work provide any support for the single presentation requirement. (para 194)

In this context, Arbitrator Born found that the single presentation requirement was 'inherently ill-suited' to its aim of preventing misleading packaging, because it was 'incapable of discriminating between misleading and non-misleading uses of trademarks, and therefore both arbitrary and disproportionate.' (para 157). He found that it was over-inclusive in that it covered both misleading and non-misleading variants, and at the same time it was under-inclusive in failing to prohibit 'alibi' brands, which also use misleading colours but are marketed under different brand names (paras 157-172). Arbitrator Born also considered that misleading use of packaging was already prohibited under other Uruguayan laws and the single presentation requirement did not add to these existing laws (para 173). He held that the single presentation requirement was 'arbitrary and disproportionate' (para 196) and violated the fair and equitable treatment standard.

Comments

The Tribunal – both the majority and the dissent – takes a deferential approach to evaluating the reasonableness of policy choices, both in terms of the standard of review, and in holding that the reasonableness of a measure is to be assessed at the time of adoption, rather than through an examination of its impact in hindsight. The Tribunal also resoundingly rejects the idea that investors have a legitimate expectation that their businesses will not be subject to more stringent regulation of general application. This level of deference to sovereign regulatory judgments regarding public health is broadly consonant with the approach taken in other investment tribunal decisions concerning the application of FET to public health regulatory measures, including *Methanex v United States* and *Chemtura v Canada*.

Importantly, the Tribunal notes that international investment law does not prevent states from adopting novel measures. The tobacco industry frequently challenges such measures as anomalous or not based on 'real-world' evidence. The Tribunal's approach affirms that states are able to innovate in relation to public health measures provided that the measures are non-discriminatory and have a rational basis.

C. The Tribunal's findings on the nature of a trademark

In reaching its conclusions on expropriation and fair and equitable treatment, the Tribunal makes a number of findings on the nature of trademark protection in Uruguayan, regional, and international law.

Negative vs. positive rights

In examining the nature of the interests at stake in PM's expropriation claim, the Tribunal found that international agreements, regional agreements, or Uruguayan law do not grant positive rights to use a trademark, but only negative rights to prevent third party use:

> 'The Tribunal notes that there is nothing in the Paris Convention that states expressly that a mark gives a positive right to use, although it is clear that a trademark can be cancelled where it has not been used for a reasonable period.' (para 260)

> 'Nowhere does the TRIPS Agreement, assuming its applicability, provide for a right to use. Its Article 16, dealing with "Rights Conferred," provides only for the exclusive right of the owner of a registered trademark to prevent third parties from using the same mark in the course of trade.' (para 262)

> 'The Claimants rely also on Article 11 of the MERCOSUR Protocol, which provides: "[t]he registration of a trademark shall grant the owner an exclusive right of use, and the right to prevent any person from performing, without the [trademark owner's] consent, the following acts…" They say that this shows that there are two separate rights granted by a trademark, an exclusive right of use and a right of prevention. … However, as the Respondent has pointed out, the better interpretation is that the exclusive right to use is simply the other side of the coin of the "right to prevent any person from performing," and does not thereby mean that a trademark gives rise to an absolute right of use. This is confirmed by the Spanish original of Article 11 which refers to "the right of exclusive use" (" *el derecho de uso exclusivo* ")' (para 263-264)

> 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. …' (para 266)

In so deciding, the Tribunal drew a distinction between an *absolute* right to use a trademark, enforceable against the State (which trademarks *do not* grant), and an *exclusive* right to use, which is enforceable only against other persons (which trademarks *do* grant):

> 'In the Tribunal's view, both Parties have focused on a dichotomy between a right to use and a right to protect. However, it may be more fruitful to view the case as a question of an absolute versus exclusive right to use. 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 *qua* regulator.' (para 267)

> '… 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. …' (para 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'. (para 271)

Finally, the Tribunal noted that trademarks have long been subjected to other forms of regulation, and that their existence does not imply a carve-out from other regulatory regimes:

> 'Most countries, including Uruguay, place restrictions on the use of trademarks, for example in advertising. Particularly in an industry like tobacco, but also more generally, there must be a reasonable expectation of regulation such that no absolute right to use the trademarks can exist. Otherwise "the mere fact of registering a trademark would guarantee the sale of any trademarked product, without regard to other considerations." If a food additive is, subsequent to the grant of a trademark, shown to cause cancer, it must be possible for the government to legislate so as to prevent or control its sale notwithstanding the trademark. (para 269)

> 'The objection might be to regulations that target and modify or ban use of their trademarks as such without otherwise changing the conditions of sale, whereas in the example of the harmful food additive, sale of the product is prohibited entirely. But there may be products (of which tobacco is currently one) whose presentation to the market needs to be stringently controlled without being prohibited entirely, and whether this is so must be a matter for governmental decision in each case. There is nothing in the relevant legal materials to support a carve-out of trademarks from the legitimate realms of regulation. Uruguayan trademark law (like trademark law in other countries following the Paris Convention system) provides no such guarantee against regulation that impinges on the use of trademarks.' (para 270)

Comments

The tobacco industry commonly argues that tobacco control measures, particularly large graphic health warnings and plain/standardized packaging, infringe its intellectual property rights, because they restrict the way in which the industry can display or otherwise use its trademarks. The Tribunal resoundingly rejects this line of argument, affirming that trademarks – here, under Uruguayan, regional and international law – do not grant a positive right to use. Rather, a trademark is a negative right to prevent others from using the mark, so that the trademark holder is the only person who can use it (or authorise its use), subject to the regulatory power of the state. Trademarks do not guarantee that a mark *can* be used, only that the holder is the *only* one who is able to do so (or to authorise others to do so), to the extent that it can be used in line with other regulations. The Tribunal conceptualises this as a distinction between an *exclusive* right to use, enforceable against other private parties to prevent unauthorised use, and an *absolute* right to use, enforceable against the State.

The Tribunal finds that a trademark is a negative/exclusive right under the TRIPS Agreement, the Paris Convention, the Mercosur Protocol, and Uruguayan law. This accords with decisions by the High Court of Australia and the High Court of England and Wales, which note that trademarks are a negative right under Australian law and a negative right under UK law, European law, and the TRIPS agreement respectively. It also accords with a WTO panel's decision in *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, which noted that TRIPS provides only

for the grant of 'negative rights to prevent certain acts' and not 'positive rights to exploit or use certain subject matter' (para 7.210). While the nature of a trademark in domestic law is up to each individual state to determine, international intellectual property treaties require only that states implement a negative right to exclude in their trademark laws.

Trademarks also do not guarantee that a product can be sold or presented to a market regardless of other considerations. The Tribunal emphasises that many states place restrictions on the use of trademarks, and that particularly in a heavily regulated area such as the marketing of tobacco, trademark holders can reasonably expect regulation of both the conditions of sale and presentation to the market.

The nature of a trademark under the TRIPS Agreement is a key issue in the Australian plain packaging WTO litigation, and has been the subject of extensive scholarly commentary in that context: see, e.g. Mark Davison and Patrick Emerton, 'Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco.' *American University International Law Review* 29 no. 3 (2014):505-580.

5. Key themes of the Award for WHO FCTC implementation

As noted above, the Award is part of a growing body of jurisprudence affirming the lawfulness of tobacco control measures. Like other decisions concerning such measures, the Award contains much reasoning that will be of broader significance, including to legal challenges against tobacco control measures conducted in other fora, whether international, regional or domestic. We draw out some of these aspects below, including the Tribunal's statements regarding the appropriate standard of review, the treatment of complex public health evidence, the relevance of other instruments such as the WHO FCTC and its Guidelines, the relevance of health as a normative value, and the contribution of the WHO/WHO FCTC Secretariat and PAHO amicus curiae briefs.

A. Approach to the task – deference / margin of appreciation

All three Tribunal members noted that substantial deference towards a state's regulatory judgments was required in construing the fair and equitable treatment standard: Award paras 418-419, Concurring and Dissenting Opinion paras 137, 191. This is perhaps best summed up by the majority's statement that FET is 'not a justiciable standard of good government, and the tribunal is not a court of appeal' (Award para 418).

In addition, the majority applied the concept of a 'margin of appreciation' from the European Court of Human Rights (ECHR) context:

> 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. 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, "[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation." (Award para 399)

Arbitrator Born disagreed with the majority, finding that 'the standard of review and degree of deference to state regulatory and legislative judgments' should be determined by interpretation of the BIT in issue (para 185), rather than a 'margin of appreciation' transposed from the ECHR context: paras 149, 181-191.

However, although the majority and dissent disagree on whether or not the margin of appreciation concept from the ECHR is applicable to investment law treaties, ultimately, all three arbitrators accept that a substantial degree of deference is required for 'sovereign regulatory judgments' (Award paras 418-419; Concurring and Dissenting Opinion paras 137, 191). The Award strongly affirms that it is not the role of investment tribunals to second-guess complex public policy decisions.

B. Evidence, international practice, and novel measures

The Tribunal made a number of important findings regarding the treatment of complex public health evidence. These include recognition that:

Measures may act in combination and the impact of any individual measure may be difficult to show

The Tribunal recognises that 'real-world' impact may be difficult to measure in the short-term or when a measure is implemented as part of a suite of programs, and that it is not necessary for the purposes of either the police powers doctrine or the fair and equitable treatment standard for a state to 'prove' the effect of each individual measure:

> '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.' (Award, para 306)

> 'Such as it is, the marketing evidence suggests that the 80/80 Regulation also had some deterrent effect on smokers, the percentage of smokers who said that health warnings made them think about quitting having increased from 25% in 2008-2009, when the warnings covered only 50% of the front and back of the packs, to 36% in 2012 when the labels covered 80%. According to reports submitted by both Parties, the Challenged Measures have contributed to a continued decline in smoking prevalence, especially in new smokers and young smokers – a crucial group in Uruguay. The view the Tribunal has expressed regarding the effectiveness of the SPR is applicable also to the 80/80 Regulation, including the fact that reasonableness of the measure is to be assessed based on the situation prevailing at the time it was adopted, and considering that, absent specific evidence, it may hardly be determined which of the two measures (or other

> concurrent measures, including tax increases) produced a given effect on smokers.' (para 417)

There is similar recognition of the complexities of public health evidence in WTO dispute settlement. As noted by the WTO's Appellate Body in *Brazil – Retreaded Tyres*:

> '[C]ertain complex public health ... problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health ... objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions — for instance ... certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time — can only be evaluated with the benefit of time.': Appellate Body Report, para 151.

The High Court of England and Wales has also noted that individual measures can 'act in a complementary manner with a series of parallel counter-measures', meaning there is 'an inherent masking effect on the potency of each measure created by the combined effect of the suite of other measures acting simultaneously' (*BAT v Secretary of State for Health*, para 614). As the Court noted:

> 'The efficacy of each individual measure in this suite is uncertain: some have been in force longer than others and their principal effects may taper off over time yet they will still work in parallel with newer measures which might be at their most potent but which might themselves taper in due course. The rate of overall decline in prevalence and use is not therefore guaranteed to be either stable or durable. Accordingly, a new measure, such as standardised packaging, can be expected to affect (one way or another) the overall downward pressure on usage but, again, the impact of the new measure might not become evident immediately and even when it does kick in its effect might evolve over time and that evolution itself might be variable.' (*British American Tobacco v Secretary of State for Health*, para 614).

For more discussion, see our paper The High Court of Justice Decision Upholding the UK's Standardized Packaging Laws: Key Points for Other Jurisdictions (at heading 3.C).

The reasonableness of a measure needs to be assessed as at the time of the decision, not in hindsight

Finally, the Tribunal states that whether measures are reasonable is to be assessed at the time of the decision, and not post-implementation – whether or not the state's assessment turns out to be correct in hindsight does not affect the reasonableness of the measure:

> '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.' (para 407)

> 'The view the Tribunal has expressed regarding the effectiveness of the SPR is applicable also to the 80/80 Regulation, including the fact that reasonableness of the

> measure is to be assessed based on the situation prevailing at the time it was adopted'(para 417)

States, particularly those with limited technical and financial resources, should be able to rely on normative documents and international practices

The majority considered that normative documents, such as the WHO FCTC and its Guidelines, as well as international experience, were sufficient to demonstrate the reasonableness of the measure and there was no need, at least for a country with limited resources, to conduct specific additional studies in relation to a measure that was supported by such documents:

> '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 and for ensuring the fulfilment of its tobacco control policy.' (para 393)

> 'In the Tribunal's view, in these circumstances there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures. Such support was amply offered by the evidence-based FCTC provisions and guidelines adopted thereunder.' (para 396)

States can adopt measures that have never been adopted before

The majority holds that states are not prevented from adopting measures 'that are in advance of international practice', provided they are rational/reasonable at the time of adoption and non-discriminatory:

> '[T]he SPR was not the subject of detailed prior research concerning its actual effects, which would in any case have been difficult to conduct since it involved a hypothetical situation; … the SPR was in the nature of a "bright idea" in the context of a policy determination to discourage popular beliefs in "safer" cigarettes but, as held by the WHO, "the rationale for this action [was] supported by the evidence." … 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.' (para 407)

> 'Nor is it a valid objection to a regulation that it breaks new ground. Provisions such as Article 3(2) of the BIT do not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory. Article 3(2) does not guarantee that nothing should be done by the host State for the first time.'(para 409)

C. The role and status of the WHO FCTC and its Guidelines

The Tribunal's decision demonstrates the various ways in which the WHO FCTC provides legal and evidentiary support for tobacco control measures challenged in litigation.

It is important to note that while Uruguay is a party to the WHO FCTC, Switzerland, the other party to the BIT is not. Where both BIT parties are party to the WHO FCTC, the WHO FCTC may have an additional role in the interpretation of BIT obligations in line with article 31(3) of the Vienna Convention on the Law of Treaties.

The WHO FCTC was relevant to the Tribunal's decision in a number of ways:

As a basis for the measures

The majority accepted that both of Uruguay's measures aimed to implement obligations under the WHO FCTC:

> "Starting with the year 2000, Uruguay implemented a series of measures including the creation of groups of experts and agencies for the study and prevention of tobacco effects on human health. In 2004, the MPH created the Advisory Commission to advise the Ministry on implementation of the State's obligations under the FCTC. … Following ratification of the FCTC in 2004 and its entry into force on 27 February 2005, Uruguay started the process of complying with the resulting obligations. All legal measures taken internally for implementing tobacco control were expressly adopted in conformity with the FCTC." (Award para 394-5)

> '[T]he 80/80 Regulation was a reasonable measure adopted in good faith to implement an obligation assumed by the State under the FCTC.' (para 420)

> '[The single presentation requirement] is not specifically mentioned in the FCTC, although Article 11(1)(a) of that Convention did require each State Party to take measures "in accordance with its national law" to prevent "the false impression that a particular tobacco product is less harmful than other tobacco products." … the rationale of the SPR in both formulations was to address the false perception, plausibly said to be created by the use of colours and their association with earlier packaging and labelling, that some brand variants, including those previously advertised as "low tar," "light," "ultra-light," or "mild," are healthier than others.' (para 404)

Arbitrator Born agreed with the majority on the 80/80 Regulation, but disagreed with them on the single presentation requirement. He considered that the single presentation requirement was not supported by the WHO FCTC because it was not specifically mentioned in the treaty or its guidelines (Concurring and Dissenting Opinion, para 127, 193-194)

As a source of evidence and an expression of international consensus

The Tribunal considered that best practice as found in the WHO FCTC is an important source of evidence that states should be entitled to rely on, and that the exchange of information that the WHO FCTC provides for is 'indispensable' for countries with resource limitations that constrain their capacity to conduct local studies.

> '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 and for ensuring the fulfilment

> of its tobacco control policy. As stated by PAHO, "Uruguay has been one of the most active countries during this period, both at governmental and non-governmental levels, not only advancing its own regulations domestically but also providing support to other Member States" regarding compliance with FCTC mandates.' (Award para 393)
>
> 'Uruguay's measures were adopted based on the substantial body of evidence that had been made available in the course of its active participation in the FCTC negotiations and in the drafting of implementing guidelines through the newly created Advisory Commission. As indicated by the WHO, such guidelines are "evidence-based," the working groups relying on available scientific evidence. Material used in their development was released publicly.' (para 394)
>
> 'In the Tribunal's view, in these circumstances there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures. Such support was amply offered by the evidence-based FCTC provisions and guidelines adopted thereunder. As indicated by the WHO, "[t]he ability of Parties to rely on this evidence-based resource in policy development is important for implementation of the Convention by all Parties, and particularly by Parties in low resources settings."' Para 396

The majority here places significant weight on the WHO FCTC as a form of international 'scientific and technical cooperation' and as an authoritative encapsulation of evidence and best practices accumulated from international experience. Such international best practices are sufficient to establish the 'reasonableness' of measures. This is a particularly important matter for low-resource settings with limited technical or financial capacity to conduct independent studies.

By way of contrast, the Concurring and Dissenting Opinion considered the *absence* of the single presentation requirement from the WHO FCTC and its Guidelines to lend support to the conclusion that the requirement was *in*sufficiently evidence-based:

> 'Although very substantial consideration had been given to issues of tobacco control generally, and tobacco packaging and labelling specifically, neither the FCTC nor its Guidelines, nor any national regulatory regime, had ever adopted or proposed a single presentation requirement. At a minimum, that deprives such a requirement of the support that would otherwise be provided by adoption of an international standard; more generally, it also inevitably raises questions as to the rationale of a measure which, despite very extensive international consideration of the subject, had never been proposed or adopted' (Concurring and Dissenting Opinion, para 127)
>
> 'If the single presentation requirement made serious regulatory sense, it would have been included in the FCTC's lengthy catalogue of regulatory measures or in the Guidelines' supplementation of those measures. Or, even if not, the measure would have been recommended in the extensive literature on antismoking regulations or, alternatively, would have been the product of study and deliberations counselling in favor of its adoption.' (Concurring and Dissenting Opinion, para 174)

As a point of reference for the reasonableness of the measures

The Tribunal noted that because Uruguay's measures aimed to give effect to obligations under the WHO FCTC, the FCTC was a 'point of reference' for the reasonableness of the measures. It did so even though, as noted above, Switzerland, the other party to the BIT, was not party to the WHO FCTC.

> "In this regard the first point to be made is that both measures were adopted in an effort to give effect to general obligations under the FCTC. It may be that the FCTC, to which Switzerland is not a party, could not be invoked by the Respondent to excuse its non-performance of distinct obligations under the BIT. But that is not the present context. In the Tribunal's view, the FCTC is a point of reference on the basis of which to determine the reasonableness of the two measures, and in the end the Claimants did not suggest otherwise." Award para 401

> 'Article 11(1)(b)(iv) of the FCTC requires health warnings on cigarette packages which "*should be* 50% or more of the principal display areas but *shall be* no less than 30% of the principal display areas" (emphasis added). In other words, the principle of large health warnings is internationally accepted; it is for governments to decide on their size, and they are encouraged to require health warnings of 50% or more. It is worth noting that Decree 287/009 was issued after Article 11 Guidelines had recommended that health warnings should cover "more than 50% of the principal display area and aim to cover as much of the principal display area as possible."' (para 412)

As a source of rights and duties

Finally, the Tribunal considers that the WHO FCTC reflects Uruguay's duty to protect public health, which informed the Tribunal's determination that PM could have no legitimate expectation that stricter tobacco regulation would not be implemented:

> 'According to Professor Barrios, the State's duty to legislate on issues of public health is reflected in Article 44 of the Constitution and in international conventions to which Uruguay is a party, including the FCTC' (para 432)

D. Public health as a normative value

The Tribunal affirms that Uruguay has both a right and a duty to protect the health of its citizens:

> 'As noted by Professor Barrios, one of the Respondent's experts, "[t]he Uruguayan State enjoys unquestionable and inalienable rights to protect the health of its citizens. And it is in this framework of the essential duty to protect public health that the State has the authority to prevent, limit or condition the commercialization of a product or service, and this will consequently prevent, limit or condition the use of the trademark that identifies it."' (para 432)

> '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.' (para 302)

> 'It is based on these obligations that the SPR and the 80/80 Regulation have been adopted. The FCTC is one of the international conventions to which Uruguay is a party guaranteeing the human rights to health; it is of particular relevance in the present case, being specifically concerned to regulate tobacco control.' (para 303)

The Award also outlines a number of ways in which public health as a normative value influences the interpretation or application of investment treaty standards. In particular:

- Public health measures fall within the police powers doctrine, and are therefore not an expropriation provided that they are non-discriminatory, proportionate, and taken in good faith: 'The Challenged Measures were taken by Uruguay with a view to protect public health in fulfilment of its national and international obligations. For reasons which will be explored in detail in relation to claims under Article 3(2) of the BIT, in the Tribunal's view the Challenged Measures were both adopted in good faith and were nondiscriminatory.' (Award para 306)
- The measures' public health objective was important to the determination of whether or not they were 'arbitrary' under the FET standard (paras 391, 409)
- 'Manufacturers and distributors of products that are harmful to health, such as cigarettes,' can have no expectation that new and more onerous regulations will not be imposed' (para 429).
- Uruguay's rights (and duties) to legislate to protect public health meant that the claimant had no legitimate expectations that the use of their trademarks would be guaranteed against regulation to 'prevent, limit or condition the commercialization of a product or service' (paras 432)
- A margin of appreciation applies to state regulatory measures, 'at least in contexts of public health' – para 399.

E. The role of the WHO amicus curiae briefs

The Tribunal's use of amicus curiae briefs from WHO/WHO FCTC Secretariat and PAHO indicates the weight that the Tribunal placed on the organisations' knowledge and expertise, and the contribution that amicus curiae can make to the determination of a case.

In particular, the Tribunal accepts the conclusions of WHO/PAHO regarding the bona fide public health purpose of both measures, as well as its assessment of the rationale for the single presentation requirement. It notes, for example, that

> 'the SPR was in the nature of a "bright idea" in the context of a policy determination to discourage popular beliefs in "safer" cigarettes but, as held by the WHO, "the rationale for this action [was] supported by the evidence."' (Award, para 407)

The Tribunal also relied on the amicus curiae briefs to support its findings on the connection between Uruguay's measures and the public health objectives of the measures:

> 'Contrary to the Claimants' contention, the Challenged Measures were not "arbitrary and unnecessary" but rather were potentially "effective means to protecting public health," a conclusion endorsed also by the WHO/PAHO submissions.' Para 306

> 'Both measures have been implemented by the State for the purpose of protecting public health. The connection between the objective pursued by the State and the utility of the two measures is recognized by the WHO and the PAHO Amicus Briefs, which contain a thorough analysis of the history of tobacco control and the measures adopted to that effect. The WHO submission concludes that "the Uruguayan measures in question are effective means of protecting public health." The PAHO submission holds 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."' Para 391

6. Conclusion

The decision is a resounding victory for Uruguay, and for the right to regulate for public health more generally. The Tribunal's decision emphasises the policy space that states have under international investment treaties and affirms that it is not the role of international tribunals to second-guess states' regulatory decisions on complex public policy matters. It also makes a number of more general statements about evidence, rights and obligations at issue that will resonate in other contexts, including in respect of tobacco industry claims that tobacco control measures breach WTO obligations, and in domestic challenges that are brought against tobacco control measures.

Following the earlier dismissal of the *Philip Morris Asia Ltd (Hong Kong) v Commonwealth of Australia* case in December 2015 on the basis that the claim was inadmissible for 'abuse of right', there are no longer any international investment law cases concerning tobacco control measures. The investment challenges to both Uruguay and Australia have shaped a number of debates and decisions at the fourth, fifth and sixth sessions of the Conference of the Parties to the WHO FCTC, including the adoption of the Punta Del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control in solidarity with Uruguay at COP4 in 2010, and decisions at COP5 (2012) and at COP6 (2014) on cooperation between the Convention Secretariat, the World Health Organization, the World Trade Organization and the United Nations Conference on Trade and Development; on issues related to implementation of the WHO FCTC and settlement of disputes concerning the implementation or application of the Convention; and on trade and investment issues, including international agreements, and legal challenges in relation to implementation of the WHO FCTC.

In the Punta del Este Declaration, the COP:

> 'Recogniz[ed] that measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the power of sovereign States to regulate in the public interest, which includes public health'

It declared:

> 'That Parties have the right to define and implement national public health policies pursuant to compliance with conventions and commitments under WHO, particularly with the WHO FCTC.'

At heart, the Tribunal's decision expresses, in the international investment law context, what the COP said so categorically in the Punta del Este Declaration six years ago. The resolution of the case underlines the importance of the WHO FCTC, and of the COP specifically, as the forum in which States express and reinforce their legal and political commitments to tobacco control, and demonstrates how the legal and political significance of the WHO FCTC, and the work of the COP, matters across the international legal system more broadly.

While the COP has been expressing its concerns about the relationships between WHO FCTC implementation and international investment agreements, in light of the cases against Uruguay and Australia, it has at the same time been strengthening the legal, normative and evidentiary basis for tobacco control measures, and empowering States to implement tobacco control measures to protect the health of their people. When the COP meets at its upcoming seventh session in November 2016, it will have the opportunity to reflect on and consolidate these developments, and recommit to accelerating the full implementation of the WHO FCTC, with even greater confidence than at previous sessions.

August 2016