Highlights and Implications of the ICSID Tribunal Arbitral Award against Subsidiaries of Philip Morris International (PMI)

- **“Right to use” registered trademarks is not absolute**: The tribunal rejected PMI’s claim that the anti-tobacco measures constituted an expropriation. One relevant aspect in its analysis was related to PMI’s “rights to use” its brands, where the tribunal held that ownership of trademarks only grants the right to prevent third parties from using those marks. The tribunal stressed that Uruguayan law and the BIT (and even other international IP instruments) do not give an “absolute right of use, free of regulation,” nor supersede the Government’s regulatory power over PMI’s trademarks.

- **Measures did not substantially deprive PMI’s business in Uruguay**: The tribunal concluded that the challenged measures were far from causing a “substantial deprivation” of the value, use or enjoyment of PMI’s whole business, even after they were implemented. To reach this conclusion, the tribunal assessed PMI’s entire investment in Uruguay, as opposed to considering their impact on each IP product separately.

- **“Single presentation” requirement was reasonable and adopted in good faith**: The tribunal ruled that Uruguay did not violate its Fair and Equitable Treatment (FET) obligation under the BIT. The majority of the tribunal applied the “margin of appreciation” doctrine, recognized under the European Convention of Human Rights when making public policy determinations. This doctrine consists in granting deference to the “discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors.” Claimant-nominated arbitrator dissented from the majority view, mainly arguing that this doctrine was not transferable to claims arising under BITs.

- **Packaging 80 percent health warning requirement is not a breach of FET**: The tribunal concluded that the 80/80 regulation was a reasonable measure adopted in good faith. In determining whether the 80 percent limit was proportionate, the tribunal held that the balance to be struck between conflicting considerations (*i.e.*, 80 percent vs. 60 percent or 50 percent) was very largely a matter for appreciation of the health authorities.

- **Measures did not deny PMI’s legitimate expectations**: The tribunal rejected PMI’s legitimate expectations of a stable legal framework argument, stating that “in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products.” The tribunal sustained that BITs do not preclude governments from enacting novel rules, provided these have some rational basis and are not discriminatory.

The tribunal dismissed other claims, including PMI’s denial of justice claim. The majority recognized the existence of certain “unusual, even surprising” features in the Uruguayan legal system, but determined that they were “not serious enough” to constitute a denial of justice. Notably, the arbitrator appointed by claimant also dissented on this point.

What to expect? This is the second investment claim that PMI has lost in the past eight months, with the aggravating factor that unlike last year’s PMI v. Australia decision on jurisdiction, this time the tribunal addressed the substance of the case (*i.e.* Uruguay’s anti-smoking measures vs. foreign investors’ rights). Although the tribunal raised a few aspects that will likely be subject to continuing debate, it remains an open question whether other measures with respect to different industries will be distinguished from the particularities of this case, and as such, lead to different outcomes.

For more information, contact: Ian Laird, Eduardo Mathison, J.J. Saulino