

PHILIP MORRIS BRANDS SARL, PHILIP MORRIS PRODUCT S.A. AND ABAL HERMANOS S.A. V. ORIENTAL REPUBLIC OF URUGUAY

- **Philip Morris Brands Sarl, Philip Morris Product S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay**, ICSID Case no ARB/10/7, **8 July 2016**
- **Legalities involved:** international investment law vs human rights law (international health standards imposed by WHO).
- **Tool to deal with inter-legality:** the margin of appreciation doctrine.

SUMMARY

To counter the public health and economic impacts of the country's high smoking rate, Uruguay became a party to the 2003 Framework Convention on Tobacco Control (FCTC) of the WHO. It then enacted a series of domestic measures of tobacco control, including required graphic and textual anti-smoking warnings to be printed on the lower half of cigarette packs, which after the 80/80 Regulation increased in size from 50 to 80 percent.

To comply, Philip Morris had to remove *Light*, *Blue* and *Fresh Mint*, keeping *Marlboro Red packs* only. Claiming that the measures were arbitrary and failed to serve a public purpose, Philip Morris challenged the state for the breach of the Switzerland–Uruguay bilateral investment treaty (BIT), including the breach of the fair and equitable treatment (FET) clause. The tribunal concluded that the measures were not arbitrary. Rather, it agreed that Uruguay adopted them in good faith and in order to protect public health. Contrary to Philip Morris's contention that the measures were adopted without scientific support, the tribunal indicated that they were based on the FCTC process, which in turn was supported by scientific evidence.

The Tribunal recognized Uruguay's right to regulate in light of its obligations vis-à-vis WHO regulation. Drawing on the ECtHR case law, it recognized that states have a margin of appreciation in adopting health regulations and that investors should pay a greater deference to governmental decisions based on national needs.

- *“The Tribunal agrees with the Respondent that the “margin of appreciation” is not limited to the context of the ECHR 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 sovereign power, not made irrationally and not exercised in bad faith ... involving many complex factors” (para 399).*
- *“In short, the 80/80 Regulation was a reasonable measure adopted in good faith to implement an obligation assumed by the State under the FCTC. It was not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure, in particular given its relatively minor impact on Abal’s business. The Tribunal concludes that its adoption was not in breach of Article 3(2) of the BIT” (para. 420).*