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POSITION OF REDES – FRIENDS OF THE EARTH URUGUAY ON THE RECENT ICSID DECISION

Bad news for Uruguay and the WHO Framework Convention on Tobacco Control

The announcement by the arbitration tribunal of the International Centre for Settlement of Investment Disputes (ICSID), a World Bank body, that it has jurisdiction to decide on the claim filed by US tobacco company Philip Morris, based in Switzerland, against the Uruguayan State shows once again the intrinsically pro-company and anti-popular bias of the investment arbitration system in general, and of this World Bank tribunal in particular, and it clearly constitutes a defeat for Uruguay, a threat for the health of our population and a huge victory for the transnational company.

Despite the solid arguments by the defense, the ICSID tribunal ruled against Uruguay and decided to hear Philip Morris' demands, disregarding the fact that the bilateral investment treaty between Switzerland and Uruguay -which the tobacco company used to base its claim-, unequivocally states in its Article 2 that public health measures cannot be challenged by investors as an indirect expropriation of their investments.

In its ruling, the tribunal also disregarded the fact that the tobacco company should have sought an amicable settlement for six months and after that, it should have processed a lawsuit for twelve months in Uruguayan national tribunals, before submitting the case to the consideration of an international investment arbitration tribunal, as clearly stipulated by the BIT between Switzerland and Uruguay.

Finally, it also disregarded that Philip Morris businesses in Uruguay should not be considered an investment to be protected under the terms of the Switzerland-Uruguay BIT because they have not contributed to the development of the host country (Uruguay in this case), as stipulated by the ICSID convention, but on the contrary, it has implied multimillion-dollar costs for Uruguay in terms of health expenses associated to diseases related to smoking.

These should have been enough reasons for the arbitration tribunal to rule out the claim filed by the tobacco company against Uruguay, and they were the focus of the strategy and hopes of the Uruguayan administration and its defense lawyers. They should not have trusted the impartiality of the arbitration tribunals managed by the World Bank and they should have paid more attention to the criticism, not only by the international civil society but that of progressive governments of the region such as Bolivia, Ecuador and Venezuela, who in the past years have decided not to submit themselves to the ICSID arbitration tribunals.

While Philip Morris is encouraged (correctly) saying that the ICSID's decision opens the doors for this tribunal to review and challenge tobacco control policies established in Uruguay under Oncologist Tabare Vazquez' administration, the Uruguayan government must recognize its mistakes in the handling of this case and resume the initial course of action set by the interministerial team, seek the support of international civil society campaigns and strengthen alliances with Latin American governments that are starting to question the legitimacy of arbitration tribunals to decide controversies where health policies and others of public interest adopted in a democratic and sovereign way are at risk, and in this case, in compliance with international public health commitments.

Philip Morris has recently lost similar claims against Australia and Norway in the respective national courts of those countries, but with this resolution, Philip Morris will feel encouraged to continue intimidating other countries trying to protect the health of their population. This is a huge victory for the company against Uruguay and the Framework Convention on Tobacco Control (FCTC), the only binding multilateral agreement in terms of public health of the World Health Organization (WHO).

REDES – Friends of the Earth Uruguay agrees with the official opinion of the Uruguayan government as

quoted by EFE news agency, "the formal reasons filed by Uruguay (through the US Foley&Hoag law firm) for the ICSID to dismiss the case were strong". However, they were not enough, as we have been saying for a long time¹, and as the tribunal's ruling shows. In order to face the following stage of this process, and the growing threat of lawsuits such as this one against the Uruguayan State in the context of BITs signed especially in the 1990s by neoliberal administrations, and in the context of an exponential growth of foreign investments in the country, it is necessary to admit this defeat and the mistakes made instead of trying to disguise it as a "warm-up".

Strategy of Silence

We consider that the official strategy through which information on the case was hidden was one of the decisive elements of this defeat. REDES—Friends of the Earth Uruguay requested information on the case several times and in a formal way, unsuccessfully. If we had had this information, we could have organized an international campaign to express civil society's support, and we could have submitted an *amicus curiae* (friends of the court) adding important arguments to those established by the Uruguayan defense for the court to make a decision contrary to the one it eventually made.

What is more, the Uruguayan government did not take advantage of the empathy of the global public opinion and of many governments with reference to our legislation against tobacco and its defense of sovereign rules, and of the solidarity and explicit support shown by governments at the 3rd Conference of the Parties (COP) to the FCTC held in Punta del Este, Uruguay, in November 2010, soon after Philip Morris filed its lawsuit against our country. Instead of using that empathy and explicit support to increase the pressure on the arbitration tribunal to dismiss the claim by the tobacco company, the official strategy was that of a self-imposed silence. Despite the global rejection against Philip Morris actions in this multilateral space, which grew hand in hand with its corporate attempts of challenging other FCTC signatory countries (claims against Australia and Norway in other fora) and against the convention, in the IV COP held in Seoul, South Korea, the Uruguayan delegation chose to remain silent.

At that moment the government should have clearly started to request international solidarity and support by other affected countries and the FCTC in its entirety against Philip Morris' lawsuit, proposing that the COP issued a statement or a message directly addressed to the ICSID arbitration tribunal, requesting it not to accept having jurisdiction to decide on this case and instead demanding that the FCTC itself be the one with jurisdiction to decide on this and other similar claims. A message of that kind, or even just the fact of addressing this issue at the 4th COP of the FCTC held last November in Seoul, South Korea, would have probably contributed to dissuade the arbitration tribunal from proceeding with the claim as it was now decided.

The Uruguayan government spokesperson is right when according to EFE says that "the experts (in this case the Foley&Hoag law firm) do not want to miss a test case such as this one". But certainly, the reasons why they do not want to miss them are less altruistic than that of imparting justice. All those law firms live and profit from this new industry represented by investment and transnational companies' claims against States, in which clearly they are a stakeholder and a key factor of their proliferation. The "experts" take turns working as lawyers representing investors and transnational companies; as defense lawyers of the governments and also as court arbitrators². An example of this is that of the ICSID arbitrator inexplicably chosen by Uruguay, James Crawford, who at least until March 2012 worked as a plaintiff lawyer against the Republic of Ecuador, representing US oil company Chevron.

And the Uruguayan Pro-Secretary of the Presidency is also right when he says that "we need to prepare ourselves for a long trial that will likely end by the end of 2015". Uruguay will now have to continue paying for arbitration costs, estimated by the United Nations Conference on Trade and Development (UNCTAD) in 8 million dollars on average for each of the parties. Now more than ever, Uruguay faces the risk of having to pay a large amount of money to Philip Morris. The company is demanding 2 billion dollars, approximately 5 per cent of the national GDP.

An opportunity to set the right direction

Nevertheless, REDES – FoE Uruguay considers the Uruguayan government has once again the opportunity to set the right direction and strongly face the attempts by the transnational tobacco company disguised as a Swiss company, where its headquarters are located, only to file its claim on the basis of the Bilateral Investment Treaty signed between Uruguay and Switzerland. If this was a football match, we would say

1 www.redes.org.uy www.radiomundoreal.fm

2 Eberhardt Pia and Olivet Cecilia, When Injustice is a Business, CEO and TNI, November 2012

that Uruguay is losing 1-0 and that from now on we will have to play at the rival's field, knowing that the referees are biased on their favor. In these circumstances, the best defense is attacking or to implement a counter-offensive strategy and ally ourselves with civil society organizations and international governments that are more than willing to support Uruguay in this cause, especially with governments which have begun to criticize BITs and their arbitration tribunals, particularly those countries of the region which met two months ago and who decided in Guayaquil, Ecuador, to create an Observatory, to promote BITs hearings and to establish a Congress of Latin American Countries Affected by Transnational Interests.

In addition, Uruguay will now have at least to review its BITs, starting with the one signed with Switzerland, as stated by REDES-FoE Uruguay and Alliance Sud, the most important coalition of Swiss NGOs who work for the development and rights of the peoples of the global South, aiming to exclude international arbitration as a mechanism to solve controversies and the concept of indirect expropriation which Philip Morris uses as a basis for its claim.

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