Philip Morris

Student Materials

- Decided by the International Centre for the Settlement of Investment (ICSID) in July 2016
- Key topics: investment (foreign investor rights, preserving state authority)

Learning Objectives

- Understand and apply:
  - forms and consequences of expropriation
  - treatment standards under international investment law

- Analyze and evaluate:
  - how investment protections can challenge state regulatory authority
  - how investment tribunals determine whether state regulatory authority is legitimate

Background Information

Philip Morris International (PMI) is a US corporation that produces and sells cigarettes in over 180 countries. PMI is notorious for filing domestic lawsuits to fight anti-smoking regulations. In recent years PMI has taken its battles to the international level, arguing that domestic anti-smoking regulations violate international investment law. When Tabarè Vàzquez, a former oncologist, became the president of Uruguay in 2005, one of his domestic priorities was to strengthen Uruguay's anti-smoking regulations. After these new regulations were implemented, PMI and Abal—its local affiliate in Uruguay—filed an international arbitration case against Uruguay at ICSID. PMI argued that the new regulations violated a 1988 bilateral investment treaty between Switzerland and Uruguay.

In response, numerous countries scaled back on their plans to adopt new anti-smoking legislation, fearful of being sued for violating investment treaties. They publicly announced that they would wait to see the outcome of this case before passing new legislation. As the case dragged on, it became a lightning-rod in public protests over new trade and investment treaties in Europe and the US. PMI ultimately lost the

case, but it was successful in delaying the adoption of stricter anti-smoking rules in many countries for a decade.[1]

Relevant Legal Text

Switzerland—Uruguay Bilateral Investment Treaty (1988)

Article 3(2)

Each contracting party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other contracting party. This treatment shall not be less favourable than that granted by each contracting party to investments made within its territory by its own investors, or than that granted by each contracting party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.

Article 5(1)

Neither of the contracting parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other contracting party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto.

[1] Carolina Moehlecke (2020) "The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty" *ISQ* 64: 1—12.

Arbitration Award[2]

Part I—Background Information

The Tribunal began by describing the two Uruguayan policies that were challenged by Philip Morris International (PMI) and Abal, PMI's local affiliate in Uruguay.

> At its core, the dispute concerns allegations by the Claimants that, through several tobacco-control measures regulating the tobacco industry, the Respondent violated the BIT in its treatment of the trademarks associated with cigarettes brands in which the Claimants had invested. These measures included the Government's adoption of a single presentation requirement precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family (the "Single Presentation Requirement" or "SPR"), and the increase in the size of graphic health warnings appearing on cigarette packages (the "80/80 Regulation"), jointly referred to as the "Challenged Measures."
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> The Single Presentation Requirement ... requires each cigarette brand to have a "single presentation" and prohibits different packaging or "variants" for cigarettes sold under a given brand. Until the enactment of the SPR, Abal sold multiple product varieties under each of its brands (for example, "Marlboro Red," "Marlboro Gold," "Marlboro Blue" and "Marlboro Green (Fresh Mint)"). As a result of [the SPR], Abal ceased selling all but one of the product variants of each brand that it owns or holds licenses to (e.g. only Marlboro Red). The Claimants allege that the measure and lack of variant sales have substantially impacted the value of the company.
>
> The 80/80 Regulation ... imposes an increase in the size of prescribed health warnings of the surface of the front and back of the cigarette packages from 50% to 80%, leaving only 20% of the cigarette pack for trademarks, logos and other information. According to the Claimants, this wrongfully limits Abal's right to use its legally protected trademarks and prevents Abal from displaying them in their proper form. This, in the Claimants' view, caused a deprivation of [PMI]'s and Abal's intellectual property rights, further reducing the value of their investment.

The Tribunal then summarized the legal claims made by PMI, and Uruguay's response to these claims.

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[2] Two—of the three—arbitrators that decided this case wrote this award. The remaining arbitrator (Gary Born) wrote a separate opinion.

> According to the Claimants, the Challenged Measures constitute breaches of the Respondent's obligations under BIT Articles ... 3(2) (fair and equitable treatment and denial of justice), [and] 5 (expropriation), ... entitling the Claimants to compensation under the Treaty and international law ...
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> Uruguay in turn holds that the Challenged Measures were adopted in compliance with Uruguay's international obligations, including the BIT, for the single purpose of protecting public health. According to Uruguay, both regulations were applied in a non-discriminatory manner to all tobacco companies, and they amounted to a reasonable, good faith exercise of Uruguay's sovereign prerogatives. The SPR was adopted to mitigate the ongoing adverse effects of tobacco promotion, including the Claimants' false marketing that certain brand variants are safer than others, even after misleading descriptors such as "light," "mild," "ultra-light" were banned. The 80/80 Regulation was adopted to increase consumer awareness of the health risks of tobacco consumption and to encourage people, including younger people, to quit or not to take up smoking, while still leaving room on packages for brand names and logos. Thus for the Respondent, this case is "about protection of public health, not interference with foreign investment" ...

The Tribunal then summarized existing knowledge about the health consequences of cigarettes. It notes that these consequences have caused many states to sign a World Health Organization (WHO) treaty called the Framework Convention on Tobacco Control (FCTC).

> It is not in dispute between the parties that smoking cigarettes and other tobacco products represents a serious health risk. Cigarettes are a legal consumer product that is highly addictive and cause the deaths of up to half of long-term consumers when used as intended. According to the WHO "approximately 5.1 million adults aged 30 years and over die from direct tobacco use each year. In addition, some 603,000 people die from exposure to second-hand smoke every year." Uruguay has one of Latin America's highest rate of smokers, being in third place in the region after Chile and Bolivia. As of 2009, more than 5,000 Uruguayans died each year from diseases linked to tobacco consumption, mainly due to cardiovascular diseases and cancer. Consumption of tobacco and exposure to tobacco smoke are responsible for 15% of all deaths of Uruguayans over 30 years of age, which is higher than the world average of 12%. Smoking also has an economic impact. Uruguayan smokers spent an average of 20% of the national minimum wage to

> sustain their habit and the health costs linked to smoking in Uruguay are estimated to amount to US$150 million per year. Against this background, Uruguay has positioned itself in the forefront of states in terms of anti-smoking policy and legislation ... Uruguay has taken a range of increasingly stringent regulatory measures of tobacco control, including restrictions on advertising, mandatory health warnings, increased taxation, and prohibition of smoking in enclosed spaces ...
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> [In] 2003, the World Health Organization concluded the Framework Convention on Tobacco Control ("FCTC"). Uruguay signed the FCTC [in] 2003 and ratified it [in] 2004, being the first Latin-American state to do so ... The FCTC is said to be an "evidence-based treaty," one that "provides a framework for tobacco control measures to be implemented by the parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke" ... In addition, in November 2008, the state parties to the FCTC established guidelines for the implementation of a number of provisions ... (the "Guidelines"). According to the WHO and FCTC Secretariat, the Guidelines, which are evidence-based, "are intended to assist parties in ... increasing the effectiveness of measures adopted and play a particularly important role in settings where resource constraints may otherwise impede domestic policy development" ...

The Tribunal then described the impact of Uruguay's new anti-smoking regulations on Abal, PMI's local affiliate. It also briefly described other major tobacco companies that operated in Uruguay and were also subject to the new anti-smoking regulations.

> The adverse health effects of tobacco consumption are not in dispute before the Tribunal. Rather, the parties disagree as to whether tobacco use and/or smoking prevalence has increased, remained constant, or decreased in Uruguay as a result of the SPR and/or the 80/80 Regulation ...
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> It is undisputed that after the entry into force of the SPR [in February 2009], Abal eliminated seven of its thirteen variants (namely Marlboro Gold, Marlboro Blue, Marlboro Fresh Mint, Fiesta Blue, Fiesta 50/50, Phillip Morris Blue, and Premier) ... The eliminated variants accounted for roughly 20% of Abal's domestic sales. In late 2009, ... the Claimants withdrew Premier Extra and Galaxy from the market. Four of Abal's thirteen variants remain in the market ...
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> Besides Abal, there are two tobacco companies that legally sell their products in Uruguay:

- Compañía Industrial de Tabacos Monte Paz S.A. ("Monte Paz"…), a domestically owned company …
- British American Tobacco (South America) ... ("BAT"), another multinational company …

Part II—Expropriation Claim

The Tribunal then examined PMI's first main argument: that Uruguay had expropriated its investment. It began by summarizing the legal positions of PMI and Uruguay.

> It is the Claimants' position that by imposing the SPR and 80/80 Regulation, the Respondent expropriated their investment in violation of Article 5(1) of the BIT. In particular, the Claimants allege that by effectively banning seven of Abal's thirteen variants and substantially diminishing the value of the remaining ones, the Respondent expropriated the Claimants' brand assets, including the intellectual property and goodwill associated with each of the Claimants' brand variants, in violation of Article 5 of the BIT.
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> According to the Respondent, the SPR and 80/80 Regulation cannot be considered expropriatory since they were legitimate exercise of the state's sovereign police power to protect public health. It contends that, in any case, the Claimants' expropriation claim fails on the merits [because] after the adoption of the measures, Abal continued to be profitable. In other words, the Challenged Measures have not had such a severe economic impact on the Claimants' business that it has been rendered virtually without value ...

The Tribunal then noted that PMI alleged that Uruguay had committed indirect (or creeping) expropriation. The Tribunal described the concept of indirect expropriation.

> The Tribunal notes that the legal title to the property representing the Claimants' investment was not affected by the Challenged Measures. Abal remained the registered owner or licensee of the relevant trademarks and continued to be entitled to protect them by an action for infringement. Clearly, the Claimants' claim relates to indirect or *de facto* expropriation ... The parties diverge as to the threshold for finding indirect expropriation, the Claimants contending that the interference with the investor's rights, whether regulatory or not, should be such as to substantially deprive the

> investment of its value, the Respondent holding that such interference must have "rendered almost without value the rights remaining with the investor" ...
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> In order to be considered an indirect expropriation, the government's measures interference with the investor's rights must have a major adverse impact on the Claimants' investments. As mentioned by other investment treaty decisions, the state's measures should amount to a "substantial deprivation" of its value, use or enjoyment, "determinative factors" to that effect being "the intensity and duration of the economic deprivation suffered by the investor as a result of such measures" ...

The Tribunal quickly dismissed the idea that the 80/80 Regulation was indirect expropriation.

> Regarding the 80/80 Regulation, the Claimants argue that it reduced the brand equity of those products that survived the implementation of the SPR, "depriving Abal of its ability to charge a premium price."
>
> In the Tribunal's view there is not even a *prima facie* case of indirect expropriation by the 80/80 Regulation. The Marlboro brand and other distinctive elements continued to appear on cigarette packs in Uruguay, recognizable as such. A limitation to 20% of the space available to such purpose could not have a substantial effect on the Claimants' business since it consisted only in a limitation imposed by the law on the modalities of use of the relevant trademarks. The claim that the 80/80 Regulation breached Article 5 of the BIT consequently fails.

The Tribunal then examined whether the SPR was indirect expropriation. The Tribunal argues that indirect expropriation requires a "substantial" decline in an investment's value, which did not occur in this case: Abal generated higher profits after Uruguay implemented its new laws.

> Regarding the SPR, at the time of its imposition in 2009, the Claimants manufactured and sold thirteen variants within its six brand families ... In the Claimants' view, each of such "brand assets" is an investment protected by the BIT. They contend that variants were vital to their business in Uruguay given the ability to utilize them to compete for market share and pricing power in the Uruguayan market and the difficulty and costs to introduce new brands in such a highly regulated market.

> According to the Claimants, the SPR banned seven of the thirteen variants manufactured and sold by Abal at the time, thus rendering them and the associated goodwill "valueless" ... They add that "[b]y destroying the value of those investments without compensation, Respondent violated Article 5 of the BIT." ...
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> The Tribunal believes that in order to determine whether the SPR had an expropriatory character in this case, Abal's business is to be considered as a whole since the measure affected its activities in their entirety ...
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> The effects of the SPR were far from depriving Abal of the value of its business or even causing a "substantial deprivation" of the value, use or enjoyment of the Claimants' investments, according to the standard that has been adopted for a measure to be considered expropriatory. The Claimants admit not to have suffered such substantial deprivation when mentioning that "while Abal has grown more profitable since 2011, Abal would have been even more profitable if Respondent had not adopted the challenged measures" ...
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> In the Tribunal's view, in respect of a claim based on indirect expropriation, as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation … A partial loss of the profits that the investment would have yielded absent the measure does not confer an expropriatory character on the measure. In *LG&E v. Argentina*, for example, the tribunal held:
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> > Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for expropriation.

The Tribunal then discussed the concept of "police powers."[3] The term "police powers" does not appear in the relevant BIT. However, the Tribunal strongly supported Uruguay's claim that: (1) the BIT must be interpreted in a way that is consistent with customary international law; and (2) customary international law allows states to assert legitimate regulatory authority (i.e. the police powers doctrine).

[3] Note that this section of the ruling is not necessary for the Tribunal to reject PMI's argument about expropriation.

The Tribunal's analysis might end here, leading to the dismissal of the Claimants' claim of expropriation for the above reasons. There is however an additional reason in support of the same conclusion that should also be addressed in view of the parties' extensive debate in that regard. In the Tribunal's view, the adoption of the Challenged Measures by Uruguay was a valid exercise of the state's police powers, with the consequence of defeating the claim for expropriation under Article 5(1) of the BIT …

It is the Claimants' contention that Article 5(1) of the BIT prohibits any expropriation unless it is carried out in accordance with the conditions established by said Article and that the existence of a public purpose, one of such conditions, does not exempt the state from the obligation to pay compensation. In the Claimants' view, the state's exercise of police powers does not constitute a defense against expropriation, or exclude the requirement of compensation. The Claimants add that there is no room under Article 5(1) or otherwise in the BIT for carving out an exemption based on the police powers of the state.

The Tribunal disagrees. As pointed out by the Respondent, Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties," a reference "which includes ... customary international law." This directs the Tribunal to refer to the rules of customary international law as they have evolved.

Protecting public health has since long been recognized as an essential manifestation of the state's police power ... According to the OECD, "[i]t is an accepted principle of customary international law that where economic injury results from a *bona fide* non-discriminatory regulation within the police power of the state, compensation is not required."

The principle that the state's reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory did not find immediate recognition in investment treaty decisions. But a consistent trend in favor of differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period, a range of investment decisions have contributed to develop the scope, content and conditions of the state's police powers doctrine, anchoring it in international law. According to a principle recognized by these decisions, whether

a measure may be characterized as expropriatory depends on the nature and purpose of the state's action.

In *Tecmed v. Mexico* the tribunal stated:

> The principle that the state's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.

In *Saluka v. Czech Republic*, the tribunal recorded the scope, conditions and effects of the police powers doctrine, stating:

> It is now established in international law that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed to the general welfare.

The tribunal added:

> The principle that the state adopts general regulations that are "commonly accepted as within the police power of states" forms part of customary international law today.

The police powers doctrine has been applied in several cases to reject claims challenging regulatory measures designed specifically to protect public health. As early as 1903, the Claims Commission in the *Bischoff Case*, in dismissing a claim for damages, held: "[c]ertainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers." In *Methanex v. United States*, the claimant had contended that its rights had been expropriated by measures adopted by the U.S. state of California banning MTBE, a fuel additive harmful to public health. In rejecting the claim, the tribunal stated:

> As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects … a foreign investor or investment is not deemed expropriatory ...

> In *Chemtura v. Canada*, a U.S. manufacturer of lindane, an agricultural insecticide said to be harmful to human health and the environment, claimed a breach of the NAFTA by Canada's prohibition of its sale. The tribunal rejected the claim ...
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> As evidence of the evolution of the principles in the field, the police powers doctrine has found confirmation in recent trade and investment treaties ...

The Tribunal then applied the concept of the public powers doctrine to the specific details of Uruguay's anti-smoking regulations.

> In order for a state's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate. In the Tribunal's view, the SPR and the 80/80 Regulation satisfy these conditions.
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> The Challenged Measures were taken by Uruguay with a view to protect public health in fulfillment of its national and international obligations ... In the Tribunal's view the Challenged Measures were both adopted in good faith and were non-discriminatory. They were proportionate to the objective they meant to achieve, quite apart from their limited adverse impact on Abal's business. Contrary to the Claimants' contention, the Challenged Measures were not "arbitrary and unnecessary" but rather were potentially "effective means to protecting public health," a conclusion endorsed also by the WHO/PAHO submissions. It is true that it is difficult and may be impossible to demonstrate the individual impact of measures such as the SPR and the 80/80 Regulation in isolation … The Challenged Measures were introduced as part of a larger scheme of tobacco control, the different components of which it is difficult to disentangle. But the fact remains that the incidence of smoking in Uruguay has declined, notably among young smokers, and that these were public health measures which were directed to this end and were capable of contributing to its achievement. In the Tribunal's view, that is sufficient for the purposes of defeating a claim under Article 5(1) of the BIT.

The Tribunal therefore concluded that Uruguay has not committed indirect expropriation.

> In light of the foregoing, the Tribunal concludes that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriation of the Claimants' investment. For this reason also, the Claimants' claim regarding the expropriation of their investment must be rejected ...

Part III—Fair and Equitable Treatment Claim

The Tribunal then turned to PMI's second main argument: that Uruguay had violated its obligation to provide fair and equitable treatment to foreign investors. The Tribunal notes that previous investment tribunals have considered whether many different situations constitute "fair and equitable treatment."

> The Claimants allege that by enacting the Challenged Measures, the Respondent has subjected their investments to unfair and inequitable treatment in violation of Article 3(2) of the BIT ...
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> As held by investment tribunals, whether a particular treatment is fair and equitable depends on the circumstances of the particular case. Based on investment tribunals' decisions, typical fact situations have led a leading commentator to identify the following principles as covered by the FET standard: transparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith ...
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> The Tribunal will proceed to determine whether the treatment afforded to the Claimants' investment by the Challenged Measures was in accordance with the FET standard ... To this purpose, it will review each measure taking into account all relevant circumstances, including the margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations.

PMI's case focused on the claim that Uruguay's regulations were "arbitrary." The Tribunal then states that it did not believe that the regulations were arbitrary.

> It is the Claimants' contention that the Challenged Measures are "arbitrary" since they were adopted without a scientific evidence of their effectiveness, without due consideration by public officials and with no reasonable connection between the objectives pursued by the state and the utility of the chosen measure.

> According to the international law standard set forth by the ICJ ..., "arbitrariness" is defined as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" ... Based on this definition, the Tribunal concludes that the Challenged Measures are not "arbitrary," for the following reasons.

To refute PMI's claim that the regulations were arbitrary, the Tribunal first discussed arguments that applied to both of the two policies. First, the Tribunal argued that there was a connection between Uruguay's objectives and its chosen policies.

> Both measures have been implemented by the state for the purpose of protecting public health. The connection between the objective pursued by the state and the utility of the two measures is recognized by the WHO and the [Pan American Health Organizaion] *amicus* briefs, which contain a thorough analysis of the history of tobacco control and the measures adopted to that effect ...

Second, the Tribunal argued that Uruguay did not need to collect new scientific evidence before passing its policies.

> The Claimants, while accepting in principle that no cigarette is safer than another, argue that the Challenged Measures were adopted with no scientific support as to their effectiveness in conveying that message. But the Tribunal would note the following points. At the time the measures were adopted, evidence was available at the international level regarding in particular consumers' misperception of the health risks attached to "light" and "lower tar" cigarettes (so called "health reassurance" cigarettes). That evidence included the tobacco industry's own records, including those of PMI, showing that "cigarettes brand variants ... were strategically positioned to offer health reassurance." Evidence included also the *U.S. v. Philip Morris* judgment of 2006, "an encyclopedia of industry research and practice with respect to brand variants," confirming, based on available data (which again included PMI internal documents) that PMI had mispresented health risks and finding that "since the 1970s, the defendants as a group had deliberately misled consumers into believing that `light' and `low tar' cigarettes were healthier than other cigarettes, and therefore an acceptable alternative to quitting." Additional empirical evidence was offered, among other sources, by the Canada NGO Physicians for a Smoke-Free Canada 557 and by the Brazilian experience. Numerous scientific studies had been published by that time in leading international journals cited by the U.S. Surgeon General and the U.S. National Cancer Institute.

> 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 of exchange of information represented an important if not indispensable means for acquiring the scientific knowledge and market experience needed for the proper implementation of its obligations under the FCTC and for ensuring the fulfillment of its tobacco control policy ...
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> 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 …

The Tribunal then focused on criticisms that were specific to the SPR policy. Namely, they noted that SPR was not included in the FCTC and had not been previously adopted by any other state.[4] Nevertheless, the Tribunal argues that the SPR is "reasonable" and hence did not violate fair and equitable treatment.

> At the time it was introduced, the SPR was without precedent in the practice of other states. It is not specifically mentioned in the FCTC, although Article 11(1)(a) of that Convention did require each state party to take measures "in accordance with its national law" to prevent "the false impression that a particular tobacco product is less harmful than other tobacco products" ... But the rationale of the SPR ... was to address the false perception, plausibly said to be created by the use of colours and their association with earlier packaging and labelling, that some brand variants, including those previously advertised as "low tar," "light," "ultra-light," or "mild," are healthier than others.
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> But there was much debate in evidence over whether the SPR was calculated to achieve this legitimate aim or not. The Claimants argue that the SPR was "overbroad" because it "prohibit[s] the use of colors that are undisputedly not misleading, if those colors are used in multiple product lines under a common brand name." The Respondent replies that instead of banning colors, "the SPR takes a different approach by eliminating the ability of tobacco companies to use color contrast within a brand family to promote the misimpression that there are differences in

[4] Note that this section of the award is in dialogue with Gary Born's separate opinion.

> healthiness." In a way one may consider the SPR as "under-inclusive" since by not prohibiting the introduction of new brands it allowed Maihlos' alibi brands. But according to the Respondent, it was considered that "new brands, entirely distinct from existing brands, do not convey the same messages as variations within the same brand." The Tribunal observes that possible over- or under-inclusiveness of the SPR was unsurprising given the relative novelty of this regulation ...
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> The Tribunal does not believe that it is necessary to decide whether the SPR actually had the effects that were intended by the state, what matters being rather whether it was a "reasonable" measure when it was adopted. Whether or not the SPR was effective in addressing public perceptions about tobacco safety and whether or not the companies were seeking, or had in the past sought, to mislead the public on the point, it is sufficient in light of the applicable standard to hold that the SPR was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith ...
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> In short, the SPR was a reasonable measure, not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure, and this is especially so considering its relatively minor impact on Abal's business. The Tribunal concludes, by majority, that its adoption was not in breach of Article 3(2) of the BIT ...

The Tribunal then focused on criticisms that were specific to the 80/80 Regulation. It argued that PMI accepted the general principle that states can require health warnings on cigarette packages. It therefore concluded that the Tribunal should defer to the Uruguayan government regarding the size of those warnings, and that the 80/80 Regulation did not violate fair and equitable treatment.

> In the Tribunal's view, the present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco. Substantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem. The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal. Article 3(2) does not dictate, for example, that a 50% health warning requirement is fair whereas an 80% requirement is not. In one sense an 80% requirement is arbitrary in that it could have been 60% or 75% or for that matter 85% or 90%. Some limit had to be set, and the balance to be struck between conflicting considerations was very largely a matter for the government.

> In the end, the question is whether the 80% limit in fact set was entirely lacking in justification or wholly disproportionate, due account being taken of the legitimate underlying aim—*viz.*, to make utterly clear to consumers the serious risks of smoking. The Claimants did not object to the content of the warnings, which reflected the scientific consensus of the different harmful effects of continued smoking, but only to their size increase to 80% with respect to the previously-accepted 50% size. How a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk, is a matter of public policy, to be left to the appreciation of the regulatory authority.
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> In short, the 80/80 Regulation was a reasonable measure adopted in good faith to implement an obligation assumed by the state under the FCTC. It was not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure, in particular given its relatively minor impact on Abal's business. The Tribunal concludes that its adoption was not in breach of Article 3(2) of the BIT ...

Concurring and Dissenting Opinion of Gary Born

Born begins by summarizing his disagreement with the majority. Born believes the Uruguay's Single Presentation Requirement is arbitrary and disproportionate. He therefore believes that Uruguay has broken its obligation to provide fair and equitable treatment to Philip Morris.[5]

> I am unable to agree ... that Uruguay's "single presentation requirement" for tobacco products did not constitute a denial of fair and equitable treatment. Rather ... I conclude that Uruguay violated Article 3(2) of the BIT ... In my view, given the factual background against which it was adopted and the evidentiary record in these proceedings, this unprecedented requirement is manifestly arbitrary and disproportionate and, as a consequence, constituted a denial of fair and equitable treatment under Article 3(2) of the BIT and international law ...

Born then discusses the specific details of the SPR that he finds problematic. Recall that international investment law does not have definitive criteria or checklists for assessing fair and equitable treatment. Born's opinion is therefore organized around themes that are relevant to assessing government treatment.

[5] Born agrees with the other key rulings by the majority: (1) Born does not believe that Uruguay has committed expropriation; and (2) Born does not believe that the 80/80 Regulation violates the fair and equitable treatment standard.

Part I: Should Arbitrators Defer to the Uruguayan Government When It Crafts Policy?

Born begins by addressing the argument the investment tribunals should defer to the expertise of governments in crafting policies. Born argues that three key facts should reduce deference to the Uruguayan government on the SPR: (1) the SPR was not included by the WHO in the FCTC; (2) no other state has adopted the SPR; and (3) the Uruguayan government did not carefully consider the SPR policy before adopting it.

(1) Born argues that the SPR was not included by the WHO in the FCTC.

> As the Award describes, like other states, Uruguay has an extensive regime of legislation and regulations governing the sale and use of tobacco. Among other things, this regulatory regime implements the WHO Framework Convention on Tobacco Control ("FCTC" or "Convention") ...
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> It is important to note that the single presentation requirement is not required by or referred to in the Convention. That is true although the Convention does mandatorily prescribe a number of other specific regulatory measures, which were developed through extensive international study and consultation. These include measures providing for protection from exposure to tobacco smoke in indoor workplaces and other public places (Article 8); measures to restrict advertising and promotion, including misleading use of trademarks (Article 13); measures to ensure that all unit packets and packages of tobacco products and any outside packaging are marked to determine the origin of the tobacco products (Article 15); and measures to prohibit the sales of tobacco products to minors (Article 16).
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> Despite this detailed list of regulatory measures, ... there is no suggestion in the text or history of the Convention that a single presentation requirement was either mandated or contemplated by the Convention. Likewise, there is nothing in the Guidelines to the Convention that suggests that a single presentation requirement was mandated or contemplated by the Convention's drafters. Although the Guidelines make reference to a variety of wide regulatory measures, they contain no reference to a single presentation requirement.

(2) Born argues that no other state had adopted the SPR before Uruguay.

> Finally, it is also relevant that a single presentation requirement has never been imposed by any other state, either in Latin America or elsewhere ... Uruguay was the first state to adopt or, so far as the evidentiary record indicates, to consider a single presentation requirement. Similarly, again so far as the evidentiary record indicates, no state other than Uruguay has subsequently adopted a single presentation requirement. The single presentation requirement was (and remains), in a field with an extensive body of regulation, unprecedented ...

(3) Born finds that the Uruguayan government did not carefully consider the SPR policy before adopting it.

> [Additionally, the] documentary evidence is clear in demonstrating that no meaningful internal discussion or consideration of the single presentation requirement occurred within the Ministry of Public Health (or elsewhere in the Uruguayan government). There is no reliable evidence that any meeting was ever held to discuss the requirement in any meaningful way, in circumstances where contemporaneous documentation inevitably would have been generated in connection with such discussions. Likewise, there are no documents recording or referring to any studies, internal discussions, or commentary regarding the single presentation requirement. In my view, the inescapable conclusion is that there was no serious internal discussion or deliberation at the Ministry of Public Health or within the Uruguayan government more generally about the requirement ...
>
> The absence of any evidence of deliberations regarding the single presentation requirement is, in my view, relevant to evaluating the Claimants' fair and equitable treatment claim. This background is not decisive, but it nonetheless provides important context in evaluating the extent to which the challenged Uruguayan measure is arbitrary or disproportionate.

Based on these three elements, Born concludes that the tribunal should give less deference to the Uruguayan government when considering its policies.

> Put simply, claims that a governmental action is arbitrary, disproportionate, or not rationally related to any stated government objective are more plausible with respect to an unprecedented regulatory measure, adopted without any meaningful prior study, discussion, or consultation, which departs from a widespread and comprehensive international regulatory regime, than with respect to measures that have been adopted by other states, recommended by international bodies,

> or developed through careful domestic or other study, discussion, and consultation. Or, put alternatively, claims that a governmental action is entitled to deference because of administrative or regulatory expertise are less persuasive where there is no indication that any such expertise was ever relied upon or brought to bear with respect to the challenged measures …

Part II: What is Required by Fair and Equitable Treatment

Born then discussed the existing law on fair and equitable treatment. He notes that a government policy must be "rational and proportionate." If is not, then the policy is "arbitrary," meaning that it violates "fair and equitable treatment."

> One of the central elements of the guarantee of "fair and equitable treatment" is a protection against arbitrary treatment. This guarantee reflects a fundamental aspect of the rule of law: citizens are entitled to treatment, by their government, which is rational and proportionate. Irrational or arbitrary governmental measures, which are unrelated to any legitimate governmental objective, or which are gravely disproportionate to the achievement of such an objective, are neither fair nor equitable, and they betray, rather than advance, the rule of law.
>
> In my view, Article 3(2)'s guarantee of "fair and equitable treatment," and the related requirements of reasonableness and proportionality, require an objective consideration of the extent to which a governmental measure is rationally related to, or fairly advances, the state's articulated objectives. That consideration must give considerable deference to a state's choice among competing means to accomplish its objectives, its assessment of the likelihood that particular means will be effective, and its weighing of costs and benefits ...

Born next identifies Uruguay's objective in passing the SPR. He notes that Uruguay's objective of protecting public health is "legitimate" and "within the scope of any government's regulatory powers."

> Uruguay has very clearly explained the governmental objective of the single presentation requirement—namely, "to combat a practice that misled smokers and would-be smokers into believing that certain brand variants were less harmful than their parent brands, or other variants in the same brand family, and caused them to smoke the supposedly 'safer' variants in lieu of quitting." In similar terms, Uruguay explained: "the existence of multiple variants of a single brand per se creates a risk of deception in the minds of some consumers" and the goal of the

> single presentation requirement is to "diminis[h] the industry's ability to continue perpetrating this fiction." …
>
> There is no question that these are legitimate and entirely proper governmental objectives. The protection of consumers from misleading or deceptive marketing in order to safeguard the public health is within the scope of any government's regulatory powers. That conclusion is non-controversial and indisputable.
>
> There is also no question, in my view, that the Tribunal must accord deference to Uruguay's chosen legislative objectives. Although one might conceive of alternative or additional legislative purposes for the single presentation requirement, it is for the state, not the arbitral tribunal, to identify such objectives with regard to the measures it has adopted.

Born says that the tribunal must then assess whether Uruguay's policy "achieves, or is calculated to achieve, [its] objective" of protecting public health.

> With the foregoing stated objectives of the single presentation requirement in mind, the fair and equitable treatment standard requires at least some measure of objective consideration of the extent to which the requirement achieves, or is calculated to achieve, that objective ...
>
> Uruguayan law already ... provided express and extensive prohibitions against the misleading use of trademarks and other elements of tobacco packaging or labelling that had the "direct or indirect effect" of misleading consumers ...
>
> Uruguay also banned the use of descriptors such as "light" and "mild" ...
>
> Given these provisions of Uruguayan law, one must ask what additional purpose the single presentation requirement would serve in achieving the measure's only stated purpose—namely, to prevent misleading use of trademarks. The simple point is that Uruguayan law already contained carefully drafted provisions, adopting international models, that achieved precisely this objective ...

Born then argues that "there is a fundamental mismatch between" the design of the SPR and Uruguay's objective of protecting public health. This mismatch is caused by two attributes of the policy: (1) the SPR is overbroad; and (2) the SPR is under-inclusive.

> In my view, [the SPR] is inherently ill-suited to achieving its asserted objective of prohibiting the deceptive or misleading use of trademarks. Instead, on considered reflection, I find it impossible to avoid concluding that the single presentation requirement is inevitably incapable of discriminating between misleading and non-misleading uses of trademarks, and therefore both arbitrary and disproportionate.
>
> [The] single presentation requirement is a blunt and sweeping measure, that contains nothing that focuses on or refers to misleading, false or deceptive use of trademarks. The measure therefore almost inevitably prohibits many uses of trademarks that are not misleading or false, while allowing even more uses of trademarks that are in fact misleading and deceptive. Put simply, there is a fundamental mismatch between the character and terms of the single presentation requirement and its stated objective.

(1) Born argues that the SPR is overbroad.

> First, [the] single presentation requirement is inherently overbroad. By its terms, the requirement forbids any use of tobacco-related trademarks other than in a single presentation. There is, however, no reason in either logic or empirical evidence to conclude that all of the myriad of different uses of trademarks that could be employed on tobacco products, apart from in a single presentation, are misleading and deceptive.
>
> There is nothing the record in this proceeding that suggests that all presentations of a product, save a single presentation chosen by the manufacturer, are misleading or deceptive. At the most, the Respondent cites some (very limited) evidence that the use of some variations of colors in some trademark presentations could mislead consumers (e.g., silver or white presentations assertedly indicating "light" or "low tar" cigarettes). In my view, this evidence was tenuous, even with regard to the question of different colors of trademark, for the reasons detailed in the Claimants' expert evidence; that evidence concluded that the use of brand variations with different colors did not create the impression that cigarettes of one brand color entailed less of a health risk that other brand colors.

Nonetheless, as applied to the use of at least some different colors of brands (e.g., silver, white, red, blue) and to "light" and "low tar" descriptors, I conclude on the record in this arbitration that Uruguay's prohibition against the use of brand variants was not arbitrary or disproportionate. Although the evidence supporting such a prohibition was, in my view, unimpressive, it was sufficient to uphold a prohibition against the use of these different colors of trademarks for tobacco packaging, particularly in light of the deference that is owed a state's regulatory and legislative judgments.

However, even accepting this evidence, it does nothing to support [the] blanket requirement of a single presentation of all aspects of trademarks (including use of different design features, additional words or numbers, seasonal or geographic variations, different languages or scripts, all colors, etc.). The Respondent's evidence addresses only the use of colors as brand extensions or variants and the use of some descriptors (such as "light" and "low tar"), but does not address other forms of brand variations.

In my view, this is insufficient to justify [the] blanket prohibition against all but a single presentation of any tobacco trademark. Put simply, the fact that some uses of colors in some brands of tobacco products may be regarded as misleading in some circumstances does not suggest, even indirectly, that all other variations of trademarks are also misleading.

There is, for example, no reason to think, or evidence to show, that seasonal motifs on tobacco products would be misleading, or that brand variants with numbers corresponding to the number of cigarettes in a package would be misleading, or that brands in different languages or with different font sizes or styles would be deceptive. There is nothing at all in either logic or the evidentiary record that suggests that there is anything deceptive or misleading about any of these countless brand variants. In my view, it is impossible on the record in this arbitration to avoid the conclusion that the single presentation requirement is gravely overbroad.

Returning to the basic character of the single presentation requirement, it is inevitable that the requirement is ill-focused and over-inclusive in the extreme. Consider a regulation aimed at prohibiting misleading food or automobile advertisements—which required manufacturers to use only a single presentation for any trademark for food or automobile products. That prohibition would obviously do nothing—except perhaps accidentally—to discourage misleading food or

> automobile advertisements, while it would prohibit large categories of perfectly acceptable and desirable advertisements. [The] single presentation requirement is no different ...
>
> These conclusions have particular force because, as discussed above, the evidentiary record makes it clear that the single presentation requirement was adopted with no meaningful prior study, internal debate, or external consultation. Rather, so far as the evidence shows, the requirement was formulated, drafted and adopted in the space of only a few days, without any meaningful study or discussion of the measure. The absence of internal checks and balances, or external consultation, both helps explain, and underscores the arbitrary and disproportionate character of the single presentation requirement.

(2) Born argues that the SPR is under-inclusive.

> Second, and conversely, [the] single presentation requirement is also under-inclusive. In particular, [it] has the effect of prohibiting multiple presentations of a single trademark, but did nothing to address the misleading presentation of different trademarks, and specifically, did nothing to prohibit the use of so-called "alibi brands" that used slightly different combinations of colors and designs to accomplish precisely the same results that the single presentation requirement was supposedly intended to prevent ...

Born then concludes that the SPR is arbitrary, meaning that Uruguay has violated its obligation to provide fair and equitable treatment to foreign investors.

> In light of the foregoing, I believe that it is beyond dispute that the single presentation requirement is inherently over-inclusive and under-inclusive. Put simply, the single presentation requirement is inherently and inescapably unrelated to its only articulated objective---protecting consumers against deceptive uses of trademarks. There is simply no logical or empirical relationship between a blanket single presentation requirement and misleading advertisements or packaging. Instead, the single presentation requirement's only independent effects are to forbid a substantial range of uses of trademarks that are not deceptive and misleading, while allowing other uses of trademarks that plainly are deceptive and misleading ...

I cannot avoid the conclusion that, in the circumstances of Uruguay's articulated regulatory purposes and existing regulatory regime, the requirement constitutes a denial of fair and equitable treatment.