Public Statement by Philip Morris:

Uruguay Bilateral Investment Treaty (BIT) Litigation

Background:
In 2010, three Philip Morris International companies ("PMI") initiated international arbitration proceedings against Uruguay, claiming that the country violated multiple provisions of the Uruguay-Switzerland Bilateral Investment Treaty (BIT). The BIT, which is one of more than twenty the country has entered into, provides protections for investments made in Uruguay, including brands, intellectual property, and ongoing business enterprises. PMI claims that two regulations implemented by Uruguay in 2009 breach the protections guaranteed by the BIT and damage their investments in the country.
PMI is making these claims before an international tribunal, which consists of three arbitrators, in accordance with the rules of the World Bank's International Centre for Settlement of Investment Disputes (ICSID). The proceedings involve two stages:

Stage 1: Jurisdiction
Uruguay filed a preliminary challenge to whether the Tribunal has jurisdiction to make a decision regarding PMI's claims. Arguments on the jurisdictional issues took place on 5-6 February 2013 in Paris. On July 2, 2013 the Tribunal ruled that it does have jurisdiction, taking this case to the second stage.

Stage 2: Merits
The parties currently are briefing the merits of PMI's claims that Uruguay breached the BIT. A hearing on the merits of the dispute likely will be held in the third quarter of 2015, and we anticipate that a decision will be issued in late 2015 or the first half of 2016.

The two regulations PMI opposes are:

1. ***"Single Presentation" Ordinance***: This regulation restricts competition to the detriment of foreign investors because it prohibits sales of more than one variation of cigarettes under a single brand name. For example, Marlboro Red, Gold, Blue and Green cannot be sold at the same time. Only one of those variants may be in the market. As a result, PMI was forced to withdraw 7 out of 12 cigarette varieties from sale in the country.
2. ***80% Health Warning Requirement***: Until 2009, health warning labels covered 50% of cigarette packaging in Uruguay, an amount PMI did not oppose. Uruguay increased the size to 80% on both the front and back of the pack, despite the fact that the 2009 Global Adult Tobacco Survey found that the awareness of the health risks of smoking is universal in the country. This requirement violates Uruguay's BIT agreement because it leaves virtually no space on the pack for the display of legally protected trademarks.

These measures go beyond the tobacco regulations enacted in virtually every country and have not been shown to reduce smoking rates. They also do nothing to address, and could further promote, the proliferation of black market cigarettes, which in 2009 amounted to nearly 1 in 4 of all tobacco products consumed in Uruguay[1].

PMI is not seeking to overturn any other tobacco control regulations in Uruguay, such as public place smoking restrictions, advertising restrictions, or reasonably sized graphic warnings on cigarette packs that accurately depict the health risks of smoking. In fact, PMI supported regulation in these areas.

Damages Sought by PMI:
PMI is seeking approximately $25 million USD for actual damages caused by the regulations, including to our Uruguayan affiliate. Those damages are the direct result of Uruguay's decision to disregard its commitments to investors, which include respecting and protecting investments such as intellectual property rights. The heart of this case focuses on such fundamental principles as the rule of law and whether or not Uruguay must keep the promises it makes.

Critical Article from Mint Press:
(24.11.2014)

Worldwide, Tobacco Regulators Monitoring Philip Morris Lawsuit Against Uruguay
By Carey L. Biron

WASHINGTON — A lawsuit that some say began as an attempt by a multinational company to intimidate a small Latin American country has instead drawn the attention of major players in global health, civil society and philanthropy circles.

Further, the legal action – brought by the tobacco giant Philip Morris International against the government of Uruguay – has led other countries to halt the implementation of new tobacco regulations until after the case is decided.

After Uruguay filed its formal defense in the case last month, the issue has been receiving increasingly broad attention, including from the World Health Organization, which has been a prominent anti-tobacco crusader.
"Uruguay's continuing efforts to protect its population against tobacco consumption and exposure to secondhand smoke, despite challenges by the tobacco industry, demonstrate that the country will not be intimidated by the industry," Carissa F. Etienne, the director of the Pan American Health Organization/World Health Organization (PAHO/WHO), said this month.

"PAHO/WHO supports Uruguay's defense of these measures, which are aimed at saving lives, and recognizes it as a role model for the region and the world." In mid-October, the WHO's director-general spoke even more forcefully on the issue, highlighting what she says is a growing trend.

"As implementation of the Framework Convention [the WHO's international tobacco regulation] reaches new heights, the tobacco industry fights back, harder and through every possible channel, no matter how devious those channels and practices are," Dr. Margaret Chan said last month, speaking in Moscow at a global summit on tobacco.

"In an especially worrisome trend, the tobacco industry is using bilateral investment treaties to try to deter governments from protecting the health of their citizens through strong tobacco control measures that are known to work. This has been the case with claims filed against Uruguay's warning labels and branding measures."

Unprecedented success

The issue goes back to new regulations passed by the Uruguayan government in 2009 regarding tobacco product packaging and sales. First, the government required that 80 percent of individual cigarette packs be covered by graphic health warnings, an increase from 50 percent previously.

Second, manufacturers would be allowed to market only a single variation of their brand's product, and also had to remove language on their packaging that appeared to differentiate different types of cigarettes ("low tar," for instance). Critics say these practices mislead consumers into believing that the negative health effects of some cigarettes are lower than others.

Philip Morris, which notes that it supported Uruguay's pre-2009 regulations, says the new rules forced the company to remove seven of its 12 products from the country. The maker of Marlboro is seeking $25 million for costs incurred.

The company also claims that the new 80-percent requirement for cigarette packaging infringes on trademark guarantees included in a trade agreement between Uruguay and Switzerland, where Philip Morris International is based. The case is being heard before an arbitration panel here in Washington, the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).

"The heart of this case focuses on such fundamental principles as the rule of law and whether or not Uruguay must keep the promises it makes," the company says in a statement.

"These measures go beyond the tobacco regulations enacted in virtually every country and have not been shown to reduce smoking rates," it claims.

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While the arbitration process began in 2010, it was only last month that the Uruguayan government filed its formal defense, which reportedly runs to 500 pages.

While that document is not yet publicly available, the legal team assisting Uruguay in this process says the crux of the issue is the fact that the country is mandated by an international agreement to take steps to cut down on smoking rates. And, contrary to what Philip Morris says, multiple studies have found that the government's anti-smoking reforms have been notably successful in achieving that goal.

"In its defense filed on October 13, Uruguay shows that it adopted both measures pursuant to its obligation to protect public health from the unparalleled harms of tobacco use, and to safeguard the human rights of its people to health and life," Larry Martin, a partner with Foley Hoag, a Washington law firm, told MintPress.

"The need to take firm and effective tobacco control measures like those Uruguay has taken is a matter of global legal and scientific consensus reflected in the WHO Framework Convention on Tobacco Control, the first and only international treaty adopted under the auspices of the WHO."

Historically, Martin says, Uruguay has had one of the highest smoking rates in Latin America, at some 45 percent. While this started to drop due to previous regulatory measures, passed in 2005, by the time the 2009 rules were put in place, Martin says, Uruguay's smoking rates was still "stuck" at around 32 percent.

"Currently, it is approximately 23 percent and falling," Martin said, citing statistics from a 2012 study published in The Lancet, a peer-reviewed journal. "The results have been even more encouraging among young people. In 2007, still approximately 22 percent of young people smoked. Today, it is roughly 13 percent and continuing to drop."

The Lancet study looked at changes in Uruguayan smoking rates since 2005, not just since 2009. Nonetheless, the researchers characterized the reduction as "unprecedented." Other research has resulted in similarly striking findings.

Symbolic case

The Philip Morris lawsuit against Uruguay is a key example of the growing spate of instances in which multinational companies are able to use trade-related arbitration to circumvent national legislation — even legislation intended to safeguard public health.

The number of these cases – and the importance of arbiters such as the ICSID – has grown significantly in recent years, following a flurry of bilateral investment deals signed during the late 1980s and 1990s. Most of these deals include provisions for external arbitration – known as investor-state dispute settlement mechanisms – in case the government does something seen as infringing on the provisions of the trade deal.

In the current case, for instance, Philip Morris is claiming that Uruguay's 80 percent rule is interfering with the company's ability to place its branded trademark. Hence, the dispute is over intellectual property rights as guaranteed in an investment agreement between Uruguay and Switzerland.

Yet many say the specifics of the deal are somewhat irrelevant. Instead, critics suggest that Philip Morris was hoping to use Uruguay as an example to other countries, particularly poor governments.

"The costs of defending these cases are enormous, so tobacco companies are trying to pick off lower-income countries that can't spend the money and political capital to defend themselves against industry," Ellen R. Shaffer, co-director of the Center for Policy Analysis, a group focused on trade and health issues, told MintPress.

"The hope was that by squashing this attempt by Uruguay to stop teenagers from starting to smoke, they would be able to chill similar initiatives in other countries. New Zealand, for instance, has said it would hold off on similar rules pending the outcome of this case."

Shaffer says that Philip Morris likely saw Uruguay as an "easy target." Yet the country's government has received backing from Bloomberg Philanthropies, the charitable foundation set up by former New York City mayor Michael Bloomberg, a prominent anti-smoking supporter. In a statement on behalf of the foundation, Bloomberg called the lawsuit a "defining moment in the fight against the global tobacco epidemic."
While the Uruguay case is being closely watched, the tobacco industry is currently involved in similar legal and administrative action against other countries. Indeed, Philip Morris itself is currently suing Australia before the World Trade Organization, also for packaging requirements, and has reportedly threatened to file another such case against the United Kingdom.

"All eyes are on [the Australia] case," the WHO's Chen noted in her mid-October remarks. "There are more third parties to the dispute than ever before in WTO history."