



# PURSUING POLICY COHERENCE: TRADE, INVESTMENT AND NCDs

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# ROAD MAP



- ◆ Overview of key WTO/international trade rules
- ◆ Overview of WTO disputes relevant to NCDs: Plain Packaging case study
- ◆ Introduction to investment treaties and health related claims: Philip Morris v Uruguay case study

# GENERAL CONTEXT

“Trade is not the most important value and the GATT exceptions say that other values are more important than trade.” (Lorand Bartels)

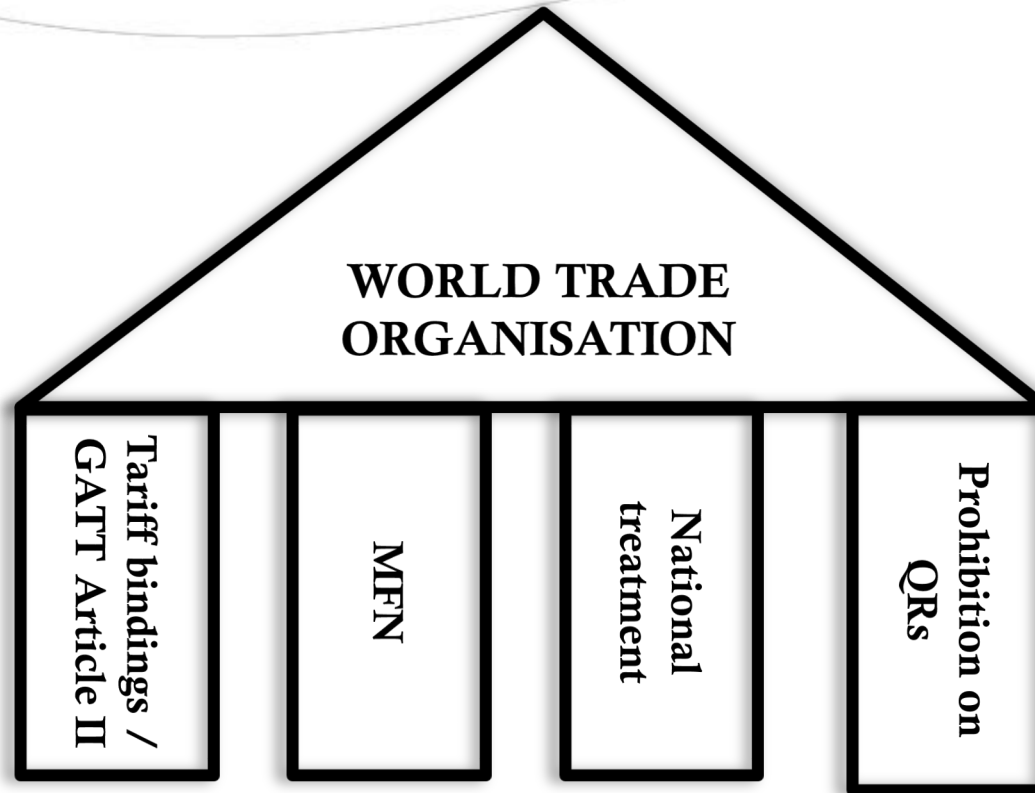
**TRADE**



**NON-TRADE**



# THE MULTILATERAL TRADING SYSTEM (THE WTO)



# THE MULTILATERAL TRADING SYSTEM: TRADE IN GOODS

## ◆ Article 1

- ◆ Not to grant less favourable treatment to like products of other WTO Members (or non-Member).
- ◆ Applies to both internal measures and border measures.

## ◆ Article 2, GATT

- ◆ Not to impose duties in excess of levels entered in Schedule of Concessions.

# THE MULTILATERAL TRADING SYSTEM: TRADE IN GOODS

## ◆ Article 3

- ◆ Internal taxes and other internal measures are not to grant less favourable treatment to 'like' imported products. (Art 3.2)
  - ◆ Covers both formally 'like' and 'directly competitive or substitutable products'
- ◆ Internal regulatory measures are not to grant less favourable treatment to 'like' imported products (Art 3.4) .

# THE MULTILATERAL TRADING SYSTEM: TRADE IN GOODS

- ◆ Likeness
  - ◆ Tariff classification
  - ◆ Physical characteristics
  - ◆ End uses
  - ◆ Consumer tastes/preferences
- ◆ Directly competitive or substitutable: additional considerations such as competition in the relevant markets, elasticity of substitution, cross-price elasticity, elasticity of substitution. .

# THE MULTILATERAL TRADING SYSTEM: TRADE IN SERVICES

- ◆ Member States got to determine which sectors and/or modes of supply they wished to liberalise and which they wished to exclude from liberalisation ('positive list' approach).
- ◆ Must consult your country's Schedule of Specific Commitments for a clear understanding of exactly what commitments they have undertaken in this area (distribution services and retail regulations, advertising services and marketing regulations etc).
- ◆ Essentially the MFN and national treatment obligations as under goods regime but they operate a little differently.



# THE MULTILATERAL TRADING SYSTEM: PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

- ◆ In so far as the TRIPS Agreement guarantees a certain minimum level of (exclusive) protection for intellectual property rights, it can have implications for public health, in particular in terms of access to medicines. (See WTO Ministerial Declaration on TRIPS & Public Health 2001 which was one of the responses to this potential threat).
- ◆ Specifically re NCDs, in the tobacco plain packaging dispute, the complainants argued, inter alia, that their intellectual property rights (trademark) had been infringed by Australia's plain packaging requirement which restricted how they displayed their trademark

# GENERAL EXCEPTIONS: GATT ARTICLE XX / GATS ARTICLE XIV

- ◆ Allow for otherwise WTO-inconsistent measures provided they are:
  - **necessary** to protect human, animal or plant life or health;
  - are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between countries where the same conditions prevail, or a **disguised restriction on international trade**.
- *EC – Asbestos*: health is a value “**both vital and important to the highest degree.**”

# THE TBT AGREEMENT

- ◆ Preamble recognises Members' right to implement measures to protect health at the level they consider appropriate provided:
  - they are not applied in a manner that amounts to **arbitrary or unjustifiable discrimination** or **a disguised restriction on international trade**.
    - i.e. is the measure rationally connected to the objective? Is it justifiable in light of risk sought to be mitigated?

# THE TBT AGREEMENT

- ◆ Technical regulations **must not be more trade-restrictive than necessary to fulfil a legitimate objective**, taking account of the risks non-fulfilment would create.
- ◆ Legitimate objectives specifically mentioned in TBT Agreement Art. 2 include “**protection of human health or safety**”.



# THE TBT AGREEMENT

- ◆ There is a rebuttable presumption that a technical regulation does *not* create an unnecessary obstacle to international trade if it:
  - falls within the scope of one of the explicitly mentioned legitimate objectives; and
  - is in accordance with relevant international standards.

# THE TBT AGREEMENT

- ◆ TBT Annex 3 Code of Best Practice:
    - International standards shall be used as a basis for standard development where they exist or their completion is imminent;
- BUT
- Expressly preserves Member States' right/ability to take action not based on an international standard where said international standard would be ineffective or inappropriate.

# KEY CASES RELEVANT TO NCDs

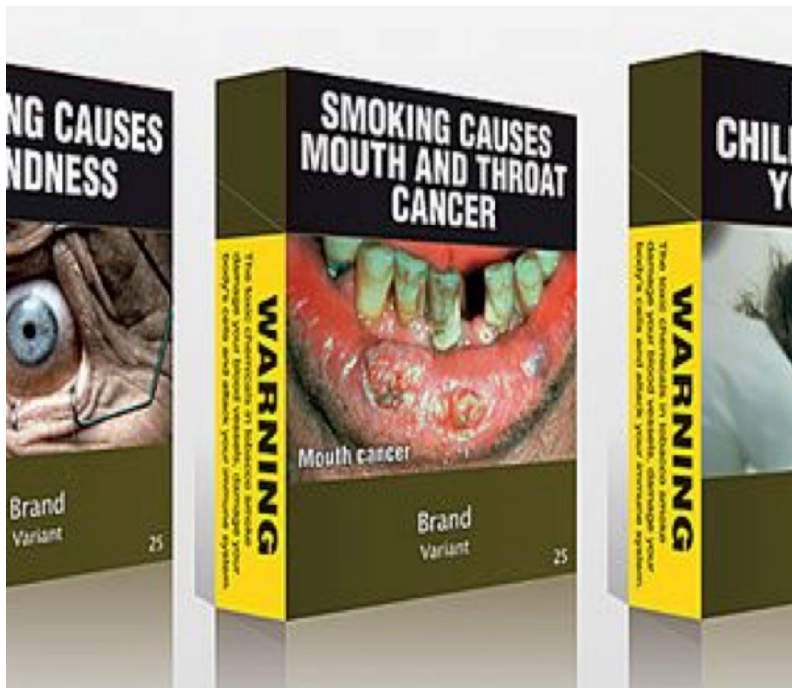
- *EC – Asbestos WT/DS135*
  - *At issue: France’s ban on asbestos*
- *US – Tuna II (Mexico) WT/DS381*
  - *At issue: US ‘dolphn safe’ labelling standard*
- *Philippine – Distilled Spirits WT/DS396*
  - *At issue: Philippines’ excise taxes for distilled spirits*

# KEY CASES RELEVANT TO NCDs

- *US – Clove Cigarettes* WT/DS406
  - At issue: US ban on cigarettes with characterizing flavours other than tobacco or menthol
- *Australia – Tobacco Plain Packaging*
  - At issue: Australia's tobacco control measures.



# THE AUSTRALIA - TOBACCO PLAIN PACKAGING DISPUTE



# WTO TOBACCO PLAIN PACKAGING DISPUTE : HIGHLIGHTS

- ◆ Noted that ‘protection of human health or safety’ is one of the ‘legitimate objectives’ explicitly identified in TBT Article 2.2.
- ◆ Recalled Appellate Body’s previous ruling in *EC-Asbestos* that **the preservation of human life and health** through the elimination or reduction of well-known and life-threatening health risks (asbestos fibres) was a value “**both vital and important to the highest degree.**”

# WTO TOBACCO PLAIN PACKAGING CASE: HIGHLIGHTS

- ◆ Confirmed that determining whether or not a technical regulation is ‘more trade-restrictive than necessary’ under the TBT Agreement Art. 2.2. involves weighing and balancing, *inter alia*:
  - ◆ the challenged measure’s degree of contribution to the legitimate objective at issue;
  - ◆ the trade-restrictiveness of the challenged measure; and
  - ◆ the nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure.

# WTO TOBACCO PLAIN PACKAGING CASE: HIGHLIGHTS

- ◆ Further confirmed that for an alternative measure to ‘trump’ the challenged (public health) measure, it would have to :
  - be less trade-restrictive than the challenged measure;
  - make “an equivalent contribution” to the legitimate objective in question, taking account of the risk non-fulfilment would create; and
  - be ‘reasonably available’ to the Member against whom the claim was being brought.



# WTO TOBACCO PLAIN PACKAGING CASE: HIGHLIGHTS

- ◆ Significance attached to the fact that Australia's TPP measures were part of a comprehensive suite of tobacco control measures such as enlarged graphic health warnings, public education etc.
- ◆ Accepted that Australia's TPP measures did contribute to Australia's objective of improving public health by reducing use of, and exposure to, tobacco products even though that there were some limitations to the literature that Australia had relied upon.

# WTO TOBACCO PLAIN PACKAGING CASE: HIGHLIGHTS

- ◆ Strong reliance on WHO/FCTC Secretariat's evidence and analysis (even though FTCTC Guidelines were not considered to be an international standard for the purposes of Article 2.5 TBT Agreement).
  - Considered “highly relevant” the recognition in a number of sources of the comprehensive nature of tobacco control in particular, including the numerous iterations to this effect within the FCTC and its supporting guidelines for implementation.

# WTO TOBACCO PLAIN PACKAGING CASE: LESSONS LEARNT

✓ **Clearly defined public policy objective**

- Evidence needed of public health problem
- 'Framing' is important (concrete & measurable)

✓ **Contribution of measure to the public health objective**

- Evidence needed
- Multi-pronged approach is helpful

✓ **No reasonably available less trade-restrictive alternatives**

- ✓ Alternative must be 'reasonably available' and equivalent in effect
- ✓ Where there is a multi-pronged strategy one element can't be substituted for another

✓ **Non-discriminatory**

- ◆ Rational connection between the public health objective being pursued
- ◆ Les favourable treatment must be based exclusively on a legitimate regulatory distinction.

✓ **Due process**

- ✓ Robust and transparent consultative processes

# REVISED TREATY OF CHAGUARAMAS

- Aimed at, inter alia, economic integration / the creation of a single economic space within CARICOM. Uses a common external tariff (CET).
- Based on GATT/WTO principles such as non-discrimination (national treatment, MFN) etc.
- General exceptions clause under Article 226 including for public health measures.
  - Broader than GATT Article XX as don't have to demonstrate the 'necessity' of the measure.
- No formal equivalent to WTO TBT and SPS agreements, but regional bodies in these areas which aim at harmonising policies across the region.





# INVESTMENT LAW AND NCDS

- ◆ Similar considerations in terms of trade liberalisation and its impact in terms of market access to unhealthy food and beverages.
- ◆ Investment law deals specifically with the relationship between the state and investors. It seeks to provide certain basic guarantees to investors as a means of encouraging investment and by extension economic development. (a little controversial)

# INVESTMENT LAW AND NCDS

- ◆ Unlike in the trade field, there is no multilateral agreement/system setting out the basic terms and conditions under which foreign investment can/should be made.
- ◆ Have to look a specific investment treaties (bilateral, regional, extra-regional)

# INVESTMENT LAW & NCDS

- ◆ Common terms
  - ◆ Scope: investor / investments
  - ◆ Expropriation
  - ◆ Fair and equitable treatment
  - ◆ Most favoured nation/national treatment clauses
  - ◆ State/investor arbitration

# INVESTMENT LAW & NCDS

- ◆ Recent trend to re-balance international investment law as seen in a number of investment disputes as well as termination/re-negotiation of investment treaties, inclusion of carve outs or express public health exceptions, limitations on recourse to action against expropriation/international arbitration more generally, other interpretive tools etc.

# INVESTMENT LAW & NCDS

- ◆ Expropriation (direct or indirect)
  - ◆ Only possible if for a public purpose, non-discriminatory/not arbitrary, there is due process and the investor has been compensated for the loss of his property.


## **HOWEVER**

- ◆ State retains ‘police powers’ i.e. the sovereign right/power to regulate in the public interest. (Philip Morris v Uruguay arbitration)

# INVESTMENT LAW & NCDs

- ◆ Fair and equitable treatment
  - ◆ due process (administrative and judicial)
  - ◆ non-discrimination
  - ◆ acting in good faith
  - ◆ maintaining a stable and predictable regulatory environment
  - ◆ protection of legitimate expectations

# INVESTMENT LAW & NCDs: A CARICOM PERSPECTIVE

- ◆  All CARICOM countries (except Montserrat) have signed at least one bilateral investment treaty (BIT). BIT (Barbados Trinidad & Tobago have the largest number).
- ◆ Investment provisions also feature in the Revised Treaty of Chaguaramas and some of CARICOM Member States' external trade agreements (e.g CARIFORUM/EU Economic Partnership Agreement)



# INVESTMENT LAW & NCDs: A CARICOM PERSPECTIVE

- ◆ Generally, the BITs of CARICOM countries are oriented towards protection of the investor/investment i.e older generation investment treaties.
- ◆ 🇸🇷🇬🇾 Exceptions: Suriname and Guyana's Cooperation and Facilitation Investment Agreements (CFIAs) with Brazil (2018).

# INVESTMENT & NCDs: A CARICOM PERSPECTIVE

- ◆ While they regulate direct investment flows, CFIAs seek to re-balance the investor's interest and the host state's development agenda.
- ◆ Inclusion of safeguards clauses related to issues such as corporate social responsibility clause, environmental, labour and public health provisions.
- ◆ Inclusion of guidance re interpretation of national treatment and MFN obligations etc

# INVESTMENT LAW & NCDs: A CARICOM PERSPECTIVE

- ◆ Brazil/Suriname CFIA
- ◆ Article 5.4 & 6.4: “*treatment accorded in like circumstances*” shall be interpreted according to the totality of circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.
- ◆ Article 7.5: only direct expropriation is protected.

# INVESTMENT LAW & NCDs: A CARICOM PERSPECTIVE

- ◆ Article 15: investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the host state and the local community, by means of a high degree of socially responsible practices on a voluntary basis.

# INVESTMENT LAW & NCDs: DRAFT CARICOM INVESTMENT CODE

- ◆ Expands the foundation created by the Revised Treaty of Chaguaramas to create common regime for protection, promotion and facilitation of investments within CARICOM.
- ◆ Ononaiwu: objectives include: attracting investment from investors of CARICOM Members and third countries, greater cross border investment and reinvestment in CARICOM and transparency and predictability in the treatment of investment in CARICOM.

# INVESTMENT LAW & NCDs: CARICOM DRAFT INVESTMENT CODE

- ◆ Usual treaty clauses re MFN, national treatment, fair and equitable treatment etc.
- ◆ Ononaiwu: negotiators are trying to strike a more equitable balance between the protection of the investor and the host State's right to regulate in the public interest (which would include health concerns).

# INVESTMENT LAW & NCDs: CARICOM BILATERALS

- CARICOM Member States have concluded five bilateral trade agreements providing for duty free trade on selected goods.
  - Venezuela (1993);
  - Colombia (1994);
  - Cuba (2000);
  - Dominican Republic (2001);
  - Costa Rica (2004).

# INVESTMENT LAW & NCDs: CARIFORUM/EU EPA

- ◆ Reciprocal preferential trade agreement between CARIFORUM and EU.
- ◆ Also built on GATT/WTO principles of non-discrimination etc.
- ◆ Investment chapter limited to commercial presence and focus on liberalisation (market access and national treatment) rather than investment protection. No investor-state dispute settlement mechanism.





# INVESTMENT LAW & NCDs: CARIFORUM/EU EPA

- ◆ In goods, EU commitments re agriculture, hunting, forestry, fishing and aquaculture, mining and quarrying, manufacturing, production, transmission and distribution on own account of electricity, gas, steam and hot water.
- ◆ CARIFORUM states made similar commitments but with reservations for non-conforming measures in sensitive sectors such as agriculture and hunting, fishing.
- ◆ Government procurement chapter also of interest.

# INVESTMENT LAW & NCDs: CARIFORUM/EU EPA

- ◆ General exceptions clause for matters including public health mirroring GATT Article XX(b).
- ◆ Has sustainable development as one of the express objectives of the agreement.

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ Proceedings in 2010 under a 1988 BIT between Switzerland and Uruguay and the ICSID Convention (decision not until July 2016) challenging Uruguay's SPR (single presentation rule) and its 80/80 regulation for graphic warnings.
- ◆ As remedies, Philip Morris sought either withdrawal of the challenged measures (together with damages for injury until the date of withdrawal) or damages in the amount of at least US\$22 million with compound interest.



# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ Philip Morris claimed Uruguay's measures violated the BIT based on, *inter alia*:
  - Failure to accord fair and equitable treatment, including denial of justice
  - Expropriation

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ Tribunal rejected the expropriation claim ruling that adoption of the measures was a valid exercise of the state's police powers.
  - Test: **the actions in question had to be “*bona fide* for the purpose of protecting the public welfare, . . . non-discriminatory and proportionate”** (para. 305).
  - The Tribunal relied on evidence from FCTC Secretariat, WHO, and PAHO on the extent of the public health threat posed by smoking within Uruguay and the desirability and effectiveness of the measures taken by Uruguay in response.

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ Tribunal also ruled that the challenged measures did not amount to indirect expropriation, as they did not cause “a ‘substantial deprivation’ of the value, use or enjoyment of the Claimants’ investments” (para. 284).

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ The Tribunal rejected the fair and equitable treatment claim holding that the regulations were not “arbitrary, grossly unfair, unjust, discriminatory or . . . disproportionate . . . and this is especially so considering [their] relatively minor impact on Abal’s business” (para. 410).
- ◆ Fair and equitable treatment test: **depends on the circumstances of a given case and such factors as “transparency and the protection of the investor’s legitimate expectations, freedom from coercion and harassment, procedural propriety and due process, and good faith”** (para. 320).

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ On the specific issue of arbitrariness in the context of the fair and equitable treatment standard, the Tribunal applied the test of “**a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety**” (para. 352).
- ◆ It found that the challenged measures were not arbitrary because they were implemented to protect public health, there was clear evidence to support their effectiveness, and they had been adopted expressly in conformity with the FCTC.



# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ Also ruled that,, in light of the support offered by the FCTC provisions and guidelines, it was not necessary for Uruguay to perform additional studies or to gather further evidence in support of its actions (para. 396).

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ On the question of legitimate expectation and legal stability also raised by Philip Morris in relation to the fair and equitable treatment standard, the Tribunal stressed that **these elements are without prejudice to the sovereign right of the state to legislate and adapt its legal system to changing circumstances, albeit such steps must be taken in a manner not “outside of the acceptable margin of change”** (para. 423).

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ The Tribunal also noted that the operation of legitimate expectation within a fair and equitable treatment standard is dependent on specific representations to the investor by the host state to secure the investment **but that in the instant case the issue involved adoption of legislation of general application, which could not create any legitimate expectations that it would remain unchanged. Moreover, the nature of tobacco as a harmful product meant that tobacco manufacturers and distributors could not expect that new and more onerous regulations would not be imposed.** (paras. 429 – 30, 434).

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ In response to the claimants' arguments that the challenged measures had been adopted without due consideration by public officials, the Tribunal indicated that:

the “margin of appreciation” is not limited to the context of the [European Convention on Human Rights] but “applies equally to claims arising under BITs,” at least in contexts such as public health. **The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health.** In such cases respect is due to the “discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith . . . . involving many complex factors.” (Para. 399)

# CASE STUDY: PHILIP MORRIS V URUGUAY ARBITRATION

- ◆ Thus, the Tribunal limited itself simply to deciding “whether or not there was a manifest lack of reasons for the legislation” (para. 399).

# CONCLUDING COMMENTS / LESSONS LEARNT

- ◆ Defending your interests does not come cheap
  - ◆ Uruguay awarded US\$7 million in legal costs but its actual legal costs were US\$10.3 million (financial assistance from Bloomberg and Bill and Melinda Gates Foundations)
- ◆ Important role amicus briefs can play in this type of litigation (especially from neutral subject matter experts such as PAHO/WHO/FCTC Secretariat).
- ◆ The relevance and normative potential of the FCTC.



# CONCLUDING COMMENTS / LESSONS LEARNT

- ◆ The importance of evidence-based regulations.
- ◆ Utility of the FCTC as a source of evidence in support of measures adopted.
  - ◆ Substantial weight was attached to the written testimony submitted by WHO/FCTC Secretariat etc
- ◆ The need for evidence does not preclude States from using novel measures, once they are reasonable.

# CONCLUDING COMMENTS / LESSONS LEARNT

- ◆ Reinforcement of police powers doctrine and margin of appreciation
- ◆ Clarifies the scope of the concept of legitimate expectation in regard to the regulation of harmful products
- ◆ Importance of comprehensive approaches to these problems. (whole of government response is key to development of a response to NCD related matters)
- ◆ Relevance of domestic process of adoption (bona fide measures, not arbitrary, reasonableness, not discriminatory).



# CONCLUDING COMMENTS / LESSONS LEARNT

- ◆ States should exercise caution when entering into investment agreements. They need to be ensure that they preserve adequate policy space to address their development needs, limit specific undertakings to investors and make sure that they are comfortable with your level of exposure to international litigation. If necessary, revisit/amend/terminate them.

THANK YOU !!!

**THE END**