The Margin of Appreciation Debate over Novel Cigarette Packaging Regulations in *Philip Morris v. Uruguay*

A Step toward a Balanced Standard of Review in Investment Disputes

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Abstract

The margin of appreciation doctrine, developed by the European Court of Human Rights, generally refers to how much deference the Court decides to accord individual States in fulfilling their obligations under the European Convention on Human Rights. This concept has been borrowed by the Tribunal of the International Centre for the Settlement of Investment Disputes (ICSID) in *Philip Morris v. Uruguay*, an investment dispute involving novel cigarette packaging regulations, requiring single presentation for each cigarette brand. While Philip Morris claimed the single presentation requirements (SPR) infringed investors' rights to use its trademark, the Tribunal applied the doctrine confirming Uruguay's rights to regulate for the benefit of public health. However, one arbitrator submitted a dissenting opinion rejecting its applicability to the investment dispute given the SPR was adopted without sufficient evidence and due consideration by the Uruguayan government.

This paper tries to examine whether and how the margin of appreciation doctrine can be applied by an investment tribunal to evaluate the legality of a newly introduced tobacco control regulation devoid of supporting scientific evidences. This paper argues that such doctrine should be applied cautiously to avoid having an easy excuse

* The present article was presented during the Workshop of the Interest Group on International Economic Law of the European Society of International Law devoted to 'Global Public Goods, Global Commons, Fundamental Values: The Responses of International Economic Law', held in Naples on 6 September 2017.

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for the tribunal to refrain from substantive reviews over investor's claims, and this doctrine can be adjusted by investment tribunals to establish a balanced standard of review theory, accommodating both the States' rights to regulate and the private rights of investors.

Keywords

Investor-State Dispute Settlement – margin of appreciation – Single Presentation Requirements – standard of review – tobacco Control – FCTC

1 Introduction

Scientific evidence has clearly shown that smoking causes serious harm to human health.¹ The World Health Organization (WHO), through the conclusion of the Framework Convention on Tobacco Control (FCTC), has obliged Parties to adopt effective tobacco control measures to prevent the further spread of tobacco epidemics.² Among the many non-price measures controlling the demand of tobacco, strict restrictions on cigarette packaging and brand marketing are considered to be effective means of preventing the youth and first-time smokers from smoking. In particular, with the current trend of prohibiting tobacco advertising and sponsorship by state legislators, the tobacco industry is highly dependent on cigarette packaging and brand design to induce the sale and purchase of tobacco products. Therefore, the adoption of tobacco control measures, such as plain packaging or larger coverage of pictorial health warning, will further limit the tobacco industry to engage in marketing activities through cigarette packaging since their rights to use trademarks for marketing will be severely restricted by these regulations. To this end, transnational tobacco companies either made a threat³ or actively took legal challenges against States implemented tobacco packaging measures through

1 Frank Chaloupka and Prabhat Jha, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (Washington DC: World Bank, 1999), pp. 21–28.

2 2003 WHO Framework Convention on Tobacco Control (adopted 21 May 2003; entered into force 27 February 2005), *UNTS* 2302: 166.

3 The example was the failure of Canadian's plain packaging proposal. It was believed that the threat to resort to investment arbitration by R.J. Reynolds Tobacco Company had deterred the Canadian government from taking legislative action to implement the plain packaging proposal. See generally, Matthew C. Porterfield & Christopher R. Byrnes, 'Philip Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing up in Smoke?',

various channels or forums, such as domestic lobbying, judicial proceedings in the host State, investor-State arbitrations or WTO dispute settlement proceedings.⁴

With respect to investor-State disputes, the *Philip Morris v. Uruguay*⁵ and *Philip Morris v. Australia*⁶ are two of the high-profile cases in recent time.⁷ The multinational tobacco company, Philip Morris International, filed legal complaints against Uruguay's Single Presentation Requirements (SPR) and 80% Pictorial Health Warning measures to the International Center for Settlement of Investment Dispute (ICSID) in February 2010, and Australia's Plain Packaging law to the Permanent Court of Arbitration in June 2011. Philip Morris claimed its commercial value of the trademark had been indirectly expropriated by such cigarette packaging regulations, requesting for compensation and even injunctive relief. After a lengthy trial, arbitral tribunals finally rendered the awards in December 2015 (*Philip Morris v. Australia*) and in July 2016 (*Philip Morris v. Uruguay*). Both tribunals issued an award against the claimant, Philip Morris, with different causes, as the lack of jurisdiction with the former and lack of the merit with the latter.

In *Philip Morris v. Uruguay*, the Tribunal applied the doctrine of margin of appreciation to determine whether the contested SPR measure violated the 'fair and equitable treatment' (FET) provision in the Swiss-Uruguay Bilateral Investment Treaty (BIT). Given the significance of the issue involved in this

12 July 2011, <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>, accessed 10 April 2018.

- 4 The Australia tobacco plain packaging dispute was the recent landmark case brought under the WTO dispute settlement procedure by five Members, i.e., Ukraine, Honduras, Dominican Republic, Cuba and Indonesia, in which Ukraine requested the panel to suspend its proceedings without further request to resume its work. The panel's jurisdiction on Ukraine's complaint was lapsed on 30 May 2016. See *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434, 435, 441, 458, and 467, Note by the Secretariat, 30 June 2016.
- 5 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (hereinafter *Philip Morris v. Uruguay*).
- 6 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility, 17 December 2015 (hereinafter *Philip Morris v. Australia*).
- 7 See generally, Tania Voon and Andrew D. Mitchell, 'Philip Morris vs. Tobacco Control: Two Wins for Public Health, but Uncertainty Remains', 12 September 2016, <https://ssrn.com/abstract=2847902>, accessed 10 April 2018. Keegan Warren-Clem, 'PMI v. Public Health and Arbitration Intertwined and Undermined', *Law and Business Reviews of the Americas* 21: 395 (2015).

dispute, the Tribunal had been debated over the applicability of such theory in investment disputes, and ended up with different opinions. The majority heavily relied on this doctrine to rule in favor of Uruguay's right to adopt novel cigarette packaging regulations without violating the FET standards, while one of the arbitrators, Mr. Gary Bone, respectfully dissented on this particular point.⁸

The 'margin of appreciation' doctrine was originally developed by the European Court of Human Rights (ECtHR). It generally refers to how much deference the Court decides to accord individual States in fulfilling their obligations under the European Convention on Human Rights (ECHR). This concept has been used by investment tribunals in several investor-State disputes.⁹ In *Philip Morris v. Uruguay*, the Tribunal also relied on this doctrine to decide if Uruguay violated the FET obligation because of the arbitrariness of the adoption of SPR measure. It became one of the issues trigger the debate among three members of the Tribunal over the applicability of such concept in investor-State disputes especially when there was no clear textual basis in the BIT. The Tribunal had divided opinions over this issue.

This paper tries to examine whether and how the 'margin of appreciation' doctrine could be applied by an investment tribunal to evaluate the legality of a newly introduced tobacco control regulation devoid of supporting scientific evidences with particular focus on the case of *Philip Morris v. Uruguay*. Part 2 of this paper will briefly introduce the factual background of this dispute and legal claims made by Philip Morris, and identify the unique features of this case in relation to tobacco investment disputes. To examine the issue of margin of appreciation, Part 3 will briefly summarize the position and main arguments of the majority and dissenting opinions, followed by a comparative analysis on the differences in Part 4. Based on the finding of such analysis, Part 5 will discuss the significance and implications of this case on the public policy, and explore the possibility of incorporating a balanced standard of review theory in the future arbitral practice.

This paper will examine the pros and cons of the margin of appreciation doctrine used by the Tribunal in *Philip Morris v. Uruguay*, and argue that the concept of margin of appreciation can be properly adjusted to accommodate the right to regulate for public health purpose, while taking into account of

8 *Philip Morris v. Uruguay*, Concurring and Dissenting Opinions.

9 See generally, Julian Arato, 'The Margin of Appreciation in International Investment Law', *Virginia Journal of International Law* 54/3: 545, (2014), p. 559; reviewing five arbitral awards that the tribunal relied on the doctrine of margin of appreciation: *Continental Casualty v. Argentina*, *Frontier Petroleum v. Czech Republic*, *Electrabel v. Hungary*, *Saluka v. Czech Republic*, and *Nicola v. Romania*.

the protection of investor's rights. Nonetheless, the Tribunal in *Philip Morris v. Uruguay* had made a crucial step towards a healthier resolution in tobacco investment disputes arisen from traditional bilateral investment treaties, and would make a profound impact on future tobacco investment disputes. Finally, Part 6 concludes this paper.

2 Overview of *Philip Morris v. Uruguay*

2.1 *Brief Procedural History*

On 19 February 2010, the Claimants, Philip Morris Brands (Switzerland), Philip Morris Products (Switzerland) and Abal Hermanos S.A. (Uruguay)¹⁰ (hereinafter 'Philip Morris' or 'the Claimants') filed a Request for Arbitration¹¹ with ICSID against the Oriental Republic of Uruguay (hereinafter 'Uruguay' or 'the Respondent') claiming that the Respondent's cigarettes packaging and health warning requirements infringe its investment (trademark) and violate the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments (the Switzerland-Uruguay BIT), entered into force on 22 April 1991.

Later on 26 March 2010, the Secretary-General of the ICSID registers the Claimant's request for the institution of arbitration proceedings. The Tribunal is then constituted with three members: Piero Bernardini (Italian), President; Gary B. Born (U.S.); and James R. Crawford (Australian) on 15 March 2011. The Tribunal issued a Decision on Jurisdiction¹² on July 2, 2013, affirming its jurisdiction over the claims presented by Philip Morris. After a proceeding on the merits, the Tribunal finally issued an award in favor of the Respondent on July 8, 2016, dismissing all of the Claimant's claims. However, one arbitrator, Mr. Born, stated his dissent on two accounts attached to the award, one of which was related to the issue regarding the applicability of the doctrine of margin of appreciation.

2.2 *Measures at Issue and Legal Claims*

The challenged measures were among a series of tobacco control policies implemented by the Uruguayan government. When oncologist Dr. Tabare Vazquez took office as Uruguayan former president, Uruguay played a leading role

¹⁰ Abal is 100% owned by Philip Morris Brands.

¹¹ *Philip Morris v. Uruguay*, Request for Arbitration, 19 February 2010.

¹² *Philip Morris v. Uruguay*, Decision on Jurisdiction, 2 July 2013.

in combating tobacco epidemic worldwide.¹³ With Uruguay's ratifications of the WHO/FCTC in 2004, Uruguayan government implemented a series of new tobacco control laws on cigarette packaging and health warning requirements, alleged to infringe Philip Morris's trademark rights. The contested measures were mainly the two aspects of tobacco control measures on packaging and health warning, i.e., Single Presentation Requirements (SPR) and the so-called '80/80 Regulation'.

Firstly, the SPR was prescribed in Article 3 of Ordinance 514, issued by the Ministry of Public Health of Uruguay, and entered into force in February 2009. According to Article 3, each cigarette brand shall have a 'single presentation' and be prohibited to use different terms, descriptive features or signs of any other kinds (presentations) for cigarettes sold under a given brand.¹⁴ This Ordinance extended existing prohibition on the use of misleading products names such as 'light' or 'mild' to restrict the use of cigarette brands to a single line of products. Therefore, Philip Morris could no longer sell multiple product varieties under of its brands such as 'Marlboro Red', 'Marlboro Gold', 'Marlboro Blue' and 'Marlboro Green', and cigarettes could only be sold under a single presentation under Marlboro. The Claimant alleged that the single presentation requirement seriously affect a large portion of its total cigarette sales in Uruguay.¹⁵

The second measure related to the expansion of health warning coverage requirement as prescribed in the Presidential Decree 287/009, which was promulgated on 15 June 2009 and came into force on 12 December 2009. Article 1 of the Decree required an increase in the size of health warnings on cigarette packages from 50 to 80 per cent of the lower part of the main sides of every cigarette package. Given the health warning occupied the large portion of cigarette pack, the Claimant accused that the 80% health warning coverage requirement wrongfully limited it rights to use its legally protected trademarks, and prevented it from displaying them in their proper form.¹⁶

Philip Morris claimed that above measures violated Article 3(1), 3(2), 5 and 11 of the BIT,¹⁷ and it was entitled to be compensated for the losses under the

13 See Todd Weiler, 'Philip Morris v. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law', 28 July 2010, http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/Opinion-PMI-Uruguay.pdf, accessed 10 April 2018.

14 *Philip Morris v. Uruguay*, Award, paras. 108–120.

15 *Ibid.*, paras. 144–152.

16 *Ibid.*, paras. 121–132.

17 Specifically, Article 3(1) prohibits subjecting the management, use, enjoyment, growth or sales of investments to 'unreasonable' or 'discriminatory' measures, because they are overbroad and bear no rational relationship to their purported public health objectives. Article 3(2) requires host State to provide fair and equitable treatment to the Claimant's

BIT and international law. The Respondent denied all of these allegations and requested the Tribunal to dismiss the case for lack of jurisdiction¹⁸ and merit.¹⁹

Among those claims, the margin of appreciation doctrine had been clearly referred and applied by the Tribunal when deciding whether the treatment afforded to the Claimant's investment by the SPR measure was in accordance with the FET standard. The FET provision was prescribed in Article 3.2 of the BIT, which provided that '[e]ach Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party'.²⁰ This paper will focus on the examination of FET clause, which was the claim explicitly referred to the doctrine of margin of appreciation by the Tribunal.

2.3 *Distinctive Features of This Dispute*

Before looking into the controversy over the margin of appreciation doctrine, several distinctive features of this case may be worth noting since they are essential elements for further analysis and evaluation.

Firstly, the contested SPR measure is a novel and unprecedented tobacco control measure. While the FCTC has obliged Parties to adopt restrictive measures on cigarette packaging and brand marketing, the SPR is not clearly prescribed or suggested in the FCTC or its guidelines. It was an innovative idea adopted by Uruguay without having sufficient or direct scientific evidence in support of the effectiveness of the SPR measure although the WHO did request to file, pursuant to Article 37(2) of the ICSID Arbitration Rules,²¹ and submit an amicus brief to the Tribunal in support of Uruguay's adoption of the SPR measure.²²

investments in which Uruguay fails to comply. Moreover, Uruguay fails to comply with Article 11 for disregard its commitments made to investors. Philip Morris further alleges a violation of Article 5 that these three measures constitute an expropriation of Philip Morris's trademarks by prohibiting their use on multiple brands.

18 *Philip Morris v. Uruguay*, Decision on Jurisdiction, para. 10.

19 *Philip Morris v. Uruguay*, Award, paras. 13–14.

20 Article 3(2) further provides: '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.'

21 *Philip Morris v. Uruguay*, Request to File a Written Submission (Amicus Curiae Brief) by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, 28 January 2015.

22 *Philip Morris v. Uruguay*, Written Submission (Amicus Curiae Brief) by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, 28 January 2015.

Secondly, in terms of the type of investment treaty, it was a conventional bilateral investment treaty rather than a more modernized one involved in this dispute. The Swiss-Uruguay BIT was concluded on 7 October 1988, which contained 12 articles and 3 *ad* articles in the Protocol attached to the BIT. Unlike recent modern BITs incorporating relevant provisions, such as interpretative statements or general exception provisions, trying to preserve State's rights to regulate in pursuit of legitimate public interests, the Swiss-Uruguay BIT simply contains conventional provisions, such as prohibition of expropriations without just compensation, non-discrimination, and fair-and-equitable treatment, with a view to protect proprietary rights of foreign investors.

Thirdly, in addition to the BIT and ICSID Convention, the FCTC rules and guidelines had a significant influence on the Tribunal's decision even they were not the applicable laws or legally binding rules directly applied by the Tribunal in this case. For one thing, as a Party to the FCTC, the Respondent, Uruguay, claimed that the challenged measures were adopted to implement the FCTC. Moreover, the Tribunal relied on the FCTC to interpret and apply the FET provision in the BIT even if Switzerland was not even a Party to the FCTC. Switzerland's status of non-Party to the FCTC did not prevent the Tribunal from referring to or even relying on the FCTC and its guidelines as influential sources when examining the claim over the compliance with the FET standard.

Fourthly, Uruguay had never done additional scientific study focusing on the effectiveness of SPR to achieve its alleged public health objectives. The only available and relevant scientific evidences were those provided by the WHO. In other words, the Respondent did not perform additional studies or gather further evidence to support the challenged measures via its national public health authority. Instead, the Respondent heavily relied on the existing evidence gathered by the WHO, reflecting in the FCTC provisions and guidelines adopted thereunder. Despite so, the FCTC and its guidelines did not explicitly mention the SPR as an effective tobacco control measure in the recommendations or guidelines.

3 Divergence over the Applicability of Margin of Appreciation Doctrine in the *Philip Morris v. Uruguay* Tribunal

Given the SPR was even stricter than the cigarette packaging measures suggested in the FCTC guidelines, Philip Morris believed the commercial value of its brand asset had been seriously damaged due to this unprecedented regulation. The legality of such measure depended largely on how much margin of

appreciation the Tribunal was prepared to grant the Uruguayan health authority to implement the SPR particularly when insufficient scientific evidences were provided by the defendant State. The Tribunal split over this particular issue as one of the arbitrators, Mr. Gary Born, offered his dissenting opinion rejecting the applicability of the concept of margin of appreciation to the investor-State dispute. The main arguments and rationales of the majority and dissenting opinions will be summarily expounded as follows before a close comparative analysis of the two positions.

3.1 *The Majority's Opinion*

The Claimant contended that the challenged measure was 'arbitrary' and inconsistent with the FET standards based on three arguments, i.e., insufficient scientific evidence regarding the effectiveness of the SPR, lack of due consideration by public officials, and no reasonable connection between the policy objectives and the utility of the measure. The Tribunal made a general remark on the margin of appreciation in response to the Claimant's second contention. The majority took a positive position on the issue of margin of appreciation based on three arguments.

Firstly, the majority agreed that the margin of appreciation could apply equally to claims arising under BITs although this theory was originally developed and applied by the ECtHR. The majority took the view that this concept was applicable to the contexts of investor-State disputes, and was not limited to the contexts of the ECtHR. Despite such a firm assertion, the majority provided little reasoning for holding such position. The possible rationales behind could be that it was the government, instead of the Tribunal, who heard the most responsibility to improve the public health, and who had such expertise to evaluate the most effective way to achieve the policy objective. Therefore, the Tribunal would not be in a good position to second guess what should be the appropriate policy measures to tackle the domestic public health problem, and should pay great deference to governmental judgments of national needs especially in public health matters.

Secondly, with respect to the content of such concept, the Tribunal referred to several ICSID and NAFTA cases, and adopted a more lenient and reasonable standard of review. In other words, the Tribunal recognized the State's exercise of sovereign power, and examined if there was a 'manifest lack of reasons' for the legislation and exercised in 'bad faith'. Moreover, instead of an abstract assessment of a legal doctrine about the margin of appreciation, the Tribunal held that such assessment must be conducted *in concreto* when reviewing the specific measures challenged by the Claimant, and went on to survey the evidence and arguments put forwarded by both Parties.

Thirdly, based on the margin of appreciation, the Tribunal proceeded to apply this concept to examine the reasonableness of specific two measures challenged. With respect to the SPR, the Tribunal disagreed with the Claimant's argument that the SPR was either 'overbroad' or 'under-inclusive' so that it was not designed to achieve the legitimate public health aim. Instead, the Tribunal considered that it was unsurprising that the SPR was designed to have the possible effects of over- or under- inclusiveness given the relative novelty of this regulation.²³ Moreover, the Tribunal did not believe it was necessary to prove the utility or effectiveness of the SPR so long as the measure was 'reasonable' when it was adopted.²⁴

With respect to the 80/80 Regulation, the Tribunal disagreed with the Claimant's argument that the measure was discriminatory because it was imposed as a 'punitive measure' to the detriment of the Claimant, and would increase the illicit trade from neighboring States.²⁵ The Tribunal agreed with the Respondent that the use of *alibi* brands by Mailhos, the competitor of the Claimant, would dilute the effect of the SPR whereas the situation demanded for further action.²⁶ Moreover, there was no evidence showing that the challenged measures had caused an increase in illegal cigarette sales.²⁷

In sum, given the fact that a strong scientific consensus over the lethal effects of tobacco consumption, the Tribunal emphasized that 'substantial deference' should be given in due regard to the national authorities' decisions as to the selection of the measures to address the major public health problem. In line with the concept of margin of appreciation, the Tribunal stated that '[t]he fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal.'²⁸ Therefore, the Tribunal found that the challenge measures were reasonable measures adopted in good faith, not arbitrary, discriminatory or disproportionate and with relatively minor impact on the Claimant's business. The Tribunal concluded that the challenged measure was not in breach of Article 3(2) of the BIT.²⁹

3.2 *The Dissenting Opinion*

One arbitrator, Mr. Gary Born, disagreed with the majority of the Tribunal on two accounts, i.e., the denial of justice and the FET standard. Mr. Born believed

23 *Philip Morris v. Uruguay*, Award, para. 406.

24 *Ibid.*, paras. 408–409.

25 *Ibid.*, para. 413.

26 *Ibid.*, para. 414.

27 *Ibid.*, para. 415.

28 *Ibid.*, para. 418.

29 *Ibid.*, paras. 410 and 420.

that the SPR measure was manifestly arbitrary and unreasonable, and violated Uruguay's obligation to provide fair and equitable treatment for the investor, the Philip Morris International. The main arguments contained following three elements.

Firstly, Mr. Born did not agree with the majority's opinion that the margin of appreciation can apply equally to claims under BITS. He took this view for two reasons. For one thing, the doctrine of margin of appreciation adopted by the ECtHR had its historical and textual basis. The ECtHR developed such a doctrine by interpreting what constitutes 'public interest' provided in Article 1 of Protocol to the ECHR.³⁰ Therefore, the doctrine of margin of appreciation under the ECHR had its textual basis for the ECtHR to respect the legislature's judgments as to what is in the public interest 'unless that judgment is manifestly without reasonable foundation'.³¹ Moreover, even if for those investment disputes adopted the doctrine of margin of appreciation, the BITS concerned in those cases had one feature in common, namely, they all contained provisions prescribing express exceptions for the 'public order' and 'essential security interests' capable of serving as the textual basis for such an analogy.³² Nonetheless, there were no similar provisions in the Swiss-Uruguay BIT so that no relevant text was available for supporting the use of this doctrine.

Secondly, Mr. Born did not question the authority of Uruguayan government to regulate public health matters, and agreed with the majority that the FET is an autonomous standard.³³ Nonetheless, Mr. Born stressed that the legal test of FET was to determine if the governmental measure was 'rational' and 'proportionate', and it must not be 'arbitrary' or 'capricious' in order to satisfy the FET standard.³⁴ The minimum standard of reasonableness and proportionality requires 'an objective consideration of the extent to which a governmental measure is rationally related to, or fairly advances, the State's articulated

30 Article 1 (Protection of property) of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides: '(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (para. 2).'

31 *Philip Morris v. Uruguay*, Concurring and Dissenting Opinion, para. 183.

32 *Ibid.*, para. 188; Mr. Born referred to *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 187.

33 *Ibid.*, paras. 89 and 132.

34 *Ibid.*, para. 136.

objectives.³⁵ Moreover, the consideration should also '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 is weighing of costs and benefits.'³⁶ Instead of relying on the doctrine of margin of appreciation, Mr. Born elaborated the FET standard by referring to previous decisions and jurisprudence of investment cases.

Thirdly, based on above standards, Mr. Born found that the SPR was inherently over-inclusive and under-inclusive in achieving its articulated objective, i.e., protecting consumers against deceptive use of trademarks.³⁷ He also pointed out that the SPR was an unreasonable and arbitrary measure mainly because of two unique factual backgrounds, i.e., the manner in which the SPR was adopted and the surrounding legislative and regulatory regime in Uruguay.³⁸ The SPR was really an innovative and unprecedented regulation that the FCTC or any other States had never clearly suggested or adopted. Moreover, there were no explicit track records or documentary evidence indicating that the SPR was the effective measure to achieve its public health objective during the course of drafting and rule-making procedure. Not to mention that no scientific study had been done or relied on by the Uruguayan government on this unprecedented tobacco control measure.

Based on above arguments, Mr. Born concluded that the SPR constituted a denial of fair and equitable treatment even if accepting the tribunal's margin of appreciation because the SPR could not satisfy the requirements of rationality and proportionality.³⁹

4 Revisiting the Margin of Appreciation Doctrine in *Philip Morris v. Uruguay*: A Comparative Analysis on Divergent Opinions

Given the doctrine of margin of appreciation was essential to determine if the challenged measures were adopted in accordance with the FET standards, this paper will first compare the majority and dissenting opinions, and offer some comments on the use of margin of appreciation doctrine in the *Philip Morris v. Uruguay* Tribunal. This paper argues that the margin of appreciation doctrine should be adjusted to reflect or transform into a more balanced standard

35 *Ibid.*, para. 144.

36 *Ibid.*

37 *Ibid.*, para. 172.

38 *Ibid.*, para. 92.

39 *Ibid.*, para. 179.

of review theory when interpreting the FET provision in order to accommodate the State's right to regulate for public interests and the investor's rights to investment.

4.1 *Common Grounds*

Before examining the differences between the majority and dissenting opinions, it is worth noting that both sides shared with similar viewpoints on this doctrine and related issues. Firstly, both recognized the host State had the authority to adopt public health regulations.⁴⁰ Secondly, no matter whether it would be called the margin of appreciation, both agreed that the State enjoyed substantial degree of discretion in choosing the regulatory means to achieve its public health objectives among various options of effective measures.⁴¹ Thirdly, both shared the same view on the nature of the FET provision as an autonomous standard and adopted the 'reasonableness' as the minimum standard in determining if the challenged measure was in accordance with the FET standard.⁴²

4.2 *Divergent Legal Views: Applicability of the Doctrine to BITS Claims*

Nonetheless, the majority and dissent diverged over several viewpoints on the applicability of the doctrine and the compatibility of the challenged measures with the FET standards.

Firstly, the major difference was the positions toward the applicability of the margin of appreciation to the claims arising under BITS. While the majority accepted that the doctrine, originally developed by the ECtHR, was not limited to the context of the ECHR, the majority provided little explanations for such position. The Dissent did explain why he held a negative position towards the applicability of such doctrine in the context of BITS.

4.3 *Legal Tests Applied to Examine the Merits of the Case*

Secondly, despite of the divergence in the applicability of the doctrine, both applied similar legal test to determine if challenged measures were in accordance with the FET clause. As indicated above, the common element of such test was the 'reasonableness' or 'rationality' of the adopted measure whereas there were minor discrepancies, indicating possible propensity either to support the public health or investor's rights. This paper finds the second difference is on the content or legal tests of the FET standard.

⁴⁰ *Ibid.*, para. 89.

⁴¹ *Ibid.*, para. 137.

⁴² *Ibid.*, paras. 132–133.

The majority held a higher threshold for a violation of FET as the measure had to be ‘manifestly lack of reasons’ and ‘not exercised in bad faith’. Unlike the dissent, the majority didn’t focus too much on the test of ‘proportionality’, and only addressed the discriminatory issue by responding to the claims challenging the over-and under-inclusiveness of the measures in achieving the public health objective. Moreover, the majority also relied on the ‘good faith’ arguments, and found that the challenged measures were adopted in good faith by the Uruguayan government. Therefore, there was no violation of the FET standard.

By contrast, the dissent held a lower threshold for a finding of violating the FET standard. In other words, the host State had to comply with a higher standard to meet its FET obligations. In addition to the ‘rationality’ test, Mr. Born emphasized the importance of ‘proportionality’ in determining the arbitrariness of challenged measures, and did not consider the ‘good faith’ argument as a critical factor. Given the stringency of the proportionality test, Uruguay was unable to satisfy such a high threshold during the process of adopting the SPR measure, and considered to be in violation of FET standard. In sum, the majority and dissent had different views and benchmarks on the real content or applicable legal tests of the FET standard.

4.4 *Scope of Covered Measures at Issue*

Thirdly, the majority and dissent differed at applying the doctrine to divergent scope of the challenged measures that may be in violation of the FET provision. The majority applied the margin of appreciation doctrine to examine two challenged measures, i.e., the SPR and the 80/80 Regulation while the dissent only considered that the SPR, not the 80/80 Regulation, was the arbitrary measure inconsistent with the FET obligation. The mere focus on the issue of SPR measure by the dissent could be explained by the fact that the SPR, as compared to the 80/80 Regulation, was a more problematic measure in terms of its weakness in providing directly relevant scientific evidence and the lack of due consideration of public official during the rule-making process.

4.5 *Procedural or Substantive Aspects of the Measures at Issue*

Fourthly, the majority and dissent seemed to have different aspects of focus when examining the rationality of the challenged measure. The majority introduced the doctrine in response to the Claimant’s argument that the challenged measures were adopted without due consideration by public officials of Uruguayan government. The doctrine was introduced to support the State’s discretion in the course of rule-making procedure. While the procedural deficiency or the manner the challenged measure being adopted was also a major reason

for arbitrariness, the dissent illustrated more on the substantive connection of the challenged measure with alleged policy objectives being achieved. In other words, the dissent focused more on fortifying the substantive arguments that the SPR measure was an inherently arbitrary measure as it was either over-inclusive or under-inclusive and without any reasonable connection with alleged public goals. Unlike the majority explicitly understated the utility or effectiveness of the SPR in reducing the tobacco consumption, the dissent underlined that there were no scientific evidence or any international guidelines indicating that the SPR did contribute to the reduction of tobacco consumption and the decrease of smoking prevalence.

4.6 *Means-and-ends Test on Discriminatory or Proportionality Claims*

Finally, this paper finds nuanced approaches between the majority and the dissent over the applicable standard of legal test in examining the consistency of FET obligation. Specifically, the means and ends relationship/connections approach, mentioned by both sides, had been utilized as a legal tool to examine the FET provision with a slight different purposes and functions. The majority referred to the means/ends approach to demonstrate the challenged measures had reasonable connection to achieve its public health objectives, and therefore, they were not discriminatory or arbitrary measures in violation of the FET standards. The means/ends approach had been used by the majority as a subsidiary test to examine if the challenged measures were arbitrary or capricious.

To the contrary, the dissent considered the means/ends approach as an independent criteria or test to examine if the challenged measures violated the FET standards. As the dissent clearly pointed out, he believed that it was necessary to have a 'sensitive and nuanced consideration of ... the relationship between the measure and its stated purpose'⁴³ when evaluating the fair and equitable claims. He also considered that in examining the FET standards, it required an objective consideration of the rational relationship between a governmental measure and its objectives.⁴⁴ Unlike the majority, the dissent applied the means/ends approach to analyze both the discriminatory claims and the efficacy claims, reflected from the dissent's emphasis on the use of proportionality benchmark.

43 *Ibid.*, para. 142.

44 *Ibid.*, para. 144.

5 Adjusting the Margin of Appreciation Doctrine to a Balanced Standard of Review Theory

In *Philip Morris v. Uruguay*, the Tribunal relied largely on the margin of appreciation doctrine to rule in favor of the defendant State's adoption of novel tobacco packaging regulations. It was believed that this case would have profound implications and effects for other ongoing or subsequent similar cases involved with tobacco control measures at various legal regimes, including the multilateral, regional or national forum.⁴⁵ Given the Tribunal divided over the issue of margin of appreciation, it was noticeably that this doctrine played a crucial role in determining the consistency of the SPR measure with the FET standard. This paper would offer some thoughts on this critical issue, and argue for a possible adjustment of the doctrine to a more balanced standard of review theory for future international investment disputes.

5.1 *Applicability of the Doctrine to BITs: A Fine-tuned Approach*

The first issue would be whether this doctrine of margin of appreciation should be applied by the investment tribunal under the context of BIT. As indicated, this doctrine was originally developed by the ECtHR, and the dissent refused to accept the applicability of this doctrine under the context of BITs because this doctrine had its historical route and textual basis, none of which could be found in the BIT. Unlike the extreme positions the majority or dissent holds, this paper takes an eclectic stance, and suggests the original doctrine should be fine-tuned under the investment arbitration.

On one hand, this paper finds that the dissent's position seemed more convincing since the majority was so eager to use this doctrine as a safeguard for lack of due consideration by public officials without offering clear rationales for holding such position. It seemed that the majority considered this doctrine a 'safe harbor' to preserve the State's discretions in the rule-making process, and failed to respond directly to the dissent's counterarguments regarding the historical and textual criticisms on the applicability of this doctrine. In other words, the doctrine seemed to be used as a safe excuse for State's right to regulate without considering the investor's rights as reflected in the majority's opinion. Nonetheless, referring to the margin of appreciation doctrine can still be a good starting point, as a first step to introduce a more balanced standard

45 McCabe Centre for Law and Cancer, 'The Award on the merits in *Philip Morris v Uruguay*: implications for WHO FCTC Implementation', August 2016, http://www.mccabecentre.org/downloads/Knowledge_Hub/McCabe_Centre_paper_on_Uruguay_award.pdf, accessed 10 April 2018.

of review theory in the investment disputes. The use of margin of appreciation doctrine should not be the end of further analysis on the merit of the case. The problem was that, in *Philip Morris v. Uruguay*, the Tribunal seemed to rely too much on this doctrine to conduct a more thorough examination on the relationship between the challenged measure and its alleged policy objectives. For example, the majority did not address the utility of the SPR measure in achieving the public health goals. Therefore, this paper would argue that the original concept of the margin of appreciation should be adjusted to accommodate State's right to regulate and private rights of investors.

On the other hand, this paper finds that it is unconvincing for the dissent's argument on the lack of textual basis as the reason for rejecting the applicability of this doctrine in investment dispute. Specifically, this paper does not agree with the dissent that it is necessary to find certain textual basis, such as express exceptions for the 'public order' and 'essential security interests' or any language in the *travaux* of the BITs to be able to apply the margin of appreciation doctrine, adjusted as recommended. The doctrine rejected by the dissent was the one originally developed by the ECtHR whereas the adjusted concept of margin of appreciation should be considered as the theory of 'standard of review'. In terms of the standard of review, this paper argues that it should be an inherently right/obligation for the tribunal when exercising its adjudicatory power to interpret and apply the rules in the BITs. Determining which level of standard of review being used is crucial to the further analysis and outcome of the dispute especially when cases involve with State's rights to regulate for public interest, or investment rules contain legal concept or lexicons without clear textual definition, such as fair and equitable treatment. An explicit legal mandate under BITs may be preferred to the lack of textual basis for the tribunal to set an appropriate standard of review. Nonetheless, such textual deficiency should not prevent the tribunal from applying certain level of standard of scrutiny to adjudicate the case.

In sum, the concept of 'standard of review' should be applicable under the context of BITs,⁴⁶ and the tribunal has the right or obligation to apply appropriate standards of review before adjudicating the merit of the case even if the BIT does not provide explicit texts or provisions, indicated by the dissent.

46 See generally, Willian Burke-White and Andreas von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitration', in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: OUP, 2010), pp. 689–720.

5.2 *Distinguishing the Standards of Review from Legal Tests or Criteria*

As indicated by the majority and dissent, reference to the margin of appreciation doctrine didn't end the judicial enquiry over the consistency of challenged measures with the FET standards despite certain level of deference to the State being inferred from the use of this doctrine. They further adopted different legal tests or criteria in examining the consistency of the FET provision, such as 'proportionality', 'rationality' or 'good faith' principles, etc. However, the concept of standard of review is different from that of legal tests applied to specific provisions. This paper finds that neither the majority nor the dissent clearly distinguishes the concept of standard of review (or margin of appreciation) from the legal tests (or criteria) of the FET standards.⁴⁷ Given the 'reasonableness' as the common test in examining the arbitrariness of challenged measure under the FET clause, neither the majority nor the dissent had provided a clear explanation about what level of scrutiny they were going to review the conformity of challenged measures with such legal test.

The theory of standard of review deals with the issue of proper allocation of power or authority between the investment tribunal and the host State. Before examine the substantive issues, the tribunal should hold a position on certain level of scrutiny as guidance for applying the legal tests in relation to the connection between means and ends. Ranging from the most lenient to the most intensive, the tribunal can choose among different levels of scrutiny, i.e., reasonable, intermediate and strict standards of review. If the tribunal decides a reasonable level of scrutiny, the State's decision is normally respected as it only requires a rational connection between the means chosen and the policy objectives alleged by the State. Therefore, the concept of standard of review is crucial to know the altitude of the threshold the State must cross over in order to satisfy the legal obligations under the BITS. This paper argues that the standard of review and the substantive legal tests are different concepts and serves different functions and objectives. The former theory is based on the functional considerations while the latter tests are applied to examine the substantive merits of the case, i.e., the means/ends test. Given that some types of dispute involved with the fact or issues the host State may be more capable of making the judgment based on available facts or evidences, the tribunal

47 See Willian Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', *Yale Journal of International Law* 35: 283 (2010), p. 324; identifying some ICSID tribunals referring to the least restrictive alternative test, the margin of appreciation, and good faith review, and resulting a melding or a confusing approach rather than a clear standard of review for public law arbitration.

should take a more deferential position on the policy choice of the host State. On the other hand, for those issues or claims the tribunal is more confident in and capable of making a better judgment than the host State, a stringent level of scrutiny can be adopted. Upon the adoption of certain level of scrutiny, the tribunal then can continue to examine the claims based on the provisions under the BITS.

Adopting the standard of review theory will not only facilitate the tribunal to exercise its adjudicatory power in a functional and efficient manner, but also enable the Parties to the dispute to manage its litigation strategy or prepare relevant evidences and arguments in accordance with the level of scrutiny decided by the tribunal. Moreover, establishing the standard of review theory can help the tribunal delivering consistent rulings on similar issues involved in different cases, and make the arbitral award more predictable and reliable in the long run. These are the benefits for the adoption of standard of review theory in the investment arbitration.

5.3 *Factors in Determining the Appropriate Level of Standard of Review*

The majority's reference to the doctrine of margin of appreciation from the ECtHR was critical to further transform it to the standard of review theory. It is noted that the standard of review is distinctive from the legal tests, and different levels of review does not guarantee certain adjudicatory findings in specific dispute. In other words, if the tribunal adopts a strict level of scrutiny, it doesn't guarantee a finding of violation or inconsistency of the measures with State's obligations. While it is more likely to rule against the host State if a strict standard of scrutiny is chosen, a finding of violation still requires further analysis of the connection between the measures at issue and the alleged policy objectives. However, negative findings are generally to be expected if strict scrutiny is used because the threshold is too high for the host State to overcome.

Then, the next question would be what factors the tribunal should take into account when deciding which level of standard of review was to be adopted in a specific case. On this issue, there seemed little precedent could be referred to and it had been suggested that the jurisprudence in domestic courts may be relevant for reference.⁴⁸ Under the context of domestic courts, the courts

48 See generally, Anna T. Katselas, 'Do Investment Treaties Prescribe a Deferential Standard of Review', *Michigan Journal of International Law* 34: 87 (2012); Conducting a comparative analysis of the U.S. Administrative Procedure Act's arbitrary and capricious standard of review and the fair and equitable treatment and arbitrary or discriminatory measures treaty standards.

would decide among different levels of scrutiny depending on the types of fundamental rights involved, the factual or legal issues involved, or the expertise or familiarity of the fact or evidence, etc. In *Philip Morris v. Uruguay*, the majority and the dissent seemed to hold different levels of scrutiny in minds, the more lenient 'reasonable' standard for the majority and the more stringent 'proportionate' standard for the dissent, despite lacking specific language in the opinions. However, either the 'reasonableness' or the 'proportionality' principles adopted were legal tests rather than the level of scrutiny. So, little indications can be inferred from the Tribunal's decision with regard to the factor in determining the level of standard of review.

Despite so, this paper supports the majority's more lenient position on the examination of the legality of challenged measures, and finds that several factors can be inferred from *Philip Morris v. Uruguay*.

First consideration could be the relative magnitude of the public interests involved. As compared to the private rights of investment, if the governmental objectives involve with significant public interest, a deferential level of scrutiny will be more appropriate than a strict one. As the health of human being was involved in this case, the host State would be more capable of assessing the seriousness of tobacco epidemic in its territory than the tribunal.

Second consideration could be the relative sufficiency of scientific evidence or risk assessment conducted by the host State. If the subject matter involves with complicated or imminent situations, the tribunal should avail more latitude for the State to formulate or create its policy responses to achieve the governmental goals. Insufficient evidence should not prevent the State from conducting some sorts of 'trial by error' or 'one step at a time' approach in the process of rule-making. As indicated, the SPR measure was a novel cigarette packaging regulation, the Tribunal adopted a more lenient approach to scrutinize the appropriateness of Uruguay's rule-making process and the effectiveness of such measure in achieving the alleged public objectives.

To sum up, this paper argues that this case may set a precedent about the level of standard of review the tribunal should be adopted when the challenged measure was a novel tobacco control regulation without sufficient scientific evidence to support its effectiveness in achieving alleged public health objectives. It seemed that the tribunal would be willing to respect the discretion of the host State as long as the States' novel regulation is adopted in good faith and in line with the public health objectives.

5.4 *Seeking Textual Basis for Adopting Standard of Review Theory*

Finally, if the textual basis were so important for the tribunal to be able to apply the theory of standard of review as indicated by the dissent, this paper

would argue that Article 3(2) of the BIT could be the textual basis for the Tribunal to exercise its authority in setting up the appropriate level of review before adjudicating the merits of this case. Given Article 3(2) of the BIT contains terms subjected to further interpretation, the Tribunal needs to take a position when applying this provision to examine the consistency of the challenged measures. If Article 3(2) was not a sufficient basis, Article 42 (1) of the ICSID Convention could be another relevant foundation for applying the standard of review. As it provided that '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.' The majority's reliance on the margin of appreciation doctrine developed by the ECtHR could be the 'rules of international law' as indicated in this provision.

6 Conclusion

In *Philip Morris v. Uruguay*, the Tribunal was requested to solve a dispute involved with potential conflicts between the public health policy and investor's property rights. Referring to the doctrine of margin of appreciation, the Tribunal finally ruled in favor of the Respondent State, supporting its novel regulations regarding the single presentation requirement of cigarette's packaging. After reviewing the contrasting opinions of the divided Tribunal, this paper believed that the majority's opinion would set a significant precedent for the State to adopt novel rules or regulations especially when there was little scientific evidence to support such policy. The concept of margin of appreciation can be properly adjusted to accommodate the right to regulate for public health purpose and the investor's private rights.

Despite the positive effect, this paper provides some observations criticizing the majority and dissenting opinions. The most critical one would be the inability to distinguish the standard of review and the substantive legal tests of the FET standards. Moreover, the majority's downplay of the utility issue could be another deficiency. Nonetheless, I believed that the Tribunal in *Philip Morris v. Uruguay* had made an important step towards a healthier resolution in tobacco investment disputes arisen from traditional bilateral investment treaties, and such outcome would be a great encouragement for the tobacco control community in defending ongoing or future tobacco-related trade or investment disputes.