

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and  
Abal Hermanos S.A. (Uruguay)**

**v.**

**Oriental Republic of Uruguay**

**(ICSID Case No. ARB/10/7)**

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**PROCEDURAL ORDER NO. 3**

Professor Piero Bernardini, President  
Mr. Gary Born, Arbitrator  
Judge James Crawford, Arbitrator

*Secretary of the Tribunal*  
Mrs. Anneliese Fleckenstein

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Date: February 17, 2015

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## **I. INTRODUCTION**

1. On January 30, 2015, the Centre received a Request to File a Written Submission (*Amicus Curiae* Brief) and the *Amicus Curiae* Brief from the World Health Organization (WHO) and the WHO's Framework Convention on Tobacco Control (WHO FCTC or FCTC) Secretariat (jointly, the "Petitioners"), dated January 28, 2015. The Request was transmitted to the Tribunal on the same day.
2. On February 2, 2015, the Tribunal transmitted the Request to the Parties and invited them to submit their comments by February 9, 2015. The Parties' comments to the Request were received on February 9, 2015.
3. On February 12, 2015, the Tribunal issued a decision allowing the Petitioners' request to submit an *Amicus Curiae* Brief and informed the Parties that a reasoned decision would follow. The *Amicus Curiae* Brief was attached to the Tribunal's decision.
4. The Tribunal now issues its reasoned decision on the Petitioners' *Amicus Curiae* Brief.

## **II. THE PETITIONERS REQUEST**

5. The Request refers to the Tribunal's authority to receive a non-disputing party submission (*Amicus Curiae* Brief) pursuant to Rule 37(2) of the ICSID Arbitration Rules and states that the submission provided by the WHO and the WHO FCTC Secretariat (the "Submission") fulfils the requirements of Rule 37(2).
6. According to the Request, the WHO is a specialized agency within the terms of Article 57 of the Charter of the United Nations with the objective of the "attainment by all peoples of the highest possible level of health." Pursuant to its objective and functions, the WHO works to "reduce the global burden of disease and death cause by tobacco." To this end, the World Health Assembly (WHA) adopted the WHO FCTC in 2003 with Uruguay as a Party and Switzerland as a signatory to the Convention. The WHO FCTC Secretariat was established with the main functions of monitoring the implementation of the Convention and providing technical, legal and financial assistance to Parties in their implementation efforts.

7. The Request states that the Submission may assist the Tribunal in the determination of factual and legal issues in accordance with Arbitration Rule 37(2)(a) by providing evidence of the relationship between large graphic health warnings, bans on misleading branding and the protection of public health; providing facts concerning “tobacco control globally and the regulatory environment in which the Claimant operates”, thereby assisting the Tribunal in determining Claimants’ legitimate expectations; explaining the provisions of the WHO FCTC and its legal relationship with the Switzerland-Uruguay BIT; and bringing perspective, knowledge and insight distinct from the parties.
8. Further, according to the Request the Submission addresses matters within the scope of the dispute as required under Rule 37(2)(b) as it sets out a body of evidence underlying tobacco control from other WHO Members States which is relevant to the Uruguayan context.
9. Finally, the Request states that the WHO and the WHO FCTC Secretariat have a significant interest in the proceeding in accordance with Rule 37(2)(c). According to the Request, the outcome of this case might have a significant impact on the implementation of the Convention by its other 180 Member States, both because the WHO FCTC and its Guidelines address tobacco packaging and labeling measures and because the claim challenges the sovereign authority of Uruguay to regulate in the interest of public health.

### **III. THE DISPUTING PARTIES’ OBSERVATIONS**

#### **A. The Claimants**

10. The Claimants object to the Petitioners’ request to file an *Amicus Curiae* Brief. According to the Claimants, the submission does not fulfill the requirement of Rule 37(2)(a) and makes references to the *Aguas Provinciales*<sup>1</sup> tribunal which stated that the purpose of an *amicus curiae* brief is to assist the decision maker arrive at its decision by bringing expertise, knowledge and arguments that the parties may not

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<sup>1</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, March 17, 2006 (“*Aguas Provinciales*”).

provide. According to the Claimants, implicit in this statement is the need for the non-disputing party to be independent of the parties to the case.

11. Claimants do not dispute that the Petitioners have knowledge in their area of expertise. Instead they dispute that with respect to the topics they propose to address, the Petitioners will not bring perspective, particular knowledge or insight different than the parties. Indeed, several of the expert reports submitted with the Respondent's counter-memorial are prepared by experts that have substantial involvement with the Petitioners. Additionally, the Petitioners lack independence from the parties to the dispute since Uruguay is a party to the WHO FCTC and an active member, and the Petitioners have represented providing technical, legal and financial support to Parties (including Uruguay) in the implementation of the WHO FCTC, Protocols and Guidelines. These links between the Petitioners, the Respondent and its experts, explain why the topics proposed to be addressed by the Petitioners have already been addressed with the same perspective by the Respondent or its experts.
12. According to the Claimants, the proposed submission does not address matters within the scope of the dispute as required under Rule 37(2)(b). The Petitioners have conceded that they will not address the impact of the specific Uruguayan measures on public health nor will they address arguments concerning the scope or application of the Switzerland-Uruguay BIT. Specifically, section 1 of the proposed Submission dealing with the health risks and global burdens associated with tobacco consumption, is not within the scope of the dispute as the Claimants have never disputed that smoking is harmful to health. In any event, this is unrelated to whether the measures enacted by the Respondent violate the Switzerland-Uruguay BIT. Additionally, Switzerland is not a party to the FCTC so obligations that parties to the FCTC have under this treaty cannot override the Respondent's obligations to the Claimants under the Switzerland-Uruguay BIT.
13. Section 2 of the proposed submission dealing with the evidence base underlying large graphic health warnings, relevant provisions of the FCTC and State practice is not within the scope of the dispute because the FCTC cannot have effect on the Respondent's obligations under the Switzerland-Uruguay BIT. In any event, the Respondent was already in compliance with the FCTC before the 80/80 regulation

was enacted. The FCTC did not mandate an increase in graphic health warnings from 50% to 80%. Additionally, general information about large graphic health warnings is not relevant to the present case because the Claimants have challenged the specific measures enacted by Uruguay increasing the size of the graphic health warnings from 50% to 80%.

14. Finally, section 3 of the proposed submission dealing with bans on misleading tobacco packaging, relevant provisions of the FCTC and State practice, are not within the scope of the dispute because, as mentioned, the FCTC does not have any legal effect on the Respondent's obligations under the Switzerland-Uruguay BIT. Furthermore, even if it the FCTC were relevant, it does not mandate the single presentation requirement challenged by the Claimants in this case and the Petitioners do not purport to have any evidence related to this requirement.
15. The Claimants argue that the Petitioners do not have a significant interest in the proceeding as this case does not implicate the FCTC. Furthermore, because Uruguay's single presentation requirement is the only measure of its kind in the world, the Petitioners cannot argue that the outcome of this case may affect the regulation in the territory of other WHO Member States.
16. Finally, the Claimants contend that the proposed *Amicus Curiae* brief will unduly burden the parties. The Claimants state that they have already been required to review a large volume of documents unrelated to the measures at issue and the brief contemplates placing even more information on the record that has no relation to this case.

## **B. The Respondent**

17. According to the Respondent, the WHO and FCTC Secretariat possess a "perspective, particular knowledge and insight different from that of the disputing parties" pursuant to Rule 37(2)(a). The WHO is the world's foremost authority on public health matters and its knowledge of tobacco control and regulation is particularly authoritative as it oversaw the drafting and adoption of the FCTC. Similarly, the FCTC Secretariat is also in a unique position to provide important information as the FCTC is an evidence

based treaty and, therefore, the Secretariat has extensive knowledge of the evidence supporting the Convention's obligations.

18. The Respondent states that under Rule 37(2)(b), the submission would address matters within the scope of the dispute, particularly because it would likely address whether the tobacco control regulations in this case are reasonably connected to the protection of public health.
19. Regarding the requirement in Rule 37(2)(c), the Respondent states that the petitioners have shown they have a direct and significant interest in light of the far-reaching consequences for tobacco control that an outcome in this case may have on all WHO and FCTC Member States. The Respondent makes reference to the *Methanex v. United States*<sup>2</sup> case in which the tribunal emphasized the importance of allowing *amicus* submissions that address matters of high public interest, as in the present case.
20. Moreover, according to the Respondent, there would be no undue burden on the parties. The Petitioners only request to present a written submission, which they have already provided, and enough time remains before the parties' second round of submissions are due. Additionally, there will be no need for special arrangements during the hearing as the Petitioners are not requesting to participate.

#### **IV. DECISION OF THE ARBITRAL TRIBUNAL**

##### **A. Introduction**

21. The Tribunal notes at the outset that the Petitioners' application, under cover of their letter of 28 January 2015, is entitled: "Request to file a written submission (*amicus curiae* brief) in *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7)." The Request is based on Rule 37(2) of the ICSID Arbitration Rules, which do not refer to an "*amicus curiae* brief." However, reference to *amicus curiae* brief may be accepted as denoting a written submission filed by a non-disputing party with the view of

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<sup>2</sup> *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* under the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, January 15, 2001 ("*Methanex v. United States*" or "*Methanex*").

assisting the Tribunal, not either of the parties in dispute, “in the determination of a factual or legal issue related to the proceeding” [Rule 37(2)(a)].

22. Under the terms of Rule 37(2), the Tribunal has discretion whether to accept a written submission by a non-disputing party. Acceptance of a submission shall confer to the petitioner neither the status of a party to the arbitration proceeding nor the right to access the file of the case or to attend hearings. The need to safeguard the integrity of the arbitral process requires in fact that no procedural rights or privileges of any kind be granted to the non-disputing parties.

**B. The Tribunal’s Analysis**

*i) The Conditions under Rule 37(2)*

23. The Request mentions that the Submission by WHO and WHO FCTC Secretariat describes the evidentiary basis underlying tobacco control measures, such as those implemented by Uruguay, as well as the evidence base underlying bans on misleading tobacco packaging, relevant provision of the WHO FCTC and state practice, thus addressing factual matters within the scope of the dispute.
24. According to the Petitioners, the Submission may also bring perspective, knowledge or insight distinct from that of the disputing parties, considering that WHO is in a unique position to provide information on tobacco control globally as the directing and coordinating authority on international health work and that WHO FCTC is the entity established by the Convention with the mandate to coordinate activities to assist parties in implementation of the WHO FCTC obligations.
25. Having carefully considered the Request and the Parties’ observations in that regard, the Tribunal is of the view that the conditions under Rule 37(2) for allowing the filing by non-disputing parties of a written submission with the Tribunal are satisfied in the present case, to the extent that:
  - a. WHO and FCTC Secretariat appear to possess perspective, particular knowledge or insight on the issues in dispute that is different from that of the disputing parties;
  - b. the Submission appears to address a matter within the scope of the dispute;



- c. both Petitioners appear to have a significant interest in the proceeding, considering that WHO is the world authority on public health matters and FCTC Secretariat is the designated global authority concerning the FCTC and its Implementation Guidelines.

*ii) The Decision*

26. In view of reaching a decision regarding whether to allow the Submission to be filed in this proceeding, the Tribunal considers that the words of the tribunal in the *Methanex* case are of particular significance in this context:

“there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater interest in this arbitration than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader process argument, as suggested by the Respondents and Canada: the ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal’s willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm.”<sup>3</sup>

27. The Tribunal has noted the concerns expressed by Claimants in their observations of February 9, 2015 (under D) for the undue burden caused by the additional information that would be placed on the record bearing no relationship to Uruguay or its specific measures. As provided by the last sentence of Rule 37(2), the Tribunal shall ensure that the non-disputing parties’ Submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party.
28. The Tribunal believes that the Submission may be beneficial to its decision-making process in this case considering the contribution of the particular knowledge and expertise of two qualified entities regarding the matters in dispute. It considers that in

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<sup>3</sup> *Methanex v. United States*, para. 49.

view of the public interest involved in this case, granting the Request would support the transparency of the proceeding and its acceptability by users at large.

29. In the light of all the foregoing considerations, the Tribunal decides to allow the filing by the Petitioners of the Submission in this proceeding pursuant to Rule 37(2).
30. Each Party shall have a time limit of thirty (30) days after the date of this Order to file its comments on the Submission, it being understood that no documents or other evidence shall be produced in conjunction with such comments.
31. The Tribunal reserves the right to make at the appropriate time an order for costs to be paid or reimbursed by the Petitioners should either Party request the reimbursement of properly documented costs it has incurred by reason of the Submission.
32. Given the public interest in the subject matter of this decision, the Tribunal hereby directs that this Procedural Order shall be subject to no confidentiality restrictions, and may be freely disclosed to third parties.

On behalf of the Tribunal:

[Signed]

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Prof. Piero Bernardini  
President  
Date: February 17, 2015