

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)

PROCEDURAL ORDER NO. 4

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

Secretary of the Tribunal
Mrs. Anneliese Fleckenstein

Date: March 24, 2015

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I. INTRODUCTION

1. On March 6, 2015, the Centre received a Request to File a Written Submission (*Amicus Curiae* Brief) and the *Amicus Curiae* Brief from the Pan American Health Organization (PAHO), of the same date. The Request was transmitted to the Tribunal on March 9, 2015.
2. On March 10, 2015, the Tribunal transmitted the Request to the Parties and invited them to submit their comments by March 16, 2015. The Parties' comments to the Request were received on March 16, 2015.
3. On March 18, 2015, the Tribunal issued a decision allowing the Petitioner's request to submit an *Amicus Curiae* Brief, informing the Parties that a reasoned decision would follow and establishing a deadline of sixty (60) days, *i.e.* May 18, 2015, for the parties to submit their observations to the Brief. The *Amicus Curiae* Brief was attached to the Tribunal's decision.
4. The Tribunal now issues its reasoned decision on the Petitioner's Request to submit an *Amicus Curiae* Brief.

II. THE PETITIONER'S REQUEST

5. According to the Request, the PAHO is the oldest public health agency in the world, founded by countries of the Americas in 1902 with the purpose of addressing "devastating epidemics of cholera, plague, typhus, influenza and other deadly diseases in the region". Since its founding, the Petitioner has worked continuously with its Member States, other international organizations, and partners to develop and update strategies to address problems of health and disease facing the Region of the Americas. The Petitioner asserts that no other public health agency has the same depth of knowledge and experience regarding the health problems faced by the Americas, or the same level of success in helping countries address them.
6. According to the Petitioner, over its 110 year history, it has worked with the singular intention of improving the health of the peoples in the Americas. Article 1 of the PAHO Constitution establishes that the fundamental purpose of the Organization is

to “promote and coordinate efforts of the countries of the Western Hemisphere to combat disease, lengthen life, and promote physical and mental health of the people”.

7. While originally the focus of the PAHO’s work was in the area of communicable diseases, the Organization is now focused also on noncommunicable diseases such as cancer, cardiovascular and respiratory diseases and diabetes, which share tobacco use as a common risk factor. The Request states that since the 1960’s the PAHO has promoted strategies to control tobacco use in all countries in the Region, and has diligently worked with its Member States, including Uruguay, to devise strong national and coordinated regional strategies for protecting citizens of the Americas against the hazards of tobacco use and second hand smoke exposure.
8. The Request states that given its experience, the Petitioner has a unique and in depth understanding of the specific health challenges facing the Region, and Uruguay in particular, including the tobacco epidemic. In its submission it will offer technical information and evidence regarding distinct trends in marketing and tobacco consumption in Uruguay and the Region, and how the trends can and are effectively being addressed through well-crafted tobacco control legislation, regulation and policies, like the ones here in dispute. It will also address details on tobacco control strategies mandated by the PAHO’s Governing Bodies and how Uruguay’s regulations answered to these mandates.
9. According to the Petitioner, the *Amicus Curiae* Brief addresses matters within the scope of the dispute, as it establishes the regional and country-specific context in which Uruguay’s regulatory approach on packaging and labeling of tobacco products was developed, and the reasonableness and effectiveness of this approach. As such, it asserts that its Brief is not duplicative of the *Amicus Curiae* Brief submitted by the WHO and the WHO FCTC Secretariat.
10. Finally, the Requests states that the PAHO has a significant interest in the proceedings because the outcome in this case will have an impact on more than 50 years of work in the Americas Region in the area of tobacco control.

III. THE DISPUTING PARTIES' OBSERVATIONS

A. The Claimants

11. The Claimants state that they do not believe the proposed PAHO *Amicus Curiae* Brief will help the Tribunal answer the factual or legal questions at issue in this arbitration. According to the Claimants, the requirements of Rule 37(2) and the need to ensure that the *amicus* brief does not “unduly burden” either party, “militate in favor of rejecting the proposed submission”. Notwithstanding the above, the Claimants defer to the Tribunal on whether to admit the proposed submission.
12. According to the Claimants, the *amicus* brief will not assist the Tribunal in resolving the factual or legal issues in this case, because it will not bring a unique perspective, knowledge or insight, as the information it proposes to provide has been addressed by the Respondent and its experts in the Counter-Memorial. Additionally, it is not clear that the submission would not be duplicative of the WHO and WHO FCTC Secretariat’s submission, since the later discusses state practices to regulate tobacco, including in the Americas Region. Furthermore, making reference to their letter of February 9, 2015, the Claimants state that the requirement that an *amicus* bring a perspective different from that of the parties implies that the *amici* be independent of the parties to the dispute. The PAHO is not independent of the Respondent given that the Respondent is an active member of the PAHO and serves on the Pan American Sanitary Conference, which is the supreme governing authority of the PAHO.
13. 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 dispute relates to two specific measures: the single presentation and the 80/80 requirements, as well as their impact on the Claimants’ investment. The Petitioner’s request does not mention either measure and does not indicate whether the proposed description of the “context in which Uruguay’s regulatory approach on packaging and labeling of tobacco products was developed” will include the examination of the efficacy of the single presentation or 80/80 requirements. Additionally, according to the Claimants, it is difficult to understand how an examination of tobacco control measures dating back half a century will address measures taken by Uruguay in 2008 and 2009.

14. The Claimants argue that the Petitioner does not have a significant interest in this arbitration. According to the Claimants, it is difficult to imagine how a ruling on two Uruguayan measures passed in 2008 and 2009 will undo “50 years of work in the Americas Region”. Furthermore, as stated by the Claimants in their February 9 letter, a general interest in the health of populations, as expressed by the PAHO, is not sufficiently specific to satisfy the requirement under Rule 37(2).
15. Finally, the Claimants contend that the proposed submission will unduly burden the Claimants. Referring to their February 9 letter, the Claimants state that the invocation by the Respondent of tobacco control measures not at issue in this arbitration, has already forced the Claimants to “analyze and respond to volumes of irrelevant documents”. The admission of the PAHO’s *amicus* brief will further swell the record with documents that bear no relationship with the present dispute.

B. The Respondent

16. According to the Respondent, the reasoning in the Tribunal’s decision to allow the submission by the WHO and the WHO FCTC Secretariat applies equally to the PAHO’s proposed submission.
17. The Respondent states that the PAHO’s Request makes clear that it satisfies the requirements under Rule 37(2). The PAHO possesses a “perspective, knowledge and insight” different from that of the disputing parties pursuant to Rule 37(2)(a). According to the Respondent, because the PAHO is dedicated to improving the health of the peoples in the Americas Region, it is uniquely positioned to provide a regional perspective on tobacco control, as well as the impact of tobacco use and the industry’s marketing practices in Latin America as a whole.
18. The PAHO’s perspective, knowledge and insight is also distinct from the WHO and the WHO FCTC Secretariat, and the Request underscores the ways in which its submission would be different. The PAHO’s proposed submission will focus specifically on the context in which Uruguay and the other countries in the Americas Region regulate tobacco, the challenges faced and the regional strategies, unlike the more general character of the WHO and WHO FCTC Secretariat’s submission.

19. The Respondent states that the submission would address matters within the scope of the dispute, particularly addressing facts bearing on the question of whether the tobacco control regulations at issue in this arbitration are reasonably connected to the protection of public health. It would also shed light on the tobacco industry's marketing practice in the region that led Uruguay to adopt the measures.
20. The Respondent states that the Petitioner has shown it has a direct and significant interest in this proceeding since the outcome of this case would have an impact on more than 50 years of work carried out by the PAHO in this area. Moreover, the outcome will likely influence the actions of other America States, which may be hesitant to adopt more stringent tobacco control measures out of a concern on the expense in having to defend themselves in an investment arbitration.
21. The Respondent again makes reference to *Methanex v. United States*¹ and the Tribunal's observations of this case in its February 17 Decision, stating it to be "of particular significance". According to the Respondent, the Tribunal should take the same approach with the PAHO's petition.
22. Finally, according to the Respondent there would be no undue burden on the parties. The Petitioner only requests to present a written submission, which it has already provided. As in the case of the WHO and WHO FCTC Secretariat's submission, the Tribunal can afford the parties a reasonable amount of time to file their written observations on the submission. Additionally, there will be no need for special arrangements during the hearing as the Petitioner is not requesting to participate.

IV. DECISION OF THE ARBITRAL TRIBUNAL

A. Introduction

23. The Tribunal notes at the outset that the Petitioner's application, under cover of its letter of March 6, 2015, is entitled: "Request to file a written submission (*amicus curiae* brief) by the Pan American Health Organization". The Request is based on Rule 37(2) of the ICSID Arbitration Rules, which does not refer to an "*amicus curiae*

¹ *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*").

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 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)).

24. 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)

25. The Request mentions that the PAHO’s Submission shall share with the Tribunal official technical information and evidence regarding distinct trends in tobacco marketing and consumption in Uruguay and the greater Americas Region and, based on Petitioner’s technical expertise, how these trends can and are effectively addressed through well-crafted tobacco control legislation, regulations and policies, such as those in dispute in this case.
26. According to the Petitioner, the Submission is not duplicative of the *amicus curiae* brief filed by the WHO and the WHO FCTC since it will focus specifically on the context in which Uruguay and other countries in the Americas Region regulate tobacco, the distinct challenges they face, and regional strategies developed by the PAHO and its Member States to address these challenges.
27. 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 a non-disputing party of a written submission with the Tribunal are satisfied in the present case, to the extent that:
 - a. the PAHO appears to possess perspective, particular knowledge or insight on the issues in dispute that is different from that of the disputing parties, thus being

able to assist the Tribunal in the determination of a factual or legal issue related to this proceeding;

- b. the Submission appears to address a matter within the scope of the dispute;
- c. Petitioner appears to have a significant interest in the proceeding, considering its more recent involvement also on noncommunicable diseases, such as cancer, cardiovascular and respiratory diseases, and diabetes, which all can be caused by a number of risk factors, one common risk factor being tobacco use.

ii) The Decision

28. 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.”²

29. The Tribunal has noted the concerns expressed by the Claimants in their observations of March 16, 2015 for the undue burden allegedly caused by the swelling of the record due to additional documents bearing no relationship to Uruguay or the measures at issue in this arbitration. As provided by the last sentence of Rule 37(2), the Tribunal shall ensure that the non-disputing party’s Submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party.

² *Methanex v. United States*, fn. 1, para. 49.

30. 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 a qualified entity, such as PAHO, regarding the matters in dispute. It considers that in 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.
31. In the light of all the foregoing considerations, the Tribunal has decided to allow the filing by the Petitioner of the Submission in this proceeding pursuant to Rule 37(2).
32. The Tribunal reserves the right to make at the appropriate time an order for costs to be paid or reimbursed by the Petitioner should either Party request the reimbursement of properly documented costs it has incurred by reason of the Submission.
33. 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.
34. This Order replaces Procedural Order N.4 dated March 20, 2015 in its entirety.

On behalf of the Tribunal:

[Signed]

Prof. Piero Bernardini
President
Date: March 24, 2015