

Public Health Protection in Investment Agreements: Recent Trends

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Executive Summary

- ▶ Recent arbitration cases dealing with tobacco-control legislation bring new questions to the field of investment protection: are investment agreements properly designed to balance investors' interests and public health concerns?
- ▶ The European Union has modified its investment agreements with third countries in recent years in order to find a better balance between both interests. The 'loser pays' principle, the right to regulate, third-party intervention rules and rules on the composition of arbitral tribunals can particularly contribute to finding such a balance.
- ▶ The European Union should grab this opportunity to develop a leadership in the field of investment protection. By modernizing its own investment agreements, it can lay down the standards that should guide investment agreements at global level. The negotiation of a multilateral investment court could be a channel to reach this goal.

Public health concerns have been at the heart of two of the most notorious investment arbitration cases in the last years (PCA No. 2012-12 *Philip Morris v Australia*; ICSID No. ARB/10/7 *Philip Morris v Uruguay*). In both disputes, an undertaking has challenged tobacco-control legislation aimed at protecting public health.

These proceedings reveal the inherent tension between the private right of an undertaking to invest in a foreign country and the public right of the State to legislate in the public interest. Arbitral tribunals need to balance the rights of investors under investment agreements and the State's right to regulate, and traditional investment agreements do not provide satisfactory responses to solve this conflict. Reaching a balance between both concerns is particularly difficult where State measures are the

result of an international agreement. In the tobacco cases, legislation was based on the Guidelines for the implementation of the Framework Convention on Tobacco Control (FCTC). These guidelines indeed recommend the adoption of plain packaging legislation.

The European Union has not been excluded from this debate. It has not been challenged on the basis of any investment agreement but the Court of Justice of the European Union (CJEU) has faced several disputes on the basis of the EU tobacco-control legislation. Three recent cases underline that the balancing of interests is also a strong concern in the European Union (C-358/14 *Poland v Parliament and Council*, C-477/14 *Pillbox 38*, C-547/14 *Philip Morris*). What is more, the recent negotiation of several investment agreements has brought a harsh debate on the need



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to properly protect public interests and civil society has been calling for more stringent rules in this regard.

The European Union has tried to provide an answer to these requests and has adopted new standards in recent investment agreements. The goal of this policy brief is to examine the new provisions and to assess whether they can avoid disputes similar to the ones that we have witnessed at the international level. In particular, it is argued that there are four provisions that can lead to an enhanced protection of public health under investment agreements: the 'loser pays' principle, the right to regulate, the rules on third-party written submissions, and the rules on the composition of arbitral tribunals.

The 'loser pays' principle

Investment arbitration disputes involve expensive procedures. The high costs of arbitration are inevitable for any of the parties. This is because the costs of the proceedings need to be covered by each of the parties notwithstanding the result of the dispute and these constitute one of the largest components of the costs. For example, the proceedings in *Philip Morris v Australia* had a cost of 39 million dollars for the State although it actually won the dispute.

This may discourage some States from adopting legislation, leading to what is commonly known as 'regulatory chill' (Mitchell and Sheargold, 2015; Faunce, 2012). The risk of regulatory chill is greater in the field of public health. Many of the public policies that are adopted to protect human health tackle non-communicable diseases, which are the consequence of our lifestyle: consuming tobacco, drinking too much alcohol or eating unhealthy food are some of the major concerns. All of these areas are led by multinational undertakings with the capacity to challenge regulatory measures.

In order to avoid such a risk, the European Union has incorporated a 'loser pays' principle in all its recent investment agreements. This principle entails that the loser in an investment proceeding will have to pay all the costs of the proceedings, including the litigation costs of the other party. Accordingly, if an investor is unsuccessful, it will need to pay the costs of the State that has been challenged.

The 'loser pays' principle could encourage the European Union to legislate on public health grounds. In a case where there is the certainty that a piece of legislation is lawful, the 'loser pays' principle ensures that the threat of being challenged under an investment agreement is not a barrier to the adoption

of such legislation. Moreover, by increasing the costs incurred by the losing party, it may deter investors with little chances of winning a dispute from challenging the EU before an arbitral tribunal.

The right to regulate

States should be allowed to adopt legislation to pursue legitimate public objectives notwithstanding the economic impact that this can have on investors. This idea, which is captured in what is often called the 'right to regulate', is however not mentioned in traditional investment agreements. The question arises then as to whether such a right to regulate would be enforceable under an investment agreement. The European Union took an important step in this regard and incorporated a right to regulate in the preamble of the first version of the CETA (Comprehensive Economic and Trade Agreement between the EU and Canada) and EU-Singapore agreement drafts. This was however deemed insufficient because it still raised some doubts as to the legally binding nature of the right (Melo Araujo, 2016).

The European Union has thus gone further in recent years. The right to regulate is now incorporated in the main text of agreements such as CETA. There is a specific provision for this right with potentially the same weight as any other investment provision. This brings more clarity to the need to balance the investors' and the State's interests. In a standard formula, those agreements provide that 'the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'.

Although the step taken by the European Union is commendable, those provisions are extremely broad and it remains to be seen how they will be interpreted by an arbitral tribunal. In particular, we may wonder what the scope of application of the provision will be and which specific measures will be justified under this right. Moreover, only 'legitimate' policy objectives are included under these provisions. This means that legislation is still likely to be challenged by investors arguing that it does not fulfil the required legitimacy threshold. Arbitral tribunals will need to carry out a balance of the interests at stake and it is unknown for the moment where the bar will be set (Krajewski and Hoffmann, 2016; Dickson-Smith, 2016).

However, we argue that such a balancing exercise is likely to effectively protect public health. This submission is justified by recent case-law in different



courts and tribunals. For example, in the recent C-547/14 *Philip Morris* case before the CJEU (EU:C:2016:325), the Court adopted a very high threshold when balancing public health protection and the freedom of expression. It stated that the tobacco area was 'characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases caused by the compounds those products contain that are pharmacologically active, toxic, mutagenic and carcinogenic'. Accordingly, it concluded that public health protection outweighed the freedom of expression. A similar approach was followed by the WTO Dispute Settlement Body in the 2018 *Australia Plain Packaging* case (WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS/467/R).

Notwithstanding this argument, it is true that we could think about alternative measures in order to better protect State legislation based on legitimate interests. For example, similarly to what the WTO Technical Barriers to Trade Agreement provides, there could be a rebuttable presumption of compliance where legislation implements international law obligations. It is indeed questionable whether we should really challenge a State for simply implementing the FCTC, to which it is a party and is therefore under the obligation to fulfil.

Consequently, the incorporation of a right to regulate is an opportunity for a more balanced relationship between investments and public health concerns and can be an incentive to adopt legislation on public health grounds. However, as currently drafted, it is difficult to predict how these provisions will be interpreted in a dispute. Alternative measures, such as a rebuttable presumption, might have led to more legal certainty.

Third-party written submissions

The European Union has also modified the rules regarding the intervention of third parties in arbitration proceedings. We submit that this is likely to contribute to arbitral tribunals taking due account of public health concerns in their awards.

Although confidentiality is a common feature of investment arbitral proceedings, civil society is increasingly demanding more transparency in public life in general, and investment arbitration has been no exception to this trend. Increasing the participation of third parties in arbitral proceedings is a way of enhancing such transparency.

Moreover, third parties generally intervene in favour of collective interests, such as public health (Pantaleo,

2017). Their contribution can be a decisive factor in the reasoning of the arbitral tribunal, particularly in cases involving technical expertise. The example of the *Philip Morris v Uruguay* case illustrates this point. In these proceedings, the arbitral tribunal admitted two *amicus curiae* briefs: the first one was submitted by the WHO and the WHO Framework Convention on Tobacco Control Secretariat and the second one was filed by the Pan American Health Organization. Both written submissions described tobacco consumption in Latin America, the effects of tobacco in our health, existing legislation in Uruguay and in other countries, and the provisions contained in the FCTC. The arbitral tribunal heavily relied on these submissions, which strongly argued in favour of public health as factual evidence.

The participation of third parties might also avoid fragmentation between different international legal regimes. For example, the Australian plain packaging legislation was challenged both before an arbitral tribunal and before the WTO dispute settlement mechanism. Allowing WTO legal representatives to assist to the investment arbitration proceedings could facilitate obtaining non-conflicting awards (Levine, 2011).

Third-party interventions therefore have several advantages in terms of protection of public interests. In the particular case of public health, this participation is all the more relevant considering the number of organisations that are specialised in the field and the scientific expertise that is required to assess whether a public measure is appropriate to tackle a public health issue.

Against this background, the European Union has incorporated to its investment agreements rules on transparency, including provisions on third-party participation. More specifically, several EU investment agreements directly incorporate the UNCITRAL Transparency Rules. Article 4 of such rules allows third persons to file written submissions with the arbitral tribunal regarding a matter within the scope of the dispute. A submission may be allowed if the third person has a significant interest in the arbitral proceedings and if the submission can assist the arbitral tribunal in the determination of a factual or legal issue related to the proceedings.

Although the move of the Union in terms of transparency is meritorious, the European Union could have gone further. The above-mentioned provisions indeed limit third-party participation to the submission of written briefs. However, in 2015, the European Union proposal on TTIP (the Transatlantic Trade and Investment Partnership between the EU and the USA) included a right of intervention for third parties that was more far reaching as it included the right to intervene orally in the proceedings. This rule was however not incorporated in other agreements, which is regrettable (BEUC and others,



2016). A right of oral intervention is provided for in CETA and in the EU-Singapore agreement but only for the non-disputing party, which is the State that is a party to the agreement but does not participate in the arbitral proceedings. Third parties thus cannot intervene orally in the proceedings. Consequently, the possibility to defend public interests is enhanced in recent investment agreements in comparison to traditional ones but it could still be further strengthened.

The composition of arbitral tribunals

The often-dual role of arbitrators, sometimes being arbitrators and others lawyers, raises questions as to their ability to assess public interests impartially and in a consistent manner. Against this background, the need to introduce checks and balances within arbitral tribunals can be suggested and the European Union has taken the initiative of incorporating new elements on this matter.

Two different aspects of arbitral tribunals are worth mentioning in this regard. A first evolution concerns the appointment of arbitrators. They now need to fulfil certain qualifications and must follow a code of conduct and certain ethical rules. A roster of arbitrators will be established, among which the specific arbitrators for a particular case will be selected. This will avoid having arbitrators who have been lawyers in a previous dispute under the same agreement. The fact of having the same group of arbitrators for all disputes under one investment agreement should also allow for a line of reasoning to be established. The rules on the selection of arbitrators seem to advocate for a more ethical and impartial assessment of public interests.

The second aspect with regard to arbitral tribunals concerns the establishment of an appellate body. Arbitration is traditionally constituted by a single instance. The introduction of an appeal mechanism should increase consistency and predictability in the interpretation of investment agreements (Díez-Hochleitner, 2016).

While the new rules will undoubtedly increase consistency, this will only work within one investment agreement. Appeal tribunals will indeed be different for each investment agreement and their awards can thus greatly vary. In the case of national legislation to protect public health, this means that similar laws – such as tobacco-control measures – can be challenged several times under different investment agreements and potentially lead to different rulings. This outcome is strengthened when national legislation is also challenged through other mechanisms as we observed with Australian plain

packaging legislation, which was not only challenged under investment arbitration but was also subject to a dispute before the WTO dispute settlement body. We therefore argue that the system established in recent EU investment agreements cannot be the final stage. Only a multilateral investment court could truly reach coherence in the interpretation of investment agreements.

A multilateral investment court would lead to a centralised appeal system following a single set of rules (Pantaleo, 2017). Although such a system would bring all disputes under a single set of rules, it would still have to interpret several investment agreements, which most probably contain very different provisions with respect to each other. Accordingly, the multilateral court would undoubtedly reach divergent conclusions depending on the investment agreement to be interpreted. However, terms and rules that are common to several agreements could be interpreted in a uniform way. It has been established in this paper that EU investment agreements do share many elements. For example, the right to regulate is contained in all agreements and the 'loser pays' principle has also been incorporated in almost identical terms in all of them. Accordingly, the multilateral court could at least interpret uniformly provisions contained in those EU investment agreements, thus leading to a uniform public health protection in all of them. In this context, the European Union would have the possibility to promote the same public health standards in relation to all its investment partners. Hence, although a multilateral investment court is probably not the ideal solution, it seems to be the optimal one in terms of coherence and predictability. The establishment of such a court is explicitly provided for in recent EU investment agreements and the negotiating directives of the European Union were established in March 2018 (Council of the European Union, 12981/17 ADD 1).

Measures improving the overall coherence of investment arbitral awards are to be welcome in terms of the protection of public interests. In the more specific case of public health, we have experienced that a single undertaking can challenge similar pieces of legislation on tobacco control under different investment agreements. When such a situation occurs, the State should be able to know how certain rules are interpreted under investment agreements.

Conclusion

The debate on the balance between economic and non-economic interests in trade agreements is a popular one. The discussion takes a prominent role in investment



agreements, where the conflict between the State's regulatory power and the investor's interests arises in a very concrete manner.

In particular, recent investment arbitration proceedings demonstrate that the balance between investments and public health protection is a central issue. Although States have successfully defended themselves in the cases on tobacco-control legislation mentioned in this paper, the fact that these disputes arise confirms that traditional investment agreements are not well designed to preserve public interests.

The European Union has tried to provide a response to this conflict by modifying a number of provisions in its most recently negotiated investment agreements. Those instruments bring a number of features that could notably contribute to a better public health protection. Such contribution comes not only from the inclusion of an explicit provision on the right to regulate but also from other provisions, which bring more transparency, more coherence and more incentives to regulate. All of these have the potential to better protect public interests in general and public health in particular.

The European Union should promote these improved provisions on investment protection at the global level. In this perspective, the EU has notably adopted the negotiating directives for a multilateral investment court. This seems to be a good forum to shape international

investment rules in the light of the EU model.

However, if the European Union wishes to play a leadership role in this field, some of the gaps pointed out in this paper should be addressed both in bilateral agreements and in multilateral negotiations. More specifically, we wonder to what extent some of the new provisions will be enforceable considering the broad way in which they have been drafted. The European Union should push for an interpretation allowing States and civil society to make a proper use of these new tools so that the changes brought are not only cosmetic. It is also argued that a multilateral court would contribute to an increased public health protection. Such court would allow for a uniform interpretation of similar provisions throughout EU investment agreements, thus providing for a uniform level of public health protection. Strengthening these provisions could lead to an investment protection model that takes due account of public interests and would fully address the criticism that are currently facing investment protection systems.

To conclude, the evolution in the content of EU investment agreements reveals the increasing attention that public interests are getting in economic discussions. The debate seems now to be moving from the judicial level to the legislative one. It is thus to be seen whether multilateral negotiations on an investment protection system will contribute to this goal.



Further reading

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Elisabet works on a PhD thesis on the promotion of public health standards in EU external relations law. In the framework of her thesis, she deals with issues related with EU external relations law, public health and trade.

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