

Phillip Morris Brings International Investment Suit Against Uruguay over Tobacco Regulations

Bill Waren, June 29, 2010

On February 19, 2010, Phillip Morris International (PMI) filed a request for arbitration with the International Centre for Settlement of Investment Disputes (ICSID) in an action against the Republic of Uruguay under the Swiss-Uruguay Bi-lateral Investment Treaty (BIT).¹

PMI alleges violations of property rights protections in the Swiss BIT resulting from public health regulations requiring that 80% of the surface of cigarette packs sold in Uruguay must be devoted to pictures and warnings about the dangers of smoking. This regulation, PMI says, will severely limit the space on packages available for branding and thereby prevent it from making effective use of its intellectual property in the form of trademarks. PMI also objects to Uruguay's regulation barring PMI from marketing more than one type of cigarette per brand, i.e. Marlboro, Marlboro Lights, and Marlboro Extra Lights. PMI says this violates the tobacco company's intellectual property rights and will result in a loss of market share.²

In a move for which there is meager precedent, Phillip Morris International will also ask the ICSID tribunal to issue an arbitral order for Uruguay to suspend these tobacco regulations, in addition to ordering it to pay money damages in compensation for PMI's investment losses.³

The PMI-Uruguay tobacco case is a potential turning point in international investment law and global health policy because of the many questions it raises.

- (1) *The WHO Framework Convention on Tobacco Control*. Both Uruguay and Switzerland have signed the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC). The FCTC provides that warnings on cigarette packages should cover 50 % or more of package surface and that product labeling should not directly or indirectly leave the false impression that "light" or "extra light" cigarettes are less harmful. How then are Uruguay's obligations under the FCTC to be reconciled with its obligations under the Swiss BIT?⁴

¹ FTR Holdings S.A. (Switzerland), Phillip Morris Products S.A. (Switzerland) and Abel Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID case no. ARB/10/7, registered march 26, 2010, tribunal not yet constituted; Luke Eric Peterson, "Uruguay: Phillip Morris files first-known investment treaty claim against tobacco regulations," Investment Arbitration Reporter, March 3, 2010, available at <http://www.iareporter.com>.

² Fernando Cabrera Diaz, "Phillip Morris initiates arbitration against Uruguay over new labeling requirements, taxes," Investment Treaty News, March 11, 2010, International Institute for Sustainable Development, available at <http://www.investmenttreatynews.org>; Juan Antonio Montecino, Rebecca Dryfus, "Phillip Morris v. Uruguay," Foreign Policy in Focus, March 4, 2010, available at http://www.fpif.org/articles/phillip_morris_vs_uruguay; International Centre for Trade and Sustainable Development (ICTSD), "Tobacco Company Files Claim against Uruguay over Labeling Laws," March 10, 2010, available at <http://ictsd.org/i/news/bridgesweekly/71988>.

³ Peterson, *supra*.

⁴ Diaz, *supra*. (Note separate issues regarding sale of Marlboro Green menthol cigarettes.)

- (2) *The Trans Pacific Partnership (TPP)*. Phillip Morris filed comments with the U.S. Trade Representative on the proposed TPP, urging USTR to (1) retain investor-state arbitration as a means of protecting its tobacco packaging and brands; and (2) strengthen trade rules to limit domestic regulation of tobacco packaging and brands.⁵ Does this suggest that the Uruguay suit is just the opening salvo of a global lobbying and litigation campaign by PMI? What will USTR's response be?
- (3) *Tribunal orders to perform specific actions*. It is generally understood that the only remedy for violation of BIT obligations is the award of money damages in compensation for investment losses. Under what possible theory could a tribunal claim authority to order specific performance, such as returning land or property to the plaintiff? Given its availability as a civil law remedy and as an equitable remedy in common law countries when damages do not fully compensate the plaintiff, is authority to order specific performance somehow incorporated into customary international law because it is reflected in the general practice of nations? How would an international investment tribunal order to perform specific acts be enforced? Wouldn't the availability of such remedy to BIT tribunals constitute a radical intrusion on state sovereignty and the independence of domestic courts?
- (4) *Incorporating by reference World Trade Organization (WTO) obligations under the Agreement on Trade-Related aspects of Intellectual Property rights (TRIPS) into BIT obligations*. ICTSD says that "TRIPS prevents governments from discriminating against trademarks based on the nature of a particular good or service."⁶ Do packaging measures based on WHO obligations that apply only to tobacco products violate this rule?⁷ If so, can such TRIPS rules be incorporated by reference into claims under BITS, which-- unlike the U.S. model--do not specifically limit the minimum standard of treatment obligation to customary international law to the exclusion of WTO and other treaty law?

⁵ Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement (January 22, 2010) 2-3.

⁶ ICTSD, *supra*.

⁷ *Id.*