

**ARBITRATION UNDER THE
RULES OF THE INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES**

**PHILIP MORRIS BRANDS SÀRL
PHILIP MORRIS PRODUCTS S.A.
AND
ABAL HERMANOS S.A.
CLAIMANTS**

v.

**ORIENTAL REPUBLIC OF URUGUAY
RESPONDENT**

ICSID Case No. ARB/10/7

**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

World Health Organization
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1. Authority of the Tribunal to Receive an Amicus Brief

1. Pursuant to Article 37(2) of the ICSID Arbitration Rules, the Tribunal may allow a non-disputing party to file a written submission. The provision states:

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.¹

2. As is set out below, the written submission provided by the World Health Organization (WHO) and the WHO Framework Convention on Tobacco Control (WHO FCTC) Secretariat satisfies the requirements of Rule 37(2).

2. The Identity and Functions of the World Health Organization and the WHO FCTC Secretariat

3. The World Health Organization (WHO) is a specialized agency within the terms of Article 57 of the Charter of the United Nations.² At present, the WHO has 194 Member States, including Switzerland and Uruguay.

4. The objective of the WHO is the “attainment by all peoples of the highest possible level of health.”³ To achieve this goal, Article 2 of the Constitution of the WHO defines the functions of the WHO. These include:

(a) to act as the directing and co-ordinating authority on international health work;

(b) to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate;

...

¹ International Centre for Settlement of Investment Disputes, Rules Of Procedure For Arbitration Proceedings (Arbitration Rules), Doc. ICSID/15/Rev. 1 (January 2003).

² Constitution of the World Health Organization, [hereinafter “WHO Constitution”], 14 UNTS 185 (preamble)

³ *Ibid*, Article 1.

(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;

...

(n) to promote and conduct research in the field of health;

...

(q) to provide information, counsel and assistance in the field of health;

...

5. Pursuant to its objective and functions, the WHO works to reduce the global burden of disease and death caused by tobacco, thereby protecting present and future generations from the devastating health, social, environmental and economic consequences of tobacco use and exposure to tobacco smoke.

6. In addition to establishing the technical functions of the WHO, the Constitution of the WHO empowers the World Health Assembly (WHA) to adopt conventions or agreements with respect to any matter within the competence of the Organization.⁴ Pursuant to this power the WHA adopted the WHO FCTC in 2003.⁵ The Convention, which has 180⁶ Parties, entered into force in 2005. Uruguay is a Party to the Convention and Switzerland is a signatory.

7. The WHO FCTC Secretariat was established in accordance with Article 24 of the WHO FCTC by the Conference of the Parties to the WHO FCTC. The Convention Secretariat is hosted by the WHO, with an independent Workplan and Budget adopted by the Conference of the Parties.

8. The main functions of the WHO FCTC Secretariat are governed by the WHO FCTC and the decisions adopted by the Conference of the Parties (COP), including the Workplan and Budget. The Convention Secretariat's main functions comprise monitoring of implementation of the Convention through the analysis of regular implementation reports submitted by Parties in accordance with Article 21 WHO FCTC and providing technical, legal and financial assistance to Parties (including Uruguay) in implementation of the WHO FCTC, its Protocols and Guidelines. Assistance is provided to Parties upon request, either through direct support or cooperation with stakeholders. Under the guidance of the COP, the WHO FCTC Secretariat also promotes international cooperation and mobilization of resources by partnering with international and regional intergovernmental and nongovernmental organizations.

⁴ *Ibid*, Article 19.

⁵ World Health Organization Framework Convention on Tobacco Control [hereinafter "WHO FCTC"], May 21 2003, 42 ILM 518 (2003).

⁶ Pending the entry into force of the Convention for Zimbabwe on 4 March 2015.

3. The Submission addresses Matters within the Scope of the Dispute in accordance with Rule 37(2)(b)

9. In its Request for Arbitration,⁷ the Claimant alleges that tobacco packaging and labelling measures implemented by Uruguay violate a number of provisions of the Switzerland – Uruguay bilateral investment treaty (BIT). More specifically, the Claimant alleges *inter alia* that the size of the graphic health warnings and the so-called ‘single presentation requirement’ constitute indirect expropriation contrary to Article 5(1) of the BIT, failure to accord fair and equitable treatment contrary to Article 3(2) of the BIT and unreasonable measures contrary to Article 3(1) of the BIT.

10. The submission by WHO and the WHO FCTC Secretariat does not set out legal arguments concerning the scope or application of the Switzerland-Uruguay BIT. Instead, the submission describes the evidentiary basis underlying tobacco control measures, such as those implemented by Uruguay. More specifically, the submission describes evidence from other WHO Member States that is relevant to the Uruguayan context as well as evidence specific to Uruguay that was gathered by WHO. The submission does not examine studies that evaluate the impact of the specific Uruguayan measures on public health on grounds that the Parties are well placed to make submissions concerning those studies. Because the body of evidence described in the submission is relevant to the effects of the Uruguayan measures and, therefore, compliance with the BIT, the submission by WHO and the WHO FCTC Secretariat is relevant to factual matters within the scope of the dispute.

4. The Submission may assist the Tribunal in the Determination of Factual and Legal Issues in accordance with Rule 37(2)(a)

11. The submission is comprised of three sections.
- Section 1 gives a brief overview of the health risks and global burden of disease associated with tobacco consumption and outlines international efforts to address these issues, including the WHO FCTC.
 - Section 2 describes the evidence base underlying large graphic health warnings, relevant provisions of the WHO FCTC and the relevant Guidelines for its implementation, and state practice with respect to tobacco warnings.
 - Section 3 describes the evidence base underlying bans on misleading tobacco packaging, relevant provisions of the WHO FCTC and state practice.

12. The Request for Arbitration raises a number of questions of fact concerning the relationship between certain tobacco control measures and the protection of public health. The Request for Arbitration questions the evidentiary basis for large graphic health warnings and bans on misleading branding, implemented in the form of the so-called ‘single presentation requirement.’ The submission provides evidence of the relationship between large graphic health warnings, bans on misleading branding and protection of public health. The submission by WHO and

⁷ Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Request for Arbitration) (ICSID Arbitral Tribunal, Case No ARB/10/7, 19 February 2010) [hereinafter “Request for Arbitration”].

the WHO FCTC Secretariat may, therefore, assist the tribunal in making findings of fact.

13. The Claimant has also made factual and legal arguments concerning its reasonable expectations with respect to regulation. The submission provides evidence of facts concerning tobacco control globally and the regulatory environment in which the Claimant operates and may, therefore, assist the tribunal in determining the Claimants' legitimate expectations.

14. The Request for Arbitration also raises questions of law concerning interpretation of the WHO FCTC and the legal relationship between the WHO FCTC and the Switzerland – Uruguay BIT. The submission by WHO and the WHO FCTC Secretariat explains the provisions of the WHO FCTC most relevant to these questions of law.

15. The submission may also bring perspective, knowledge and insight distinct from that of the disputing parties. As the directing and coordinating authority on international health work, the WHO is in a unique position to provide information on tobacco control globally. The WHO FCTC Secretariat is the entity established by the Convention with the mandate to coordinate activities to assist Parties in implementation of the WHO FCTC obligations. In addition to assisting the Tribunal in making findings of fact and law, the submission by WHO and the WHO FCTC Secretariat will assist the Tribunal to understand the broader international context in which this dispute arises. This context includes a broad consensus among states of the negative health, social and economic costs associated with tobacco consumption and an acceleration of international and domestic efforts to address those costs.

5. The World Health Organization and the WHO FCTC Secretariat have a Significant Interest in the Proceeding in accordance with Rule 37(2)(c)

16. The WHO FCTC and the relevant Guidelines for its implementation address tobacco packaging and labelling measures, suggesting that the outcome of the dispute could have implications for implementation of the Convention by its 180 Parties. The Claimants question the extent to which WHO FCTC Parties may rely on the Convention and Guidelines in implementing domestic tobacco control measures. The claim questions Uruguayan implementation of the Convention and its Guidelines and, if successful, may have significant implications for implementation by other Parties to the Convention.

17. The claim also challenges the sovereign authority of Uruguay to regulate in the interests of public health and, therefore, has the potential to impact public health in Uruguay. Although the outcome of the claim will bind only the Claimants and Uruguay, the outcome may also affect regulation in the territory of other WHO Member States. As the directing and coordinating authority on international health work, the WHO has a significant interest in the outcome of the dispute and in any impact it has in the territory of WHO Member States.