Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
No. 182 September 12, 2016
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Philip Morris vs. tobacco control: two wins for public health, but uncertainty remains

by
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In 2010, Philip Morris Products S.A. and related entities launched an arbitration under the 1998 Switzerland–Uruguay bilateral investment treaty (BIT) against Uruguay's tobacco control measures increasing health warnings to 80% of each package and requiring a "single presentation" (i.e., one variant per brand family). In 2011, Philip Morris Asia Limited brought claims under the 1993 Australia–Hong Kong BIT against Australia's mandatory "plain" packaging of tobacco products. Philip Morris recently lost both disputes, demonstrating the flexibilities available in international investment law to accommodate public health and other domestic policy objectives. Nevertheless, the particularities of the two cases leave some uncertainties, emphasising the need for continued reform of the investment regime.

In each case, the parties disagreed as to whether the tribunal had jurisdiction (authority) to hear the claims. In *Philip Morris v. Uruguay*, the tribunal dismissed Uruguay's jurisdictional objections in July 2013,[1] so the case proceeded to the merits (substance) of the claims. By contrast, in an award published in May 2016, the tribunal in *Philip Morris v. Australia*[2] held itself "precluded from exercising jurisdiction" because "the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred … when there was a reasonable prospect that the dispute would materialize and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection".[3] This conclusion flowed from the fact that the claimant's acquisition took place in February 2011, around ten months *after* the Australian government announced its intention to introduce plain packaging.

In an award released in July 2016, the tribunal in the Uruguay case dismissed all claims by Philip Morris and ordered the claimants to cover the costs and expenses of the tribunal and the International Centre for Settlement of Investment Disputes (estimated at US$1.5 million) and to pay Uruguay US$7 million toward its legal costs.[4] The tribunal held, *inter alia*, that under relevant Uruguayan and international law a "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".[5] Although "the Claimants had property rights regarding their trademarks capable of being expropriated",[6] the tribunal found "not even a *prima facie* case of indirect expropriation" through the 80% warning requirement.[7] Similarly, the claimed partial loss of profits arising from the single presentation requirement did not amount to indirect expropriation, which entails a "'substantial deprivation' of [the] value, use or enjoyment" of the investment.[8] Moreover, "the adoption of the Challenged Measures by Uruguay was a valid exercise of the State's police powers … defeating the claim for expropriation".[9] The tribunal also noted that Uruguay adopted the measures pursuant to national and international legal obligations, including the *WHO Framework Convention on Tobacco Control*.

The tribunal found that the 80% requirement and the single presentation requirement did not breach Uruguay's obligation of fair and equitable treatment. Relatedly, Uruguay did not commit a denial of justice through the way in which its highest administrative court disposed of Philip Morris' challenges to the two regulations' administrative validity. However, one member of the three-person tribunal dissented in part, finding a breach of fair and equitable treatment regarding the single presentation requirement and a denial of justice.

These disputes are significant for other countries pursuing public health and other policy measures and for investors navigating complex regulatory environments. Australia's win on jurisdiction offered a political boost to countries implementing or considering standardized tobacco packaging, but the circumstances of Philip Morris' investment in Australia may not be mirrored elsewhere. The tribunal's decision on the merits in the Uruguay case, on the other hand, provides evidence of investment tribunals' ability to accord appropriate weight to sovereign regulatory objectives: "investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health".[10] Nevertheless, the existence of a partial dissent in that case highlights continuing uncertainties.

Negotiators have agreed an unprecedented "carve-out" from investor-state dispute settlement for tobacco control measures in the recently signed Trans-Pacific Partnership, but other treaties lack such a carve-out, which in any case is specific to a single product. The use of general exceptions covering objectives such as health or the environment may provide additional comfort to regulating states, but such exceptions do not preclude significant financial and personnel costs in successfully defending measures. Although Australia and Uruguay both won in the end, the proceedings took several years at considerable expense. These cases may focus states' attention on the need for careful drafting of treaties and broader reform of the investment regime.

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authors are grateful to Gabriel Bottini, Lee M. Caplan and Gus Van Harten for their helpful peer reviews. The authors also thank Jonathan Liberman for helpful comments. **The views expressed by the authors of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters or those of any other entity. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[1] *Philip Morris Brands Sàrl v. Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (Jul. 2, 2013), para. 236.

[2] *Philip Morris Asia Ltd v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015).

[3] Para. 588.

[4] *Philip Morris Brands Sàrl v. Uruguay*, ICSID Case No. ARB/10/7, Award (Jul. 8, 2016), para. 590.

[5] Paras. 269, 271.

[6] Para. 274.

[7] Para. 276.

[8] Para. 192.

[9] Para. 287.

[10] Para. 399.

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