PMI vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law

Executive Summary

In March 2010, three subsidiaries of USA-based Philip Morris International (PMI) launched a damages claim against the Government of Uruguay under the *Switzerland – Uruguay Agreement on the Promotion and Protection of Foreign Investments*. Under this treaty, Uruguay and Switzerland promised to treat each other's investors fairly. They also agreed to submit disputes with the other county's investors to binding international arbitration administered by the International Centre for the Settlement of Investment Disputes.

Over two thousand similar treaties are currently in force worldwide, so it is likely that PMI sees its claim against Uruguay as a test case. If Big Tobacco can force Uruguay to weaken its tobacco control measures, by threatening it with expensive litigation and a possible damages award, other developing countries should expect to see similar claims being made against them too.

PMI is challenging two types of tobacco control measure, both of which are required under the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), to which Uruguay is a Party. The first type of measure is a requirement that 80% of the space on tobacco packages be devoted to graphic health warnings chosen by the government. These health warnings have been proven effective in reducing tobacco consumption and the greater the space reserved for such warnings, the greater their efficacy.

The second measure is a prohibition on the ability of tobacco companies to adopt differentiated branding strategies to increase consumption. Differentiated branding involves applying the same well known brand, such as Marlboro®, to an entire family of products (e.g. "Marlboro Regular;" "Marlboro Light;" and "Marlboro Mild" or "Marlboro Red;" "Marlboro Gold;" and "Marlboro Green"). Differential branding increases consumption because it provides younger individuals, and chronic smokers who would like to quit, with the illusion that less harmful alternatives to "regular" cigarettes exist, such as "light," "mild," or "ultra-light" versions of the same famous brand.

With such misleading advertising being outlawed worldwide, Big Tobacco has adopted a colour-coding strategy, in which "light" is gold; "menthol" is green; etc. Uruguay's new measures are an effective response to such tactics because they prevent tobacco companies from applying a single brand to more than one tobacco product, thereby neutralizing the colour-coding ploy.

Brands are by far the most valuable investment for the tobacco industry. Any measures that prevent tobacco companies from using internationally recognized brands to sell more cigarettes locally reduces their profits. The problem with PMI's claim is that it confuses the fact that these measures impair its use of the notorious Marlboro® brand in Uruguay with a right to seek damages under the treaty for such impairment. The treaty is not a general insurance policy against all commercial risks, nor was it ever intended to limit the sovereign right of countries to adopt measures protecting the health of their citizens.

Neither of Uruguay's measures discriminates against PMI or its subsidiaries. No locally owned Tobacco Company or brand receives more favourable treatment under these measures. There was also nothing arbitrary or manifestly unjust about the way in which the measures were developed or implemented.

For PMI to succeed in its claim, it must prove its entitlement to hold a "legitimate expectation" that these sorts of measures would never be imposed on its investments in Uruguay. However, as a party to the WHO FCTC, Uruguay was both entitled and obliged to impose exactly these kinds of measures upon the tobacco industry in order to reduce tobacco consumption in its territory.

It is simply not credible for PMI to claim an unfettered right to use its tobacco brands in Uruguay, when it knew full well that Uruguay had both the right and obligation, under the FCTC, to impose measures designed to impair its use of these investments to reduce tobacco consumption.

Moreover, the Switzerland – Uruguay investment treaty cannot be read in splendid isolation from the other applicable rules of international law, which also impact upon how Uruguay regulates its tobacco industry. No amount of high-priced legal talent should convince an international tribunal to pretend as if Uruguay's rights and obligations under the WHO FCTC do not exist, or to ignore the fact that Uruguay is entitled to take reasonable, non-discriminatory steps to protect the health of its citizens under any investment treaty.

If any more proof was needed about the effectiveness of product labelling rules and prohibitions against brand differentiation, PMI' new claim against Uruguay provides the answer. This particular member of Big Tobacco is obviously running scared, so it has decided to try to make an example of Uruguay by subjecting it to costly and unnecessary international litigation. Fortunately, tribunals are authorised to litigious investors, such as PMI, to reimburse less developed countries, such as Uruguay, for the costs of defeating such unmeritorious claims.

Strategically, PMI's claim may only represent the thin edge of the wedge, so it is important to stop it in its tracks, before the tobacco control policies of other developing countries can be negatively affected.