

THE INTERNATIONAL LAW GAZE: THE ICSID AWARD IN *PHILIP MORRIS V URUGUAY* AND THE NEAR END OF THE
“AESTHETIC EXPERIENCE”

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international investment agreements

“The sensuousness of those soft American cigarette packets! The cellophane, the name of the brand, the paper of the packet outlining the shapes of the cigarettes: the thin red paper-ribbon at the top of the packet which enables you to undo the cellophane: the delicious smell. Cigarettes had always been for me an aesthetic experience.” (V.S. Naipul, *The Enigma of Arrival*).

It was the large economic value of tobacco’s “aesthetic experience” that Philip Morris (PM) sought to preserve in its litigation against Uruguay before an international tribunal operating under the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID). There, PM claimed that Uruguay was in violation of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, dated October 7, 1988 (the BIT). The reason? Uruguay’s decision to enact tobacco control measures, in particular, its single presentation requirement (SPR) prohibiting tobacco manufacturers from selling more than one variant of cigarette per brand family and the increase in the size of health warnings included on cigarette packets from 50% to 80% of the surface of the front and the back (80/80 Regulation). As a result, manufacturers had only 20% of the room on cigarette packs for trademarks, logos, and other information.

According to PM, such measures had expropriated PM’s investment, had constituted a violation of the Fair and Equitable principle provided for in Article 3(2) of the BIT, and were a failure to

observe commitments as to the use of trademarks. Finally, PM argued that two apparently conflicting decisions by Uruguay's Supreme Court and the top Administrative Tribunal on the lawfulness of the measures had led to a denial of justice for PM.

Like the tribunal in *Philip Morris Asia v Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015) (Alberto Alvarez-Jimenez, *The international law gaze: the plain victory in Philip Morris Asia v Australia*, *New Zealand Law Journal* December 2016), the tribunal in *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No ARB/10/7, July 8, 2016) sided with the host State, but this time on the merits of PM's claim, and ordered PM to pay Uruguay seven million dollars in legal fees and all of the tribunal's expenses (*PM v Uruguay*, at [588]). Uruguay had the support of the World Health Organization, as *amicus curiae*, and inflicted a second significant blow to PM's international litigation strategy to combat tobacco control measures. The award shows for the second time in a few months that investor/State arbitration—the dispute settlement mechanism included in many BITs—can effectively respond to host States' new challenges in terms of the protection of health and other public policy objectives. In addition, the decision paves the way, to a certain extent, for the adoption of legislation with a similar goal by other States, New Zealand among them, that were waiting for the outcome of PM's litigation against Australia and Uruguay to proceed.

I. Philip Morris's Claims and the Tribunal's Decisions

Expropriation

PM claimed that the measures had indirectly expropriated its investment in Uruguay, in violation of Article 5(1) of the BIT. It provides:

“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. ... ”

In support of this claim, PM alleged that it had to stop selling seven of its thirteen variants as a result of the single presentation requirement (Marlboro Gold, Marlboro Blue, Marlboro Fresh Mint, Fiesta Blue, Fiesta 50/50, Philip Morris Blue, and Premier). (*PM v Uruguay*, at [144]). These variants represented 20% of PM’s sales in Uruguay. PM claimed that it had property rights on each of these variants and that, as a result, PM had the right to use its trademarks unconstrained. Uruguay replied that the measures constituted a legitimate exercise of its sovereign police power to protect public health and that, under Uruguayan law, trademark registrants were granted a negative right, the right to prevent others from using the trademarks, and not an affirmative right to use them. (*PM v Uruguay*, at [180]-[181]).

The tribunal rejected the expropriation claim. It started by saying that indirect expropriation requires that “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.’” (*PM v Uruguay*, at [192]).

The tribunal stated that there was nothing in the 1979 Paris Convention for the Protection of Intellectual Property explicitly stating that positive rights to use are attached to marks. (*PM v Uruguay*, at [260]). But in addition, the tribunal decided to downplay the dichotomy between right to use and right to protect suggested by the parties. Instead, the tribunal looked at the issue from a different angle: an absolute right to use versus an exclusive right to use. (*PM v Uruguay*, at [267]). The tribunal then stated that trademarks do not confer an absolute right to

use that prevents States from adopting regulations that restrict such use. (*PM v Uruguay*, at [268]).

On these bases, the tribunal proceeded to assess whether the measures had expropriated PM's investment. The tribunal disposed easily of the claim that the single presentation requirement constituted indirect expropriation. The tribunal noted that the Marlboro brand continued to appear on tobacco packs in Uruguay; the requirement was just a limitation on the use of the trademarks. (*PM v Uruguay*, at [276]).

The tribunal then dealt with the claim that, by banning seven of the thirteen variants manufactured by PM, the SPR had made each of them, which were independent investments according to PM, valueless. (*PM v Uruguay*, at [279]). The tribunal rejected this claim and took a different approach, suggested by Uruguay: the claim would be assessed in light of the impact of the measures on the whole of PM's investments in that country. The reason for this choice was that the SPR had an impact on the whole of PM's portfolio and that PM had responded with actions involving its business as a whole: price increases initially and price reductions subsequently. (*PM v Uruguay*, at [283]). Once the investment was assessed as whole, a totally different picture emerged. According to PM's own accounting expert, PM was doing very well after the SPR, much better even than before the regulation was adopted. In the expert's words, PM "would have been significantly more profitable in a scenario where the Regulation [the SPR] had not been introduced." (*PM v Uruguay*, at [285]). The tribunal took note of this reality for obvious reasons and concluded regarding this claim that "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." (*PM v Uruguay*, at [286]).

Indirect Expropriation and States' Police Powers

Although the tribunal recognized that nothing else was required to adjudicate PM's expropriation claim, the tribunal decided to deal with the central issue of expropriation and host States' police powers. Basically, PM was claiming in this regard that compensation was always due, even if the host State was exercising its police powers. The tribunal disagreed and stated that it would look at the relevant provision, Article 5(1) in light of international law, as mandated by Article 31(3)(c) of the Vienna Convention on the Law of Treaties. The selection of international law sources was wide, and traditional views on the sources of law under Article 38 of the Statute of the International Court of Justice were, to a certain extent, left aside by the tribunal. Past case law under other international investment agreements (In the Matter of an International Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules Between *Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005), treaty provisions under international agreements not yet in force at the time of the award (EU-Canada Comprehensive Economic and Trade Agreement), and even academic publications by an international organization (OECD, "*Indirect Expropriation*" and the "*Right to Regulate*" in *International Investment Law*. 2004) were relied on by the tribunal to conclude that there was a rule of international law denying compensation when an expropriation by a State through the exercise of its police powers met three conditions: the regulation was adopted with the goal of protecting the public welfare, was not discriminatory, and was proportionate. (*PM v Uruguay*, at [295]-[305]).

To the tribunal, regulation for a public purpose meant regulation aimed at complying with an obligation provided for in both domestic and international laws, in this case the protection of public health mandated by the Uruguayan Constitution and by the Framework Convention on Tobacco Control (FCTC). (*PM v Uruguay*, at [302]-[304]). As to the proportionality requirement, the tribunal expressed that the regulations were a potentially "effective means to protecting human health." (*PM v Uruguay*, at [306]). Echoing the case law of the WTO Appellate Body on GATT Article XX in *Brazil—Measures Affecting Imports of Retreaded Tyres*, (WT/DS332/AB/R,

December 3, 2007, at [155]), the tribunal stated that it was difficult to isolate the impact of the contribution to the achievement of the goal and that the regulations were capable of making a contribution. Therefore, they were neither arbitrary nor unnecessary. (*PM v Uruguay*, at [306]).

The Uruguayan Tobacco Control Measures and the Fair and Equitable Treatment Standard under the BIT

International investment agreements always provide for the obligation by host States to accord investors fair and equitable treatment (FET). Traditionally, expropriation claims face a higher bar to be successful. The bar is not equally high for claims of violation of the FET standard of protection. Article 3(2) of the BIT provides that “each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Contracting Party.”

PM claimed that the SPR and the 80/80 Regulation did not comply with the FET obligation. Specifically, PM argued that the measures did not serve a public purpose and were arbitrary, were contrary to PM’s legitimate expectation of being able to use its brand assets, and opposed the legal stability Uruguay had committed itself to preserving in the BIT, on which PM had relied when developing the said assets. (*PM v Uruguay*, at [309]). Uruguay replied that measures taken in good faith should not be deemed arbitrary unless there was an absence of a rational relationship between the measures and their declared purpose. (*PM v Uruguay*, at [353]). Uruguay also stated that violation of legitimate expectations required PM to show that Uruguay had made specific representations or assurances to the investor that it would not change its legislation. (*PM v Uruguay*, at [375]-[377]). Finally, Uruguay argued that there was nothing in the BIT establishing a general obligation to provide a stable legal environment, much less so in an industry, like tobacco, which is one of the most highly regulated in the world. (*PM v Uruguay*, at [380]-[381]).

The tribunal began its analysis with an attempt to define the FET obligation in the BIT. After a review of prior decisions, and relying on a well-known commentator, the tribunal highlighted the following constitutive elements: transparency and the protection of investors' legitimate expectations, freedom of coercion, good faith and due process. (*PM v Uruguay*, at [320]).

The Tribunal's Reasoning Regarding the Measures' Arbitrariness

The tribunal rejected the claim but was not unanimous regarding this dimension of the violation of the FET standard. One of the arbitrators, Gary Born, argued that the SPR was manifestly arbitrary and unreasonable and that it did not have a rational relationship with the goal of protecting public health. (Gary Born, *Concurring and Dissenting Opinion*, at [82]-[86]). In support of this conclusion, Born claimed that the SPR had no basis in the text of the Framework Convention on Tobacco Control or in its negotiating history. (Gary Born, *Concurring and Dissenting Opinion*, at [100]). Uruguay was the first and is the only State to have adopted the SPR. Moreover, Born argued that there were no "meaningful internal study, discussions or deliberations at the Ministry of Public Health or by other Uruguayan authorities." (Gary Born, *Concurring and Dissenting Opinion*, at [108]). There were no external consultations with other Uruguayan bodies or with the tobacco industry. (Gary Born, *Concurring and Dissenting Opinion*, at [120]). According to this arbitrator, the reasons for showing deference to Uruguay's decisions were consequently less persuasive. (Gary Born, *Concurring and Dissenting Opinion*, at [126]).

To define arbitrariness, the tribunal followed a chamber of the International Court of Justice. It defined the notion in the *ELSI* judgment as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety." (*PM v Uruguay*, at [390], quoting International Court of Justice, *Case Concerning Elettronica Sicula S.p.a (ELSI) (United States of America v Italy)*, Judgment of July 20, 1989), at [128]). The measures did not meet this standard, concluded the tribunal. First of all, the tribunal found, there was a rational relationship between the two measures and the protection of public health, which was

highlighted by the World Health Organization and the Pan-American Health Organization in their *amicus curiae* briefs to the tribunal. (*PM v Uruguay*, at [391]). Second, the tribunal acknowledged the limitations that Uruguay faced to gather this evidence on its own and looked at the existence of public evidence internationally. It concluded that “Uruguay’s measures were adopted based on the substantial body of evidence that had been made available in the course of its active participation in the FCTC negotiations and in the drafting of implementing guidelines ... Material used in their development was released publicly.” (*PM v Uruguay*, at [393]). Third, addressing the criticism that the measures had been adopted without much discussion, the tribunal pointed out that States had “a margin of appreciation” when making public policy decisions. (*PM v Uruguay*, at [398]). Dealing specifically with the SPR, the tribunal highlighted that it was a novel decision that was supported, as the WHO had pointed out, by an evidence-based rationale. (*PM v Uruguay*, at [407]). The tribunal did not think it necessary to arrive at a conclusion on whether or not the SPR had produced its intended effects in terms of reduction of tobacco consumption. What mattered, in the tribunal’s view, was to assess if the measure “was reasonable when it was adopted.” (*PM v Uruguay*, at [409]). A similar analysis was carried out regarding the 80/80 regulation, and with an important qualification. When discussing the effectiveness of the measure in terms of reducing consumption, the tribunal stated that “the fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal.” (*PM v Uruguay*, at [418]). The tribunal concluded that both measures did not meet the standard of arbitrariness of the *ELSI* case, and therefore, there was no violation of Article 3(2) of the BIT. (*PM v Uruguay*, at [410]-[420]).

Uruguay’s Measures, the Stability of the Legal Framework, and PM’s Alleged Legitimate Expectations

The tribunal rejected this facet of the claim of violation of the FET. There is a set of consistent decisions by investor/State tribunals under various international investment agreements favouring States’ regulatory powers concerning legal stability and legitimate expectations. (*PM v Uruguay*, at [422. Footnote 607]).

As to legal stability, the tribunal was emphatic: “Changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State’s normal regulatory framework in the pursuance of a public interest and do not modify the regulatory framework relied upon the investor at the time of its investment ‘outside of the acceptable margin of change.’” (*PM v Uruguay*, at [423]).

The tribunal went on to state that an investor’s legitimate expectation of the stability of the legal framework has to be based not on general legislation but on specific commitments made by the host State to the investor. (*PM v Uruguay*, at [426]). Investors, the tribunal stated, should inquire of the host State in advance about potential regulatory changes. (*PM v Uruguay*, at [427]). The tribunal concluded that Uruguay did not commit to such specific undertaking to PM, on one hand and on the other, that the measures did not modify “the legal framework for foreign investment beyond an ‘acceptable margin of change’ considering the limited impact on [PM]’s business.” (*PM v Uruguay*, at [433]).

Not less important was the tribunal’s admission that the FET did not prevent host States from adopting creative legislation: “Provisions such as Article 3(2) of the BIT does not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory.” (*PM v Uruguay*, at [430]).

The Tribunal and the BIT’s Umbrella Clause

PM claimed that the measures constituted a violation of Article 11 of the BIT, the umbrella clause, according to which:

“Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investment of the investors of the other Contracting Party.”

PM argued that, by granting trademarks to PM, Uruguay had “committed to ensuring [PM] the full range of rights that trademark holders enjoy in Uruguay, including the right to use the trademarks and the rights to exclude others from doing so.” (*PM v Uruguay*, at [450]). Uruguay replied by stating that, among other reasons, registering a trademark did not constitute a commitment under the above-mentioned provision. (*PM v Uruguay*, at [454]).

Once again, the tribunal sided with Uruguay. The tribunal relied on previous arbitration awards, most notably, *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11, Award, 12 Oct. 2005), to state that wording similar to that of Article 11 referred to specific commitments and not to general commitments. (*PM v Uruguay*, at [478]). The tribunal then dealt with PM’s argument of a specific commitment as a result of the granting of trademarks to it by Uruguay. The tribunal disagreed: “A trademark is not a unique commitment agreed in order to encourage or permit a specific investment. Unlike the case of an authorization or a contract, where the host State may undertake some specific obligations, Uruguay entered into no commitment ‘with respect to the investment’ by granting a trademark ... While the trademark is particular to the investment, it stretches the word to call it a ‘commitment.’” (*PM v Uruguay*, at [480]).

Furthermore, the tribunal stated that umbrella clauses may not prevent changes to legislation. In the tribunal’s words, “If investors want stabilization they have to contract for it.” (*PM v Uruguay*, at [481]).

PM’s Claim of Violation of the Fair and Equitable Treatment Standard and Uruguay’s Denial of Justice

Prior to starting investment arbitration under the BIT, PM took Uruguay before Uruguay’s own courts on the legality of the 80/80 regulation and Law 18,256, the legislation authorizing it.

Because of the dual judicial system, the constitutionality of the legislation had to be adjudicated by the Uruguayan Supreme Court of Justice (SCJ), while the legality of the 80/80 regulation had to be decided by the Supreme Administrative Tribunal, Tribunal de lo Contencioso Administrativo (TCA). The two bodies rendered conflicting decisions. The Supreme Court found that Law 18,256 was in conformity with the Constitution, for it did not allow the Ministry of Public Health to require a health warning covering more than 50% of cigarette packets. However, subsequently, the TCA concluded that the 80/80 regulation was lawful, because Law 18,256 did permit the Ministry to require warnings exceeding 50% of the cover of the packets. (*PM v Uruguay*, at [506]). According to PM, the TCA'S judgment was a "failure of State authorities to give effect to a judicial decision favorable to the alien's cause." According to PM, the TCA's decision constituted a violation of the FET standard. (*PM v Uruguay*, at [488]-[507]). Uruguay replied by expressing that both the SCJ and the TCA were co-equal institutions and that allegedly divergent rulings did not amount to a denial of justice. (*PM v Uruguay*, at [510]).

The tribunal rejected this claim. It started by confirming that a denial of justice claim had to meet a very high threshold. It said, "For a denial of justice to exist under international law there must be '*clear evidence of ... an outrageous failure of the judicial system*' or a demonstration of '*systemic injustice*' or that '*the impugned decision was clearly improper and discreditable.*'" (*PM v Uruguay*, at [500]). The tribunal then assessed the conflicting decisions and the lack of recourse against the TCA's decision and concluded that, although the situation was unusual, it did not reach the level of a denial of justice, for PM had had its days in court; there was a judicial institution available; and the decision was reasoned in both cases. (*PM v Uruguay*, at [527]-[528]). The tribunal concluded unequivocally: "Arbitral tribunals should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving the judicial architecture of the State." (*PM v Uruguay*, at [528]).

II Some Comments on *PM v Uruguay*

This was a complex decision, no doubt, for the legitimacy of investor/State arbitration at times is not always perceived as a positive feature of international investment agreements. However,

the tribunal sent clear signals to States, investors, and other future tribunals should similar litigation arise. All these signals preserve States' regulatory powers.

To begin with, the impact of tobacco control measures should be assessed on the investment as a whole. Thus, if the investor is able to positively adjust to the new regulatory realities, the chances of success of its claims of expropriation or violation of the FET under a BIT narrow. Just for this reason, in general, the award creates disincentives for litigation under international investment agreements as a result of tobacco control measures. Those investors who manage to adapt to the measures should think twice before deciding to incur the significant costs of investment arbitration.

Second, the tribunal reinforced the trend in investment arbitration according to which, in general, States can impose even significant costs on investors when legislating for a public purpose, so long as they do it in non-discriminatory and proportionate ways. No compensation is due to investors, as was mentioned. The tribunal stated that "a consistent trend in favour of differentiating the exercise of police powers from indirect expropriation emerged after 2000." (*PM v Uruguay*, at [295]). The award was, however and surprisingly, not impeccable when offering the bases of this trend. For instance, the tribunal relied on the award in *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2. May 29, 2003, at [119]). This was a dispute related to a lack of renewal of a permit to operate a landfill due to its proximity to urban area and to the public's opposition based on new environmental legislation that was, based on the facts, inapplicable to the permit. To support its conclusion on lack of compensation, the tribunal quoted the following statement made in *Tecmed v Mexico*: "The principle that the State's exercise of its sovereign powers 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." (*Tecmed v Mexico*, at [119], as quoted by *PM v Uruguay*, at [296]). The quote is taken out of context. *Tecmed* held a more nuanced view by stating: "After reading [the applicable BIT

provision on expropriation] we find no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.”(*Tecmed v Mexico*, at [121]). This paragraph reflects more the decision finally taken by the *Tecmed* tribunal: declaring the lack of renewal an indirect expropriation and ordering payment of compensation to the investor. *Tecmed v Mexico* and *PM v Uruguay* do not share the same perspective in terms of protection of States’ regulatory powers. It is surprising that the latter relied on the former. Although, the tribunal offered other reasons based on other awards more in line with its conclusion, the tribunal’s reliance on *Tecmed v Mexico* is an oddity.

Third, the award is also a boost to States’ regulatory creativity when responding to new realities or challenges. Uruguay’s measures were novel, and their effects were not easily or immediately identified. For the tribunal what mattered, for the purpose of the FET, was the existence of a rationale for the measure and the pursuit of a public purpose.

The tribunal was divided on the issue of the margin of appreciation accorded to the host State regarding the reasonableness of the measures under FET. The majority found inspiration in the case law of the European Court of Human Rights related to Article 1 of the Protocol to the European Convention on Human Rights (*PM v Uruguay*, at [399]). However, the dissenting arbitrator was of the view that there was no treaty text supporting such deference (Gary Born, *Concurring and Dissenting Opinion*, at [143]). This is not the right time to narrow this deference for States are enhancing their regulatory powers. Perhaps that moment passed long ago. For instance, the tribunal in *S.D. Myers, Inc v Government of Canada* stated: “When interpreting the ‘minimum standard’ [in the FET] a [North American Free Trade Agreement] Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision making.

Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern government is through internal political and legal process” (In a Nafta Arbitration under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc v Government of Canada*, First Partial Award, November 13, 2000. at [261]). Although the dissenting arbitrator recognized that deference to host States is due, he had a more limited view of the scope of this deference. (Gary Born, *Concurring and Dissenting Opinion*, at [139]). His interpretation of the FET significantly tied Parties’ regulatory hands by giving investor/State tribunals a certain power to pass judgement on the virtues of States’ measures. To the present author, it is untenable that the silence in the FET clause can be the source of such vast power over arbitral tribunals. A more explicit wording in the agreement would be required to prevent tribunals from granting host States a wide margin of appreciation.

Fourth, implicitly and by focusing only on the rationale of the measures, the tribunal also recognized ample latitude given to host States in how they determined the process for the adoption of regulations. The dissenting arbitrator was of the view that one of the elements of arbitrariness of the SPR was the lack of consultation with relevant stakeholders. (Gary Born, *Concurring and Dissenting Opinion*, at [120]). The majority of the tribunal did not pay much attention to this argument. It was right in the present author’s view. The FET standard does not include, for instance, the Parties’ obligation to notify in advance certain proposed measures to other Parties and relevant stakeholders, as is the case with Article 2.9 of the WTO Agreement on Technical Barriers to Trade. When States wish to include such obligation of notification, they do it. Thus, a measure that is not consulted with foreign investors by a host State and that adversely affects them prior to its adoption does not become for this reason only a violation of the FET. There are vastly different levels of transparency and consultation under which governments operate, and the award tacitly recognized this reality.

Fifth, there is a slight difference in perspective between *PM v Uruguay* and the NAFTA award in *GAMI v Mexico* (*In the Proceedings between Gami Investment Inc. v The Government of the United Mexican States*, Award of November 15, 2004) regarding the impact that lack of losses might have on a claim of violation of the FET. As was mentioned, the tribunal in *PM v Uruguay* noted in passing that the lack of adverse effects on PM was an element that it took into account when assessing the claim of violation of the FET due to the alleged arbitrariness of the measure. Implicit here is the intuitive argument that an investor that has not sustained losses cannot have received treatment by the host State that failed to meet the FET. The tribunal in *GAMI v Mexico* faced a similar situation, no losses, but it separated the two issues: a violation of the NAFTA FET could be found, but no compensation would be ordered, obviously. (*GAMI v Mexico*, at [85]). Taking into account the lack of losses explicitly or even implicitly in the context of FET makes a finding of arbitrariness more unlikely. In this sense, the approach taken in *PM v Uruguay* was more protective of host States than that in *GAMI v Mexico*.

Finally, it is important to make a distinction between the 80/80 regulation and tobacco plain-packaging legislation, the latter limiting intellectual property rights more than the former. Can *PM v Uruguay* apply equally to this type of legislation if it is challenged under another BIT? Caution is in order, since different results could be achieved if there were important textual differences between the applicable treaties in terms of protection of intellectual property rights as investments and the text of the legislation. But by assuming that the tobacco plain-packaging legislation is not discriminatory and preserves registered trademarks, it is possible to identify some key issues. First, the impact of the plain-packaging regulation on the investment could play a role and potentially narrow the possibility of expropriation claims, at least by those investors capable of responding to the stricter regulation. Second, if the impact is significant, then the question is whether or not the legislation falls under the margin of regulatory change to intellectual property legislation that host States enjoy under the police powers doctrine. It would be surprising if a tribunal answered this question in the negative, in light of the

overwhelming evidence of the risks to health that smoking produces. Third, if a novel measure such as the SPR, which was not specifically mentioned in the FCTC, was deemed reasonable, chances of a similar conclusion regarding tobacco plain packaging, which is actively promoted by the World Health Organization, would be higher. Consequently, it might not be taking *PM v Uruguay* too far for the propositions that it has reduced the likelihood of plain-packaging legislation being deemed as a violation of the FET, if the standard has the usual broad wording.

Although Dante, in the *Divine Comedy*, sent to Inferno those who dared to anticipate the future, it can be said that, after *PM v Uruguay*, the end of the “tobacco aesthetic experience” is a step closer.