

should include questions about emotional abuse, as well as physical and sexual abuse. Prevention of all forms of intimate partner violence is very important for improving women's health, particularly their mental health.

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Philip Morris versus Uruguay: health governance challenged

One prominent feature of the challenges in global health governance is the ability of nations to protect health through legislation within a global market economy that is governed by bilateral and multilateral trade regimens. Although nations have a right to regulate imported products, such as tobacco, this right is constrained by World Trade Organization rules and other bilateral and multilateral agreements. In principle, health considerations are protected by Article XX (b) of the World Trade Organization's General Agreement on Tariffs and Trade, which states that trade agreements must not have a negative impact on human health.¹ However, in 2005, the Framework Convention on Tobacco Control

(FCTC) became the first global health governance tool to become international law.² The FCTC seeks to facilitate and legitimise the implementation of national tobacco-control legislation. The relation between health protection and trade facilitation was salient in the negotiation of the FCTC.³ FCTC negotiations sought to clarify the relation between health governance and trade or investment regimes. The relation eventually remained implicit; but with what consequence? The answer to this question might occur sooner than we thought.

The following correspondence highlights a recent case that could bear on the health-trade dialogue. On Feb 19, 2010, Philip Morris presented a case against Uruguay under a Switzerland–Uruguay Bilateral Investment Treaty.⁴ Philip Morris is challenging Uruguay's decision—a party to the FCTC—to increase the coverage on tobacco packs of tobacco-warning labels to 80% and to require the use of coloured or plain packaging. According to *Investment Arbitration Reporter*, Philip Morris argues that these measures infringe on their intellectual property rights and hamper their competitiveness in the Uruguayan market.⁵ The company investigated the case against plain packaging well before the Uruguay case was filed. Legal consultants for the company issued a report on July 23, 2009, stating that "A plain packaging measure would...create a two-tier



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system: one which severely restricts the use of trademarks and is only applicable to tobacco companies, and another which affords the minimum standards of protection to all other products. Such discriminatory treatment of trademarks is expressly prohibited by the TRIPS Agreement.”⁶

Plain packaging has become a salient issue for the tobacco industry given that countries, such as Australia, have begun to adopt it as a tobacco-control measure.⁷ Bilateral Investment Treaties (BIT), unlike those under the World Trade Organization framework, often incorporate intellectual property provisions within the specific agreement. A UN report noted that “The impact of having IP [intellectual property] included in the definition of investment is that it could potentially subject IP to the general guarantees afforded to investors under the BIT... [and] could provide a legal basis to foreign investors for a cause of action against the host country for failing to protect their IP.”⁸ In Article 1 of the Treaty, the term “investment” includes “copyrights, industrial property rights (such as patents of inventions, utility models, industrial designs or models, trade or service marks, trade names, indications of source or appellation of origin)”.⁴

Philip Morris might argue that Uruguayan legislation exceeds the bounds of fair and equitable treatment and applies “unreasonable or discriminatory measures” according to Article 3 paragraph 1 of the Treaty.⁴ It is interesting that Articles 11 and 13 of the FCTC provide specific requirements for countries to implement warning labels of at least 30% coverage of the tobacco pack, and that labels must be rotating (ie, visible on all sides of the pack) but recommend that coverage should be 50% or more. This recommendation might provide transnational tobacco companies with grounds to argue that provisions, such as those implemented by Uruguay, are unreasonable to achieve health goals.

This case between Philip Morris and Uruguay has three important implications for global health governance. The first pertains to the general debate about how health governance should be treated in view of trade and investment treaties. It is well recognised that global health is affected by governance mechanisms outside the health field.⁹ This case highlights the intersection between health and economic agreements. The second implication pertains to governmental control over health protection and promotion. The policy space of governments is of paramount importance for health protection in the global environment.¹⁰ In this environment, governments

will inevitably relinquish sovereignty to a certain degree; however, this case might show the extent to which sovereignty is relinquished. It might also show the extent to which health measures are compromised by the provisions in bilateral and multilateral trade agreements. The final implication pertains to precedence for future tobacco-control litigation and the power of the FCTC to legitimise government’s tobacco-control legislation. The regulation of tobacco packaging (eg, warning labels and plain packaging) is an important intervention to both dissuade non-smokers from becoming smokers and encourage smokers to quit;¹¹ it is also an intervention that the tobacco industry has worked to resist in the past.¹² Individuals with an interest in global health governance should follow Philip Morris’ case against Uruguay with interest to observe whether, and if so how, international health law is used to support governmental decisions to protect health.

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