Uruguay’s cigarette labelling victory also a win for the FCTC

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The 8th July trade tribunal decision upholding Uruguay’s cigarette labelling requirements was widely celebrated by tobacco control advocates. Philip Morris, the claimant, lost across the board in its efforts to stop Uruguay implementing 80-percent health warnings and to keep selling multiple version of its flagship Marlboro brand.

For those of us who focus on the Framework Convention on Tobacco Control (FCTC), one of the most significant aspects was the extent to which the arbitrators relied on the Convention and its guidelines, particularly Article 11 (packaging and labelling). This despite the fact that the “bilateral investment treaty” (or BIT) under which the tobacco industry complaint was lodged was between an FCTC Party (Uruguay) and a non-Party (Switzerland).

In its claim, originally filed in 2010, Philip Morris alleged (among other things!) that Uruguay had been “arbitrary” in imposing its packaging requirements. The company claimed Uruguay failed to conduct scientific studies showing that 80-percent health warnings were particularly effective, or that limiting each brand to a single presentation (so just “Marlboro”, rather than Marlboro Gold and Marlboro Red, for example) was effective in reducing smokers’ belief that one brand variant is less harmful than another. (Generally, when countries ban the terms “light” and “mild” on cigarette packs, in accordance with Article 11, the industry simply switches to colour-coding to convey the false message that some cigarettes are less hazardous than others, with lighter colours = “lighter”, “less harmful”. In neighbouring Brazil – the first country to ban the descriptors – BAT even included package onserts at the time of the change, explaining that blue = light.)

The ‘chilling’ effect

The problem, of course, is that the types of studies that Philip Morris was calling for are likely to be unreasonably expensive for small countries such as Uruguay (population 3.4 million), even if it’s now officially classified as a high-income country – and even more so for many low- and middle-income countries. If trade arbitration panels start throwing out tobacco control regulations on this basis, many countries are likely to hesitate before doing anything “controversial” (i.e. that the tobacco industry might object to).

Fortunately, the arbitration panel rejected this approach altogether, pointing to the evidence-based nature of the FCTC and FCTC guidelines:

> *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 exchange of information represented an important if not indispensable means for acquiring the scientific knowledge and market experience needed for proper implementation of its obligations under the FCTC… 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. (Paragraphs 393 and 396 of the ruling.)*

As is usual, the panel included one arbitrator selected by the claimant (i.e. Philip Morris), one by Uruguay and a neutral arbitrator to break any deadlocks. Interestingly, one of the two main arguments from the PMI-nominated arbitrator also relied on the FCTC. In his dissent, Gary Born argued that the requirement of selling a single version of each brand was unprecedented – and not specifically recommended by the FCTC or by FCTC guidelines.

Logically (though perhaps not in reality), this would appear to mean that a simple mention of the Uruguayan approach, in Article 11 guidelines, would have been sufficient to convince even an industry-nominated arbitrator. It is worth noting that plain packaging – another innovative tobacco control measure that the industry is challenging in trade fora – is mentioned in both Article 11 and Article 13 guidelines.

Where does all this leave us?

First, good-faith efforts to implement the FCTC – even with novel approaches, such as Uruguay’s single brand variant requirement – are highly likely to survive trade/investment challenges. A successful challenge would need to show that something had gone outrageously wrong in the decision-making process, or that the measure being challenged was in fact an attempt to favour one company (e.g. a domestic manufacturer) over another.

Second, although the arbitrators required Philip Morris to pay most of the legal costs of the case, Uruguay’s defence did cost money and tied up government resources – for six years! – that might have been better spent advancing Uruguay’s tobacco control efforts even more rapidly. On the other hand, tobacco companies – and Philip Morris in particular – may think twice about launching more such challenges, because they know that every such ruling will reassure hesitant governments that tobacco control measures are legally sound.

Third, people working on other public health issues can take comfort from various other aspects of the ruling, including the high value that the arbitrators placed on protection of public health, as well as their unsurprising but welcome finding that trademark rights do not create a right to use those trademarks to sell unhealthy products. But many in the public health community are likely to remain concerned about the idea that a corporation can have sovereign governments’ public health policies reviewed by panels of trade lawyers.

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About the Author

Francis Thompson became Framework Convention Alliance's executive director in January 2016 after seven years as the alliance's policy and advocacy director. He has worked in tobacco control since 1996, first at Info-tabac in Montréal, then as policy analyst and later director of policy at the Non-Smokers' Rights Association in Ottawa. Francis is a member of the NCD Alliance Steering Group.

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