

Litigator of the Week: Paul Reichler of Foley Hoag

By Michael D. Goldhaber

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Paul Reichler has been dubbed Mr. World Court for his dominance at the seat of public international law. But in the past week Mr. World Court became Mr. Arbitration.

It was a great week for public health and maritime borders. And a terrible week for international bullies. In the space of five days, Foley Hoag's Reichler won the most sweeping possible victories for the Philippines over China, on control of the South China Sea; and for Uruguay over Philip Morris International, on the regulation of tobacco packaging.

In addition to suing China for colonizing the South China Sea, Reichler has in the course of his career sued America for mining Nicaraguan waters, and Russia for invading the Caucasus. His guiding star is the conviction that international law binds superpowers (past, present or future).

Tangling with Big Tobacco is something new. But Reichler has always championed the sovereignty of less powerful nations. And he confesses that the death of both his parents from tobacco-related illness provided a powerful extra motive to work for Uruguay, whose president just happens to be an oncologist.

"It was a great week for public health," says Reichler, "and a good week for the health of the investor-state dispute system." The Uruguay claim has been a prime exhibit in the case against ISDS. Though Reichler remains a critic of the system, he is satisfied that it's "strong enough to treat a frivolous case the way it deserves."

China has aggressively staked a claim to 90 percent of the South China Sea, over competing claims by six surrounding nations including The Philippines.



Courtesy photo

Paul Reichler of Foley Hoag.

On July 12, an ad hoc panel supervised by the Permanent Court of Arbitration handed down the South China Sea award in favor of the Philippines. Appointed by the International Tribunal for the Law of the Sea, the panel applied the U.N. Convention on the Law of the Sea.

Considering that Foley filed over 10,000 pages of pleadings, the holdings have been summarized with surprising simplicity by Julian Ku of Hofstra Law.

None of the disputed land features fits the definition of an "island," and few qualify as a "rock." Mischief Reef is neither, and the artificial island that China built atop it is illegal. A land feature that doesn't even rate as a rock can't generate maritime rights. So most of those rights go to the Philippines as the closest coastal state.

Reichler's other mega-win this week came on July 8, when an International Centre for Settlement of Investment Disputes tribunal handed down an award in favor of Uruguay over a partial dissent.

The majority rejected challenges to two Uruguayan laws. One forced cigarette makers to cover most of their packaging with lurid health warnings. The other barred Big Tobacco from distinguishing different varieties of a brand family with color coding. (Uruguay worried that Philip Morris would use "Marlboro Gold" as a stealthy way to market Marlboro Lights under false health claims.)

The Uruguay arbitration was likely the first to attract public interest litigation funding, with \$500,000 contributed by the Bloomberg Foundation. It was also arguably the first investor arbitration where amicus briefs filed by intervenors had a discernible impact.

In what may be the clearest articulation of the police power doctrine by an investment panel, the award reasoned that state measures must be "taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate."

The panel believed the World Health Organization amicus that Uruguay chose "effective means to protect public health." Further, it gave "great deference to governmental judgments of national needs". In particular, the arbitrators cited the European Court of Human Rights' doctrine of deference, clunkily known as the "margin of appreciation."

Finally, the Uruguay arbitrators accepted a narrow conception of trademark. On this view, world trade law protects the negative right to stop others from making Marlboros -- but not the affirmative right to make Marlboros. Philip Morris thinks that makes trademark worthless. Reichler hopes the arbitration will influence the WTO in its pending tobacco claims.

Those who wish to delve deeper into the law may consult Luke Eric Peterson's excellent work. But in Reichler's view, the tobacco case turned on the facts.

Reichler says his experts -- who took the stand together, in a technique colorfully known as "hot-tubbing" -- persuaded the panel that tobacco marketing deceived the public about health. By contrast, he argued at closing that Big Tobacco's witnesses knew nothing about tobacco. Consider this exchange

between arbitrator James Crawford and Philip Morris's expert Jacob Jacoby of NYU.

Crawford: "How much do we know about why people keep on smoking or stop smoking or move to 'lighter' brands? Is this a well researched area?..."

Jacoby: "It may be, but I'm not aware, and I think it must be, that it's not anything I keep up with, so I don't know how much we really know. I cannot comment on that as an informed expert."

In an odd way, Reichler's career has come full circle. For the South China Sea arbitration shared two unique features with the Nicaragua ICJ case that made Reichler's name in the 1980s.

In both cases, Reichler's opponent didn't show up to the merits hearing (or in the case of China, at all). Surprisingly, Reichler thinks it's "harder to argue against an absent adversary than a present one." The problem is the decision makers play devil's advocate. In the China case, he says, "We were up against five of the world's most distinguished experts on the law of the sea."

Perversely, China may have participated by hacking the peace palace's computers during the South China Sea arbitration. Reichler can't confirm the incident, which China denies, but he has his suspicions. "About two months before award issued," he notes, "China launched an unprecedented propaganda campaign. They must have anticipated an adverse ruling. What the basis is for that supposition I don't know--but they're rumored to be very good at hacking." So yes, Reichler says: "It's a special challenge litigating against China on many levels.

The second commonality between South China Sea and Nicaragua is that Reichler never expected his superpower opponent in either case to comply with the legal decision.

Reichler's goal in the Nicaragua case, which he believes he achieved, was to help end congressional support of the contras. Here, Reichler's goal is to inform diplomatic negotiations.

"It's shortsighted to say nothing will change," he says. "In the real world the law matters." Yes, China may choose to "impose by force its will against all its neighbors, engendering hostility and perpetuating instability.... [But] "frankly I think China's too smart for that. I think ultimately there will be a diplomatic settlement."