INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

PHILIP MORRIS BRANDS SÀRL,
PHILIP MORRIS PRODUCTS S.A.
and
ABAL HERMANOS S.A.
(THE CLAIMANTS)

and

ORIENTAL REPUBLIC OF URUGUAY
(THE RESPONDENT)

(ICSID Case No. ARB/10/7)

AWARD

Members of the Tribunal
Prof. Piero Bernardini, President
Mr. Gary Born, Arbitrator
Judge James Crawford, Arbitrator

Secretary of the Tribunal:
Mrs. Mairee Uran-Bidegain

Date of dispatch to the parties: July 8, 2016

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

80/80 Regulation	Adopted through Presidential Decree 287/009 dated 15 June 2009
Advisory Commission	National Advisory Commission for Tobacco Control of the Ministry of Public Health of Uruguay
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings dated 10 April 2006
BIT or Treaty	Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments dated 7 October 1988
C – [X]	Claimants' Exhibit
Challenged Measures	The 80/80 Regulations and the SPR
CLA – [X]	Claimants' Legal Authority
CM	Claimants' Memorial on the Merits dated 3 March 2014
CR	Claimants' Reply on the Merits dated 17 April 2015
Dec. Jur.	Decision on Jurisdiction dated 2 July 2013
FCTC	WHO Framework Convention on Tobacco Control dated 21 May 2003
Hearing	Hearing held in Washington, D.C., on 19-29 October 2015
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
MPH	Ministry of Public Health of Uruguay
PAHO	Pan-American Health Organization

R – [X]	Respondent's Exhibit
RCM	Respondent's Counter Memorial on the Merits dated 13 October 2014
RfA	Request for Arbitration dated 19 February 2010
RLA – [X]	Respondent's Legal Authority
RR	Respondent's Rejoinder on the Merits dated 20 September 2015
SCJ	Supreme Court of Justice of Uruguay
SPR	Single Presentation Regulation adopted through Ordinance 514 dated 18 August 2008
TCA	*Tribunal de lo Contencioso Administrativo*
Tobacco Control Program	National Program for Tobacco Control of the Ministry of Public Health of Uruguay
Tr Day [x] [p.] [line]	Transcript of the hearing on the merits held in Washington D.C., on 19-29 October 2015
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of Article 10 of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments (including Ad Article 10 of the Protocol thereto) dated 7 October 1988 (the "**Switzerland-Uruguay BIT**" or the "**BIT**" or the "**Treaty**"), which entered into force on 22 April 1991, and Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The Claimants are Philip Morris Brand Sàrl (Switzerland) ("PMB"), Philip Morris Products S.A. (Switzerland) ("PMP") and Abal Hermanos S.A. ("Abal"), jointly referred to as "**Philip Morris**" or the "**Claimants**."

3. PMB is a *société à responsibilité limitée* organized under the laws of Switzerland, with a registered office in Neuchâtel, Switzerland. PMB is the direct owner of 100% of Abal.[1] PMB substituted and replaced FTR Holding S.A., one of the original Claimants in this case.[2]

4. PMP is a *société anonyme* organized under the laws of Switzerland on 22 December 1988, with a registered office in Neuchâtel, Switzerland.

5. Abal is a *sociedad anónima* organized under the laws of Uruguay and has its registered office in Montevideo, Uruguay.[3]

6. The Claimants' ultimate parent company,[4] Philip Morris International Inc. ("**PMI**"), is incorporated and headquartered in the United States.[5]

---

[1] Diagram of Claimants' Corporate Ownership Structure (C-64). *See also* CM, ¶ 56.

[2] FTR Holding S.A. was incorporated on 14 Dec. 1924 in Switzerland and registered in the Commercial Register of Neuchâtel on 15 Jan. 1943. By letter of 5 Oct. 2010 the Claimants informed the Centre that Philip Morris Brands Sàrl replaced FTR Holding S.A. as one of the Claimants in this case and requested that the caption of the case be amended accordingly.

[3] Notarized Attestation of Abal's Status as a Limited Liability Company Organized Under the Laws of Uruguay, 5 Nov. 2009 (C-10). *See also* CM, ¶ 56.

[4] Tr. Day 1, 13:22-14:1-3.

[5] CM, ¶ 55; PMI 2012 Annual Report (C-144).

7. The Respondent is the Oriental Republic of Uruguay and is hereinafter referred to as "**Uruguay**" or the "**Respondent**." Uruguay is a constitutional democracy with a population of over 3.4 million people.

8. The Claimants and the Respondent are hereinafter collectively referred to as the "**Parties**." The Parties' respective representatives and their addresses are listed above on page (i).

II. OVERVIEW OF THE DISPUTE AND THE PARTIES' REQUEST FOR RELIEF

9. At its core, the dispute concerns allegations by the Claimants that, through several tobacco-control measures regulating the tobacco industry, the Respondent violated the BIT in its treatment of the trademarks associated with cigarettes brands in which the Claimants had invested. These measures included the Government's adoption of a single presentation requirement precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family (the "**Single Presentation Requirement**" or "**SPR**"), and the increase in the size of graphic health warnings appearing on cigarette packages (the "**80/80 Regulation**"), jointly referred to as the "**Challenged Measures.**"

10. The Single Presentation Requirement was implemented through Ordinance 514 dated 18 August 2008 ("**Ordinance 514**") of the Uruguayan Ministry of Public Health (the "**MPH**"). Article 3 of Ordinance 514 requires each cigarette brand to have a "single presentation" and prohibits different packaging or "variants" for cigarettes sold under a given brand. Until the enactment of the SPR, Abal sold multiple product varieties under each of its brands (for example, "*Marlboro Red,*" "*Marlboro Gold,*" "*Marlboro Blue*" and "*Marlboro Green (Fresh Mint)*"). As a result of Ordinance 514, Abal ceased selling all but one of the product variants of each brand that it owns or holds licenses to (*e.g.* only *Marlboro Red*). The Claimants allege that the measure and lack of variant sales have substantially impacted the value of the company.

11. The 80/80 Regulation was implemented through the enactment of Presidential Decree No. 287/009 dated 15 June 2009 ("**Decree 287**"). Decree 287 imposes an increase in the size of prescribed health warnings of the surface of the front and back of the cigarette packages from 50% to 80%, leaving only 20% of the cigarette pack for trademarks, logos and other information. According to the Claimants, this wrongfully limits Abal's right to use its legally protected trademarks and prevents Abal from displaying them in

their proper form. This, in the Claimants' view, caused a deprivation of PMP's and Abal's intellectual property rights, further reducing the value of their investment.

12. According to the Claimants, the Challenged Measures constitute breaches of the Respondent's obligations under BIT Articles 3(1) (impairment of use and enjoyment of investments), 3(2) (fair and equitable treatment and denial of justice), 5 (expropriation) and 11 (observance of commitments), entitling the Claimants to compensation under the Treaty and international law. They further claim damages arising from these alleged breaches. On this basis, the Claimants request that this Tribunal:

> *Either:*
>
> - *Order that Respondent withdraw the challenged regulations or refrain from applying them against Claimants' investments, and award damages incurred through the date of such withdrawal; or, in the alternative*
>
> - *Award Claimants damages of at least US$ 22.267 million,* plus compound interest running from the date of breach to the date of Respondent's payment of the award; and*
>
> *Award Claimants all of their fees and expenses, including attorney's fees, incurred in connection with this arbitration; and*
>
> *Award such other relief as the Tribunal deems just and appropriate.*[6]

13. Uruguay in turn holds that the Challenged Measures were adopted in compliance with Uruguay's international obligations, including the BIT, for the single purpose of protecting public health. According to Uruguay, both regulations were applied in a non-discriminatory manner to all tobacco companies, and they amounted to a reasonable, good faith exercise of Uruguay's sovereign prerogatives. The SPR was adopted to mitigate the ongoing adverse effects of tobacco promotion, including the Claimants' false marketing that certain brand variants are safer than others, even after misleading descriptors such as "light," "mild," "ultra-light" were banned. The 80/80 Regulation was adopted to increase consumer awareness of the health risks of tobacco consumption and to encourage people, including younger people, to quit or not to take up smoking, while still leaving room on packages for brand names and logos. Thus for the

[6] CR, ¶ 406 (emphasis in the text). The Claimants originally requested an award of damages of "at least US $25,743,000.00 plus compound interest." This number was reduced after the first round of pleadings.

Respondent, this case is "about protection of public health, not interference with foreign investment."[7]

14. On this basis the Oriental Republic of Uruguay, submits that:

> *1. Claimants' claims should be dismissed in their entirety; and*
>
> *2. Uruguay should be awarded compensation for all the expenses and costs associated with defending against these claims.*[8]

III. PROCEDURAL HISTORY

15. On 22 February 2010, ICSID received the request for arbitration dated 19 February 2010 (the "**RfA**").

16. On 26 March 2010, the Secretary-General of ICSID registered the RfA in accordance with Article 36(3) of the ICSID Convention and notified the Parties accordingly. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

17. The Parties agreed to constitute the Arbitral Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and to a Tribunal consisting of three arbitrators, one to be appointed by each party and the third arbitrator and President of the Tribunal to be appointed by agreement of the two co-arbitrators. In the absence of an agreement between the two Party-appointed arbitrators, the Secretary-General would appoint the third and presiding arbitrator.

18. On 1 September 2010, the Claimants appointed Mr. Gary Born, a U.S. national, as arbitrator. Mr. Born accepted his appointment on 3 September 2010. On 24 September 2010, the Respondent appointed Prof. James R. Crawford AC, SC, an Australian national, as arbitrator. Prof. Crawford accepted his appointment on 1 October 2010. Mr. Born and Prof. Crawford could not reach an agreement as to the third presiding arbitrator. Accordingly, it fell to ICSID's Secretary-General to appoint the President of the Tribunal. On 9 March 2011, the Secretary-General appointed Prof. Piero Bernardini,

[7] RCM, ¶ 1.1.

[8] RR, p. 297.

an Italian national, as President of the Tribunal. Professor Bernardini accepted his appointment on 15 March 2011.

19. On 15 March 2011, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**") notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anneliese Fleckenstein, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

20. The Tribunal held a first session with the Parties on 25 May 2011. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006 and that the procedural languages would be English and Spanish. The Parties also agreed on a schedule for the jurisdictional phase of the proceedings, including for the production of documents. The agreement of the Parties was embodied in the Minutes of the First Session signed by the President and the Secretary of the Tribunal and circulated to the Parties on 1 June 2011.

21. On 31 August 2011, as agreed by the Parties, the Tribunal issued Procedural Order No. 1 for the Protection of Confidential Information.

22. Pursuant to the agreed upon schedule of pleadings on jurisdiction, the Respondent filed the Memorial on 24 September 2011, the Claimants filed the Counter-memorial on 23 January 2012, the Respondent filed the Reply on 20 April 2012, and the Claimants filed the Rejoinder on 20 July 2012.

23. The hearing on jurisdiction was held on 5 and 6 February 2013, at the International Chamber of Commerce in Paris. Information regarding those present at the hearing and additional details are included in the Tribunal's Decision on Jurisdiction.

24. On 2 July 2013, the Tribunal issued a Decision on Jurisdiction affirming its jurisdiction over the claims presented by the Claimants. This decision constitutes an integral part of this Award and is appended hereto as Annex A.

25. The Tribunal ruled that it had jurisdiction over the dispute. It held that its jurisdiction over the denial of justice claim, which had not been included in the RfA, was established under Article 46 of the ICSID Convention, and that it had jurisdiction over all other claims insofar as they were based on alleged violations of the BIT. Specifically it ruled as follows:

> *a. That it has jurisdiction over the claims presented by Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. as far as they are based on alleged breaches of the Agreement on the Reciprocal Promotion and Protection of Investments concluded on 7 October 1988 between the Swiss Confederation and the Oriental Republic of Uruguay;*
>
> *b. That it has jurisdiction under Article 46 of the ICSID Convention over the Claimants' claim for denial of justice;*
>
> *c. To make the necessary order for the continuation of the procedure pursuant to Arbitration Rule 41(4); and*
>
> *d. To reserve all questions concerning the costs and expenses of the arbitral proceedings for subsequent determination.*[9]

26. On 7 August 2013, the Parties filed a proposed procedural schedule for the submission of pleadings on the merits, which was approved by the Tribunal on 19 August 2013.

27. Pursuant to the agreed upon schedule of pleadings, the Claimants filed a Memorial on the Merits on 3 March 2014.

28. On 22 September 2014, the Parties filed a revised procedural schedule for the submission of the remaining pleadings on the merits, which was approved by the Tribunal on 23 September 2014.

29. On 13 October 2014, the Respondent filed a Counter-Memorial on the Merits pursuant to the agreed upon schedule of pleadings.

30. On 28 November 2014, the Claimants filed a request with the Tribunal for an order adjusting the schedule for the production of documents phase. On 3 December 2014, the Respondent filed a response to the different issues stated by the Claimants in their letter and asked the Tribunal to approve the new schedule for production of documents agreed by the Parties.

[9] Dec. Jur., ¶ 236.

31. On 4 December 2014, the Tribunal approved the revised schedule for production of documents agreed by the Parties.

32. On 17 December 2014, both Parties submitted their response to the exchanged request for documents, pursuant to the approved schedule for production of documents. On 30 and 31 December 2014, the Parties submitted their replies to the responses for the document request submitted by each Party.

33. On 8 and 9 of January 2015, the Respondent and the Claimants submitted observations in connection with the replies to the responses for the document production requests that had been transmitted to the Tribunal on 30 and 31 December 2014.

34. On 13 January 2015, the Tribunal issued Procedural Order No. 2 concerning the production of documents.

35. On 30 January 2015, the World Health Organization (the "**WHO**") and the WHO Framework Convention on Tobacco Control Secretariat (the "**FCTC Secretariat**") submitted a request to file a written submission as a non-disputing party, pursuant to ICSID Arbitration Rule 37(2).

36. On 9 February 2015, each Party filed observations on the non-disputing party's application, as instructed by the Tribunal.

37. On 12 February 2015, the Tribunal granted leave to the WHO and the FCTC Secretariat to file a written submission pursuant to ICSID Arbitration Rule 37(2) and informed the Parties that it would subsequently issue a reasoned decision.

38. On that same date, the WHO and the FCTC Secretariat's *amicus curiae* brief dated 28 January 2015 (the "**WHO Amicus Brief**") was transmitted to the Parties and the Tribunal. In their *amicus* brief, the WHO and the FCTC Secretariat concluded that:

> *The action taken by Uruguay was taken in light of a substantial body of evidence that large graphic health warnings are an effective means of informing consumers of the risks associated with tobacco consumption and of discouraging tobacco consumption. There is also a substantial body of evidence* [sic] *that prohibiting brand variants is an effective means of preventing misleading branding of tobacco products. These bodies of evidence, which are consistent*

> *with state practice, support the conclusion that the Uruguayan measures in question are effective means of protecting public health.*[10]

39. The Tribunal's reasoning for its 12 February 2015 decision was provided in Procedural Order No. 3 on 17 February 2015. In this Order, the Tribunal stated, among others that:

> *[T]he 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 [the WHO and the FCTC Secretariat] 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.*
>
> *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).* (¶¶ 28, 29).

40. On 6 March 2015, the Pan American Health Organization (the "**PAHO"**) submitted a request to file a written submission as a non-disputing party, pursuant to ICSID Arbitration Rule 37(2).

41. As instructed by the Tribunal, on 16 March 2015 each Party filed observations on the PAHO's request to file a written submission as a non-disputing party.

42. On 18 March 2015, the Tribunal decided to grant the PAHO leave to file a written submission pursuant to ICSID Arbitration Rule 37(2) and informed the Parties that it would subsequently issue a reasoned decision.

43. On that same date PAHO's *amicus curiae* brief dated 6 March 2015 (the "**PAHO Amicus Brief**") was transmitted to the Parties and the Tribunal. In its submission, PAHO concluded that:

> *PAHO and its Member States publicly recognize and fully support Uruguay's efforts to protect its citizens from the harmful effects of tobacco consumption, including through its implementation of the 80% Rule and the Single Presentation Rule measures and have expressed their deep concern about misinformation campaigns and legal actions instituted by the tobacco industry against tobacco contro1.*
>
> *PAHO supports Uruguay's defense of the 80% Rule and the SPR, which are aimed at saving lives, and recognizes it as a role model for the Region and the world.*

[10] WHO Amicus Brief, ¶ 90.

> *Uruguay's tobacco control measures are a reasonable and responsible response to the deceptive advertising, marketing and promotion strategies employed by the tobacco industry, they are evidence based, and they have proven effective in reducing tobacco consumption. For this simple reason, the tobacco industry is compelled to challenge them.* (footnotes omitted).[11]

44. On 19 March 2015, each Party filed observations on the WHO Amicus Brief.

45. The Tribunal's reasoning for its 18 March 2015 decision was provided in Procedural Order No. 4 on 20 March 2015.

46. On 24 March 2015, the Tribunal issued a revised version of Procedural Order No. 4, as agreed by the Parties. In this Order, the Tribunal followed the same reasoning as in its order granting access to the WHO and FCTC Secretariat and stated that:

> *[T]he 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.*
>
> *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).* (¶¶ 30-31)

47. On 18 April 2015, the Claimants submitted their Reply on the Merits.

48. On 18 May 2015, each Party filed observations on the PAHO's Amicus Brief.

49. On 22 July 2015, the Avaaz Foundation ("**Avaaz**") submitted a request to file a written submission as a non-disputing party, pursuant to ICSID Arbitration Rule 37(2).

50. As instructed by the Tribunal, each party filed observations on 6 August 2015 concerning Avaaz' request to file a written submission as a non-disputing party.

51. On 4 August 2015, the Centre informed the Parties and the Tribunal that Ms. Mairée Uran Bidegain, ICSID Legal Counsel, would act as Secretary of the Tribunal for the remainder of the case.

[11] PAHO Amicus Brief, ¶¶ 98-100.

52. On 7 August 2015, the Tribunal issued a decision denying the petition by Avaaz to file a written submission as a non-disputing party. Having considered the petition and the Parties' respective arguments, the Tribunal concluded that:

> *The alleged "unique composition of its membership," the only argument provided by the Petitioner, is not a sufficient basis to consider that the Avaaz Foundation may offer a perspective, particular knowledge or insight that is different from that of the disputing parties nor one that is relevant to this arbitration.*
>
> *The Tribunal further notes that, as recognized by the Petitioner, the Petition is submitted late in the proceedings, when one of the Parties' has presented all of its scheduled written pleadings to the Tribunal. The intervention of a non-disputing party therefore may disrupt the proceeding and unfairly prejudice one of the Parties.* (p. 2)

53. On 14 September 2015, the Inter-American Association of Intellectual Property (in Spanish, *Asociación Interamericana de la Propiedad Intelectual*, (*"***ASIPI***")* submitted a request to file a written submission as a non-disputing party, pursuant to ICSID Arbitration Rule 37 (2).

54. On 22 September 2015, each Party submitted observations on ASIPI's request to file a written submission as a non-disputing party, as instructed by the Tribunal.

55. On 24 September 2015, the Tribunal issued a decision denying the petition by ASIPI to file a written submission. After carefully reviewing the petition and the Parties' respective arguments, the Tribunal stated among others the following:

> *Pursuant to [Arbitration Rule 37(2)], the Tribunal must not only consider whether the person or organization that seeks to intervene has the required expertise or experience, but also whether it is sufficiently independent from the disputing parties to be of assistance to the Tribunal. Prior ICSID tribunals have already recognized the importance of the lack of connection between the petitioner and the disputing parties for the tribunal's determination to accept or deny non-disputing parties' submissions.*
>
> *The Respondent has brought to the Tribunal's attention, the "close relationship between ASIPI and Claimants," by identifying the participation of Claimants' lawyers on the management board and on specific thematic committees of ASIPI. The Tribunal cannot ignore this detailed information.*
>
> *In addition, the Tribunal highlights that the Petition has been submitted little over one month before the start of the hearing for the merits phase of these proceedings*
>
> *Consistent with its prior determinations on this question, the Tribunal considers that this belated intervention will disrupt the proceeding and has the potential*

to unduly burden and unfairly prejudice the Parties, including in connection with their current preparation of the forthcoming hearing. […] (p. 2)

56. The hearing on the merits was held from 19 to 29 October 2015, at the Centre's seat in Washington, D.C. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For the Claimants:

Party Representative:
Mr. Marc Firestone
Ms. María del Carmen Ordóñez López
Mr. Diego Cibils
Ms. Tiffany Steckler
Ms. Luisa Menezes
Mr. John Bails Simko
Mr. Steve Reissman
Mr. Marco Mariotti

Party Counsel:
Mr. Stanimir A. Alexandrov
Mr. James E. Mendenhall
Ms. Jennifer Haworth McCandless
Ms. Marinn Carlson
Mr. Patrick Childress
Ms. Courtney Hikawa
Ms. María Carolina Durán
Mr. Andrew Blandford
Mr. Michael Krantz
Ms. Samantha Taylor
Ms. Avery Archambo
Mr. Hisham El-Ajluni
Mr. Carlos Brandes
Mr. Ken Reilly
Ms. Madeleine McDonough
Mr. Bill Crampton
Ms. Catherine Holtkamp
Mr. Leland Smith
Mr. Stuart Dekker
Mr. Dushyant Ailani

For the Respondent:

Party Representative:
Dr. Miguel Toma
Dr. Jorge Basso
Ambassador Carlos Gianelli
Dr. Carlos Mata Prates
Dr. Inés Da Rosa
Dr. Verónica Duarte
Ms. Marianela Bruno

Party Counsel:
Mr. Paul S. Reichler
Mr. Lawrence H. Martin
Ms. Clara E. Brillembourg
Professor Harold Hongju Koh
Mr. Andrew B. Loewenstein
Ms. Melinda Kuritzky
Mr. Nicholas Renzler
Ms. Christina Beharry
Mr. Yuri Parkhomenko
Dr. Constantinos Salonidis
Ms. Analía González
Mr. Eduardo Jiménez de Aréchega
Ms. Francheska Loza
Ms. Gabriela Guillén
Ms. Nancy López

Mr. José Rebolledo	Mr. Oscar Norsworthy Ms. Anna Aviles-Alfaro

The following persons were examined:

On behalf of the Claimants:

Witnesses

Mr. Chris Dilley Mr. Nicolás Herrera	Mr. Diego Cibils

Experts

Professor Julián Villanueva Professor Alexander Chernev Professor Jacob Jacoby Professor Gustavo Fischer Professor Christopher Gibson Professor Alejandro Abal Oliú	Professor Jan Paulsson Mr. Brent Kaczmarek Mr. Kiran P. Sequeira

On behalf of the Respondent:

Witnesses:

Dr. Jorge Basso, Minister of Public Health Dr. Winston Abascal, Ministry of Public Health Dr. Ana Lorenzo, Ministry of Public Health	Dr. Eduardo Bianco, Uruguayan Medical Union/Tobacco Epidemic Research Center (CIET Uruguay)

Experts:

Dr. Andrea Barrios Kübler Dr. Nuno Pires de Carvalho Professor Nicolas Jan Schrijver Dr. Santiago Pereira	Dr. Joel B. Cohen Dr. Timothy Dewhirst Dr. David Hammond Mr. Jeffrey A. Cohen

57. On 2 November 2015, the Tribunal issued Procedural Order No. 5, providing the procedural steps for the remainder of the proceeding.

58. The Parties filed their submissions on costs on 19 January 2016, updating the same on 8 April 2016 as instructed by the Tribunal.

59. The proceeding was closed on 27 May 2016.

IV. FACTUAL BACKGROUND

60. The Tribunal provides below a general overview of the factual background that has led to this dispute, to the extent it is substantiated and is material for the determinations and decisions in this Award. In doing so, it will adopt a chronological timeline when possible, referring to the evidence presented by the Parties and describing the Parties' positions with regard to disputed facts.

61. This section is not intended to be an exhaustive description of all facts underlying this dispute. Some facts will also be addressed, to the extent relevant or useful, in the context of the Tribunal's legal analysis of the issues in dispute, and will be supplemented by relevant factual information including that provided by witnesses and experts in their written statements and reports, and in the course of oral examination at the hearing.

62. Below, the Tribunal describes: (A) the Claimants' operations and investments in Uruguay; (B) Uruguay's tobacco control policy and the applicable regulatory framework; (C) the use of tobacco in Uruguay before and after the Challenged Measures; (D) the domestic court proceedings relating to the Challenged Measures, and (E) the regulatory framework for trademarks in Uruguay.

A. The Claimants' Operations and Investments in Uruguay

63. Abal was formally established in its present form in 1945, although in an earlier incarnation it had manufactured and marketed tobacco products in Uruguay since 1877.[12] Its main business after 1945 continued to be manufacturing cigarettes for export and sale in the local market.[13]

64. Abal was acquired by PMI in 1979.[14] Twenty years later, in 1999, it became a wholly owned subsidiary of FTR Holding S.A ("**FTR**").[15] On or before 5 October 2010, PMB, as FTR's successor, became Abal's 100% direct owner.[16]

[12] RfA, ¶¶ 14, 17.

[13] Abal Hermanos, Financial Statements, 31 Dec. 2012 (C-123).

[14] Tr. Day 1, 18:18-19.

[15] Notarized attestation of FTR's ownership of 100% of Abal, 6 Nov. 2009 (C-7); RfA, ¶ 15.

[16] Dec. Jur., ¶ 2.

65. Abal concluded license agreements to manufacture and sell cigarettes under various Philip Morris brands. PMP was the owner of the *Marlboro, Fiesta, L&M* and *Philip Morris* trademarks which it licensed to Abal.[17] Abal also used a number of Uruguayan trademarks registered in its own name to sell tobacco products.[18] In particular, Abal sold the *Marlboro*, *Fiesta*, *L&M*, *Philip Morris*, *Casino*, and *Premier* brands of cigarettes in Uruguay; and it owns the *Casino*, *Premier* and associated trademarks.[19]

66. On 14 March 2002, the then President of Uruguay issued a "Declaration of Promoted Activity for Investment Project of Abal Hnos. S.A.," which included a package of tax exemptions and credits to Abal with the objective of increasing Abal's production capacity in order to "supply the Paraguayan market with Philip Morris products."[20]

67. As described further below, from 2005 onward, Uruguay initiated a tobacco control campaign and issued several decrees to regulate the tobacco industry.

68. Between 2008 and 2011 the factory generated revenues of more than US $30 million and employed about 100 people.[21] In October 2011, Abal closed its factory in Uruguay.[22] Since that time, Abal's main activity has been the importation of cigarettes from its Argentine affiliate, Massalin Particulares S.A., for sale in Uruguay and for re-exportation.[23]

69. At the jurisdictional stage of the proceedings, the Claimants' investments in Uruguay were considered to include the local manufacturing facility (now closed), shares in Abal, rights to royalty payments and trademarks.[24]

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[17] Notarized attestation of FTR's ownership of 100% of Abal, 6 Nov. 2009 (C-7); PMP's Uruguayan Registration Documents for "*Marlboro*," "*Fiesta*," "*L&M*," and "*Philip Morris*" Trademarks (C-8); License Agreement and Amendment between PMP and Abal (C-9). By letter of 17 Mar. 2011, the Claimants informed the Centre that the trademark for Marlboro, Philip Morris and Fiesta were transferred to PMB as of 1 Jan. 2011, to be then licensed to Philip Morris Global Brands, sublicensed to PMP and sub-sublicensed to Abal (Dec. Jur., ¶ 3). *See also* RfA, ¶ 15.

[18] Uruguayan Registration Documents for "Casino" and "Premier" Trademarks (C-11). RfA, ¶ 16.

[19] Dec. Jur., ¶ 3.

[20] Declaration of Promoted Activity for Investment Project of ABAL HNOS. S.A., 14 Mar. 2002 (C-29); CM, ¶ 20; Dec. Jur., ¶ 172.

[21] Witness Statement of Mr. Chris Dilley of 27 Mar. 2014 ("**Dilley Statement I**") (CWS-5), ¶ 4.

[22] Martín Cajal, "Philip Morris se retira de Uruguay," *El Diario*, 22 Oct. 2011 (C-137); Witness Statement of Roman Militsyn, 27 Feb. 2014 ("**Militsyn Statement I**") (CWS-7), ¶ 6. CM, ¶ 58.

[23] Abal Hermanos, Financial Statements, 31 Dec. 2012 (C-123). CM, ¶ 58.

[24] Dec. Jur., ¶ 183, 190, 194; CR, ¶ 107.

70. At the merits stage, the Claimants submit that their investments in this arbitration are composed by three main elements: (i) Abal itself, (ii) "brand assets," including the associated intellectual property rights owned by or licensed to the Claimants, and (iii) the goodwill associated with the Claimants' brands.[25]

71. Concerning the first element, since PMB directly owns 100% of the shares of Abal, the Claimants consider Abal itself (and the Abal shares held by PMB) to be an investment of PMB.[26]

72. Concerning the second element, the Claimants consider that they possess a direct or indirect interest in the "brand assets" that they developed and used in Uruguay. The Claimants' alleged brand assets include (a) the Claimants' brands and brand families; (b) the Claimants' variants; and (c) the intellectual property rights associated with the Claimants' brands, brand families, and variants. Each of these brand assets can be summarized as follows:

- *Brands, brand families*. Until 2009, Abal sold cigarettes under the following six brands: *Marlboro*, *Fiesta*, *Philip Morris*, *Premier*, *Galaxy*, and *Casino*. The bundle of variants sold under a particular brand is known as a "brand family."[27]

- *Variants*. Before 2009, Abal sold thirteen variants within its six brand families. Variants within a given brand family share certain characteristics such as quality, brand heritage, or taste but may also exhibits slightly different characteristics. *Marlboro* was Abal's most important brand family. The *Marlboro* brand family consisted of four variants—*Marlboro Fresh Mint*, *Marlboro Red*, *Marlboro Blue*, and *Marlboro Gold*.[28]

- *Associated intellectual property rights*. These intellectual property rights consist of the trademarks associated with the brand markings on the products that Abal sold before 2009. Abal owns the trademarks associated with the

[25] CM, ¶ 60. The Claimants also deem their investments to include the royalty payments the Claimants would earn on sales of tobacco products. CR, ¶ 107.

[26] CM, ¶ 61.

[27] CM, ¶ 65; Militsyn Statement I, (CWS-7), ¶ 7.

[28] CM, ¶¶ 74-76; Witness Statement of Daniela Sorio, 1 Mar. 2014 (CWS-8), ¶ 14.

Premier and *Casino* brand families, while the Claimants PMP and PMB own and license to Abal the trademarks for all of the other products that Abal currently markets in Uruguay or previously marketed in Uruguay before the SPR.[29]

73. Finally, concerning the third element, the Claimants contend that they possessed valuable goodwill that was associated with their brand assets and business as a whole in Uruguay. In the Claimants' view, the awareness of their brands was valuable in that consumers were willing to pay more for products that carried the Claimants' well-known brands. That goodwill is also alleged to be an asset that is a protected investment under the BIT.[30]

B. Uruguay's Tobacco Control Policy and the Applicable Regulatory Framework

74. It is not in dispute between the Parties that smoking cigarettes and other tobacco products represents a serious health risk.[31] Cigarettes are a legal consumer product that is highly addictive and cause the deaths of up to half of long-term consumers when used as intended.[32] According to the WHO "approximately 5.1 million adults aged 30 years and over die from direct tobacco use each year. In addition, some 603,000 people die from exposure to second-hand smoke every year."[33]

75. Uruguay has one of Latin America's highest rate of smokers, being in third place in the region after Chile and Bolivia.[34] As of 2009, more than 5,000 Uruguayans died each year from diseases linked to tobacco consumption, mainly due to cardiovascular diseases and cancer.[35] Consumption of tobacco and exposure to tobacco smoke are

[29] CM, ¶¶ 84-85; PMP's Uruguayan Registration Documents for "Marlboro," "Fiesta," "L&M," and "Philip Morris" Trademarks (C-8); Uruguayan Registration Documents for "Casino" and "Premier" Trademarks (C-11); Trademark Registration for *Marlboro Green Mint*, No. 395718, 23 Nov. 2011 (C-158).

[30] CM, ¶¶ 63, 92-93; Switzerland-Uruguay BIT, Art. 1(2) (C-1).

[31] Tr. Day 1, 36:14-15; *see also infra* ¶ 133, n. 108.

[32] PAHO Amicus Brief, ¶ 3 (citing Peto R; Lopez AD, Boreham J; Thun M; Heath C. Mortality from tobacco in developed countries: indirect estimation from national vital statistics, Lancet (1992)).

[33] WHO Amicus Brief, ¶ 2 (citing WHO Global Report: Mortality Attributable to Tobacco, World Health Organization, 2012).

[34] Pan American Health Organization (PAHO) & World Health Organization (WHO), Tobacco Control Report for the Region of the Americas (2013) (R-267), Chart 2.

[35] This figure exceeded the combined total number of deaths from traffic accidents, homicides, suicides, AIDS, tuberculosis and alcoholism in Uruguay. *See Pan American Health Organization (PAHO), Global Adult Tobacco Survey (GATS): Uruguay '09 (2011)*, ("**GATS Uruguay 2009**"), (R-233) pp. 15, 22.

responsible for 15% of all deaths of Uruguayans over 30 years of age, which is higher than the world average of 12%.[36]

76. Smoking also has an economic impact. Uruguayan smokers spent an average of 20% of the national minimum wage to sustain their habit and the health costs linked to smoking in Uruguay are estimated to amount to US$150 million per year.[37]

77. Against this background, Uruguay has positioned itself in the forefront of States in terms of anti-smoking policy and legislation, with an important push from its current President, Tabaré Ramón Vázquez Rosas, who in his earlier career was an oncologist, and whose first presidential term was between 2005 and 2010.

78. Uruguay has taken a range of increasingly stringent regulatory measures of tobacco control, including restrictions on advertising, mandatory health warnings, increased taxation, and prohibition of smoking in enclosed spaces.[38] These are discussed in detail below. In addition, starting in the year 2000, it implemented a number of policies that translated into the creation of a series of governmental and non-governmental expert groups and agencies focusing on the study and prevention of tobacco use. The paragraphs below summarize the most important agencies in light of the issues in dispute.

79. In 2000, Uruguay's ***Dirección General de Salud*** (General Directorate of Health), of the MPH, participated in the creation of the **National Alliance for Tobacco Control**, an interdisciplinary non-governmental organization, with members drawn from various sectors of the public health community, including governmental, parastatal, local and international, and academics which promoted Uruguay's participation in the Framework Convention on Tobacco Control.[39] It operated until 2006.

80. In 2004, the MPH created the National Advisory Commission for Tobacco Control (the "**Advisory Commission**"), a governmental entity made up of experts from the public sector, civil society, and representatives of medical associations, to advise the Ministry

[36] PAHO Amicus Brief, ¶ 23 (explaining that as of 2003, 14 Uruguayans died per day of tobacco-related diseases).

[37] A. Sica et al., "Tobacco Control Policies In Uruguay" in *Prevention Of Health Risk Factors In Latin America And The Caribbean: Governance Of Five Multisectoral Effort* (M. Bonilla-Chacín, ed., 2014) (R-282), p. 149.

[38] GATS Uruguay 2009 (R-233), p. 15.

[39] *See* A. Sica et al. (R-282), p. 150; Witness Statement of Dr. Winston Abascal of 9 Oct. 2014 ("**Abascal Statement I**") (RWS-1), ¶ 2; GATS Uruguay 2009 (R-233), p. 20.

of Public Health.[40] "The Advisory Commission provides technical support to the Ministry of Public Health, evaluating the efficacy of current smoking-related policies, and monitoring and discussing the implementation of the law."[41] Historically, the Advisory Commission has met approximately twice a month to discuss issues regarding tobacco control.[42]

81. Tobacco companies also participate in tobacco control policy by submitting recommendations. In that same year, 2004, Abal submitted a detailed recommendation to the Government proposing alternative regulatory action.[43]

82. In 2005, the MPH created the National Program for Tobacco Control (*Programa Nacional para el Control del Tabaco*) (the "**Tobacco Control Program**"). The Tobacco Control Program is the focal point responsible for planning, developing, and implementing national-level tobacco control policies in Uruguay: it reports to the General Directorate of Health and the Minister of Public Health. The Tobacco Control Program is also charged with ensuring compliance with applicable regulations. It deploys trained inspectors throughout the country to carry out this task.[44]

83. At the national level, the Tobacco Control Program serves as the representative of the MPH on the Advisory Commission. Relevant proposals of the Advisory Commission are submitted to the Government through the Tobacco Control Program. Similarly, if a tobacco measure originates in the MPH, the Tobacco Control Program may refer them to the Advisory Commission for consideration.[45]

84. The regulation of the tobacco industry has increased world-wide over the years. Uruguay has been a strong supporter of anti-smoking policies at the international level, notably those described in section (a). At least partly in pursuance of these policies, it has enacted its own legislation, described in section (b) below.

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[40] Ordinance 507/004 (RLA-210); *See also* A. Sica et al. (R-282), p. 152.

[41] Witness Statement of Dr. María Julia Muñoz, 8 Oct. 2014 ("**Muñoz Statement**") (RWS-3), ¶ 14.

[42] Abascal Statement I, (RWS-1), ¶ 6.

[43] Abal Hermanos S.A., Recommendations for a comprehensive regulation of tobacco products (9 Jul. 2004) (R-166), p. 8.

[44] *See* A. Sica et al. (R-282), p. 152.

[45] Abascal Statement I (RWS-1), ¶ 6. At the regional and international levels, the Tobacco Control Program is the focal point representing the country in MERCOSUR's Intergovernmental Commission for Tobacco Control and at the World Health Organization and Framework Convention on Tobacco Control Secretariat meetings.

a. **The International Regulatory Framework**

85. On 21 May 2003, the World Health Organization concluded the Framework Convention on Tobacco Control ("**FCTC**").[46] Uruguay signed the FCTC on 19 June 2003 and ratified it on 9 September 2004, being the first Latin-American State to do so.[47] Switzerland is a signatory but not a party to the FCTC.

86. The FCTC entered into force on 27 February 2005. Its current membership includes 180 State parties.[48] Some of the background elements that drove many countries to consider adopting the FCTC are explained in its preamble as follows:

> *Determined to give priority to their right to protect public health,*
>
> *Recognizing that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response,*
>
> *Reflecting the concern of the international community about the devastating worldwide health, social, economic and environmental consequences of tobacco consumption and exposure to tobacco smoke,*
>
> *Seriously concerned about the increase in the worldwide consumption and production of cigarettes and other tobacco products, particularly in developing countries, as well as about the burden this places on families, on the poor, and on national health systems,*
>
> *Recognizing that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases,*
>
> *Recognizing also that cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases,*

87. The FCTC is said to be an "evidence-based treaty," [49] one that "provides a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence

[46] WHO Framework Convention on Tobacco Control ("**FCTC**"), 2302 UNTS 166 (RLA-20).

[47] RCM, ¶ 3.110.

[48] *See* Parties to the WHO Framework Convention on Tobacco Control available at http://www.who.int/fctc/signatories_parties/en/.

[49] WHO Amicus Brief, ¶ 12.

of tobacco use and exposure to tobacco smoke."[50] No reservations may be made to the FCTC.[51]

88. Relevant provisions of the FCTC include the following:

Article 2

Relationship between this Convention and other agreements and legal instruments

1. In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.[…]

Article 4

Guiding principles

To achieve the objective of this Convention and its protocols and to implement its provisions, the Parties shall be guided, inter alia, by the principles set out below:

1. Every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke.

Article 11

Packaging and labelling of tobacco products

1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"; and

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the

[50] FCTC (RLA-20), Art. 3.

[51] FCTC (RLA-20), Art. 30.

harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

(i) shall be approved by the competent national authority,

(ii) shall be rotating,

(iii) shall be large, clear, visible and legible,

(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,

(v) may be in the form of or include pictures or pictograms.

2. Each unit packet and package of tobacco products and any outside packaging and labelling of such products shall, in addition to the warnings specified in paragraph 1(b) of this Article, contain information on relevant constituents and emissions of tobacco products as defined by national authorities.

[…]

Article 13

1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.

[…]

4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:

(a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;(…)

5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.

89. The WHO established a strategy called "MPOWER" to implement the FCTC. This was composed of six steps:

- **M**onitor tobacco use and prevention policies,
- **P**rotect people from tobacco smoke,
- **O**ffer help to quit tobacco use,
- **W**arn about the dangers of tobacco,
- **E**nforce bans on tobacco advertising, promotion and sponsorship,
- **R**aise taxes on tobacco.

90. In addition, in November 2008, the State Parties to the FCTC established Guidelines for the implementation of a number of provisions, including Articles 11 and 13 of the FCTC (the "**Guidelines**"). [52]

91. According to the WHO and FCTC Secretariat, the Guidelines, which are evidence-based, "are intended to assist Parties in … increasing the effectiveness of measures adopted and play a particularly important role in settings where resource constraints may otherwise impede domestic policy development."[53]

92. The Article 11 Guidelines call on States to consider enlarging health warnings above 50% to the maximum size possible. Paragraph 12 of the Guidelines provides:

> *Article 11.1(b)(iv) of the Convention specifies that health warnings and messages on tobacco product packaging and labelling should be 50% or more, but no less than 30%, of the principal display areas. Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible. The text of health warnings and messages should be in bold print in an easily legible font size and in a specified style and colour(s) that enhance overall visibility and legibility.* [54]

93. The Guidelines also urge State Parties to "prevent packaging and labelling that is misleading or deceptive" and to adopt plain packaging or "restrict as many packaging design features as possible" as follows:

> *43. Article 11.1(a) of the Convention specifies that Parties shall adopt and implement, in accordance with their national law, effective measures to ensure that tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about the product's characteristics, health effects, hazards or emissions, including any term, descriptor, trademark or figurative or other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than others. These may include terms such as "low tar", "light", "ultra-light" or "mild", this list being indicative but not exhaustive. In implementing the obligations pursuant to Article 11.1(a), Parties are not limited to prohibiting the terms specified but should also prohibit terms such as "extra", "ultra" and similar terms in any language that might mislead consumers.*

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[52] *Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products),* adopted at the third Conference of the Parties (Nov. 2008) ("**Article 11 Guidelines**") (RLA-13).

[53] WHO Amicus Brief, ¶ 19.

[54] Article 11 Guidelines (RLA-13), ¶ 12.

[….]

46. Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.[55]

94. Guidelines to Article 13 read in relevant part:

Parties should prohibit the use of any term, descriptor, trademark, emblem, marketing image, logo, colour and figurative or any other sign that promotes a tobacco product or tobacco use, whether directly or indirectly, by any means that are false, misleading or deceptive or likely to create an erroneous impression about the characteristics, health effects, hazards or emissions of any tobacco product or tobacco products, or about the health effects or hazards of tobacco use. Such a prohibition should cover, inter alia, use of the terms "low tar", "light", "ultra-light", "mild", "extra", "ultra" and other terms in any language that may be misleading or create an erroneous impression.[56]

95. As a Party to the WHO FCTC, Uruguay participated in adopting the *Punta del Este Declaration* on the Implementation of the WHO FCTC[57] and the *Seoul Declaration*,[58] which reflect the FCTC Parties commitment to implement the FCTC.

b. **The Domestic Regulatory Framework**

96. This Section is divided into two parts. First, it contains a non-exhaustive list of tobacco regulatory measures adopted by the Uruguayan Government prior to the enactment of the Challenged Measures. Second, it describes in more detail the Challenged Measures: (i) the SPR and (ii) the 80/80 Regulation.

[55] *Ibid.* (RLA-13), ¶ 46.

[56] Conference of the Parties to the Framework Convention on Tobacco Control (COP-FCTC), *Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship)*, FCTC/COP3(12), Nov. 2008 (RLA-133), ¶ 39.

[57] *Punta del Este Declaration on implementation of the WHO Framework Convention on Tobacco Contro1*, Conference of the Parties to the WHO Framework Convention on Tobacco Control, fourth session, Punta del Este, Uruguay, 6 Dec. 2010 (RLA-135).

[58] *Seoul Declaration*, Conference of the Parties to the WHO Framework Convention on Tobacco Control, fifth session, Seoul, Republic of Korea, 17 Nov. 2012, FCTC/COP5(5).

1. The Regulatory Framework up to the Enactment of the Challenged Measures

97. Article 44 of the Uruguayan Constitution provides that it is the Government's duty to legislate public health and hygiene issues, with the purpose of attaining the physical, moral and social improvement of Uruguay's citizens.

98. On 12 January 1934, Law No. 9,202, the Organic Law of the Ministry of Public Health, was enacted.

99. On 24 December 1982, Law 15,361 was enacted, which, *inter alia*, required the inclusion of specific warning texts on the side of tobacco packages, prohibited the sale of cigarettes to minors, and mandated quarterly publications by tobacco manufacturers of the *maximum* percentages of tar and nicotine levels for each cigarette contained in the packages of the brands sold.[59] The latter requirement was modified on 25 October 1984 by Law 15,656, requiring annual publication (instead of quarterly) of *average* percentages of tar and nicotine levels contained in tobacco packages.[60]

100. In May 1996, Decree 203/996 banned smoking in offices, public buildings and establishments destined for public or common use, in particular where food is provided.[61]

101. In 1998, Decree 142/98 prohibited promotional efforts that involved tobacco product giveaways.[62]

102. Between January and October of 2005, the Respondent issued an important number of decrees on tobacco control, including:

[59] Law 15,361 dated 24 Dec. 1982 (C-274 (Spa. and Eng. Art. 2) and RLA-5 (Spa.)), Art. 2. On Law 15,361 *see* CM, ¶ 45; RCM, ¶ 3.105; RR, ¶ 3.71.

[60] Law 15,361 dated 24 Dec. 1982 as modified by Law, 15,656 of 1984 in Art. 3 (C-274 *bis*); CR, n. 21; RCM, ¶ 3.105. On 28 Nov. 2003, Law 17,714 was enacted to amend the text of the side warning mandated by Article 2 of Law 15,361. Such text warning consisted originally of: "*Warning: smoking is injurious to health. M.S.P*.," and was then modified to read "*Smoking can cause cancer, heart and lung diseases. Smoking when pregnant harms your baby. MSP*." Law 15,361, 24 Dec. 1982, amended by Law 17,714 dated 28 Nov. 2003, e.i.f. on 10 Dec. 2003 (C-274), Art. 2. CM, ¶ 45.

[61] V. Denis, et al., *Application of FODA Matrix on the Uruguayan Tobacco Industry* (2007) (R-180), p. 141.

[62] *Ibid*., p. 140.

- **Presidential Decree No. 36/005 ("Decree 36")**, requiring the inclusion of the warning texts described in paragraph 99 above, to cover 50% of the front and back of tobacco packaging instead of the side of the package.[63]

- **Decree 169/005**, regulating smoking areas within restaurants, bars and recreation areas, and prohibiting the advertisement of tobacco products and/or brands on television channels during so-called "safe harbor" hours for the protection of minors.[64]

- **Decree 170/005,** prohibiting the sponsorship, through advertising and promotion of tobacco-derived products, in sporting events in Uruguay.[65]

- **Decree 171/005 ("Decree 171"), "**extending" what was mandated by Decree 36, insofar as the health warnings in the packages of tobacco products should not only occupy 50% of the total display areas, but that they shall also be periodically rotated, and include images and/or pictograms. Decree 171 further prohibited the use of terms such as "low tar," "light," or "mild" on tobacco products, and gave the MPH the discretion to define the type, legend, images and pictograms to be included thereon.[66]

- **Presidential Decree 214/005**, providing that public offices were considered "100% tobacco smoke-free environments."[67]

- **Presidential Decree 268/005**, providing that "all enclosed premises for public use and any work area, whether public or private, intended for common use by people" had to be 100% tobacco smoke-free environments.[68]

- **Presidential Decree 415/005**, confirming that all pictograms must be approved by the MPH, further defining the eight types of images to be printed on the lower 50% of the principal display areas of all packs of cigarettes and tobacco products (as set forth in Decree 171/005), and providing that one of the two sides of the packs of cigarettes should be occupied entirely by the text health warning.[69]

103. Uruguay enacted additional relevant regulations in 2007:

[63] Presidential Decree No. 36/2005 dated 25 Jan. 2005 (C-31); CM, ¶ 45; Cl. Opening Statement, slide 4; RCM, ¶ 3.113.

[64] Presidential Decree 169/2005, dated 31 May 2005, published on 6 June 2005 (C-146); CM, ¶ 20; Cl. Opening Statement, slide 4; RCM, ¶ 3.115.

[65] Presidential Decree 170/2005, dated 31 May 2005, published on 6 June 2005 (C-147); CM, ¶ 20; RCM, ¶ 3.115.

[66] Presidential Decree 171/2005 dated 31 May 2005 (C-32, C-148, RLA-2); Arts 1 and 2. *See also* CM, ¶¶ 20, 37, 146; CR, ¶¶ 35, 102; RCM, ¶ 3.113.

[67] Presidential Decree 214/2005, dated 5 July 2005 (C-150); CM, ¶ 20.

[68] Presidential Decree 268/2005 dated 5 Sep. 2005 (C-151). On 17 Feb. 2006, Presidential Decree 40/2006 was enacted, setting forth fines for violations of Decree 268/2005. *See* Presidential Decree 40/2006 dated 17 Feb. 2006 (C-152); *See also* CM, ¶ 20; Cl. Opening Statement, slide 4; RCM, ¶ 3.115.

[69] Presidential Decree 415/2005 dated 20 Oct. 2005, e.i.f. on 26 Oct. 2005 (C-153). *See also* CM, ¶ 20; Cl. Opening Statement, slide 4.

- **Presidential Decree 202/007**, attaching three images combined with six legends to be printed on 50% of the display areas of all packs of cigarettes and tobacco products, further to Decree 171/005.[70]

- **Decree of July 2007**, imposing a 22% Value Added Tax on tobacco products. Tobacco products were previously exempt from VAT.[71]

104. The Claimants did not, nor do they, challenge any of the measures described in the precedent paragraphs.[72]

105. On 6 March 2008, the Uruguayan Parliament adopted **Law 18,256**.[73] The law re-affirmed and reinforced many of the measures adopted under the Decrees referred to in paragraphs 102 and 103above, including the prohibitions of smoking in public or private enclosed places (Art. 3), the limitation of retail advertising to point-of sale and the prohibition of all other forms of advertising, promotion and sponsorship of tobacco products including at sporting events (Art. 7), and the prohibition of the free distribution of tobacco products (Art. 11). Law 18,256 also authorized the MPH to "adopt guidelines regarding analysis and measurements of the contents and emissions of tobacco products and regulation thereof," including the disclosure of information on toxic components, additives and emissions of tobacco products based on Article 9 of the FCTC (Arts. 5 and 6). In addition, Articles 1, 2, 8 and 9 of Law 18,256 provided in relevant part:

> *Article 1. (General principle). All persons are entitled to the enjoyment of the highest possible level of health, improvement of all labor and environmental health issues, as well as prevention, treatment and rehabilitation from diseases, pursuant to several international agreements, pacts, statements, protocols and conventions which have been ratified by law.*
>
> *Article 2. (Subject-matter). This law pertains to public order and its objective is to protect the inhabitants of the country against the sanitary, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.*
>
> *In such sense, measures aiming at the control of tobacco are established, in order to reduce in a continuous and substantial manner the prevalence of tobacco consumption and exposure to tobacco smoke, pursuant to the World Health Organization Framework Agreement for Tobacco Control, which was ratified by Law No. 17.793 of 16 July 2004.*

[70] Presidential Decree 202/2007 dated 20 Jun. 2007 (C-149). *See also* CM, ¶ 20; Cl. Opening Statement, slide 4.

[71] Euromonitor International, *Tobacco - Uruguay* (Aug. 2010), (R-229), p. 2. *See also* RCM, ¶ 3.118.

[72] CM, ¶¶ 20, 46; C-CM, Jur, ¶ 32.

[73] Law 18,256 dated 6 Mar. 2008 (C-33). *See also* RfA, ¶ 20; Cl. Opening Statement, slide 4; CM, n. 6; RCM, ¶¶ 3.118-3.121.

> *Article 8.* *(Packaging and labeling of tobacco products).- It is forbidden for packages and labels of tobacco products to promote such products in a false, wrong or misleading way which may lead to a mistake regarding their features, health effects, risks or emissions.*
>
> *It is likewise forbidden to use terms, descriptive features, trademarks or brands, figurative signs or any other kind, which have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than others. (emphasis added)*
>
> *Article 9.* *(Health warnings in tobacco products' packaging and packets).- All packaging and packets of tobacco products and all external labeling and packaging thereof must contain health warnings and images or pictograms describing the harmful effects of tobacco consumption or other appropriate messages. Such warnings and messages must be approved by the Ministry of Public Health, as well as large, clear, visible and legible, and shall occupy at least 50% (fifty percent) of the total main exposed areas. These warnings must be periodically modified in accordance to the implementation regulation.*
>
> *All packaging and labeling of tobacco products and all external labeling and packaging of the same, as well as the warnings specified in the above paragraph shall contain information regarding the main [all]* [sic] *components of tobacco smoke and emissions thereof, pursuant to the instructions furnished by the Ministry of Public Health.*

106. On 9 June 2008, President Vazquez signed Decree 284/008, which implemented Law 18,256 ("**Decree 284**").[74] Article 6 and 12 of Decree 284 provide, in relevant part:

> *Article 6.* *Manufacturing companies or importers shall quarterly submit to the Ministry of Public Health an affidavit, addressed to the National Program for Tobacco Control of such Ministry, in which they will report the presence of the toxic substances to be established by the Ministry of Public Health. The information mentioned above shall be published in two newspapers of the capital city.*
>
> *Article 12. It is herein established that health warnings shall be rotated every 12 (twelve) months; such warnings shall be approved by the Ministry of Public Health.*
>
> *The use of descriptive terms and elements, trademarks or brands, figurative signs or signs of any other nature, such as colors or combination of colors, numbers or letters, that have the direct or indirect effect of creating the misleading impression that a certain product is less harmful than others is forbidden.*

[74] Presidential Decree 284/008 dated 9 June 2008 (C-34). *See also* RfA, ¶ 21; CM, n. 6; RCM, ¶ 3.118.

107. Neither Law 18,256 nor Decree 284 are challenged in this arbitration, nor have they been challenged before the Uruguayan courts.[75]

2. The Challenged Measures

(i) The Single Presentation Regulation

1. The Regulation

108. On 18 August 2008, taking into account the provisions of Article 44 of the Constitution, the FCTC, Law No. 18,256 and Decree 284, the MPH issued Ordinance 514 adopting the SPR,[76] which entered into force in February 2009.

109. Ordinance 514 required the use of pictograms consisting of five images combined with five statements to be printed on 50% of the display areas (lower half) of all packs of cigarettes and tobacco products.[77] Articles 2 of the Ordinance required a legend on the side of the package:

> *2. One of the two lateral display areas on cigarette packs and tobacco product containers shall be taken up in full by the following statement: 'This product contains nicotine, tar and carbon monoxide,' with no specification as to the amount thereof. […]*

110. Article 3 of the Ordinance required each brand of tobacco products to have a single presentation, thus prohibiting the use of multiple presentations (*i.e.* variants) of any cigarette brand. It provided as follows:

> *3. Each brand of tobacco products shall have a single presentation, such that it is forbidden to use terms, descriptive features, trademarks, figurative signs or signs of any other kind such as colors or combinations of colors, numbers or letters, which may have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than another, varying only the pictograms and the warning according to article 1 of the present Ordinance.*[78]

111. Based on Ordinance 514, tobacco companies could only market one variant for each family brand. The tobacco companies had the discretion to pick which variant would remain on the market. For example, for the *Marlboro* family brand, Philip Morris chose

[75] Abal's Request for Annulment of Ordinance 514 before the TCA, 9 Jun. 2009 ("**Abal's SPR Annulment Request**") (C-41), p. 3. CM, ¶ 21.

[76] Ministry of Public Health Ordinance 514 dated 18 Aug. 2008 ("**Ordinance 514**") (C-3 and RLA-7). *See also* RfA, ¶ 24; CM, ¶ 23; C-CM, Jur., ¶ 20; CR, ¶ 27; RCM, ¶ 3.122.

[77] Ordinance 514 (C-3 and RLA-7), Art. 1.

[78] Ordinance 514 (C-3 and RLA-7), Articles 2 and 3.

Marlboro Red. Correspondingly, *Marlboro Light*, *Blue* and *Fresh Mint* were taken off the market.

112. On 1 September 2009, the Ministry of Public Health issued **Ordinance 466**, which, *inter alia*, restated and modified the requirement of Ordinance 514 that each brand of tobacco products have a single presentation, as follows:[79]

Ordinance 514 (2008)	**Ordinance 466 (2009)**
"Each brand of tobacco products shall have a single presentation, such that it is forbidden to use terms, descriptive features, trademarks, figurative signs or signs of any other kind such as colors or combinations of colors, numbers or letters, which may have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than another, varying only the pictograms and the warning according to article 1 of the present Ordinance."	"Each brand of tobacco products shall have a single presentation, ~~such that it is forbidden to use terms, descriptive features, trademarks, figurative signs or signs of any other kind such as colors or combinations of colors, numbers or letters, which may have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than another,~~ varying only the pictograms and the warning according to article 1 of the present Ordinance."

2. The Process to Adopt the Single Presentation Regulation

113. The Parties are in dispute as to the process that led to the adoption of the SPR. According to the Claimants, with little preparation and specifically without any thorough and meaningful studies, the Respondent devised the SPR simply because Dr. Abascal, the Director of the MPH's Tobacco Control Program, had witnessed customers in a store receiving *Marlboro Gold* packs when they asked for *Marlboro* "*light*" cigarettes, and he then, single-handedly, drafted the regulation.[80] The Respondent argues that the SPR was adopted pursuant to the same deliberative process as other tobacco control measures, and rejects the Claimants' contention that its adoption was

[79] Ministry of Public Health Ordinance 466, 1 Sep. 2009 (C-43). The Ordinance also restated the obligation that a legend be established on the side of the package. Sections 2 and 3 read in relevant part:

> *2. It is herein established that one of both side panel of any packet of cigarettes and packages of tobacco products shall be totally occupied by the following message: "This product contains nicotine, tar and carbon monoxide", without any specification of the quantities thereof. The text shall be printed in black characters on white background.*
>
> *3. Each brand of tobacco products shall have a single presentation, and only the images and messages will vary according to the first section of this Ordinance [relating to pictograms].*

[80] CR, ¶ 44; Witness Statement of Nicolas Herrera of 28 Feb. 2014 ("**Herrera Statement I**" (CWS-6), ¶¶ 3-4; *see also* Second Witness Statement of Nicolas Herrera of 26 Mar. 2015 ("**Herrera Statement II**") (CWS-19), ¶¶ 4-5; *See also* CR, ¶¶ 52-54.

based on a single public health official's "visit to a store"[81] or that it was unilaterally adopted by a single government official without any meaningful deliberation.[82]

114. According to Dr. Abascal's account, after the implementation of Law 18,254, the Tobacco Control Program in consultation with the Advisory Commission considered both plain packaging and single presentation requirements as a way to (a) further implement the mandate of Article 11 of the FCTC; and (b) counteract tobacco companies' desire to circumvent the 2005 ban on descriptors such as "light" through the use of brand variants to maintain the perception that one brand variant was less harmful than another.[83] The Advisory Commission decided that "Uruguay was not ready to adopt plain packaging" and "opted for single presentation."[84] Mr. Jorge Basso, the then-director of the *Dirección Nacional de Salud*, asked Dr. Abascal to submit a draft proposal to this effect for the next regulation on tobacco product packaging.[85]

115. On 8 July 2008, Abal's representatives met with Dr. Abascal to "discuss the details regarding Decree 284." According to Abal's account, during the meeting, Dr. Abascal explained "his general interpretation on [the] implementing regulation, including what he considers to be a relation between descriptors and colors,"[86] but he did not mention the possibility of requiring a single presentation for all brands.[87]

116. On 25 July 2008, Attorney R. Becerra of the *Dirección General de Salud* (General Directorate of Health) of the MPH sent a draft ordinance to the Tobacco Control Program, telling the latter to add the pictograms and descriptions to be incorporated in

[81] RR, ¶ 3.83, citing CR, § I.A.2.a., p. 20.

[82] RR, ¶ 3.83, citing CR, § I.A.2.a., p. 20; *see also* RR, ¶¶ 3.85-3.87; Abascal Statement I (RWS-1), ¶ 10; Witness Statement of Dr. Jorge Basso Garrido, 11 Sep. 2015 ("**Basso Statement**") (RWS-4); Witness Statement of Dr. Ana Lorenzo, 18 Sep. 2015 ("**Lorenzo Statement**") (RWS-6); Witness Statement of Ms. Amanda Sica of 14 Sep. 2015 ("**Sica Statement**") (RWS-5).

[83] Abascal Statement I (RWS-1), ¶ 10; *see also* Lorenzo Statement (RWS-6), ¶ 13.

[84] Abascal Statement I (RWS-1), ¶ 10.

[85] Basso Statement (RWS-4), ¶ 10; Lorenzo Statement (RWS-6), ¶ 16.

[86] Regulatory Update, Philip Morris Latin America and Canada Inc., Jul. 2008 (C-488), p. 5. In addition, on 24 July 2008, BAT informed Abal representatives that the MPH intended to allow one design per brand in reaction to tobacco companies' attempt to circumvent the ban on using color combinations, letters and others "to make it seem as though a given product is less harmful than other." *See* Email from Javier Ortiz to Chris Dilley, 24 July 2008 (C-343).

[87] Dilley Statement I, ¶ 6.

cigarette packages in accordance with Article 1 of the Ordinance.[88] The draft did not contain the single presentation requirement.[89]

117. On 28 July 2008, the draft Ordinance was sent from the Tobacco Control Program to the *División de Salud de la Población* (Division of Population Health). The new draft expressly referred to Article 8 of Law 18,256 (addressing the ban on the use of terms, descriptive elements, etc., that have the effect of creating the false impression that a particular tobacco product is less harmful than others), and contained a new Article 3 providing for the SPR.[90] The draft also contained the requested pictograms.

118. On 30 July 2008, the *División de Salud de la Población* sent the draft to the *Dirección General de Salud*. On 31 July 2008, attorney Rodolfo Becerra, of the General Directorate, submitted the new version of the proposal "to the consideration of the *Dirección."*[91]

119. On 1 August 2008, Dr. Jorge Basso, Director of the *Dirección Nacional de Salud*, sent the draft back to the *Departamento de Secretaría y Acuerdos de la División Jurídico Notarial* containing a hand-written note to be added to Article 3 in order to prohibit descriptive elements or signs "such as colors, combinations of colors, numbers or letters."[92]

120. Uruguay adopted Ordinance 514 on 18 August 2008, with the approval of the Minister of Public Health (Ms. María Julia Muñoz), and the signature of the Director of the *Departamento de Secretaría y Acuerdos*.[93]

(ii) The 80/80 Regulation

1. The Regulation

121. On 15 June 2009, Presidential Decree 287/009 was enacted. It entered into force on 22 December 2009. Article 1 mandated an increase in the size of health warnings on

[88] Ministry of Health Administrative File regarding Ordinance 514 (C-334) p. UGY001807.

[89] *Ibid*.

[90] *Ibid*., p. UGY001810-1812.

[91] *Ibid*., p. UGY001822. *See* handwritten note reading "*con la formulación que antecede pase a consideración de la Dirección*."

[92] *Ibid*., p. UGY001822-1825.

[93] *Ibid*., P. UGY0001838.

cigarette packages from 50 to 80 per cent of the lower part of each of the main sides of every cigarette package, as follows:

> *It is ordered that the health warnings to be included on packages of tobacco products, including images and/or pictograms and messages, shall cover 80% (eighty per cent) of the lower part of each of the main sides of every cigarette package and in general of every packet and container of tobacco products and of any similar packaging and labelling.*[94]

122. As a result of the measure, tobacco companies had to limit their branding in the remaining 20% of the front and back of the packaging.

123. On 1 September 2009, **Ordinance 466** of the MPH restated in its Section 1 the requirement that tobacco packages should have an 80% health warning as follows:[95]

> *It is herein ordered that the pictograms to be used in the packages of tobacco products are defined in six (6) images combined with the corresponding legends (back and front), which shall be printed in the 80% lower area of both main panels of any unit packet of cigarettes and in general in any packet and package of tobacco products[…]..*

2. The Process of Adoption of the 80/80 Regulation

124. As with the SPR, the Parties provide different accounts of the process leading to the adoption of the 80/80 Regulation.

125. The Claimants argue that the 80/80 Regulation was the result of a decision to penalise Mailhos for its evasion of the SPR through the introduction of the so-called "alibi brands." Before the introduction of the SPR, Mailhos, Abal's main competitor, marketed its brands under the "Coronado" label. After the adoption of the SPR, Mailhos adopted boxes with the colors and designs of the former "Coronado" range, but ostensibly under different brands, namely "Madison" (silver) and "Ocean" (blue). It was clear that they all pertained to the same family of products and as such were "alibis."[96] For its part, the Respondent alleges that the 80/80 Regulation originated in the Office of the President of the Republic, in the wake of Uruguay's decision to adopt

[94] Presidential Decree 287/009 dated 15 Jun. 2009 (C-4), Art. 1. *See also* Dec. Jur., ¶ 4; C-CM, Jur., ¶ 33; CM, ¶ 44; CR, ¶ 158; RCM, ¶ 3.123.

[95] Ministry of Public Health Ordinance 466 dated 1 Sep. 2009 (C-43). *See also* CM, ¶¶ 21, 28, 44; CR, n. 246.

[96] CR, ¶¶ 68-73. The Claimants cite that internal documents mention, apart from the documents submitted below, Dr. Abascal's statement during a radio interview in 2009, and internal communications of the Claimants. "Acusaciones a tabacalera," Radio el Espectador 7 Apr. 2009, (C-277).

additional control measures to implement its obligations under the FCTC and its guidelines.[97]

126. On 3 April 2009, Dr. Abascal of the Tobacco Control Program sent a letter to the *Dirección General de Salud* expressing concerns about the use of alibi brands by Mailhos:

> *Since May 31st of the year 2005, when the decree was enacted that prohibited deceptive terms, which was later also adopted in Law 18,256, attempts have been made time and again to avoid compliance with the legal provisions. Every time measures have been taken in an endeavor to correct the situation, there is an attempt once again to avoid compliance with those provisions. Therefore, it is this Program's understanding that consideration should be given to expanding the pictograms and legends to 90% of both main faces, as is expressly authorized by Article 9 of Law 18,256 when it states '[s]aid warnings and messages must be approved by the Ministry of Public Health, must be clear, visible, and legible, and must occupy at least 50% (fifty percent) of the total principal exposed surfaces.'*[98]

127. On 16 April 2009, Attorney Becerra addressed an advisory opinion to the *Dirección General de Salud*, informing the Directorate of the Tobacco Control Program's proposed 90% increase of the health warnings and referring to Mailhos' alleged lack of compliance with the SPR. He also suggested plain packaging as an alternative.[99]

128. On 15 April 2009, Mr. Eduardo Bianco, a member of the Advisory Commission, met with President Vázquez to discuss Uruguay's next steps in terms of tobacco control measures. Based on Dr. Bianco's contemporaneous account of the meeting, the President approved his suggestion of increasing the health warning to the extent legally practicable. This was to be implemented by the MPH by 2010.[100] The relevant documentation does not contain any reference to Mailhos' alleged violation of the SPR.

129. The Respondent's witnesses state that sometime thereafter, the President encouraged and authorized the MPH to increase the size of the warning labels. The Tobacco Control

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[97] RR, ¶¶ 4.10-4.11; RCM, ¶¶ 5.60-5.65. Email from Eduardo Bianco to Minister María Julia Muñoz & Director-General Jorge Basso, Ministry of Public Health, 2 Dec. 2007, (R-383) Bates No. UGY0000325; E. Bianco, *The Implementation of the Framework Convention: The Role of Civil Society*, VIII Congress on the Prevention and Treatment of Tobacco Consumption, 19 Feb. 2009 (R-389) Bates No. UGY0002092.

[98] Letter from Dr. Abascal to the Director General of the MPH, 3 Apr. 2009 (C-338), p. 2 (English text).

[99] *Ibid*., p. 11 (Spanish text) (R-377) (including English translation of relevant note at p. 7).

[100] Letter from E. Bianco, Uruguayan Tobacco Epidemic Research Center (CIET), to President Tabaré Vásquez, 16 Apr. 2009, and email sending same (R-208) p. 5.

Program then requested an opinion from the Advisory Commission regarding the appropriate size of the warnings. The Advisory Commission concluded that warnings covering 80% of both faces were appropriate and submitted its recommendation to the MPH through the Tobacco Control Program.[101] After being submitted to the necessary consultation levels at the MPH, the Decree was sent back to the President's office for review and approval. The Decree was signed by the President and the Cabinet of Ministers on 15 July 2009.[102]

130. In May 2009, representatives of PMI met with representatives of the Tobacco Control Program and the Advisory Commission. According to a contemporaneous account by PMI's representatives, during the meeting Dr. Abascal suggested that the President's measure "might have been motivated on punishing Mailhos."[103] Both Dr. Abascal and Dr. Lorenzo, who were also present at the meeting, reject that characterization of the conversation.[104]

131. On 30 June 2009, the Director of the *Dirección General de Salud* archived the letter referred to in paragraph 126 above, with a note explaining that the health warnings had already been increased by Decree.[105] Dr. Abascal declares that "neither my Memorandum nor its recommendation, nor my own statements affected the decision to increase the health warnings."[106]

132. Documentary evidence submitted by both Parties indicates that the decision to increase the size of the health warning levels was an initiative implemented on the instructions of the President's Office.[107]

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[101] Witness Statement of Dr. Eduardo Bianco, 15 Sep. 2014 ("**Bianco Statement**") (RWS-2), ¶¶ 16-20; Abascal Statement I (RWS-1), ¶¶ 16-18; Muñoz Statement (RWS-3), ¶¶ 20-22.

[102] Muñoz Statement (RWS-3), ¶ 22.

[103] Email from Federico Gey to Javier Ortíz, 3 Jun. 2009 (C-339); Email from Federico Gey to Javier Ortíz, 13 Jul. 2009 (C-340).

[104] Lorenzo Statement (RWS-6), ¶ 25; Abascal Statement II (RWS-7), ¶ 25.

[105] Letter from Dr. Abascal to the Director General of the Ministry of Public Health, 3 Apr. 2009 (C-338), p. 7 (Spanish text); *see also* Basso Statement (RWS-4), ¶ 16; Abascal Statement II (RWS-7) ¶ 23.

[106] *See* Abascal Statement II (RWS-7), ¶ 23.

[107] *See* Email from Federico Gey to Javier Ortíz, 3 June 2009 (C-339) (stating that Dr. Abascal had explained that the proposal to enlarge the health warnings was not coming from his office, that it was a Presidential initiative and that PMI had confirmed through the media relations agency that President's advisors were the ones making the announcement in national press about the potential increase). *See also* "Encuesta gigante sobre tabaquismo," El País, 31 May 2009 (C-136), p. 2. *See also* Uruguayan Ministry of Public Health *Commitment to the Health of the Population: Strengthening the Anti-Tobacco Campaign*, 1 June 2009 (R-37), p. 2.

C. The alleged effects of the Challenged Measures

133. The adverse health effects of tobacco consumption are not in dispute before the Tribunal.[108] Rather, the Parties disagree as to whether tobacco use and/or smoking prevalence has increased, remained constant, or decreased in Uruguay as a result of the SPR and/or the 80/80 Regulation.[109] The Parties further disagree on whether the Challenged Measures have created incentives for consumers to turn to the illicit/irregular market.[110]

134. This Section accordingly summarizes the Tribunal's understanding of the status of tobacco consumption, the illegal trade, and market competition in the tobacco industry in the relevant period, based on the documentary evidence available in the case record.

a. Tobacco Use in Uruguay Before and After the Challenged Measures

135. The Parties are in agreement on two issues relating to the evaluation of tobacco consumption. First, they agree that any correlation between one individual tobacco control measure and overall consumer behaviour is difficult to establish.[111] Particular control policies cannot be taken in isolation from other strategies which form the basis of a State's control program, or from general socio-economic conditions. Second, the impact of tobacco control policies takes time before they are clearly visible.

136. From 1998 to 2006, smoking prevalence in adults remained at around 32%.[112] The documentary evidence suggests, however, that tobacco use in Uruguay has been in decline for the last decade.[113] According to the 2014 International Tobacco Control Policy Evaluation Project ("**ITC**"), the smoking prevalence rate decreased to 25% in

[108] CR, ¶ 30; RCM, ¶¶ 3.1-3.65, 4.1-4.59; *See also*, Claimants' Opening Arguments, stating that "for many years, PMI has publicly described the adverse health effects of smoking. We respect the need for strict regulation. PMI understands the public-health community's concerns about tobacco." Tr. Day 1, 36:14-17; Report of Dr. Jonathan M. Samet, 10 Oct. 2014 (REX-1); David M. Burns, M.D., Report on Dennis Deshaies, 21 Oct. 2013, presented in *Deshaies v. R.J Reynolds Tobacco Co.*, Case No. 3:09-cv-11080-WGY-JBT (M.D. Fla.) (RE-277).

[109] *See*, *e.g.*, CR, ¶¶ 82-86 and RCM, ¶¶ 5.5-5.14.

[110] CR, ¶¶ 87-96.

[111] CR, ¶¶ 97-98; RCM, ¶ 6.18.

[112] *GATS Uruguay 2009* (R-233), p. 21.

[113] In this regard, Euromonitor, an industry monitoring agency, indicates that the "[t]he strict Uruguayan legislation forbidding smoking in public areas, the total ban on advertising and sponsoring of sports and cultural plus the crude warnings on cigarettes and other tobacco products packs have contributed to the acceleration in the declining rates of smoking prevalence since 2005 onwards." Euromonitor International, *Tobacco in Uruguay*, Oct. 2014 ("**Euromonitor 2014**"), (C-373), p. 4*; see also* Euromonitor 2009, p. 1 ("[F]or the third consecutive year the tobacco market in Uruguay faced a significant decline.") (R-215).

2009,[114] and then further to 23.5% by 2011.[115] Official data from the *Centro de Investigación de la Epidemia del Tabaquismo* ("**CIET**"), indicated that smoking prevalence in Uruguay had dropped to levels below 20% in 2012[116] and got closer to the 19% mark in 2013.[117]

137. Other studies have found that the proportion of pregnant Uruguayan women who quit smoking in their third trimester increased markedly from 15% to 42% between 2007 and 2012.[118] The studies posited that "the tobacco control campaign, taken as a whole, was in fact responsible for the marked increase in quit rates."[119]

138. With regard to young smokers, in 2007, 23.2% of adolescents aged 13 to 15 years used tobacco products.[120] As of 2009, most young smokers began their tobacco consumption at age 16.[121] Among young smokers, female consumption appears to be surpassing male consumption.[122] In 2009, 18.4% of secondary school students were current smokers, including 21.1% of females and 15.5% of males. In 2011, the prevalence had decreased to 14.1% of female and 11.9% of male secondary school students.[123]

139. The parties are also in dispute as to whether the proper way of determining the effect of the Challenged Measures on Uruguayans' health is tobacco prevalence (*i.e.* the

[114] *See* International Tobacco Control (ITC) Policy Evaluation Project, *ITC Uruguay National Report: Findings from the Wave 1 to 4 Surveys* (2006-2012) Aug. 2014, ("**ITC 2014**") (R-313) p. 20, citing *GATS Uruguay 2009* (R-233) p. 42. The survey was conducted among others under the auspices of the PAHO/WHO and the US Centre for Disease Control and Prevention from 19 Oct. 2009 to 4 Dec. 2009; *see also*, Euromonitor International, *Tobacco in Uruguay*, Oct. 2012 ("**Euromonitor 2012**") (R-417), p. 4, referring to the *GATS Uruguay 2009* (R-233).

[115] ITC 2014, (R-313), p. 20, citing the National Statistics Institute Household Survey, 2001.

[116] *See* Euromonitor International, *Tobacco in Uruguay*, Oct. 2013 ("**Euromonitor 2013**") (C-121) pp. 1, 3, referring to official data from the CIET.

[117] *See* Euromonitor 2014 (C-373), p. 1, referring to official data from the CIET.

[118] Harris JE, Balsa AI, Triunfo P., *Tobacco control campaign in Uruguay: Impact on smoking cessation during pregnancy and Birth Weight, National Bureau of Economic Research. Working Paper 19878*. Cambridge MA (Jan. 2014) (R-287), pp. 12, 24; see also, PAHO Amicus Brief, ¶ 90.

[119] *See* Harris J.E. (R-287), p. 24.

[120] PAHO Amicus Brief, ¶ 25 (citing the 2007 Global Youth Tobacco Survey (GYTS), Uruguay, Fact Sheet, (ages 13-15)). *See also* Pan American Health Organization (PAHO) & World Health Organization (WHO), Tobacco Control Report for the Region of the Americas (2013) (R-267), p. 59.

[121] *GATS Uruguay 2009* (R-233), p. 16.

[122] According to the GATS 2009 Survey, this may result from tobacco companies' strategies of focusing its advertising in young women deliberately linking smoking to greater independence and gender equality. (R-233), p. 55.

[123] ITC 2014 (R-313), p. 20.

percentage of the population that smokes) or tobacco consumption (the number of cigarettes consumed).[124]

140. The Tribunal notes that Euromonitor, the market research firm heavily relied on by the Claimants,[125] refers to the figures of "tobacco prevalence" and not to the general volume of sales to assess the state of tobacco use in Uruguay.[126] These reports, which were submitted into the record from the years 2008 to 2015 by both Claimants and the Respondent, confirm the decline of tobacco prevalence in Uruguay.[127] In particular the 2014 report states:

> *According to the […] CIET the smoking prevalence in Uruguay keeps declining and in 2013 it fell towards the 19% mark. Restrictive measures that put increasing pressure on the industry and smokers since the first bans were put in force in 2005 resulted in a significant reduction in the total number of smokers, especially between 2008 and 2012. However, this fall in prevalence shows significantly faster rates than the decline of volume sales during the review period, which means that those still smoking are doing it more intensively, or at least purchase more cigarettes.*[128]

141. The record also shows that Uruguay has received considerable support from the international public health community for the Challenged Measures, including from the

[124] CR, ¶ 99; RCM, ¶ 6.15.

[125] *See* CR, ¶¶ 82-86; 91-92.

[126] *See e.g*. Euromonitor International, *Tobacco in Uruguay* yearly reports Sep. 2008 ("**Euromonitor 2008**") (C-120), pp. 1-2; Sep. 2009 (R-215), p. 2; Aug. 2010 (R-229) p. 3; Euromonitor International, *Tobacco in Uruguay*, Aug. 2011 ("**Euromonitor 2011**") (R-412), p. 4; Euromonitor 2012 (R-417), p. 4 (see also p. 1 noting that "2011 ended with the undisputed reality that despite all the government measures to fight […] cigarette smoking, a lessening of the tax pressure and the good economic conditions prevailing in the country combined to produce the first positive volume in growth in cigarette in many years"); Euromonitor 2013 (C-121) pp. 1-3 (noting that "smoking prevalence declin[ed] sharply since 2009" and that "restrictive measures that put increasing pressure on the industry and smokers since the first ones were put in force in 2005 have resulted in a significant reduction in the total number of smokers, especially since 2009"); Euromonitor 2014 (C-373), p. 4; Euromonitor 2015 (AG-49), p. 4.

[127] *Id.* Nevertheless, the data provided in these reports is inconsistent. For example, the figures reflecting tobacco prevalence for 2008 and 2009 as reflected in the 2010 report (R-229) are different to the figures provided for those same years (2008, 2009) in the 2014 report (C-373). Similarly, the tobacco prevalence figure for the year 2011 is different in the 2012 (R-417) and the 2015 reports (AG-49).

[128] Euromonitor 2014 (C-373), p. 1.

WHO,[129] PAHO,[130] the Mercosur Member States,[131] and the private sector.[132] PAHO for example explains:

> *[A]n assessment of the impact of national tobacco control policies on three dimensions of tobacco use in Uruguay (per person consumption, adolescent prevalence, and adult prevalence) demonstrates consistent decreases in smoking in Uruguay since the country initiated a comprehensive control program in 2005.*[133]

142. The International Tobacco Control Policy Evaluation Project assesses the impact of the SPR and 80/80 Regulation as follows:

> *The percentage of smokers who reported that warning labels on cigarette packs were a reason to think about quitting increased from 25% in 2008-09 (when the warnings were symbolic and covered only 50% of the front and back of the pack) to 31% in 2010-11 and 30% in 2012 (when the images were more graphic and covered 80% of the front and back of the pack). In addition, gaps in smokers' awareness of stroke and impotence as smoking-related health effects were reduced after the introduction of pictorial health warnings specifically addressing these health effects.*
>
> *The ITC Uruguay Survey provides modest evidence of a positive impact of the single presentation policy. The percentage of smokers who had false beliefs that light cigarettes are less harmful than regular cigarettes decreased from 29% before the single presentation policy to 15% after the policy. However, in 2012, 29% of smokers stated that their current brand is a "light", "mild", or "low tar" brand and the majority (91%) of smokers believe that although Uruguay has implemented a single presentation policy, the same cigarettes are being sold under different names.*[134]

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[129] *See* WHO Amicus Brief, ¶ 90. *See also*, World Health Organization 62ND Session of the Regional Committee and Pan American Health Organization 50th Directing Council, Resolution CD50.R6 adopted with regard to *Strengthening the Capacity of Member States to Implement the Provisions and Guidelines of the WHO Framework Convention on Tobacco Control*, 29 Sep. 2010 (R-230) (endorsing the SPR); Memorandum of Understanding between the Secretariat of the WHO Framework Convention for Tobacco Control and the Uruguayan Ministry of Public Health, 21 May 2014, (R-301-bis) (showing the FCTC Secretariat support for the creation of the International Cooperation Center on Tobacco Control (ICTC) within the Ministry of Public Health).

[130] *See* PAHO Amicus Brief, ¶ 99; *See also*, Pan American Health Organization (PAHO), "Director Carissa Etienne's Presentation on Tobacco Control: 'PAHO commits itself to continue supporting the leadership path that the country has taken", 2 May 2014 (R-300).

[131] Joint Communiqué of the Presidents of the Member States of MERCOSUR (29 Jul. 2014) (R-311).

[132] "Bloomberg Philanthropies Honors Uruguay's Efforts To Fight Big Tobacco," PR Newswire (22 Mar. 2012), Bates No. UGY0003430 (R-415).

[133] PAHO Amicus Brief, ¶ 89 (citing Abascal W, Esteves E, Goja B, Gonzale Mora F, Lorenzo A, Sica A, Triunfo P, Harris JE. *Tobacco Control Campaign In Uruguay: A Population Based Trend Analysis*, Lancet Vol. 380 3 Nov 2012).

[134] ITC 2014 (R-313), p. 5; *see also* PAHO Amicus Brief, ¶¶ 87-88. The reliability of ITC Evaluation project is disputed by the Claimants, considering that it did not study actual consumer behavior (*i.e.* whether consumers actually quit smoking), but instead focused on what smokers thought about or what they were more likely to think about. CR, ¶ 98. The International Tobacco Control Policy Evaluation Project (ITC) is an international research collaboration across 23 countries, including Canada, the US, the UK, Australia, France, Germany, the Netherlands, Brazil, India and others. ITC Uruguay Survey is a national survey conducted by researchers from

143. The 2012 ITC Survey Report says that:

> *[W]arning effectiveness remained unchanged or decreased slightly[…], after the warnings changed to smaller set of more symbolic images in 2008, covering 50% of the packages. At Wave 3, after implementation of larger, more graphic warning covering 80% of the package, warning effectiveness increased to levels higher than Wave 1, demonstrating that large, graphic images with clear health messages are more effective than smaller, more abstracts warnings.*[135]

b. Claimants' Investments and Market Competition Before and After the Challenged Measures

144. It is undisputed that after the entry into force of the SPR, Abal eliminated seven of its thirteen variants (namely *Marlboro Gold, Marlboro Blue, Marlboro Fresh Mint, Fiesta Blue, Fiesta 50/50, Phillip Morris Blue,* and *Premier).*

145. The graph below produced by the Claimants in their pleadings shows the number of family brands pertaining to the Claimants originally sold in Uruguay, and the variants that were taken off the market.[136]

146. The eliminated variants accounted for roughly 20% of Abal's domestic sales.[137]

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the Department of Sociology at the University of the Republic of Uruguay, the Research Centre for Tobacco Epidemic (CIET), and the National Institute of Public Health of Mexico - University of South Carolina in collaboration with the ITC Uruguay Project team centered at the University of Waterloo in Canada. ITC 2014 (R-313), p. 16.

[135] International Tobacco Control Policy Evaluation Project, *ITC Uruguay National Report: Findings from the Wave 1 to 3 Surveys (2006-2011)* Aug. 2012, ("**ITC 2012**") (C-133), p. 39. According to Euromonitor, "the increase in the size of the warnings and the use of images have contributed to the decline in sales of all tobacco products, but especially sales of cigarettes." Euromonitor 2014 (C-373), p. 5; *See also* Euromonitor 2011 (R-412), p. 39.

[136] *See also* Tr. Day 1, 22:4-6.

[137] Expert Report of Brent C. Kaczmarek and Kiran P. Sequiera, 3 Mar. 2014 ("**First Navigant Report**") (CWS-013), ¶ 74; *See also* CR, ¶ 27.

147. In late 2009, after the SPR had entered into force and after the 80/80 Regulation had been adopted but before it entered into force on 22 December 2009, the Claimants withdrew *Premier Extra* and *Galaxy* from the market.[138] Four of Abal's thirteen variants remain in the market: *Marlboro Red, Casino, Fiesta* and *Phillip Morris*.[139]

148. The Claimants contend that the Challenged Measures have also dramatically shifted the competitive landscape and that they have created incentives for consumers to turn to the illicit/irregular market.

149. Claimants' expert, Mr. B. Kazmarek, indicated that by 2008, Abal's market share of the Uruguayan market was 13.5%;[140] it rose to 20.4% by 2010, allegedly after Abal had implemented price reductions for some of its variants, and then decreased again to similar levels as in 2008, with 13.9% by 2013.[141] This is not disputed by the Respondent.[142]

150. Besides Abal, there are two tobacco companies that legally sell their products in Uruguay:

- Compañía Industrial de Tabacos Monte Paz S.A. ("**Monte Paz**" or "**Mailhos**"), a domestically owned company, which held a market share somewhere between 75% and 85% between 2007 and 2013.[143] Monte Paz is Abal's main competitor.

- British American Tobacco (South America) Limited Sucursal Uruguay ("**BAT**"), another multinational company, which closed its Uruguayan factory in 2003, and began importing the brands it commercialized from Argentina and Chile. In 2007, it held 7% of the Market, which decreased to less than a 2% market share as of 2012.[144] According to Euromonitor, BAT "finally withdrew from the Uruguayan market in mid-2010."[145] BAT continued nevertheless to have a presence in the

[138] RCM, ¶ 9.82; Witness Statement of Mr. Diego Cibils of 28 Feb. 2014, (CWS-004), ¶ 18.

[139] RCM, ¶ 9.83.

[140] *See* First Navigant Report (CWS-013), ¶¶ 79 and 82, Figures 11 and 13 and Appendix K-1. The Tribunal notes that according to Euromonitor, Abal Hermanos' market-share as of 2008 was of 16% and as of 2013 it increased to 17%. See Euromonitor 2009 (R-215), p. 14; and Euromonitor 2014 (C-373), p. 17. ITC 2014 Report states that "Abal controls around 16% of the market" by 2012 (ITC 2014, (R-313), p. 27).

[141] First Navigant Report (CWS-013), ¶¶ 79 and 82, Figures 11 and 13 and Appendix K-1.

[142] *See* RCM, ¶ 7.39.

[143] It held 76% as of 2007. *See* Euromonitor 2008 (C-120), p. 36; 84% in 2010, *see* Euromonitor 2011 (R-412), p. 17; 85% in 2011, Euromonitor 2012 (R-417), p. 20; 83% in 2013, Euromonitor 2014 (C-373), p. 19.

[144] ITC 2014 (R-313), p. 27. According to the ITC 2012 (C-133), p. 12, BAT's market share was 4% as of 2011.

[145] Euromonitor 2011 (R-412), p. 2.

Uruguayan market, by selling cigarettes in the Department of Maldonado through a distributor.[146]

151. With regard to illicit trade, Euromonitor explained already in its 2008 report, that "[a]n unwanted if not unexpected result from all government measures, and especially from the price increases of 2005 and 2007, was the growth of illicit trade."[147] Euromonitor further considered that "[i]llicit trade, which had remained relatively stable at around 17% of total sales, with small fluctuations tied to price variation of legitimate brands, started to grow in 2008 and reached almost 23% in 2010."[148] In particular, it held:

> *Illicit trade which had continued fluctuating between 17% and 21% of the total sales (estimated at 20.9% in 2012), with small variations is usually tied to price increases of legitimate brands. Despite an apparently stronger pressure from the customs authority and the Ministerio de Economía y Finanzas, there is a steady flow of illegal brands from Paraguay, Brazil and to a lesser degree, Argentina.*[149]

152. There is apparently no official data available on illicit trade of tobacco in Uruguay. Estimates of the current illicit share of the total cigarette market, according to the evidence in the record, were in 2011 and 2012 between 17% to 25% of all sales.[150]

D. The Challenges to the Regulations before the Uruguayan Courts

153. Section D summarizes the proceedings lodged by Claimants before the Uruguayan courts in connection with the Challenged Measures, in particular: (1) before the *Tribunal de lo Contencioso Administrativo* ("**TCA**") seeking to declare invalid Ordinance 514 and its single presentation requirement; and (2) before the TCA and the Supreme Court of Justice ("**SCJ**") relating to the 80/80 Regulation. The decisions rendered in these cases are the basis of the Claimants' denial of justice claims, which are dealt with in Section V (F) below.

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[146] ITC 2014 (R-313), p. 27.

[147] Euromonitor 2008 (C-120), p. 1.

[148] Euromonitor 2011 (R-412), p. 10; In its 2012 report Euromonitor confirms that illicit trade continues to fluctuate between 17% and 21% (R-417).

[149] Euromonitor 2014 (C-373), p. 12. *See* also Euromonitor 2012 (R-417), p. 11. *See also* Euromonitor 2011 (R-412), p. 8 *("Ilicit trade has increased significantly as a result of price hikes and illicit brands now account for an important share of volume sales.")*

[150] *See* Euromonitor 2012 (C-121), p. 11 (referring to "illicit trade fluctuating between 17% and 21%") and ITC 2014 (R-313), p. 27 (citing estimates between 22% and 25%); *see also* ITC 2012 (C-133), p. 12 (referring to the same fluctuation.

a. Proceedings Before the *Tribunal de lo Contencioso Administrativo* (TCA) Relating to the SPR

154. On 18 September 2008, Abal presented an administrative challenge to the SPR before the MPH.[151] On 13 April 2009, the challenge was rejected by operation of law when the Ministry did not rule on it within 120 days.[152]

155. On 9 June 2009, Abal filed an *accion de nulidad* before Uruguay's TCA to annul Article 3 of Ordinance 514, which imposed the SPR.[153] Abal set out three separate bases for its application. *First*, the SPR was "manifestly illegal because it exceeds and contradicts the legal provisions it is intended to implement" (Law 18,256 and the Decree 284) as those norms did not impose any prohibition on multiple presentations but only against "misleading packages."[154] *Second*, the Ordinance is "manifestly illegal because it imposes an entirely new prohibition on variants" that the MPH has no authority to impose.[155] *Third*, it considered Ordinance 514 to be "manifestly illegal because it violates the principle of '*reserva de la ley*' by restricting Abal's constitutional rights in a manner that may only be accomplished, if at all, […] by a formal law enacted by Parliament."[156]

156. On 30 July 2010, the *Procurador del Estado de lo Contencioso Administrativo* (State Attorney) submitted an opinion to the TCA supporting Abal's challenge.[157] It concluded that Ordinance 514 should be annulled as "neither the […] Law nor its Decree limit the number of products that may be sold under one brand and, therefore, the limitation imposed exceeds the norms it regulates."[158]

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[151] Abal's Administrative Opposition against Ordinance 514, Sep. 2008 (C-35); RCM, ¶ 11.51.

[152] *See* Abal's Request for Annulment of Ordinance 514 Before the TCA *("***Abal's SPR Annulment Request**"), (C-41), p. 11. *See also*, Legal Opinion of Prof. Felipe Rotondo, 22 Sep. 2014 (REX-7), ¶ 9.

[153] Abal's SPR Annulment Request (C-41).

[154] *Ibid.*, (C-41), pp. 12-19, § IV.A.

[155] *Ibid.*, (C-41), pp. 19-25, § IV.B.

[156] *Ibid.*, (C-41), pp. 27-29, § IV.C. Claimants define the principle of *reserva de la ley* as one providing that "only the legislature has the power to severely impair constitutional rights, including property rights," while the Respondent considers that the principle "posits that fundamental rights may be limited only through the law."

[157] Opinion of the State Attorney in Administrative Litigation, 30 Jul. 2010 (C-141).

[158] *Ibid.*, (C-141), p. 1; *See also* Tr. Day 1, 35:18-22. The State Attorney also stated that: "*the purpose of the Law and its Decree is the protection of individuals so that they are not misled with the slogans on the product labels. However, provided that those guidelines are respected, the existence of more than one product of the same brand does not in any way affect or harm the legally protected interest that is meant to be protected."* (p. 2).

157. British American Tobacco ("**BAT**"), one of Abal's competitors as described above, also filed an annulment application challenging the legality of Ordinance 514 before the TCA. In its application, BAT also alleged that the Ordinance violated the principle of "*reserva de ley*."[159]

158. On 14 June 2011, before rendering its decision on BAT's case, the TCA rejected Abal's challenge.

159. In its decision, the Court referred three times to BAT.[160] The TCA also discussed a statement by Dr. Abascal that was not part of Abal's submission before the TCA.[161]

160. On 24 August 2011, Abal filed a motion for clarification and expansion of the TCA's decision.[162] Abal argued that the TCA had erroneously rejected Abal's application by considering "another company" with "other tobacco products," and on the basis of "other arguments" and "other evidence," different to that presented by Abal.[163] Abal alleged, in short, that the TCA's Decision had been made on the basis of evidence and arguments submitted by BAT, and not Abal, including a statement by Dr. Abascal not included in Abal's file.[164]

161. On 29 September 2011, the TCA rejected Abal's motion for clarification and expansion in a one-page document, considering, *inter alia*, that there was no omission regarding "some essential point of the case," and that a revision was not justified, as the decision took into account and considered the "*ratio*" of the relevant legal provision. [165]

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[159] British American Tobacco's Complaint in Challenge to Ordinance 514 (C-127).

[160] TCA Decision No. 509, Case No. 363/2009, 14 June 2011 ("**TCA Decision No. 509**") (C-53; R-242), pp. 7, 12.

[161] *Ibid.*, (C-53; R-242), p. 8; CM, 162.

[162] Abal's Motion for Clarification and Further Judgment for the TCA's Decision on Ordinance 514, 24 Aug. 2011 ("**Abal's Motion for Clarification**") (C-55).

[163] *Ibid.*, (C-55), p. 1.

[164] *Ibid.*, (C-55), p. 1.

[165] TCA Decision No. 801 Rejecting Abal's Appeal for Clarification, 29 Sep. 2011 ("**TCA Decision No. 801**") (C-56); *See also* CM, ¶ 166; RCM, ¶ 11.55.

b. The Proceedings Before the TCA and the Supreme Court of Justice Relating to the 80/80 Regulation

162. On 11 September 2009, Abal filed a constitutional challenge to Articles 9 and 24 of Law 18,256 before the Supreme Court of Justice ("**SCJ**").[166] In its unconstitutionality action, it considered that the Law impermissibly delegated authority to the Executive.

163. The Legislature and the *Fiscal de Corte y Procurador General* intervened during the proceedings before the Supreme Court. In their respective submissions to the Court, they submitted that Law 18,256 did not contain an impermissible delegation of authority to the Executive Power.[167]

164. The basis for this conclusion, according to the Legislature, was that the term "at least" in Article 9 should be understood in the sense of imposing an obligation on tobacco companies to incorporate health warning that may occupy more space -- if the company so desires -- but never less than the fixed minimum of 50%. Law 18,256 also imposed an obligation on the MPH not to approve smaller warnings. Since the Law did not allow the regulation to set a higher percentage of the package to be covered by health warnings, there was no impermissible delegation of authority.[168] Likewise, the State Attorney General also considered that there was "no indication that the Executive Power could establish a higher percentage."[169]

165. On 22 March 2010, Abal filed an *acción de nulidad* before the TCA seeking annulment of the 80/80 Regulation. The TCA suspended its proceedings pending the Supreme Court's decision.

166. On 10 November 2010, the SCJ unanimously dismissed Abal's unconstitutionality action, declaring that Law 18,256 did not grant the Executive Power "the unlimited

[166] Complaint of Abal Hermanos S.A., SCJ Case No. 1-65/2009, 11 Sep. 2009 (R-216); CM, ¶ 169; RCM, ¶ 11.96; CR, ¶ 159.

[167] Legislature's Answer to Abal's Unconstitutionality Action of Law 18,256, 10 Nov. 2009 (C-46) ¶ 4.2. Opinion of the State Attorney General regarding Law 18,256, 8 Feb. 2010 (C-197).

[168] Legislature's Answer to Abal's Unconstitutionality Action of Law 18,256, 10 Nov. 2009 (C-46) ¶ 3.9-3.10.

[169] Opinion of the State Attorney General regarding Law 18,256, 8 Feb. 2010 (C-197), p. 2.

power to restrict individual rights," and therefore there was no impermissible delegation of authority.[170]

167. On 28 August 2012, the TCA rejected Abal's *acción de nulidad* against Decree 287.[171]

E. The Regulatory Framework of Trademarks in Uruguay

168. This section provides a general overview of the legal framework relevant to trademarks in Uruguay. The parties disagree as to whether this regulatory framework confers on trademark owners only the right to prevent others from using the trademarks, or also the right to use the trademarks in commerce. The Claimants maintain it does the latter,[172] while the Respondent states that there is no provision in the law that creates a right to use.[173]

169. The legal framework for trademarks in Uruguay was established by **Law No. 17,011,** enacted on 25 September 1998 (the "**Trademark Law**"), which was implemented by Decree No. 34/99.[174] Trademark protection is based on Article 33 of Uruguay's Constitution which requires the legislature to recognize and protect the rights of creators and inventors.[175]

170. Article 1 of the Trademark Law defines a trademark as "any sign capable of distinguishing goods and services of one natural or legal person from those of other natural or legal persons."[176]

171. Relevant provisions of the Trademark Law include the following:

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[170] Supreme Court Decision No. 1713, "Abal Hermanos S.A. v. Legislative Power et al. – Unconstitutionality Action, Articles 9 and 24 of Law 18,256" Docket File No. 1-65/2009, 10 Nov. 2010 (C-51), p. 4; RCM, ¶ 11.97.

[171] TCA Decision No. 512 on Abal's Request for Annulment of Decree 287/009, 28 Aug. 2012 ("**TCA Decision No. 512**") (C-116).

[172] CR, ¶ 132; To support this proposition, Claimants refer *inter alia* to a decision by the TCA in which it allegedly recognized that trademark holders have the right to the exclusive and effective use of their trademarks *(see Marcelo Lopez, Alejandro Ignacio v. The Ministry of Industry, Energy and Mining*, TCA Decision 189-2012, 15 May 2012 (C-370), p. 8. This will be discussed in section V.B (b)(1)(iii) below.

[173] RR, ¶ 9.30; RCM, ¶ 9.25 – 9.28 (relying inter alia on TCA Decision 933, Case No. 527/2008, 11 Nov. 2010 (RLA-211)).

[174] Law No. 17,011, of 25 Sep. 1998, Establishing Provisions on Trademarks ("**Trademark Law**") (C-135). *See also*, CM, ¶ 86; RCM, ¶ 9.23; Expert Report of Professor Andrea Barrios Kubler, 2 Oct. 2014, ("**Barrios Report**"), (emphasis in the text), (REX-004), ¶ 6.

[175] Constitution of the Oriental Republic of Uruguay, 31 Oct. 2004 (RLA-1 and C-30). *See also*, Barrios Report (REX-004), ¶ 6.

[176] Trademark Law (C-135), Art. 1; *See also*, CM, ¶ 86.

Article 9

The right to a trademark is acquired by registration carried out in accordance with this Law.

Registration of a trademark shall imply the natural or legal person under whose name the trademark is registered in the rightful owner.

Article 11

The exclusive property of a trademark is acquired only over products and services for which registration has been requested.

In the case of a trademark that includes the name of a product or service, the trademark shall be registered exclusively for the product or service included in the trademark.

Article 14

The right to oppose the use of any trademark that could lead to confusion between goods or services shall belong to the person that meets all the requirements of the present law.

172. Both Parties agree that Uruguay's Trademark Law is based on a number of intellectual property conventions to which Uruguay is a Party.[177] These include among others the following:

- The **Montevideo Treaty** of 1892, providing in its Article 2 that "ownership of a trademark or a trade name includes the right to use it…";[178]
- The 1979 Paris Convention for the Protection of Intellectual Property ("**Paris Convention**");[179]
- The 1994 the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**").[180]

173. In addition, Uruguay is a party to the 1998 Protocol on Harmonization of Intellectual Property Norms in MERCOSUR in the Field of Trademarks, Indications of Source and Appellations of Origin (the "**MERCOSUR Protocol**").[181] Article 11 of the Mercosur Protocol reads in relevant part: "[t]he registration of a trademark shall grant the owner

[177] CR, ¶ 110; RCM, ¶ 9.37.

[178] Law No. 2,207, 1 Oct. 1892 (C-367). CR, ¶ 131.

[179] Paris Convention on the Protection of Industrial Property ("**Paris Convention**") (C-AB-04). According to the Respondent, WIPO confirmed that the Paris Convention does not recognize a right to use; RCM, ¶¶ 9.38-9.41.

[180] Notification submitted to the TRIPS Agreement Council on 14 Jul. 1998, WTO Document No. 98-2786 ("**TRIPS Agreement**") (R-AB-52); MERCOSUR Protocol of Harmonization of Rules Regarding Intellectual Property ("**MERCOSUR Protocol**") (R-AB-20).

[181] MERCOSUR Protocol (R-AB-20). *See also* Barrios Report, (REX-004), ¶ 7; RCM, ¶ 9.23.

an exclusive right of use." ("*El registro de marca conferirá a su titular el derecho de uso exclusivo").*

174. In the Claimants' view, the MERCOSUR Protocol has been incorporated into domestic law through **Law 17,052** of 14 December 1998 and so is applicable to all owners of trademarks registered in Uruguay.[182] In the Respondent's view, the MERCOSUR Protocol only applies between State Parties that have ratified it; that is, Uruguay and Paraguay.[183]

V. LIABILITY

175. The Claimants assert that the Respondent has violated each of Articles 3(1), 3(2), 5 and 11 of the BIT. The Tribunal examines in turn, each of the Claimants' claims. To do so, it will first examine the applicable standard for each of the substantive protections allegedly infringed by the Respondent's measures, before examining the merits of each claim.

A. Applicable Law

176. Article 42 of the ICSID Convention provides:

> *Article 42*
>
> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*
>
> *The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.*
>
> *The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute* ex aequo et bono *if the parties so agree.*

177. The governing law in this case is the BIT, supplemented by such rules of international law as may be applicable. The Tribunal has been tasked with determining whether the Respondent has breached its obligations under the BIT. The role of Uruguayan law is important in two respects. On the one hand, it informs the content of the Claimants'

[182] Trademark Law No. 17,052, 14 Dec. 1998 (C-364); *See also* CR, ¶¶ 126, 128; Second Expert Opinion of Gustavo Fischer, 17 Apr. 2015 ("**Second Fischer Opinion**") (CWS-24), ¶ 7.

[183] RCM, ¶ 9.23 n. 938.

rights and obligations within the Uruguayan legal framework, as in the field of trademarks. On the other hand, Uruguayan law also informs the content of commitments made by the Respondent to the Claimants that the latter alleges have been violated.

178. Uruguayan law may be relevant for establishing the rights the State recognizes as belonging to the Claimants. The legality of a modification or cancellation of rights under Uruguayan law, while relevant, would not determine whether such an act may constitute a violation of a BIT obligation.

179. Rather, whether a violation has in fact occurred is a matter to be decided on the basis of the BIT itself and other applicable rules of international law, taking into account every pertinent element, including the rules of Uruguayan law applicable to both Parties.

B. Expropriation under Article 5 of the Treaty

180. It is the Claimants' position that by imposing the SPR and 80/80 Regulation, the Respondent expropriated their investment in violation of Article 5(1) of the BIT.[184] In particular, the Claimants allege that by effectively banning seven of Abal's thirteen variants and substantially diminishing the value of the remaining ones, the Respondent expropriated the Claimants' brand assets, including the intellectual property and goodwill associated with each of the Claimants' brand variants, in violation of Article 5 of the BIT.[185]

181. According to the Respondent, the SPR and 80/80 Regulation cannot be considered expropriatory since they were legitimate exercise of the State's sovereign police power to protect public health.[186] It contends that, in any case, the Claimants' expropriation claim fails on the merits for at least three different reasons.[187] First, after the adoption of the measures, Abal continued to be profitable. In other words, the Challenged Measures have not had such a severe economic impact on the Claimants' business that it has been rendered virtually without value. Second, the Claimants as an investor had no rights capable of being expropriated under the law creating them since, under Uruguayan law, trademark registrants are conferred only a negative right, the right to

[184] CM, ¶¶ 180, 182-183.
[185] CM, ¶ 213; CR, ¶ 178.
[186] RCM, ¶ 7.2.
[187] RCM, ¶¶ 7.3-7.5.

exclude others from their use, and not an affirmative right to use them. Third, the Claimants had no valid title to trademarks since they failed to register the modifications made in the descriptive characteristics of those variants the use of which was affected by the Challenged Measures.[188]

182. Article 5(1) of the BIT, under the rubric "Dispossession, Compensation," provides:

> *(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto.*

a. **The Legal Standard**

1. The Claimants' Position

183. According to the Claimants, to assess their expropriation claim under Article 5, the Tribunal must examine whether the investor was deprived, wholly or partially, of the use, enjoyment, or benefit of the investment.[189] For the Claimants, to find a violation of Article 5, the Tribunal need not reach the conclusion that the Claimants were deprived entirely of the economic benefit of the investment. Rather, the threshold is whether the Challenged Measures have "substantially deprived" the investments of their value.[190]

184. The Claimants also contend that under Article 5, all lawful expropriations must be accompanied by effective and adequate compensation, even when actions are carried out for a public purpose.[191] "Public benefit" is not an exception from expropriation but instead one of several prerequisites for an expropriation to be considered consistent with the BIT.[192] The latter, according to the Claimants, is further emphasized by the lack of

[188] RCM, ¶¶ 7.1-7.5.

[189] CM, ¶¶ 185-191.

[190] CR, ¶ 185.

[191] CM, ¶¶ 204-212 (relying *inter-alia* on *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007 ("***Vivendi Argentina* (II)**") (CLA-210), ¶ 7.5.21; and *Compañía del Desarrollo de Santa Elena, S. A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 Feb. 2000 ("***Santa Elena**") (CLA-214), ¶ 72; *Norwegian Shipowners' Claims (Norway v. USA),* Award, 13 Oct. 1922 ("***Norwegian Shipowners**") (CLA-212), p. 337, and *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, Award, 20 May 1992, (CLA-215), ¶ 158.

[192] CR, ¶ 192.

any provision in the BIT providing for "carve-outs, exceptions or saving presumptions for public health or other regulatory actions," in clear contrast with other BITs such as the Uruguay-U.S. BIT, which contain such provisions.[193]

185. In the Claimants' view, other considerations such as whether (a) the host State acquired a benefit of a proprietary character after the expropriatory measure;[194] (b) the State intended to expropriate the investment;[195] or (c) the Claimants' business stopped being an ongoing matter as a result of the expropriation,[196] are irrelevant for a valid expropriation claim to exist.

186. The Claimants also contend that the standard outlined above is applicable to both direct and indirect or *de facto* expropriations,[197] and that it serves to protect not only tangible property but also intangible assets, including intellectual property, from uncompensated expropriation.[198]

2. The Respondent's Position

187. According to the Respondent, before determining whether the conditions for a lawful expropriation under Article 5 have been met, the Tribunal must determine whether the Challenged Measures were expropriatory in character.[199] In other words, if an act is not an "expropriation," as a matter of law Article 5 does not apply.[200] Article 5 specifies

[193] CM, ¶ 210; *see also* CR, ¶¶ 19; 165-167.

[194] CM, ¶ 189.

[195] CM, ¶ 190; CR, ¶ 282 (citing *Vivendi v. Argentina* (II) (CLA-210), ¶ 7.5.20).

[196] CR, ¶ 181 (citing *inter alia*, *Chemtura Corp. v. Government of Canada*, NAFTA Arbitration under UNCITRAL Rules, 2 Aug. 2010, ("***Chemtura***") (RLA-53), ¶ 249, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 22 Apr. 2002 (CLA-206)*; Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability, and Suspension, 26 Oct. 2010, (CLA-271)).

[197] CM, ¶¶ 185-191 (relying *inter alia* on *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, ("***Metalclad***") (CLA-039), ¶ 103*; Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ("***Tecmed***") (CLA-203), ¶ 116*; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009 (CLA-179), ¶ 443; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 Sep. 2001 ("***CME***") (CLA-202), ¶¶ 606, 608).

[198] CM, ¶ 191.

[199] RCM, ¶¶ 7.9-7.11 (relying on *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 Jul. 2006 (RLA-169), ¶ 174).

[200] RCM, ¶ 7.8.

the conditions that render an expropriation lawful, but has no bearing on the question of whether an expropriation, or a measure having the same effect, actually took place.[201]

188. That question depends on the nature of the State's action.[202] Interference with foreign property in the valid exercise of police power is not considered expropriation and does not give rise to compensation.[203]

189. Moreover, even if the governmental measures here at stake could be considered as falling under Article 5, the Claimants' claim is for indirect expropriation, and such a claim requires showing that the measures have had such a severe economic impact on the Claimants' business that it has rendered it virtually without value. A mere negative impact is not sufficient.[204] The interference must be "sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner" so as "to render almost without value the rights remaining with the investor."[205]

190. The primary consideration is how much value remains after the expropriation, not how much was taken. The Respondent relies on the finding of the *Archer Daniels*, *LG&E*, *CMS*, and *Encana* tribunals, to submit that if "sufficiently positive" value remains, there is no expropriation.[206] The reasons for this threshold, are, according to Uruguay, clear: "if States were held liable for expropriation every time a regulation had an adverse impact, effective governance would be rendered impossible."[207]

3. The Tribunal's Analysis

191. The Tribunal notes that the legal title to the property representing the Claimants' investment was not affected by the Challenged Measures. Abal remained the registered

[201] RR, ¶ 6.7.

[202] RR, ¶ 6.8.

[203] RCM, ¶¶ 2.10-2.11.

[204] RR, ¶ 6.38.

[205] RCM, ¶¶ 7.30-32 (*see Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 Dec. 2002, ("***Feldman***") (RLA-201), ¶ 103; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, ("***Pope & Talbot***") (RLA-216), ¶ 102; *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, 8 Jun. 2008, ("***Glamis***") (RLA-183), ¶ 357).

[206] RCM, ¶¶ 7.33-37 (referring to *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 Nov. 2007, ("***Archer Daniels***"), (RLA-178), ¶¶ 246-247, 251; *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 13 Oct. 2006, ("***LG&E***") (RLA-65), ¶ 191; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ("***CMS***") (CLA-093), ¶¶ 262-264; and *Encana Corporation v. Republic of Ecuador*, UNCITRAL, Award, 3 Feb. 2006, ("***Encana***")).

[207] RCM, 7.32.

owner or licensee of the relevant trademarks and continued to be entitled to protect them by an action for infringement. Clearly, the Claimants' claim relates to indirect or *de facto* expropriation, as shown by the reference to this kind of expropriation in their pleadings.[208] As shown above, the Parties diverge as to the threshold for finding indirect expropriation, the Claimants contending that the interference with the investor's rights, whether regulatory or not, should be such as to substantially deprive the investment of its value,[209] the Respondent holding that such interference must have "rendered *almost without value* the rights remaining with the investor."[210]

192. Article 5(1) of the BIT refers to "any other measure having the same nature or the same effect" as an expropriation or a nationalization. Thus, indirect expropriation under the Treaty is defined in a different and apparently stricter way than in other treaties that make reference to measures, the effect of which, would be "tantamount" or "equivalent" to nationalization or expropriation.[211] Be that as it may, in order to be considered an indirect expropriation, the government's measures interference with the investor's rights must have a major adverse impact on the Claimants' investments. As mentioned by other investment treaty decisions, the State's measures should amount to a "substantial deprivation" of its value, use or enjoyment, "determinative factors" to that effect being "the intensity and duration of the economic deprivation suffered by the investor as a result of such measures." [212]

[208] At the Hearing, counsel for the Claimants confirmed that the claim in question is for indirect expropriation (Closing, answer to Judge Crawford's question, Tr. Day 9, 2417: 2-12). The Respondent refers to the Claimants' claim as relating to indirect expropriation: RCM, ¶ 7.1.

[209] CR, ¶ 185.

[210] RCM, ¶ 7.32 (emphasis in the text).

[211] *See, e.g.*, the 2004 and 2012 US Model BITs referring to indirect expropriation as consisting of "measures equivalent to expropriation or nationalization," adding in a special Annex B entitled "Expropriation" that "the determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry," considering the different factors that are indicated in the Annex.

[212] *Telenor Mobile Communications AS v. Republic of Hungary*, Award, 13 Sep. 2006, (RLA-078), ¶¶ 65, 70. *See also Metalclad* (CLA-039) ¶ 103; *CME* (CLA-202), ¶ 688; *Pope & Talbot* (CLA-216), ¶¶ 96, 102.

b. **The Claim**

1. The Claimants' Position

193. According to the Claimants, the Respondent expropriated seven of Abal's thirteen variants, including the goodwill and the legal rights deriving from the associated intellectual property, when it enacted the SPR.[213]

194. Thereafter, the Respondent's 80/80 Regulation destroyed the brand equity of the six remaining variants, with two immediate alleged effects: first, the discontinuance of two other brands from the market (the *Galaxy* and *Premier* brands) in 2009, and second, the erosion of the Claimants' brand equity and pricing power. In particular, the Claimants say that as a result of the "corrupted presentation" of the Claimants' packaging, Abal has been forced to choose between maintaining its market share or maintaining its historical price premium.[214] This, in turn, has substantially affected the Claimants' profits and revenues as smokers are less willing to pay premium prices for the Claimants' products.

195. The Claimants do not dispute that Abal remained a profitable business. They contend, however, that each brand asset—including each variant and each brand—is an individual investment in its own right.[215] Thus, the discontinuance of each of the brand variants, or the interference with each of the remaining brands, constitutes an expropriation.[216]

196. Finally, the Claimants address two defenses raised by the Respondent: the police powers doctrine and the Claimants' alleged lack of property rights—intellectual or other—that could be the object of an expropriation.

(i) Uruguay's Police Powers

197. First, the Claimants consider that the police powers doctrine does not excuse the Respondent from liability for expropriating the Claimants' investment. According to the Claimants, "under customary international law, the scope of the implicit exception for police powers is limited to State powers related to protection and security such as

[213] CM, ¶¶ 182, 192-203.
[214] CM, ¶ 201.
[215] CR, ¶ 180.
[216] CR, ¶¶ 180-181.

enforcement of the law, maintenance of the public order, and defense of the State."[217] State police power does not constitute a defense against expropriation.[218]

198. Furthermore, a State cannot remove a measure from the scope of the BIT's expropriation provision by invoking its general authority under domestic law to adopt regulatory measures.[219] A State's regulatory measure must be subject to limitations. But, in any event, the Challenged Measures were expropriatory, even if enacted in pursuit of public health, because they were unreasonable.[220]

199. Claimants further consider that in any case the SPR and 80/80 Regulation do not fall within the police powers doctrine on the basis that:

- The government actions were not in fact "designed and applied to achieve" reduced tobacco consumption.[221]
- Even the tribunals that would recognize an implied expropriation exception for regulatory actions would find that the exception is inapplicable where the government's actions conflict with specific commitments to investors.[222]
- In contrast with the facts in the *Chemtura* and *Methanex* cases, in this case Respondent has not conducted a "serious, objective and scientific" assessment of whether the Challenged Measures are justified. Moreover, the measures have been ineffective in practice and are "not proportional to the public interest the Respondent alleges they serve given the severe harm they inflict."[223]

(ii) The Claimants' Intellectual Property Rights are Capable of Being Expropriated

200. The Claimants also reject the Respondent's allegations that Claimants lack intellectual property rights that could be the subject of an expropriation. First, they assert that the Claimants' trademarks are validly registered before Uruguay's National Directorate of Industrial Property ("**DNPI**") and thus benefit from legal protection.

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[217] CR, ¶ 196 (relying on *Too v. Greater Modesto Insurance Associates*, AWD 460-880-2, 29 Dec. 1989, reprinted in 23 IRAN-U.S.CL. TRIB. REP. 378 (1991) ("***Too v. Greater Modesto***") (RLA-153) and *Bischoff Case*, German-Venezuelan Commission, Decision (1903), 10 U.N.R.I.A.A. 420, ("***Bischoff***") (RLA-138), p. 421).

[218] CM, ¶ 208 (relying on *Pope & Talbot* (CLA-216), ¶ 99).

[219] CR, ¶¶ 201-206.

[220] CR, ¶ 211.

[221] CM, ¶ 211.

[222] CM, ¶ 212 (relying on *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp*., Award (24 Aug. 1978), 17 I.L.M. 1321 (CLA-217), ¶ 1331).

[223] CR, ¶ 204.

201. The Claimants consider that the disputed marks maintained "the distinctive characteristic" of the registered trademarks, and were therefore covered by the same original registration, even if the two were not identical in all respects. For example, the *Marlboro Gold* and *Marlboro Light* trademarks as used and as registered are covered by the same registration, because they both "contain the word 'Marlboro' written in the same distinctive typeface, the classic chevron or 'rooftop' symbol, and the distinctive Philip Morris coat of arms placed above the word Marlboro," even though the former removes the word "light."[224] According to the Claimants, the use of descriptors such as "light," "mild flavour," or "milds" are not distinctive, but instead are common in the tobacco industry and are non-essential elements.[225] Thus, their absence on the branded packaging is without effect.[226]

202. The Claimants note the conclusions of their intellectual property experts that the marks associated with the branded packaging Abal used for its variants, maintained the distinctive character of the registered trademarks and, therefore, were protected as trademarks.[227]

203. Finally, the Claimants address the Respondent's contention that they do not own trademark rights for *Marlboro Fresh Mint* because the trademark was registered on September of 2008 and introduced to the Uruguayan market on 3 December 2008, shortly before the SPR entered into force (on 18 February 2009), but after it was enacted on 18 August 2008.[228] In the Claimants' view, since the MPH and the SPR do not regulate trademark registrations, compliance or lack of compliance with MPH's regulations has no bearing. Moreover, even if it did, the SPR did not prohibit the registration of variants. The SPR, the Claimants submit, governs the number of presentations that may be used in trade, not the number of trademarks that may be registered.[229] The Claimants could have chosen at any time to trade *Marlboro Fresh Mint* as its variant for the *Marlboro* family brand after registration.[230]

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[224] CR, ¶¶ 115-116.

[225] *See* CR, ¶ 116; *See also* Second Fischer Report (CWS-024), ¶¶ 70, 74, 85, 87, 91.

[226] CR, ¶¶ 117-119.

[227] CR, ¶¶ 112-121, referring to Expert Reports from Fischer and Gibson.

[228] CR, ¶¶ 112, 120-121, citing RCM, Chapter 9.II.B.

[229] CR, ¶ 120, citing RCM, ¶ 9.63 (citing Barrios Report (REX-004), ¶ 96).

[230] CR, ¶¶ 120-121, citing RCM, ¶ 9.63 (citing Barrios Report (REX-004), ¶ 108).

(iii)Uruguay's Trademark Law Confers Registrants a Right to Use and a Right to Protect

204. The Claimants cite the BIT, which recognises trademarks and trade names as industrial property rights for the purposes of defining the investment, as did the Tribunal in finding jurisdiction in this case. The Claimants explain: "[a] trademark is an asset because it creates value by distinguishing goods in commerce. A trademark can only serve that function if it is used."[231]

205. Further, in connection with their Article 11 claim, the Claimants submit that they had a right to use their trademarks in commerce under Uruguayan law for two main reasons. First, Uruguayan trademark law, incorporating international law, protects the right to use trademarks.[232] Second, Uruguayan property law applies to intellectual property and protects the right to use intellectual property.[233]

206. First, the Claimants rely on Article 11 of the MERCOSUR Protocol, which provides that "[t]he registration of a trademark shall grant the owner an exclusive right of use."[234] In the Claimants' view, the MERCOSUR Protocol has been incorporated into domestic law and so is applicable to all owners of trademarks registered in Uruguay. Thus it is irrelevant that that Switzerland is not a party to the MERCOSUR Protocol.[235]

207. The Claimants then refer to several provisions of the TRIPS Agreement which in their view also recognize at least a qualified right to use a trademark in connection with goods or services that are lawfully available for sale within a WTO Member State.[236] The Claimants further rely on Article 2 of the Montevideo Treaty which provides that "[o]wnership of a trademark or a trade name includes the right to use it."[237] Moreover, they refer to a decision by the *Tribunal de lo Contencioso Administrativo* in which the TCA allegedly recognized that trademark holders have the right to the exclusive and

[231] CR, ¶ 123.

[232] CR, ¶¶ 126-133.

[233] CR, ¶¶ 134-140.

[234] CR, ¶ 126 (emphasis in the text), referring to Trademark Law No. 17,052, 14 Dec. 1998 (C-364), incorporating the MERCOSUR Protocol into domestic law.

[235] CR, ¶ 128; Second Fischer Opinion, (CWS-024), ¶ 7.

[236] CR, ¶¶ 128-130; Expert Report of Christopher Gibson, 17 Apr. 2015 ("**Gibson Report**") (CWS-023), ¶¶ 61-79; Gervais, *Analysis of the Compatibility of Certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention* (CLA-307), ¶ 33.

[237] CR, ¶ 131; Law No. 2,207, 1 Oct. 1892 (C-367).

effective use of their trademarks.[238] Finally, the Claimants evoke an alleged reference to the "effective use of trademarks" made by Uruguay's Legislature to the Supreme Court in the context of the Claimants' litigation challenging the 80/80 Regulation.[239]

208. Second, the Claimants submit that under Uruguayan law, trademark rights are a form of property and that all property owners have the right to use their property. This is recognized by Articles 7 and 32 of Uruguay's Constitution referring to property as "an inviolable right," and to the "right to be protected in the enjoyment of ... property," respectively. In the Claimants' view, in order to "enjoy" property, one must be allowed to use that property.[240]

209. The Claimants further rely on the literal wording and interpretations of Articles 486, 487, and 491 of the Civil Code, and Article 16 of the Trademark Law.[241] They submit that, contrary to the Respondent's assertion, trademark rights—like all other property rights—are protected under Uruguayan law despite the fact that those rights are not absolute; in fact, no property rights are absolute.[242] Also, in Claimants' view, the fact that separate provisions in the Constitution and Civil Code exist for intellectual property does not mean that intellectual property is not protected under these instruments.[243]

2. The Respondent's Position

210. According to Uruguay, even if the Challenged Measures could be considered expropriatory – something it denies – the effect of the SPR and the 80/80 Regulation are not tantamount to an expropriation because the "value of the business has not been so reduced as to effectively deprive it of its character of an investment."[244]

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[238] The Claimants refer *inter alia* to a decision by the TCA allegedly recognizing that the trademark holders have the right to the exclusive and effective use of their trademarks. *See* CR, ¶ 132, citing *Marcelo Lopez, Alejandro Ignacio v. The Ministry of Industry, Energy and Mining*, TCA Decision 189-2012, 15 May 2012 (C-370), p. 8.

[239] CR, ¶ 133; Legislature's Answer to Abal's Unconstitutionality Action of Law 18,256, 10 Nov. 2009 (C-46), ¶ 3.15.

[240] CR, ¶¶ 134, 137-138; Constitution of the Oriental Republic of Uruguay, 31 Oct. 2004 (RLA-1 and C-30), Arts. 7 and 32; Second Fischer Opinion, (CWS-24), ¶ 5.

[241] CR, ¶ 134-135, 137-140; Uruguay Civil Code (C-266), Art. 491; Fischer Opinion (CWS-12), ¶ 32; Trademark Law (C-135), Art. 16; Second Fischer Opinion (CWS-24), ¶ 39.

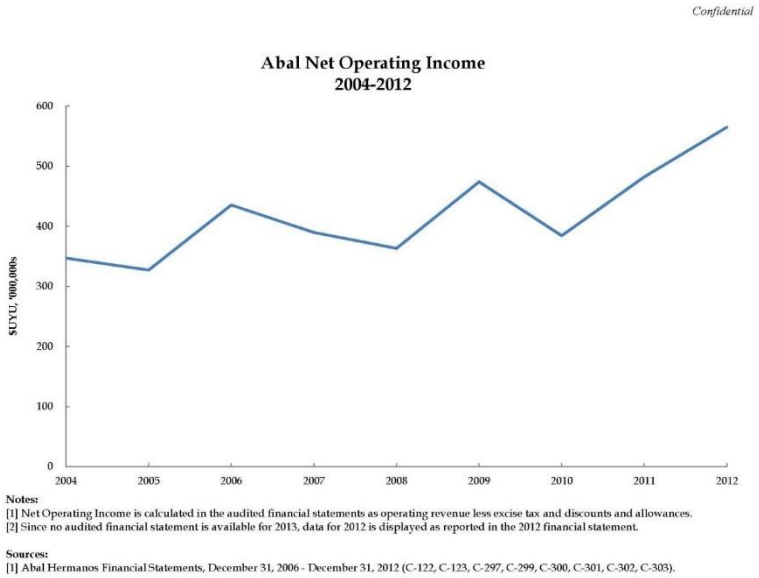
[242] CR, ¶ 136; Second Fischer Opinion, (CWS-24), ¶ 37.

[243] CR, ¶¶ 138, 140.

[244] RCM, ¶¶ 7.3, 7.29-45.

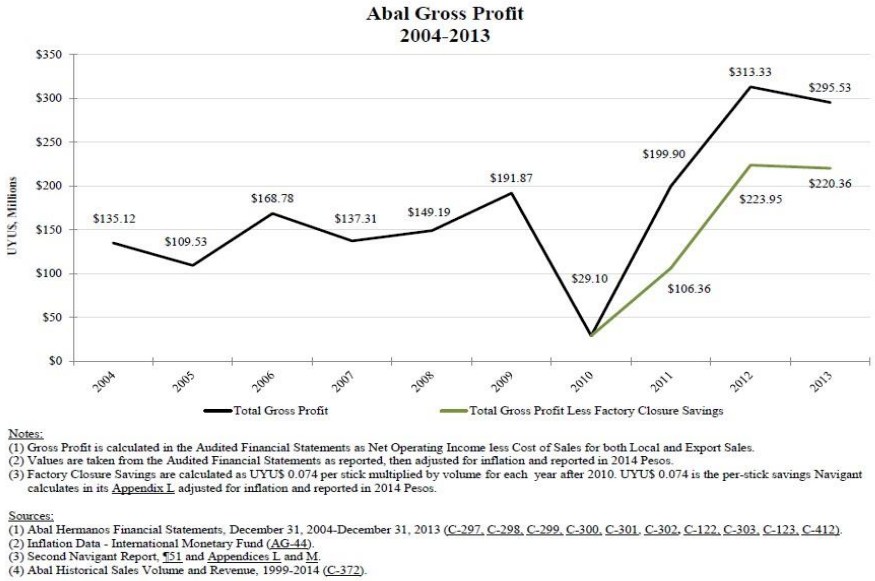
211. Uruguay points to the factual evidence showing that the Claimants' business retains significant commercial value.[245] Referring to Abal's market share data, the Respondent notes that Abal retained and retains its commercial value. It also refers to the Claimants' damages expert report, which exhibited positive cash flows in perpetuity for Abal, notwithstanding the SPR and 80/80 Regulation.[246]

212. Uruguay stresses that Abal's net operating income actually increased between 2005 and 2012. It highlights that in 2012, three years after the implementation of the SPR and the 80/80 Regulation, it was higher than at any point since 2004, as shown by the graph below.[247]



213. Uruguay likewise refers to Abal's total gross profits between 2005 and 2013. It notes that except for 2010 (when Abal sold cigarettes below production cost for a period of time), its total gross profit was higher every year after 2008, when the regulations were implemented. This is depicted in the graph below:[248]

[245] RCM, ¶¶ 7.30, 7.38-7.43; RR, ¶¶ 6.20-6.40.
[246] RR, ¶ 6.34.
[247] RCM, ¶ 7.40.
[248] RR, ¶ 6.36.



Notes:
(1) Gross Profit is calculated in the Audited Financial Statements as Net Operating Income less Cost of Sales for both Local and Export Sales.
(2) Values are taken from the Audited Financial Statements as reported, then adjusted for inflation and reported in 2014 Pesos.
(3) Factory Closure Savings are calculated as UYU$ 0.074 per stick multiplied by volume for each year after 2010. UYU$ 0.074 is the per-stick savings Navigant calculates in its Appendix L adjusted for inflation and reported in 2014 Pesos.

Sources:
(1) Abal Hermanos Financial Statements, December 31, 2004-December 31, 2013 (C-297, C-298, C-299, C-300, C-301, C-302, C-122, C-303, C-123, C-412).
(2) Inflation Data - International Monetary Fund (AG-44).
(3) Second Navigant Report, ¶51 and Appendices L and M.
(4) Abal Historical Sales Volume and Revenue, 1999-2014 (C-372).

214. Finally, Uruguay underscores that in 2012, Abal's profits were approximately US$3.5 million.[249]

215. The Respondent also rejects the Claimants' argument that each of its brand assets should be considered as independently affected by the Challenged Measures.[250] To the contrary, the Respondent submits, in the context of indirect expropriation claims, that the analysis must focus on the investment as a whole, globally, not on its discrete parts.[251] Moreover, it disagrees with the Claimants re-characterizing of the activities that fall within the concept of "investments" under Article 1(2) in order to include brand-assets.

(i) Uruguay's Sovereign Police Powers

216. It is Uruguay's submission that preserving and protecting public health is a quintessential manifestation of police power,[252] which is in turn an essential element of a State's permanent sovereignty.[253] Uruguay has the right to exercise its inherent

[249] RCM, ¶ 7.39, referring to CM, ¶ 108.

[250] RR, ¶¶ 6.21-6.22.

[251] RR, ¶¶ 6.21-6.22; *See also* ¶¶ 6.24-6.25 (citing *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Liability, 14 Dec. 2012, ("***Burlington***") (CLA-274), ¶¶ 257, 260, 398; *Feldman* (RLA-201), ¶ 109).

[252] RCM, ¶ 2.9.

[253] RCM, ¶ 2.6.

sovereign power to protect public health without incurring international responsibility generally (either for alleged expropriation or breach of other standards of treatment).

217. The Respondent alleges that a *bona fide*, non-discriminatory exercise of a State's sovereign police power to protect health or welfare does not constitute an expropriation as a matter of law.[254] Nor is the State liable to pay compensation for any damages arising from its exercise of such a power.[255] The Respondent relies *inter alia* on *Chemtura* for this proposition.[256]

218. Uruguay sees no merit on the Claimant's assertion that the BIT does not contain a particular carve-out or exception. For the Respondent, the police powers doctrine is a fundamental rule of customary international law and as such, it must be applied to interpret Article 5, in accordance with Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**").[257] Moreover, Article 2(1) of the BIT explicitly recognizes the special plane on which police power exists by allowing the contracting States to refuse to admit investments "for reasons of public security and order, public health or morality."[258] This power cannot be limited to the point of admission of investments but must be considered a permanent part of the State's regulatory authority.

219. Uruguay does not suggest that the police powers of the State are absolute.[259] To the contrary, they are limited to governmental action that is not discriminatory or taken in bad faith, but is taken in exercise of "the inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health,

[254] RCM, ¶¶ 7.11-12; RR, ¶ 6.8 (citing *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 Feb. 2014 ("***Levy***"), (RLA-207), ¶ 475).

[255] RCM, ¶¶ 2.10-18; 7.10-16, 7.21; RR, ¶¶ 6.8, 6.12. (citing *inter alia* the 1961 Harvard Draft Convention on Int'l Responsibility of States for injuries to Aliens, Restatement (Third) of Foreign Relations Law of the United States; *Saluka Investments B.V. (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006, ("***Saluka***") (CLA-227), ¶ 262*; Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 Aug. 2005, ("***Methanex***") (RLA-164), Part IV, Ch. D,¶ 7; *Chemtura* (RLA-53), ¶ 266; *Too v. Greater Modesto* (RLA-153), ¶ 26, *Bischoff* (RLA-138)).

[256] RCM, ¶ 2.17 (citing *Chemtura* (RLA-53), ¶ 266).

[257] RR, ¶¶ 2.3-2.9.

[258] RCM, ¶ 2.9.

[259] RR, ¶ 2.13.

morality and justice."[260] Other categories of State action, even when taken for some public purpose, are not covered.[261]

220. The Respondent considers that the authorities on which the Claimants rely are inapposite. In both the *Norwegian Shipowners* and the *Santa Elena* cases, the tribunals were not called upon to determine if there was an expropriation but only the amount of compensation due for such an expropriation. [262]

221. Accordingly, Uruguay's alleged interference with the Claimants' property in the exercise of police power does not constitute expropriation.[263]

(ii) The Claimants Had No Trademark Rights Capable of Being Expropriated

222. The Respondent claims that it has no commitments in relation to the trademarks at issue in these proceedings because they are not owned by the Claimants. The Respondent goes through each of the seven variants allegedly affected by the SPR and the 80/80 Regulation: *Marlboro Gold, Marlboro Blue, Marlboro Fresh Mint, Fiesta Blue, Fiesta 50 50, Philip Morris Blue* and *Premier*.[264] It concludes that in each case, they were not the same as any of the trademarks originally registered.[265] Thus, at the time the Challenged Measures were adopted, these variants were not registered before the DNPI, and "the necessary predicate for legal protection … under Uruguayan law" did not exist.[266] Since all of the Claimants' brands as registered contained the prohibited descriptors, this invalidated their trademarks. Accordingly, the Claimants have no viable expropriation claim since they "never bothered to perfect those alleged rights."[267]

223. The Respondent says that under Uruguayan law in order for a trademark in use to be entitled to protection, it must cover the marks "*exactly* as registered" and that "*[a]ny change* made to the original mark as registered, either to its name or its graphic elements, logos, figures, colors, etc., constitutes a *different unregistered* trademark and as such its

[260] RCM, ¶ 2.8; RR, ¶ 2.10.
[261] RR, ¶ 2.10.
[262] RR, ¶¶ 6.10-6.11.
[263] RCM, ¶ 2.17.
[264] RCM, ¶¶ 9.52-9.76.
[265] RCM, ¶¶ 9.51-9.75; RR, ¶ 9.66.
[266] RCM, ¶ 9.20.
[267] RCM, ¶ 9.83.

holder will not acquire exclusive rights to the new mark nor can it claim rights to it based on the registration of the original trademark."[268]

224. The operative provisions of Uruguayan trademark law confirm, in the Respondent's view, that negative protection is limited to the mark precisely as it was registered. The Respondent cites, *inter alia*,

- Article 31 of the Trademark Law, which provides that "[o]nce the registration application is submitted, no modifications will be allowed to the representation of the mark. All requests for modification shall be cause for a new registration."[269]

- Article 13 of the Trademark Law, providing that when registration of a mark is granted, the holder cannot request a new registration for an identical mark for the same classes unless it first abandons the first registration.[270]

- DNPI Resolution No. 21/2001, a technical Resolution, confirming that "modifications to the sign shall be grounds for a new registration request" and "only the modification of owners' names and domiciles due to typographical errors and limitation of protection shall be allowed."[271]

225. In the Respondent's view, the Claimants seek to get around the applicable Uruguayan law by invoking Article 5(C)(2) of the Paris Convention. However, Article 5(C)(2) has nothing to do with a Member State's registration requirements. It applies only to the question of the protection afforded in other countries to marks that have already been registered.

226. In any event, the marks in dispute did not have the same "distinctive character" as the marks the Claimants originally registered, and therefore they should have been separately registered, even under the Claimants' alleged misreading of the Paris Convention.[272] Uruguay explains, *inter alia*, that if the variants the Claimants invoke changed the distinctive character of the original trademark (i.e., if *Marlboro Gold* is protected by the registration of *Marlboro Light*), then it would be unnecessary to register any other *Marlboro* trademark sharing the same characteristics and it would extend to

[268] RCM, ¶ 9.53, citing Barrios Report (REX-004), ¶ 96 (emphasis in the text).

[269] RR, ¶ 9.68; Trademark Law (C-135), Article 31.

[270] RR, ¶¶ 9.70-9.72.

[271] National Directorate of Industrial Property, DNPI Resolution No. 21/2001 (14 Nov. 2001) (R-375), p. 1.

[272] RR, ¶ 9.67.

all, not only *Gold*, but also to *Red, Blue, Black,* and *Fresh Mint*, so long as the central characteristics remain the same.[273]

(iii)Uruguayan Law Confers Trademark Registrants only a Right to Protect against use by others

227. The Respondent posits that the Claimants do not have a legally protected right amenable to being expropriated. Like the international law on which it is based, Uruguayan intellectual property law does not afford trademark registrants an affirmative right to use their marks in commerce. Instead, it confers on them only the negative right to prevent others from doing so.[274] The argument is three-fold.

228. First, the Respondent alleges that the Claimants' expert Professor Gustavo Fischer, outside the context of this arbitration, specifically noted in his capacity as President of the Uruguayan Association of Industrial Property Experts that under Uruguayan law, the registration of a trademark "does not in any way imply an authorization or qualification for the performance of the specific activity for which the registration is requested. This is because the National Directorate of Industrial Property has not been assigned such task."[275] The Respondent also notes that the Claimants failed to raise a claim to a guaranteed right to use under Uruguayan trademark law in their challenges to either the SPR or the 80/80 Regulation before the national courts.[276]

229. Second, the Respondent submits that the Claimants have been unable to point to any provision in the Trademark Law or find any basis under Uruguayan law for their proposition that a trademark confers the registrant anything other than the right to prevent others from using it.[277]

230. In particular, the Respondent further argues that the position and practice of the DNPI has always been that a registered trademark does not confer on its owner a right to use,

[273] RR, ¶ 9.76.

[274] RCM, ¶¶ 1.26, 7.47-7.52; RR, ¶¶ 6.16-6.19; RCM, ¶¶ 9.22-9.47.

[275] RR, ¶ 9.23, citing Document submitted by AUDAPI to the DNPI, 15 Feb. 2012 (R-AB-57), p. 3.

[276] RR, ¶¶ 9.24-9.28.

[277] RR, ¶¶ 9.30, 9.32-9.33.; RCM, ¶ 9.25.

but rather a right to exclude third parties from using it.[278] This is confirmed by the jurisprudence.[279]

231. The Respondent submits that the Claimants are reduced to arguing that such a right can be inferred from Property Law precisely because Uruguay's trademark law does not grant a "right to use."[280] The Respondent notes, *inter alia*, that Article 491 of Uruguay's Civil Code expressly establishes separate provisions for tangible property, on the one hand, and intellectual property, on the other.[281] Moreover, the special rules of trademark law that only recognize a negative use, would trump the special rules of the Civil Code even if the Code were in principle to govern trademark rights.[282]

232. In conclusion, the Respondent considers that the mere act of registering a trademark cannot be used as a shield against government regulatory action that restricts the use of such marks, or the products with which they are associated.[283]

233. Third, the Respondent submits that none of the international intellectual property conventions cited by Claimants recognizes a right to use: [284]

- As to the MERCOSUR Protocol, it only uses affirmative language to describe a negative right.[285] Its Preamble notes that it is intended to conform to the Paris Convention and the TRIPS Agreements, neither of which create a right to use.[286] In any event, the MERCOSUR Protocol only applies between State Parties that have ratified it; that is, Uruguay and Paraguay.[287] Even if were incorporated in Uruguayan law, something that the Respondent denies, it would not constitute a free-standing provision of universal application, but would apply along with its limitation and conditions (*i.e.* as only applicable to Paraguay). The Most Favored Nation clause of the TRIPS Agreement does not apply as the Mercosur

[278] RR, ¶ 9.39, citing Witness Statement of Dr. Brenda Justo Delorenzi, 16 Sep. 2015 (RWS-008), ¶ 12; RCM, ¶¶ 9.27-9.28.

[279] RCM, ¶ 9.26; RR, ¶¶ 9.37-9.38. The Respondent also asserts that the Claimants have misunderstood the nature of the TCA's decision to which they refer in support of their position, mainly because they omitted to present the citation in full, which contained an explicit reference to the right to exclude. *See* RR, ¶¶ 9.34-9.36.

[280] RR, ¶¶ 9.40-9.46; RCM, ¶¶ 9.32-9.34.

[281] RR, ¶¶ 9.40-9.41.

[282] RR, ¶ 9.44.

[283] RR, ¶ 9.46.

[284] RR, ¶ 9.48.

[285] RR, 9.51-9.52, citing Expert Report of Nino Pires de Carvalho, 16 Sep. 2015 ("**Carvalho Report**") (REX-017). The Respondent also alleges that Claimants' argument is premised on an incorrect translation, since the original Spanish and Portuguese texts refer to the "right of exclusive use" which is not the same as the "exclusive right to use;" (RR, ¶¶ 9.49-9.51).

[286] RR, ¶ 9.52.

[287] RR, ¶¶ 9.53-9.56; RCM, ¶ 9.46.

Contracting Parties notified the TRIPS Council that they would avail themselves of the exception under Art. 4(d) of the TRIPS Agreement.

- As to the Paris Convention and the TRIPS Agreement, the Respondent argues that the Claimants' Reply does not address the Paris Convention,[288] and notes that a WTO panel has ruled that TRIPS Agreement only recognizes a negative right not a "positive right to exploit or use."[289]

- As to the Montevideo Treaty, the Respondent alleges that it applies only as between the State Parties (Uruguay, Argentina, Bolivia, Paraguay, Peru),[290] and Article 2, which Claimants cite for their proposition, in fact refers to the "right to use exclusively," which does not constitute an affirmative right to use in the sense the Claimants contend.[291]

234. According to the Respondent, since such a right does not exist, the Claimants had no trademark right capable of being expropriated. "The essential precondition to a valid expropriation claim—extant legal rights with which governmental regulation interferes — is therefore absent."[292] The Claimants have kept their right to prohibit third-parties from using their registered trademarks. Thus, there is no expropriation.

3. The Tribunal's Analysis

235. It is undisputed that trademarks and goodwill associated with the use of trademarks are protected investments under Article 1(2)(d) of the BIT.[293] In order to establish whether the Claimants' investments have been expropriated, the Tribunal will deal in turn with the following questions:

a. Did the Claimants own the banned trademarks?
b. Does a trademark confer a right to use or only a right to protect against use by others?
c. Have the Challenged Measures expropriated the Claimants' investment?

(a) Whether the Claimants Owned the Banned Trademarks

236. The Respondent claims that it has no commitments in relation to the trademarks at issue in these proceedings because they are not owned by the Claimants.[294] The Respondent relies on Uruguayan Trademark Law which states that "[o]nce the application is

[288] RR, ¶ 9.58. *See also* RCM, ¶¶ 9.38-9.41.

[289] RR, ¶¶ 9.59-9.61.

[290] RR, ¶ 9.62.

[291] RR, ¶ 9.63.

[292] RCM, ¶ 7.47

[293] As held by the Dec. Jur., ¶ 194.

[294] *Supra*, ¶ 222, indicating which are the trademarks at issue in these proceedings.

submitted, *no modifications will be allowed* to the representation of the mark."[295] A Technical Resolution by the DNPI confirms that "modifications of the sign shall be the basis for a new registration request."[296]

237. The argument is that it was necessary for the Claimants to re-apply for trademarks that had been modified, including those regarding which the 2005 Decree had prohibited the use of certain misleading descriptors on cigarette packets, such as "lights," "low in tar," "ultra-light" or "mild."[297]

238. The Claimants argue that the Respondent is barred from challenging the ownership of their trademarks at the merits stage since this objection should have been raised during the jurisdictional phase, the Claimants' trademark registrations being publicly available long before the start of this arbitration.[298] The Claimants also contend that the Respondent is precluded from contesting their ownership of the trademarks since the Tribunal already found in its Decision on Jurisdiction that "the Respondent has not objected to the Claimants' description of their investments."[299]

239. The Tribunal notes that in asserting that the Respondent is barred from challenging only at this stage their trademarks ownership, the Claimants do not invoke any legal ground in support of their position. It further notes that this objection was not developed at the Hearing. Regarding the other objection, the Claimants did not set out during the jurisdictional phase their precise trademarks, instead simply stating in general terms that their investment included certain trademarks.[300] The Tribunal was only concerned during that phase with establishing that there was an "investment" for the purposes of Article 25(1) of the ICSID Convention, not with creating an inventory of that investment. Therefore, the question remains properly before the Tribunal.

240. The Claimants have contended further that under Uruguay's Trademark Law, which is based on intellectual property conventions such as the Paris Convention, the marks they

[295] RR, ¶ 9.68, citing Trademark Law (C-135), Article 31 (emphasis in the text).

[296] DNPI Resolution No. 21/2001, 14 Nov. 2001 (AB-60).

[297] RCM, ¶¶ 9.48-9.76; RR, ¶ 9.67.

[298] CR, ¶ 108.

[299] Dec. Jur., ¶ 194.

[300] Claimants' Memorial on Jurisdiction ("**CMJ**"), ¶ 62; RfA, ¶ 64 (noting that " PMP has registered a number of trademarks in Uruguay, including its *Marlboro, Fiesta, L&M* and *Philipp Morris* trademarks.").

used in commerce "are not deprived of trademark protection merely because they are not identical in all respects to Claimants' registered trademarks."[301]

241. As previously mentioned, following the 2005 Decree, the Claimants removed the prohibited descriptors from their cigarette packets and renamed many of their brands to comply with the legislation. But they did not apply for new trademarks, continuing to use cigarette packets with substantially the same logo, colour and branding. They say that, for instance, *Marlboro* Lights became *Marlboro* Gold with a gold package, retaining "the same distinctive typeface, the classic chevron or 'rooftop' symbol and the distinctive Philip Morris coat of arms, placed just above the word 'Marlboro'."[302] They make reference to Professor Barrios' indication that "the presentation adopted by the *Marlboro* Gold trademark is similar to that claimed in the trademark title corresponding to the *Marlboro* Lights trademark."[303]

242. The Claimants' experts compared the registered trademarks with the mark in use for each banned variant and concluded that the marks maintained the distinctive character of the registered trademarks and were therefore protected.[304] On this basis, the Claimants argue that since "the differing elements do not alter the distinctive character of the mark" they retained ownership over their trademarks as registered even if the word "lights" was removed from the mark Abal used in commerce.[305] They note that the word "lights" was a generic term commonly used within the industry before it was banned; it was not a distinctive element of the registered trademark.[306] The Claimants add that they "did not obtain a new trademark because they did not need to -- the *Marlboro* Gold trademark was <u>already</u> protected."[307]

243. The question of ownership of the trademarks is one to be determined under Uruguayan law governing intellectual property since the trademarks here in issue are registered in Uruguay and exist, if they exist at all, under Uruguayan law. The Tribunal is confronted

[301] CR, ¶ 110.
[302] CR, ¶ 115.
[303] *Ibid.*, citing Barrios Report (REX-004), ¶ 101.
[304] CR, ¶ 113; citing their intellectual property experts, Professors Gibson and Fischer Reports.
[305] CR, ¶ 116, citing Gibson Report (CWS-023), ¶ 16.
[306] *Ibid.*, citing Fischer Second OpinionOpinion (CWS-024), ¶ 74.
[307] CR, ¶ 117 (emphasis in the text).

with the difficult task of applying Uruguayan trademark regulation in the presence of discordant opinions of the Parties' experts regarding its interpretation.

244. The Claimants' expert, Professor Fischer, has opined that "[t]he product variants as used in the market fall within the scope of protection of Claimants' registered trademark rights, because they maintain the essential distinctive features of the trademark families and only differ slightly from the registered trademarks with respect to non-essential elements."[308] He has further held that "variations in secondary, non-essential elements of trademarks neither invalidate the registration nor diminish the protection granted to the trademarks."[309]

245. The Respondent's expert, Professor Barrios, has stated:

> *The analysis of Claimants' Memorial seems to show that the Claimants are attempting to base their trademark rights to some of these marks on the fact that they form a part of a "trademark family" or that they are "derivative marks" derived from other trademarks that are indeed registered. Unlike other legal systems, the Uruguayan system does not provide protection for derivative trademarks (or trademark variants) or for trademark families, and therefore a claim based on the protection of a family of trademarks or their variants has no legal basis in Uruguayan Trademark Law, and consequently does not enjoy protection.*[310]

246. In addition to the experts' opinions, the Tribunal notes that, as contended by the Respondent and attested by the DNPI website, when the Challenged Measures were adopted there were no registered trademarks for many of the variants at issue that Abal sold in Uruguay.[311] This is not dispositive of the question whether a re-registration of said variants would have been required, depending on the kind of changes made to the trademarks as registered.

247. It has also taken note that Professor Barrios, although supporting the Respondent's conclusions on ownership, admitted that whether a modified brand is covered by the trademark is not a literal exercise, since "… trademarks must be taken as a whole, and not dismembering them into component parts for the purposes of analysis … . In other

[308] Second Fischer Opinion, (CWS-024), ¶ 70.

[309] *Ibid.*

[310] Barrios Report (REX-004), ¶ 93 (footnotes omitted).

[311] RCM, ¶¶ 9.57 for Marlboro Gold; 9.61 for Marlboro Blue; 9.67 for Fiesta Blue; 9.69 for Fiesta 50 50; 9.71 for Philip Morris Blue. According to the Respondent, the trademarks at issue in these proceedings which were not registered at the time the SPR was adopted were seven, Marlboro Fresh Mint and Premier being added to the above trademarks (RCM, ¶ 9.83) with no evidence however of the DNPI certificate.

words we must bear in mind that the trademark is indivisible. It is the impression of the whole that must be taken into account for all intents and purposes."[312]

248. This position, taken from a decision of the TCA, accords with the views of the experts called by the Claimants, who stated that the question is whether the trademark retains its distinctive character. This is also the position under the Paris Convention for the Protection of Industrial Property under which use of a mark "in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered […] shall not entail invalidation of the registration and shall not diminish the protection granted to the mark."[313] This provision, however, has to be reconciled with Article 6(1) of the same Convention, according to which "the conditions for the filing and registration of trademarks shall be determined in each country of the Union by the domestic legislation."

249. Even accepting that, based on Article 5(C)(2) of the Paris Convention, only a change in the "distinctive character" of the mark would entail its invalidation also under Uruguayan trademark law, it remains to be determined whether the changes made to each of the Claimants' trademarks at issue have affected their "distinctive character," an issue as to which the Parties' experts diverge.

250. According to Dr. Carvalho, the Respondent's expert, the question "is whether MARLBORO GOLD is an alteration of the distinctive character (in Paris Convention terms) or a material alteration (in US legal terms) of MARLBORO LIGHT. The answer is yes. Both the term "light" and the gold colour have significant strength and meaning for consumers." He concludes that a new registration would have been required, since the previous registration of MARLBORO Light does not encompass "such a significantly material alteration."[314]

251. According to Professor Fischer, the Claimants' expert, "the *Marlboro* Gold variant of the *Marlboro* trademark family is substantially identical to the registered *Marlboro* Lights trademark (Reg. No. 335,632)." He adds that the "core distinctive elements of

[312] RCM, ¶ 9.74, citing Barrios Report (REX-004), ¶ 119, which in turn cites TCA Judgment No. 354/2011, 28 Apr. 2011, resolving a dispute over possible confusing similarity between competing marks (AB-46).

[313] Paris Convention (AB-04), Article 5(C)(2). It is essentially this provision that is relied upon by Professor Gibson in his Report in support of the Claimants' position: ¶ 5, second bullet point (CWS-023).

[314] Carvalho Report (REX-017), ¶ 64.

the *Marlboro* brand family are present both in the *Marlboro* Gold variant and in Reg. No. 335,632, including the characteristic chevron or 'rooftop' design, the coat of arms, and the word *Marlboro* written in a distinctive typeface" and that "the term 'light' is not distinctive. It is common in the tobacco industry and constitutes a non-essential element." He concludes that *Marlboro Gold* variant is protected by the *Marlboro lights* trademark registration Reg. No. 335,632, noting that "the registration covers the mark *without claim to colors*, thus providing protection for any color variant under which the distinctive elements of the trademark may be presented."[315]

252. This discussion deals with all of the variants at issue since the legal argument is the same in each case. The only exception is *Marlboro Fresh Mint*, for which the Respondent advances a different argument. It alleges that it was introduced to the Uruguayan market shortly before the SPR entered into force but after it was enacted; therefore Abal knew that this brand variant would have to be removed from the market.[316] The Tribunal believes that the Claimants must be correct when they argue that the existence of the SPR regulation did not prevent the registration of the trademark and did not affect their ownership.[317] However, the timing of the registration of this trademark may be relevant to damages, if any, given potential causation problems.

253. According to the Respondent, no claim may be raised regarding two other variants, *Premier Extra* and *Galaxy*, which the Claimants chose to withdraw from the market in late 2009, allegedly as a result of the 80/80 Regulation,[318] since nothing would have prevented their use in commerce.[319] The Tribunal concurs.

254. The Tribunal has taken note that according to Dr. Carvalho, even if Article 13 of the Trademark Law requires that any alterations to a mark be subject to new registration, the Law "does not deny protection to alterations based on the first registration."[320] It believes that in light of its other findings regarding the claim of expropriation, it is not necessary to reach a definitive conclusion on the question of the Claimants' ownership

[315] Second Fischer Opinion, (CWS-024), ¶¶ 72-75 (emphasis in the text).
[316] RCM, ¶ 9.62.
[317] CR, ¶ 120.
[318] CM, ¶¶ 98, 198.
[319] RCM, ¶ 9.78.
[320] Carvalho Report (REX-017), ¶ 58.

of the banned trademarks. It will assume, without deciding, that the trademarks continued to be protected under the Uruguay Trademark Law.

(b) Whether a Trademark Confers a Right to Use or only a Right to Protect Against Use by Others

255. The central issue over the trademarks is what rights a registered trademark accords its owner under Uruguayan law. Abal says that it was required to withdraw seven variants as a result of SPR and that it had to distort and truncate its trademarks in order to fit them within the limited space available on the package under the 80/80 Regulation. It says that under Uruguayan law, and consequently the BIT, it had a right to use those trademarks unconstrained by such regulations.[321]

256. The key provision is Law 17,011, the Trademark Law. The Respondent says that there is no provision in the Law creating the "right to use" as asserted by the Claimants,[322] the Law granting only an "exclusionary right," but not an absolute right to use: "once registered, the holder of a trademark has the right to *challenge the use* of any trademark that could result in confusion between goods or services for which the trademark was registered […] and also the right to *challenge the registration* of identical or similar signs."[323]

257. The Respondent cites Article 14 of Law 17,011, which provides that "[t]he right to oppose the use or registration of any trademark that could lead to confusion between goods or services shall belong to the person that meets all the requirements of the present law."[324] That is, a trademark gives to the holder an exclusive right to challenge a third party attempting to register or use the same trademark "such that only the trademark holder (and no one else) has the *possibility* to use the trademarks in commerce."[325] The Respondent argues that Professor Barrios' opinion has been confirmed by the TCA, which has made clear that there is a distinction between the registration of a trademark

[321] CR, ¶ 122.

[322] RR, ¶ 9.30.

[323] RCM, ¶ 9.24, citing Barrios Report (REX-004), ¶ 48 (emphasis in the text).

[324] RCM, ¶ 9.25, citing Barrios Report (REX-004), ¶ 60.

[325] Barrios Report (REX-004), ¶ 60 (emphasis in the text).

and the use of that trademark in commerce, ruling that the mere registration does not give rise to a right to use the trademark.[326]

258. The Respondent relies on an exchange in 1994 between the tobacco companies and WIPO, where WIPO states clearly its view that the registration of a trademark is a separate question from the use of that trademark: "the Paris Convention obliges its member States to register a mark even where the sale of the goods to which such mark is to be applied is prohibited, limited or subject to approval by the competent authorities of such states."[327] However, it is not clear on the face of the Paris Convention that this is so, and it is unclear what legal weight is to be given to a statement from the WIPO Secretariat on such a matter.

259. Certainly this is the rule in the case of *patents*, for which there is a specific provision in the Paris Convention.[328] But it seems difficult to draw the conclusion that the same rule applies in the case of trademarks where none is provided. In fact, the text of the Convention points in the other direction, stating, as already mentioned, that "the conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation."[329] The exception to this is where a trademark is already registered in its country of origin, in which case a second country, which is also party to the Convention, must accept the filing for trademark purposes, subject to certain reservations.[330]

[326] RCM, ¶ 9.26, citing TCA Decision No. 933, 11 Nov. 2010 (RLA-211), pp. 5-6.

[327] RCM, ¶ 9.40, citing N. Collishaw, *Tobacco Control and the Paris Convention for the Protection of Industrial Property*, TOBACCO CONTROL, Vol. 5, No. 2 (1996), p. 165 (quoting Letter from A Bogsch, Director-General of the World Intellectual Property Organization, to H. Nakajima, Director-General of the World Health Organization) (RLA-226).

[328] Paris Convention (AB-04), Article 4 *quater*: "The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law."

[329] Paris Convention (AB-04), Article 6(1). *See supra*, ¶ 248.

[330] Paris Convention (AB-04), Article 6 *quinquies*.

260. The Tribunal notes that there is nothing in the Paris Convention that states expressly that a mark gives a positive right to use,[331] although it is clear that a trademark can be cancelled where it has not been used for a reasonable period.[332]

261. The Claimants rely on Article 20 of the TRIPS Agreement which seems to imply "a right to use" a trademark by prohibiting WTO Member States from unjustifiably imposing "special requirements" on trademarks used in the course of trade. They rely on Professor Gibson's Opinion holding that "if there is no right or legitimate interest in use, there is no need… for Article 20."[333]

262. However, to imply a right to use from a provision that prohibits WTO Member States to encumber the use of trademarks would elevate to a "right to use" a provision that does no more than simply acknowledging that trademarks have some form of use in the course of trade which should not be "unjustifiably" encumbered by special requirements. In any case, nowhere does the TRIPS Agreement, assuming its applicability, provide for a right to use. Its Article 16, dealing with "Rights Conferred," provides only for the exclusive right of the owner of a registered trademark to prevent third parties from using the same mark in the course of trade.[334]

263. The Claimants rely also on Article 11 of the MERCOSUR Protocol, which provides: "[t]he registration of a trademark shall grant the owner an exclusive right of use, and the right to prevent any person from performing, without the [trademark owner's] consent, the following acts…"[335] They say that this shows that there are two separate rights granted by a trademark, an exclusive right of use and a right of prevention.

264. However, as the Respondent has pointed out, the better interpretation is that the *exclusive* right to use is simply the other side of the coin of the "right to prevent any person from performing," and does not thereby mean that a trademark gives rise to an

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[331] *See also* the conclusions in this respect of M Davison, "The legitimacy of plain packaging under international intellectual property law: why there is no right to use a trademark under either the Paris Convention or the TRIPS Agreement," in Tania Voon et al (eds.) *Public Health and Plain Packaging of Cigarettes: Legal Issues* (2012), p. 82; cited in RCM, ¶ 9.41.

[332] Paris Convention, Article 4(1).

[333] CR, ¶ 130; citing Gibson Report, (CWS-023), ¶ 76.

[334] TRIPS Agreement (AB-52), Article 16(1). Switzerland is not a party to this Agreement, which makes its applicability to the present dispute questionable.

[335] CR, ¶ 126 (emphasis in the text).

absolute right of use.[336] This is confirmed by the Spanish original of Article 11 which refers to "the right of exclusive use" ("*el derecho de uso exclusivo*").[337] Based on the clear language of the Spanish text, the Tribunal considers it unnecessary to deal with the further arguments raised between the Parties regarding the effects of the incorporation of the MERCOSUR Protocol into Uruguayan domestic law, and in particular whether benefits granted by the Protocol should extend to trademark holders of third countries by virtue of the MFN provision of Article 4 of the TRIPS Agreement.

265. In their Reply, the Claimants made reference for the first time to the Montevideo Treaty.[338] Whatever its import in the present dispute, it is clear from its definition of "use" in Article 1 as being "right to use exclusively" ("*el derecho de usar exclusivamente*") that it also intends to establish only an exclusive right of use, not an absolute right.[339]

266. The Claimants also argue that a trademark is a property right under Uruguayan law which thus accords a right to use. Again, nothing in their argument supports the conclusion that a trademark grants an inalienable right to use the mark. As the Respondent rightly points out, the scope of the property right is determined by Uruguayan IP laws, such that, in order to work out the legal scope of the property right, it is necessary to refer back to the *sui generis* industrial property regime in Uruguay.[340] Professor Fischer, one of the Claimants' experts, confirms in a paper prepared not for the purposes of this dispute that a trademark confers on its owner only "the right to prevent others from using a trademark or trademarks that may be confused with their own."[341]

267. In the Tribunal's view, both Parties have focused on a dichotomy between a right to use and a right to protect. However, it may be more fruitful to view the case as a question of an absolute versus exclusive right to use. Ownership of a trademark does, in certain circumstances, grant a right to use it. It is a right of use that exists *vis-à-vis* other persons,

[336] RCM, ¶ 9.46, n. 971.
[337] RR, ¶ 9.50.
[338] CR, ¶ 131.
[339] RR, ¶ 9.63.
[340] RCM, ¶ 9.33; referring to Uruguay Civil Code, Article 491.
[341] Fischer Report on Trademarks with the Term "University/Bank," 15 Feb. 2012, (AB-57), p. 3.

an exclusive right, but a relative one. It is not an absolute right to use that can be asserted against the State *qua* regulator.

268. As explained by Professor Barrios with reference to Professor Bugallo's work on Intellectual Property, it is the "right to exclude third parties from the market (called the negative facet) [that] renders the exclusive use of the registered trademark in the marketplace possible."[342] Nothing in any of the legal sources cited by the Claimants supports the conclusion that a trademark amounts to an absolute, inalienable right to use that is somehow protected or guaranteed against any regulation that might limit or restrict its use. Moreover, as the Respondent has pointed out, this is not the first time that the tobacco industry has been regulated in such a way as to impinge on the use of trademarks.[343]

269. Most countries, including Uruguay, place restrictions on the use of trademarks, for example in advertising. Particularly in an industry like tobacco, but also more generally, there must be a reasonable expectation of regulation such that no absolute right to use the trademarks can exist. Otherwise "the mere fact of registering a trademark would guarantee the sale of any trademarked product, without regard to other considerations."[344] If a food additive is, subsequent to the grant of a trademark, shown to cause cancer, it must be possible for the government to legislate so as to prevent or control its sale notwithstanding the trademark. The Respondent relies on another publication of the Claimants' expert, Professor Fischer, to this effect, where he noted that registering a trademark "does not in any way imply an authorization or qualification for the performance of the specific activity for which the registration is requested."[345]

270. The objection might be to regulations that target and modify or ban use of their trademarks as such without otherwise changing the conditions of sale, whereas in the

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[342] RR, ¶ 9.35, citing Second Legal Opinion of Professor Andrea Barrios Kubler, 19 Sept. 2015 ("**Barrios Second Opinion**") (REX-016), ¶ 35. Professor Barrios further notes that the TCA decision relied upon by the Claimants (*supra*, ¶ 207) makes explicit reference to the right to exclude (*ius prohibendi*) conferred by Article 14 of Law No. 17.011 but does not make any reference, directly or indirectly, to the existence of an affirmative "right to use" a trademark: RR, ¶ 9.36, citing Barrios Second Opinion (REX-016), ¶ 36.

[343] RR, ¶ 9.25. However, the reference by the Respondent to the 2005 Ordinance banning certain descriptors is a problematic example, since the Claimants allege that such descriptors were not distinctive aspects of their trademarks, being terms commonly used in the marketplace. Thus, the Claimants' response would be that they did not challenge the 2005 Ordinance because they did not understand it to impinge on their ability to use their trademark. *See* RfA, ¶ 22, noting that they have never sought to challenge this Ordinance.

[344] RR, ¶ 9.28.

[345] *Ibid.*

example of the harmful food additive, sale of the product is prohibited entirely. But there may be products (of which tobacco is currently one) whose presentation to the market needs to be stringently controlled without being prohibited entirely, and whether this is so must be a matter for governmental decision in each case. There is nothing in the relevant legal materials to support a carve-out of trademarks from the legitimate realms of regulation. Uruguayan trademark law (like trademark law in other countries following the Paris Convention system) provides no such guarantee against regulation that impinges on the use of trademarks.

271. The Tribunal concludes that under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power.[346]

(c) Whether the Challenged Measures Have Expropriated the Claimants' Investment

272. The Respondent has asserted that the Claimants had no rights capable of being expropriated since "Uruguayan trademark law does *not* recognize an affirmative right for registrants *to use* their trademark in commerce".[347] The Tribunal does not share the Respondent's position. Absence of a right to use does not mean that trademark rights are not property rights under Uruguayan law, as contended by the Claimants and as recognized by one of the Respondent's experts, Professor Carvalho,[348] according to whom "the fact that trademarks are protected as private property does not mean that they

[346] Professor Fischer, confirms that regulatory authorities impose restrictions on the use of a trademark, holding that "[u]ltimately, as normally occurs, the owner of a trademark registration who seeks to carry out a particular activity under said trademark in the Republic must carry out the activity in compliance with the rules and regulations applicable to such activity, which will be regulated and controlled by the agency to which jurisdiction has been legally assigned, depending on the case (for example, the Ministry of Education and Culture, the Ministry of Public Health, the Central Bank of Uruguay, the respective City Council, etc.)": Report on Trademarks with the Term "University/Bank," 15 Feb. 2012, (AB-57), pp. 3-4. The Tribunal does not deem necessary to deal specifically with the question whether the trademark owner has a legitimate interest in using its registered and protected trademarks, as mentioned by Prof. Gibson, one of the Claimants' experts (Gibson Report (CWS-023), ¶¶ 71-73), considering that this question related to a specific provision of the TRIPS Agreement making reference to "legitimate interest" (Art. 17).

[347] RCM, ¶ 7.49 (emphasis in the text).

[348] Carvalho Report (REX-017), ¶ 7: "Intellectual property is private property, indeed. The TRIPS Agreement does not define it as such, but it recognizes it as 'private rights'. Case law and statutes of a vast number of countries have established that those rights are of a proprietary nature. It follows that the first part of PMI's argument is correct, trademark rights are rights of property."

convey the right to use."[349] Professor Barrios, another expert for the Respondent, disagrees holding that "[i]ntellectual property is a *sui generis* regime, that is not assimilable to the right of ownership or property," the ownership or property rights and their limitations under the Constitution and the Civil Code being not attributable to trademark owners.[350]

273. Trademarks being property, their use by the registered owner is protected. As intellectual property assets, trademarks are "inherently associated with trade for they imply a situation of intermediation between producers and consumers."[351] It must be assumed that trademarks have been registered to be put to use, even if a trademark registration may sometime only serve the purpose of excluding third parties from its use.[352]

274. As a matter of fact, Abal made use of all of its thirteen trademark variants before SPR effectively banned seven of them,[353] and the 80/80 Regulation limited "the space available for Claimants to display the visual elements of their remaining brands to only 20% of the front and back of the package."[354] As to the Respondent's allegation regarding the Claimants' lack of valid title to the banned trademarks, the Tribunal refers to its ruling in that regard.[355] The Tribunal concludes that the Claimants had property rights regarding their trademarks capable of being expropriated. It must now examine whether the Challenged Measures had an expropriatory character with regard to the Claimants' investment.

275. Regarding the 80/80 Regulation, the Claimants argue that it reduced the brand equity of those products that survived the implementation of the SPR, "depriving Abal of its ability to charge a premium price."[356]

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[349] Carvalho Report (REX-017), ¶ 9.

[350] Barrios Report (REX-004), ¶ 11.

[351] Carvalho Report (REX-017), ¶ 20.

[352] Trademark Law, Article 19: "The use of a trademark shall be optional". However, under the Uruguayan Trademark Law the registration of the trademark terminates upon expiration of the term provided by Article 18 (ten years), save in case of renewal. Likewise under the Paris Convention (AB-04) (*supra*, ¶ 260).

[353] CM, ¶ 192.

[354] *Ibid.*, ¶ 196.

[355] *Supra*, ¶ 254.

[356] CM, ¶ 104.

276. In the Tribunal's view there is not even a *prima facie* case of indirect expropriation by the 80/80 Regulation. The *Marlboro* brand and other distinctive elements continued to appear on cigarette packs in Uruguay, recognizable as such. A limitation to 20% of the space available to such purpose could not have a substantial effect on the Claimants' business since it consisted only in a limitation imposed by the law on the modalities of use of the relevant trademarks. The claim that the 80/80 Regulation breached Article 5 of the BIT consequently fails.

277. Regarding the SPR, at the time of its imposition in 2009, the Claimants manufactured and sold thirteen variants within its six brand families, as follows:[357]

- *Marlboro* (a family comprised of *Marlboro Red*, *Marlboro Gold*, *Marlboro Blue*, and *Marlboro Fresh Mint*);
- *Fiesta* (a family comprised of *Fiesta*, *Fiesta Blue*, and *Fiesta 50 50*);
- *Philip Morris* (a family comprised of *Philip Morris* and *Philip Morris Blue*);
- *Premier* (a family comprised of *Premier* and *Premier Extra*);
- *Galaxy* (which was comprised of only one product, *Galaxy*); and
- *Casino* (which was comprised of only one product, *Casino*).

278. Before the SPR, Abal owned the trademarks associated with *Premier* and *Casino* and was licensee of the trademarks for all other products from PMP and PMB, which owned them, as shown by the list of the relevant Uruguayan trademarks, including their registration numbers, owners and licensees, provided by the Claimants.[358] In the Claimants' view, each of such "brand assets"[359] is an investment protected by the BIT.[360] They contend that variants were vital to their business in Uruguay given the ability to utilize them to compete for market share and pricing power in the Uruguayan market[361] and the difficulty and costs to introduce new brands in such a highly regulated market.[362]

279. According to the Claimants, the SPR banned seven of the thirteen variants manufactured and sold by Abal at the time, thus rendering them and the associated goodwill "valueless": these were *Marlboro Gold, Marlboro Blue, Marlboro Fresh Mint, Fiesta*

[357] CM, ¶ 75 (emphasis in the text).

[358] *Ibid.*, ¶ 85.

[359] The Claimants define "brand assets" as including (a) Claimants brand and brand families; (b) brand variants and (c) the intellectual property rights associated with Claimants' brand, brand families and variants: CM, ¶ 62.

[360] CR, ¶ 179.

[361] CM, ¶ 192.

[362] *Ibid.*, ¶¶ 81-82.

Blue, *Fiesta 50 50*, *Philip Morris Blue* and *Premier*.[363] They add that "[b]y destroying the value of those investments without compensation, Respondent violated Article 5 of the BIT."[364] They reply to the Respondent's argument that the damage caused by the Challenged Measures on Claimants' business has not been so severe "as to render their activities so marginal or unprofitable as effectively to deprive them of their character as investment"[365] by pointing to the fact that "each brand asset is an individual investment in its own right, and each has been expropriated."[366]

280. The question whether indirect expropriation may relate to identifiable distinct assets comprising the investment or, rather, is to be determined considering the investment as a whole is disputed, with a number of investment treaty cases supporting one[367] or the other[368] position. The Tribunal is of the view that the answer largely depends on the facts of the individual case.

281. The starting consideration in the present case is the value that each brand asset had in the context of Abal's overall business. Abal produced and sold cigarettes in the Uruguayan market using different trademarks, each of which was associated by consumers with specific quality cigarettes. *Marlboro* brand was associated with the highest quality being sold which, before the SPR, was sold at a premium over Mailhos' highest priced cigarettes, accounting for more than 45% of Abal's profits in the Uruguay market.[369] *Marlboro Gold* alone accounted for over 10% of Abal's sales in Uruguay.[370] Based on these assumptions, the Claimants' accounting experts have separately calculated for each variant the loss resulting from its elimination by the SPR.[371]

[363] *Ibid.*, ¶ 193. *See supra*, ¶ 222.

[364] *Ibid.*, ¶ 194.

[365] RCM, ¶ 7.38.

[366] CR, ¶ 180.

[367] In favor of the separate consideration of individual assets comprising the investment are all cases relied upon by the Claimants: CR, ¶¶ 181-185 and footnotes 296-303. *See* RR, ¶¶ 6.26-6.31 for critical remarks regarding cases relied upon by the Claimants.

[368] In favor of the need to consider the investment "as a whole" are the cases relied upon by the Respondent: RR, ¶ 6.23 and footnotes 476-478.

[369] CM, ¶ 105.

[370] CM, ¶ 193.

[371] First Navigant Report (CWS-013), ¶ 183; Second Expert Report of Brent C. Kaczmarek and Kiran P. Sequiera, 17 Apr. 2015 ("**Second Navigant Report**") (CWS-017), ¶ 206.

282. Whether the above specificities of Abal's business are decisive to conclude that each of the Claimants' trademarks was an individual investment and that, accordingly, seven of them were indirectly expropriated as a result of the SPR remains to be seen. The Respondent gives in that regard the example of an investor owning 13 buildings, arguing that if just one of them were directly taken this would constitute an expropriation but that the case would be different if "a generally applicable regulation prohibits the use of seven of the same buildings due to high levels of asbestos." In the latter case, the Respondent adds, whether such "regulation constitutes an *indirect* expropriation has to be assessed by reference to its effect on the value of the investor's investment as a whole."[372] Since "Claimants continue to reap significant returns on their investment in Uruguay," there was no expropriation as a result of the SPR and 80/80 Regulation.[373]

283. The Tribunal believes that in order to determine whether the SPR had an expropriatory character in this case, Abal's business is to be considered as a whole since the measure affected its activities in their entirety. This is confirmed by the fact that in order to mitigate its effects, Abal resorted to countermeasures involving its business as a whole. Prices were increased initially and then, when its products lost market share, they were lowered in December of 2009, with Abal suffering losses *vis-à-vis* its competitor Mailhos across its entire portfolio. Prices were then increased again beginning February 2011 with resulting market share decline "across its portfolio."[374]

284. In any case, the effects of the SPR were far from depriving Abal of the value of its business or even causing a "substantial deprivation" of the value, use or enjoyment of the Claimants' investments, according to the standard that has been adopted for a measure to be considered expropriatory.[375] The Claimants admit not to have suffered such substantial deprivation when mentioning that "while Abal has grown more profitable since 2011, Abal would have been even more profitable if Respondent had not adopted the challenged measures."[376]

[372] RR, ¶ 6.32 (emphasis in the text).
[373] *Ibid.*, ¶ 6.37.
[374] CM, ¶¶ 106-108; CR, ¶¶ 348-351.
[375] *Supra*, ¶ 192.
[376] CR, ¶ 342 (emphasis in the text).

285. As indicated by the Claimants' accounting expert, Navigant, their investment shows positive cash flows in perpetuity, as evidenced by Abal's payment of royalties to PMP every year between 2009 and 2013, and having paid more than it did in 2008 or any prior year (before the measures) and by Abal's gross profit which, except in 2010, was greater between 2009 and 2013 that it was before 2008.[377] According to Navigant, "Abal would have been economically better off, *But-For* the Regulations. While Abal is currently profitable because of the cost reductions realized from the factory closure, it could have been significantly *more* profitable in a scenario where the Regulations had not been introduced."[378]

286. In the Tribunal's view, in respect of a claim based on indirect expropriation, as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation. As confirmed by investment treaty decisions, a partial loss of the profits that the investment would have yielded absent the measure does not confer an expropriatory character on the measure. In *LG&E v. Argentina*, for example, the tribunal held:

> *Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for expropriation.*[379]

287. The Tribunal's analysis might end here, leading to the dismissal of the Claimants' claim of expropriation for the above reasons. There is however an additional reason in support of the same conclusion that should also be addressed in view of the Parties' extensive debate in that regard. In the Tribunal's view, the adoption of the Challenged Measures by Uruguay was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation under Article 5(1) of the BIT.

288. In its Decision on Jurisdiction, the Tribunal noted that the BIT "does not prevent Uruguay, in the exercise of its sovereign powers, from regulating harmful products in

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[377] Respondent's Opening Presentation at the Hearing, tab. 4 slides 16-17.

[378] Second Navigant Report (CWS- 017), ¶ 52 (emphasis in the text). The factory closure mentioned by Navigant was the Claimants' factory in Montevideo which was shut down in October 2011. According to Navigant, "this factory closure was a business restructuring that would have been implemented regardless of the Regulations": *Ibid*.

[379] *LG&E* (RLA-65), ¶ 191. The Respondent relies also on *Archer Daniels*, *CMS*, and *Encana*; *See* RCM, ¶¶ 7.33-7.37.

order to protect public health after investments in the field have been admitted."[380] At that stage, no conclusion had been drawn from the exercise of such powers regarding the present dispute.

289. It is the Claimants' contention that Article 5(1) of the BIT prohibits any expropriation unless it is carried out in accordance with the conditions established by said Article and that the existence of a public purpose, one of such conditions, does not exempt the State from the obligation to pay compensation.[381] In the Claimants' view, the State's exercise of police powers does not constitute a defense against expropriation, or exclude the requirement of compensation.[382] The Claimants add that there is no room under Article 5(1) or otherwise in the BIT for carving out an exemption based on the police powers of the State.[383]

290. The Tribunal disagrees. As pointed out by the Respondent, Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties," a reference "which includes … customary international law."[384] This directs the Tribunal to refer to the rules of customary international law as they have evolved.[385]

291. Protecting public health has since long been recognized as an essential manifestation of the State's police power, as indicated also by Article 2(1) of the BIT which permits contracting States to refuse to admit investments "for reasons of public security and order, public health and morality."

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[380] Dec. Jur., ¶ 174.

[381] CM, ¶ 205.

[382] CM, ¶ 208 (citing *Pope & Talbot*).

[383] CM, ¶ 210.

[384] RCM, ¶ 7.23, citing the ICJ's Judgment of 26 June 1986 in *Nicaragua v. United States* holding that customary international law does not require incorporation into a treaty to be applicable.

[385] As held by the tribunal in *Mondev v International Ltd. v. United States of America*, Award, 11 Oct. 2002, ("***Mondev***") (RLA-117); a NAFTA case, "like all customary international law, the international minimum standard has evolved and can evolve…" (¶ 124). According to *Chemtura*, another NAFTA case, "in line with *Mondev*, the tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard" (¶ 122).

292. The police powers doctrine was propounded much earlier than its recognition by investment treaty decisions. The 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens already provided in Article 10(5) as follows:

> *An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from … the action of the competent authorities of the State in the maintenance of public order, health, or morality … shall not be considered wrongful, provided*
>
> *(a) it is not a clear and discriminatory violation of the law of the State concerned;*
>
> *(b) it is not the result of a violation of any provision of Article 6 to 8 of this Convention [denial of justice];*
>
> *(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and*
>
> *(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.*[386]

293. The doctrine was endorsed in the *Third Restatement of the Foreign Relations Law* of the United States of 1987 in the following terms:

> *A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of states, if it is not discriminatory.*[387]

294. According to the OECD, "[i]t is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police power of the State, compensation is not required."[388]

295. The principle that the State's reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory did not find immediate recognition in investment treaty decisions. But a consistent trend in favor of

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[386] Draft Convention on the International Responsibility of States for Injuries to Aliens, (1961) 55 Am. J. Int'l 548, p. 562.

[387] American Law Institute, *Restatement (Third) Foreign Relations of the United States* (1987), vol. 1, (RLA-257), ¶ 712, comment (g).

[388] OECD, "*Indirect Expropriation" and the "Right to Regulate*" *in International Investment Law*, OECD Working Papers on International Investment, 2004/4 (Sept. 2004), (RLA-238), p. 5, n. 10.

differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period, a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law. According to a principle recognized by these decisions, whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action.[389] Some decisions have relied on the jurisprudence of the European Court of Human Rights, based on Article 1 of Protocol 1 of the Convention.[390]

296. In *Tecmed v. Mexico* the tribunal stated:

> *The principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.*[391]

297. In *Saluka v. Czech Republic*, the tribunal recorded the scope, conditions and effects of the police powers doctrine, stating:

> *It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed to the general welfare*.

The tribunal added:

> *[T]he principle that the State adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today.*[392]

298. The police powers doctrine has been applied in several cases to reject claims challenging regulatory measures designed specifically to protect public health. As early as 1903, the Claims Commission in the *Bischoff* Case, in dismissing a claim for damages, held: "[c]ertainly during an epidemic of an infectious disease there can be no liability for the

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[389] *Tecmed* (CLA-203), ¶ 122; *Methanex* (RLA-164), Part IV, Ch. D, ¶ 7; *Chemtura* (RLA-53), ¶ 247; *Glamis* (RLA-183), ¶ 356; *Saluka* (CLA-227), ¶¶ 255-264.

[390] *Tecmed* (CLA-203), ¶ 122; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/2, Award, 14 July 2006, (CLA-296), ¶ 311; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009 ("***EDF***"), (CLA-224), ¶ 293.

[391] *Tecmed* (CLA-203), ¶ 119.

[392] *Saluka* (CLA-227), ¶¶ 255, 260, 262. Reference to customary international law as the legal ground for the police powers doctrine had been made by the OECD Working Paper of 2004 (*supra*, ¶ 294).

reasonable exercise of police powers."[393] In *Methanex v. United States*, the claimant had contended that its rights had been expropriated by measures adopted by the U.S. state of California banning MTBE, a fuel additive harmful to public health. In rejecting the claim, the tribunal stated:

> *[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory….*[394]

299. In *Chemtura v. Canada*, a U.S. manufacturer of lindane, an agricultural insecticide said to be harmful to human health and the environment, claimed a breach of the NAFTA by Canada's prohibition of its sale. The tribunal rejected the claim, stating:

> *Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.*[395]

300. As evidence of the evolution of the principles in the field, the police powers doctrine has found confirmation in recent trade and investment treaties. The 2004 and 2012 U.S. Model BITs provide in the section dealing with "Expropriation": "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation." Similar provision is made by the 2004 and 2012 Canada Model BITs. The EU-Canada Comprehensive Economic and Trade Agreement contains a similar provision:

> *For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objective, such as health, safety and the environment, do not constitute indirect expropriations*.[396]

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[393] *Bischoff* (RLA-138).

[394] *Methanex* (RLA-164), Part IV, Ch D, ¶ 7.

[395] *Chemtura* (RLA-053), ¶ 266.

[396] Comprehensive Economic and Trade Agreement between the European Union and Canada ("**CETA**") Annex 8-A, Expropriation, Article 3. On 29 Feb. 2016, the EU Commissioner for Trade Cecilia Malmström and the Honourable Crystia Freeland, Minister of International Trade of Canada, announced in a joint statement that "the

The same provision is now to be found in the EU-Singapore FTA.[397]

301. In the Tribunal's view, these provisions, whether or not introduced *ex abundanti cautela*, reflect the position under general international law.

302. It should be stressed that the SPR and the 80/80 Regulation have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health. Article 44 of the Uruguayan Constitution[398] states: "The State shall legislate in all matters appertaining to public health and hygiene, to secure the physical, moral and well-being of all the inhabitants of the country." As held by Professor Barrios, one of the Respondent's experts, "it is in this framework of the essential duty to protect public health that the State has the authority to prevent, limit or condition the commercialization of a product or service, and this will consequently prevent, limit or condition the use of the trademark that identifies it."[399] Article 7 states the principle of protection pursuant to which "[t]he inhabitants of the Republic have the right to be protected in the enjoyment of their life" and Article 46 directs the State to "combat *social vices* by means of the law and International Convention."

303. The 1934 Organic Law[400] provides in Article 2(1) that the MPH must adopt "all measures deemed necessary to maintain collective health…" and in Article 23 that it must also take "preventive action in regards to… social vices… that decrease the capacity of individuals or threaten health."

304. Law 18,256 on Tobacco Control[401] directs the MPH in Article 1-2 to protect the country's inhabitants against the health, social, environmental and economic consequences of tobacco use and exposure to tobacco smoke. Articles 8 and 9 of the Law set forth rules in fulfillment of the obligations undertaken by Uruguay under Articles 11 and 13 of the FCTC.[402] It is based on these obligations that the SPR and the 80/80 Regulation have been adopted. The FCTC is one of the international conventions

English text of the Agreement has been completed "and that they "are confident that CETA will be signed in 2016 and entered into force in 2017" (Press Release: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468).

[397] European Union-Singapore Free Trade Agreement, initialed on 17 Oct. 2014, Annex 9-A, "Expropriation," http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

[398] Constitution of the Oriental Republic of Uruguay (2004) (RLA-*1bis*); *supra*, ¶ 97.

[399] Barrios Report (REX-004), ¶ 66.

[400] Uruguayan Organic Law of Public Health No. 9,202 (20 Dec. 1934) (RLA-8).

[401] *Supra*, ¶ 105.

[402] *Supra*, ¶ 88.

to which Uruguay is a party guaranteeing the human rights to health; it is of particular relevance in the present case, being specifically concerned to regulate tobacco control.[403]

305. As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate.[404] In the Tribunal's view, the SPR and the 80/80 Regulation satisfy these conditions.

306. The Challenged Measures were taken by Uruguay with a view to protect public health in fulfilment of its national and international obligations. For reasons which will be explored in detail in relation to claims under Article 3(2) of the BIT, in the Tribunal's view the Challenged Measures were both adopted in good faith and were non-discriminatory. They were proportionate to the objective they meant to achieve, quite apart from their limited adverse impact on Abal's business.[405] Contrary to the Claimants' contention,[406] the Challenged Measures were not "arbitrary and unnecessary" but rather were potentially "effective means to protecting public health," a conclusion endorsed also by the WHO/PAHO submissions.[407] It is true that it is difficult and may be impossible to demonstrate the individual impact of measures such as the SPR and the 80/80 Regulation in isolation. Motivational research in relation to

[403] Among international conventions to which Uruguay is a party is the European Convention for the Protection of Human Rights, whose Article 1, Protocol 1, is another source of decisions regarding the police powers doctrine (*supra*, ¶ 295).

[404] In *Tecmed* in order to determine if regulatory actions are to be characterized as expropriation, the tribunal considered "whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality" (¶ 122) (CLA-203).

[405] In other investment treaty cases, the exercise of the State's regulatory powers in the field of protection of public health determined the banning of the production and sale of the subject product: in *Methanex* (RLA-164) for MTBE (*supra*, ¶ 298) and in the *Chemtura* (RLA-53) for lindane (*supra*, ¶ 299). No similar situation occurred in the present case: the Challenged Measures only limited the use of Abal's trademarks for the protection of public health, far from banning the production and sale of tobacco altogether.

[406] CM, ¶¶ 48-53.

[407] WHO Amicus Brief, ¶ 90: "These bodies of evidence, which are consistent with state practice, support the conclusion that the Uruguayan measures in question are effective means of protecting public health." PAHO Amicus Brief, ¶ 100: "Uruguay's tobacco control measures are a reasonable and responsible response to the deceptive advertising, marketing and promotion strategies employed by the tobacco industry, they are evidence based, and they have proven effective in reducing tobacco consumption. For this simple reason, the tobacco industry is compelled to challenge them".

tobacco consumption is difficult to carry out (as recognized by the expert witnesses on both sides). Moreover, the Challenged Measures were introduced as part of a larger scheme of tobacco control, the different components of which it is difficult to disentangle. But the fact remains that the incidence of smoking in Uruguay has declined, notably among young smokers,[408] and that these were public health measures which were directed to this end and were capable of contributing to its achievement. In the Tribunal's view, that is sufficient for the purposes of defeating a claim under Article 5(1) of the BIT.

307. In light of the foregoing, the Tribunal concludes that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriation of the Claimants' investment. For this reason also, the Claimants' claim regarding the expropriation of their investment must be rejected.

C. Denial of Fair and Equitable Treatment under Article 3(2) of the Treaty

308. Article 3(2) under the rubric "Protection and Treatment of Investments" provides, insofar as relevant:

> *Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.*

309. The Claimants allege that by enacting the Challenged Measures, the Respondent has subjected their investments to unfair and inequitable treatment in violation of Article 3(2) of the BIT for the following reasons: (i) the regulations are arbitrary because they "fail to serve a public purpose and yet at the same time they cause substantial harm to the Claimants;" (ii) the measures undermine the Claimants' legitimate expectations with respect to the use and enjoyment of their investments, including the Claimants' expectation that they would be permitted to use their valuable brand assets; and (iii) the regulations "destroy the legal stability that Uruguay pledged in the BIT and on which Abal has relied on when developing and deploying its brand assets."[409]

[408] *Supra*, ¶¶ 136-138.

[409] CM, ¶ 248; *see also* CR, ¶ 236.

310. The Respondent considers that far from being "egregious," "shocking," or "reflecting bad faith" or "wilful neglect," the SPR and 80/80 Regulation were adopted in good faith, and in a non-discriminatory manner to protect public health.[410] Moreover, even if the Tribunal were to adopt the Claimants' autonomous legal standard when examining Claimants Article 3(2) claim, something the Respondent rejects, the Claimants' claim would fail, as the measure is a reasonable regulatory measure that is "logically connected" with the State's public health objectives. The Respondent further alleges that the Claimants should be precluded from bringing an FET claim when their own fraudulent actions created the need to take the measures they now challenge.[411]

a. **The Legal Standard**

311. The Parties agree that the fair and equitable treatment standard has its roots in the minimum standard of treatment long required by international law.[412] They further agree that the standard of State responsibility for failure to protect rights of aliens under customary international was first articulated in the *Neer* case.[413]

312. The Parties disagree however on the content of the applicable legal standard under the Treaty. According to the Claimants, the Treaty provides for an autonomous treaty standard, whereas the Respondent maintains that Article 3(2) of the BIT refers to the minimum standard of treatment owed to aliens under customary international law. They further disagree on the content and interpretation of the minimum standard of treatment under customary international law.

1. The Claimants' Position

313. According to the Claimants, the Respondent's interpretation of BIT Article 3(2) as providing for the customary international law minimum standard of treatment is inapposite for the following reasons:

- It has no basis in the Treaty and it would be contrary to Article 31 of the VCLT, as the ordinary meaning of the terms "fair" and "equitable" does not refer to the

[410] RCM, ¶ 8.2-8.8.

[411] RCM, ¶ 8.24-8.29.

[412] CM, ¶ 217; RCM, ¶ 8.3.

[413] *See* CM, ¶ 217; RCM, ¶ 8.4. *Neer (U.S.A.) v. United Mexican States*, U.S.-Mexico General Claims Commission (CLA-237) (actions that "amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.").

minimum standard of treatment under customary international law. Similarly, the context, object and purpose of the Treaty do not support the Respondent's interpretation either.[414]

- It has no basis on the relevant case law. The case-law cited by the Respondent either refers to Article 1105 of NAFTA, which is not an issue in this arbitration, or does not support the argument that the FET clause provides for the minimum standard of treatment.[415]

- The statement of the Swiss Foreign Office of 1979 relied on by the Respondent to support its position, even if one were to consider it to be relevant (something that the Claimants deny), confirms that the fair and equitable treatment standard under the BIT is broader than the minimum standard of treatment under customary international law.[416]

- Even if the fair and equitable treatment standard could be equated to the standard under customary international law, the standard has continued to evolve today through state practice and the jurisprudence of arbitral tribunals. International tribunals have consistently rejected the *Neer* standard as a statement of the current customary international law. Thus to establish a violation of Article 3(2), the Tribunal shall not assess whether Uruguay's treatment is "egregious," "shocking," or indicative of "willful neglect" or "bad faith."[417]

- Instead, the Claimants allege that the Tribunal must assess "in light of all circumstances" whether Uruguay "ensure[d] that foreign investors are treated reasonably and objectively and are permitted to realize a reasonable return on their investments, free from unfair or unjust interference by the State."[418]

2. The Respondent's position

314. According to the Respondent, FET is a "legal term of art" that refers to the minimum standard of treatment accorded to aliens under customary international law.[419] It is not an autonomous standard.[420] Even if the standard has evolved from *Neer*, the level of scrutiny is in principle the same as in *Neer*, and the burden of proof is on the

[414] CR, ¶¶ 215-218.

[415] CR, ¶¶ 225-230 (citing *inter-alia Total v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 Dec. 2010, ("***Total***") (RLA-190), ¶ 125; *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan. 2010 ("***Lemire***"), (RLA-114), ¶¶ 251-253; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 Nov. 2008, ("***National Grid***") (CLA-221), ¶ 170; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 Nov. 2007 (CLA-277), ¶ 230; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ("***Enron***"), (CLA-028), ¶ 258; *Sempra v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, (CLA-142), ¶ 302. *See also* CR, ¶ 238.

[416] CR, ¶¶ 219-224.

[417] CR, ¶¶ 231-234.

[418] CM, ¶ 216.

[419] RCM, ¶ 8.3.

[420] RCM, ¶ 8.11.

Claimants.[421] Relying, *inter alia*, on the *Glamis v. United States* case, the Respondent maintains that even if the *Neer* standard is not reproduced verbatim by subsequent tribunals, the "same heightened standard for a breach of the minimum standard … continues to exist."[422]

315. The Respondent also invokes the commentary to the 1967 OECD Draft Convention on the Protection of Foreign Property and the 1979 Swiss Foreign Office Statement to argue that under the principle of contemporaneity, the phrase "fair and equitable treatment" was considered at the time of the conclusion of the BIT to refer to the minimum standard of treatment.[423]

3. The Tribunal's Analysis

316. At the outset, the Tribunal notes that the absence of any reference in Article 3(2) of the BIT to "treatment in accordance with international law" or "to customary international law or a minimum standard of treatment," as provided by some other investment treaties with regard to the FET standard, does not mean that the BIT creates an "autonomous" FET standard, as contended by the Claimants[424] and disputed by the Respondent.[425] In the absence of any additional qualifying language, the reference to FET in Article 3(2) cannot be read as "treatment required by the minimum standard of treatment under international law."[426]

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[421] RCM, ¶¶ 8.6-8.8 (relying on *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 Nov. 2000) (Chiasson, Hunter, Schwartz), (RLA-155), ¶ 263*; Glamis* (RLA-183), *Genin v. Estonia*, Award, 25 June 2001 ("***Genin***"), (RLA-157).

[422] RR, ¶¶ 7.11-7.12 (citing *Glamis* (RLA-183) ¶ 616. Respondent also refers extensively to *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 22 Jul. 2008, ("***Biwater***"), ¶¶ 597-599 (CLA-013); *Waste Management Inc. v. United Mexican States*, Award, 30 Apr. 2004 ("***Waste Management***") (CLA-225) ¶ 98; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 Dec. 2014, (RLA-313), ¶ 219. *See also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB (AF)/05/2, Award, 18 Sep. 2009, ¶ 284 (RLA-186)).

[423] RR, ¶¶ 7.4-7.10 (citing the UN Conference on Trade and Development, UNCTAD Series on International Investment Agreements II, Fair and Equitable Treatment: A Sequel (2012), (RLA-274) p. 21.)

[424] CR, ¶¶ 226, 215.

[425] RR, ¶ 7.5.

[426] This is instead the Respondent's reading of Article 3(2): RCM, ¶ 8.3. The Claimants deny that the FET obligation under Article 3(2) is the same as "the international minimum standard of treatment under customary international law": CR, ¶ 218. The UNCTAD study on "*Fair and Equitable Treatment,*" Series on Issues in International Investment Agreements, 1999 (CLA-065), after looking at the evidence in some detail concludes: "These considerations point ultimately towards fair and equitable treatment not being synonymous with the international minimum standard" (p. 40).

317. As any other treaty provisions, the text of Article 3(2) of the BIT must be interpreted according to the normal canons of treaty interpretation as contained in Articles 31 and 32 of the VCLT. This includes interpretation in accordance with general international law, as stated in Article 31(3)(c) which requires that a treaty be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties." The scope and content of FET under Article 3(2) must therefore be determined by reference to the rules of international law, customary international law being part of such rules.

318. As held by *Chemtura v. Canada*, "such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution."[427] The tribunal in that case relied on *Mondev v. United States* which held as follows:

> *[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms – had they been current at the time -- might have meant in 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith […].*[428]

319. In line with the evolution of customary international law, the FET standard has evolved since the time, in 1926, when the *Neer* case, on which the Respondent relies,[429] was decided. The standard is today broader than it was defined in the *Neer* case although its precise content is far from being settled.

320. As held by investment tribunals, whether a particular treatment is fair and equitable depends on the circumstances of the particular case.[430] Based on investment tribunals' decisions, typical fact situations have led a leading commentator to identify the following principles as covered by the FET standard: transparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith.[431] In a number of investment

[427] *Chemtura*, (RLA-053), ¶ 121.

[428] *Ibid*.

[429] RCM, ¶ 8.4

[430] *Mondev* (RLA-117), ¶ 118; *Waste Management* (CLA-225), ¶ 99; *Saluka* (CLA-227), ¶ 285.

[431] Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, The Journal of World Invest. & Trade, June 2005, (CLA-275), pp. 373-374.

cases tribunals have tried to give a more definite meaning to the FET standard by identifying forms of State conduct that are contrary to fairness and equity.

321. In *Genin v. Estonia,* the tribunal indicated that a conduct in breach of the standard would include

> *[A]cts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.*[432]

322. In *Saluka v. Czech Republic*, the tribunal held that:

> *A foreign investor whose interests are protected under the Treaty is entitled to expect that the* [host State] *will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).*[433]

323. In other cases it has been found that the relevant standard is breached by State conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice."[434]

324. The Tribunal agrees that the various aspects of State conduct mentioned above are indicative of a breach of the FET standard. It will deal with "legitimate expectations" and "stability of the Uruguay legal system" as components of the FET standard in the context of the Claimants' claim in that regard.[435]

b. **The Claim**

1. The Claimants' Position

(a) The Challenged Measures are Arbitrary

325. According to the Claimants, many Tribunals, including those adopting a narrow fair and equitable treatment standard, consider that "a measure that inflicts damage on the

[432] *Genin* (RLA-157), ¶ 395.

[433] *Saluka* (CLA-227), ¶ 309.

[434] *Waste Management* (CLA-225), ¶ 98. This view is shared by the tribunals in *Biwater* (CLA-013), ¶ 597 and by *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Liability, 29 Dec. 2014 (RLA-313), ¶ 219.

[435] *Infra.*, ¶¶ 421-435.

investor without serving any apparent legitimate purpose" is "arbitrary" (or "unreasonable") and violates the standard.[436]

326. The Claimants consider that to assess whether a challenged measure is arbitrary, "tribunals have examined the rationality of the measure and of the decision-making process that led to it, the existence of a genuine public purpose, and whether there was a reasonable connection between the objectives pursued by the state and the utility of the chosen measures."[437] Referring to this standard, they consider that the Challenged Measures are arbitrary, as examined further below.[438]

(i) SPR

327. The SPR prohibits tobacco manufacturers from marketing more than one variant of cigarette per brand family. According to the Claimants, there is no connection between the Respondent's purported rationale for adopting the measure (*i.e.*, avoid misleading the consumers) and the actual regulatory measure at issue (*i.e.*, a prohibition against the marketing of multiple variants within a single brand family).[439] Thus, the measures "damage Claimants' investment and are not reasonably related to the Respondent's stated objectives."[440]

328. The Claimants challenge Ordinance 514 and Ordinance 466, the ordinances that impose the Single Presentation Requirement, on three main bases: (i) the Respondent adopted the SPR without any scientific evidence of its effectiveness; (ii) the SPR was adopted without due consideration by public officials; (iii) the SPR did not further its stated objective.

329. First, the Claimants submit that the Respondent has failed to provide empirical evidence or scientific research in support of the proposition that the existence of various variants and different packaging were *per se* misleading to consumers.[441] For example, while

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[436] CM, ¶ 219 (relying on *Waste Management* (CLA-225), ¶ 98*; National Grid* (CLA-221), ¶ 197; *Plama v. Bulgaria*, Award, 27 Aug. 2008 ("***Plama***") (CLA-222), ¶ 184; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 11 Sept. 2009, ("***Toto Costruzioni***") (CLA-223), ¶ 157; *Lemire* (RLA-114), ¶ 262.

[437] CM, ¶ 223.

[438] CM, ¶¶ 221-234.

[439] CM, ¶ 225.

[440] CR, ¶ 242.

[441] CR, ¶¶ 35-41, 55. CM, ¶¶ 8, 25, 28, 222-230.

the Respondent portrays the SPR as a regulation restricting the use of misleading colors on tobacco packaging, it does not in fact regulate or prohibit any colors at all (e.g. gold packaging). [442] Accordingly, there is no "logical connection" between the regulation and the stated objective of ensuring that consumers are not mislead into believing that one variant within a brand family presents fewer health risks than another.[443]

330. Second, the Respondent has failed to provide any evidence showing that the Government engaged in meaningful deliberations before adopting the SPR.[444] Relying on one of their witnesses, the Claimants affirm that, instead, the SPR was devised after the Director of the MPH's Tobacco Control Program, Dr. Abascal, witnessed customers in a store receiving *Marlboro Gold* packs when they asked for *Marlboro* "light" cigarettes.[445] The Claimants also consider that the evidence presented by the MPH indicates that the SPR was drafted by one individual on his own initiative, without input or consultation from others.[446]

331. Third, the Claimants argue, relying on the conclusion of their marketing experts, that the tobacco consumption did not decrease in Uruguay as a result of the SPR. Thus the SPR substantially damaged the Claimants' investments without advancing the public interest to any degree.[447]

332. The Claimants challenge the Respondent's justification for the SPR—that consumers necessarily perceive one variant of a cigarette brand as less harmful than another variant of the same brand, and will begin or continue smoking due to that misperception—alleging that before the Respondent adopted the SPR, the vast majority of Uruguayans already believed that smoking caused cancer and coronary heart disease and knew that cigarettes are harmful.[448]

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[442] CM, ¶¶ 3, 30, 32-34; CR, ¶ 36, 38-40.

[443] CM, ¶¶ 2, 30, CR, ¶¶ 2, 28-36.

[444] CR, ¶¶ 47-51.

[445] CR, ¶¶ 43- 44; Herrera Statement I (CWS-6), ¶ 3. *See also* Herrera Statement II (CWS-19), ¶¶ 4-5. In this regard, the Claimants argue that anecdotal reporting from a handful of store visits does not serve as a substitute for actual evidence such as studies, surveys, formal interviews, sales data, etc. CR, ¶ 245.

[446] CR, ¶¶ 52-54.

[447] CM, ¶ 230. CR, ¶¶ 57-61; Expert Report of Mr. Alexander Chernev, 28 Feb. 2014 ("**Chernev Report**") (CWS-9), ¶ 4; Second Expert Report of Mr. Alexander Chernev, 17 Apr. 2015 ("**Chernev Second Report**") (CWS-20), ¶¶ 56-82, 115, 120, 130; Expert Report of Mr. Jacob Jacoby, 17 Apr. 2015 ("**Jacoby Report**") (CWS-21), ¶ 5.

[448] CR, ¶ 31.

333. In addition, they consider that the SPR is at odds with Uruguayan law's requirement that tobacco manufacturers publish in local newspapers the tar and nicotine levels of each of their cigarette brands. According to the Claimants, that publication is much more likely to lead consumers to the same misperceptions that the SPR purportedly was intended to eradicate, and this highlights the irrationality of the Respondent's SPR policy.[449]

334. Finally, the Claimants highlight that neither FCTC nor the Guidelines call for parties to consider single presentation requirements or 80/80 requirements. Since no other country had adopted such regulations, it cannot be that they are required by the FCTC.[450]

(ii) The 80/80 Regulation

335. According to the Claimants, the 80/80 Regulation is arbitrary as there is no evidence that the government deliberated in a meaningful way about the measure, or that the measure was necessary to increase awareness of the health effects of smoking and thereby further the alleged objective of reducing tobacco consumption.

336. The 80/80 Regulation was, it is said, not adopted for public safety or public health reasons. According to the Claimants, there are no records indicating that the Respondent deliberated in any meaningful way as to whether health warning labels covering 50 percent of the front and back surface of the cigarette packages were insufficient to inform consumers about the health effects of smoking.[451] Instead, the Claimants contend, it was adopted to punish one of its competitors (Mailhos) that was circumventing the SRP by using the same logo across different brand names through the use of so-called "*alibi brands.*"[452] The Claimants allege that, while there is no contemporaneous documentation indicating that the desire to raise awareness of the health risks of smoking motivated the MPH to adopt the 80/80 regulation, the desire to punish Mailhos is confirmed by MPH's internal documents.[453]

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[449] CR, ¶¶ 6, 42.

[450] CR, ¶ 102.

[451] CR, ¶ 246, *See also* CR, ¶¶ 76-77.

[452] CM, ¶ 231; *see also* CM, ¶¶ 7, 50, 53, 202. "Alibi brands" as defined by the Claimants, "are cigarette brands that were developed and sold by the local company Mailhos in the wake of the SPR. Alibi brands use nearly identical packaging to the packaging that Mailhos used before the SPR was adopted—the only exception is that alibi brands are sold under different brand names, but the products are clearly part of the same family. (*See* CM, ¶ 40).

[453] CR, ¶¶ 10, 62-74, CM, ¶ 50-52. In support of their argument, the Claimants cite internal documents produced by the Respondent, including a letter from Dr. Abascal to the Director General of the MPH, Dr. Abascal's

337. Moreover, the Claimants cite to the findings of two of their expert reports noting that most of the sources the Respondent cites as a basis for the 80/80 Regulation, did not, and could not, establish that larger health warnings would either increase awareness of smoking risks or reduce tobacco consumption.[454]

338. The Claimants also assert that the 80/80 Regulation was arbitrary as it "sought to address a non-existent problem." The Claimants recognize that there is a public health interest in graphic images.[455] They consider, nevertheless, that before the adoption of the 80/80 Regulation there was already "near universal awareness" of the health risks of smoking. Therefore, "the impact on the trademarks is out of proportion to the need and justification for 80% warnings."[456] Relying on the GATS Study, they assert that 98% of Uruguayans already believed that smoking caused cancer and 97% of them believed that smoking caused coronary heart disease. Enlarging the warnings, therefore, could not and did not increase public awareness.[457] There is also no proof that it has reduced or will reduce consumption.[458] Instead, the Claimants allege, the regulations limit space for and distort the trade dress, including the trademarked images.[459]

339. According to the Claimants "the fact that a regulation simultaneously fails to meet its supposed purpose while substantially damaging investments protected by the BIT is the model of an arbitrary measure."[460]

(b) The Claimants' Legitimate Expectations

340. The Claimants also assert that the BIT's fair and equitable treatment standard requires that Contracting Parties provide a treatment that does not affect the "basic expectations" that were taken into account by the foreign investor when making its investment.[461]

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statement during a radio interview in 2009, and internal communications of the Claimants. *See* CR, ¶¶ 68-73; Dilley Statement (CWS-5), ¶ 14, and press articles C-136 and C-277 and C-337; C-338 and C-339.

[454] CR, ¶ 77; Chernev Second Report (CWS-20), ¶¶ 22, 26-27, 167; Jacoby Report (CWS-21), ¶ 5.

[455] Tr. Day 1, 23:17-18.

[456] Tr. Day 1, 24:6-8; *see also* CM, ¶ 233.

[457] CM, ¶ 233; CR, ¶ 11.

[458] CM, ¶ 234.

[459] CM, ¶ 9.

[460] CM, ¶ 234.

[461] CR, ¶ 247, referring inter alia to *Tecmed* (CLA-203), ¶ 154. This is rebutted by Respondent, which alleges that Tecmed's interpretation of FET is an outlier. *See* RCM, ¶¶ 8.34-8.36; RR, ¶¶ 7.45-7.50.

341. The Claimants contend that they made substantial investments based on, *inter alia*, their justifiable expectations that the Uruguayan Government would: (a) allow the Claimants to continue to deploy and capitalize on their brand assets; (b) refrain from imposing restrictive regulations without a well-reasoned, legitimate purpose; (c) respect the Claimants' intellectual property rights; and (d) ensure that the Claimants had access to a just, unbiased, and effective domestic court system.[462] All these expectations, the Claimants continue, were "eviscerated."

342. For the Claimants, those legitimate expectations may arise from general statements, the legal framework, legislation, treaties, licenses, and contracts, and even from a general expectation that the State will only implement regulations that are "reasonably justifiable by public policies."[463] Specific, explicit promises to an investor in a particular form are not necessary.

343. In this case, their expectation arose out of both general statements and specific assurances. As to the general statements, the Claimants assert that they are constituted by Articles 1 and 4 of Uruguay's Investment Promotion Law by which Uruguay sought to attract investment.[464]

344. As to the Claimants' specific expectations, they are said to have arisen out of the following facts: (a) the Claimants own the intellectual property rights, including the trademarks, that form the core components of the branding on their cigarette packages; (b) those intellectual property rights are property rights protected under Uruguayan law; (c) the Claimants have a right to use their intellectual property rights under Uruguayan law; (d) the Claimants had used their intellectual property and brand assets without disruption over many decades, and in the process have created substantial brand value; (e) the production and sale of tobacco products have at all times been legal in Uruguay; and (f) the Respondent encouraged further investment in Abal's production and marketing of cigarettes.[465]

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[462] CM, ¶¶ 237-242.

[463] CR, ¶¶ 250-254 (relying *inter-alia* on *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 Nov. 2010 ("***Frontier Petroleum***") (CLA-105) and *Saluka* (CLA-227), ¶ 329.

[464] CR, ¶ 255.

[465] CR, ¶¶ 249-250.

345. The Claimants conclude that through the SPR Uruguay thwarted these expectations "by stripping the Claimants of the ability to market profitable variants and to capitalize on the intellectual property and associated goodwill tied to these products. The 80/80 Regulation frustrated this expectation further, by weakening the value of the Claimants' residual products and preventing the Claimants from leveraging their iconic branding to introduce new products."[466]

(c) Uruguay's Legal Stability

346. Relying *inter alia* on the *Occidental v. Ecuador* Award, the Claimants allege that the Respondent's fair and equitable treatment obligations under the Treaty require Uruguay to provide a reasonably stable and predictable legal system.[467] The Claimants accept that it is a State's prerogative to exercise its regulatory and legislative powers, but they consider that those must not be "outside of the acceptable margin of change."[468]

347. The Claimants submit that the Respondent's arbitrary actions altered the business circumstances in which Claimants' operated and undermined decades of legal stability during which time the Claimant had developed and used their trademarks through careful brand-building in Uruguay, by launching new variants and products.[469]

(d) The Doctrine of Unclean Hands, Raised by Respondent, is Inapplicable.

348. The Respondent alleges that the Claimants' FET claim should be barred under the principle of *ex dolo malo non oritus actio* (a right of action cannot be raised out of fraud) or the "unclean hands doctrine." The Claimants allege that the Respondent lacks any basis for its defence, either in fact or in law.

349. First, the doctrine of unclean hands is premised on the assumption that the complaining party engaged in wrongdoing. The Claimants have never been convicted of fraud or of any illegal activity in Uruguay.[470] The Respondent's allegations regarding "industry deception" and the history of wrongfully marketing "light cigarettes" related to conduct in the United States by parties other than the Claimants. The decisions of the United

[466] CM, ¶ 238.

[467] CM, ¶ 243 (citing inter alia, *Occidental Exploration and Production Co. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN 3467, Final Award, 1 Jul. 2004 (CLA-071), ¶ 191).

[468] CM, ¶ 243.

[469] CM, ¶¶ 10, 243 – 248.

[470] CR, ¶ 269.

States Department of Justice and the U.S. Courts cannot be considered to have definitively adjudicated any facts relevant to the present dispute.[471] Moreover, the tobacco companies begin selling low-tar and low-nicotine cigarettes at the urging of the international public health community, and the public authorities were the ones that communicated those messages to consumers.[472]

350. Second, according to the Claimants, the "unclean hands" doctrine is not a general principle of international investment law or general international law, and only applies in limited circumstances not present in this case.[473]

2. The Respondent's Position

351. The Respondent asserts that even if the Tribunal adopts an autonomous treaty standard requiring that measures not be (a) arbitrary, (b) inconsistent with legitimate expectations, or (c) such as to deprive investors of legal stability, the Claimants' case would still fail.

(a) The Challenged Measures are Not Arbitrary

352. The international law standard for determining whether a State acted arbitrarily was set forth in the *ELSI* case, in which a Chamber of the ICJ, after observing that "[a]rbitrariness is not so much something opposed to a rule of law," defined it as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[474]

353. For regulatory measures to be deemed arbitrary, "'some important measure of impropriety [must] be manifest,' reflecting 'the absence of legitimate purpose, capriciousness, bad faith, or a serious lack of due process.' Consequently, measures undertaken in good faith cannot be considered arbitrary unless there is a manifest lack

[471] CR, ¶¶ 271-273.

[472] CR, ¶¶ 275 - 277.

[473] CR, ¶¶ 266-268.

[474] RCM, ¶ 8.16, RR, ¶¶ 7.18-7.23 (referring to *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, I.C.J. Reports 1989, ("***ELSI***") (CLA-088), p. 15, ¶ 128). Respondent further relies on *El Paso Energy International Co. v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 Oct. 2011, ("***El Paso***") (CLA-102), ¶ 319, and *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005 ("***Noble Ventures***") (RLA-165), ¶ 176, and *Genin* (RLA-157), ¶ 371.

of rational relationship between the measure and its objective, *i.e.*, unless there is no logical connection between them.'"[475]

354. To determine whether a State acted arbitrarily, it is irrelevant that the Claimants believe that courses of action adopted in other countries would have been better. As recognized in past cases, an international arbitral tribunal cannot substitute its own policy judgments for those of the State.[476]

355. The Respondent further alleges that it is "a well-established principle that 'States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.'"[477]

356. Finally, Uruguay alleges that the question is not whether Uruguay has shown that the Challenged Measures are *necessary*. Instead, the Claimants bear the burden of showing that Uruguay acted in an obviously arbitrary manner when they issued the regulations. The Respondent's case clearly shows that it did not.[478]

(i) The SPR

357. According to the Respondent, the Single Presentation Regulation is a responsible, reasonable and targeted regulatory measure adopted to prevent the tobacco industry from continuing to perpetuate the false belief, cultivated over decades, that some cigarettes are less harmful than others. It is intended to stop deceptive marketing of variants of cigarettes brands (referred to as "health reassurance" cigarettes) that were being portrayed as less harmful thus giving existing smokers an apparently healthy alternative to quitting and new smokers more reasons to smoke.[479]

358. The SPR is fully justified and must be considered within the following historical context:

[475] RCM, ¶ 8.21.
[476] RCM, ¶ 8.20 (citing *Enron* (CLA-230), ¶ 281).
[477] RCM, ¶ 8.19 (citing *Saluka* (CLA-227), ¶ 255; *see also Methanex* (RLA-164), Part IV, Ch. D, ¶ 7).
[478] RR, ¶ 4.28.
[479] RCM, ¶ 8.22.

- Tobacco companies had full knowledge of the harmful effect of the "health reassurance" type of cigarettes, but used them as a powerful marketing strategy to appeal to an increasingly health-conscious smoking population.[480]

- After deceptive descriptions ("light," "mild," "low tar") were banned from packages, tobacco companies found other ways to communicate their misleading messages through: (a) continuity campaigns to allow consumers to identify their preferred rebranded health reassurance cigarettes ("Your pack may be changing but your cigarette stays the same"); and (b) structuring brand families so as to communicate message that within a brand different degrees of healthiness through the use of color-codes (*i.e. Marlboro "Light*" became *Marlboro "Gold*;" "*Ultralight," "Silver;" Intermediate, "Blue*").[481]

- Studies covering smokers found that marketing strategy had worked and that different colors were associated with "healthier" cigarettes, including in Uruguay.[482] Respondent submits that pack design affects consumers' perception of risk and this is "consistent with subsequent peer-reviewed studies that document the association between packaging and risk perception in countries other than Uruguay."[483]

359. Accordingly, there is an obvious "logical connection" between the SPR and the objective of preventing consumers from being misled—it is, and has always been, Uruguay's position that the existence of multiple variants of a single brand *per se* creates a risk of deception in the minds of some consumers.[484]

360. In addition, the SPR is part of Uruguay's comprehensive tobacco control policies and is in line with WHO Recommendations and Uruguay's express obligations under Article 11 of the FCTC as well as in accordance with Art. 8 of Law 18,256.[485] The SPR thus draws upon the scientific evidence of the FCTC and its implementation guidelines, and constitutes a sound policy that advances important public health objectives.[486]

361. This has been confirmed by the world's leading authorities on public health and tobacco control.[487] WHO, the FCTC Secretariat, and PAHO have (a) confirmed the existence

[480] RCM, ¶¶ 1.14, 3.6-3.7, 4.11-4.117.

[481] RCM, ¶¶ 4.68-4.76, 4.94.

[482] RCM, ¶¶ 4.94-4.101 (citing *inter-alia* Euromonitor 2008 showing that low-tar market was experiencing an important volume growth). *See also* RR, ¶¶ 3.46-3.47.

[483] RR, ¶ 3.18.

[484] RR, ¶ 3.34. *See also Ibid*., ¶¶ 3.27-3.39.

[485] RCM, ¶¶ 1.21, 4.8, 4.106.

[486] RR, ¶¶ 3.12-3.82; RCM, ¶¶ 4.1- 4.143.

[487] RR, ¶¶ 3.12-3.24. Uruguay also recalls that it has received international support for the adoption of the SPR, including by the Punta del Este Declaration signed by 172 States (RCM, ¶¶ 4.112-117).

of a real problem that SPR is designed to address and (b) concluded that SPR is an effective and sound measure to address it by expressly endorsing the SPR.[488]

362. In this regard, the Respondent recalls the January 2015 joint Written Submission to the Tribunal by the WHO and the FCTC Secretariat that expressed support for the SPR, *inter alia*, by noting that "brand extensions can in themselves be misleading to consumers, particularly when presented in the course of trade alongside one another and regular or full flavored brands," and referring to the "substantial body of evidence" that shows that "prohibiting brand variants is an effective means of preventing misleading branding of tobacco products." [489] Furthermore, the Respondent relies on PAHO's conclusions that "Uruguay's tobacco control measures," including the SPR: (1) are "evidence based;"(2) "are a reasonable and responsible response to the deceptive advertising, marketing and promotion strategies employed by the tobacco industry;" and (3) have "proven effective in reducing tobacco consumption."[490] By contrast, the Respondent stresses, the Claimants' experts do not have any direct experience with tobacco control policy or, indeed, public health regulation.[491]

363. Moreover, the Respondent argues that the SPR was adopted pursuant to the same deliberative process as other tobacco control measures, and rejects the Claimants' contention that its adoption was based on a single public health official's "visit to a store."[492] Uruguay submits that it engaged in an extensive deliberative process that involved input from both external advisors and government regulators, to consider how it should address the ongoing problem of consumers being misled into believing that some cigarettes are less dangerous than others, including through the Advisory Commission described in paragraph 80 above. These discussions, which occurred over a period of months, drew upon the existing scientific and public health literature and prior experience, and considered a variety of regulatory options. They ultimately yielded the recommendation that the MPH adopt the SPR. The Ministry subjected this recommendation to its own internal evaluation process and decided it was meritorious. Only after these processes had been completed was a draft Ordinance prepared, which

[488] RR, ¶¶ 3.13 - 3.24.

[489] RR, ¶¶ 3.17, 3.19, citing WHO Amicus Brief, ¶¶ 79, 90. *See also Ibid.*, ¶¶ 3.13-3.19.

[490] RR, ¶ 3.23, citing PAHO Amicus Brief, ¶ 100.

[491] RR, ¶¶ 3.48-3.60.

[492] RR, ¶ 3.83-3.109, citing CR, § I.A.2.a., p. 20.

was itself subjected to additional internal review within the MPH, before being officially adopted and signed into law by the Minister of Public Health.[493]

364. In the Respondent's view, apart from its implausibility, the Claimants' argument that Dr. Abascal alone is responsible for the SPR is contradicted by the evidence, including contemporaneous official documentation and testimony of those who were directly involved in the adoption of the regulation and the extensive deliberations that preceded it.[494]

365. With regard to the publication of tar and nicotine levels, this was a requirement in 1982, but the requirement was superseded by Art. 6 of Law 18,256, which requires a publication in major media of toxic products, but not of the levels. There is a temporary gap in Uruguayan law that has not yet defined with precision what these toxic components and emissions are. Uruguay is waiting for State Parties to the FCTC to complete Guidelines to Art. 10 to determine implementation details of Art. 6 of Law 18,256. [495]

366. In addition, the Claimants' argument that there was no need for the SPR because consumers are already aware that cigarettes are harmful is baseless—cognizant of health risks, smokers may eagerly switch to brand variants that they have been led to believe offer a "healthier" option.[496]

367. Finally, the Respondent submits that the Claimants' threats have stopped other States from adopting a SPR. Claimants cannot contend that "no other FCTC party has adopted legislation similar to the SPR" since other States have considered adopting similar regulations but have been deterred by the threat of litigation, including Paraguay, New Zealand, and Costa Rica.[497]

(ii) The 80/80 Regulation

368. According to the Respondent, there is no basis for challenging either the good faith or the reasonableness of Uruguay's 80/80 Regulation. The "logical connection" between

[493] RR, ¶ 3.84.
[494] RR, ¶¶ 3.88-3.105, 3.107.
[495] RR, ¶¶ 3.71-3.73.
[496] RR, ¶¶ 3.40-3.47.
[497] RR, ¶¶ 3.71-3.82, referring to CR, ¶ 102.

more effectively warning people of the harms caused by smoking and the protection of public health is in its view incontestable.

369. Before turning to these issues, the Respondent notes that there are two critical points of agreement between the Parties. First, the Parties agree that warning labels are an effective way to inform consumers.[498] Second, the Parties agree that when it comes to delivering a message, bigger is better. Uruguay, for its part, requires large warning labels because they are better at informing smokers of the health risks of smoking. The Claimants, for their part, seek to maximize the space available for them to display their branding because they know that larger design elements are more effective in reaching, attracting, and maintaining consumers.[499]

370. The Respondent rejects the Claimants' allegations that the 80/80 Regulation was introduced to punish Mailhos.[500] In support of this argument, the Respondent recalls the process by which the 80/80 Regulation was adopted. Particularly, it notes that Law 18,256 followed the WHO's recommendation of February 2008 that warning labels should cover "*at least* half of the pack's main display areas."[501] Then in November 2008, the States Parties to the FCTC unanimously adopted the Article 11 Implementation Guidelines which expressly call on States in paragraph 12 to enlarge health warnings above 50% to the maximum size possible.[502] In the wake of these developments, Uruguayan authorities met with and then presented a memorandum to President Vázquez recommending additional tobacco control measures.[503] One of the measures recommended was to enlarge the size of warning labels to increase public awareness of the harms caused by tobacco smoking, and thus cause people to quit or not take up the habit. The President approved the proposal, leaving it for the MPH to determine the precise size requirement. Following consultations among officials of the

[498] RR, ¶ 4.5; Philip Morris International, "Health Warning Labels," (RE-358), p. 1; Abal Hermanos S.A., *Comments on the "Tobacco Control Law,"* Mar. 2008 (RE-197), p. 13.

[499] RR, ¶ 4.6.

[500] RCM, ¶¶ 5.72-5.73.

[501] RR, ¶ 4.8; World Health Organization (WHO), Report on the global tobacco epidemic, 2008: The MPOWER package (2008) (RE-28), pp. 34-35.

[502] RR, ¶ 4.9; Article 11 Guidelines (RLA-13), ¶ 12. Uruguay also refers to ¶ 13 of the Guidelines suggesting plain packaging.

[503] RR, ¶ 4.10; Bianco Statement (RWS-2), ¶¶ 16-20; Letter from E. Bianco, Uruguayan Tobacco Epidemic Research Center (CIET), to President Tabaré Vásquez dated 16 Apr. 2009, and email sending same (RE-208).

PNCT and members of the Advisory Commission, the decision was made to set the requirement at 80%.[504]

371. The Respondent further considers that the Claimants contradict the international consensus that larger warning labels are more effective than smaller ones.[505] First, both experimental and observational studies demonstrate that warning labels larger than 50% are more effective [506] Second, the Implementation Guidelines for Article 11 of the FCTC expressly state that the Guidelines and the studies on which they are based constituted a sound basis on which to make policy and the Guidelines call for warning bigger than 50%.[507] Third, the WHO and FCTC Secretariat submission provides further confirmation of the mass of evidentiary support underlying Uruguay's action.[508] Finally, current and past State practice demonstrate the international consensus that larger health warning are more effective.[509]

372. More than 20 States have acted to enlarge the size of their warnings labels above 50%, including: Namibia (55%),[510] Turkey (65%),[511] Ecuador (60%),[512] Burkina Faso

[504] RR, ¶¶ 4.10-4.11; RCM, ¶¶ 5.60-5.65 (citing *inter-alia*; Bianco Statement (RWS-2), ¶¶ 15-20; Email from Eduardo Bianco to Minister María Julia Muñoz & Director-General Jorge Basso, Ministry of Public Health, 2 Dec. 2007, Bates No. UGY0000325 (RE-383); E. Bianco, T*he Implementation of the Framework Convention: The Role of Civil Society*, VII Congress on the Prevention and Treatment of Tobacco Consumption, 19 Feb. 2009, Bates No. UGY0002092 (RE-389); Abascal Statement I (RWS-1), ¶¶ 16-18; Muñoz Statement (RWS-3), ¶¶ 20-22; Abascal Statement II (RWS-7), ¶ 19; Lorenzo Statement (RWS-6), ¶ 24. In the Respondent's view, the record shows that Dr. Abascal's opinions in an internal memorandum ―noting that in response to the alibi brands consideration should be given to expanding the pictograms and legends to 90% of both main faces― were not what ultimately led to the adoption of the 80/80 Regulation. Rather, his suggestion was overtaken by the Presidential decision to increase warning label size as recommended in the WHO's 2008 report and the Implementation Guidelines to Article 11 of the FCTC (*See* RR, ¶¶ 4.15-4.19)).

[505] RCM, ¶¶ 5.25-5.55; RR, ¶ 4.26.

[506] RCM, ¶¶ 5.31-5.43; RR, ¶¶ 4.26-4.34.

[507] RR, ¶¶ 4.30-4.34.

[508] RR, ¶ 4.32. *See also* RR, ¶ 7.27.

[509] RCM, ¶ 5.98; RR, ¶¶ 4.55-4.57

[510] Campaign for Tobacco-Free Kids, "Country Details for Namibia: Summary" (R-445); Canadian Cancer Society, *Cigarette Package Health Warnings: International Status Report* (4th ed.), Sep. 2014, ("**Canadian Cancer Society 4th Report**") (R-426), p. 4.

[511] Canadian Cancer Society 4th Report (R-426), p. 2.

[512] Tobacco Labelling Resource Centre, "Ecuador," (R-349).

(60%),[513] Chad (70%),[514] Uganda (65%),[515] Moldova (65%),[516] Canada and Brunei (75%) (average of both the front and the back of the package).[517] In addition, the European Union has mandated through the Tobacco Products Directive (2014/40/EU) that all 28 member States shall require warning labels that cover 65% of the front and back of the package by May 2016.[518]

373. Other States have gone as far as or beyond Uruguay's 80%. Sri Lanka also requires warnings covering 80%.[519] Australia requires not only plain packaging, but also warnings to cover an average of 82.5% of the package (75% front, 90% back).[520] Thailand increased the required size of its warning labels from 55% to 85% of the front and back of its cigarette packs, as of June 2014.[521] Similarly, Pakistan and India now require warning labels that cover 85% of the front and back of cigarette packs.[522] Nepal has recently increased its warning from 75% of the front and back to 90%.[523]

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[513] Campaign for Tobacco-Free Kids, "Country Details for Burkina Faso: Summary" (R-442).

[514] World Health Organization, Regional Office for Africa, "Chad: 70% Health Warnings in pictures on cigarettes packs"(R-360).

[515] Campaign for Tobacco-Free Kids, "Uganda Sets Powerful Example with Comprehensive Tobacco Control Law", 30 Jul. 2015 (R-443).

[516] Campaign for Tobacco-Free Kids, "Moldova Enacts Historic Law to Fight Tobacco Use, Resisting Pressure from U.S. Chamber of Commerce", 14 Jul. 2015 (R-441).

[517] *Canadian Cancer Society, Cigarette Package Health Warnings: Int' l Status Report, Third Edition*, Oct. 2012, ("**Canadian Cancer Society 3rd Report**") (R-262), p. 2; Canadian Cancer Society 4th Report, (R-426), pp. 2, 4; Tobacco Labelling Resource Centre, "Brunei," (R-348).

[518] European Union, Directive 2014/40/EU, 3 Apr. 2014, Art. 10(1) ("Each unit packet and any outside packaging of tobacco products for smoking shall … cover 65% of both the external front and back surface of the unit packet and any outside packaging."), Art. 29(1) ("Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 May 2016.") (R-295). *See also* European Commission, "Revision of the Tobacco Products Directive," (directive entered into force on 19 May 2014) (R-339).

[519] Campaign for Tobacco-Free Kids, "Country Details for Sri Lanka: Summary" (updated 3 Aug. 2015) (R-444).

[520] Cunningham, Canadian Cancer Society, "*Cigarette Package Warning Size and Use of Pictures: International Summary*," (R-289), p. 2; Canadian Cancer Society 3rd Report (R-262), p. 2; Canadian Cancer Society 4th Report, (R-426), p. 2.

[521] Canadian Cancer Society 4th Report (R-426) (discussing Thailand's regulation of warning labels on cigarette packages at 85% of the front and back). *See* A. Sawitta Lefevre, "*Bigger health warnings for Thai cigarette packs*," Reuters, 27 Jun. 2014, (R-306) (noting that international tobacco companies sued the Thai government after the health ministry ordered to increase the size of its warning labels from 55% to 85%. A court temporarily suspended the measure but, on Jun. 2014, the Supreme Administrative Court ruled it could take effect).

[522] Government of Pakistan, Ministry of National Health Services, Regulations and Coordination, "Pictorial Warning," (R-430) (announcing Pakistan's increase to 85%); Campaign for Tobacco-Free Kids, "India Takes Historic Step to Protect Health and Save Lives by Requiring Large, Graphic Tobacco Warnings: Statement of Matthew L. Myers", 15 Oct. 2014, (R-427).

[523] Action on Smoking & Health, "Success: 90% graphic health warnings now required on tobacco packs in Nepal", 3 Dec. 2014, (R-428); Tobacco Labelling Resource Centre, "Nepal: Health Warnings," available at http://www.tobaccolabels.ca/countries/nepal/ (last visited 2 Sep. 2015) (R-359).

374. Finally, Uruguay also rejects the argument that the regulations were not necessary because Uruguayans were aware of the health risks of smoking. The Respondent notes that the enlargement of warnings, in conjunction with other tobacco control measures, allowed smokers to learn about the risks other than cancer and heart diseases and better understand the severity of the risks.[524] This was important as Uruguayans smokers cited packages as their primary source of information about the dangers of smoking.[525] Moreover, large warning labels also serve to minimize the advertising appeal of cigarette packs.[526]

(b) The Claimants' Legitimate Expectations

375. Uruguay asserts that the balance that the Tribunal must strike when analyzing allegations of changes in regulations constituting unfair and inequitable measure has been properly formulated by the *El Paso* tribunal, as follows:

> *Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze.*[527]

376. The Respondent rejects the Claimants' allegations that their legitimate expectations were "eviscerated." It sustains that even if legitimate expectation were to apply, to be protected, the Claimants must show that their expectations were predicated on specific representations or assurances made by the host State to the particular investor.[528] In addition, those expectations must be assessed at the time the investment is made,[529] and they must be proved by contemporary documentation, not post-hoc argumentation of counsel.[530]

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[524] RR, ¶ 4.29. *See also* RCM, ¶¶ 5.16-5.17.

[525] RCM, ¶ 5.15.

[526] RR, ¶¶ 4.45-4.58.

[527] RR, ¶ 7.72, citing *El Paso* (CLA-102), ¶ 372. The Claimants' rebut the Respondent's interpretation of *El Paso*. *See* CR, ¶ 252.

[528] RCM, ¶ 8.31-34; RR, ¶¶ 7.44, 7.48, 7.51-7.54 (relying on inter-alia, *Glamis* (RLA-183), ¶ 620; *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 Aug. 2008, ("***Duke Energy***") (CLA-98; CLA-228), ¶ 351; *EDF* (CLA-224), ¶ 217; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 Mar. 2011, (RLA-191), ¶¶ 283, 287, 291; *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, (RLA-196), ¶ 249. Claimants' rebut Respondent's interpretation of these cases. *See* CR, ¶ 253.

[529] RR, ¶¶ 7.56 - 7.57.

[530] RR, ¶ 7.58.

377. Uruguay made no specific commitments to the Claimants capable of giving rise to legitimate expectations.[531] The sources of expectations that the Claimants cite are unavailing because (a) they arise from general municipal legislation; (b) they either have no connection with the expectations that the Claimants claim to have; or (c) they post-date the Claimants' investment.[532]

378. The Respondent has contended in the context of the claim for expropriation that the Claimants do not own their trademarks and do not have the right to use them.[533] It rebuts that since the rights they invoke do not exist, the Claimants cannot have had "legitimate expectations" that they would have been able to exercise those rights permanently.[534] Moreover, such expectations would be based on general Uruguayan trademark law, and not on specific commitments to the Claimants.[535]

379. Finally, the Respondent contends that neither the SPR nor the 80/80 Regulation affected the Claimants' specific expectations to capitalize on their intellectual property rights.

(c) Uruguay's Legal Stability

380. After indicating that tobacco is one of the most highly regulated businesses in the world, the Respondent alleges that the Claimants could not reasonably have expected that Uruguay's regulatory scheme would never change.[536]

381. According to the Respondent, there is no language in the Uruguay-Switzerland BIT that provides for affirmative legal stability, nor is there a general obligation to provide a stable legal environment.[537] Moreover, many past international investment law tribunals have taken the view that fair and equitable treatment provisions are not stand-alone guarantees of legal stability, let alone stasis.[538]

382. The Respondent further alleges that even if a putative obligation existed, past tribunals have stated that investors should expect legal systems to change over time without

[531] RR, ¶¶ 7.55-7.57.
[532] RR, ¶ 7.63.
[533] *Supra*, ¶¶ 222-234.
[534] RR, ¶ 7.61.
[535] RR, ¶¶ 7.59-7.61.
[536] RCM, ¶ 7.28; RR, ¶ 7.62.
[537] RCM, ¶ 8.46.
[538] RR, ¶ 7.67.

infringing on the State's inherent right to regulate.[539] Uruguay, as every State, has "the sovereign right to exercise its police powers in a non-arbitrary and non-discriminatory manner to protect public health."[540] Neither the SPR nor the 80/80 Regulation could be considered an "unreasonable modification of the legal framework."

383. In addition, evidence shows that the Claimants did not expect the regulatory framework to remain immutable. Abal itself foresaw some regulatory action, since it sent a letter to the MPH stating its encouragement for the adoption of effective tobacco regulations after Uruguay ratified the FCTC in 2004.[541]

(d) The Claimants' Fraudulent Behavior Prevents them from Bringing an FET Claim

384. In any event, according to the Respondent, the SPR and 80/80 Regulation "are direct outgrowths of the Claimants' history of deceit."[542] They were made necessary and appropriate by the actions of the tobacco industry itself. On the basis of the maxim *ex dolo malo non oritur actio* ("an action at law does not arise from evil deceit"), an investor should not be permitted to argue that it has been denied FET when it has itself acted fraudulently or in bad faith, particularly where, as here, the fraud in question contributed to the adoption of the measures about which the investor complains.

385. This notion, closely related to the common law "unclean hands doctrine," is said to be "inherent in the notion of equity," derives from the principle of good-faith, and has a role in an investor's claim that it has been treated unfairly.[543]

386. As to the facts, the decisions of the D.C. Circuit Court and U.S. Court of Appeals authoritatively show that the Claimants have engaged in a history of misconduct and consumer deceit.[544] Regulators around the world have arrived at similar conclusions,

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[539] RCM, ¶¶ 8.47-8.49; (citing *Saluka* (CLA-227), ¶¶ 304-308; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 Sept. 2007, ("**Parkerings-Compagniet**") (RLA-177), ¶ 332); *see also* RR, ¶¶ 7.68-7.69 (citing *Levy* (RLA-207), ¶ 3.19 and *Enron* (CLA-28), ¶ 261).

[540] RR, ¶¶ 7.70-7.71.

[541] RCM, ¶ 8.52.

[542] RR, ¶ 7.32.

[543] RR, ¶ 7.31; RCM, ¶ 8.25.

[544] RR, ¶¶ 7.36-7.38 (citing myriad court decisions including *Engle v. RJ Reynolds Tobacco*, No. 94-08273 CA–22, 2000, WL 33534572, p.*3 (Fla. Cir. Ct.), 6 Nov. 2000, (RLA-287) and *Price v. Philip Morris, Inc*., 9 N.E. 3d 599 (Ill. App. Ct. 2014) (RLA-310)). According to the Respondent, the industry perpetuated the myth for four decades by knowingly exploiting the limitations of the "smoking machine," developed by the U.S. FTC with full knowledge that the machine was based on wrong premises. *See* RCM, ¶¶ 4.35-4.41 (referring to US District Court

including the Australian Competition and Consumer Commission and the Italian antitrust authority.[545] Whether it has been recognized by the Uruguayan courts is irrelevant; recognition by domestic courts have not been considered necessary by past tribunals.[546]

387. Both before and after they made their investment in Uruguay, the Claimants defrauded Uruguayan consumers about the harmfulness of smoking in general, and the relative safety of certain brand variants in particular. The Claimants' fraud was multi-faceted. For decades they, among other things: (1) falsely denied the harmful health effects of smoking, claiming the issue was the subject of controversy; (2) falsely denied that nicotine is addictive, even as they designed their products to be as addictive as possible; and (3) extended brand families to promote the false belief among health-concerned consumers that some cigarettes are less harmful than others.[547]

3. The Tribunal's Analysis

388. The Tribunal will proceed to determine whether the treatment afforded to the Claimants' investment by the Challenged Measures was in accordance with the FET standard, interpreted as indicated above. To this purpose, it will review each measure taking into account all relevant circumstances, including the margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations.

(a) Are the Challenged Measures Arbitrary?

389. It is the Claimants' contention that the Challenged Measures are "arbitrary" since they were adopted without a scientific evidence of their effectiveness, without due

Decision confirming the manipulative marketing schemes. *See U.S. v. Phillip Morris, 566* F3D 1095, 1106 (D.C. Cir. 2009) (RLA-182). The Claimants' challenge the reference to these litigations stating that PMI has prevailed in many other cases and that the District Court decision is an outlier. RR, ¶¶ 7.41-7.43 (citing *inter alia* Philip Morris Internal Document, S. Schachter, Pharmacological and Psychological Determinants of Smoking, 2 Mar. 1977, Bates No. 1000046626-1000046661, pp. 1000046655, 1000046660 (R-101)).

[545] RR, ¶ 7.39 (citing Australian Competition & Consumer Commission, "ACCC resolves 'light' and 'mild' cigarette investigation with Imperial Tobacco", 7 Nov. 2005, (R-378) and E. Povoledo, "National Fight Against Smoking Attacks 'Light' and 'Mild' Brands," Italy Daily, 1 Oct. 2002, (R-376)).

[546] RR, ¶ 7.33 (citing *Plama* (CLA-222); ¶ 134 and *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 Aug. 2007 (RLA-175), ¶ 398).

[547] RCM, ¶ 8.29.

consideration by public officials and with no reasonable connection between the objectives pursued by the State and the utility of the chosen measure.[548]

390. According to the international law standard set forth by the ICJ Chamber in the *ELSI* case, "arbitrariness" is defined as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety." [549] As noted by the Respondent, the *ELSI* judgment is most commonly referred to by investment tribunals' decisions as the standard definition of "arbitrariness" under international law.[550] Based on this definition, the Tribunal concludes that the Challenged Measures are not "arbitrary," for the following reasons.

391. Both measures have been implemented by the State for the purpose of protecting public health. The connection between the objective pursued by the State and the utility of the two measures is recognized by the WHO and the PAHO Amicus Briefs, which contain a thorough analysis of the history of tobacco control and the measures adopted to that effect. The WHO submission concludes that "the Uruguayan measures in question are effective means of protecting public health."[551] The PAHO submission holds that "Uruguay's tobacco control measures are a reasonable and responsible response to the deceptive advertising, marketing and promotion strategies employed by the tobacco industry, they are evidence based, and they have proven effective in reducing tobacco consumption."[552]

392. The Claimants, while accepting in principle that no cigarette is safer than another, argue that the Challenged Measures were adopted with no scientific support as to their effectiveness in conveying that message.[553] But the Tribunal would note the following points. At the time the measures were adopted, evidence was available at the international level regarding in particular consumers' misperception of the health risks

[548] CM, ¶¶ 222-223; CR, ¶¶ 242-243.

[549] *ELSI* (CLA-88), ¶ 128; cited by the Respondent: RCM, ¶ 8.16; RR, ¶¶ 7.18-7.23.

[550] A list of such decisions is in RR, n. 536.

[551] WHO Amicus Brief, ¶ 90.

[552] PAHO Amicus Brief, ¶ 100.

[553] The Parties' experts have debated at length on the subject, including at the Hearing, Professors Chernev and Jacobs supporting the Claimants' position in their Reports (CWS-009; CWS-20; CWS-21), Professors Cohen, Dewhirst and Hammond showing in support of the Respondent that the SPR was based on an extensive evidentiary record (REX-004; REX-013). It is to be noted that the Parties agreed to limit the experts' intervention at the Hearing to the SPR.

attached to "light" and "lower tar" cigarettes (so called "health reassurance" cigarettes). That evidence included the tobacco industry's own records, including those of PMI, showing that "cigarettes brand variants … were strategically positioned to offer health reassurance."[554] Evidence included also the *U.S. v. Philip Morris* judgment of 2006, "an encyclopedia of industry research and practice with respect to brand variants,"[555] confirming, based on available data (which again included PMI internal documents) that PMI had mispresented health risks and finding that "since the 1970s, the defendants as a group had deliberately misled consumers into believing that 'light' and 'low tar' cigarettes were healthier than other cigarettes, and therefore an acceptable alternative to quitting."[556] Additional empirical evidence was offered, among other sources, by the Canada NGO Physicians for a Smoke-Free Canada[557] and by the Brazilian experience.[558] Numerous scientific studies had been published by that time in leading international journals cited by the U.S. Surgeon General and the U.S. National Cancer Institute.[559]

393. For a country with limited technical and economic resources, such as Uruguay, adhesion to the FCTC and involvement in the process of scientific and technical cooperation and reporting and of exchange of information represented an important if not indispensable means for acquiring the scientific knowledge and market experience needed for the proper implementation of its obligations under the FCTC and for ensuring the fulfilment of its tobacco control policy. As stated by PAHO, "Uruguay has been one of the most active countries during this period, both at governmental and non-governmental levels, not only advancing its own regulations domestically but also providing support to other Member States" regarding compliance with FCTC mandates.[560]

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[554] Rebuttal Expert Report by Cohen, Dewhirst and Hammond, ("**Rebuttal Report by Cohen, Dewhirst and Hammond**") (REX-013), ¶ 9. In PM USA R&D Strategic Plan, Dec. 1987, one may read: "we have a considerable commitment at this time to development of a product which addresses consumer health concerns. The low tar (or zero tar)/high taste program and Project ART (low nicotine) can be marketed to the consumer in such a way to convince them that they are indeed receiving a product which would be perceived as 'safer". (JC-048), p. 28.

[555] Hammond, Tr. Day 5, 1213:12-13.

[556] *United States v. Philip Morris USA inc. et al.*, 449 F. Supp. 2d1 (D.D.C. 2006), (excerpts in RLA-171); RCM, ¶ 3.54.

[557] *A Comprehensive Plan to End the "Light" and "Mild" Deception*, Physician for A Smoke-Free Canada, Jan. 2005 (R-170).

[558] *Labelling and Packaging in Brazil*, National Cancer Institute, Health Ministry of Brazil, WHO, 2003 (R-014).

[559] Rebuttal Report by Cohen, Dewhirst and Hammond, (REX-013), ¶ 60.

[560] PAHO Amicus Brief, ¶ 94.

394. Starting with the year 2000, Uruguay implemented a series of measures including the creation of groups of experts and agencies for the study and prevention of tobacco effects on human health.[561] In 2004, the MPH created the Advisory Commission to advise the Ministry on implementation of the State's obligations under the FCTC. Uruguay's measures were adopted based on the substantial body of evidence that had been made available in the course of its active participation in the FCTC negotiations and in the drafting of implementing guidelines through the newly created Advisory Commission. As indicated by the WHO, such guidelines are "evidence-based," the working groups relying on available scientific evidence.[562] Material used in their development was released publicly.[563]

395. Following ratification of the FCTC in 2004 and its entry into force on 27 February 2005, Uruguay started the process of complying with the resulting obligations. All legal measures taken internally for implementing tobacco control were expressly adopted in conformity with the FCTC. Law 18.256 of 6 March 2008 on Tobacco Control provides in Article 2 that its object "is to protect the inhabitants of the country from the devastating health, social, environmental, and economic consequences of tobacco consumption and exposure to second-hand smoke," stating that measures have been taken "in accordance with the World Health Organization Framework Convention on Tobacco Control, ratified by Law Number 17,793 on 16 July 2004." Law 18,256 and its implementing Decree 284/008 reinforced the measures adopted since 2005 and provided the basis for the further tobacco regulation, including the two measures challenged in this arbitration.

396. In the Tribunal's view, in these circumstances there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures. Such support was amply offered by the evidence-based FCTC provisions and guidelines adopted thereunder. As indicated by the WHO, "[t]he ability of Parties to rely on this evidence-based resource in policy development is important for

[561] Reference is made to Section IV B for a description of Uruguay's tobacco control measures.

[562] WHO Amicus Brief, ¶ 16.

[563] *Ibid.*, ¶ 49, with reference to the Article 11 Guidelines.

implementation of the Convention by all Parties, and particularly by Parties in low resources settings."[564]

397. The Claimants have further argued that the Challenged Measures were adopted without due consideration by public officials. The Tribunal would respond with two remarks, one of a general character and the other regarding each measure considered separately.

398. The remark of a general character relates to the "margin of appreciation" to be recognized to regulatory authorities when making public policy determinations. According to the Claimants, the "margin of appreciation" has no application in the present proceeding as being a concept applied by the ECHR for interpreting the specific language of Article 1 of the Protocol to the Convention, no analogous provision being contained in the BIT.[565]

399. 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.[566] 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."[567] As held by another investment tribunal, "[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation."[568]

400. The issue arose in a somewhat similar context in a NAFTA Chapter 11 case, *Chemtura v. Canada*, which concerned an administrative decision to phase out a pesticide, lindane, on public health grounds. The tribunal deemed it

> *[N]ecessary to address an additional question concerning the scope of Article 1105 on which the Parties disagree, i.e. whether the protection granted under this provision is lessened by a margin of appreciation granted to domestic regulatory agencies and, if so, to what extent. Having reviewed the arguments*

[564] *Ibid.*, ¶ 47.

[565] CR, ¶ 174.

[566] RCM, ¶ 2.42.

[567] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicability and Liability, 30 Nov. 2012, (RLA-200), ¶ 8.35. *See also Saluka* (CLA-227), ¶¶ 272-273; *Frontier Petroleum* (CLA-105), ¶ 527.

[568] *Glamis* (RLA-183), ¶ 805.

> *of the Parties, the Tribunal is of the opinion that the assessment of the facts is an integral part of its review under Article 1105 of NAFTA. In assessing whether the treatment afforded to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted in concreto. The Tribunal will proceed to such assessment in concreto when reviewing the specific measures challenged by the Claimant.*[569]

401. As done by the *Chemtura* tribunal, the Tribunal proceeds to assess *in concreto* whether the treatment afforded to the Claimants' investment by each of the Challenged Measures was in conformity with the FET standard, as interpreted by it. In this regard the first point to be made is that both measures were adopted in an effort to give effect to general obligations under the FCTC. It may be that the FCTC, to which Switzerland is not a party, could not be invoked by the Respondent to excuse its non-performance of distinct obligations under the BIT. But that is not the present context. In the Tribunal's view, the FCTC is a point of reference on the basis of which to determine the reasonableness of the two measures, and in the end the Claimants did not suggest otherwise.[570]

(i) The SPR

402. Regarding the SPR, the measure was adopted by Ordinance 514[571] which in its preamble refers to the FCTC, in addition to the Constitution, Law 18,256 and Decree 284. More specifically, the preamble confirms that Ordinance 514 was issued in accordance with Article 8 of Law 18,256, which, in turn, as made manifest by its formulation, was intended to implement Article 11(1)(a) of the FCTC.[572] The measure was not discriminatory since it applied to foreign and domestic investors alike. The TCA Decision n. 509 of 14 June 2011 upheld the validity of the SPR, rejecting Abal's challenge under Article 3 of Ordinance 514.[573]

403. As indicated by one of the reports filed by the Respondent, "promoting 'light' and 'lower tar' cigarettes as a way for most smokers to reduce their tar intake misrepresented what

[569] *Chemtura* (RLA-053), ¶ 123.
[570] Tr. Day 1, 125: 5-7 (Alexandrov).
[571] *Supra*, ¶ 108.
[572] *Supra*, ¶ 105.
[573] TCA Decision No. 509 (C-53; R-242).

would actually happen."[574] In fact, smokers' need for a given amount of nicotine would be compensated by smoking more intensively, switching to brands perceived as "safer," the term "lights" being chosen by producers to convey a message of reduced harm.[575] A similar process of increased concern for health risks of smoking and the strategy, revealed by Philip Morris' internal documents, "to provide reassurance to consumers through the creation of different brand variants that were associated with less harm" apparently applied in Uruguay "using the product and marketing techniques also observed in the U.S. and other markets."[576]

404. At the time it was introduced, the SPR was without precedent in the practice of other States. It is not specifically mentioned in the FCTC, although Article 11(1)(a) of that Convention did require each State Party to take measures "in accordance with its national law" to prevent "the false impression that a particular tobacco product is less harmful than other tobacco products."[577] In its first formulation, the SPR tracked the language of Article 11(1)(a), whereas in its re-enacted version as Article 3 of MPH Ordinance 466, the SPR was unconditional.[578] But the rationale of the SPR in both formulations was to address the false perception, plausibly said to be created by the use of colours and their association with earlier packaging and labelling, that some brand variants, including those previously advertised as "low tar," "light," "ultra-light," or "mild," are healthier than others.[579]

405. The Claimants in effect accepted the validity of this concern, since they themselves had recognized the importance of including health warnings on packaging, even voluntarily.[580] Nor did they suggest, publicly or in argument before the Tribunal, that

[574] "The Single Presentation Requirement: Overcoming the Illusion of a Less Hazardous Cigarette," Report by Cohen, Dewhirst and Hammond, 19 Sep. 2014, (REX-002), ¶ 59.

[575] *Ibid.*, ¶¶ 53,62.

[576] *Ibid.*, ¶ 80.

[577] The WHO Amicus Brief recognizes that "Uruguay is the only Party to have prohibited brand extensions on grounds that they are misleading" (at ¶ 66), adding, on the one side, that "sovereign states adopt different levels of protection with respect to the risks associated with tobacco consumption" (at ¶ 62) and, on the other, that "the rationale for this action is supported by the evidence" (at ¶ 66).

[578] The potential difference between the two formulations of the SPR was not really explored in the arguments by the Parties.

[579] RCM, ¶ 4.143.

[580] RCM, ¶ 5.12.

"light," "mild" or "menthol" cigarettes are in truth safer: the scientific consensus is that the only safe approach to smoking is not to smoke at all.

406. But there was much debate in evidence over whether the SPR was calculated to achieve this legitimate aim or not. The Claimants argue that the SPR was "overbroad" because it "prohibit[s] the use of colors that are undisputedly not misleading, if those colors are used in multiple product lines under a common brand name."[581] The Respondent replies that instead of banning colors, "the SPR takes a different approach by eliminating the ability of tobacco companies to use color contrast *within* a brand family to promote the misimpression that there are differences in healthiness."[582] In a way one may consider the SPR as "under-inclusive" since by not prohibiting the introduction of new brands it allowed Maihlos' alibi brands. But according to the Respondent, it was considered that "new brands, entirely distinct from existing brands, do not convey the same messages as variations within the same brand."[583] The Tribunal observes that possible over- or under-inclusiveness of the SPR was unsurprising given the relative novelty of this regulation.

407. The Tribunal's conclusions on the evidence would be as follows: (1) the SPR was not the subject of detailed prior research concerning its actual effects, which would in any case have been difficult to conduct since it involved a hypothetical situation; (2) there was consideration of the proposal by the Tobacco Control Program in consultation with the Advisory Commission of the MPH, although the paper trail of these meetings was exiguous;[584] (3) the SPR was in the nature of a "bright idea" in the context of a policy determination to discourage popular beliefs in "safer" cigarettes[585] but, as held by the WHO, "the rationale for this action [was] supported by the evidence."[586]

[581] CM, ¶ 4.

[582] RCM, ¶ 4.124 (emphasis in the text).

[583] RCM, ¶ 4.129.

[584] For a description of the process leading to the adoption of the SPR see *supra*, ¶¶ 113-120.

[585] During her examination at the Hearing, Dr. Lorenzo, Technical Director of the Centre for International Cooperation on Tobacco Control of the MPH, stated: "So the very existence of the variants means that the consumer can compare, has a reference, and can assume one is less harmful than the other. By eliminating the variants, you remove that comparison. When we determined the single presentation, it was to put to an end that comparison within a same brand. Here, it's different brands. Therefore, there is no possibility of comparison within a single brand because there is only one" (Lorenzo, Tr. Day 3, 830:20-22; 831:1; 832:14-18).

[586] WHO Amicus Brief, ¶ 66.

408. As to the utility of the measure, the marketing evidence on either side is discordant. According to the Claimants, tobacco consumption in the legal domestic market remained close to the trend, which had been projected in 2008 (prior to the Challeged Measures) by Euromonitor, an independent market research firm, to decline by 150 million cigarettes from 2008-2012.[587] The Respondent relies on various sources, including ITC, Uruguayan National Report of August 2014, to show that the rate of smoking prevalence, which was around 32% prior to the measures, by 2009 dropped to 25% in persons 15 years or older, estimated by a 2011 survey to be "approximately 23%."[588]

409. In the end the Tribunal does not believe that it is necessary to decide whether the SPR actually had the effects that were intended by the State, what matters being rather whether it was a "reasonable" measure when it was adopted.[589] Whether or not the SPR was effective in addressing public perceptions about tobacco safety and whether or not the companies were seeking, or had in the past sought, to mislead the public on the point, it is sufficient in light of the applicable standard to hold that the SPR was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith. The effect of the SPR was to preclude the concurrent use of certain trademarks, without depriving the Claimants of the negative rights of exclusive use attached to those trademarks.

410. In short, the SPR was a reasonable measure, not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure, and this is especially so considering its relatively minor impact on Abal's business.[590] The Tribunal concludes, by majority, that its adoption was not in breach of Article 3(2) of the BIT.[591]

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[587] CM, ¶¶ 112-113.

[588] RCM, ¶ 6.45, based on ITC 2014 (R-313), p. 20.

[589] *See* the Tribunal's question n. 4 addressed to the Parties on 27 Oct. 2015 during the Hearing: "Assuming 'reasonableness' to be the relevant standard under question 1, is reasonableness of the two measures to be assessed based on the situation prevailing at the time the measures in question have been adopted or should this judgment consider also the extent to which the measures have met their intended objective?" The Parties' answers during Closing were as follows: for the Claimants, "the measures must have an adequate evidentiary foundation at the time of their adoption," but "subsequent evidence can help to demonstrate that the measures, even when adopted, had fatal and readily apparent flaws" (Tr. Day 9, 2464:1-3; 2467:13-15); for the Respondent, "the critical date for the assessment of a regulatory measure's reasonableness is the date of its adoption, not afterwards" (Tr. Day 9, 2564:7-9).

[590] *Supra*, ¶¶ 284-285.

[591] Arbitrator Born dissents, for the reasons set out in the Opinion attached as **Annex B.**

(ii) The 80/80 Regulation

411. The 80/80 Regulation was adopted by Presidential Decree 287/009 of 15 June 2009, which also refers to the FCTC. The Decree was issued in accordance with Article 9 of Law 18,256, which was meant to implement Article 11(1)(b) of the FCTC.[592] The TCA Decision n. 512 of 23 August 2012 upheld the validity of the 80/80 Regulation, rejecting Abal's request for its annulment.

412. Article 11(1)(b)(iv) of the FCTC requires health warnings on cigarette packages which "*should be* 50% or more of the principal display areas but *shall be* no less than 30% of the principal display areas" (emphasis added). In other words, the principle of large health warnings is internationally accepted; it is for governments to decide on their size, and they are encouraged to require health warnings of 50% or more. It is worth noting that Decree 287/009 was issued after Article 11 Guidelines had recommended that health warnings should cover "more than 50% of the principal display area and aim to cover as much of the principal display area as possible."[593]

413. The 80/80 Regulation was imposed on all cigarettes sold in Uruguay. The Claimants nonetheless argued that the measure was discriminatory in two respects. First, they argue that it was imposed as a punitive measure in response to the use by its competitor Mailhos of alibi brands.[594] Second, they argue that the 80/80 Regulation (as well as the SPR) encouraged illicit sales from neighbouring States, to their prejudice.[595]

414. On the first point, the Tribunal notes that the evidence does not sustain the assertion that this measure was punitive in its aim. It is true that within the MPH concerns were expressed as to the alibi brands; the MPH was advised by its legal counsel, rightly or

[592] Articles 8 and 9 of Law 18,256 implement also Article13 of the FCTC which in paragraph 4 provides, among others:

> *4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:*
>
> *a. prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions.*
>
> *b. require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship.*

[593] *Supra*, ¶ 92.

[594] CM, ¶ 231; CR, ¶ 63.

[595] CM, ¶¶ 121-124; CR, ¶ 87.

wrongly, that these could not be prosecuted under the existing law.[596] But that does not show that the 80/80 Regulation was a merely punitive response. From the Ministry's point of view, the adoption of alibi brands diluted the intended effect of the SPR, and the situation called for further action.

415. As to the second point, there was some increase at the relevant time in the incidence off cigarette smuggling, but it was not shown how, if at all, this related to the Challenged Measures. The Claimants went no further than to say that cigarettes are smuggled into Uruguay "to evade taxation"[597] and that they are "appealing to consumers because they cost a fraction of the price of legal cigarettes" and because they "*often* do not comply with government regulations such as the SPR and 80/80 Regulation."[598] The Tribunal agrees with the Respondent that no evidence has been offered by the Claimants showing that "the two challenged measures have caused an increase in illegal cigarette sales."[599]

416. As to the Claimants' further assertion that the government did not deliberate in a meaningful way about the adoption of the 80/80 Regulation, it is on record that the relevant process was initiated by a proposal to increase health warnings made by a member of the Advisory Commission, Dr. Eduardo Bianco, in a meeting with the President of the Republic, Dr. Tabaré Vázquez. Following the meeting, Dr. Bianco presented a memorandum to President Vázquez recommending additional tobacco control measures of various nature.[600] President Vázquez approved the increase of warning space leaving to the MPH to determine the precise size requirement.[601]

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[596] Dr. Rodolfo Becerra's legal opinion, 16 Apr. 2009, noting that "*Desde el punto de vista marcario la empresa [Mailhos or Monte Paz] puede utilizar las marcas registradas*" ("From the trademark point of view, the enterprise may make use of the registered trademarks": translated by the Tribunal) (C-338, available only in Spanish). The same opinion advises the MPH to consider a new regulation calling for the plain packaging as a means of putting an end to alibi brands. At the time, plain packaging was considered to be "too aggressive" (Lorenzo, Tr. 799:3-5).

[597] CM, ¶ 115.

[598] CR, ¶ 90 (emphasis added).

[599] RCM, ¶ 6.20.

[600] Letter from Dr. Bianco to President Tabaré Vázquez, 16 Apr. 2009 (R-208). Dr. Bianco's letter to President Vazquez shows the attention by which health control measures regarding tobacco were studied, monitored and implemented by the MPH in areas such as:

- Protection from Exposure to Tobacco
- Offering Help to Quit Smoking
- Health Warning
- Enforcing bans on tobacco advertising
- Raising taxes on the price of tobacco products.

[601] RCM, ¶ 5.65.

Following consultation, the decision was made to fix the requirement at 80% rather than 90%, which was also under consideration.[602] Apparently the reason for the lower figure was to leave space for branding.

417. Such as it is, the marketing evidence suggests that the 80/80 Regulation also had some deterrent effect on smokers, the percentage of smokers who said that health warnings made them think about quitting having increased from 25% in 2008-2009, when the warnings covered only 50% of the front and back of the packs, to 36% in 2012 when the labels covered 80%.[603] According to reports submitted by both Parties, the Challenged Measures have contributed to a continued decline in smoking prevalence, especially in new smokers and young smokers – a crucial group in Uruguay.[604] The view the Tribunal has expressed regarding the effectiveness of the SPR is applicable also to the 80/80 Regulation, including the fact that reasonableness of the measure is to be assessed based on the situation prevailing at the time it was adopted,[605] and considering that, absent specific evidence, it may hardly be determined which of the two measures (or other concurrent measures, including tax increases) produced a given effect on smokers.

418. In the Tribunal's view, the present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco. Substantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem. The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal. Article 3(2) does not dictate, for example, that a 50% health warning requirement is fair whereas an 80% requirement is not. In one sense an 80% requirement is arbitrary in that it could have been 60% or 75% or for that matter 85% or 90%. *Some* limit had to be set, and the balance to be struck between conflicting considerations was very largely a matter for the government.

419. In the end, the question is whether the 80% limit in fact set was entirely lacking in justification or wholly disproportionate, due account being taken of the legitimate

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[602] For a description of the process leading to the adoption of the 80/80 Regulation *see supra*, ¶¶ 124-132. As witnessed at the Hearing by Dr. Lorenzo, "along the line of trying to move forward more cautiously, it was preferable to go with 80 percent, and then to move later on to plain package" (Lorenzo Tr. Day 3, 823:6-8).

[603] RCM, ¶ 6.42, referring to ITC 2014, (R-313), p. 102.

[604] *Supra*, ¶¶ 136-140.

[605] *Supra*, n. 589.

underlying aim – viz., to make utterly clear to consumers the serious risks of smoking. The Claimants did not object to the *content* of the warnings, which reflected the scientific consensus of the different harmful effects of continued smoking, but only to their size increase to 80% with respect to the previously-accepted 50% size. How a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk, is a matter of public policy, to be left to the appreciation of the regulatory authority.

420. 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.[606] The Tribunal concludes that its adoption was not in breach of Article 3(2) of the BIT.

(b) Claimants' Legitimate Expectations & Uruguay's Legal Stability

421. These two additional grounds of the Claimants' claim of breach of the FET standard will be considered in the same context due to their interrelation.

422. It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.[607]

423. On this basis, changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment "outside of the acceptable margin of change."[608]

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[606] *Supra*, ¶¶ 284-285.

[607] *Parkerings-Compagniet* (RLA-177), ¶¶ 327-28; *BG Group v. Argentina*, UNCITRAL, Final Award, 24 Dec. 2007, (CLA-084), ¶¶ 292-310; *Plama* (CLA-222), ¶ 219*; Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, (CLA-096), ¶¶ 258-61; *EDF* (CLA-224), ¶ 219; *AES v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010, (RLA-100), ¶¶ 9.3.27-9.3.35; *Total* (RLA-190), ¶¶ 123,164; *Paushok v. Mongolia*, UNCITRAL, Award, 28 Apr. 2011, ("***Paushok***") (RLA-75), ¶ 302; *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011, (RLA-061), ¶¶ 290-291; *El Paso* (CLA-102), ¶¶ 344-352, 365-367.

[608] CM, ¶ 243, citing *El Paso* (CLA-102), ¶ 402; CR, ¶ 210.

424. The Tribunal in *EDF v. Romania* has stated in that regard:

> *The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*[609]

425. A similar view has been expressed by the tribunal in *El Paso v. Argentina:*

> *There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total.*[610]
>
> *Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze.*[611]

426. It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on *specific* undertakings and representations made by the host State to induce investors to make an investment. Provisions of *general* legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.

427. Given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.

428. The Claimants rely on what they consider "justifiable expectations" that the Respondent would "(a) allow Claimants to continue to deploy and capitalize on their brand assets; (b) refrain from imposing restrictive regulations without a well-reasoned, legitimate

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[609] *EDF* (CLA-224), ¶ 219.

[610] *El Paso* (CLA-102), ¶ 374.

[611] *Ibid.*, ¶ 372.

purpose; (c) respect Claimants' intellectual property rights; and (d) ensure that Claimants had access to just, unbiased, and effective domestic court system."[612]

429. According to the Claimants, each of these expectations was "eviscerated" by the Respondent's actions.[613] Leaving aside the last mentioned expectation, which will be considered in the context of the "denial of justice" claims, the following may be noted. The Claimants have provided no evidence of specific undertakings or representations made to them by Uruguay at the time of their investment (or, for that matter, subsequently). The present case concerns the formulation of general regulations for the protection of public health. There is no question of any specific commitment of the State or of any legitimate expectation of the Claimants vis-à-vis Uruguayan tobacco control regulations. Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed, and certainly no commitments of any kind were given by Uruguay to the Claimants or (as far as the record shows) to anyone else.

430. On the contrary, 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. Nor is it a valid objection to a regulation that it breaks new ground. Provisions such as Article 3(2) of the BIT do not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory. Article 3(2) does not guarantee that nothing should be done by the host State for the first time.

431. As an example of distortion of the legal framework, the Claimants indicate that the "Uruguayan legal system guaranteed to the Claimants a right to use all of their trademarks."[614] Leaving aside the absence of "a right to use" under the Uruguayan trademark legislation, which has been excluded by the Tribunal,[615] no undertaking or representation may have been grounded on legal rules of general application, as is the

[612] CM, ¶ 237.
[613] *Ibid.*, 237.
[614] CM, ¶ 244.
[615] *Supra*, ¶ 271.

case of trademarks regulation, made subject in any case to the State's regulatory power in the public interest.

432. As noted by Professor Barrios, one of the Respondent's experts, "[t]he Uruguayan State enjoys unquestionable and inalienable rights to protect the health of its citizens. And it is in this framework of the essential duty to protect public health that the State has the authority to prevent, limit or condition the commercialization of a product or service, and this will consequently prevent, limit or condition the use of the trademark that identifies it."[616] According to Professor Barrios, the State's duty to legislate on issues of public health is reflected in Article 44 of the Constitution and in international conventions to which Uruguay is a party, including the FCTC.[617]

433. In any event, the Claimants' "expectations" have not been "eviscerated" by the Challenged Measures for the reasons detailed in the context of the Tribunal's analysis of the alleged "arbitrary" character of such measures. Nor have the new regulations modified the legal framework for foreign investments beyond an "acceptable margin of change," as also alleged by the Claimants,[618] considering the limited impact on Abal's business, as found by the analysis of the alleged expropriation of their investment.[619]

434. The Tribunal concludes that by adopting the Challenged Measures the Respondent has not breached Article 3(2) of the BIT regarding "legitimate expectations" and the "stability of the legal framework," considering that the Claimants had no legitimate expectations that such or similar measures would not be adopted and further considering that their effect had not been such as to modify the stability of the Uruguayan legal framework.

435. The conclusion reached regarding the dismissal of the Claimants' claim of breach of Article 3(2) means that the Tribunal has no need to examine the Respondent's objection that the Claimants are prevented from bringing a FET claim due to their alleged fraudulent behavior.[620]

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[616] Barrios Report, (REX-004), ¶ 66.
[617] *Ibid.*, ¶ 67.
[618] CM, ¶ 243; CR, ¶ 262.
[619] *Supra*, ¶¶ 284-285.
[620] RR, ¶¶ 7.31-7.43.

D. Impairment of Use and Enjoyment of the Claimants' Investments under Article 3(1) of the Treaty

436. The Claimants also allege, albeit briefly, that the Respondent violated Article 3(1) of the BIT.

437. Article 3(1) of the BIT provides, in so far as relevant:

> *Each Contracting Party shall protect within its territory investments made in accordance with its legislation by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.*

1. The Claimants' Position

438. The Claimants allege that as a result of Respondent's "unreasonable" measures, they "have clearly lost the 'use,' 'enjoyment,' and 'extension' of their investments in PMI's portfolio of brands and intellectual property."[621] In particular, they consider that establishing a BIT violation requires "no more than" showing that "the measures are, in a general sense, not reasonable."[622]

439. The Claimants rely on the holding of the *National Grid* tribunal for its proposition that "arbitrariness" and "unreasonableness" are interchangeable terms. From this, they conclude that the same facts that demonstrate the Respondent's violation of the fair and equitable treatment obligation on grounds of arbitrariness are also sufficient to establish an "unreasonable" impairment of the Claimants' investment.[623]

440. These facts include *inter alia* (1) allegations that the Respondent has not produced any documentation to prove that it discussed and studied the possible effects of the Challenged Measures,[624] and (2) the lack of connection between the regulation and the Respondent's stated objectives and policy goals to change the habits of Uruguayans.[625] This demonstrates, according to the Claimants, that the Challenged Measures are not reasonable and constitute a violation of Article 3(1) of the BIT.

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[621] CM, ¶ 250.

[622] CR, ¶ 281.

[623] CM, ¶ 251 (citing *National Grid* (CLA-221), ¶ 197).

[624] CR, ¶¶ 47-54.

[625] CM, ¶¶ 251-2.

2. The Respondent's Position

441. Article 3(1) only prohibits impairment of use and enjoyment of an investment if the measure is "unreasonable or discriminatory."[626] The Respondent underlines that the SPR and 80/80 Regulation were applied equally and without discrimination to all tobacco brands.[627]

442. With regard to "unreasonableness," the appropriate standard was set forth by the tribunals in the *Biwater Gauff* and *Saluka* cases, where the tribunals found that the affected investors were intentionally targeted by the States' measures and went on to find the measures to be unreasonable.[628]

443. The Respondent further argues that the factual arguments (summarized above) demonstrating that the measures were not arbitrary also apply to prove that they were reasonable.[629]

3. The Tribunal's Analysis

444. The Claimants claim to have lost the "use," "enjoyment" and "extension" of their investment by reason of measures that they consider unreasonable. In their view, the term "unreasonable" is interchangeable with "arbitrary," so that the same facts demonstrating the Respondent's violation of the FET obligation on ground of "arbitrariness" are sufficient to establish an "unreasonable" impairment of their investment under Article 3(1).[630]

445. The facts at the basis of the alleged "unreasonable" impairment of the Claimants' investments[631] have already been examined by the Tribunal in the context of the claim for breach of the FET obligation, reaching the conclusion that the Respondent has not breached Article 3(2). There is no reason regarding the present claim to apply a test

[626] RCM, ¶ 8.55.

[627] RCM, ¶ 1.1.11.

[628] RCM, ¶¶ 8.58-8.60 (citing *Saluka*, (CLA-227), ¶ 460, and *Biwater* (CLA-013), ¶ 460. The Respondent further relies on *Invesmart v. Czech Republic*, Award, 26 June 2009 (RLA-297), ¶ 453.

[629] RCM, ¶ 8.57.

[630] CM, ¶¶ 250-251. In their Reply, the Claimants appear to have abandoned the ground of arbitrariness to contend only that the Challenged Measures "are not reasonable measures": CR, ¶ 281. It may be noted that while Article 3(1) refers to "reasonable or discriminatory measures" as impairing the investment, the Claimants rely only on the "unreasonableness" of the measures, without reference to their discriminatory character.

[631] *Supra*, ¶ 438.

different from the one applied to the claim of breach of the FET, considering that the factual and legal basis of the two claims are the same.

446. For the same reasons that have been given for dismissing the claim for breach of Article 3(2), the Tribunal concludes that there was no breach of Article 3(1), dismissing the Claimants' claim also in this regard.

E. Failure to Observe Commitments as to the Use of Trademarks under Article 11

447. Article 11 of the BIT, under the rubric "Observance of Commitments," provides:

> *Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.*

448. The Tribunal will first examine whether Article 11 operates as an umbrella clause and then determine the scope of "commitments" entered into by the State which had thus to guarantee their observance.

449. Before doing so, and considering its determinations with regard to the expropriation claim, it will deal with the Respondent's contention that since the Claimants did not own the trademarks allegedly affected by the Challenged Measures, it has not made any "commitments" to the Claimants;[632] and then with the Claimants' allegation that they enjoyed a full range of rights as holders of those trademarks, namely the right to use them in commerce and the right to exclude others from doing so, which rights the Respondent undertook the obligation to protect when it accepted the Claimants' trademark applications.[633] After summarily reviewing the Parties' positions on these issues, it will provide its determination on these two questions, before turning to the analysis of the standard of treatment set forth under Article 11 of the BIT.

a. The Claimants' Trademark Rights

1. The Claimants' Position

450. The Claimants allege that by enacting the SPR and 80/80 Regulation, the Respondent breached its commitments to protect the Claimants' right to use their trademarks. In

[632] RCM, ¶ 9.83.

[633] CM, ¶ 257; CR, ¶ 283.

particular, they alleged that by granting the trademarks over Abal's different cigarette brands, the Respondent "committed to ensuring the Claimants the full range of rights that trademark holders enjoy in Uruguay, including the right to use trademarks and the right to exclude others from doing so." Such commitments arose from Uruguay's decision to accept the Claimants' trademark registrations. The Respondent failed to observe that obligation by virtue of the SPR and 80/80 Regulation. Failure to honor them constitutes a violation of Uruguay's obligations under Article 11's umbrella clause.[634]

451. The effect of the SPR regulation was that the Claimants could only use one variant from each of its cigarette brands, and the effect of the 80/80 Regulation was that their ability to use those trademarks was significantly undermined. This, according to the Claimants, constitutes a violation of the umbrella clause of Article 11 of the BIT.

452. Moreover, all the variants that are the basis of the claim are protected because they maintain the "distinctive features" of the trademarks as originally registered and they grant the Claimants a right to use their trademarks in commerce.

453. The Claimants further rebut Uruguay's allegations that (i) the Claimants did not own the trademarks that were allegedly affected by the Challenged Measures and thus it cannot be considered to have made any "commitments" in relation to the Claimants, and (ii) Uruguay's trademark law only confers upon trademark registrants the rights to exclude others from using the trademark, but not the right to use the trademarks in commerce.

2. The Respondent's Position

454. The Respondent rejects the Claimants' contentions on several grounds: (1) Article 11 does not operate as an umbrella clause; (2) registration of a trademark does not constitute a "commitment" for purposes of Article 11; (3) the Claimants' trademarks were not registered with Uruguay's National Directorate of Industrial Property (DNPI) to benefit from legal protection so that the Respondent has no "commitments" in relation to the trademarks at issue in these proceedings because they are not owned by the Claimants; and (4) Uruguayan trademark law does not grant registrants a positive right to use the trademarks in commerce, but only a right to exclude others from doing so.

[634] CM, ¶ 259.

455. With regard to the third point, the Respondent argues that the marks displayed on the branded packaging of seven of the thirteen brands variants allegedly affected by the Challenged Measures, were not, in fact, protected trademarks insofar as the Claimants failed to register them.[635]

456. With regard to the last point, Respondent asserts that after obtaining a trademark registration by the DNPI, the holder of trademark has the right to challenge the use of any trademark that would result in confusion between the goods or services in question and the good for which the trademark was registered. It also has the right to challenge the registration of identical or similar signs. [636] In sum, what Uruguayan law recognizes is a right to prevent others from using the trademark and not a right to use the trademark in commerce.[637] The freedom to engage in commerce and market products bearing marks is recognized by the Constitution regardless of whether the trademark is registered or not. This qualified freedom cannot be converted in a right to use.[638] Moreover, none of the international Intellectual Property Conventions on which the Claimants rely, and on which Uruguay's Intellectual Properly law was based, recognize a right to use.[639]

3. The Tribunal's Analysis

457. Regarding the Claimants' ownership of the trademarks at issue in these proceedings the Tribunal, when examining the expropriation claim, has assumed, without deciding, that said trademarks continued to be protected under the Uruguayan trademark law.[640] It will proceed, based on the same assumption, to establish whether a trademark is a "commitment" for the purposes of Article 11 of the BIT.

458. Also when examining the expropriation claim, the Tribunal has excluded that the right to use is among the rights conferred by a trademark.[641] To that extent, therefore, no

[635] RCM, ¶ 9.83. The Respondent asserts that seven of the 13 variants about which Claimants complain were not validly registered when the SPR was adopted. *See supra*, ¶ 246 and n. 311.

[636] RCM, ¶ 9.24, citing Barrios Report (REX-004), ¶ 50.

[637] RR, ¶¶ 9.29, 9.31-46 (referring to the Barrios Report, the decision of the *Tribunal de lo Contencioso Administrativo* No. 933 of Nov. 2010, and the administrative practice of Uruguay).

[638] RR, ¶ 9.31.

[639] RR, ¶¶ 9.47-9.64; RCM, ¶¶ 9.36-9.47.

[640] *Supra*, ¶ 254.

[641] *Supra*, ¶ 271.

"commitments" may be said to have been undertaken by the Respondent with regard to the trademarks allegedly affected by the Challenged Measures.

b. Article 11 as an Umbrella Clause and the Scope of the State's "Commitments"

1. The Claimants' Position

459. The Claimants contend that Article 11 is an umbrella clause since it includes "the core components" of such a clause: (1) a State obligation to observe (2) commitments entered into with respect to investments, which the State has failed to observe.[642]

460. Relying on, among others, the *LG&E* and *Enron* tribunals, the Claimants posit that a State can assume those "obligations" by enacting generally applicable domestic laws and regulations. A failure to meet these general obligations would trigger State responsibility.[643] They further add that "[t]here is nothing unusual about the BIT's umbrella clause."[644]

461. The Claimants contend that their trademark registration is within the scope of "commitments" covered by Article 11 of the BIT because:

> *[A]a trademark registration is a grant of the rights specified in Uruguayan law to an individual person or entity. Claimants' trademark registration are indeed specific to Claimants. As a result of those particular registrations, Claimants alone have rights in their trademarks, no one else owns the trademarks, and no one else may use the trademarks without Claimants' authorization.*[645]

462. Contrary to the Respondent's arguments, the Claimants consider that a letter presented to ICSID in the *SGS v. Pakistan* arbitration, where Switzerland provided its interpretation of the BIT, is inapposite in this arbitration. They allege that (1) it refers to the Swiss-Pakistan BIT, not the Switzerland-Uruguay BIT; (2) it was signed 15 years after Switzerland concluded the BIT with Uruguay; (3) it is a *post hoc* interpretation of the Switzerland BIT with Pakistan; and (4) it is irrelevant to the interpretation of the Uruguay BIT under the VCLT as it was a unilateral communication.[646] Even if the

[642] CR, ¶ 286, citing *Duke Energy* (CLA-228), ¶ 318.

[643] CM, ¶¶ 253-256 (citing *Enron* (CLA-230), ¶¶ 274-277, and *LG&E,* (RLA-65), ¶ 174); CR, ¶¶ 287-291.

[644] CR, ¶ 286.

[645] CR, ¶ 290.

[646] CR, ¶¶ 287-289.

Tribunal accepts the relevance of the letter, the Claimants' trademark registration still falls under the commitments covered by Article 11.[647]

2. The Respondent's Position

463. The Respondent makes two arguments on this score. First, it argues that Article 11 cannot be equated to umbrella clauses in other BITs involving different parties.[648] To support its argument, it points to its "unusual" wording of Article 11, which obligates the Contracting States to the BIT to "constantly guarantee the observance of the commitments." This, according to the Respondent, differs from the "conspicuously different" usual formulation of umbrella clauses, under which States "*shall observe any obligation*" entered into.[649] The Respondent notes that the difference is evident "as a matter of simple semantics."[650] It says that this unusual wording shows that it is not intended to elevate domestic commitments into a treaty obligation, relying on academic commentary and a sample of relevant arbitral awards on the question.[651]

464. Second, it alleges that even if it did operate as an umbrella clause, Article 11 should not be interpreted as covering commitments made under generally applicable municipal law.[652] Thus, Uruguay's registration of the Claimants' trademarks cannot be considered an international law obligation on the basis of Article 11.

465. The Respondent refers to a letter sent by Switzerland to ICSID, which stated that a provision of the Swiss-Pakistan BIT in similar language to the Switzerland-Uruguay BIT was not intended to cover obligations arising under general legislative, administrative, or other unilateral measures. According to the Respondent, Switzerland's interpretation in *SGS* is applicable in the present case.[653] It points out that the Claimants themselves rely on the Tribunal's finding in *SGS v. Pakistan* and that they cannot now allege its inapplicability.[654]

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[647] CR, ¶ 290.

[648] RCM, ¶ 9.6.

[649] RCM, ¶ 9.8 (emphasis in the text).

[650] RR, ¶ 9.8.

[651] RR, ¶¶ 9.9-9.12

[652] RCM, ¶¶ 9.6-9.18; RR, ¶ 9.19.

[653] RCM, ¶ 9.14; citing Letter from Ambassador Marino Baldi, Swiss State Secretariat for Economic Affairs, to Mr. Antonio R. Parra, Deputy Secretary General, ICSID, 2003, p. 14 (RLA-251).

[654] RR, ¶ 9.17.

466. Relying on the findings of the *HICEE B.V. v. Slovak Republic* tribunal, the Respondent considers, in the alternative, that Switzerland's letter should, in any case, be considered merely as a "supplementary means of interpretation" under Article 32 of the VCLT.[655]

3. The Tribunal's Analysis

(i) Interpretation of Article11 as an umbrella clause

467. Clauses with similar wording to that of Article 11 have by now been the subject of a number of awards and extensive academic commentary. In *SGS v. Pakistan*, concerns about the "almost indefinite expansion" of Article 11 of the Swiss-Pakistan BIT, which is identical to Article 11 of the Uruguay-Swiss BIT, resulted in an interpretation of the word "commitment" that did not include contract claims.[656] In *SGS v. Philippines*, the tribunal reached the contrary result on the basis of Article 10(2), which provided: "[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party," justifying its interpretation based partly on the different wording in this provision. [657]

468. The textual distinction between Article 10 of one BIT and Article 11 of the other BIT was rejected in the *SGS v. Paraguay* award. The *Paraguay* tribunal was concerned with Article 11 of the Paraguay-Swiss BIT, which is also identical to Articles 11 of the Swiss-Pakistan and Swiss-Uruguay BITs. In a footnote in the jurisdictional decision, the tribunal sought to deal with the diverging case law on the topic as follows:

> *The SGS v. Philippines tribunal suggested that it reached a different result […] based at least in part on difference between the umbrella clause language of the Switzerland-Philippines BIT and the supposedly less direct or less specific language of the umbrella clause in the Switzerland-Pakistan BIT. […] Inasmuch as we reach the same result on jurisdiction as the SGS v. Philippines tribunal, on the basis of the same Treaty language as was before the SGS v. Pakistan tribunal, it follows that this Tribunal does not see the language as meaningfully different. That is, we do not consider that the wording of Article 11 of the Treaty is so general or hortatory as to preclude reading it as an obligation of the State to comply with, inter alia, its contractual commitments.*[658]

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[655] RR, ¶¶ 9.15-9.17 (citing *HICEE B.V. v. Slovak Republic*, UNCITRAL, Partial Award, 23 May 2011, ("***HICEE***") (RLA-111), ¶ 136).

[656] *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 Aug. 2003 ("***SGS Pakistan***") (CLA-059), ¶¶ 166-167.

[657] *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 Jan. 2004 ("***SGS Philippines***") (CLA-058), ¶ 119.

[658] *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 Feb. 2010, (CLA-143), ¶ 169, n. 95.

469. That decision was upheld by the annulment committee, which rejected Paraguay's allegations that the tribunal had manifestly exceeded its powers,[659] albeit in terms that suggested that its members might have personally taken a different view.[660]

470. The Respondent made reference to the Switzerland–Paraguay BIT[661] but did not deal with the *SGS v. Paraguay* decision in either of its written pleadings.

471. While the Respondent placed significance on academic commentary emphasizing the textual differences, it must be noted that much of that commentary has taken its cue from the *SGS v. Pakistan* case. Moreover, that commentary can be understood in a context in which there is a drive to defend the coherence of the arbitration system in the face of apparently contradictory awards involving the same claimant. In this case, the Respondent's argument would require emphasis to be placed on textual differences too subtle to bear the weight of such a distinction. The words "constantly guarantee the observance of commitments" require something more active than merely providing a legal system within which commitments might be enforced, as the Respondent would have it.[662] Moreover, the *Noble Ventures* award is not directly applicable; it did not express a final view on the question, finding in any case that it could hear the contract claim on the basis of the standard umbrella clause before it.[663]

472. The Tribunal concludes that Article 11 operates as an umbrella clause, at least for contract claims.

(ii) Is a trademark a "commitment" within Article 11?

473. The Claimants say that the trademarks they were granted were "commitments" for the purposes of Article 11: on this basis, they claim a breach of that Article since the Respondent failed to observe the obligations it had assumed by adopting the Challenged

[659] *SGS v. Paraguay,* ICSID Case No. ARB/07/29, Decision on Annulment, 19 May 2014, ¶ 120.

[660] *Ibid.*, ¶¶ 119-121.

[661] RCM, ¶ 9.9. No reference to the Switzerland-Paraguay BIT or the *SGS v. Paraguay* decision was made by the Claimants.

[662] RR, ¶ 9.10, relying on Anthony Sinclair, "The Umbrella Clause Debate," in Andrea Bjorklund et al (eds.) *Investment Treaty Law: Current Issues III* (2009), (RLA-247), p. 283 (arguing for a different interpretation stating that "[i]t might for example, mean merely to provide a legal system and framework of institutions in which commitments may be enforced."); and on *Noble Ventures* (RLA-165), ¶ 58.

[663] *Noble Ventures* (RLA-165), ¶ 61.

Measures.[664] According to the Claimants, "commitments" may be entered into by the State "through generally applicable laws and regulations and this includes the trademark law."[665] The Claimants say that by granting the trademarks over Abal's different cigarette brands, the Respondent "committed to ensuring Claimants the full range of rights that trademark holders enjoy in Uruguay, including the right to use trademarks and the right to exclude others from doing so."[666] The effect of the SPR regulation was that the Claimants could only use one variant from each of its trademarked cigarette brands, and the effect of the 80/80 regulation was that its ability to use those trademarks was undermined, thus failing to "constantly guarantee the observance of the commitments" under Article 11.[667]

474. The Respondent denies that Article 11 can be used "to elevate nominal violations of generally applicable IP law into a treaty breach."[668] It relies on a letter from the Swiss government to ICSID following the *SGS v. Pakistan* and *SGS v. Philippines* awards, where Switzerland explained that Article 11 of the Switzerland-Pakistan BIT (which is identical to Article 11 of the Switzerland-Uruguay BIT) was intended to cover specific commitments related to the investment, such as an investment authorisation, but it does not extend to "*municipal, legislative or administrative or other unilateral measures.*"[669]

475. In its Counter-Memorial, the Respondent made no legal argument as to what weight should be given to a letter of this kind, simply stating that it would be appropriate to give the parties' views considerable deference. The Swiss-Uruguayan BIT contains no facility akin to the NAFTA Free Trade Commission whereby the State parties can issue binding interpretations of NAFTA.[670] Moreover, as the Claimants note, under the VCLT there is no facility for taking into account the *post hoc* explanations by one State as to what it meant when it signed a treaty, although it would be possible for Switzerland

[664] CM, ¶¶ 255-256; CR, ¶ 283.

[665] CM, ¶ 258, relying on *LG&E* (RLA-65); CR, ¶ 285, citing *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 Mar. 2008, (CLA-247) and other cases in CR n.499.

[666] CR, ¶ 283.

[667] *Ibid*.

[668] RCM, ¶ 9.18.

[669] RCM, ¶ 9.14 (citing Letter from Ambassador Marino Baldi, Swiss State Secretariat for Economic Affairs, to Mr. Antonio R. Parra, Deputy Secretary General, ICSID, 2003 (emphasis in the text) (RLA-259)).

[670] North American Free Trade Agreement (NAFTA), Article 2001(2).

and Uruguay to subsequently agree on the scope of Article 11.[671] The Respondent did not seek to argue that this had crystallised into agreement with the acceptance of the position by it in these proceedings, but even if it had, it is not clear what weight should be given to such an agreement.[672]

476. In its Rejoinder, the Respondent argued that Switzerland's letter was capable of being given weight under Article 32 VCLT as a supplementary means of interpretation, noting that the list in Article 32 is not exclusive. It pointed to the *HICEE B.V. v. Slovak Republic* award as an example.[673] There the relevant statement by the Dutch Government had been made public in the process of concluding the treaty, not subsequently, and had been shared by Slovakia during the proceedings.[674] It would be quite novel and potentially raise due process concerns in investment arbitration cases if a subsequent unilateral statement by one State could be given substantial, let alone decisive, weight.

477. The letter does not deal with trademarks. It merely underlines the words "commitment to a specific investments or a specific investor," suggesting that they require a specific link between the commitment and the investment, such that a general law, or "municipal legislative or administrative or other unilateral measures," would not be covered. On the other hand, a more active demeanour by a party that points more in the direction of a commitment to a specific investment or a specific investor, either in a contract or "an investment authorization … or a written agreement" would be covered.[675]

478. Irrespective of the interpretative weight of Switzerland's letter, its content reflects the view, repeatedly held by investment tribunals, that clauses such as Article 11, referring to "commitments entered into [by State] with respect to the investment of the investor"

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[671] VCLT, Article 31(3).

[672] Richard K. Gardiner, *Treaty Interpretation* 32 (2008) at p. 1268: "That the agreement of the parties on an interpretation trumps other possible meanings seems obvious enough, given the nature of a treaty as an international agreement between its parties." But compare *Interpretation of the Air Transport Services Agreement of 6 Feb. 1948 (Italy v. United States*), 16 RIAA 75, 99 (1965), noting that subsequent practice of the treaty parties is not "in itself decisive for the interpretation of the disputed text; it can however serve as additional evidence as regards the meaning to be attributed to the text." The ICJ adopts an even narrower approach: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument." (*International Status of South-West Africa*, Advisory Opinion, I.C.J. Reports 1950, 128, at 135-136).

[673] RR, ¶¶ 9.13-9.17.

[674] *HICEE* (RLA-111), ¶ 136. *See* RR, ¶ 9.16, n. 652.

[675] RR, ¶ 9.13.

of the other State, do not cover general obligations imposed by the law of the host State. As held by the tribunal in the *Noble Ventures* case, "the employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts."[676]

479. The question for this Tribunal is whether a trademark falls between the two categories, i.e. whether it can be considered a commitment under general legislation or by reason of the individual consideration involved in the initial grant as a specific commitment to as specific investment or investor.

480. The Claimants argue that it is a commitment that arises when a submitted registration application is granted under Uruguayan law "to an individual person or entity."[677] Yet, a trademark is not a unique commitment agreed in order to encourage or permit a specific investment. Unlike the case of an authorisation or a contract, where the host State may undertake some specific obligations, Uruguay entered into no commitment "with respect to the investment" by granting a trademark. It did not actively agree to be bound by any obligation or course of conduct; it simply allowed the investor to access the same domestic IP system available to anyone eligible to register a trademark. While the trademark is particular to the investment, it stretches the word to call it a "commitment."

481. In addition, the scope of any such commitment remains uncertain. As compared to a contract, where the host State enters into specific, quantifiable obligations in relation to an investment, a trademark is not a promise by the host State to perform an obligation. It is simply a part of its general intellectual property law framework. A trademark gives rise to rights, but their extent, being subject to the applicable law, is liable to changes which may not be excluded by an umbrella clause: if investors want stabilization they have to contract for it.

482. The Tribunal concludes that trademarks are not "commitments" falling within the intended scope of Article 11 of the BIT. Accordingly, the Claimants' claim of breach by the Respondent of Article 11 by the adoption of the Challenged Measures is rejected.

[676] *Noble Ventures* (RLA-165), ¶ 51. *See also SGS Philippines* (CLA-058), ¶ 121.
[677] CR, ¶ 290.

F. Denial of Justice

483. The Claimants further allege that the Respondent, through its judicial system, committed two denials of justice in breach of the fair and equitable treatment standard set out in Article 3(2) of the Swiss-Uruguayan BIT. First, the Claimants allege that the final decision of Uruguay's Supreme Court of Justice ("SCJ") on the constitutionality of Law 18,256 (Article 9) and the TCA's Decision on the legality and validity of the 80/80 Regulation were directly contradictory with no way to reconcile that contradiction without incurring in a denial of justice. Second, the Claimants say that the TCA's decision on the SPR amounted to a denial of justice because when rendering its judgment, the TCA failed to address Abal's arguments and evidence and instead considered the challenge against the same regulation brought by one of its competitors, British American Tobacco ("**BAT**").

484. The Respondent in turn explains that Uruguay's judicial system and its commitments to the rule of law, are widely recognized by international organizations and independent observers as among the best in South America.[678] The actions of its judiciary in this case do not show otherwise. First, allegedly divergent decisions from the SCJ and the TCA with regard to the interpretation of Law 18,256 are not sufficient to amount to a denial of justice.[679] The Respondent stresses that the Supreme Court and the TCA are co-equal institutions and that each acted "within its sphere of competence." The TCA was only bound by a decision of the SCJ holding a law *un*constitutional, which did not occur here. [680] Second, the 3 passing references to BAT's trademarks in the TCA's decision over Abal's SPR challenged, are at most an oversight. They do not amount to a "procedural irregularity of such severity that it affects the outcome of the case" and thus cannot be considered a denial of justice under the FET standard interpreted in accordance with international law.[681] In addition, the Claimants failed to exhaust all available and effective remedies.

[678] RCM, ¶¶ 11.44-11.50 (citing to rankings from the Inter-American Development Bank, the World Bank, the U.S. State Department, Transparency International and others). This point was recognized by the Claimants' own experts: Tr. Day 6, 1832:19 – 1833:3.

[679] RCM, ¶¶ 11.120, 11.125.

[680] RCM, ¶¶ 11.101, 11.112-11.118; RR, ¶ 11.54.

[681] RCM, ¶ 11.84.

a. **The Legal Standard**

485. Article 3(2) of the BIT reads in relevant part:

> *Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.*

486. Both parties agree that in so far as Article 3(2) concerns judicial decisions, it creates a denial of justice standard.

487. The Parties further agree that for a State to incur international responsibility, the underlying denial of justice claim must arise from "fundamentally unfair judicial proceedings" at the issuance of which the claimant is considered to have exhausted all available local remedies.[682] The Parties disagree nevertheless on the standard of proof and the threshold necessary for a denial of justice claim.

1. The Claimants' Position

488. According to the Claimants, a denial of justice may result from, for instance, a "refusal to judge" (including a "disguised refusal"), a breach of due process, arbitrariness, gross incompetence, or a pretense of form.[683] Neither bad faith nor malicious intent are required, however, as recognized by the Respondent's expert, Professor Schrijver.[684]

489. The Claimants also relied on the original formulation in the 1929 Harvard Draft Convention on State Responsibility, article 9 of which provided: [685]

> *Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.*

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[682] CR, ¶ 294.

[683] CM, ¶ 263, citing Paulsson, *Azinian v. Mexico*, *Grand River v. United States*, the 1929 Harvard Draft Convention, and *Mondev v. United States* (the latter stating that "question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment").

[684] CR, ¶ 298 (relying on *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 26 June 2003, ("***Loewen***") (CLA-169), ¶ 132.

[685] CM, ¶ 264. The 1929 Harvard Draft Convention on State Responsibility, article 9 was relied on by: Ian Brownlie, *Principles of Public International Law* (2003), pp. 506-07; *Grand River Enterprises Six Nations Ltd v. USA*, UNCITRAL, Award, 12 Jan. 2011, ¶ 223.

490. Relying on their expert, Professor Paulsson, the Claimants submit that the alleged denial of justice would breach both the FET obligation in the BIT and the relevant customary international law standard.[686]

491. The condition that local remedies be exhausted, for its part, requires determining whether there is a higher court that can reconsider and correct a lower court's unfair proceeding. The available higher court must be capable of redressing the wrong and thereby correct what would otherwise be a denial of justice.[687]

492. In any case, it is the Respondent who bears the burden of showing that a reasonable and effective remedy was available and was not exhausted by the Claimants, to avoid incurring international responsibility after its courts have denied justice to the Claimants.[688]

2. The Respondent's Position

493. The Respondent is broadly in agreement with the Claimants' statement of the legal standard for a denial of justice, but it emphasises that there is a high threshold to prove a denial of justice.[689] It requires clear and convincing evidence of an egregious conduct of judicial proceedings, that results in an *outrageous* failure of the judicial system.[690] It is not enough to have an erroneous decision, or even an incompetent judicial procedure. For instance, the misapplication of municipal law or erroneous factual findings do not *per se* give rise to a denial of justice.[691] There must be a "failure of a national system as a whole to satisfy minimum standards" or a demonstration of "systemic injustice."[692] Uruguay also relies on *Flughafen* award, to allege that the grave procedural errors must

[686] Expert Report of Jan Paulsson of 27 Feb. 2014 ("**Paulsson Report I**") (CWS-011), ¶ 20.

[687] CR, ¶¶ 303-309.

[688] CR, ¶ 301, relying on Schwebel's Opinion ("**Schwebel Opinion**") (CWS-15), ¶ 19; *ELSI* (CLA-164; CLA-88), ¶ 63.

[689] RCM, ¶ 11.11; Second Expert Report of Jan Paulsson, 8 Apr. 2015 ("**Paulsson Report II**") (CWS-25), ¶¶ 6-8; Schwebel Opinion (CWS-15), ¶ 11; Second Legal Opinion of Professor Nico Schrijver, 10 Sep. 2015 ("**Schrijver Second Opinion**") (REX-10), ¶¶ 4-5; *See also* RR, ¶ 11.15.

[690] RCM, ¶ 11.16 (emphasis in the text).

[691] RCM, ¶ 11.18.

[692] RCM, ¶¶ 11.13-11.14; citing *Oostergetel v. Slovakia*, Final Award, UNCITRAL Arbitration, 23 Apr. 2012, (RLA-194), ¶ 273.

have an impact on the outcome,[693] and that there is a presumption of legality of the decisions of domestic courts which the Claimants must overcome.[694]

494. Moreover, the standard of conduct imposed by international law is independent from the question of legality under domestic law. The Respondent emphasizes that international investment tribunals may not serve as a court of appeals for decisions of national courts or tribunals. Accordingly, the Respondent argues, when examining a denial of justice claim the Tribunal may not engage in a re-adjudication of complex questions of municipal law over which the parties advance plausible interpretations.[695]

495. As to the exhaustion of local remedies, the Respondent emphasizes that the denial of justice requires the exhaustion of all reasonably available and potentially effective local remedies, including constitutional and extraordinary remedies.[696] The only exception is local remedies that are obviously futile. [697]

496. According to the Respondent, the standard outlined above applies to a denial of justice claim under both to fair and equitable treatment under the BIT and under customary international law.[698]

497. With regard to the burden of proof, Uruguay asserts that if it is for the claimant to bear the burden of demonstrating that it has exhausted all reasonable remedies or that a local remedy was not exhausted because it would be futile.[699] The Respondent considers that as long as a remedy is available and capable of affording effective relief, the Claimants have the obligation to exhaust it.

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[693] RR, ¶ 11.16 citing *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 Nov. 2014 ("***Flughafen***") (CLA-248), ¶ 693.

[694] RR, ¶ 11.17, citing *Flughafen* (CLA-248), ¶ 637.

[695] RCM, ¶¶ 11.18-11.23; RR, ¶¶ 11.15-11.16, citing *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 Mar. 2015, (RLA-314), ¶ 764.

[696] RCM, ¶¶ 11.11, 11.24, 11.31-11.33 (citing ILC Drafts Articles on Diplomatic Protection 14.2, and jurisprudence of the European Court of Human Rights).

[697] RCM, ¶¶ 11.31-11.35.

[698] RCM, ¶¶ 11.37-11.43 (citing *Paushok*, (RLA-75), ¶ 625, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 Aug. 2012, (RLA-199), ¶ 427, *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 Nov. 2008, *(*RLA-181), ¶ 259).

[699] RCM, ¶ 11.30; RR, ¶ 11.47 (citing inter alia *Apotex, Inc.& the United States*, UNCITRAL Arbitration, Award on Jurisdiction and Admissibility, 14 June 2013 (RLA-205), ¶ 268).

3. The Tribunal's Analysis

498. The fair and equitable treatment obligation may be breached if the host State's judicial system subjects an investor to denial of justice. The Parties appear to be broadly in agreement on the legal standard for a denial of justice. Both cite *Arif v. Moldova*, its basic proposition being that a denial of justice is found "*if* and *when* the judiciary breached the standard by *fundamentally* unfair proceedings and *outrageously* wrong, final and binding decisions."[700]

499. An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such. A denial of justice claim may be asserted only after all available means offered by the State's judiciary to redress the denial of justice have been exhausted. As held by one decision, "[a] denial of justice implies the failure of a national system as a whole to satisfy minimum standards."[701]

500. The high standard required for establishing this claim in international law means that it is not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal.[702] For a denial of justice to exist under international law there must be "*clear evidence* of … an *outrageous* failure of the judicial system"[703] or a demonstration of "systemic injustice"[704] or that "the impugned decision was clearly improper and discreditable."[705]

501. The Tribunal shares the view according to which "grave procedural errors" may result in a denial of justice depending on the circumstances of each case.[706] It believes that a denial of justice exists if the conditions outlined above for finding the same are satisfied, whatever impact it may have had on the outcome of the court proceedings.[707]

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[700] CM, ¶ 262; RCM, ¶ 11.12 (emphasis in the citation added by the Respondent).

[701] RCM, ¶ 11.13 (relying on *Ian Oestergetel v. Slovak Republic*, UNCITRAL Arbitration, Final Award, 23 Apr. 2012 ("***Oestergetel***")(RLA-194), ¶ 273).

[702] *Mondev* (RLA-117), ¶ 126.

[703] RCM, ¶ 11.16, citing Professor Greenwood's opinion (emphasis in the text).

[704] RCM, ¶ 11.13, citing *Oestergetel* (RLA-194), ¶ 273.

[705] *Mondev* (RLA-117), ¶ 127.

[706] RR, ¶ 11.16, relying on Schrijver's Second Opinion, (REX-10), ¶¶ 6-7, citing *Flughafen* (REX-010), ¶ 693.

[707] *See infra*, ¶¶ 571572.

502. After citing in the Counter-Memorial the position of Sir Gerald Fitzmaurice that to prove denial of justice it is necessary to show bad faith[708] and after repeating it in the summary of *Arif v. Moldova,*[709] the Respondent does not invoke the bad faith requirement in the Rejoinder. The requirement of bad faith has been excluded by other tribunals.[710]

503. As to the Parties' debate regarding burden of proof of the exhaustion of local remedies,[711] the Tribunal notes that this is a condition that has to be satisfied prior to asserting a denial of justice claim. It is for the Claimants to show that this condition has been met or that no remedy was available giving "an effective and sufficient means or redress"[712] or that, if available, it was "*obviously* futile."[713]

b. **The Apparently Contradictory TCA and SCJ Decisions on the 80/80 Regulation**

1. The Claimants' Position

504. In the Claimants' view, Decree 287 was impermissible under Uruguayan law under either of the following readings of Law 18,256: (a) if Law 18,256 only allowed the MPH to impose a requirement that the warnings cover 50% of the package, then the 80/80 Regulation would impermissibly exceed the scope of the law; and (b) if Law 18,256 allowed the MPH to require warnings covering more than 50% of the package, then that delegation of legislative authority would have been impermissible under the Uruguayan Constitution, because only the legislature is permitted to restrict fundamental property rights, including intellectual property rights.

505. Under the Uruguayan judicial system, Abal was required to litigate each of the propositions described in the preceding paragraph in separate courts. Abal could only litigate proposition (a) before the TCA, which has jurisdiction to assess the legality of

[708] RCM, ¶ 11.19.

[709] RCM, ¶ 11.23.

[710] Such as in *Loewen* (CLA-169), ¶ 132.

[711] CR, ¶ 301; RR, ¶ 11.47.

[712] CR, ¶ 309, citing Draft Articles on Diplomatic Protection with Commentaries, *Report of the International Law Commission on the Work of its 6th Session*, UN Doc. A/61/10 15, (LC-10), Article 14, comment 2, p. 72.

[713] RCM, ¶ 11.30 (referring in n. 1218 to Schrijver Opinion, (REX-008), ¶ 35, to *Claim of Finnish Shipowners against Great Britain*, Award, 9 May 1934, (CLA-030), p. 1505 (emphasis added in the reference) and to *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award, 6 Mar. 1956, 12 U.N.R.I.A.A. 83 (RLA-44), p. 119.

administrative acts such as decrees; and only proposition (b) before the Supreme Court, which has jurisdiction to assess the constitutionality of laws.[714]

506. According to the Claimants, the outcomes before the Supreme Court and the TCA turned on the same matter under dispute: did Article 9 of the Law delegate authority to the executive to require warnings of more than 50%?[715] However the decisions ultimately rendered by the Supreme Court and the TCA are openly contradictory in the Claimants' view. On the one hand, the Supreme Court found that Law 18,256 was constitutional because it did not allow the MPH to require health warnings covering more than 50% of the surface of a cigarette package; on the other hand, the TCA, when assessing the legality of the Decree, found that the 80/80 Regulation was permissible because Law 18,256 *did* allow the MPH to require warnings covering more than 50% of the package. The Claimants contend that both propositions cannot be true. In their view, as a result of these allegedly conflicting rulings without the possibility of any further appeal, the Uruguayan judicial system deprived Abal of its right to a decision on the legality of the 80/80 Regulation and inflicted a denial of justice.[716]

507. The Claimants consider that the TCA's decision, subsequent to the SCJ ruling, is an example of a "failure of State authorities to give effect to a judicial decision favorable to the alien's cause."[717]

508. The Claimants further contend that the TCA violated Uruguayan law when it contradicted the Supreme Court's interpretation of Law 18,256. Because Uruguayan law incorporates the principle of *res judicata*, the TCA was bound to follow the Supreme Court's interpretation of Law 18,256 as applied to Abal. The TCA's failure to do so resulted in contradictory and irreconcilable decisions.[718]

509. By invoking the separate functioning and relationship between its administrative and constitutional systems, the Claimants contend, the Respondent is improperly seeking to invoke domestic law and its domestic legal system to insulate it from international responsibility. In any case, even under the domestic legal system, the principles of legal

[714] CM, ¶ 168.
[715] Tr. Day 1, 31:19-22.
[716] CR, ¶ 163. *See also Ibid*., ¶¶ 158-162; CM, ¶¶ 272-275.
[717] CR, ¶ 322.
[718] CR, ¶ 164.

interpretation, the integrity of the legal system and due process cannot tolerate that two directly contradictory legal positions coexist and apply simultaneously to the same parties.[719] Finally, a denial of justice must be compensated, regardless of the merits of the domestic case.[720]

2. The Respondent's Position

510. The Respondent submits that under Uruguayan law, the TCA and SCJ are co-equal institutions with different spheres of competence. The TCA rules on administrative acts, the SCJ determines the constitutionality of laws. Thus, according to Uruguay, the existence of allegedly divergent decisions is not sufficient to amount to a denial of justice. [721]

511. The "key point," in the Respondent's view, is that the SCJ found the law *constitutional*. When a law is declared constitutional, the TCA is not obligated to adopt the SCJ's legal reasoning.[722] Rather, under Respondent's analysis, it was constitutionally empowered to reach a different conclusion.[723] Thus, the TCA was not bound to agree with the SCJ's interpretation that the law only authorized the Ministry to require warnings covering up to 50% of the pack. [724] Instead, it was free to decide on the legality of the Decree, based on its own interpretation of the authority Law 18,256 conferred on the MPH.[725]

512. In any case, the Respondent asserts, at the end of the day, whether the TCA is bound by the SCJ on questions of interpretation, is a fine question of Uruguayan public law, but what is important is that the TCA decision plainly constitutes a "plausible and reasonably tenable interpretation of municipal law."[726] Since it is not possible to consider that the TCA's decision was NOT of a kind which no competent judge would have made, the TCA's decision cannot constitute a denial of justice under international

[719] CR, ¶ 324.

[720] CR, ¶¶ 329-333 (citing *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case: Award, 31 May 1990 (CLA-160), ¶ 174; *Harry Roberts (U.S.A) v. United Mexican States*, Award, 2 Nov. 1926 ("***Roberts***") (CLA-241), ¶¶ 6-7, 10-11; *B.E Chattin (U.S.A) v. United Mexican States*, Award, 23 July 1927 ("***Chattin***") (CLA-242), ¶¶ 26, 30).

[721] RCM, ¶¶ 11.120, 11.125.

[722] RCM, ¶¶ 11.8, 11.113-11.126.

[723] RR, ¶ 11.60.

[724] *Ibid*.

[725] RR, ¶ 11.73.

[726] RCM, ¶ 11.124.

law.[727] It would stretch the concept of denial of justice far beyond its limits to declare the Uruguayan constitutional order itself unjust.[728]

513. The relationship between the parallel administrative and constitutional systems is critical in determining whether justice was denied. That system was in place before the Claimants invested in Uruguay. The Claimants' knowledge of this relationship is evidenced by Abal's procedural stance in challenging the 80/80 Regulation.[729]

514. The Respondent further rejects the Claimants' contention that the alleged contradictory character of the two decisions, means, ultimately, that the Claimants were deprived of a decision on the legality of Decree 287. On the contrary, there was a clear legal decision on the constitutionality of Law 18,256 and the validity of its implementing Decree, respectively.[730] Each decision was "reasonably substantiated."[731] Both courts received vigorous argument from both sides (Abal/MPH), and subsequently reviewed, analyzed, adjudicated upon the claims and dismissed them.

515. Moreover, the Respondent argues that under Uruguayan law, *res judicata* only exceptionally extends beyond the *holding* of a judgment itself.[732]

3. The Tribunal's Analysis

516. Abal challenged the 80/80 Regulation through two separate actions, one before the SCJ and the other before the TCA, due to the two courts' distinct jurisdiction.

517. Abal argued before the SCJ, in relevant part, that:

> *Articles 9 and 24 of the Law [Law No. 18,256] violate the Constitution inasmuch as they grant unlimited authority to the Executive Branch to restrict individual rights. Such authority is exclusively reserved for the law and cannot be delegated to the Executive Branch. For such reason, Articles 9 and 24 of the Law are unconstitutional. It is the power of the legislature, and only the legislature, to affect the rights of individuals.*[733]

[727] RCM, ¶¶ 11.123-11.125.

[728] RR, ¶ 11.65.

[729] RR, ¶ 11.65.

[730] RCM, ¶¶ 11.99-11.111.

[731] RCM, ¶ 11.110.

[732] RR, ¶¶ 11.71-11.72.

[733] Complaint of Abal Hermanos S.A., SCJ Case No. 1-65/2009, 11 Sep. 2009 (R-216), p. 2.

518. In dismissing Abal's unconstitutionality action the SCJ, after noting that the Law's origins are predicated on the FCTC, declared:

> *[A]rticle 9 of the Law No. 18.256, […] does not delegate to the Executive Power a discretionary power to impose restrictions on top of said minimum, but imposes on the tobacco company the obligation that the exterior labeling of their packs must contain a warning that occupies at least 50% of the total exposed principal surfaces. […]*
>
> *[T]he only thing left by the norm in the field of the Executive Power (Ministry of Public Health) is to control –for the purpose of its approval- that the health warnings and messages are clear, visible, legible and occupy at least the 50 % (fifty per cent) of the total exposed principal surfaces, and also the periodical modification of such warnings, aspect that clearly refers to the message and not to their size. […]*[734]

519. In its action before the TCA, Abal alleged that Decree 287, based on which the 80/80 Regulation had been adopted, went beyond the scope of authority conferred on the MPH by Law 18,256 when it required warnings covering 80% of the package, while Article 9 of the Law prescribed health warnings covering "at least 50%" of the total main exposed areas.[735] It further alleged that the Decree affected a number of its fundamental rights and that under the *reserva de la ley* principle such limitations could only be imposed by law and not by an executive decree.[736]

520. In its decision rejecting Abal's *acción de nulidad,* the TCA referred to Uruguay's FCTC ratification law, and then indicated that Decree 287 was an administrative act that sought to complement, enable and ensure the execution of Law 18,256.[737] It further found that:

> *The contended decree has limited itself to what was established by law […]. The law establishes a minimum limit for the administrator as much as the space that the warnings go and permits to be regulated, and therefore, raising the set minimum, according to the directives of the World Health Organization, is in accordance to law. […]*
>
> *Lastly, regarding the decision of the Supreme Court of Justice that the plaintiff brings to this Court as a new fact, it is not understood that the decision has the reach claimed by the plaintiff. Being an exclusive capacity of this administrative […] jurisdiction the analysis of the legality of the contested decree, only this organ can analyze it, and according to what was said the contested decree does no other thing than reaffirming the legal will, enshrined in Law Number 18.256 and in its regulatory decree Number 284/2008, contemplating the spirit of the*

[734] Supreme Court Decision No. 1713 (C-51).

[735] Abal's Request for Annulment of Decree 287 before the TCA, 22 Mar. 2010 (C-49); CR, ¶ 160; RCM, ¶ 11.98.

[736] *Ibid*. (C-49), p. 2.

[737] TCA Decision No. 512 (C-116), pp. 4-5; CM, ¶ 177; RCM, ¶ 11.98; CM, ¶ 177, RCM, ¶ 11.98.

> *constitutional author to regulate aspects relating to health and public hygiene (Decisions 219/10 and 395/10) (Decision 133/2012). […]*
>
> *In this sense, [Law]18.256 clearly shows the legal minimum for the warning and entrusts to regulations its enlargement and/or modification, with the evident objective of preventing the consumer from becoming familiarized and living with it without perceiving the harmful consequences attributed to tobacco products.* [738]

521. According to the Claimants, in their resulting decisions, the SCJ and the TCA directly contradicted each other, the SCJ finding that Articles 9 and 24 of Law 18,256 were constitutional since they "did *not* delegate authority to the MPH to require warnings covering more than 50% of tobacco packaging" while the TCA found that the law *did* delegate that exact authority to the MPH.[739] The Claimants argue that this "Orwellian display of arbitrariness again denied Abal a fair hearing of its case, amounting to a denial of justice."[740] Professor Paulsson opined that the effect of the two decisions "was the functional equivalent of locking Abal out of the court building."[741]

522. The Respondent does not suggest that there was a failure to exhaust local remedies in relation to this claim.[742] As to the merits of the claim, however, it argues that the existence of divergent jurisdiction is not sufficient to amount to a denial of justice.[743] According to the Tribunal, the simple fact is that the Supreme Court and the TCA are co-equal under the Uruguay constitutional system. Both have original and exclusive jurisdiction: the SCJ to determine the constitutionality of a law;[744] the TCA to declare the validity or illegality of an administrative act adopted pursuant to a law determined to be constitutional, examining whether the administrative act is "contrary to a rule of law or under a distortion of authority."[745]

523. Under that system, which has been in place since the 1952 Constitution (long before the Claimants invested in Uruguay), the TCA is only bound by a decision of the SCJ holding a law unconstitutional, which did not occur here. On the other hand, "the interpretation

[738] TCA Decision No. 512 (C-116), pp. 4-5; CM, ¶ 177; RCM, ¶ 11.98.

[739] CM, ¶ 272 (emphasis in the text).

[740] *Ibid.*

[741] *Ibid.*, ¶ 274; citing Paulsson Report I (CWS-011), ¶ 40.

[742] RCM, ¶ 11.126.

[743] RCM, ¶¶ 11.120, 11.125.

[744] Constitution, Articles 256 and 257 (RLA-1 *ter*).

[745] Constitution, Article 309 (RLA-1 *ter*); Expert Opinion of Santiago Pereira, 19 Sep. 2015 ("**Pereira Opinion**") (REX-015), ¶¶ 285-288.

made by the SCJ in declaring the constitutionality of a law is not binding upon the TCA."[746] The co-equal position of the two judicial bodies and the independence of their respective decisions was confirmed by both the SCJ and the TCA in their decisions. The SCJ mentioned in its decision that there was no impediment to the TCA's review of the constitutionality of the Law:

> *The circumstance that the Executive Power has promulgated a decree establishing that the health warnings should occupy the lower 80% of both principal faces [Decree N.° 287/009] and, as a result, that is has interpreted the challenged legal norms in a manner different from that put forth, involves a question that cannot be reviewed by this body by virtue of the regime established in Section XV, Chapter IX of the Constitution*.[747]

524. For its part, the TCA acknowledged the existence of the SCJ's decision when it ruled on the validity of Article 9 of Law 18,256:

> *Lastly, regarding the decision of the Supreme Court of Justice that the plaintiff brings to this Court as a new fact, it is not understood that the decision has the reach claimed by the plaintiff. Being an exclusive capacity of this administrative-litigation jurisdiction the analysis of the legality of the contested decree, only this organ can analyze it, and according to what was said the contested decree does no other thing than reaffirming the legal will, enshrined in Law Number 18,256 and its regulatory decree Number 284/2008, contemplating the spirit of the constitutional author to regulate aspects relating to health and public hygiene*.[748]

525. The fact is that the very ground on which the SCJ upheld the constitutionality of the 80/80 Regulation – that it did not permit an increase to the size beyond the 50% stated in the Law itself – was not decisive for the TCA. Under Uruguay's Constitution only the TCA has jurisdiction to determine the validity of an administrative act, so that the views of the SCJ regarding an administrative act "are *obiter dicta* and impose no obligation on the TCA."[749]

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[746] Pereira Opinion (REX-015), ¶ 287.

[747] Supreme Court Decision No. 1713, 10 Nov. 2010, ("**Supreme Court Decision No. 1713**") (C-051), p. 4 (under V).

[748] TCA Decision No. 512 , Ground VIII, (C-116), p. 5; Legal Opinion of Dr. Felipe Rotondo, 22 Sep. 2014 (REX-007), p. 28.

[749] RCM, ¶ 11.120.

526. The TCA found the 80/80 Regulation to be an implementing regulation necessary to ensure execution of Law 18,256 and Decree 284/008, the Law establishing a minimum limit for the administrator. Therefore, raising the set minimum according to the recommendations of the WHO was in accordance with the Law.[750] According to the TCA, the 80/80 Regulation does not constitute a deviation of power. The pursued objective did not infringe on any constitutionally protected rights since those rights can be limited for reasons of general interest through the law: "[t]he right to life and the enjoyment of health of the population… prevail over the abovementioned rights."[751] The 80/80 Regulation – added the TCA - does not operate "a plain suppression of the brand, but rather a limitation established for reasons of public interest."[752]

527. In the Tribunal's view, it is unusual that the Uruguayan judicial system separates out the mechanisms of review in this way, without any system for resolving conflicts of reasoning. The Tribunal believes, however, that it would not be appropriate to find a denial of justice because of this discrepancy. The Claimants were able to have their day (or days) in court, and there was an available judicial body with jurisdiction to hear their challenge to the 80/80 Regulation and which gave a properly reasoned decision. The fact that there is no further recourse from the TCA decision, which did not follow the reasoning of the SCJ, seems to be a quirk of the judicial system.

528. Under the Uruguayan judicial system, the SCJ can uphold the constitutionality of a law based on an interpretation of the scope of that law, in application of constitutional principles. That interpretation, however, does not bind the TCA when it determines, on the basis of the principles provided by administrative law, the legality of decrees rendered under that same law. That position does not seem to be manifestly unjust or improper, either in general or in the context of this case. Here both courts separately upheld the legality of the measure the Claimants sought to challenge, each under its own jurisdiction and applying its own legal criteria. In the Tribunal's view this does not rise to the level of a denial of justice. As previously mentioned, arbitral tribunals should not

[750] TCA Decision No. 512 (C-116), p. 4.

[751] *Ibid.*

[752] *Ibid.*, p. 6.

act as courts of appeal to find a denial of justice,[753] still less as bodies charged with improving the judicial architecture of the State.

529. In other words, the failure of the TCA to follow the Supreme Court's interpretation of Articles 9 and 24 of Law 18,256 may appear unusual, even surprising, but it is not shocking and it is not serious enough in itself to constitute a denial of justice. Outright conflicts within national legal systems may be regrettable but they are not unheard of.

530. In terms of the separation of constitutional from administrative jurisdiction, Uruguayan law derives from the civil law tradition, albeit with features of its own, including the independence and high standing of the TCA. [754]

531. The position of separate administrative tribunals in the civil law tradition was explained in the following terms by the European Court of Human Rights in the context of Article 6 of the European Convention:

> *81. […] The Court considers that in a domestic legal context characterised […] by the existence of several Supreme Courts not subject to any common judicial hierarchy, it cannot demand the implementation of a vertical review mechanism of the approach those courts have chosen to take. To make such a demand would go beyond the requirements of a fair trial enshrined in Article 6 §1 of the Convention.*
>
> *82. What is more, the Court points out that the lack of a common regulatory authority shared by the Supreme Courts – in this case the Supreme Administrative Court and the Supreme Military Administrative Court – capable of establishing the interpretation these courts should follow, is not a specificity of the Turkish judicial system. Numerous European States whose judicial systems feature two or more Supreme Courts have no such authority […] In itself, however, this cannot be considered to be in breach of the Convention.*
>
> *83. The Court further considers that in a judicial system like that of Turkey, with several different branches of courts, and where several Supreme Courts exist side by side and are required to give interpretations of the law at the same time and in parallel, achieving consistency of the*

[753] *Mondev* (RLA-117), ¶ 126.

[754] TCA and Supreme Court judges are appointed by the same method, assuring independence from political decisions: *see* Pereira Opinion (REX-015), ¶¶ 40-61. Unlike the French Conseil d'Etat, the TCA performs exclusively judicial functions.

> *law may take time, and periods of conflicting case-law may therefore be tolerated without undermining legal certainty.*[755]

532. The Court added:

> *[…] that it must avoid any unjustified interference in the exercise by the States of their judicial functions or in the organization of their judicial systems. Responsibility for the consistency of their decisions lies primarily with the domestic courts and any intervention by the Court should remain exceptional.*[756]

533. A parallel can also be drawn, in the context of investment protection, with the recent award in *Mamidoil*, which found that "a legal system that is characterized by a division between public and private law as well as civil and administrative procedures" did not result in an "improper, discreditable or in shocking disregard of Albanian Law," despite the fact that the claimant took his claim for overpaid taxes before two different tribunals, both of which refused to hear the merits of his claim.[757] As Professor Paulsson has stated, "the vagaries of legal culture that enrich the world are to be respected."[758]

534. The other element of the Claimants' case for denial of justice was based on a *res judicata* argument. As mentioned by the Respondent, no such rule was undermined here since *res judicata* applies under Uruguayan procedural law only upon satisfaction of a "triple identity" test requiring that proceedings (1) be between the same parties, (2) seek the same relief, and (3) arise from the same cause of action.[759] Even if it is doubtful that the parties were different,[760] different reliefs were sought (a declaration of unconstitutionality of a law before the SCJ *versus* the annulment of a complementing regulation before the TCA) based on different causes of action (the compatibility of Law 18.256 with the constitutional provisions *versus* the compatibility of the 80/80 Regulation with the provisions of Law 18.256).[761]

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[755] *Case of Nejdet Şahin & Perihan Sahin v. Turkey*, ECH Application No. 13279/05, Judgment of 20 Oct. 2011, ("***Nejdet***") (NS-59), ¶¶ 81-86, cited in Schrijver Second Opinion (REX-010), ¶ 22, n. 30.

[756] *Nejdet* (NS-59), ¶ 94.

[757] Schrijver Second Opinion (REX-010), ¶ 22, citing *Mamidoil* (RLA-314), ¶ 769.

[758] RR, ¶ 11.59; citing Paulsson, *Denial of Justice in International Law* (2005), (LC-06), p. 205.

[759] RR, ¶ 11.70, citing Pereira Opinion (REX-015), ¶¶ 309-311.

[760] According to the Respondent the parties were different since the action before the SCJ was addressed to the Legislative Power whereas the action before the TCA was addressed to the Executive Branch: RR, ¶ 11.70. This is a doubtful proposition since in both cases the action was addressed to the State even if in the person of different judiciary organs.

[761] RR, ¶ 11.70.

535. It was only in the reasons of the Supreme Court that there was a potential divergence with the TCA, but, as noted by the Respondent, under Uruguayan law *res judicata* would only exceptionally extend beyond the holding of a judgment where the reasons form an "absolutely inseparable logical precedent of the operative part."[762] That was not the case here since the Supreme Court offered alternative reasons to reach its conclusion, including its finding that the MPH "is competent in establishing *all* the measures it may deem necessary for ensuring the health of the population,"[763] a finding which would seem to have been applied by the TCA.

536. For the above reasons, the Tribunal holds by majority that there was no denial of justice regarding the 80/80 Regulation proceedings.

c. The TCA's Decision on the SPR

1. The Claimants' Position

537. Turning to the TCA's decision on the SPR, it is the Claimants' view that when the TCA rejected Abal's challenge to Ordinance 514, based on the record brought by a different claimant in a different case (*i.e.* BAT's distinct annulment application to the TCA challenging Ordinance 514), and then refused to correct the error, Uruguay committed a denial of justice.[764]

538. In its view, the TCA decided only Abal's first argument relating to the *reserva de la ley* claim and it did so on the basis of BAT's evidence and arguments, not Abal's.[765] Moreover, the TCA did not adjudicate Abal's other two claims[766] and it deprived Abal of the right to seek a remedy of a manifestly erroneous decision.[767] These three arguments will be outlined in turn.

539. First, the Claimants contend that the TCA rejected the claim as presented and litigated by BAT, not Abal, because the decision: *(i)* refers to Abal only in the title of the decision—throughout the rest of the decision it refers to BAT; *(ii)* does not discuss

[762] RR, ¶ 11.71; relying on Pereira Opinion, (REX-015), ¶¶ 330-332, 337-341.
[763] RR, ¶ 11.72; Supreme Court Decision No. 1713 (C-051), p. 3 (emphasis added).
[764] CM, ¶¶ 267-269; CR, ¶ 311.
[765] CR, ¶¶ 145-150.
[766] CR, ¶¶ 151-154.
[767] CR, ¶¶ 155-157.

Abal's trademarks; it only lists BAT's trademarks; and (*iii)* does not discuss Abal's expert evidence.[768] In the Claimants' view, even if the decision did not address all of BAT's claim, nor did it address all of Abal's, but it did specifically refer to BAT, BAT's trademarks, and evidence from BAT's administrative file. The decision, in short, decided BAT's claim, not Abal's.[769]

540. Second, the Claimants consider that the TCA failed to adjudicate Abal's claims that *(i)* the SPR exceeded and was inconsistent with Law 18,256, and *(ii)* the MPH did not have the authority to establish the SPR because Law 18,256 did not expressly grant the MPH the authority to adopt the regulation.[770]

541. Third, the Claimants argue that the TCA deprived Abal of the right to seek a remedy against a manifestly erroneous decision since it did not provide any explanation of why or how the references to BAT, and the mistakes with regard to essential points of the case, did not merit full reconsideration. In the Claimants' view, even if the TCA had initially made a mistake in its decision, it had an opportunity to correct that error, and it knowingly refused to do so. Abal had no further avenue of appeal or no other remedy it could have pursued to have its challenge to the SPR decided on the merits.[771]

542. Thus, contrary to the Respondent's contentions, the Claimants consider that Abal exhausted all applicable local remedies to challenge the SPR. The TCA's decision on the challenge was final and could not be subject to further appeal.[772]

543. The additional remedy raised by the Respondent, *i.e.* challenging the constitutionality of Article 8 of Law 18,256, cannot be considered an "available and effective local remedy." The exhaustion doctrine does not require initiating proceedings to challenge an entirely different measure, on entirely different legal grounds before a court that is manifestly not a court of appeals from the TCA.[773] In any case, seeking a declaration

[768] CR, ¶ 145.
[769] CR, ¶ 149.
[770] CR, ¶¶ 152-154.
[771] CR, ¶¶ 155-157.
[772] CR, ¶¶ 317-320.
[773] CR, ¶ 319.

of unconstitutionality, besides being frivolous, could not correct the wrong that had been done by the TCA and thus could not have been effective.[774]

544. According to the Claimants, it is a fundamental principle of procedural fairness that a court must respond to the arguments and evidence of the party before it, rather than the arguments and evidence of a third party that is not involved in the suit. Thus, the TCA's fundamental breach of due process, arbitrariness, and effective refusal to judge Abal's case constitutes a denial of justice.[775]

2. The Respondent's Position

545. The Respondent rejects the Claimants allegations. It submits that the TCA considered and dismissed Claimants' *reserva de la ley* claim, as well as other claims in regard to the SPR "as presented and litigated by BAT, not Abal."[776] Moreover, the TCA considered the legality of the administrative act generally, thus its determination does not vary depending on the tobacco company challenging the measure.[777] Finally, the Claimants failed to exhaust all available and effective local remedies against the TCA's decision.[778]

546. On the first question, the Respondent contends that "it is not true that the TCA decision 'refers to Abal only in the title of the decision'." The TCA rejected Abal's challenge after addressing each of its arguments and the opinion of its experts in a well-reasoned decision. For instance, the TCA stated in its decision that the claim it was deciding was filed by Abal's legal representative; and in the section of its decision called *Resultando* ("**Findings of Fact**"), the TCA described and addressed Abal's arguments.[779] Moreover, the TCA's references to BAT's trademarks should be understood in the context of the TCA's review of a challenge to a general administrative act.

547. Second, the Respondent addresses the Claimants' argument that the TCA violated Abal's due process rights by denying Abal the opportunity to refute evidence that had been submitted in BAT's case and that the TCA relied upon in deciding Abal's case,

[774] CR, ¶¶ 319-320.
[775] CM, ¶ 270.
[776] RR, ¶¶ 11.20-11.37. *See also* RCM, ¶¶ 11.59-11.77.
[777] RR, ¶¶ 11.38-11.40.
[778] RR, ¶¶ 11.45-11.51. *See also* RCM, ¶¶ 11.88-11.95.
[779] RR, ¶ 11.22.

including the public statement made by Dr. Abascal which was known to tobacco companies in Uruguay, including the Claimants.

548. The Respondent notes that the Claimants challenged the legality of Ordinance 514 as a matter of general administrative law; they did not challenge a specific resolution applying it to the factual circumstances.[780] The specific trademarks at issue (*i.e.* Abal's or BAT) were thus irrelevant.

549. The Respondent explains that when the TCA addresses challenges filed by different parties against the same general administrative act, it tends to address them integrally. When examining the legality of the SPR, the TCA engaged in an abstract judicial review of SPR by reference to the relevant domestic legislation, constitutional norms and international obligations of Uruguay and concluded that "it complied with the *ratio legis* of Law 18,256." This applied to all tobacco companies.[781]

550. In addition, in the Respondent's view, there is nothing in the TCA's decision to suggest that it "relied upon" Dr. Abascal's statement.[782] Also, the Respondent contends that the Claimants' expert opinions met none of the requirements to be considered evidence,[783] and that the TCA considered and dismissed the Claimants' other claims in regard to the SPR.[784]

551. Third, the Respondent addresses the Claimants' contention that Abal had exhausted all available local remedies. It notes that the Claimants could have challenged the constitutionality of Article 8 of Law 18,256, the provision under which the SPR was adopted, before Uruguay's Supreme Court of Justice.[785] In the Respondent's opinion, while the success of such a potential challenge cannot now be known, there is no question that it was available and that the Claimants did not pursue it.[786] There is also no question that if successful, the SCJ declaration of unconstitutionality would have

[780] RR, ¶¶ 11.23-11.24
[781] RCM, ¶¶ 11.83-11.86; RR, ¶ 11.24.
[782] RR, ¶¶ 11.38-11.39.
[783] RR, ¶¶ 11.27-11.28.
[784] RR, ¶¶ 11.30-11.37.
[785] RR, ¶ 11.45.
[786] RR, ¶ 11.47.

resulted in the illegality and invalidity of the SPR. Thus, it was an effective legal remedy.

3. The Tribunal's Analysis

552. Regarding the TCA's decision on the SPR,[787] the Claimants argue that the TCA rejected Abal's application for annulment of Article 3 of Ordinance 514 imposing the SPR[788] on the basis of a record in an entirely different proceeding involving a different claimant, BAT. In their view, the TCA failed to respect a fundamental principle of procedural fairness whereby a court must respond to the arguments and evidence of the party before it.[789] According to the Claimants, the judgment delivered did not refer to Abal's evidence, arguments, trademarks, or expert legal opinions.[790] While the caption of the decision reads "Abal," much of the rest of the decision referred to BAT and relied on evidence from Dr. Abascal that was not part of the proceedings in Abal's challenge, but only in BAT's challenge. The Claimants say, with considerable force, that this was procedurally and substantively unfair.

553. Abal filed its objection to the SPR second after BAT. It sought to differentiate its challenge from BAT's. It alleged that Ordinance 514 was improper based on three arguments: (i) only the Legislature had the right to severely impair property rights, not the MPH (*reserva de la ley*); (ii) the SPR exceeded and was inconsistent with the legal provisions it intended to implement, Law 18,256 and Decree 284/008; (iii) the MPH was not competent to impose the SPR because neither Law 18,256 nor Decree 284/008 or the Constitution or the FCTC expressly grants MPH the authority to adopt the regulation.

554. By comparison, the BAT claim had only relied on argument (i), not the other two arguments Abal made;[791] it also relied on arguments Abal did not make. During the proceedings the State Attorney in Administrative Litigation (*Procurador del Estado en lo Contencioso Administrativo*) submitted an opinion to the TCA in support of Abal's

[787] TCA Decision No. 509 (C-53, R-242).
[788] Abal's SPR Annulment Request (C-41).
[789] CM, ¶ 270.
[790] CM, ¶ 268.
[791] CM, ¶ 163.

position.[792] According to the Claimants, the TCA never addressed the State Attorney's argument or their own arguments.[793]

555. Abal timely filed a request for clarification, pointing out that the TCA had erroneously rejected Abal's annulment application based on the evidence and arguments that had been submitted in BAT's litigation.[794] However, the TCA summarily rejected the request for clarification on the grounds that "*the so called contradictions are not important* nor do they justify the revision of the decision."[795] The Respondent notes that in its motion for clarification "Abal did *not* argue that the TCA had failed to address its legal arguments" and this for good reason since such arguments had in fact been addressed by the TCA.[796]

556. In the Counter-Memorial the Respondent contends that "[t]he record is clear that the TCA addressed Abal's arguments and the opinions of its experts, and rendered a well-reasoned decision that the Claimants dare not dispute as such."[797] It notes that "at the root" the Claimants complain that "the TCA's decision makes three passing references to the trademarks of a different company," which it claims was "a *de minimis* oversight."[798] It describes where in its decision TCA addressed each of Abal's three arguments.[799] The Respondent's Rejoinder records in more detail the occasions on which the TCA specifically addressed the claims and arguments of the Claimants.[800] It notes that the "evidence" that the Claimants allege was overlooked was merely the opinions of their legal experts, which do not constitute evidence under Uruguayan law,[801] even though they may be taken into account.

[792] CM, ¶ 164.
[793] CM, ¶ 165.
[794] CM, ¶ 269 (referring to Abal's Motion for Clarification (C-55). *Supra*, ¶ 160.
[795] *Ibid*. (referring to TCA Decision No. 801 (emphasis in the text) (C-56). *Supra*, ¶ 161.
[796] RCM, ¶ 11.61 (emphasis in the original).
[797] RCM, ¶ 11.6.
[798] *Ibid.*, ¶ 11.6.
[799] *Ibid.*, ¶¶ 11.63-11.66.
[800] RR, ¶¶ 11.29-11.37.
[801] RR, ¶¶ 11.26-11.28.

557. According to the Tribunal, the refusal of courts to address a claim can clearly amount to a denial of justice.[802] However, it is not incumbent on courts to deal with every argument presented in order to reach a conclusion.[803] The question is whether, in substance, the TCA failed to decide material aspects of Abal's claim, such that they can be said not to have decided the claim at all. As noted, the Claimants argue that they put three matters before the TCA and that only the first (regarding the *reserva de la ley*) was addressed in the decision.

558. The Tribunal notes that the TCA's decision addressed Abal's three arguments for challenging Article 3 of Ordinance 514 both in the Findings of Fact ("***Resultando***") and Conclusions of Law ("***Considerando***"), where the following is stated:

> *In short, the Claimant stated that the contested Ordinance is manifestly illegal because it goes beyond and contradicts the laws it was designated to implement; because it creates a prohibition that the Ministry of Public Health lacks the competence to impose, and because of the limitation of constitutionally protected rights such as the right to property and commerce.*[804]

559. The TCA also addressed separately each of Abal's arguments in a reasoned manner. Regarding the "*reserva de la ley*" argument,[805] it stated as follows:

> *In other words, this is not a case of invading areas of legislation reserved exclusively to the Law; on the contrary, the purpose is to implement the legal provisions through regulations that enable such ratio legis.* [806]

560. Regarding Abal's argument that the SPR exceeded and was inconsistent with Law 18,256 and Decree 284/008, it held that "the contested regulatory provision is part of an administrative act which the issuing entity calls an 'Ordinance' and that said measure may be classified as an implementing regulation",[807] the TCA then stated:

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[802] *Antoine Fabiani Case (No. 1), (France v. Venezuela*), Award of the President of the Swiss Confederation, (1898) V Moore Intl ARB 4878, 15 Dec. 1896 (CLA-259); *Azinian v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, 18 Oct. 1999 (NS-17).

[803] Compare the decision of the annulment committee in *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision, 5 Feb. 2002, ¶¶ 101 and 105, finding that an annulment would be appropriate only where the Tribunal's failure to answer a question impacted on the reasoning of other issues. That is, a failure to respond to an argument is not concerning unless the argument itself might have been material to the outcome. Obviously, the context of this case is different – but it may provide a useful analogy.

[804] TCA Decision No. 509, (C-53; R-242), respectively at pp. 3 and 6.

[805] The Claimants mention in the Memorial that the TCA responded to this argument (CM, ¶ 163) while stating in the Reply that the TCA rejected the "*reserva de la ley*" claim "as presented and litigated by BAT," not by Abal (CR, ¶ 145). The Claimants' contention is said by the Respondent to be "false": RR, ¶ 11.29.

[806] TCA Decision No. 509, (C-53; R-242), p. 10.

[807] *Ibid.*, p. 8.

> *Ergo, the Court considers that the Ordinance in the instant case belongs to the aforementioned category of administrative acts, and therefore seeks to provide general regulations for Law 18,256 and Decree 284/008, supplementing them and enabling and ensuring their implementation.*[808]

561. Finally, regarding MPH's alleged lack of competence, the TCA held that:

> *The scope of the ban established in Law 18,256 and its Regulatory Decree No. 284/008 is so broad that, in the opinion of the Court, the contested regulatory provision does nothing more than interpret, as an implementing regulation, the spirit and purpose of the legal framework governed by this broad law enacted in protection of human health.*[809]

562. Based on the above reasons, the TCA concluded:

> *[T]he contested regulatory provision does nothing more than reaffirm the legal provision established in Law 18,256 and its Regulatory Decree No. 284/008, and, moreover, the aforesaid regulatory provision is consistent with the spirit of the Constituent Assembly (art. 44 of the Constitution[)], insofar as it provides: "The State shall legislate on all matters related to public health, seeking the physical, moral and social development of all inhabitants of the country."*[810]

563. The Claimants concede that the TCA dealt with one of Abal's arguments, raised also by BAT, namely that the SPR violated the principle of the "*reserva de la ley.*"[811] But the TCA directly dealt also with Abal's other two arguments, finding that the MPH was competent to issue the SPR pursuant to Law 18,256, and that the SPR did not exceed and was not inconsistent with Law 18,256 and Decree 284/008.[812] It held that the SPR was "designed to implement" Article 8 of Law 18,256 and Article 12(3) of Decree 284, also adhering to Article 11 of the FCTC[813] and was an "implementing regulation,"[814] such that it did not exceed Law 18,256 and Decree 284/008. It also held that the MPH may promulgate regulations that "establish formalities or requirements *not provided for by the law* which are necessary for its enforcement,"[815] that is, it was not necessary for the law to expressly grant the authority. The TCA thus responded to Abal's other two arguments, as the Respondent points out.[816] The Tribunal notes that the fact that this

[808] *Ibid.*, p. 10.

[809] *Ibid.*, p. 12.

[810] *Ibid.*, p. 13.

[811] CM, ¶ 163.

[812] TCA Decision No. 509 (C-53, R-242), p. 12; RCM, ¶ 11.66.

[813] TCA Decision No. 509 (C-53, R-242), p. 10; RCM, ¶ 11.64.

[814] TCA Decision No. 509, p. 8; cited at RR, ¶ 11.36, n. 995.

[815] RCM, ¶ 11.64 (emphasis added), with reference to the TCA Decision No. 509, p. 8.

[816] RCM, ¶¶ 11.63-11.66.

discussion may have fallen under a different heading, or may have not been clearly structured, does not mean that the TCA failed to deal with Abal's substantive arguments.

564. As to the Claimants' contention that the TCA ignored the evidence presented by Abal, most notably expert opinions from three prominent Uruguayan law experts,[817] it is to be noted that under Uruguayan procedural law, expert opinions on matters of law are not considered "expert evidence."[818] To be considered evidence rather than assertions of a party, the expert opinion must relate to a question of fact and not a question of law and must have been prepared pursuant to an order of the court, neither of these requirements being met in this case.[819] The TCA may disregard expert legal opinions not meeting these requirements.[820] The Tribunal finds Professor Pereira's opinion persuasive, as evidenced also by his cross-examination at the Hearing making reference, *inter alia*, to the *iura novit curia* principle as the basis for disregarding expert legal opinions.[821] There is a reference in the TCA decision to the three legal opinions as "dogmatic constructions which may be very respectable in themselves"[822] (a reference which does not apply to BAT since it had not filed legal opinions) and to the State Attorney's opinion.[823]

565. As to the Claimants' further contention regarding reference in the Abal's judgment to Dr. Abascal's evidence, not relied upon by Abal but in the record of BAT's case,[824] the Tribunal notes that while it may be regrettable that there was such a reference in Abal's judgment, it was not in the dispositive section and it can be understood, as the Respondent argues, as simply informing the context of the MPH decision to adopt the SPR, not as a key part of the reasoning.[825]

566. The Claimants have complained that Abal's judgement referred to BAT's trademarks, not to Abal's trademarks.[826]As a matter of fact, in its decision TCA stated as follows:

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[817] CR, ¶ 147.
[818] Pereira Opinion (REX-015), ¶ 182.
[819] *Ibid.*, ¶¶ 187-188.
[820] *Ibid.*, ¶ 208.
[821] Tr. Day 7, 2029: 18-22; 2030: 1-10.
[822] TCA Decision No. 509 (C-53, R-242), p. 13.
[823] *Ibid.*, p. 4.
[824] CM, ¶ 268.
[825] RCM, ¶ 11.76; RR, ¶ 11.39.
[826] CM, ¶ 268; CR, ¶ 145, 2nd bullet point.

> *[T]he Court considers that the Claimant has failed to prove its ownership of the trademarks included in the list of products added to case filet page 4; nevertheless, and because this is not something that has been disputed by the defendant, we shall consider that BAT is the owner of the trademarks listed […]. Consequently, from the list of trademarks provided by the claimant (administrative case file page 4), and by a contextual interpretation of the arguments in the complaint with respect to the contested measure, the Court interprets that what aggrieves BAT is the limitation on presenting their products with trademarks that differentiate them by the use of a distinctive color; however, we observe that this prohibition was already contained in Decree 284/008… .* [827]

567. The Tribunal agrees with the Respondent's remarks that this reference "was of no consequence to the outcome of Abal's case," considering also that the MPH had raised no question in that proceeding regarding Abal's ownership of its trademarks.[828]

568. At the very least, the failure to deliver a separate judgment for Abal raises questions of procedural propriety. The cases were not joined, and Abal took no part in BAT's challenge. There are frequent references throughout the TCA judgment to BAT and to its trademarks and infrequent references to Abal, although there are also references to Abal and its particular arguments, even if replies to such arguments are given in a disorganised manner so as to raise questions regarding completeness of the analysis. The question is whether, taken together, this is enough to raise sufficiently serious questions about the propriety of the process.

569. In general, when considering procedural improprieties arbitral tribunals have adopted a high threshold for a denial of justice. In *International Thunderbird Gaming Corp v. Mexico*, the tribunal rejected a claim that administrative proceedings amounted to a denial of justice, notwithstanding certain procedural irregularities, noting that "even if one views the absence of Lic. Aguilar Coronado (who signed the Administrative Order) at the 10 July hearing as an administrative irregularity, it does not attain the minimum level of gravity required under Article 1105 of the NAFTA under the circumstances."[829] The tribunal noted that the Administrative Order was sufficiently detailed and reasoned, reviewed the evidence presented, and discussed at length the legal grounds for the decision that the Claimant was objecting to. It concluded that the proceedings "were

[827] TCA Decision No. 509 (C-53, R-242), pp. 7, 12.

[828] RCM, ¶ 11.82.

[829] *International Thunderbird Gaming Corp v. Mexico,* UNCITRAL, Arbitral Award, 26 Jan. 2006 (RLA-166), ¶ 200.

[not] arbitrary or unfair, let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment."[830]

570. Likewise in *Tokios Tokelés v. Ukraine*, the tribunal held that discontinued and then twice revived criminal charges for tax evasion, which remained pending three years after the event, did not amount to a denial of justice, even in circumstances in which the tribunal was unable to rule out the possibility that these were "part of an attempt to put pressure on *Tokios Tokelés* to settle an expensive […] arbitration."[831]

571. On the other hand, the tribunal in *Loewen* found a denial of justice arising from a procedural failure in the trial process that was clearly discriminatory against the foreign investor.[832] The tribunal referred to the Trial Judge's failure to reign in frequent references to the claimant's race, class and foreign nationality by defense counsel, concluding that by any standard the trial "was a disgrace," the tactics of the lawyers were "impermissible" and the trial judge failed to afford Loewen due process.[833] The tribunal did not ultimately find that the standard at international law was breached, but this was because Loewen had not exhausted local remedies, including the possibility of seeking *certiorari* before the United States Supreme Court.

572. In the Tribunal's view, there is clearly a case to answer here. But it is important to be clear about the exact form that Abal's TCA judgment took. It was not simply a photocopy of the BAT decision, as the Claimants sometimes came close to alleging. It was entered under Abal's name and correctly identified the arguments it was making in the introductory summary. True, the TCA appears to have copied and pasted large chunks of the BAT decision directly into the *Abal* decision, without taking care to correct incorrect references to BAT and to BAT's trademarks, and with reference on one occasion to the evidence of Dr. Abascal, which was not before the TCA in the *Abal* proceeding. According to the Claimants, the result is that the *Abal* judgment did not actually address Abal's arguments in its decision and did not cite Abal's expert evidence from three prominent Uruguayan law experts.[834]

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[830] *Ibid.*, ¶ 197.

[831] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/01/18, Award, 26 July 2007 (CLA-207), ¶ 133.

[832] *Loewen*, (CLA-169).

[833] *Ibid.*, ¶ 119.

[834] CR, ¶¶ 147-148. These arguments were however refuted by the analysis conducted by the Tribunal.

573. There could have been no complaints had the TCA quoted lengthy passages of the BAT judgment in its decision with proper attribution and gone on to endorse them. Account should be taken in this context that when deciding challenges filed by different parties against the same general administrative act the TCA tends to decide them on uniform grounds since only matters of law are at issue so that decisions are made "with independence from arguments advanced by the parties."[835]

574. The Respondent argues that procedural improprieties cannot amount to a denial of justice where the claimant has not proved that the outcome would have been any different had there been no procedural injustice. The Respondent's expert, Professor Schrijver, relies on the *Frontier Petroleum Services Ltd v. Czech Republic* award, where "the fact that the domestic courts would not have come to a different conclusion" was a particularly important factor in rejecting any procedural impropriety.[836] But that was not the only reason given. In particular, the tribunal also reasoned that the procedural irregularities in the case – denial of the right of the claimant to participate in certain judicial proceedings involving its bankruptcy proceedings – had been cured by the fact that the claimant had subsequently appealed.[837] But it did place significance on the proposition that no different conclusion would have been reached.

575. In the Tribunal's view the question of what a BIT-compliant domestic court would have decided is an appropriate factor (and may be highly relevant) for the damages assessment, but it is not determinative of whether a breach occurred. A procedural impropriety can occur notwithstanding that the court could (and probably would) still have reached the same result absent the impropriety. This is the effect of the cases cited by the Claimants where a denial of justice was found notwithstanding that the criminal defendant subjected to the internationally wrongful behaviour was guilty on the merits.[838] Even apparently weak cases or apparently undeserving parties are entitled to

[835] Pereira Opinion, (REX-015), ¶¶ 157-162.

[836] Schrijver's Second Opinion, (REX-010), ¶ 8, citing *Frontier Petroleum* (CLA-105), ¶ 411.

[837] *Frontier Petroleum* (CLA-105), ¶ 410.

[838] CM, ¶¶ 292-293, citing *Roberts* (CLA-241) and *Chattin* (CLA-242). However, these cases are not authority for the proposition that compensation is to be entirely de-linked from the question of the merits. In those cases, the defendants were not compensated as if they were not guilty (i.e. had been acquitted); instead, the tribunals calculated compensation for the long period of imprisonment without trial that gave rise to an award of indemnity under international law. In other words, the tribunals awarded compensation for the procedural impropriety itself, calculating damages based on the cost of the improper restriction to liberty, in a particular criminal context not applicable here. On such a principle, the Claimants here might be entitled to all or some of Abal's costs in taking

minimum standards of due process, and this is true even if what they lost thereby was a remote chance.

576. Two issues need to be considered. The first is whether these procedural improprieties were sufficiently grave in themselves as to rise to the standard of a denial of justice. It is then relevant to turn to consider whether, substantively, Abal's claim was nonetheless fairly determined, having regard in particular to Abal's unsuccessful motion to the TCA for reconsideration of its decision on grounds of confusion with BAT's claim.

577. Although the Claimants went to great lengths to show how their case was different, the substance of Abal's administrative challenge was that the MPH did not have the authority to enact the SPR regulation. While BAT's argument put the focus on the proposition that only the legislature had the authority to impair property rights, Abal focused on the other side of the same coin, arguing that the MPH did not have that authority. In finding that MPH was entitled to impair property rights pursuant to Law 18,256, the TCA dealt with the substance of Abal's closely related claim.

578. This is therefore a case that may hardly be characterized as a denial of justice. Clearly, there were a number of procedural improprieties and a failure of form. But ultimately, the similarities between the two cases and the claims made in them support the conclusion that there has been no denial of justice. In substance, Abal's arguments were addressed.[839]

579. The subsequent failure of the TCA to amend or clarify its decision did not create a denial of justice. In particular, Abal did not bring to the TCA's attention the arguments it now alleges were not dealt with in the judgment.[840] Whether or not the subsequent proceedings were sufficient in themselves to cure a prior perfected denial of justice, they were at least relevant to the question whether a sufficiently egregious error occurred.

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the TCA case, but it is difficult to understand how they could be entitled to claim full damages as if they had won that case.

[839] The Tribunal notes further that according to Uruguayan procedural system a failure to address arguments does not result in a denial of justice given the distinction between a "claim" ("what is requested") and arguments ("why it is requested"). Only the "claim" is to be considered and decided and the claim in the present case, namely the illegality of Article 8 of Law 18,256 on which the SPR was founded, was decided by the TCA (Pereira's Expert Testimony at the Hearing, slide 7, and his cross-examination, Tr. Day 7, 2033:10-16).

[840] RCM, ¶¶ 11.61, 11.86; RR, ¶¶ 11.31, 11.41-11.44.

580. For these reasons the Tribunal holds that the procedural improprieties were not sufficient in this case to rise to the standard of a denial of justice and decides that there was no denial of justice also in the SPR proceedings.

581. That being so, there is no need to address questions of the non-exhaustion of local remedies and of *quantum* of damages regarding both claims for denial of justice raised by the Claimants.

VI. COSTS OF THE PROCEEDINGS

582. According to Article 61(2) of the ICSID Convention and Rule 47(1)(j) of the Arbitration Rules, the Tribunal has to decide, as part of the Award, the apportionment of the costs incurred by the Parties as well as of the fees and expenses of the members of the Tribunal and the charges for the use of the facilities and services of the Centre.

583. Each Party has requested the Tribunal that its costs in connection with these proceedings, including the advances made to ICSID for the Centre's charges and the fees and expenses of the arbitrators, be reimbursed to it by the other Party. The Claimants have quantified their costs in the total amount of US$ 16,906,045.46. The Respondent has quantified its total costs, in the amount of US$ 10,319,833.57.[841] The Tribunal notes that these costs in aggregate exceed the base amount of damages claimed by the Claimants.

584. The Tribunal notes that under Article 61(2) of the ICSID Convention it has a wide discretion with regard to cost allocation. Specifically, Article 61(2) states that:

> *[I]n the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

585. The ICSID Convention and the Arbitration Rules offer little guidance on how this discretion is to be exercised. It has been said that "*the practice of ICSID Tribunals in apportioning costs is neither clear nor uniform.*"[842] In some cases the principle "*the loser pays*" (referred to also as "*costs follow the event*"), commonly applied in

[841] The Parties' total cost increased by US$ 75,000 per party, in light of the Centre's final request for advance payments to cover all final costs and expenses relating to the proceedings.

[842] Schreuer, *The ICSID Convention. A Commentary.* Second Edition. 3rd printing, 2011, p. 1229.

international commercial arbitration, has been followed in investment treaty arbitration. In other cases, tribunals have ordered the parties to bear their costs and share equally the fees and expenses of the arbitrators and the charges of the Centre. In a number of cases arbitral tribunals have also taken into account the nature of the dispute and the conduct of the parties.

586. The Tribunal notes that this case has given rise to important and complex legal issues and that both the Claimants and the Respondent have raised weighty arguments in support of their respective positions. The Tribunal finds that, in the circumstances of this particular arbitration, the application of the "*loser pays*" principle is appropriate. It does not consider that either Party's procedural conduct in the arbitration has been such that it should be taken into account in apportioning costs.

587. The Tribunal notes that all jurisdictional objections raised by Respondent have been rejected but that the Claimants' different claims of breach of the BIT have been substantially rejected. On balance, the outcome of the case has favoured the Respondent to a large extent.

588. In view of the outcome of the case and the significant disproportion between the Parties' respective costs, the Tribunal deems it fair and reasonable that the costs of the proceedings be paid by the Parties as follows: each Party shall bear its own costs but the Claimants shall reimburse the Respondent for part of the latter's costs in the amount of US$ 7,000,000.00 and, in addition, pay all fees and expenses of the Tribunal and ICSID's administrative fees and expenses.

589. The fees and expenses of the Tribunal and ICSID's administrative fees and expenses are the following (in US$):[843]

Arbitrators' fees and expenses	
- Professor Piero Bernardini:	**US$ 482,887.01**
- Mr. Gary Born	**US$ 307,349.27**
- Judge James Crawford	**US$ 155,477.80**
ICSID admin fees and expenses (estimated)[844]	**US$ 540,000.00**
Total	**US$ 1,485,714.08**

VII. AWARD

590. For the reasons set forth above, the Tribunal decides as follows:

(1) The Claimants' claims are dismissed; and

(2) The Claimants shall pay to the Respondent an amount of US$7 million on account of its own costs, and shall be responsible for all the fees and expenses of the Tribunal and ICSID's administrative fees and expenses, reimbursing to the Respondent all the amounts paid by it to the Centre on that account.

Arbitrator Born attaches a statement of dissent.

[843] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final.

[844] The amount includes estimated charges (courier, printing and copying) in respect of the dispatch of this Award.

[Signed]

Mr. Gary Born
Arbitrator
Date: June 28, 2016

Subject to a partial dissent

[Signed]

Judge James Crawford
Arbitrator
Date: June 21, 2016

[Signed]

Prof. Piero Bernardini
President of the Tribunal
Date: June 17, 2016

ANNEX A

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

PHILIP MORRIS BRANDS SÀRL,
PHILIP MORRIS PRODUCTS S.A.
and
ABAL HERMANOS S.A.
(THE CLAIMANTS)

and

ORIENTAL REPUBLIC OF URUGUAY
(THE RESPONDENT)

(ICSID Case No. ARB/10/7)

DECISION ON JURISDICTION

Members of the Tribunal
Prof. Piero Bernardini, President
Mr. Gary Born, Arbitrator
Prof. James Crawford, Arbitrator

Secretary of the Tribunal:
Mrs. Anneliese Fleckenstein

Date of dispatch to the parties: July 2, 2013

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and
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Mr. Ronald Goodman
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Centre	The International Centre for the Settlement of Investment Disputes established under the ICSID Convention
Counter-memorial	The Claimants' Counter-memorial on Jurisdiction, filed on 23 January 2012
Exh C-	The Claimants' Exhibits
Exh CLA-	The Claimants' Legal Authorities
Exh R-	The Respondent's Exhibits
Exh RL-	The Respondent's Legal Authorities
fn.	footnote
ICJ	The International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington D.C., 1965
Memorial	The Respondent's Memorial on Jurisdiction, filed on 24 September 2011
MFN clause	Most-Favored Nation clause
MPH	Uruguayan Ministry of Public Health
RFA	The Claimants' Request for Arbitration, filed on 19 February 2010
Rejoinder	The Claimants' Rejoinder on Jurisdiction, filed on 20 July 2012
Reply	The Respondent's Reply on Jurisdiction, filed on 20 April 2012
VCLT	Vienna Convention on the Law of Treaties, 1969
The BIT	Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments of 7 October 1998, entered into force on 22 April 1991
Transcript Day[#], [page:line]	Transcript of the Hearing on Jurisdiction Day One: 5 February 2013 Day Two: 6 February 2013

I. THE DISPUTE

1. FTR Holding S.A. ("**FTR**"), Philip Morris Products S.A. ("**PMP**") and Abal Hermanos S.A. ("**Abal**"), together with FTR, PMP, "**Philip Morris**" (or "**the Claimants**"), filed a Request for Arbitration on 19 February 2010 (the "**RFA**") to institute arbitration proceedings against the Oriental Republic of Uruguay ("**Uruguay**" or "**the Respondent**"). The proceedings were initiated in accordance with Article 36 of the Convention on Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965 (the "**ICSID Convention**") and Article 10 of (including *Ad* Article 10 of the Protocol to) the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments dated 7 October 1988 (the "**Switzerland-Uruguay BIT**" or "**the BIT**"). The BIT entered into force on 22 April 1991, as provided by its Article 12.

2. FTR and PMP are *sociétés anonymes* organized under the laws of Switzerland, with registered office in Neuchâtel, Switzerland. FTR was incorporated on 14 December 1924 and registered in the Commercial Register of Neuchâtel on 15 January 1943. PMP was incorporated on 22 December 1988 and registered in the Commercial Register of Neuchâtel on the same date. Abal is a *sociedad anónima* organized under the laws of Uruguay and has its registered office in Montevideo, Uruguay. FTR was the direct owner of 100% of Abal. By letter of 5 October 2010 the Claimants informed the Centre that Philip Morris Brands Sàrl replaced FTR Holding S.A. as one of the Claimants in this case and requested that the caption of the case be amended accordingly. Philip Morris Brands Sàrl ("**PMB**") is a *Société à responsibilité limitée* organized under the laws of Switzerland, with registered office in Neuchâtel, Switzerland. PMB is now the direct owner of 100% of Abal.

3. PMP was the owner of the "Marlboro", "Fiesta", "L&M" and "Philip Morris" trademarks which it licensed to Abal. By letter of 17 March 2011, the Claimants informed the Centre that the trademark for Marlboro, Philip Morris and Fiesta were transferred to PMB as of 1 January 2011, to be then licensed to Philip Morris Global Brands, sublicensed to PMP and sub-sublicensed to Abal. Abal produces and sells the "Marlboro", "Fiesta", "L&M", "Philip Morris", "Casino", and

"Premier" brands of cigarettes in Uruguay; it owns the "Casino", "Premier" and associated trademarks.

4. The Claimants' claims arise out of the enactment by the Uruguayan Ministry of Public Health (the "**MPH**") of Ordinance 514 dated 18 August 2008 ("**Ordinance 514**") and the enactment by the President of Uruguay of Decree 287/009 dated 15 June 2009 ("**Decree 287/009**"). On 1 September 2009, Ordinance 466 was enacted by the MPH ("**Ordinance 466**"), allegedly perpetuating the "single presentation" requirements of Ordinance 514 and restating the 80% health warning requirement in Decree 287/009.

5. Article 1 of Ordinance 514 mandates graphic images ("pictograms") that purport to illustrate the adverse health effects of smoking reflected in the text warnings. According to the Claimants, many of these pictograms are not designed to warn of the actual health effects of smoking; rather they are highly shocking images that are designed specifically to invoke emotions of repulsion and disgust, even horror. Thus, it is said, the effective function of the pictograms is to undermine and indeed destroy the good will associated with Abal's and PMP's legally protected trademarks, and not to promote legitimate health policies.

6. Article 3 of Ordinance 514 requires each cigarette brand to have a "single presentation" and prohibits different packaging or presentations for cigarettes sold under a given brand. Until the enactment of Ordinance 514, Abal sold multiple product varieties under each of its brands (for example, "Marlboro Red", "Marlboro Gold", "Marlboro Blue" and "Marlboro Green (Fresh Mint)"). The Claimants allege that Article 3 has forced Abal to cease selling all but one of those product varieties under each brand that it owns or licenses and that sales of these now forbidden products represented a significant portion of Abal's total sales.

7. Decree 287/009 imposes an increase in the size of health warnings on cigarette packages from 50% to 80 per cent of the surface of the front and back of the package. According to the Claimants, the 80 per cent health warning coverage requirement wrongfully limits Abal's right to use its legally protected trademarks and prevents Abal from displaying them in their proper form.

8. The Claimants allege that Ordinance 514 has caused a decrease in Abal's sales, notably because Abal has been forced to discontinue a number of its product varieties. It has also caused a deprivation of PMP's and Abal's intellectual property rights and a substantial reduction in the value of Abal as a company. As a result, it is alleged that the Claimants have already sustained, and will continue to sustain, substantial losses.

9. The Claimants claim that the mandatory pictograms under Article 1 of Ordinance 514 to illustrate the adverse effect of smoking, the single presentation requirement in Article 3 of Ordinance 514 and the 80% health warning requirement imposed by Decree 287/009 constitute breaches of the Respondent's obligations under Articles 3(1), 3(2), 5 and 11 of the BIT, entitling the Claimants to compensation under the BIT and international law.

10. The Respondent has denied the Claimants' allegations and has requested that the Claimants' claims be dismissed for lack of jurisdiction.

II. PROCEDURAL HISTORY

11. According to the RFA, the dispute arose out of the Claimants' investment in Uruguay. The Claimants allege that Uruguay violated their rights under the BIT in connection with that investment.

12. On 26 March 2010, pursuant to Article 36(3) of the ICSID Convention and in accordance with Rule 6 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**Institution Rules**"), ICSID's Secretary-General registered the RFA and the proceeding was instituted on the same date.

13. The method for the constitution of the Tribunal was agreed upon by the Parties, pursuant to which the Tribunal would be comprised of three arbitrators, with each Party appointing one arbitrator and the third arbitrator to be appointed by the two Party-appointed arbitrators. In the absence of an agreement between the two Party-appointed arbitrators, the Secretary-General would appoint the third presiding arbitrator.

14. On 1 September 2010, the Claimants appointed Mr. Gary Born, a US national, as arbitrator. Mr. Born accepted his appointment on 3 September 2010. On 24 September 2010, the Respondent appointed Prof. James Crawford, an Australian national, as arbitrator. Prof. Crawford accepted his appointment on 1 October 2010. Mr. Born and Prof. Crawford could not reach an agreement as to the third presiding arbitrator. Accordingly, it fell upon ICSID's Secretary-General to appoint the President of the Tribunal. On 9 March 2011, the Secretary-General appointed Prof. Piero Bernardini, an Italian national, as President of the Tribunal. Professor Bernardini accepted his appointment on 15 March 2011.

15. On 15 March 2011, the Tribunal was constituted. Its members are: Prof. Piero Bernardini (Italian), President of the Tribunal; Mr. Gary Born (U.S.), Arbitrator; Prof. James Crawford (Australian), Arbitrator. Mrs. Anneliese Fleckenstein was appointed by ICSID's Secretary-General as Secretary of the Tribunal.

16. On 25 May 2011, the Tribunal held its first session by telephone conference. A procedural calendar was established for the proceedings on jurisdiction. The Minutes of the First Session were transmitted to the Parties.

17. On 31 August 2011, as agreed by the Parties, the Tribunal issued Procedural Order No. 1 for the Protection of Confidential Information.

18. Pursuant to the agreed upon schedule of pleadings, the Respondent filed the Memorial on 24 September 2011, the Claimants filed the Counter-memorial on 23 January 2012, the Respondent filed the Reply on 20 April 2012 and the Claimants filed the Rejoinder on 20 July 2012.

19. Pursuant to the Tribunal's direction of 14 December 2012, the Parties agreed on 15 January 2013 on the schedule of the hearing on jurisdiction. The schedule was accepted by the Tribunal.

20. The hearing on jurisdiction was held on 5 and 6 February 2013, at the International Chamber of Commerce in Paris. Present at the hearing were:

- for the Tribunal: Prof. Piero Bernardini, President; Mr. Gary Born and Prof. James Crawford, arbitrators; Mrs. Anneliese Fleckenstein, Secretary of the Tribunal;
- for the Claimants:

Mr. Daniel M. Price	Daniel M. Price PLLC
Mr. Stanimir A. Alexandrov	Sidley Austin LLP
Mr. James Mendenhall	Sidley Austin LLP
Ms. Mika Morse	Sidley Austin LLP
Mr. Andrew Blandford	Sidley Austin LLP
Mr. Carlos Brandes	Guyer & Regules
Mr. JB Simko	Philip Morris
Mr. John Fraser	Philip Morris
Mr. Matias Cikato	Philip Morris
Ms. Anne Edward	Philip Morris
Dr. Carlos E. Delpiazzo	Expert

- for the Respondent:

Mr. Paul S. Reichler	Foley Hoag LLP
Dr. Ronald E.M. Goodman	Foley Hoag LLP
Dr. Eduardo Jiménez de Aréchaga	Attorney at Law
Mrs. Christina Beharry	Foley Hoag LLP
Mr. Yuri Parkhomenko	Foley Hoag LLP
Dr. Constantinos Salonidis	Foley Hoag LLP
Mr. Yoni Bard	Foley Hoag LLP
Mrs. Irene Okais	Foley Hoag LLP
Ms. Angelica Villagran	Foley Hoag LLP
Dr. Diego Cánepa Baccino	Deputy Secretary Presidency of the Republic of Uruguay
Dr. Carlos Mata	Director of Legal Affairs Ministry of Foreign Affairs
Dr. Daniel Hugo Martins	Expert

21. The Parties agreed on corrections to the hearing transcript by letter of 25 February 2013 enclosing jointly agreed corrections.

III. RELEVANT LEGAL PROVISIONS

22. According to Article 41 of the ICSID Convention, the Tribunal is the judge of the Centre's jurisdiction and its own competence. In order to determine the existence of the Centre's jurisdiction and its competence in the present case, the Tribunal

must decide whether the jurisdictional requirements of the ICSID Convention and the BIT have been satisfied. In reaching such decision, the Tribunal must apply Article 25(1) of the ICSID Convention, Articles 1 and 10 of the Switzerland-Uruguay BIT and *Ad* Articles 9 and 10 of the Protocol to the BIT.

23. Article 25 of the ICSID Convention sets forth the criteria for ICSID's jurisdiction and provides in relevant part:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
> (2) "National of another Contracting State" means:
> (a) [omitted]
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

24. Article 1 of the BIT defines as follows certain relevant terms:

> (1) The term "investor" refers with regard to either Contracting Party to
> (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
> (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organized under the law of the Contracting Party and have their seat in the territory of that same Contracting Party;
> (c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party.
> (2) The term "investment" shall include every kind of assets and particularly:
> (a) movable and immovable property as well as any other rights in rem, such as charges on real estate, mortgages, liens, pledges;
> (b) shares, certificates or other kinds of participation in companies;
> (c) money claims and any entitlement of economic value;
> (d) copyrights, industrial property rights (such as patents of inventions, utility models, industrial designs or models, trade or service marks, trade names, indications of source or appellation of origin), know-how and good-will;
> (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of a public entity in accordance with the law.

25. Article 10 of the BIT sets forth provisions governing the disputes between a Contracting Party and an investor of the other Contracting Party that may be submitted to international arbitration. In pertinent part, it reads:

> (1) Disputes with respect to investments within the meaning of this Agreement between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties concerned.
> (2) If a dispute within the meaning of paragraph (1) cannot be settled within a period of six months after it was raised, the dispute shall, upon request of either party to the dispute, be submitted to the competent courts of the Contracting Party in the territory of which the investment has been made. If within a period of 18 months after the proceedings have been instituted no judgment has been passed, the investor concerned may appeal to an arbitral tribunal which decides on the dispute in all its aspects.

26. *Ad* Articles 9 and 10 of the Protocol to the BIT read as follows:

> Judgment of the competent courts in the sense of Article 9, paragraph (8) and Article 10, paragraph (2) means for the Oriental Republic of Uruguay a judicial decision in a one and only instance.

Ad Article 10 of the Protocol to the BIT reads as follows:

> In the event of both Contracting Parties having become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States, disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party shall, at the request of the investor, be submitted according to the provisions of the aforementioned Convention to the International Centre for Settlement of Investment Disputes.

27. The jurisdiction of the Centre and the Tribunal's competence depend first and foremost on the consent of the Parties.[1] The Tribunal shall exercise jurisdiction over all disputes that fall within the scope of the Parties' consent as long as the dispute satisfies the requirements of the ICSID Convention and the relevant provisions of the BIT.

28. Based on Article 25 of the ICSID Convention, Articles 1 and 10 of the BIT, *Ad* Articles 9 and 10 of the Protocol to the BIT, this Tribunal has jurisdiction over the present dispute if the following conditions are met: (1) a condition *ratione*

[1] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention, stating that "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre", 1 ICSID Reports, para. 23.

personae: the Claimants are all investors of one Contracting Party and Uruguay is another Contracting Party; (2) a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment made by the Claimants in the territory of the other Contracting Party; (3) a condition *ratione voluntatis*: the parties to the dispute have consented that the dispute be settled through ICSID arbitration. While no objections have been raised by the Respondent regarding jurisdiction *ratione personae*, it has objected that since the other conditions have not been met, the Tribunal lacks jurisdiction to hear the case. Before examining the Respondent's objections, two preliminary matters must first be addressed.

29. Regarding burden of proof, it is commonly accepted that at the jurisdictional stage the facts as alleged by the claimant have to be accepted when, if proven, they would constitute a breach of the relevant treaty.[2] However, if jurisdiction rests on the satisfaction of certain conditions, such as the existence of an "investment" and of the parties' consent, the Tribunal must apply the standard rule of onus of proof *actori incumbit probatio*[3], except that any party asserting a fact shall have to prove it.[4]

30. Regarding the law governing the determination of jurisdiction, the Tribunal adheres to the predominant opinion that this issue is to be decided according to Article 25 of the ICSID Convention, the applicable rules of the relevant treaty and

[2] Regarding facts that have to be provisionally accepted for jurisdictional purposes reference may be made to *Saipem v. Bangladesh* Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, stating as follows (at para. 91):
"The Tribunal's task is to determine the meaning and scope of the provisions upon which [the claimant] relies to assert jurisdiction and to assess whether the facts alleged by [the claimant] fall within those provisions or would be capable, if proven, of constituting breaches of the treaty obligations involved. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions and to the assessment whether the facts alleged may constitute breaches of these provisions. In doing so, the Tribunal will assess whether [the claimant's] case is reasonably arguable on its face. If the result is affirmative, jurisdiction will be established but the existence of breaches will remain to be litigated on the merits."

[3] *SOABI v. Senegal*, Award, 25 February 1988, para. 9,23; *AAPL v. Sri Lanka*, Award, 27 June 1990, para. 56; *Tradex v. Albania*, Award, 29 April 1999, paras 73-75; *Middle East Cement v. Egypt*, Award, 12 April 2002, paras 88-91; *Generation Ukraine v. Ukraine*, Award, 16 September 2003, paras 19.1, 19.4; *CSOB v. Slovakia*, Award, 29 December 2004, paras 225-226; *Noble Ventures v. Romania*, Award, 12 October 2005, para. 100; *Salini v. Jordan*, Award, 31 January 2006, paras 70-75; *Tokios Tokelès v. Ukraine*, Award, 26 July 2007, paras 121, 122. See also Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1987, paras 327-331.

[4] *Feldman v. Mexico*, Award, 16 December 2002, para. 117; *Soufraki v. UAE*, Award, 7 July 2004, paras 58,81; *Thunderbird v. Mexico* Award, 26 January 2006, para. 95; *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, para 83. See also the ICJ in: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 26 November 1984, ICJ Reports 1984, p. 437, para. 101; *Case concerning Avena and other Mexican Nationals (Mexico v. United States)*, Judgment, 31 March 2004, ICJ Reports 2004, p. 41, paras 55-57. See also Article 27(1) of the 2010 UNCITRAL Arbitration Rules.

the applicable rules and principles of international law, Article 42(1) of the ICSID Convention governing only the merits of the case.[5]

IV. THE RESPONDENT'S OBJECTIONS TO JURISDICTION

A. First Objection: The Claimants Have Not Satisfied Jurisdictional Requirements

1. Arguments of the Respondent

31. According to the Respondent, requirements prescribed by Article 10, including the domestic litigation requirement, are jurisdictional pre-conditions that have to be satisfied in order for the Tribunal to have the authority to hear this case. This is evident from the form of words used by which international arbitration was intended to be a forum of last resort only if justice is not served in the host State.

32. The requirements of Article 10 are stated in terms of obligatory steps, each to be complied with before the next step may be taken. First, disputes "shall" as far as possible be settled amicably under Article 10(1) and only "if" the dispute cannot be so settled within six months, it "shall" be submitted to the competent court of the host State under Article 10(2). Then, but only "if" no judgment has been passed within 18 months, the investor may appeal to an arbitral tribunal under the same Article 10(2).

33. The choice of words is deliberate. The term "if" combined with the mandatory "shall" introduces cumulative conditions that must all be satisfied before resort may be had to arbitration. Article 9(8) of the BIT underscores the fact that domestic litigation is an indispensable pre-condition by specifying that an arbitral tribunal "may only" render an award if it finds that a domestic judgment breaches the BIT. The conditions stated in Article 10 define the scope of the Tribunal's jurisdiction *ratione voluntatis*, non-compliance negating jurisdiction.

[5] Schreuer, The ICSID Convention, A Commentary (2nd edn, 2009), Article 25, para. 578, stating that "[t]ribunals have held consistently that questions of jurisdiction are not subject to Art. 42 which governs the law applicable to the merits of the case", referring in this regard to various ICSID decisions on jurisdiction. Article 42(1) provides as follows:
"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

34. The history of the BIT's negotiation and ratification shows that Uruguay deemed domestic litigation requirement to be a critical element of the BIT and an important limitation on the consent to international arbitration. The Senate Committee on International Affairs, when recommending the adoption of the BIT, in a Report dated 9 August 1990 explained that Article 10 establishes a procedure requiring that only after an unsuccessful attempt to the amicable settlement and the referral to the competent domestic court could the dispute be submitted to an arbitral tribunal.[6]

35. Consent being the cornerstone of ICSID jurisdiction, any limitations on consent contained in a BIT constitute limitations on the scope of the tribunal's jurisdiction. International jurisprudence, both from the ICJ and other ICSID tribunals, confirms that procedural preconditions like those under Article 10 limit States' consent to jurisdiction.

36. In the case concerning *Armed Activities on the Territory of the Congo (New Application 2002)*[7], the ICJ held that where the applicable preconditions had not been met, the treaty could not provide jurisdiction. The Court made clear that examination of such conditions "relates to its jurisdiction and not to the admissibility of the application".[8] Accordingly, the Court did not accept jurisdiction due to the failure to comply with the pertinent conditions.[9]

37. ICSID tribunals have applied the same rules regarding the six-month waiting period. In *Enron v. Argentina*, the relevant BIT required the parties to initially seek a resolution of the dispute through consultation and negotiation, this requirement being, in the tribunal's view, "very much a jurisdictional one. A

[6] Memorial, para 54, referring to the Report of the Senate Committee on International Affairs (9 August 1990) in Minutes of the Uruguayan Senate Sessions (4 September 1990), p. 42 (R-5).
[7] *Case Concerning Armed Activities on the Territory of the Congo (New Application, 2002) (Democratic Republic of the Congo v. Rwanda*), Judgment on Jurisdiction and Admissibility, 3 February 2006, I.C.J. Reports 2006, para. 88 (RL-48).
[8] *Ibid*., para. 88.
[9] *Ibid*., para. 126.

failure to comply with that requirement would result in a determination of lack of jurisdiction".[10]

38. ICSID tribunals have held that the requirement of litigation is a jurisdictional condition. In *Wintershall v. Argentina* the tribunal held that this requirement "is an essential preliminary step to the institution of ICSID arbitration under the Argentina-Germany BIT; it constitutes an integral part of the "standing offer" ("consent") of the Host State that must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration….The requirement of recourse to local courts…. is fundamentally a jurisdictional clause".[11]

39. The Claimants made no effort to comply with the domestic litigation requirement, as is evident from the fact that they did not pursue the special statutory mechanism designed by Uruguayan law exclusively for the resolution of BIT disputes. The Claimants chose rather to bring before the Uruguayan courts only matters of Uruguayan municipal law, declining to raise any claims under the BIT in those proceedings. Even on the Claimants' theory, the 18 months had not run before the arbitration began.

40. The special procedure created in Uruguay for the litigation of BIT claims is set forth in Law 16,110 of 25 April 1990. As explained by the Respondent's expert Dr. Daniel Hugo Martins, the first article of Law 16,110 "ratifies" Uruguay's bilateral investment treaty with Germany.[12] The remainder of that Law creates a specific mechanism, of a general character, for the resolution of investor-State disputes arising under any bilateral investment treaty, the competent courts being the *Tribunal de lo Contencioso Administrativo* ("**TCA**") and the *Tribunales de Apelación en lo Civil*.

[10] *Enron Corp and Ponderosa Assets v. The Argentine Republic*, ICSID Decision on Jurisdiction, 14 January 2004, para. 88. Similarly, *Burlington Resources Inc. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Decision on Jurisdiction, 2 June 2010, para. 315; *Murphy Exploration and Production Co. Int'l v. Republic of Ecuador*, ICSID Decision on Jurisdiction, 15 December 2010, para .151.

[11] *Wintershall v. Argentina*, Award, 8 December 2008, para. 114. The same was held by the tribunal in *Impregilo S.p.A. v. Argentine Republic*, Award, 21 June 2011, paras 79-94.

[12] Dr. Daniel Hugo Martins' Expert Report attached to the Reply, para. 18.

41. Under Law 16,110, a claimant must express with precision that its claims are based on the norms established under a BIT, identifying the BIT claims with particularity. Once the Uruguayan court has rendered its decision, no domestic appeal is available, any secondary recourse being to international arbitration. The Law establishes a series of expedited deadlines that are shorter than those applicable in conventional domestic proceedings so as to facilitate the rendering of a judgment within the 18-month period provided by a number of Uruguay's BITs, including the Switzerland-Uruguay BIT.

42. The Claimants nowhere suggest that they invoked Law 16,110. They rather chose not to submit this BIT dispute to the Uruguayan courts by pursuing ordinary actions against Uruguay's tobacco regulations in the TCA, raising purely municipal law disputes alleging breaches of Uruguayan administrative and constitutional norms, arguing that the challenged regulations should be annulled on those grounds.

43. Disputes arising under Uruguayan domestic law and under the BIT are different, however; they cannot be conflated. The alleged BIT violations were mentioned by the Claimants only to indicate that they reserved the right to present that dispute later, in a different forum. However, under Article 10 of the BIT the same BIT dispute, involving the same BIT issues, will be presented before both the domestic court and the arbitral tribunal. Article 9(8) of the BIT confirms that the arbitral tribunal may be called upon only to rule on the same dispute submitted to the domestic court.

44. The critical distinction between treaty and non-treaty claims is well established in investor-State jurisprudence. As stated by the Annulment Committee in *Vivendi v. Argentina*, "a treaty cause of action is not the same as a contractual cause of action, it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard".[13] There can be no opportunity to rule upon the international obligations guaranteed in the BIT before disputes concerning the scope of those obligations are submitted to

[13] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Decision on Annulment, 3 July 2001, para. 113.

arbitration if the domestic courts are never presented with the international claims in the first place. That this was the intent of Article 10 is confirmed by the *travaux préparatoires* of the BIT[14] in view of Uruguay's insistence on the preference for local courts to rule on its international legal obligations in the first instance.

45. The Claimants' contention that the requirement of Article 10 is a matter of admissibility which can be satisfied after arbitration has begun, even if accepted (which is not), fails since their case would still be at least 18 months short of becoming admissible. As held by another tribunal, "At the time of commencing dispute resolution under the treaty, the investor can only deny or accept the offer to arbitrate but cannot vary its terms".[15] There is no ambiguity in the mandatory character of the prior submission of the dispute to the decision of the competent court of the host State. It is not simply a question of timing, but it is instead a critical substantive requirement that is a key condition going to the heart of the Tribunal's jurisdiction.

46. Jurisdiction must exist at the moment of instituting legal proceedings. The Claimants suggest that it is enough to create jurisdiction that the 18-month period has since run even if such period has not ended when the arbitration began. The ICJ has allegedly applied this rule "with some flexibility", as asserted by the Claimants' expert, Professor Schreuer, citing three cases from the ICJ's jurisprudence. Such cases are of little consequence since, in its judgment on jurisdiction in the *Georgia v. Russia* case[16], the Court denied jurisdiction because of Georgia's failure to meet a jurisdictional pre-condition before initiating litigation. The failure in this case to satisfy the requirement of prior recourse to local courts deprives the Tribunal of jurisdiction even if the 18-month clock could now be deemed to have expired.

47. It is the Claimants' contention that the MFN clause in Article 3(2) of the BIT allows them to dispense with the Article 10(2) requirements by applying BITs

[14] *Supra*, para. 34.
[15] *ICS Inspection and Control Services Limited v. The Argentine Republic*, UNCITRAL Award on Jurisdiction, 10 February 2012, para. 272.
[16] *Georgia v. Russia*, ICJ Judgment, 1 April 2011, para. 130.

that contain more favourable dispute resolution clauses. They cite two other BITs that do not require prior resort to domestic courts for 18 months before instituting international arbitration, Uruguay's BITs with Canada and Australia.

48. Article 3(2) (referred to by the Respondent, with emphasis added by it) provides:

> Each Contracting Party shall ensure **fair and equitable treatment** within its territory of the investments of the investors of the other Contracting Party. **This treatment** shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if the latter treatment is more favourable.

The ordinary meaning of this language confirms that this clause is confined to fair and equitable treatment and does not allow the Claimants to escape the jurisdictional requirements of Article 10(2).

49. As explained by the ILC Commentary on the Draft Articles on Most-Favoured Nation Clauses, pursuant to the *eiusdem generis* rule "the clause can only operate in regard to the subject matter which the two States had in mind when they inserted the clause in their treaty" and it "can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matters".[17] The principle of contemporaneity proves that Article 3(2) does not apply to dispute settlement. When the BIT was concluded nearly 25 years ago, the Contracting Parties could not have reasonably envisaged that it might apply to dispute settlement. The BIT was signed 12 years before the *Maffezini* tribunal for the very first time applied an MFN clause to establish jurisdiction where it did not otherwise exist.[18]

50. In stark contrast to the wording of broad MFN clauses in other BITs, Article 3(2) limits the scope of the MFN clause to fair and equitable treatment. Other treaties accord MFN treatment to "all matters subject to the agreement"[19] or to matters that are specifically mentioned.[20] These differences demonstrate that the drafters

[17] Memorial, para. 69.
[18] *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports, para.396.
[19] Argentina-Spain BIT dated 3 October 1991, Article IV.2. See *Maffezini v. Spain*, cit., para. 60.
[20] Argentina-Germany BIT dated 4 September 1991, Article 3.

of treaties know how to provide for broad or narrow application of MFN treatment as fits the circumstances.

51. Investment arbitration tribunals have held that an MFN clause cannot incorporate by reference dispute settlement provisions unless the clause clearly and unambiguously indicates that the contracting parties intended this effect.[21] The MFN clause of the Uruguay-Switzerland BIT does not "clearly and unambiguously" indicate that it should be interpreted to replace one means of settlement with another.[22] Unlike the MFN clause in other cases, the MFN clause of the BIT in the present case does not apply to "all matters governed by the treaty" so that it cannot be extended to dispute resolution.[23]

52. Differential treatment regarding dispute resolution may not necessarily equal less favourable treatment. Whether certain provisions are more or less favourable cannot depend on the subjective perception of the individual investor but rather on an objective determination based on a comparison of the provisions of the two treaties "as a whole and not part-by-part".[24] A comparison with the BITs with Australia and Canada shows that the Switzerland-Uruguay BIT is more favourable as to the dispute settlement clause since it gives the Claimants "two bites at the apple", not just one.[25]

53. As the tribunal in *Renta 4 v. The Russian Federation* held, "the attribution to Subparagraph 3 of sophisticated implications simply cannot dislodge the qualifying adjectives "fair and equitable" in Subparagraph 1 [and] even less can it undermine the unambiguous reference in Subparagraph 2 to "treatment referred to in paragraph 1 above".[26] The same applies to the Claimants' reference to Article 3(3)-(4) of the BIT and the implications they seek to draw therefrom. The importance of the "*expressio unius*" principle is overstated by the

[21] *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 223; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, Award, 21 April 2006, para. 181; *Wintershall v. Argentina*, cit., para. 17; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, 9 November 2004, paras 118-119; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award, 13 September 2006, paras 89-95.
[22] *Wintershall v. Argentina*, cit., para. 167.
[23] *Impregilo S.p.A. v. Argentine Republic*, cit., para. 103.
[24] *ICS v. Argentina*, cit., para. 320.
[25] *Ibid*., paras 323-324.
[26] *Renta 4, S.V.S.A. v. The Russian Federation*, Award on Preliminary Objections, 20 March 2009, para. 117.

Claimants. As shown by Articles 5(2) and 7 of the BIT, when the Contracting Parties deemed it appropriate to grant MFN treatment, they did so explicitly.

54. As noted by another tribunal, the content of the substantive standard of "fair and equitable treatment" as applied in international law does not encompass the procedural issues of access to international arbitration. Even if such access may be more favourable to investors than lack of access, "this does not mean that failure to give access to such a tribunal is unfair or inequitable".[27]

2. Arguments of the Claimants

55. According to the Claimants, Uruguay's objections to the Tribunal's jurisdiction are premised on the incorrect assumption that the prerequisites for arbitration set forth in Article 10 of the BIT have not been satisfied. On the contrary, with respect to each of the measures that gave rise to the dispute, the Claimants sought to reach an amicable resolution with the Government for at least six months and have litigated their dispute in local courts for at least 18 months. The fact that some procedural steps were not taken prior to the registration of the RFA does not deprive the Tribunal of jurisdiction.

56. The term "appeal" in Article 10(2) does not imply that the Claimants may only resort to arbitration to appeal an adverse domestic court decision. This would be contrary to the plain meaning of that provision which permits the Claimants to submit their dispute to arbitration if no decision has been rendered in domestic courts within 18 months. In the context, "to appeal" means "to petition, to resort to". The above interpretation is clear from the English text, and even clearer in the Spanish version of the BIT, which states "[s]i dentro de un plazo de 18 (dieciocho) meses . . . no se dictara sentencia, el inversor involucrado *podrá recurrir* a un Tribunal Arbitral." The verb "*recurrir*" confirms that the BIT drafters did not mean "appeal" in the sense of bringing a judgment to a higher authority for review. In the context, "*recurrir*" means, as the English "appeal", "to petition, to resort to."

[27] *Ibid.*, para. 154.

57. Regarding Ordinance 514, the six-month consultation period began on 18 September 2008 with the filing of administrative opposition and expired on 18 March 2009, while the 18-month litigation period began on 9 June 2009 when an annulment action was filed before the TCA and expired on 9 December 2010, no decision having been issued by the TCA during that time.

58. On behalf of the Claimants, Abal sent letters to the MPH on 23 and 24 September and on 26 December 2008 and on 3 February 2009, objecting to Ordinance 514. The filing of an administrative opposition on 18 September 2008 did not constitute a submission to a "competent court" within the meaning of Article 10 but merely the continuation of the effort to reach an amicable settlement. In a supplemental submission with the MPH of 7 November 2008 Abal gave express notice that Ordinance 514 violated the Claimants' rights under the BIT.

59. The six-month consultation period ended on 18 March 2009, six months after the filing of the administrative opposition, or at the latest on 7 May 2009, six months after the filing of the supplemental submission.

60. The Claimants waited until 9 June 2009 to submit their dispute to the TCA seeking annulment of Ordinance 514 based on the "single presentation" requirement being a new restriction of Law 18.256 and Decree 284 and a violation of the Claimants' rights under the BIT. The 18-month litigation period before the local courts ended on 9 December 2010. The TCA issued a decision on 14 June 2011, i.e. only 24 months after domestic litigation had been initiated and six months after expiry of the 18-month period.[28]

61. The TCA's decision of 14 June 2011 rejected Abal's annulment request relying on arguments and evidence presented in the different proceedings initiated by British American Tobacco ("**BAT**"). Requested for a clarification, the TCA declared on 29 September 2011 that "the so-called contradictions are not important nor do they justify the revision of the decision". Since the facts and arguments presented by BAT are vastly different from those presented by Abal

[28] The TCA Decision 509 on Abal's Request for Annulment of Ordinance 514, 14 June 2011(C-053).

and since TCA's decision is final and unappealable, the Claimants have no recourse against that decision. Even if the Tribunal finds that the Claimants have not complied with the BIT's procedural requirements, the Claimants should be permitted to raise a denial of justice claim in this arbitration, as to which the Tribunal has jurisdiction.

62. Regarding Decree 287, the six-month consultation began on 5 June 2009, even before the issuance of the Decree on 25 June 2009, with a letter sent by Abal on behalf of the Philip Morris group of companies to the MPH, objecting to the new requirement that the size of health warnings had to increase from 50% of the surface area of tobacco package to 90%. The letter indicated that this was in breach of the Claimants' rights under the BIT.

63. The Government ignored the objections and, without consultation, issued Decree 287 on 25 June 2009, increasing to 80% the surface area of the health warning. Abal filed an administrative opposition to the Decree on 16 July 2009 and a supplemental brief on 6 November 2009. The six months expired on 5 December 2009, over two months before the RFA was filed. The 150-day period for the MPH to address the Claimants' opposition expired on 13 December 2009, without any response.

64. The Claimants waited until 22 March 2010 to initiate domestic litigation by filing an action before the TCA seeking annulment of Decree 287, asserting rights on behalf of the Philip Morris group of companies under the BIT. The 18-month litigation period expired on 22 September 2011, but the decision was not issued by the TCA until 28 August 2012[29], i.e. eleven months later. The RFA had been filed on 19 February 2010 and registered on 26 March 2010.

65. Ordinance 466 continued the requirements of Ordinance 514 and Decree 287. The consultation and litigation steps undertaken by the Claimants with respect to the latter therefore fulfilled the procedural requirements for the Claimants' challenge of Ordinance 466. In any event, the six-month consultation period began on 11 September 2009, when the Claimants filed an administrative

[29] The TCA Decision 512 on Abal's Request for Annulment of Decree 287, dated 28 August 2012 (C-116).

opposition to Ordinance 466, and it expired on 11 March 2010. The 18-month litigation period began on 20 April 2010 when an annulment action was filed before the TCA and expired on 20 October 2011. The decision was issued by the TCA on 22 November 2011, i.e. one month later.[30]

66. The Respondent argues that even if Abal has met certain of the requirements of Article 10, the other Claimants have not. The Respondent overlooks the fact that Abal was wholly owned by FTR and now is wholly owned by Philip Morris Brands and that the brands Abal sells in Uruguay are owned or licensed by Abal or PMP. Any dispute involving Abal and its products necessarily involves the other Claimants. Further, throughout the discussions with the Government and the administrative and judicial proceedings, Abal made it clear that it was speaking on behalf also of its parents and affiliates.

67. According to the Respondent, the fact that the Claimants were not in compliance with the domestic litigation requirement as of the date of registration of the RFA is fatal to the Tribunal's jurisdiction. The Respondent misconstrues the steps in Article 10 as preclusive jurisdictional prerequisites rather than procedural requirements. A lengthy line of jurisprudence supports the Claimants' position that procedural steps, such as notification requirements, waiting periods and domestic litigation requirements, are not conditions for the vesting of jurisdiction. Such procedural steps pertain, not to jurisdiction, but to the admissibility of the dispute, or to procedural conduct related to the claim.[31] Given that all procedural prerequisites have been met, dismissal of the claims would serve no purpose as the Claimants could resubmit the dispute to arbitration.

68. In the cases Uruguay cites in support of its position, the claimants never made any attempt to comply with negotiation or domestic litigation requirements. In contrast, in this case, the Claimants have complied with the BIT requirements as

[30] The TCA Decision 970 on Abal's Request for Annulment of Ordinance 466, dated 22 November 2011 (C-114).
[31] In the Counter-memorial the Claimants cite to the following cases (at para. 86):
Hochtief AG v. Argentina Republic, Decision on Jurisdiction, 24 October 2011 ("*Hochtief*"), paras 90, 91 (CLA-032); *Telefonica S.A. v. Argentine Republic*, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, ("*Telefonica*"), para. 93 (RL-77); *TSA Spectrum de Argentina S.A. v. Argentine Republic*, Award, 19 December 2008 ("*TSA*"), para. 112 (CLA-064).

to all steps, the passage of time having rendered moot the fact that the RFA was registered before the end of the 18-month domestic litigation period. Uruguay has not contested that there is jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis*. As explained by Professor Schreuer in his legal opinion, "requirements additional to those of Article 25 [of the ICSID Convention], contained in an instrument of consent would generally be related to admissibility".

69. Most decisions have concluded that the six-month consultation period is not a jurisdictional requirement and that in any case it can be rendered moot or dispensed with if pursuit of consultation would be futile. Tribunals have recognized that procedural prerequisites cannot be applied mechanically in situations where dismissing the case would have no effect other than to delay the proceedings and force the parties to incur additional costs.[32] Declining jurisdiction in the present case would be an unduly formalistic decision, at odds with the spirit and rationale of the dispute settlement provisions of the BIT.

70. According to the Respondent, the Claimants were required to have litigated their BIT claims before the TCA, not claims under Uruguay's domestic law. There is no basis for the Respondent's position.

71. The "dispute" that must be submitted to litigation before the competent domestic court is defined by Article 10(1) as relating to an investment, not as a dispute limited to claims of a violation of the BIT. Since either party may submit the "dispute" to local courts, it would make no sense if the dispute were limited to BIT claims, there being no basis for Uruguay to submit to local courts a BIT claim against an investor. Furthermore, under Articles 9(8) and 10(2) the BIT allows the investor to submit to arbitration "all aspects" of the dispute, which must be understood to mean both domestic and international law claims related to the same subject matter. There is no exhaustion requirement under Article 10,

[32] In the Counter-memorial the Claimants cite to the following cases (at para. 92):
SGS Société Générale de Surveillance S.A v. Islamic Republic of Pakistan, Decision of the Tribunal on Objection to Jurisdiction, 6 August 2003 *("SGS v. Pakistan"*), para. 184 (CLA-059) ; *Ethyl Corp. v. Government of Canada*, Award on Jurisdiction, 24 June 1998 ("*Ethyl"*), para 75 (CLA-029) ; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 14 November 2005, paras 99-100 (CLA-012).

the investor having only to wait to see whether a judgment is passed by the local court within 18 months before resorting to arbitration.

72. According to the Respondent, even if the TCA were the proper court for hearing their claims, the Claimants should have invoked the procedures set forth in Law 16,110, which provides for the submission of the BIT claims to the TCA. The Claimants note at the outset that neither the government defendant nor the TCA at any point indicated that the Claimants should have invoked Law 16,110. As stated by Professor Schreuer in his legal opinion, either Uruguay knew about the special procedure under Law 16,110 but refrained from pointing it out to the Claimants, in which case it did not act in good faith, or it was not aware of the special procedure under Law 16,110, in which case it would be highly unusual to hold a foreign investor to a procedural error of which the host State was not aware.

73. Due to changes in Uruguay's Constitution, critical parts of Law 16,110 are no longer operational so that it can no longer allow a single and unappealable decision for annulment and damages. This is contrary to the BIT's requirement that the investor seek a "judicial decision in a one and only instance", which the Respondent has interpreted to mean a proceeding that could simultaneously hear damages and annulment claims. The Claimants complied with the requirements of Article 10 by submitting their dispute to the TCA and seeking annulment. They were not required to invoke the procedures of Law 16,110, the BIT saying nothing about the applicable domestic procedures.

74. As stated by the Claimants' expert Dr. Carlos E. Delpiazzo, the Uruguayan constitutional reform of 1997 implicitly abrogated Law 16,110 by prohibiting the simultaneous hearing of annulment and damage claims, which was the objective of Law 16,110. According to the Respondent's expert, Dr. Daniel Hugo Martins, the constitutional change "does not imply the repeal of Law 16,110". However, this position is directly contradicted by Dr. Daniel Hugo Martins' previous publications stating that actions for damages must now "be filed before the jurisdiction as established by law", which in his opinion was no longer the TCA.

75. On the basis of the foregoing, it is clear that it is no longer possible to raise BIT claims in a single, non-appealable court proceeding in Uruguay under Law 16,110 or otherwise. Consequently, if, as the Respondent contends, Law 16,110 was necessary in order to allow investors to submit their disputes to a court capable of rendering a "judicial decision in a one and only instance", then the Respondent itself has undermined that process and rendered it a nullity. This dire result, however, only occurs if one accepts the Respondent's flawed argument that Law 16,110 was necessary to implement the BIT.[33]

76. Requiring investors to use Law 16,110 would effectively preclude investor-State arbitration, since the relevant procedure would have resulted in a decision by the TCA within 90 days, therefore before the 18 months had elapsed. As the legislative history indicates, Law 16,110 was designed for a category of BITs, like the Germany-Uruguay BIT, differing from the Switzerland-Uruguay BIT. For the first category of BITs, the use of the procedure in Law 16,110 would not preclude access to international arbitration once the TCA has issued its decision. This is not the case for the other category of BITs, like the instant BIT.

77. Should the Tribunal find that the Claimants have not satisfied the domestic litigation requirement of the BIT, the MFN clause of Article 3(2) allows the Claimants to rely on other BITs that do not contain similar restrictions. Uruguay has in fact entered into other investment treaties that allow investors to submit a dispute directly to arbitration, such as Uruguay's BITs with Canada and Australia.

78. As held by other investment treaty tribunals, the ability to initiate arbitration without submitting the dispute to domestic courts is "more favourable" to investors than not having such a right. Under Article 312 of the Uruguayan Constitution, the TCA only has jurisdiction to annul an administrative act but not to award monetary compensation, one of the remedies sought by the Claimants in this case. To obtain this remedy would have required filing another action

[33] Rejoinder, para. 96.

before a different court, the multiple level of jurisdiction being clearly less favorable to investors than arbitration.

79. According to the Respondent, having "two bites at the apple", one before domestic courts and one before an arbitral tribunal, is more favorable. Under the present BIT, should the domestic court render a judgment within 18 months the investor would be precluded from resorting to arbitration, so that there could not be two bites at the apple but just one. This is less favorable than to allow the investor to choose either domestic litigation or arbitration or both. Under the Canadian BIT, the choice of when and whether to proceed to arbitration is entirely that of the investor. Under the Australian BIT, the presence of a fork-in-the-road provision allows investors to have direct access to arbitration if they so choose. Both situations are more favorable than the one under the Switzerland-Uruguay BIT.

80. As held by other tribunals, the "treatment" guaranteed by the MFN clause is not limited to substantive treatment, as asserted by the Respondent, but extends to procedures for the settlement of investment disputes. Dispute settlement is an important part of the treatment a State gives to an investor and there is no textual basis to exclude it from the scope of the MFN clause. Further, even if the treatment so guaranteed were limited to "fair and equitable treatment", as argued by the Respondent, the MFN clause would still be to the Claimants' advantage.

81. Whether "this treatment" refers to "treatment" or only to "fair and equitable treatment" is unclear. Other tribunals have held that MFN provisions with a similar construction are not limited to "fair and equitable treatment". If the Respondent's view that this treatment refers to "fair and equitable treatment" were correct, the exceptions to the MFN clause in Articles 3(3) and 3(4), regarding respectively free trade agreements and double taxation or other taxation agreements, would be nonsensical.

82. "Fair and equitable treatment" is an international law concept that is not applicable to a State's treatment of its own investors. It is an obligation owed by a State to "foreign" investors. Therefore, as Professor Schreuer opines, the only

interpretation that gives the second sentence of Article 3(2) a meaning is to interpret the phrase "the treatment" as referring to treatment generally and not fair and equitable treatment.

83. In the absence of language to the contrary, the BIT's guarantee of "most favored nation treatment" should be read to extend to more favorable dispute settlement provisions. As held by other investment treaty tribunals, the dispute settlement provisions are at the core of the BIT's protections, the MFN clause making no distinction between substantive and procedural rights. A long line of cases consistently supports the position that MFN treatment extends to dispute settlement.

84. In order to deny the applicability of the MFN clause to dispute settlement, Uruguay invokes the *ejusdem generis* principle and argues that the clause does not expressly state that it applies to "all matters" covered by the BIT. Neither of these contentions has merit.

85. Under the *ejusdem generis* principle, an MFN clause "attracts matters belonging to the same category of subject as that to which the clause itself relates". This was central to the reasoning of the *Ambatielos* and *Maffezini* decisions, which were seminal. As noted in *Maffezini*, *Ambatielos* "accepted the extension of the clause to questions concerning the administration of justice and found it compatible with the *ejusdem generis* rule". The subject matter of the third-party treaty was found to be the same as that of the basic treaty, namely the protection of foreign investments or the promotion of trade, both including access to dispute settlement.

86. It is not necessary for the MFN provision to state explicitly that it covers dispute settlement. The latter is not listed in Articles 3(3) and 3(4) of the BIT as one of the limited exceptions to the MFN obligation and there is no basis to impose new exceptions that the parties themselves did not include. The "all matters" language is considered evidence of the parties' intentions regarding the scope of the MFN clause, but it is not a necessary prerequisite to a finding that the clause

extends to dispute settlement. As the tribunal held in *Maffezini*, where no such express provision is included this does not end the inquiry.

87. As noted by other investment treaty tribunals, the exceptions to MFN treatment for certain preferential agreements show that the parties considered which issues should not benefit from the MFN protection. Since dispute settlement was not included among such exceptions, under the rule "*expressio unius est exclusio alterius*", the MFN provision extends to dispute settlement.

88. The MFN clause's extension to the 18-month domestic litigation requirement does not raise the policy concerns identified by *Maffezini* and other tribunals. Uruguay has not argued that any such concerns are applicable in this case, and for good reasons. Article 10(2) of the BIT does not require a final and non-appealable decision but only that no decision has been rendered after 18 months. The Claimants are not trying to use the MFN clause to switch arbitration forums or to introduce the type of radical jurisdictional change that *Maffezini* found problematic and that led the *Plama* tribunal to reject extension of the MFN clause to dispute settlement.

89. Even if the MFN clause were limited to "fair and equitable treatment", it nevertheless extends to dispute settlement, as held in *Maffezini*. The principles of *ejusdem generis* and *expressio unius* would still apply in situations where the MFN clause is linked to "fair and equitable treatment". Fair and equitable treatment includes investors' procedural rights, such as access to international arbitration for the protection of their rights. Uruguay's grant of more favorable international arbitration terms in other treaties is a "more favorable" form of fair and equitable treatment.

90. Relying on the alleged principle of contemporaneity, the Respondent argues that, because it could not have known at the time of negotiating the BIT with Switzerland that tribunals would interpret the MFN clause to apply to dispute settlement, such a clause cannot be interpreted in that manner. There is no basis for applying the alleged principle which, under the VCLT, may only be a supplementary means of interpretation when the ordinary meaning and context

criteria leave the meaning ambiguous, which is not the case here. Further, Uruguay was fully aware that the MFN standard applied to dispute settlement at the time it approved the BIT, as shown by contemporaneous statements by the Uruguayan legislature indicating that Uruguay expected the MFN clause to apply to dispute settlement.

3. Findings of the Tribunal

91. The Tribunal has carefully considered the Parties' submissions, which have been summarized above. It now proceeds to discuss them in turn.

(i) *The six-month settlement attempt requirement*

92. In its written submissions, the Respondent contends that the Claimants have not satisfied the mandatory preconditions to raise disputes under the BIT. The reference made in this context to the first two paragraphs of Article 10 of the BIT makes it clear that when referring to mandatory preconditions in the plural the Respondent means both the six-month requirement to make efforts to amicably settle the dispute and the 18-month domestic litigation requirement.[34]

93. Regarding the six-month requirement, the Respondent states that "Neither FTR Holding S.A. nor its replacement Claimant, Philip Morris Brand Sàrl, ever attempted to raise *any* aspect of the present dispute with Uruguay, let alone negotiate an amicable solution, prior to the filing of the RFA".[35] Even if the Respondent emphasizes primarily the Claimants' alleged failure to comply with the 18-month domestic litigation requirement, the 6-month requirement must also be addressed.

94. Under Article 10(1) of the BIT, "Disputes with respect to investments… shall, as far as possible, be settled amicably between the parties concerned". The Respondent has not argued that no dispute had yet arisen with the Claimants, but only that the latter had failed to make efforts to amicably settle the same. The

[34] Memorial, para. 38.
[35] *Ibid.*, fn. 60 (emphasis in the original text).

Tribunal notes in this regard that Article 10(1) applies to both Parties, not only to the Claimants.

95. The Claimants have convincingly shown that they have complied with the six-month requirement before these proceedings were instituted.[36] No reply having been received from the Respondent to the initial correspondence during the six-month period, as well as thereafter on occasion of the administrative oppositions filed against the various measures, the Claimants initiated litigation before the local courts seeking the annulment of such measures. It is true that some letters were sent and administrative oppositions filed by Abal alone. But the latter's actions were aimed at removing the effects of the measures to the extent they limited the marketing of tobacco in Uruguay by all of the Claimants. Due to the identity of positions and interests involved, Abal's actions were to the benefit also of the other Claimants. Documents in the evidentiary record show that Abal acted in some cases expressly on behalf also of the other Claimants.[37]

96. Further, at the hearing, the Respondent's counsel conceded that Uruguay had no complaint regarding the Claimants' satisfaction of the 6-month requirement. In reply to the President's question in this regard, Mr. Reichler stated: "Happily I can give you a very short answer to your question, Mr. President; the answer is, yes, they satisfied the six-month requirement".[38]

97. In the light of the foregoing, the Respondent's objection that the Claimants failed to satisfy the six-month negotiation requirement is rejected.

(ii) *The 18-month domestic litigation requirement*

98. The Respondent also contends that the Claimants have failed to satisfy the 18-month domestic litigation requirement of Article 10(2) on the following grounds:

[36] *Supra*, paras 57-59 as to Ordinance 514; paras 62-63 as to Decree 287; para. 65 as to Ordinance 466.
[37] See the letter sent by Abal to the MPH on 5 June 2009 (C-018) and Grounds for the Administrative Appeal against Ordinance 514 of 7 November 2008 (C-036).
[38] Transcript, Day One, page 78, lines 3-6.

a) The Claimants failed to litigate their treaty dispute in Uruguayan courts[39],

b) Even if they had submitted the dispute to Uruguayan courts, the Claimants were required to litigate for 18 months before initiating arbitration.[40]

99. According to the Respondent, jurisdiction is wanting on either of these grounds or both of them.[41] In opposition, the Claimants contend that they satisfied this requirement by filing with the TCA a request for annulment of each of the three measures enacted by the Respondent on which their claims are founded (the "**Requests for Annulment**").

1. The first ground of the First Objection.

100. The first ground cited by the Respondent to deny jurisdiction raises the question whether the Claimants were required to litigate their "treaty" dispute in Uruguayan courts to satisfy the 18-month requirement. To properly address this question, resort must be had to the meaning of the term "dispute" under Article 10 of the BIT. In this regard, reference must be made to Article 10(1), which provides that "Disputes with respect to investments within the meaning of this Agreement between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties concerned". Account must also be taken of the other provisions of Article 10 referring to "disputes". The Parties disagree as to the meaning to be ascribed to "disputes with respect to investments".

101. The Respondent claims that it is not sufficient to submit to the Uruguayan courts a dispute concerning violations of Uruguayan constitutional or administrative law in order to "fulfill the conditions of Article 10".[42] In its view, what must be submitted to the Uruguayan courts is "the actual dispute arising under the BIT".[43] According to the Respondent, this interpretation is confirmed by the sequence of steps established by the various provisions of Article 10 through which it claims that a dispute must proceed before arriving to international arbitration.

[39] Reply, para. 75.
[40] *Ibid*., para. 76.
[41] Transcript, Day One, page 14, lines 10-25.
[42] Transcript, Day One, page 15, lines 22-24.
[43] Reply, para. 27

102. The Respondent argues that, for these provisions to make sense, the dispute to be submitted to international arbitration must be the same dispute that has been presented to Uruguayan courts, not a different dispute involving different issues.[44] This interpretation finds support in the term "appeal" in Article 10(2), which would suggest that one and the same dispute will be heard in the first instance by the domestic courts and then by the arbitral tribunal.[45]

103. According to the Claimants, the ordinary meaning and the context of the phrase "disputes with respect to investments within the meaning of this Agreement" indicate that it refers to the subject matter at issue, not to particular legal claims, much less to claims for breach of the BIT. The Claimants refer in this regard, on the one hand, to other BITs signed by Uruguay that expressly define "disputes" to mean disputes arising out of breach of the BIT or international law[46], and, on the other hand, to arbitral decisions and awards holding that the general term "disputes with respect to investments" may well cover both domestic and treaty claims pertaining to the subject matter at issue.[47]

104. Clearly, by alleging violation of Uruguayan municipal law before the local courts, the Claimants would not have submitted a dispute over breach of the BIT to the Uruguayan courts. In addition to submitting Uruguayan municipal law claims, however, the Claimants' Requests for Annulment filed with the TCA included an "Assertion and Reservation of Rights".[48] In each case, the Claimants

[44] *Ibid.*, para. 30
[45] *Ibid*., para. 31.
[46] Rejoinder, para. 36, citing Uruguay BITs with Canada, Chile, the United States and Venezuela.
[47] Rejoinder, para. 39, citing *CMS v. Argentina*, Decision on Jurisdiction, 17 July 2003, paras 109-11: *Lucchetti v. Peru*, Award, 7 February 2005, para. 50; *ATA Construction v. Jordan*, Award, 10 May 2010, paras 99-103; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, paras 130-135.
[48] Abal's Request for Annulment of Ordinance 514 before the TCA dated 9 June 2009 (C-041), at Chapter VII ("The 'single presentation' clause of the Ordinance also constitutes a breach of the rights of Abal and its parent companies, and other companies belonging to the Philip Morris group of companies, under applicable bilateral investment treaties, including, without limitation, the Agreement between the Swiss Confederation and the Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, approved by law No. 16.176, dated 30 March 1991, … Without prejudice to the above, and in order to preserve all their right, Abal on its own behalf and on behalf of its parent companies and other companies belonging to the Philip Morris group of companies hereby explicitly asserts its own and their rights under the treaties mentioned above."); Abal's Request for Annulment of Decree 287 before the TCA dated 22 March 2010 (C-049) , at Chapter V ("The 80-80 requirement also constitutes a breach of the rights of ABAL and its parent companies, and other companies belonging to the Philip Morris group of companies, under applicable bilateral investment treaties, including, without limitation, the Agreement between the Swiss Confederation and the Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, approved by law No. 16.176, dated 30 March 1991,. … Without prejudice to the above, and in order to preserve all their rights, ABAL on its own behalf and on

included both an "assertion" of their BIT rights and a reservation of rights to pursue those claims in international arbitration. Moreover, in at least one case, the TCA also ruled expressly on such claims under the BIT (apparently rejecting them).[49] Regardless how the TCA's conclusions regarding these claims are characterized, the Tribunal considers that the TCA was made fully aware of the Claimants' BIT claims in the context of Article 10(2)'s domestic litigation requirement.

105. In any event, even if the Claimants had not submitted their claims under the BIT to the Uruguayan courts, the Tribunal concludes that they had no obligation to do so under the BIT. The question is whether for purposes of the domestic litigation requirement under Article 10(2), the dispute brought before the Uruguayan courts must be the same as the dispute brought in arbitration. The Tribunal does not believe so.

106. The Respondent's argument that the sequence of steps under Article 10 for a dispute to arrive at international arbitration implies that the dispute must necessarily be the same in every step is certainly worthy of consideration. In the Tribunal's view, however, this argument, and more generally the Respondent's position regarding the meaning of "disputes with respect to investments" under Article 10, must yield to the ordinary meaning to be given to this phrase in its context and in the light of the object and purpose of the BIT, in accordance with Article 31 of the VCLT.[50]

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behalf of its parent companies and other companies belonging to the Philip Morris group of companies hereby explicitly asserts its own and their rights under the treaties mentioned above."); Abal's Request for Annulment of Ordinance 466 before the TCA dated 20 April 2010 (C-050) , at Chapter VI ("The challenged Pictogram created and imposed by the Ordinance also constitutes a breach of the rights of ABAL and its parent companies, and other companies belonging to the Philip Morris group of companies, under applicable bilateral investment treaties, including, without limitation, the Agreement between the Swiss Confederation and the Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, approved by law No. 16.176, dated 30 March 1991,. … Without prejudice to the above, and in order to preserve all their right, ABAL on its own behalf and on behalf of its parent companies and other companies belonging to the Philip Morris group of companies hereby explicitly asserts its own and their rights under the treaties mentioned above.").

[49] The TCA Decision 512 on Abal's Request for Annulment of Decree 287, dated 28 August 2012, under VIII (C-116).

[50] VCLT, Article 31 (*General rule of interpretation*):

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

107. In the Tribunal's view, the ordinary meaning of the phrase "disputes with respect to investments" is broad and includes any kind of disputes where the subject matter is an "investment" as this term is defined by the BIT. The words "within the meaning of this Agreement", appearing after the phrase in question in Article 10(1), clearly refer in the context to "investments" as defined by Article 1(2) of the BIT, not to "disputes". The Respondent acknowledges that this phrase, as used in Article 10 of the BIT, is "broader than comparable clauses in other BITs and that its reach extends beyond treaty-based disputes", to include investment contract disputes not involving treaty breach, but not domestic law claims.[51]

108. Disputes concerning alleged breaches of the BIT and disputes regarding domestic law claims may well both fall within the scope of the reference in Article 10(1) to "Disputes with respect to investments". A line of investment treaty decisions draws a distinction between the broad meaning of the wording in other bilateral investment treaties that are similar to Article 10 in the BIT,[52] and the narrower meaning of the wording in still other treaties, including treaties concluded by Uruguay, referring to "disputes relating to a claim for breach of the treaty" or to "an investment dispute" (defined as including also an alleged breach of rights conferred by the treaty) or similar wording.[53]

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

[51] Transcript, Day One, page 11, lines 8-15; 19-25; page 12, lines 1-3.

[52] *Ex multis*: *Salini v. Morocco*, Decision on Jurisdiction, 23 July 2001, para. 61, referring to Article 8 of the Italy-Morocco BIT mentioning "tous les différends ou divergences… concernant un investissement"; *Vivendi v. Argentina*, Decision on Annulment, cit., para. 55, referring to Article 8 of the BIT between France and Argentina mentioning "any dispute relating to investments made under this Agreement"; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, para. 15, referring to Article VIII(2) of the BIT between Switzerland and The Philippines mentioning "disputes with respect to investments"; *Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A and the Argentine Republic*, Decision on Jurisdiction, 21 December 2012, para. 112, referring to Article X (1) of the Argentine-Spain BIT mentioning "disputes.. in connection with investments within the meaning of this Agreement". An exception to this uniform interpretation is in the *SGS v. Pakistan* Decision on Jurisdiction, 6 August 2003, holding that the phrase "disputes with respect to investments" in Article 9 of the Switzerland-Pakistan BIT was "merely descriptive" and that "pure contractual claims were not covered by this clause" (para. 161).

[53] Many BITs concluded by Uruguay following the conclusion of the Switzerland-Uruguay BIT refer in the same context to disputes relating to claims for breach of the treaty:

109. The reference in the last series of treaties to claims based on the alleged breaches of the treaty is clearly different from the wording of Article 10(1) of the Switzerland-Uruguay BIT and of provisions of other treaties concluded by Uruguay. As the tribunal said in *SGS v. Philippines,* "if the State Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using similar language"[54]. The Tribunal shares the view expressed by other tribunals that the definition of disputes as "relating to investments within the meaning of this Agreement", or "relating to investments made under this Agreement"[55], or "in connection with investments within the meaning of this Agreement"[56], "does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself…; it is sufficient that the dispute relate to an investment made under the BIT"[57].

110. The interpretation of the meaning of "disputes with respect to investments" under Article 10 is confirmed by the other interpretative rule provided by Article 31 VCLT, namely, the context. As noted by the *ad hoc* committee in *Vivendi v. Argentina,*[58] in the same context, a broad formulation of "dispute" like that in Article 10(1) of the BIT may be contrasted with the State-to-State dispute settlement provision of Article 9(1) of the BIT which refers to "disputes… regarding the interpretation or application of the provisions of this Agreement". The definition of "disputes" in the latter case is deliberately narrow, in contrast to the expansive language of Article 10(2), clearly indicating in the Tribunal's

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Treaty between the Argentine Republic and the United States of America concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, entered into force on 20 October 1994; Agreement between the Government of Canada and the Government of the Eastern Republic of Uruguay for the Promotion and Protection of Investments, signed on 29 October 1997, entered into force on 2 June 1999, Art. XII; Acuerdo entre la República de Chile y la República Oriental del Uruguay Para la Promoción y Protección Recíproca de las Inversiones, signed on 26 October 1995, entered into force on 22 April 1999, Art. 8; Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 November 2005, entered into force on 1 November 2006, Art. 24; Acuerdo entre el Gobierno de la República Oriental del Uruguay y el Gobierno de la República de Venezuela para la Promoción y la Protección Recíproca de Inversiones, signed on 20 May 1997, entered into force on 18 January 2002, Art. 9.

[54] Cit., s*upra*, fn. 52, para. 138.

[55] As in the France-Argentina BIT in the *Vivendi v. Argentina* case (*supra*, fn. 52).

[56] As in the Argentina-Spain BIT on which the *Teinver v. Argentina* case was based (*ibidem*).

[57] *Vivendi v. Argentina*, cit., para 55. This holding is endorsed by the tribunal in *Teinver v. Argentina*, cit., para. 112.

[58] Cit., para. 55.

view that an investor could satisfy Article 10(2) by submitting a domestic law claim to the Uruguayan courts, provided that it was based on substantially similar facts and subject matter as the BIT claim subsequently submitted by the investor to arbitration.

111. Articles 9(8) and 10(2) of the BIT support the conclusion that the term "disputes" under Article 10(1) embraces either domestic law claims or BIT claims. Both provisions contemplate that, should the dispute be submitted to arbitration following the domestic court litigation, the arbitral tribunal shall decide on the dispute "in all its aspects". Article 10(2) provides that failing a decision by the domestic court within 18 months, the investor may "appeal to an arbitral tribunal which decides on the dispute in all its aspects". As already noted, "appeal" in the context means "resort to", without necessarily implying, as contended by the Respondent, that the dispute must be the same. The words "in all its aspects" must have a meaning according to the principle that all treaty provision must have an "*effet utile*". Such meaning cannot but be that once the dispute reaches the level of an arbitral tribunal, be it a State-to-State dispute or the investor-State dispute, "in all its aspects" regarding the latter dispute must refer to issues of both domestic and international law. Should Article 10(2) apply, this contextual aspect confirms that, following consideration of domestic law claims by the Uruguayan courts, the investor-State tribunal shall be competent to deal also with international law claims.[59]

112. The Tribunal notes that the remedy sought by the Claimants from the TCA was appropriate since had the annulment of the three measures issued by the Respondent been granted that would have answered the Claimants' claims, under both domestic and international law, including the BIT.

113. In the light of all the foregoing the Tribunal concludes that by submitting their domestic law claims through the Requests for Annulment filed with the TCA to the Uruguayan courts the Claimants satisfied the domestic litigation requirement under Article 10(2) of the BIT. The term "disputes", as used in Article 10(2), is to be interpreted broadly as concerning the subject matter and facts at issue and

[59] As opined by Professor Schreuer, Second Legal Opinion, para. 21.

not as limited to particular legal claims, including specifically BIT claims. The dispute before domestic courts under Article 10(2) does not need to have the same legal basis or cause of action as the dispute brought in the subsequent arbitration, provided that both disputes involve substantially similar facts and relate to investments as this term is defined by the BIT.[60]

114. Finally, even if the Requests for Annulment were filed by Abal, the latter clearly acted in the interest also of the other Claimants considering that it is wholly-owned by Philip Morris Brands and the brands Abal sells in Uruguay are sub-licensed from PMP.[61]

(iii) *Applicability of Law 16,110.*

115. The Respondent's first ground for objecting to the Tribunal's jurisdiction involves the further question whether the Claimants have satisfied the 18-month requirement by addressing their domestic claims to the "competent courts" of Uruguay. The Respondent has not disputed that the TCA is the competent court for the annulment of administrative acts, this being the object of the Claimants' Requests for Annulment.[62] The Respondent contends rather that the Claimants should have followed the special procedure established by Law 16,110 of 7 May 1990[63], which they concededly did not do.[64]

116. The Tribunal notes at the outset that the reference to Law 16,110 was made by the Respondent for the first time only in the Reply, i.e., more than two years after the RFA was filed and eight months after the filing of the Memorial. At the hearing, the Respondent argued that it waited until the Reply to invoke the Claimants' failure to comply with Law 16,110 due to the fact that in the RFA "they relied exclusively on the MFN clause".[65] This is hardly consistent with the

[60] In this regard, the reference made by the Respondent to cases dealing with the effect of the fork-in-the-road clauses on jurisdiction depending whether the dispute before a domestic court is or not the same as the dispute in arbitration is inapposite in this context.
[61] *Supra*, para. 3.
[62] Abal's Request for Annulment of Ordinance 514 before the TCA dated 9 June 2009 (C-041); Abal's Request for Annulment of Decree 287 before the TCA dated 22 March 2012 (C-049); Abal's Request for Annulment of Ordinance 466 before the TCA dated 20 April 2010 (C-050).
[63] Uruguayan Law 16,110 of 7 May 1990 (RL-83).
[64] Transcript, Day One, page 9, lines 5-17.
[65] Transcript, Day One, page 72, lines 19-23.

importance given by the Respondent to the application of Law 16,110 and of all elements that were at its disposal to timely raise this issue.

117. Neither the TCA nor the Respondent called the Claimants' attention to the alleged need to apply the special procedure of Law 16,110 following the filing by the Claimants of the Requests for Annulment of Ordinance 514, Decree 287 and Ordinance 466. This, despite the fact that the notification to the Respondent of the RFA had made known the existence of BIT claims and that under each of the Requests for Annulment the Claimants had reserved the right to bring and pursue claims under various treaties, including the BIT.[66] The Respondent was therefore in a position immediately to react by calling the Claimants' attention to any need to comply with the procedure of Law 16,110.

118. Whether the Respondent itself overlooked the existence of the special law or took the view that the law was inapplicable in the instant case, it is difficult for the Tribunal to accept the critical remarks addressed to the Claimants in this arbitration for having brought their claims before the TCA based on procedural rules of general application rather than in accordance with the special procedure of Law 16,110. If it were mandatory for the Claimants to seek relief under Law 16,110, the Respondent's failure to so advise the Claimants would itself not escape criticism and could, if necessary for a decision, provide the basis for a finding against the Respondent. Moreover, in the Tribunal's view, the Respondent's objection that the Claimants should have used the special procedure under Law 16,110 would be belated in view of the timely filing of jurisdictional objections required by Rule 41(1) of the Arbitration Rules.[67] Nonetheless, the Tribunal, in view of the duty to satisfy itself that it has jurisdiction to hear the case,[68] notes the following.

[66] See "Assertion and Reservation of Rights" under the various Requests for Annulment (C-041, Chapter VII; C-049, Chapter V; C-050, Chapter VI).
[67] Rule 41(1) provides: "Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder-unless the facts on which the objection is based are unknown to the party at that time".
[68] *AIG v. Kazakhstan*, Award, 7 October 2003, para. 9.2: "It [the "as early as possible" filing requirement] cannot be read as coercive".

119. The Claimants have alleged that Law 16,110 applies only to treaties having the same characteristics as the Treaty on Reciprocal Promotion and Protection of Investments signed by the Respondent with the Federal Republic of Germany on 4 May 1987 and approved by Article 1 of Law 16,110 (the "**Germany-Uruguay Treaty**"). In the Tribunal's view, this limited application of Law 16,110 is not warranted in the light of Article 3 of Law 16,110 that unambiguously states that all disputes arising under treaties ratified by Uruguay "shall be subject to the procedure established in the following articles". In the absence of any exceptions, this statement cannot but refer also to the Switzerland-Uruguay BIT. The procedure that had to be followed pursuant to Article 3 is then described by Articles 4 and 9 of Law 16,110.

120. Article 4 states in pertinent part:

> The procedure to be followed shall be that established below:
> A) The *Tribunales de Apelaciones en lo Civil* (Courts of Civil Appeal) shall have the competency to hear these proceedings
>
> Article 9 states:
> Annulment and reparatory actions of a contentious-administrative nature, which are presented under the Treaties to which the present law refers, shall be subject to the decision of the *Tribunal de lo Contencioso Administrativo*, following the procedure provided for in the foregoing articles.

121. As explained by the Respondent's legal expert, Dr. Martins, "All lawsuits against the State must be filed with the *Tribunales de Apelaciones en lo Civil*, except for "annulment and reparatory actions of a contentious-administrative nature", which take place before the TCA, pursuant to Article 9 of Law 16,110".[69]

122. The Claimants have not filed with the TCA a dispute arising under the Switzerland-Uruguay BIT pursuant to the special procedure of Law 16,110. This Law was also not applied by the TCA in the proceedings before it, even if, as shown by certain parts of the TCA's decisions regarding the Requests for Annulment which refer to and rely upon the BIT, the court was made aware of the existence of BIT claims by the Claimants and, as discussed above, in fact

[69] Dr. Daniel Hugo Martins' Expert Report annexed to the Reply, para. 22.

rejected them.[70] No reference was made by the TCA on that occasion to Law 16,110 regarding the procedure that should have been applied. Instead, the Parties accepted that the TCA was the competent court: their debate has focused rather on the question whether that court continued to be competent, as in the past, not only for annulment claims but also for damages claims following the constitutional reform of 1997.

123. The Claimants' position is that, by submitting the dispute to the TCA under the procedure of general application limited to the annulment of the three measures enacted by the Respondent, they fulfilled the requirements of Article 10 and *Ad* Article 9 and 10 of the Protocol to the BIT since, on the one hand, they were not bound to submit a dispute by reference to the BIT and, on the other hand, the TCA's decisions are not appealable to any other authority. Thus, according to the Claimants, by submitting the dispute to the TCA the condition of a decision "in a one and only instance"[71] was satisfied since this phrase does not "necessarily mean annulment and damages combined".[72] The Respondent contends in opposition that the Claimants should have submitted to the TCA the dispute regarding both annulment and damages in accordance with Law 16,110, since in this arbitration they are seeking both annulment and damages.

124. The question whether the TCA is competent to rule on damages claims, as well as other claims for relief, following the Uruguayan constitutional reform of 1997, has lost some of its importance in view of the Tribunal's decision that Law 16,110 is inapplicable to the Claimants' filings with the TCA. However, since this question may still be of interest in the frame of the TCA's competence under the procedure of general application and the unappealable character of its decisions, it is briefly examined below.

125. Under the older version of Article 312 of the Uruguayan Constitution, actions for damages could only be raised after actions for annulment, the TCA being the

[70] Notably, in its Decision of 28 August 2012 rejecting the Claimants' Request for Annulment of Decree 287 (C-116), the TCA has made reference to the plaintiff's allegation of the violation of the Switzerland-Uruguay BIT stating that "the investments of the Swiss company are not affected" by the Decree and that "Regulating matters of Public Health is outside of the rules on investment protection". This passage of the TCA's Decision was referred to by the Claimants at the hearing: Transcript, Day One , p. 170, lines 11-22.
[71] Transcript, Day One, page 176, lines 12-16.
[72] Transcript, Day One, page 169, lines 10-14.

only jurisdiction, separate from the Judicial Branch, for hearing lawsuits seeking the annulment of final administrative acts issued by any State body. The new version of Article 312, following the constitutional reform of 1997, provided for the possibility of choosing between an annulment action and damages action, establishing that in the case of opting for annulment, "if there is a judgment of annulment an action for damages may later be filed with the corresponding court".[73]

126. In his Expert Report, Dr. Martins, the Respondent's legal expert, opines that the provisions of Law 16,110 allowing the TCA to hear annulment and damages claims simultaneously, are compatible with the new Constitution, because the reference in Article 312 to "the jurisdiction provided by the law" is a reference to the TCA.[74] According to the Claimants, this position contradicts Dr. Martins' previous publications, not mentioned in his c.v. submitted in this proceeding, where he concluded: "However, Article 312 as amended says that actions for damages may be filed in the jurisdiction stipulated by the law, and here the law appears to grant jurisdiction to the Judicial Branch but could not grant to the *Tribunal de lo Contencioso Administrativo* because, in my opinion, the [TCA] has a closed jurisdiction; in other words, its jurisdiction is expressly established in the text of the Constitution… it would appear that we can deduce that when the text provides "shall be filed before the jurisdiction as established by the law" the [TCA] is not included".[75]

127. According to Dr. Delpiazzo, the Claimants' legal expert, the 1997 Uruguayan constitutional reform meant that "art. 312 provides for an option between damages and annulment which excludes the possibility of bringing both actions simultaneously. Accordingly, any provision establishing the possibility of bringing both proceedings simultaneously would contradict the Constitution".[76] According to Dr. Delpiazzo, "This means that said provision [of Law No. 16,110] on the one hand grants the TCA jurisdiction in compensatory reparation matters and on the other, it allows for the consolidation of the annulment and

[73] Dr. Martins' Expert Report, paras 14-15.
[74] Dr. Martins' Expert Report, para. 22.
[75] Dr. Daniel Hugo Martins, *Algunos Aspectos del reparatorio patrimonial*, in *Reflexiones sobre la Reforma Constitucional del 1996*, 1998, para. 130,134 (CLA-097).
[76] Dr. Delpiazzo's Expert Opinion, para. 3.2.1 (CWS-03).

damages claims in a single proceeding, which is manifestly inconsistent with supervening constitutional reform".[77] According to other Uruguayan legal scholars, the constitutional reform eliminated the possibility of expanding the TCA's jurisdiction to damages claims simply through a law, such as Law 16,110.

128. Dr. Delpiazzo's opinion coincides with the opinion that Dr. Martins had expressed in his doctrinal writing prior to this arbitration. Having to choose between two diverging opinions by distinguished experts of Uruguayan law, the Tribunal is inclined to give more weight to Dr. Delpiazzo's opinion in light of the weight of scholarly commentary and the wording of the revised version of Article 312 of the Constitution. The new provision states that in case of annulment by the TCA "an action for damages may later be filed with the corresponding court". The reference to a "later" filing of the damages action "with the corresponding court" points rather to a separate proceeding before a court other than the TCA. The two experts agreed at the hearing that annulment and damages are two separate proceedings.[78]

129. The Tribunal does not need to pursue the matter further considering its previous holding that the Claimants have satisfied the 18-month domestic litigation requirement by filing with the TCA the Requests for Annulment[79]. In light of these considerations, the Tribunal holds further that the TCA's decisions satisfy the requirement of "a judicial decision in a one and only instance", as required by *Ad* Articles 9 and 10 of the Protocol to the BIT, since such decisions are not appealable before any other judicial authority in Uruguay.[80]

2. The second ground of the First Objection.

[77] *Ibidem*, para. 3.3.1.
[78] Dr. Martins, replying to the President's question: "Yes. First, there is an annulment decision with reservations for repairs and subsequently the interested party can initiate an action for repairs" (Transcript, Day One, page 300, lines 4-7). Dr. Delpiazzo: "If it [the TCA] can only annul or confirm, then it cannot issue a ruling calling for reparations to be given… for a damage case to be heard that means it has to be heard in a different jurisdiction" (Transcript, Day One, page 327, lines 6-11).
[79] *Supra*, para. 99.
[80] "The decisions by the TCA are not subject to appeal… its rulings are not subject to review by any other Tribunal" (Dr. Delpiazzo, Transcript, Day One, page 315, lines 4-9).

130. The other ground of the Respondent's contention regarding the Claimants' failure to satisfy the 18-month domestic litigation requirement rests on the fact that the Claimants initiated this arbitration before the 18-month domestic litigation period prescribed by Article 10(2) had expired. This is not disputed by the Claimants.

131. The Parties agree that, in accordance with Rule 6 of the Institution Rules, this proceeding was instituted on 26 March 2010.[81] The Parties also agree that no decisions by the Uruguayan courts intervened within the 18-month period prescribed by Article 10(2) of the BIT.

132. The decision regarding the Request for Annulment of Ordinance 514 was rendered by the TCA on 14 June 2011, i.e., 24 months after the RFA had been filed on 9 June 2009.[82] The decision regarding the Request for Annulment of Ordinance 466 was rendered by the TCA on 22 November 2011, i.e., nineteen months after the Request for Annulment had been filed on 20 April 2010.[83] The decision regarding the Request for Annulment of Decree 287 was rendered by the TCA on 28 August 2012, i.e., twenty-nine months after the RFA had been filed on 22 March 2010.[84] All these requests were rejected.

133. The Respondent contends that the 18-month litigation requirement is a jurisdictional requirement and that failure to satisfy the same by the date this arbitration was instituted deprives the Tribunal of jurisdiction to hear the case. The Claimants assert in opposition that the requirement in question is merely directory and procedural, not mandatory and jurisdictional, and that the Tribunal is not deprived of jurisdiction if, as in the instant case, the requirement is not satisfied on the date of institution of the arbitration, but is satisfied thereafter.

134. In support of their respective positions, each of the Parties relies on a line of investment treaty decisions on jurisdiction that, on various grounds, have denied or, respectively, asserted the jurisdictional character of the domestic litigation

[81] *Supra*, para. 12.
[82] *Supra*, para. 60.
[83] *Supra*, para. 65.
[84] *Supra*, para. 64.

requirement under the relevant treaty. The Tribunal has carefully considered the jurisdictional decisions referred to by the Parties. It notes that many such decisions are based either on language of the relevant treaty provision, or on factual circumstances, that differ from those in the present case.[85] It notes further that these decisions evidence the large extent to which this area of investment treaty law remains in the process of developing a *jurisprudence constante*, due to the variety of qualifications given to the requirement in question and the resulting discrepancies in reasoning and conclusions.

135. As to the cases relied on by the Claimants,[86] the following may be observed. In *Hochtief*, the tribunal preferred not to make a decision regarding the character of the 18-month domestic litigation requirement by proceeding to examine the applicability of the MFN clause of the Germany-Argentina treaty.[87] In *Telefónica*, the tribunal held that the 18-month domestic litigation requirement "is best qualified as a temporary bar to the initiation of arbitration. The objection is therefore technically an exception of inadmissibility…", making reference in this regard to Art. 44 of the ILC Articles on State Responsibility.[88] The Tribunal notes that the relevant provision of the applicable Spain-Argentina treaty differs in one significant respect from Article 10(2) of the BIT. Art. X.3(a) of the treaty permits either party to defer the dispute to an international arbitral tribunal not only "when there is no decision on the merits after eighteen months following the beginning of the process under point 2 of this article" ("*cuando no exista una decisión sobre el fondo después de transcurridos dieciocho meses contados a partir de la iniciación del proceso previsto por el apartado 2 de este articulo")* but also when "the timely issuance of such decision exists but the dispute

[85] For example, in *Burlignton v. Ecuador*, the claimant had never given notice of the dispute and therefore had not tried to reach a settlement (Decision on Jurisdiction dated 2 June 2010, paras 312-318); in *Murphy v. Ecuador* the tribunal found that it was not possible for a dispute to have arisen in the absence of a prior allegation of a treaty breach (Award dated 15 December 2010, para.104).See on these two case, Schreuer, First Legal Opinion attached to the Memorial, paras 31-32.

[87] *Supra*, para. 67.

[88] *Hochtief*, para. 55: "The Tribunal does not need to decide the point because the Claimant has raised another argument, based on the MFN provision in BIT Article 3. That argument was the main focus of the parties' pleadings, and is a sufficient basis for the Tribunal's decision". Only later on, at para. 91, when examining the applicability of the MFN clause, the tribunal appears to consider the requirement in question as part of "the prescribed procedures for accessing that [the tribunal's] jurisdiction".

[89] The I.L.C. uses the term "Admissibility of claims" as title of Art. 44 of its Articles on State Responsibility. According to this article: "The responsibility of a State may not be invoked if: (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted".

between the parties continues" ("*cuando existe tal decisión pero la controversia subsiste entre las partes*"). The reference to Art. 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies.

136. In *TSA*, the tribunal indicated that Article 10(2) of the Netherlands-Argentina treaty "has some resemblance with Article 26 of the ICSID Convention which provides that a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention".[89] Having noted that when the ICSID proceedings were initiated only three months out of the prescribed 18 month time period remained, and that it would have been "most unlikely that a decision by a court giving TSA satisfaction could have been obtained before the expiry of the eighteen months",[90] the tribunal concluded "that it could be highly formalistic now to reject the case on the ground of the failure to observe the formalities of Article 10(3) of the BIT, since a rejection on such ground would in no way prevent TSA from immediately instituting new ICSID proceedings on the same matter".[91] No position was expressed by the tribunal regarding the characterization of the domestic litigation requirement.

137. The Tribunal disagrees with the position expressed by some tribunals, and echoed by the Claimants, which would disregard the domestic litigation requirement is "nonsensical",[92] since, allegedly, the domestic court would not be in a position to render a decision within the time-limit prescribed by the applicable treaty.[93] The Tribunal also considers that a finding that domestic litigation would be "futile" must be approached with care and circumspection. Except where this conclusion is justified in the factual circumstances of the particular case, the domestic litigation requirement may not be ignored or dispensed with as futile in view of its paramount importance for the host State. Its purpose is to offer the State an opportunity to redress alleged violations of the

[89] *TSA*, para. 110.
[90] *Ibid*., para. 111.
[91] *Ibid*., para. 112.
[92] The latter is the expression used in *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 224.
[93] As shown by the time taken to issue its various decisions (*supra*, paras 57, 61 and 62), the TCA might have rendered a decision on each of the Requests for Annulment within the 18-month period.

investor's rights under the relevant treaty before the latter may pursue claims in international arbitration.

138. Whether the domestic litigation requirement relates to jurisdiction or, rather, to admissibility or procedure depends on the interpretation of Article 10 of the BIT, based on the interpretative rules of the VCLT.[94]

139. The sequence of steps to be followed by the Claimants under Articles 10(1) and (2) before resorting to international arbitration is of importance for the purpose of this analysis. Each such step is clearly indicated as part of a binding sequence, as evidenced by the word "shall" before each step as follows:

(i) initially, a dispute "shall" as far as possible be settled amicably between the parties;

(ii) "if" there is no settlement within six months after the dispute was raised, the dispute "shall", as a second step, be submitted to the competent Uruguayan courts;

(iii) "if" within 18 months after institution of the proceeding before the domestic courts "no judgment has been passed", the investor may as a final step resort to international arbitration.

Obviously, Article 10 is based on the premise of the binding character of steps (i) and (ii) which the investor must comply with if it wishes ("may") to resort to step (iii). In the Tribunal's view, this is true regardless how Article 10(2)'s terms are characterized (i.e., as jurisdictional, admissibility or procedural).

140. The ordinary meaning of the terms used for the two steps (i) and (ii), which are preliminary to the institution of international arbitration, is clearly indicative of the binding character of each step in the sequence. That is apparent from the use of the term "shall" which is unmistakably mandatory and from the obvious intention of Switzerland and Uruguay that these procedures be complied with, not ignored.

[94] *Supra*, para. 106.

141. The position in international law generally is stated by the ICJ. In *Georgia v. Russia*, the Court explained the legal character of procedural preconditions as follows:

> "To the extent that the procedural requirements of [a dispute settlement clause] may be conditions, they must be conditions precedent to the seisin of the court even when the term is not qualified by a temporal element".[95]

The Court referred to the "fundamental principle of consent" [96] as stated in the *Armed Activities case* in the following terms:

> "[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them…When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application…".[97]

142. In the present case, the Tribunal does not consider it necessary to characterize the 18-month domestic litigation requirement as pertaining to jurisdiction or to admissibility. Even if that requirement were considered as pertaining to admissibility, its compulsory character would be evident. This conclusion is confirmed by the object and purpose of the requirement in question which is aimed at offering the host State the opportunity to redress the violations of the BIT alleged by the investor. The objective pursued by the Respondent when negotiating the domestic litigation requirement was made clear during the Uruguayan Parliamentary debate leading to the approval of the BIT.[98] The Claimants do not dispute that this was the Respondent's objective when providing for this requirement in the BIT.

143. The Claimants' actions before the TCA sought annulment of the administrative measures that are claimed in this arbitration to be in breach of the BIT. Had the

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[95] *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation*), Judgment on Preliminary Objections, 1 April 2011, para. 130 (RL-47).
[96] *Ibid*., para. 131.
[97] *Case Concerning Armed Activities in the Territory of the Congo*, cit. (*supra*, para. 33).
[98] See the Respondent's statement in that regard at the hearing: "The record shows that Article 10 was proposed by Uruguay which insisted that disputes between investors and contractors [sic] would continue to be submitted to review by the competent national courts. As shown in slide 24, it was Uruguay's firm position that disputes of this type should be handled through a contentious administrative process before the competent judicial body" (Transcript, Day One, page 52, lines 14-21.). See also the Report of the Senate Committee on International Affairs (9 August 1990) in Minutes of Uruguayan Senate Sessions, No. 48, vol. 332 (4 September 1990), p. 42 (R-5).

TCA granted the Claimants' requests within the prescribed 18-month period, or even thereafter, by annulling the measures in question, the Claimants' claims in this arbitration would have lost their legal grounds. The object and purpose of the domestic litigation requirement under Article 10(2) would thus have been met.[99]

144. The domestic litigation requirement had not been satisfied at the time this arbitration was instituted.[100] The present case differs from the other cases where jurisdiction has been denied due to the absence either of a dispute expressed in legal terms[101] or of any actions by the investor to address its claims to the domestic court before resorting to arbitration.[102] Nonetheless, even if the requirement were regarded as jurisdictional, the Tribunal concludes that it could be, and was, satisfied by actions occurring after the date the arbitration was instituted. The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes[103] has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken).

145. As held by the ICJ,

> "it is not apparent why the arguments based on the sound administration of justice, which underpin the *Mavrommatis* case jurisprudence, cannot also have a bearing in a case such as the present one. It would not be in the interest of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. It is preferable except in special circumstances, to conclude that the condition has, from that point on, been fully met".[104]

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[99] The tribunal in *Teinver v. Argentina*, referring to the domestic litigation and the arbitration as having the same subject matter, states: "the goal of both suits is to make the Claimants… whole for the economic loss suffered as a result of the nationalization" (cit., para. 132).
[100] *Supra*, para. 131.
[101] As in the case of *Burlington v. Ecuador*, fn. 85.
[102] As in the case of *Wintershall v. Argentina*, leading to the dismissal of the case for lack of jurisdiction.
[103] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium*), Judgment, 14 February 2002, ICJ Reports 2002, para. 26: "The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events".
[104] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), Preliminary Objections, Judgment, 18 November 2008, ICJ Reports 2008, pp. 441-442, para. 87.

In the *Mavrommatis* case the Permanent Court of International Justice had found that jurisdictional requirements which were not satisfied at the time of instituting legal proceedings could be met subsequently. The Court stated:

"Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications". [105]

The Tribunal agrees with and accepts this reasoning. It also notes that the same reasoning applies regardless how Article 10(2)'s domestic litigation requirement is characterized. Whether regarded as jurisdictional, admissibility or procedural, the considerations identified in the *Mavrommatis* case apply fully.

146. During oral argument, in response to a question from the Tribunal, Counsel for the Claimants accepted that had the TCA given a decision (either way) within 18 months, the proceedings before the Tribunal would have been (or, if they had already started, would have become) inadmissible.[106] The Tribunal agrees. A party commencing proceedings prior to the date set out in a domestic litigation requirement of a BIT takes the risk of its claims failing if the condition in question is satisfied within the time limit laid down. This gives domestic courts the opportunity to adjudge the matter if they can do so in the time available. But that did not happen here, where no judgment was rendered by the TCA within the 18 month time period.

147. Nor does the Tribunal have to decide between the position taken by the International Court in *Croatia v Serbia* and the position taken by Judge Abraham, dissenting, in that case. In *Croatia v Serbia*, Judge Abraham expressed the view that the *Mavrommatis* principle cannot be applied if it is no longer possible to recommence the proceedings (because of supervening changes in jurisdictional provisions, for example) at the time when the decision

[105] *Mavrommatis Palestine Concession* case, Judgment No. 2, 30 August 1924, PCIJ, Series A, No. 2, p. 34.
[106] Transcript, Day Two, p. 463, lines 14-19.

is taken.[107] In the present case, the BIT remains in force and it would be perfectly possible for the Claimants to commence these same proceedings on the day after a decision by this Tribunal is handed down, a situation where dismissal of the Claimants' claims would merely multiply costs and procedures to no use.

148. Relying on the ICJ's jurisprudence, the Tribunal comes to the same conclusion as the tribunal in *Teinver v. Argentina*, namely that "the core objective of this requirement, to give local courts the opportunity to consider the disputed matters, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources".[108] That is true however Article 10(2)'s domestic litigation requirement is characterized. In view of the filing by the Claimants of domestic proceedings before the Uruguayan court prior to the initiation of this proceeding, the Claimants have satisfied the terms and objective of the domestic litigation requirement under Article 10(2) of the BIT. This is the case even where the Uruguayan court's decisions were rendered after the expiry of the 18-month period set by Article 10(2), but before the Tribunal rules on its jurisdiction.

149. In the light of all the foregoing, the Tribunal dismisses the First Objection to its jurisdiction.

150. In view of the above conclusion, there is no need to examine whether based on the most favored nation clause in Article 3(2) of the BIT the Claimants could have relied on the allegedly more favorable dispute resolution clause contained in treaties concluded by Uruguay with third States in order to dispense with the 18-month domestic litigation requirement.

B. Second Objection: Article 2 of the BIT Excludes Public Health Measures from the Scope of the Protections Afforded Investors.

[107] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, 18 November 2008, ICJ Reports 2008, p. 540, para. 51.
[108] *Teinver v. Argentina*, cit., para. 135.

1. Arguments of the Respondent

151. According to the Respondent, Article 2 of the BIT excludes the measures the Claimants attack from the scope of the BIT's protection to investors and their investments. Article 2(1) states in relevant part:

> "The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors".

152. The Respondent argues that the emphatic affirmation of Uruguay's and Switzerland's mutual sovereign rights to effect regulations in the interest of public health can only be understood as excluding "economic activities for reasons of … public health…" from the scope of the BIT and thus the Tribunal's jurisdiction. Article 2 must be interpreted so as to give it a meaning rather than to deprive it of meaning and the only plausible meaning is that it was intended to exclude public health measures from the scope of the BIT protection.

153. The provision in question comes after a prior sentence of Article 2 expressing the Parties' reciprocal obligations to promote and admit investments. This structure of the clause can only mean that the Parties' obligation to promote and admit investments gives way to each State's right to prohibit certain activities for the listed reasons. Since this categorical affirmation of the Parties' "right" not to permit certain economic activities comes before any of the investor's rights are listed, this means that the first enunciated right modifies the latter's enunciated right. Thus, Article 2 precludes the existence of a "dispute" within the meaning of the BIT when a Contracting State has acted for the reasons stated by that Article.

154. There is a critical difference between the obligation to promote and that to admit investments, which is the fact that the obligation to promote applies throughout the life-cycle of an investment, covering also investments already made. Therefore, contrary to Claimants' contention, Article 2 is not limited to the pre-admission phase, the obligation to promote extending beyond this phase. Abal was itself a beneficiary of Uruguay' s National Interests Promotion

and Protection Law 16,906 of 1997 being granted a "generous package" of tax exemptions and credits.

155. Under the Uruguayan Constitution, public health is a primordial right and supreme good ("*bien supremo*"), meaning that it is not negotiable. As a *bien supremo*, public health matters are above other sovereign powers and obligations. In view of the supreme duty owed its people in matters of public health, Uruguay could not agree to bestow rights to foreign investors conflicting with this duty, thus carving out from the BIT's protection any actions it might need to take for reasons of public health, even if they restrict investors' economic rights.

156. Article 2 of the BIT is different from other BITs provisions regarding "non-precluded measures". The latter only make clear that the treaty applies but that nothing elsewhere in the treaty should be read to hinder necessary measures from being taken. On the contrary, Article 2 leaves the exercise of the State's right to prohibit certain economic activities for reasons of public health as entirely outside the scope of the BIT or its dispute resolution mechanism. Further, Article 2 does not require that the excluded measures be "necessary" for the designated policy goal, in contrast with precluded measures. This is confirmed by the ICJ's reasoning in the *Nicaragua v. United States* case, holding that since Article XXI of the 1956 Treaty between the two States speaks simply of "necessary" measures it did not remove the interpretation and application of that Article from the Court's jurisdiction to determine whether the measures taken by a State fall within the exception.[109]

157. The three measures challenged by the Claimants were taken by Uruguay for reasons of public health, against a background of persistent tobacco control efforts dating back to the 1970s. Such efforts intensified in the 2000s due to the staggering impact of tobacco consumption on public health. Despite educational and regulatory efforts, between 1998 and 2005 the percentage of smokers among adult population remained steady at 32% while particularly alarming was the percentage of adolescents who smoked, 23%, one of the

[109] Memorial, paras 123-126.

highest rates in Latin America. These high rates of tobacco consumption among the population were rightly considered to constitute a public health crisis.

158. To better educate the public, especially adolescents, about the consequences of smoking, the Government adopted the three measures challenged by the Claimants. Ordinance 514, adopted on 18 August 2008 and in force as of 14 February 2009, required, as the first measure, all cigarette packages to include graphic pictograms illustrating the effects of smoking on human health, in addition to textual warnings. As set forth in the Preamble, Ordinance 514 was promulgated because "it is the duty of the State to legislate in all matters regarding public health and hygiene", consistent with Article 44 of the Constitution, the Organic Law on Public Health of 12 January 1934 and the World Health Organization Framework Convention on Tobacco Control ratified on 16 July 2004. The public health reasons for these measures are evident.

159. The other measure required by Ordinance 514, criticized by the Claimants, is a single presentation, forbidding descriptive elements creating the false impression that a certain tobacco product is less harmful than another.

160. As found by a United States federal court in *United States v. Philip Morris*,[110] tobacco companies knew that the risks of lung cancer, other debilitating diseases and premature death were just as high for smokers of "light" and "low tar" cigarettes than for smokers of "regulars". The Court sanctioned the cigarette companies, including Philip Morris, for their deceptive "light" descriptors, that remained banned.

161. That is what more than 70 States proceeded to do by banning for reasons of public health the sale of tobacco products labeled as "light", "low tar", "mild" or other similarly deceptive descriptors. Article 3 of Ordinance 514 implements Law 18,256 of 2008, reiterating the prohibition on deceptive terms and other descriptive elements, such as colors, numbers or letters creating a false

[110] Memorial, para. 141.

impression that one tobacco product is less harmful than another. There can be no doubt that it was adopted for reasons of public health.

162. The third measure challenged by the Claimants is the requirement of Decree 287/009, enacted in June 2009, that the size of mandatory health warnings on tobacco products be increased from 50% to 80% of the front and back of each pack. The public health reasons for the adoption of Decree 287/009 are evident, the Preamble to the Decree citing the same public health justification as the Preamble to Ordinance 514, invoking Article 11 of the WHO Framework Convention on Tobacco Control requiring, *inter alia*, that warnings and messages "be 50% or more of the principal display areas…". Decree 287/009 was issued six months after the unanimous adoption of the Framework Convention Guidelines for Article 11, establishing that health warning and messages should cover "as much of the principal display area as possible".

2. Arguments of the Claimants

163. According to the Claimants, Article 2 of the BIT is not applicable because it covers admission and does not affect investments already admitted, including those made by the Claimants. Article 2 states:

> Promotion, admission
> (1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its law. The Contracting Parties recognize each other's right not to allow economic activities for reason of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.
> (2) When a Contracting Party shall have admitted, according to its law, an investment on its territory, it shall grant the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance. Each contracting party shall, whenever needed, endeavor to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality.

164. As is clear from the title and its plain language, this provision applies only prior to the time an investment is being made, not thereafter. Uruguay's reading of the second sentence of Article 2(1) to extend the scope of the

provision to the post-establishment stage of an investment would lead to absurd results. The host State could, after an investment has been made, declare it reserved to its own investors and throw out all existing investors of the other Party in the sector. The terms "admit" (used in the first sentence) and "allow" (used in the second sentence) are synonymous. They both relate to the same issue. Thus, Article 2(1) pertains to the admission of an investment while Article 2(2) relates to the post-admission phase.

165. Uruguay has welcomed and admitted the Claimants' investment, granting Abal a generous package of tax exemptions and credits in furtherance of Abal's plans to make a capital investment to upgrade the machinery in the local factory. None of the measures at issue in this dispute pertains to the admission of investments. Article 2 is inapplicable in this context. Once the investment has been admitted, Article 2 does not exempt the State from any obligation pertaining to that investment. Article 2 contains no exceptions to the BIT's post-admission investor rights, therefore it does not foreclose the Tribunal's jurisdiction over the Claimants' claims that the measures at issue violate Uruguay's obligations under the BIT.

166. The Claimants do not contest Uruguay's right to adopt non-discriminatory, legitimate regulation to protect public health. Whether the measures at issue are legitimate public health measures that comply with the BIT is a matter for the merits, not a matter of jurisdiction. The fact that Uruguay's Constitution obliges the Government to adopt public health measures has no bearing on whether the Respondent has breached its obligations under the BIT. As stated in Article 3 of the ILC Articles on State Responsibility, the characterization of an act of State as internationally wrongful is governed by international law, such characterization being not affected by the same act being lawful under domestic law.

3. Findings of the Tribunal

167. It is the Respondent's contention that measures taken by the State for public health purposes fall outside the scope of the BIT. It relies in that regard on Article 2(1) of the BIT which states:

> Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its law. The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.

As indicated by its title, "Promotion, admission",[111] Article 2 deals with two different concepts, promotion and admission of investments.

168. Consistent with the Preamble of the BIT, "promotion" of investments refers to the Contracting States' duty to create the conditions for the flowing of investments by nationals of one State into the territory of the other State. To that effect, the Preamble stresses the Contracting States' intent "to create favourable conditions for capital investments in both States" while at the same time "Recognizing the need to protect investments by nationals and companies of both States with the aim to foster the economic prosperity of both States". Accordingly, "promotion" is a continuing duty that the Contracting States have accepted in order to foster investments both by creating favourable conditions for their flowing into each other's territory and, once investments have been made, by ensuring their protection and by granting the necessary permits and authorizations concerning the activities to be carried out by investors.[112]

169. As the ordinary meaning of the word indicates, "admission" is the act by which each State, having verified the conformity of the proposed investments with internal legislation,[109] allows them to be made in its territory, thus accepting that they are protected investments for purposes of the BIT. Thus, Article 2(2) relates to the post-admission stage, as made clear by its initial words: "When a Contracting Party shall have admitted, according to its law, an investment on its territory,…" .

[111] Article 2 is reproduced in its entirety *supra*, para. 163.
[112] Article 2(2) deals with this continuing promotion of the investments once they have been admitted.

170. The reference in Article 2(1) to "public health" as one of the reasons by which economic activities may not be allowed by the host State points to the stage of admission of the investments, therefore to the pre-establishment stage, as clearly shown by the context. The reference in question is made immediately after providing for each State's duty to admit investments, as an exception to such duty for reasons, including of public health, characterized by the importance of the public interest involved.[113] Admission and acceptance, including the exception for reasons of public health, refer both to the pre-establishment stage. The Respondent accepts that the obligation to admit investments is limited to the pre-establishment stage[114] and that the right to admit is the same as the right to regulate whether to "allow [investments] to enter".[115]

171. It is not true that, as asserted by the Respondent, "The only plausible meaning that can be given to the language of this Article is that it was intended to exclude public health measures from the scope of the protections the BIT affords investors".[116] Uruguay might exclude the admission of investments under the BIT for reasons of public health in two different ways, either (i) by providing for such exclusion in its internal legislation so that a proposed investments would not be admitted as being not "in accordance with its law" under Article 2(1), or (ii) by availing itself of the possibility under Article 25(4) of the ICSID Convention to notify the Centre that it would not consider submitting to the jurisdiction of the Centre disputes relating to public health.[117] In no other case could any such exclusion apply to investments that have already been admitted under the BIT, which is the case so far as the Claimants are concerned.

[113] Article 2(1) states, in pertinent part, that "The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors".

[114] Reply, para. 185: "Among the critical differences between the obligations to promote and to admit investments is the fact that the obligation to promote investments applies throughout the life-cycle of an investment".

[115] In the Memorial, para. 109, the Respondent accepts that the ordinary meaning of "to admit" is "to allow to enter".

[116] Memorial, para. 108.

[117] ICSID Convention, Article 25(4) provides:

"Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or **at any time thereafter**, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)" (emphasis added by the Tribunal).

172. As far as is known to the Tribunal, neither of the above steps has been taken until now by the Respondent in pursuance of its objective to exclude investments in tobacco activities from the scope of the BIT. To the contrary, the investments made by the Claimants were encouraged by the Respondent by the granting in 2002 of an exemption "from all surtaxes" in connection with the importation of certain types of cigarette manufacturing equipment and of a credit for the Value-Added Tax included in the acquisition of materials used for works contemplated by the project submitted by Abal on behalf of the Claimants.[118]

173. The Resolution of the President of the Republic, after stating that the project submitted by ABAL HNOS "complies with Article 11 of Law 16,906 of January 7, 1998," resolves "To declare that the activity of the investment project submitted by ABAL HNOS S.A. is hereby promoted, with respect to the manufacturing, marketing and distribution of cigarettes and tobacco". The Declaration confirms, on the one hand, that, as distinct from the "admission" of investments, "promotion" is not limited to the pre-establishment stage, and, on the other hand, that, still in 2002, the Respondent, despite intensified efforts allegedly made already at the time to fight tobacco consumption,[119] encouraged the Claimants' tobacco activities by promoting the related investments.

174. The Tribunal concludes that Article 2(1) does not create an exception to the BIT's substantive obligations with respect to investments that have already been admitted in accordance with Uruguayan law. It is true, as the Claimants accept, that this does not prevent Uruguay, in the exercise of its sovereign power, from regulating harmful products in order to protect public health after investments in the field have been admitted. But Article 2(1) is concerned solely with admission, although it is subject to the subsequent regulation of investments in ways consistent with the BIT. Whether the regulations here are in conformity with the BIT is thus an issue for the merits.

[118] Declaration of Promoted Activity for Investment Project of ABAL HNOS dated 14 March 2002, paras 1-3 (C-029).
[119] Memorial, para. 127; *supra*, para. 157.

175. In the light of the foregoing considerations, the Second Objection to the Tribunal's jurisdiction is dismissed.

C. Third Objection: The Claimants' Activities in Uruguay are not an "Investment" Within the Meaning of Article 25 of the ICSID Convention

1. Arguments of the Respondent

176. According to the Respondent, in the absence of a definition of "investment" in the ICSID Convention, jurisprudence and legal authority have accepted that the term has an objective meaning which must be satisfied for the purpose of ICSID jurisdiction. This meaning sets the limits within which the States' bilateral definition under a treaty must be interpreted.

177. The Claimants' interests in Uruguay do not constitute a protected investment since not only do they fail to make any contribution to the Country's development, but they actively prevent and interfere with such development. The Claimants' concern about *post-hoc* evaluation is at odds with other ICSID tribunals that have examined investors' contributions to the economic development of host States with little difficulty. The huge costs the Claimants' activities impose on Uruguay are obvious to any reasonable observer.

178. Under the "*Salini* test", one of the objective criteria to be satisfied is that the economic activity must contribute positively and significantly to the economic development of the host State. Economic development is at the core of the foreign investment regime and is the paramount objective of the ICSID Convention, as shown also by its Preamble.

179. The *Salini* interpretation has been confirmed by subsequent tribunals and scholarly commentary. The requirement of contribution to the economic development of the host State is emphasized by the Preamble of the ICSID Convention which refers to "the need for international cooperation for economic development and the role of private international investment therein". Reference to the "economic development process" and to the fact that

an adequate flow of capital may "substantially contribute to the development of the country" as the object and purpose of the BIT is made by its Preamble. An indication of the significant nature of the contribution to the host State's economic development is whether the activity serves the public interest.

180. The *Salini* test logically requires that if the investor's activities or interests create an overall negative effect on economic development, such as the Claimants' interests, this would not meet the definition of investments protected by the ICSID Convention. The Claimants' activities have harmed and continue to harm Uruguay's economic development, still less do they serve the State's public interest.

181. The negative impact of the consumption of tobacco products on the State's development has been confirmed by authoritative specialized international institutions, including the OECD, the World Bank and the WHO. In Uruguay, more than 5,000 people die each year from smoking-related illness. The estimated direct health costs of smokers in Uruguay amount approximately to US$ 150 million per year.

182. The "net contributions" to the economic development made by the Claimants' interests and activities in Uruguay has been overwhelmingly negative. Based on the Claimants' own inflated estimate, their combined contributions total around US $ 29 million per year, more than offset just by the direct health care costs of US $ 30 million (a small share of Uruguay total costs imposed by the Claimants' tobacco products). For these reasons, the Claimants' interests and activities are not "investments" in the sense of the ICSID Convention. The jurisdiction of the Centre may not extend to disputes arising in connection with such activities and interests.

2. Arguments of the Claimants

183. According to the Claimants, Uruguay's assertion that the Claimants do not own an "investment" in Uruguay is factually and legally incorrect. The Claimants have several investments falling within the definition of investment under

Article 1(2) of the BIT which are covered by Article 25 of the ICSID Convention. Specifically, the Claimants' investments include manufacturing facilities (Article 1(2)(a)), shares in Abal (Article 1(2)(b)), rights to royalty payments (Article 1(2)(c)) and trademarks (Article 1(2)(d)).

184. The ICSID Convention does not define "investment". The fixed definition that Uruguay attempts to impose is contrary to the intention of the drafters of the ICSID Convention to provide the greatest flexibility to the scope of the Contracting States' consent to arbitration. Even if there may be an outer limit to what can be considered an investment under the ICSID Convention, this does not necessitate the mandatory application of tribunal-created criteria as jurisdictional pre-requisites. Uruguay's argument that the Claimants' activities in Uruguay are not "investments" rests entirely on a controversial, tribunal-created criterion for identifying an investment that has no basis in the plain meaning of the term either in the BIT or in the ICSID Convention.

185. The *Salini* criteria are not jurisdictional requirements. Most of the tribunals that have examined these criteria have used them as typical characteristics rather than as jurisdictional requirements. Specifically, the criterion of the contribution to the economic development of the host State is inappropriate because it has no basis in the BIT, leads to a troubling *post hoc* analysis of the investment and is highly subjective. In any case, the Claimants' investments have as a matter of fact contributed to the economic development of Uruguay.

186. It is in keeping with the plain meaning of Article 25 and the purpose of the ICSID Convention to defer to the State parties' intent, as expressed in the relevant treaty, as to what constitutes an investment. It is reasonable for the Tribunal in this case to defer to the Contracting Parties' definition of investment as set forth in the BIT.

187. As explained by the tribunal in *Biwater Gauff v. Tanzania*, the *Salini* "criteria are not fixed or mandatory as a matter of law".[120] They are problematic to the extent they provide for a fixed and inflexible test which may contradict

[120] *Biwater Sauff v. Tanzania*, Award, 24 July 2008, paras 323 ff.

individual agreements, as expressed in bilateral investment treaties. Other decisions have declined to apply the *Salini* criteria, holding that they should not create a limit which neither the ICSID Convention nor the State parties to a specific treaty intended to create.[121] These criteria should not play a role in the Tribunal's analysis of whether an investment exists, much less to serve as a jurisdictional requirement.

188. In particular, the contribution-to-development criterion requires a *post-hoc* examination of the economic, financial and/or policy assessment that prompted the Claimants' activities which, in addition to being difficult to make, will render uncertain whether the investment is protected until the analysis has been performed. Further, the criterion introduces elements of subjective judgment on the part of the arbitral tribunal, transforming it into a policy maker. If jurisdiction under the ICSID Convention became dependent on such retrospective analysis, the unpredictability of ICSID availability to settle given disputes would increase.

189. The contribution-to-development criterion is in any event based on a misunderstanding of the Preamble of the ICSID Convention. The reference to the "need for international cooperation for economic development and the role of private investment therein" is not evidence that contribution to economic development is a required criterion of investment, as Uruguay claims. The Preamble should be read as describing how the ICSID Convention will foster economic development by achieving and maintaining a flow of foreign investment. Further, should the Tribunal perform the *Salini* analysis using the criteria as part of a flexible, pragmatic approach, it will find that the Claimants' investments have in fact satisfied those criteria.

190. Uruguay does not contest that the Claimants have invested in Uruguayan manufacturing facilities, shares in Abal, rights to royalty payments and trademarks, requiring substantial technical, financial and human resources contribution. Having maintained operations in Uruguay for more than 30 years,

[121] *Phoenix v. Czech Republic*, Award, 15 April 2009, para. 85; *Malaysian Historical Salvors v. Malaysia*, Annulment Decision, 16 April 2009, paras 76-79; *Saba Fakes v. Turkey*, Award, 14 July 2010, para. 111; *Alpha v. Ukraine*, Award, 8 November 2010, para. 312.

the Claimants easily satisfy the *Salini* criterion of duration of the investment. This is not contested by Uruguay. The Claimants took a commercial risk without any guarantee of payment by their customers.

191. In any event, the Claimants' investments have made a significant contribution to Uruguay's economy in terms of revenues earned in Uruguay from sales of the Claimants tobacco products, taxes paid to the Government and workers employed in Uruguay and their salaries. From 2005 to 2010, the Claimants paid over US$ 148 million in taxes to the Uruguayan Government and directly employed an average of 99 people in Uruguay, paying salaries and social security contributions of US $ 3.7 million each year.

192. Uruguay's argument that the Claimants' activities do not contribute to the State's economic development is inconsistent with Uruguay's conduct of active encouragement to the Claimants to continue to invest over the past 30 years. Despite the knowledge of the alleged negative effects that the Respondent lists, it actually encouraged the Claimants to expand its operations by granting Abal a generous package of tax exemptions and credits in furtherance of Abal's plan to make capital investment in the Uruguayan factory to upgrade the machinery. The Respondent's allegations shall be addressed at the appropriate stage in these proceedings.

3. Findings of the Tribunal

193. Inasmuch as this Tribunal is established under the ICSID Convention, its competence and the Centre's jurisdiction are established by the reference in Article 25(1) to "any legal dispute arising directly out of an investment between a Contracting State … and a national of another Contracting State". The concept of "investment" is therefore central to the Centre's jurisdiction and the Tribunal's competence "*ratione materiae*".

194. The Claimants' investments in Uruguay, as described by them,[122] fall within the definition of the term under Article 1 of the BIT. The Respondent has not objected to the Claimants' description of their investments but has instead asserted that such investments do not satisfy one of the constitutive elements of the term.

195. The Respondent contends that the term "investment" under the ICSID Convention has an objective meaning which must be satisfied for the purposes of the ICSID jurisdiction. Under the *Salini* test, to be protected, an investment must contribute to the economic development of the host State.[123] Since the Claimants' activities assertedly impose a huge cost on Uruguay, they do not satisfy the above condition. Accordingly, the Centre's jurisdiction may not extend to disputes arising in connection with the Claimants' activities and interests.

196. It is generally accepted that the term "investment" under Article 25 of the ICSID Convention was left undefined so as to leave flexibility in its application. The fact that the term is not defined does not mean that it is not to be interpreted based on the criteria set by Article 31 of the VCLT[124]. The controversy regarding the term "investment" shown by various arbitral decisions and doctrinal writings reveals that the meaning of the term is far from settled.

197. According to the 1965 Report of the Executive Directors on the ICSID Convention, "[n]o attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))".[125] To understand this statement, it must be recalled that the question of whether and how to define the concept of "investment" was one

[122] *Supra*, para. 183.
[123] See, *infra*, para. 207.
[124] *Supra*, para. 106.
[125] Report of the Executive Directors, *supra*, fn.1, nr. 27.

of the most contentious issues in the negotiation process leading to the adoption of the ICSID Convention.

198. The compromise eventually adopted took account both of the concern expressed by capital exporting countries by providing a non-definition approach, implying weak limits to the jurisdiction *ratione materiae* of the Centre, and the concern expressed by capital importing countries by permitting Contracting States "to notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre" according to Article 25(4).[126]

199. A further aspect to be considered when interpreting the term "investment" under Article 25(1) of the ICSID Convention is its interplay with the definition of "investment" under the BIT.[127] The consent of the Contracting Parties under the BIT to the scope of "investment" is of relevance when establishing the meaning of the term under Article 25(1) of the ICSID Convention, although such Parties do not have an unfettered discretion to go beyond what have been called the "outer limits" set by the ICSID Convention.[128]

200. To establish these "outer limits", the concept of "investment" under Article 25(1) must be interpreted by reference first of all to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The notion covers a wide range of economic operations confirming the broad scope of its application, subject to the possibility for States to restrict the jurisdiction *ratione materiae* by limiting their consent either in their investment legislation or in the applicable treaty.

[126] The background of the adoption of Article 25(1) of the ICSID Convention is described in the *Ambiente Ufficio S.p.A. and Others and the Argentine Republic* Decision on Jurisdiction, 8 February 2013, paras 448-452.
[127] Para. 22, *supra*, reproduces Article 1(2) of the BIT defining the term "investment".
[128] Broches, The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, 5 Columbia Journal of Transnational Law, 1966, para. 268: "Presumably, the parties' agreement that a dispute is "an investment dispute" will be given a great weight in any determination of the Centre's jurisdiction, **although it would not be controlling**" (emphasis added by the Tribunal). Reference to the "outer-limits" of the notion of investment under the ICSID Convention is made by Professor Abi-Saab in his Dissenting Opinion dated October 28, 2011 in the *Abaclat v. Argentin*a Decision on Jurisdiction, 4 August 4, 2011 (at para. 46).

201. The reference to the object and purpose of the treaty does not make a significant contribution to the meaning and scope of the term "investment". The usual reference to the Preamble of the ICSID Convention emphasizing "the need for international cooperation for economic development and the role of private international investment therein" may reasonably be understood in different ways, underlining either the contribution to the host State's development or the role of the private investment depending on individual cases. The Preamble therefore does not materially advance analysis. Likewise, the reference in the Preamble of the BIT to the "important… role of foreign investment in the economic development process" appears too general to permit the drawing of definitive conclusions regarding the need for the investment to contribute to the host State's economic development.

202. The foregoing analysis leads the Tribunal to conclude that the term "investment" under Article 25(1) of the ICSID Convention, when interpreted according to its ordinary meaning in its context and in the light of the object and purpose of the Convention, is to be given a broad meaning.

203. This meaning would in any case be subject to the outer limits of an economic activity that would not encompass within the notion of investment, and therefore the Centre's jurisdiction, a single commercial transaction, such as the mere delivery of goods against payment of the price. Within such expansive limits, however, it is for the States' agreement, as reflected in the present case by the BIT, to define the scope of the "investment" that they accept to protect by their treaty. No such limits have been laid down by the definition of "investment" in Article 1 or otherwise in the BIT.

204. Whether the so-called *Salini* test relied upon by the Respondent has any relevance in the interpretation of the concept of "investment" under Article 25(1) of the ICSID Convention is very doubtful. The test finds its source in a decision on jurisdiction issued by an ICSID tribunal in the case *Salini v. Morocco*.[129] Assuming arbitral decisions and awards are "judicial decisions" within the meaning of Article 38(d) of the Statute of the ICJ, which is far from

[129] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, Decision on Jurisdiction, 23 July 2009, para. 52.

being commonly accepted, this would be on condition that they have attained a sufficient degree of publicity and are part of a "*jurisprudence constante*". As shown hereafter, there is no such a "*jurisprudence constante*" with respect to acceptance of the *Salini* test.

205. As is known, the *Salini* test includes the following elements, as described by the tribunal in *Salini v. Morocco*:

> "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition". [130]

206. The *Salini* test has received varied applications by investment treaty tribunals and doctrinal writings.[131] In the Tribunal's view, the four constitutive elements of the *Salini* list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not "a set of mandatory legal requirements".[132] As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case.

207. Of its constitutive elements, the most controversial one has been held by some tribunals to be the contribution to the economic development of the host State due to the subjective character of this element and the resulting difficulty to ascertain its presence in a given investment.[133] In order to determine whether an investment, at the time it is made, is capable of contributing to the economic development of the host State a tribunal would be required to conduct an *ex post facto* analysis of a number of elements that, considering also the time

[130] *Salini v. Morocco*, cit., para. 52.
[131] The Parties' written submissions analyze arbitral decisions and scholarly writings favouring the application of this particular test (Memorial, paras 160-166; Reply, paras 227-253) and those criticizing it (Counter-memorial, paras 196-198; Rejoinder, paras 250-272).
[132] Schreuer, The ICSID Convention. A Commentary, Art. 25, para. 171.
[133] The tribunal in *Phoenix v. Czech Republic*, Award, 15 April 2009, referring to the contribution to the development of the host State, states that it is "impossible to ascertain [it] – the more so as there are highly diverging views on what constitutes development" (para. 85).

elapsed, "can generate a wide spectrum of reasonable opinions".[134] As explained by another tribunal, "… the criterion invites a tribunal to engage in a post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant's activities. It would not be appropriate for such a form of second-guessing to drive a tribunal's jurisdictional analysis".[135]

208. The Tribunal agrees in this regard with what was stated by the tribunal in *Pey Casado v. Chile*:

> "An investment could prove useful or not for a country without losing its quality [as an investment]. It is true that the Preamble to the ICSID Convention mentions contribution to the economic development of the host State. However, this reference is presented as a consequence and not as a condition of the investment: by protecting investments, the Convention facilitates the development of the host State. This does not mean that the development of the host State becomes a constitutive element of the concept of investment". [136]

209. The Respondent appears to agree on a more flexible approach to the concept of investment when stating: "… whether one views the *Salini* criteria as mandatory jurisdictional requirements or instead adopts the "typical characteristic approach" is, in the circumstances of the case, a distinction without a difference".[137] In the Tribunal's view, the purposes of the ICSID Convention and the BIT, and the weight of authority, support the more flexible approach acknowledged by the Respondent. Applying that analysis, however, the Tribunal sees no basis for concluding that the Claimants' long-term, substantial activities in Uruguay do not qualify as "investments" under the BIT and the ICSID Convention.

210. In the light of the above considerations, the Tribunal dismisses the Third Objection to its Jurisdiction.

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[134] *Deutsche Bank AG v. Democratic Socialistic Republic of Sri Lanka*, Award, 31 October 2012, para. 306.
[135] *Alpha v. Ukraine*, cit., para. 312.
[136] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, Award, 8 May 2008, para. 232. The same conclusion was reached by the tribunal in *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43.
[137] Reply, para. 253.

V. THE CLAIMANTS' DENIAL OF JUSTICE CLAIM

1. Arguments of the Claimants

211. In the Counter-memorial the Claimants have indicated the intent to include in their Memorial on the Merits an additional claim that the TCA's decision of 29 September 2011 rejecting the request for annulment of Ordinance 514 amounts to a denial of justice in breach of the guarantee of fair and equitable treatment under Article 3 of the BIT.[138] In the Claimants' view, the TCA's decision was grossly unjust and denied their right to due process. They add that the denial of justice claim cannot be subject to the 18-month local litigation requirement since the TCA's decisions are final and not subject to appeal so that there is no local forum before which to bring such a claim.[139]

212. In the Rejoinder,[140] the Claimants further explained that the TCA's decision addressed a different plaintiff, British American Tobacco. The latter was not party to Abal's annulment action and had presented an entirely different set of facts and arguments. According to the TCA, BAT had not proven the ownership and the trademarks that, on the contrary, Abal had proven in its case. Requested for a clarification, the TCA dismissed the objections asserting that "the so-called contradictions are not important nor do they justify the revision of the decision".[141]

213. The denial of justice claim was addressed by the Claimants at the hearing of 5 February 2013 based on arguments that had been previously submitted.[142] The Claimants added that "Seeking redress in Uruguay's domestic courts would not only be futile but impossible because the TCA decisions are final and unappealable" and that "There is nothing more that the Claimants can do to resolve their denial of justice claim in Uruguayan courts", so that direct access to arbitration should be allowed "to resolve this dispute".[143] Following a

[138] Counter-memorial, fn. 46.
[139] *Ibidem.*
[140] Rejoinder, para. 213.
[141] The TCA Decision 801 Rejecting Abal's Appeal for Clarification, 29 September 2011 (C-056).
[142] Transcript, Day One, pages 218-221.
[143] *Ibid*. page 221, lines 17-24.

question from the Tribunal, the Claimants indicated that resorting to the six-month notification requirement would also be futile since "the executive would not be able to seek a revision of that decision of the TCA".[144]

214. In answer to another question by the Tribunal, the Claimants pointed out that had they to submit the claim to a court of "one and only instance" using Law 16,110, they "would have to appear before the TCA a third time and ask them to adjudicate a claim that the TCA itself committed a denial of justice while the TCA jurisdiction is limited to claims for annulment of administrative acts and nothing else".[145]

215. Regarding whether they had to go to a domestic court with the denial of justice claim under Law 16,110, the Claimants referred also to the passage of the Senate record of the discussion when Law 16,110 was adopted recording Dr. Eduardo Jimenez de Aréchaga's letter to the Chairman of the International Affairs Committee. They summarized the content of said letter as follows:

> "What he is saying here is in cases of denial of justice or delay that is equivalent to denial of justice, this principle in no way means that the foreign investor cannot go to arbitration. In our submission, law 16,110, if you look at the drafting history in the Senate records, the statement of Dr. Eduardo Jimenez de Aréchaga does not preclude the submission to arbitration of a denial of justice claim. It does not require that the denial of justice claim be submitted again to domestic litigation in Uruguay."[146]

216. Requested to state their position as to whether the denial of justice claim is to be qualified as an additional claim under Article 46 of the ICSID Convention, the Claimants confirmed that the claim in question "does squarely fall within the ambit of Article 46 because it arises directly out of the subject matter of the dispute".[147]

2. Arguments of the Respondent

[144] Transcript, Day Two, page 483, lines 2-8.
[145] *Ibid.*, page 480, lines 13-20, 25; page 481, lines 1-2.
[146] *Ibid.*, page 490, lines 7-25; page 492, lines 3-14
[147] *Ibid.*, page 484, lines 3-7, 13-16.

217. The Respondent asserts that in advancing this claim the Claimants exalt form over substance since "a number of tobacco companies, including Abal, all challenged Uruguay's actions as a matter of domestic law on identical grounds at approximately the same time", so that "the TCA's reasons for rejecting their challenge were equally applicable to all of them".[148]

218. In its reply at the hearing, the Respondent noted, without however committing the Government of Uruguay, as it indicated, that regarding the alleged futility of addressing the denial of justice claim to the Uruguayan executive, even if the latter could not revoke a decision by the TCA it would not be excluded that if the Government were convinced through friendly negotiations that its position were similar to that of the Claimants, "it is very likely that support of the Government of Uruguay could be influential with whichever Tribunal were hearing the matter under Law 16,110".[149]

219. Regarding the domestic litigation, Respondent commented at the hearing as follows on the futility argument raised by the Claimants:

> " [i]n the event of going before a Tribunal under law 16,110, in the event there is a negative decision in regard to their allegation or claim under the treaty for denial of justice, then with an unfavourable decision they would also have the right to arbitrate. That is the interpretation of the Government of Uruguay. So there is no futility here".[150]

220. At the hearing, the Respondent agreed that the Claimants' denial of justice claim would come within Article 46 of the ICSID Convention.[151]

3. Findings of the Tribunal

221. The Parties agree that the Claimants' denial of justice claim falls within the ambit of Article 46 of the ICSID Convention[152]. Article 46 states:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within

[148] Reply, para. 72.
[149] Transcript, Day Two, page 487, lines 24-25; page 488, lines 1-8.
[150] *Ibid*., page 489, lines 1-8.
[151] *Ibid.*, page 486, lines 17-19.
[152] This agreement is recorded in the hearing transcript, *supra*, paras 215 and 218.

the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

222. Article 46 must be read in conjunction with Rule 40 of the Arbitration Rules, which states as follows:

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counterclaim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
> (3) The Tribunal shall fix a time limit within which the party against which ancillary claim is presented may file its observations thereon.

223. The Parties' agreement regarding the applicability of Article 46 of the ICSID Convention and, as a result, of Rule 40 of the Arbitration Rules does not exempt the Tribunal from determining whether the conditions set by these provisions are met.

224. To meet these conditions the Claimants' claim must:

a) be presented not later than in the reply or, if so authorized by the Tribunal upon justification by the party presenting the claim and consideration of the other party's objections, if any, at a later stage;

b) arise directly out of the subject-matter of the dispute; and

c) be within the scope of the consent of the parties and otherwise within the jurisdiction of the Centre.

225. Regarding the timely presentation of the claim, the Tribunal notes that it was mentioned for the first time in the Claimants' Counter-memorial,[153] therefore in the first written submission following the RFA. No objections have been raised by the Respondent regarding satisfaction by the Claimants of this condition.

226. There is no doubt that the denial of justice claim arises directly out of the same subject matter of the dispute brought before the TCA by Abal's request for

[153] *Supra*, para. 211.

annulment of one of the measures challenged by the Claimants, Ordinance 514. The TCA's decisions that, according to the Claimants, denied them justice are both the decision rejecting the requested annulment of Ordinance 514 and the decision rejecting the requested clarification of the latter decision.[154] The Respondent has not objected to this condition being met in the instant case.

227. Whether the denial of justice claim falls within the scope of the Parties' consent or otherwise within the Centre's jurisdiction requires a closer examination of the six-month settlement attempt and the 18-month domestic litigation of this claim requirements, in view also of the Respondent's remarks in that regard.

228. The discussion at the hearing centered on the question whether it would have been futile for the Claimants, as asserted by the latter, to attempt to reach an amicable settlement of the dispute related to this claim. According to the Respondent, the Claimants should have proceeded to "first provide notice to the executive… and enter into conversation", admittedly without any power by the executive to "revoke a decision or an order or ruling by the TCA".[155] The Respondent's reference being clearly to the six-month attempt for an amicable settlement,[156] the Tribunal shall deal with this issue for the sake of completeness of the analysis.

229. The Tribunal notes initially that the dispute must be held to have arisen as a result of the TCA's decision dismissing the Claimants' request for a clarification of the previous decision rejecting the request for annulment of Ordinance 514. The executive having no power to revoke such decision,[157] there would have been no real prospect for an amicable settlement of the dispute that had arisen. It is difficult for the Tribunal to see how an appeal by the Claimants directly to the Government for an amicable settlement would have served any useful purpose in

[154] The TCA's decisions 509 on Abal's Request for Annulment of Ordinance 514 dated 14 June 2011 (C-053) and 801 Rejecting Abal's Appeal for Clarification dated 29 September 2011 (C-056). Abal's Appeal for Clarification and Further Judgment for the TCA Decision on Ordinance 514 is dated 24 August 2011 (C-055).
[155] Transcript, Day Two, page 487, lines 1-8.
[156] No views are expressed by the Tribunal regarding whether this requirement is an element of the State's consent to arbitration.
[157] As admitted by the Respondent at the hearing, "The executive cannot by itself, of course, revoke a decision or an order or ruling by the TCA": Transcript, Day Two, page 487, lines 6-8.

this particular context, nor has the Respondent offered convincing arguments to that effect.[158]

230. May the same conclusion be drawn regarding the 18-month domestic litigation requirement? In support of their respective positions, the Parties have proposed arguments at the hearing based on assumptions that a closer scrutiny leads to the following remarks.

231. The Respondent has contended that in case of a negative decision by the court under Law 16,110 regarding the claim for denial of justice the Claimants would have the right to arbitrate so that in this case there is no futility.[159] This contention is correct only if the reference is to a decision rendered beyond the prescribed time limit of 18 months. If, however, as the context seems to indicate, the Respondent had in mind a decision by the TCA within said time limit, its interpretation[160] would overlook the fact that under the BIT a Uruguayan court decision within the 18-month period, whether favourable or not to the Claimants, would appear to preclude resort to arbitration. This appears to be the intended meaning of Article 10(2) of the BIT when it provides that "If within a period of 18 months after the proceedings have been instituted no judgment has been passed, the investor concerned may appeal to an arbitral tribunal, which decides on the dispute in all its aspects". This would mean, *a contrario*, that if such a judgment intervenes within 18 months, resort to arbitration is precluded.[161]

232. The Claimants' contention that in case of a denial of justice claim the foreign investor does not need to go again to domestic litigation in Uruguay but may submit the claim to arbitration is based on the letter addressed by Eduardo Jimenez de Aréchaga to the Chairman of the International Affairs Committee.[162] However, as apparent from its text, the letter in question refers to the Germany-

[158] *Supra*, para. 218.
[159] *Supra*, para. 218.
[160] At the hearing the Respondent stated: "That is the interpretation of the Government of Uruguay" (*supra*, para. 212).
[161] The Respondent's interpretation would be correct if the Germany-Uruguay Treaty (as to which see below in the text) had been the applicable treaty.
[162] *Supra*, para. 215.

Uruguay Treaty,[163] the text of which was in the process of being examined by the Senate in view of its ratification.[164]

233. Article 11(2) of the Germany-Uruguay Treaty provides as follows:

> "If a dispute as described in Paragraph 1 cannot be settled within the period of six months counted from the date on which one of the interested parties raised it, it shall be submitted at the request of one of the parties to the competent courts of the Contracting Party in whose territory the investment was made. As soon as there has been a decision by the competent courts, either of the parties may resort to an International Court of Arbitration, for the purpose of declaring if the legal decision complies and to what extent it meets the terms of this Treaty. If after a period of 18 (eighteen) months from bringing the legal action there has been no pronouncement, either of the parties may resort to the International Court of Arbitration, which in this case shall have the competence to resolve the dispute in its entirety. This provision shall not affect Article 10".

According to this provision, and apparently unlike Article 10(2) of the BIT, whatever domestic court's decision is rendered within 18 months from bringing legal action, resort to international arbitration is open to the party dissatisfied with such decision. The Claimants seem to have had this provision in mind when denying the requirement to go once again to the competent court in Uruguay for the denial of justice claim.

234. Unlike the subject matter of the dispute regarding the three measures issued by the Respondent and challenged by the Claimants, the dispute in this case does not concern an administrative act for the annulment of which the TCA is the only competent court in Uruguay. As alleged by the Claimants, the denial of justice claim arises out of the TCA's decisions rejecting an annulment request and the subsequent request to correct the previous decision. To go back to the TCA to redress such decision would have been a useless, time consuming and costly exercise, any decisions by the TCA being final and not appealable. This is one of the circumstances of the particular case warranting a conclusion of "futility" of the domestic litigation requirement.[165]

[163] The text of the Germany- Uruguay Treaty is in Exhibit RL-31.
[164] The agenda of the Senate Session and the text of Eduardo Jimenez de Aréchaga' letter are in Exhibit R-75 (see Transcript, Day Two, page 490, lines 17-18). As clearly mentioned therein, the analysis made by the letter is based on the Germany-Uruguay Treaty, specifically "the clauses on disputes recorded in Articles X and XI of the Treaty…".
[165] *Supra*, para. 137.

235. In the light of all the foregoing, the Tribunal affirms the Centre's jurisdiction and its competence to hear the Claimants' claim for denial of justice.

VI. DISPOSITIF

236. For the foregoing reasons, the Tribunal unanimously decides:

a. That it has jurisdiction over the claims presented by Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. as far as they are based on alleged breaches of the Agreement on the Reciprocal Promotion and Protection of Investments concluded on 7 October 1988 between the Swiss Confederation and the Oriental Republic of Uruguay;

b. That it has jurisdiction under Article 46 of the ICSID Convention over the Claimants' claim for denial of justice;

c. To make the necessary order for the continuation of the procedure pursuant to Arbitration Rule 41(4); and

d. To reserve all questions concerning the costs and expenses of the arbitral proceedings for subsequent determination.

Piero Bernardini
President

Gary Born
Arbitrator

James Crawford
Arbitrator

ANNEX B

Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay)
(The Claimants)

and

Oriental Republic of Uruguay
(The Respondent)

(ICSID Case No. ARB/10/7)

Concurring and Dissenting Opinion

Mr. Gary Born, Arbitrator

Date of dispatch to the parties: July 8, 2016

CONCURRING AND DISSENTING OPINION

1. I agree with almost all of the conclusions in the Tribunal's Award. I also have the utmost respect for the members of the Tribunal, and the care and diligence that they have brought to this matter. I write separately, with respect to two limited issues, only because of my fundamental disagreement with the Tribunal's conclusions and reasoning on these matters. Apart from these issues, I concur with the Tribunal's conclusions in its Award.

2. The two issues on which I part company from the Tribunal concern the interpretation of Article 3(2) of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, dated 7 October 1988 ("BIT"). In particular, I am unable to agree that Uruguay's failure to provide the Claimants any means of judicial recourse following contradictory decisions by the Uruguayan Supreme Court and *Tribunal de lo Contencioso Administrativo* did not constitute a denial of justice or that Uruguay's "single presentation requirement" for tobacco products did not constitute a denial of fair and equitable treatment. Rather, with respect to each of these grounds, I conclude that Uruguay violated Article 3(2) of the BIT.

3. As a preliminary matter, it is important to emphasize the narrow scope of the two foregoing conclusions. My conclusions are not in any way a comment on the sovereign authority of Uruguay (or any other state) to safeguard its population's health or safety, to enact tobacco control legislation, or to prevent deceptive or misleading tobacco marketing or packaging. The adoption of such measures are within the regulatory sovereignty of Uruguay, which nothing in my Opinion questions. Rather, this Opinion concerns two highly unusual aspects of the Uruguayan legal system, neither of which implicates Uruguay's sovereign regulatory authority, but both of which entail violations of individual rights protected by Article 3(2) of the BIT.

4. First, this Opinion is directed towards a highly unusual aspect of the Uruguayan legal system, which produced a result in this case that has never previously occurred under Uruguayan law. As discussed below, two of the country's highest civil courts reached directly contradictory interpretations of precisely the same statutory provision, in closely-related proceedings involving claims by the same party against the government, with these contradictory interpretations then being applied, in each case, to deny that party relief. Moreover, that same party was then left with no judicial forum in which to assert otherwise available constitutional challenges to the relevant statutory provision, as it had been authoritatively interpreted and applied to that party. In my view, that unprecedented result plainly constituted a denial of justice under Article 3(2) of the BIT and basic principles of international law.

5. Second, this Opinion is directed towards an equally unusual aspect of Uruguay's regulatory regime for tobacco – namely, a "single presentation requirement" that permits only a single presentation of any trademark used in marketing tobacco products. It is undisputed that no other country in the world has adopted such a requirement, which is also neither required nor contemplated by the comprehensive international regulatory regime for tobacco products. In my view, given the factual background against which it was adopted and the evidentiary record in these proceedings, this unprecedented requirement is manifestly arbitrary and disproportionate and, as a consequence, constituted a denial of fair and equitable treatment under Article 3(2) of the BIT and international law.

I. THE FAILURE OF URUGUAY TO PROVIDE ANY MEANS OF RECOURSE FOLLOWING CONTRADICTORY DECISIONS BY THE SUPREME COURT AND *TRIBUNAL DE LO CONTENCIOSO ADMINISTRATIVO* CONSTITUTED A DENIAL OF JUSTICE

6. I first consider the Claimants' denial of justice claim based upon the disposition of their challenges to the so-called "80/80" requirement imposed by Decree 287/009 and Ordinance 466. In particular, the Claimants assert that Uruguay "effectively denied Abal the right to a decision on the legality of the 80/80 requirement," when the Supreme Court of Justice of Uruguay ("Supreme Court") and the *Tribunal de lo Contencioso Administrativo* ("TCA") rendered contradictory decisions regarding the meaning of Articles 9 and 24 of Law 18,256.[1] The Claimants argue that these assertedly contradictory decisions by the Supreme Court and TCA resulted in a denial of justice, in violation of the fair and equitable treatment guarantee of Article 3(2) of the BIT.[2]

7. The Respondent contends that the Supreme Court and the TCA are separate and independent governmental organs, and that Uruguayan law has for decades allowed the possibility that these organs will reach inconsistent conclusions.[3] The Respondent also contends, in at least some of its submissions, that the Supreme Court and TCA decisions are consistent, because the two tribunals addressed and resolved different issues.[4]

8. The Tribunal accepts the Respondent's conclusions in part, holding that the Supreme Court and TCA reached contradictory results, which were "unusual, even surprising,"[5] but that such a quirk is not sufficiently "shocking" or "serious"[6] to constitute a denial of justice. Adopting the Respondent's analysis, the Tribunal reasons that judicial systems in other national legal systems allow similar types of inconsistent results, citing a decision of the European Court of Human Rights ("ECtHR").[7]

9. In my view, in the particular circumstances of this case, the contradictory decisions of the Supreme Court and TCA operated to deny the Claimants access to justice. Those decisions were rendered in closely-related proceedings involving the same parties and interpreted the same provision of Uruguayan law to mean diametrically opposed and contradictory things, in each case as the basis for rejecting Abal's claims. As a consequence of these contradictory decisions, Abal was left without any judicial forum in which to pursue generally available constitutional challenges against Law 18,256, as it had been authoritatively interpreted and applied to Abal by the TCA. I am unable to avoid concluding that the operation of the Uruguayan judicial system in these circumstances amounted to a denial of justice in violation of Article 3(2) of the BIT.

A. Preliminary Matters

10. Preliminarily, it is important to be clear that the Claimants' claim does not require the Tribunal to decide whether the existence of parallel and co-equal judicial organs – that is, the Supreme Court and the TCA – constitutes a denial of justice. Many legal systems have

[1] Claimants' Memorial, II.C.2, p. 75.
[2] Claimants' Memorial, III.B., pp. 115-21; Claimants' Memorial, III.A.2., pp. 96-109.
[3] Respondent's Counter-Memorial, para. 11.113.
[4] Respondent's Counter-Memorial, para. 11.62 et seq.
[5] Award, para. 529.
[6] Award, para. 527, 529.
[7] Award, para. 529-532.

comparable divisions of legal authority, and the existence of specialized tribunals operating within a single legal system provides no independent basis for a denial of justice complaint. On the contrary, the existence of such specialized tribunals is intended precisely to ensure that justice is not denied and that the rule of law is enhanced.

11. The Claimants' claim also does not require the Tribunal to decide whether the rendering of contradictory decisions concerning the same issue of law, by parallel and co-equal judicial organs, constitutes a denial of justice. This result is theoretically possible in systems in which parallel and co-equal judicial tribunals exist and, as a consequence, virtually all legal systems have adopted mechanisms for avoiding or preventing contradictory decisions.[8] Again, however, the Claimants' claim does not require deciding whether these mechanisms are required as a matter of the BIT or customary international law.

12. Instead, what this dispute concerns is a highly unusual circumstance where parallel Uruguayan judicial tribunals – that is, the Supreme Court and the TCA – reached contradictory decisions interpreting the same statutory provision in closely related proceedings involving the same party, in each case applying those contradictory interpretations to deny that party relief on claims against the government. Moreover, following those contradictory decisions, the same party was also denied any opportunity of presenting a concededly serious constitutional challenge to Uruguayan legislation (specifically, Law 18,256), as that legislation had been authoritatively interpreted and applied to it by the TCA, to a competent Uruguayan judicial authority. In my view, that constitutes a paradigmatic denial of access to justice which cannot be dismissed as merely an unusual quirk or curiosity, but which is instead a violation of basic guarantees of international law.

B. Factual Background

13. In my view, it is important to begin consideration of this issue by recounting the relevant factual and procedural background. This background is essential to the appreciation and resolution of the Claimants' claim.

1. The Uruguayan Supreme Court and *Tribunal de lo Contencioso Administrativo*

14. Uruguay's highest civil court is the Supreme Court of Justice of Uruguay, established pursuant to the 1952 Uruguayan Constitution. The Supreme Court is empowered to interpret Uruguayan legislation and determine the constitutionality of such legislation.[9] The Supreme Court has the authority to review decisions of lower courts by cassation.[10]

[8] *See* L. Garlicki, 'Constitutional courts versus supreme courts,' (2007) 5(1) *Int J Constitutional Law* 44 (citing, e.g., German Constitutional Court (*Bundesverfassungsgericht*); *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 34 (citing Germany, Ukraine, Greece, and Bulgaria) [Exhibit REX-010].

[9] Uruguayan Constitution, Art. 256 ("Laws may be declared unconstitutional by reason of form or content, in accordance with the provisions of the following articles."); Art. 257 ("The Supreme Court of Justice has original and exclusive jurisdiction in the hearing and decision of such matters; and must render its decision in accordance with the requirement for final decisions.").

[10] Rotondo Opinion, para. 25 [Exhibit REX-007] ("The Supreme Court exclusively reviews the constitutionality of laws and acts as the last stage in any action where the parties have filed a petition for cassation against the judgments of the Courts of Appeals.").

15. The TCA is a governmental organ established pursuant to the Uruguayan Constitution.[11] The TCA is, in all material respects, a judicial body but, nonetheless, is not formally part of the Uruguayan judiciary and is independent from both the Uruguayan government and the Uruguayan judiciary, including the Uruguayan Supreme Court of Justice.[12] The TCA is granted jurisdiction by the Uruguayan Constitution[13] and Law No. 15,869 of 6/22/1987.[14] Specifically, the TCA is empowered to adjudicate disputes regarding the validity of administrative acts, including the interpretation of Uruguayan legislation to authorize or annul such administrative acts.[15]

16. The only respect in which the Uruguayan Constitution limits the TCA's independence vis-à-vis the Supreme Court is Article 258 of the Constitution, which provides that the TCA must abide by a Supreme Court determination that a statute is unconstitutional.[16] The Respondent's legal expert on Uruguayan law describes the institutional divide between the TCA and Supreme Court as "*sui generis*."[17]

2. Law 18,256 and Decree 287/009

17. The Claimants' denial of justice claim arises out of challenges under Uruguayan law by Abal to Law 18,256 and Decree 287/009. In particular, Abal challenged the constitutionality of Law 18,256 in the Uruguayan Supreme Court and the validity of Decree 287/009 in the TCA. It is important to appreciate the issues raised in these two proceedings and the relevant Uruguayan statutory provisions at issue in those proceedings.

18. The Uruguayan Parliament adopted Law 18,256 on 6 March 2008. The relevant portions of Law 18,256 for present purposes were Articles 9 and 24, which provided:

> *Article 9. (Health warnings). – All packages and containers of tobacco products, and all external labeling and packaging thereof, shall bear health warnings and images or pictograms describing the harmful effects of tobacco consumption or other appropriate messages. Such warnings and messages shall be approved by the Ministry of Public Health; shall be clear, visible, and legible; and shall take up at least 50% (fifty percent) of the total exposed primary surfaces. These warnings shall be modified periodically in accordance with regulations. All packages and containers of tobacco products and all packaging and labeling thereof, as well as the warnings described in the preceding paragraph, shall contain information on all components of the tobacco products and their emissions, in accordance with the provisions of the Ministry of Health.*

[11] Rotondo Opinion, para. 48 [Exhibit REX-007].
[12] Rotondo Opinion, paras. 5, 7, 48 [Exhibit REX-007].
[13] Uruguayan Constitution, Art. 309.
[14] Rotondo Opinion, para. 5 [Exhibit REX-007].
[15] Rotondo Opinion, para. 6 [Exhibit REX-007] ("The TCA has jurisdiction to hear the cases of actions for annulment of final administrative acts issued by any Government entity which are contrary to a 'legal rule,' which includes those that are affected by misuse, or abuse or excess of power … The TCA annuls or confirms the challenged administrative acts, without modifying them.").
[16] Uruguayan Constitution, Art. 258 ("In [the] case [that a law is declared unconstitutional], the [TCA] proceedings shall be suspended and the case referred to the Supreme Court of Justice.").
[17] Rotondo Opinion, para. 55 [Exhibit REX-007] ("Based on everything that has been asserted in this report, it may be concluded that: a) The Uruguayan jurisdictional system is *sui generis*…").

> *Article 24. (Regulation). – The Executive Branch shall regulate this law within a period of ninety days from its date of enactment.*[18]

19. In implementation of Law 18,256, the Uruguayan President issued Presidential Decree 287/009 on 15 June 2009. That Decree provided for the so-called 80/80 graphic warning requirement, mandating that tobacco companies include graphic health warnings on at least 80% of the surfaces of tobacco packages:

> *It is ordered that the health warnings to be included on packages of tobacco products, including images and/or pictograms and messages, shall cover 80% (eighty per cent) of the lower part of each of the main sides of every cigarette package and in general of every packet and container of tobacco products and of any similar packaging and labelling.*[19]

20. The Uruguayan Ministry of Public Health adopted Ordinance 466 on 1 September 2009, giving effect to Presidential Decree 287/009. Ordinance 466 provided for the 80/80 graphic warning requirement, in Section 1, as follows:

> *The pictograms to be used on packs of tobacco shall be defined by six (6) images associated with the corresponding texts (front and back), which shall be printed on the lower 80% of both principal display areas of all packets of cigarettes and in general all packets and packs of tobacco products and all similar wrappings and labels in the order and manner shown in the annexed model, which is an integral part of this Order, an equal number of each type of pack design being printed for each brand available on the market.*[20]

As noted above, the Claimants' denial of justice claim arises from the handling of the challenges which Abal initiated to Law 18,256 and Decree 287/009 in Uruguay's courts.

3. Abal's Challenges to Law 18,256 and Decree 287/009

21. Shortly after promulgation of Ordinance 466, on 11 September 2009, Abal filed an action in the Supreme Court – *Abal Hermanos S.A. v. Legislative Power and Ministry of Health* – challenging the constitutionality of Article 9 of Law 18,256.[21] The basis of Abal's action was that a grant of authority by Article 9 to the President and Ministry of Public Health to require graphic warnings in excess of 50% of the surface of tobacco packages would violate limitations on the delegation of legislative authority under the Uruguayan Constitution.

22. Six months later, on 22 March 2010, Abal filed an action (an *accion de nulidad*) in the TCA requesting annulment of the 80/80 requirement in Ordinance 466 and Decree 287/009.[22] The basis of Abal's action was that Ordinance 466 and Decree 287/009 exceeded the scope properly permitted by Law 18,256, by requiring 80% graphic warnings, while, properly interpreted, Law 18,256 only permitted a requirement of 50% graphic warnings.

23. Immediately after Abal filed its action in the TCA, the TCA suspended its proceedings pending a decision by the Supreme Court on Abal's constitutional challenge to Law 18,256. According to the TCA, the Supreme Court's decision would involve a "threshold question"

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[18] Uruguayan Law No. 18,256 (6 Mar. 2008), Arts. 9, 24 [Exhibit RL-6].
[19] Uruguayan Decree No. 287/009 (15 June 2009), Article 1 [Exhibit RL-4].
[20] Ministry of Public Health Ordinance 466, September 1, 2009, Articles 1-2 [Exhibit C-043].
[21] Abal's Complaint Challenging Law 18,256 before the SCJ, September 11, 2009 [Exhibit R-216].
[22] *See* Abal's Request for Annulment of Decree 287 Before the TCA, March 22, 2010 [Exhibit C-049].

(*cuestion previa*) which therefore warranted suspension of the TCA proceedings until the Supreme Court had rendered its decision.[23]

24. In the Supreme Court proceedings initiated by Abal challenging the constitutionality of Article 9 of Law 18,256, the Uruguayan Legislature made formal submissions regarding Abal's claim. The Legislature took the position that Law 18,256 was constitutional because Article 9 did not authorize graphic warnings in excess of 50% of the surface of tobacco packages; the Legislature also acknowledged that, if Law 18,256 did delegate authority to require graphic warnings in excess of 50%, then the statute would have been subject to challenge under the Uruguayan Constitution as an excessive delegation of legislative authority. The Legislature's submission in the Abal proceeding concluded:

> *3.9 When the law says 'at least 50%' it is setting the quantitative limit on the fundamental right, that is, the size of the health warning. This legal determination has a dual consequence:*
>
> *1. It imposes an obligation on the tobacco companies to include a warning that takes up at least 50% of the package or container—which means that it could take up more space, if the tobacco company so wished—never less; and*
>
> *2. It imposes an obligation on the Ministry of Public Health to reject a request to approve a health warning that takes up less than 50% of the above-referenced surface areas.*
>
> *3.* But it does not allow the regulation to set a higher percentage: … That is not what the law allows, because there is no reason whatsoever to support [the view] that said percentage should fluctuate periodically. …
>
> *3.10. … What the law establishes is that said containers cannot display a warning of less than fifty percent (at least 50%) and that the Ministry shall not approve them. The* only *thing that the law attributed to regulation is the periodic regulation of the modification of the warning, regarding things that the law cannot reasonably determine, which is not the percentage of surface area affected.*
>
> *… [D]espite the fact that* the limiting of rights is reserved for statute, *it is reasonable for the law to have the [Executive] make an exact determination of the limitation when the Legislative Branch does not have the information, aptitude or technical advice to compose 'clear; visible, legible' warnings … Therefore, the possibility of a '… narrow exception for delegation …' … is fully present here, on account of being '… justified by technical or practical necessities.'* But that is not with respect to the percentage of affected surface areas that must be taken up by the health warnings; rather, it is with respect to the periodic modifications of said warnings …[24]

25. The Uruguayan State Attorney General (*Fiscal de Corte y Procuraduria General de la Nacion*)[25] also made formal submissions in Abal's Supreme Court proceedings. Like the

[23] *See* Motion of Abal Hermanos S.A., Motion to Suspend Proceedings, TCA Case No. 132/2010, May 3, 2010 [Exhibit R-224].

[24] Legislature's Answer, paras. 3.9-3.10 [Exhibit C-046].

[25] The Uruguayan State Attorney General is empowered by the Organic Law of the State Attorney General's Office (Decree-Law No. 15,365) to: (i) be the exclusive representative of the State Attorney General's Office before the Supreme Court of Justice; (ii) represent the State Attorney General's Office in the proceedings of exclusive jurisdiction of the Supreme Court of Justice and be heard in all other proceedings conducted before the

Uruguayan Legislature, the State Attorney General took the position that Article 9 of Law 18,256 was constitutional because the legislation did not authorize graphic warnings in excess of 50% of the surface of tobacco packages, again indicating that a contrary interpretation of the law would render it unconstitutional.

26. According to the State Attorney General, "the provision as to the percentage limits itself to establishing that it cannot be less than 50% of the [packaging]. … [T]he Ministry of Health, to whom approval of these warnings is entrusted, will not be able to approve them if they occupy less than this 50%." The State Attorney General noted that there were "no references to the Executive having the power to establish a higher percentage," and thus, "the provision does not contain any delegation whatsoever."[26]

27. The Uruguayan Supreme Court accepted the arguments advanced by the Legislature and the State Attorney General. In a thoroughly reasoned decision, the Court held that Article 9 of Law 18,256 did not authorize the Ministry of Public Health to require graphic warnings that covered more than 50% of the surface of tobacco packages, while indicating that a contrary interpretation of the legislation would render it unconstitutional (by reason of an excessive delegation of legislative authority).

28. The Supreme Court interpreted Article 9's requirement that graphic warnings "be clear, visible, and legible… and shall take up at least 50% (fifty percent) of the total exposed primary surfaces" as not delegating additional authority to require warnings occupying more than 50% of the surfaces of tobacco packages. In the Supreme Court's words:

> *[Law 18,256]* does not delegate to the Executive Power a discretionary power to impose restrictions on top of said [50%] minimum, *but imposes on the tobacco company the obligation that the exterior labeling of their packs must contain a warning that occupies 'at least 50% of the total exposed principal surfaces.' As asserted by the representatives of the Legislative Power, the text of the norm 'at least' should be understood in the sense that the health warning may occupy more space—if the tobacco company wants that—but never less than the minimum fixed at 50%.*
>
> *Further, it emerges from the text that the only thing left by the norm in the field of the Executive Power (Ministry of Public Health) is to control—for the purpose of its approval—that the health warnings and messages are clear, visible, legible and occupy at least the 50% (fifty per cent) of the total exposed principal surfaces, and also the periodical modification of such warnings, [an] aspect that clearly refers to the message* and not to their size. In consequence, *since the [statute] determines the minimum limit of the warnings so they can be approved by the Ministry of Public Health, and to leave to the discretion of the regulatory power only certain aspects that [relate] to its execution,* it cannot be considered that the principles of legality and non delegation have been infringed.[27]

Supreme Court of Justice when laws or constitutional principles are involved, or when the general interests of the Society, the State, or the Treasury are, or may be, at stake; (iii) intervene in the unconstitutionality proceedings; and (iv) be heard in the conflicts of jurisdiction to be resolved by the Supreme Court of Justice. (*See* Claimants' Memorial, fn. 217.)

[26] State Attorney General's Opinion at Section 2 [Exhibit C-197].

[27] Supreme Court Decision No. 1713 at 4 [Exhibit C-051].

In sum, the Supreme Court was unambiguous in its conclusion that Law 18, 256 did not authorize the Ministry of Health, or the Uruguayan Executive Branch more generally, to require graphic warnings occupying more than 50% of the surface of tobacco packages.

29. Following the Supreme Court's decision, the suspension of Abal's TCA proceedings was lifted and the TCA rendered a decision on Abal's claim that Decree 287/009 and Ordinance 466 were invalid because, under Article 9 of Law 18,256, the Uruguayan Executive Branch was not empowered to require graphic warnings that covered more than 50% of the surface of tobacco packages. The TCA rejected Abal's challenge, as well as the Supreme Court's prior conclusion that Article 9 of Law 18,256 did not authorize the requirement of graphic warnings covering more than 50% of the surface of tobacco packages.

30. The TCA's brief statement of reasons in Abal's proceeding was quoted from a decision in another proceeding, which had been initiated by another tobacco company against Law 18,256 and Decree 287/009. In relevant part, the TCA's opinion was as follows:

> *[The Framework Convention on Tobacco Control] is composed by a preamble and 38 sections. In the first it is explicitly stated that addiction to tobacco [is] an epidemic with grave consequences to Global Health inasmuch: '... the cigarettes and other products containing tobacco are designed in a very sophisticated manner with the end of creating and maintaining dependency…,' to this respect is that the Framework's provisions seek to regulate warnings in the cigarette packs in order to allow the population to access truthful information regarding the chemicals they are ingesting and consuming.*
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> *Reason for which, Section 18.256 enters in direct and frank legal accordance with the international provisions, legislating and regulating the Convention's provisions, in compliance with the obligations towards humankind and the international community adopted by the Oriental Republic of Uruguay. In this sense,* Statute 18.256 clearly shows the legal minimum for the warning and entrusts to regulations its enlargement and/or modification, *with the evident objective of preventing the consumer from becoming familiarized and living with it without perceiving the harmful consequences attributed to tobacco products.*[28]

31. In reaching this conclusion, the TCA rejected the interpretation of Article 9 of Law 18,256 that the Supreme Court had previously adopted.[29] As discussed above, the Supreme Court, Legislature, and State Attorney General had all concluded that Law 18,256 did not authorize the Uruguayan executive branch to require graphic warnings that covered more than 50% of the surface of tobacco packages. In contrast, the TCA reached the opposite conclusion, holding with minimal explanation that Article 9 of Law 18,256 authorized precisely such a result (and therefore provided authorization for the 80% requirement of Decree 287/009 and Ordinance 466).

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[28] TCA Decision 512, Section VI [Exhibit C-116].

[29] The TCA's interpretation of Law 18,256, quoted in relevant part above, provides no insight into its reasons for rejecting the views of the Uruguayan Legislature and State Attorney General.
Testimony of the Respondent's expert witnesses at the evidentiary hearing indicated that the TCA has a very heavy case load (with some 1,000 cases being decided each year by a five judge tribunal). (Evidentiary Hearing (Tr., 6/1745/3-12) (Abal) ("…[The TCA] is made up of five members and [they have] to decide yearly about 1,000 that are submitted to its consideration …")). The consequences of this caseload are apparent in the Claimants' challenge to the TCA's decision regarding the single presentation requirement, where, as the Tribunal describes, the TCA's decision confused the Claimants' proceedings and submissions with those of another company, in a different proceeding.

32. It is undisputed that the TCA's interpretation of Article 9 of Law 18,256 is authoritative as a matter of Uruguayan law, having been issued pursuant to the TCA's constitutional and statutory mandate to interpret legislative authorizations of regulatory action.[30] On the basis of that interpretation of Article 9 by the TCA, Decree 287/009, Ordinance 466, and the 80/80 requirement were upheld. It is also undisputed that there was no basis for appealing from the TCA decision to the Supreme Court, or to any other body, whether by cassation or otherwise.[31]

33. It is also clear that, so far as the record shows, this case was the first time that the Uruguayan Supreme Court and TCA have rendered contradictory decisions about the meaning of a statutory provision.[32] The Respondent asserted that other examples of such cases existed, but it cited only a single instance allegedly involving such a contradiction.[33]

34. On examination, however, the one case cited by the Respondent did not in fact involve contradictory decisions, but instead involved a decision by the Supreme Court upholding the constitutionality of a particular procedure and a decision by the TCA holding that the same procedure was not permitted as a statutory matter.[34] As the Tribunal appears to accept,[35] that is not a conflicting or contradictory set of decisions, but an example of entirely consistent decisions about different legal rules.

35. The present case is fundamentally different: it involves a direct and irreconcilable conflict between the Supreme Court and the TCA with regard to the interpretation of Article 9 of Law 18,256. The Supreme Court held, directly and explicitly, that Article 9 only authorized the Executive to require graphic warnings covering 50% of the surface of tobacco packages, while the TCA held, equally directly and explicitly, that Article 9 authorized the Executive to require graphic warnings covering 80% (or more) of the surface of tobacco packages. These two interpretations could not be more diametrically opposed, yet both were applied to Abal, in each case in order to reject claims that it had brought against the application of Law 18,256 by the Uruguayan government to its activities.

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[30] Abal Opinion, para. 94 [Exhibit CWS-014] ("It is undisputed that the TCA is the 'highest entity' (and the only entity) in the Uruguayan legal system that can resolve challenges of nullity against administrative acts."); Respondent's Counter-Memorial, para. 9.26 ("Uruguay's highest administrative tribunal, the *Tribunal de lo Contencioso Administrativo*").

[31] Abal Opinion, para. 94 [Exhibit CWS-014] ("It is [ ] undisputed that 'there is no possible appeal' against TCA judgments. It is also absolutely undisputed that the Supreme Court cannot review TCA judgements.") (citing Rotondo Opinion, para. 22 [Exhibit REX-007] ("… [T]here is no appeal or petition for cassation against judgments of the TCA."); Respondent's Counter-Memorial, para. 11.113 ("[the TCA] is not subject to the cassation review of the Supreme Court").

[32] *See* Abal Opinion, para. 94 ("The contradiction that arose in this case between decisions of the [Uruguayan Supreme Court] and the TCA is unusual, and there is no Court in Uruguay that has the authority to hear the controversy generated by the TCA's decision."); *see also* Evidentiary Hearing (Tr., 6/1804/11-17) (Abal) ("… I don't know of any case, apart from this one right here, where [ ] a contradiction [between the Uruguayan Supreme Court and the TCA] has transpired … I have searched, and I have found no instances where the SCJ has contradicted the TCA or the TCA has contradicted a decision of the Supreme Court of Justice.").

[33] Respondent's Rejoinder, paras. 11.56-11.58; Pereira Opinion, paras. 293-296, [Exhibit REX-015] (citing Case No. 2-3871/2006, Supreme Court of Justice, Decision No. 47/2007 (May 2, 2007), Conclusion of Law I [Exhibit SPC-049] ("the Henderson case")).

[34] *See* Evidentiary Hearing (Tr. 7/2119/3-19) (Pereira) (**"**In my opinion, there is no contradiction in the judgments.").

[35] Award, paras. 527-528.

4. No Possibility of Constitutional Challenge to Article 9 of Law 18,256 in the Supreme Court Following the TCA Decision

36. The record in this arbitration also establishes that, following the TCA's decision, Abal was unable to return to the Supreme Court to challenge the constitutionality of Article 9 of Law 18,256 as it had been authoritatively interpreted by the TCA. As the Tribunal acknowledges,[36] there was no procedure available under Uruguayan law that would have allowed Abal to reopen proceedings in the Supreme Court challenging Article 9 of Law 18,256. Rather, as the Claimants contend, the prior Supreme Court decision, rejecting Abal's constitutional challenge to Article 9, was *res judicata* and foreclosed further litigation of that challenge by Abal in the Supreme Court.[37]

37. As indicated by the Tribunal, the Respondent did not argue during these arbitral proceedings that Abal could have returned to the Supreme Court to challenge the constitutionality of Article 9 following the TCA decision, nor that Abal's failure to do so constituted a failure to exhaust its local remedies. Rather, although the Respondent argued that Abal could have challenged the constitutionality of *Article 8*[38] of Law 18,256 in the Supreme Court,[39] it never suggested that Abal could have reopened its previously decided challenge to *Article 9* of Law 18,256. Likewise, none of the Respondent's experts on Uruguayan law made any such suggestion in their expert reports or oral testimony.[40]

38. On the final day of the evidentiary hearing, counsel for the Respondent suggested, in answer to questions from the Tribunal, that Abal could in fact have reopened proceedings in the Supreme Court challenging the constitutionality of Article 9 of Law 18,256 based on the "new fact" of the TCA decision.[41] As indicated above, that suggestion was inconsistent with the Respondent's position throughout the course of the arbitration[42] and was unsupported by any expert testimony or other evidence regarding procedural avenues available to Abal in the Supreme Court.[43] In contrast, Claimants' expert evidence concluded (without prior contradiction by the Respondent's experts) that Abal had exhausted its local remedies.[44]

39. In these circumstances, I see no basis for concluding that Abal could have either

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[36] Award, paras. 522-523.

[37] As the Tribunal notes, the Respondent did not suggest during the course of this arbitration that Uruguayan law permitted Abal to return to the Supreme Court and revive its constitutional challenge to Law 18,256 based on the TCA's interpretation of the statute. Award, para. 521 ("The Respondent does not suggest that there was a failure to exhaust local remedies in relation to this claim.").

[38] Article 8 of Law 18,256 was designed to prohibit misleading packaging (*see* full text of Article 8 at para. 151 below) This is distinct from Article 9 of the Law which requires graphic heath warming on tobacco packages (*see* full text of Article 9 at para. 20).

[39] Respondent's Counter-Memorial, para. 1.28.

[40] In particular, the expert opinions of Professor Rotondo and Schrijver made no suggestion that Abal could have reopened its Article 9 challenge in the Supreme Court or that the failure to do so constituted a failure by Abal to exhaust its local remedies.

[41] Evidentiary Hearing (Tr., 9/2640/6-9) (Salonidis) ("In our submission, we believe yes [it would have been possible to challenge the constitutionality of Article 9 in the Supreme Court as that Article had been interpreted by the TCA], because the TCA interpretation would be definitely a new fact to be considered by the Supreme Court.").

[42] The Respondent argued that Abal could have challenged a different provision of Law 18,256 (Article 8, rather than Article 9) in new proceedings in the Supreme Court. Respondent's Counter-Memorial, para. 11.89 et seq. ("…Claimants could have sought a declaration of unconstitutionality of Article 8 of Law 18,256, whose provisions the SPR was intended to 'enable.'").

[43] *See generally* Rotondo Opinion [Exhibit REX-007]; Schrijver Opinion [Exhibit REX-008].

[44] *See* Abal Opinion, para. 94; Paulsson Opinion, paras. 45-46.

reopened its challenge to Article 9 of Law 18,256 in the Supreme Court, or initiated new proceedings in the Supreme Court making such a challenge. Rather, after the TCA's decision, Abal was left with a Supreme Court ruling upholding Law 18,256's constitutionality because Article 9 *did not* authorize graphic health warnings in excess of 50% of the surface of tobacco packages, and a TCA ruling upholding Decree 287/009 and Ordinance 466 because Law 18,256 *did* authorize graphic health warnings in excess of 50% of the surface of tobacco packages.

C. Analysis

40. In light of the foregoing, I am unable to avoid the conclusion that the operation of the Uruguayan judicial system in this case constituted a denial of justice. Specifically, Uruguay denied Abal justice when its courts rendered directly contradictory decisions interpreting Article 9 of Law 18,256 in proceedings involving Abal, but did not thereafter provide Abal access to a judicial forum in which to present a presumptively serious constitutional challenge to Article 9 as that provision had been authoritatively interpreted and applied to it. In my view, this amounted to "Heads, I win; tails, you lose" treatment, without affording Abal the possibility of subsequent judicial recourse, which is contrary to Article 3(2)'s guarantee of fair and equitable treatment and the rule of law.

41. The Tribunal observes that the TCA's refusal to follow the interpretation of Article 9 of Law 18,256 which the Supreme Court (and the Uruguayan Legislature and State Attorney General) had adopted was "unusual, even surprising."[45] That is correct. The TCA's decision was both unusual and surprising because the interpretation of a statutory provision to mean diametrically opposed things, by different judicial tribunals within the same legal system, is in conflict with the basic values of the rule of law and prohibitions against denials of justice.[46]

42. The rule of law serves to ensure predictability, stability, neutrality, and objectivity; it ensures that generally applicable legal rules, rather than personal or political expedience, govern human affairs. Where different courts within a single legal system adopt contradictory interpretations for the same law, the rule of law is undermined, exposing individuals to inconsistent, unpredictable, and arbitrary treatment. Put simply, "[t]he fact that litigants can receive diametrically opposite answers to the same legal question depending on which type of court examines their case can only undermine the credibility of courts and weaken public confidence in the judicial system."[47]

43. Despite its surprise at the contradictory interpretations of Law 18,256 by the Supreme Court and TCA, the Tribunal nonetheless concludes that these decisions are not a denial of justice. According to the Tribunal, while unusual and surprising, the TCA's decision was the result of a "quirk," which is not sufficiently "serious" or "shocking" to violate Article 3(2) of the BIT.

[45] Award, para. 529.

[46] Like the Tribunal, I do not accept the Respondent's argument that the Supreme Court and TCA decisions were not inconsistent, because they addressed different issues (namely, whether Law 18,256 was constitutional and whether Decree 287/009 and Ordinance 466 were authorized by Law 18,256). The critical point is that the Supreme Court and TCA interpreted Article 9 of Law 18,256 in diametrically opposite ways (namely, that Article 9 did not authorize graphic warnings larger than 50% and that Article 9 did authorize such warnings). In my view, it is impossible to regard these decisions as anything other than squarely inconsistent or contradictory.

[47] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011, para. 17 [Exhibit REX-010].

44. The sole basis for the Tribunal's conclusion on this point appears to be a decision of the ECtHR in *Nejdet Şahin and Perihan Şahin v. Turkey* ("*Şahin v. Turkey*").[48] In my view, as detailed below, the ECtHR's decision does not support the Tribunal's holding and, on the contrary, requires the opposite conclusion from that reached by the Tribunal. Simply put, even if the ECtHR's interpretations of the European Convention on Human Rights ("ECHR") were decisive in interpreting Article 3(2) of the BIT, which they are not, the *Şahin v. Turkey* decision involved a vitally different factual setting than this case. When those differences are taken into account, the ECtHR's decision does not support, and instead contradicts, the Tribunal's interpretation of Article 3(2). More fundamentally, the decisions of the Uruguayan courts in this case violated basic precepts of the fair and equitable treatment standard, denying the Claimants access to vitally important judicial protections which are guaranteed by both Article 3(2) and general principles of international law.

45. As a preliminary matter, I do not agree that decisions interpreting the protection of the right to a fair trial in Article 6 of the ECHR are of decisive importance in interpreting the fair and equitable treatment guarantee of Article 3(2) of the BIT. Article 6's fair trial guarantee is contained in a particular human rights instrument, which was drafted and accepted in a specific geographic and historical context. Interpretations of Article 6 by the ECtHR may shed light on the general objects and purposes of the prohibition in Article 3(2) against denials of justice, but they provide little additional guidance in interpreting Article 3(2) or the standard of fair and equitable treatment under international law more generally.

46. Also preliminarily, the Tribunal relies on the ECtHR's decision for the proposition that the use of "separate administrative tribunals in the civil law tradition"[49] does not constitute a denial of justice. In my view, that proposition is undoubtedly correct, but irrelevant to the real grounds on which the actions of Uruguay's courts in this case are subject to challenge under Article 3(2) of the BIT.

47. There is in my view no basis for criticizing the existence or use of "separate administrative tribunals in the civil law tradition" (or in other traditions). As discussed above, this is a common feature of many legal systems, in both common law and civil law traditions.[50] As a general proposition, the existence of administrative tribunals (or other specialized types of tribunals), as well as other civil tribunals, is perfectly consistent with requirements for fair trials or prohibitions against denials of justice.

48. That general proposition is, however, of little relevance in this case. The existence of separate tribunals (the TCA and Supreme Court) in the Uruguayan legal system, is not the basis for either the Claimants' denial of justice argument or my own conclusion that Uruguay has violated Article 3(2). Rather, the challenge to Uruguay's actions rests on the fact that the Supreme Court and TCA rendered contradictory decisions, in proceedings involving the same party, without allowing that party any possibility of recourse to a judicial forum for constitutional challenges following the TCA's authoritative interpretation of Law 18,256. Even if authorities interpreting the ECHR were relevant to the meaning of Article 3(2) of the BIT, the ECtHR's decision in *Şahin v. Turkey* does not support the Tribunal's resolution of the real issues presented in this case.

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[48] Award, para. 530 (quoting *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011 [Exhibit REX-010]).
[49] Award, para. 530.
[50] *See above* paras. 11-12.

49. In *Şahin v. Turkey*, a narrow majority of the ECtHR held that the issuance of inconsistent decisions by Turkish military and administrative courts was not a violation of Article 6 of the ECHR. The ECtHR reasoned that "achieving consistency of the law may take time, and periods of conflicting case-law may therefore be tolerated without undermining legal certainty."[51] The Court also emphasized the existence of mechanisms in the Turkish legal system for avoiding inconsistent interpretations of the law,[52] and the deference that the ECtHR owed national courts in the administration of their judicial systems under Article 6 of the ECHR.[53]

50. Initially, it is appropriate to note that the *Şahin v. Turkey* decision on this point was rendered by a narrow majority of the European Court (ten judges) and was accompanied by a powerful dissent (by seven judges).[54] The dissent reasoned that the rendering of inconsistent judgments by different courts was a "flagrant malfunctioning" of the judicial system, which created the appearance of "arbitrariness," resulting in a violation of Article 6 of the ECHR.[55] Specifically, the dissent reasoned:

> *[W]e consider that a violation of the right to a fair hearing was caused by a malfunctioning of the machinery set in place to settle conflicts of jurisdiction, coupled with inconsistency in court decisions concerning the same factual situation. While domestic systems may comprise a variety of judicial structures, these structures should not give any appearance of arbitrariness in the public eye; when taking legal action litigants should be able to make decisions with a sufficient degree of foreseeability and based on clear, common and stable criteria.*[56]

51. In my view, there is substantial force to the reasoning of the dissenting opinion in *Şahin v. Turkey*. The concept of the rule of law implies regularity, stability, and lack of arbitrariness. In the words of the dissenting judges, the rule of law ensures that private parties are "able to make decisions with a sufficient degree of foreseeability and based on clear, common and stable criteria." The dissent's reasoning is also consistent with the approach taken by the ECtHR in its earlier jurisprudence, where the Court has routinely held that conflicting judicial decisions, producing legal uncertainty and unpredictability, are contrary to Article 6(1) of the ECHR.[57]

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[51] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 83 [Exhibit REX-010].

[52] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, paras. 87, 91-92 [Exhibit REX-010] The Court reasoned that Turkish courts had established mechanisms for "respecting the boundaries of their respective areas of jurisdiction and refraining from both intervening in the same area of the law," and that a Jurisdiction Disputes Court had issued rulings on the issue before the Turkish administrative and military courts, which had been applied by those courts in the matters before the ECtHR. *Ibid*.

[53] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, paras. 88-89 [Exhibit REX-010].

[54] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011 [Exhibit REX-010].

[55] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011, para. 2 [Exhibit REX-010].

[56] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011, paras. 3, 15-16 [Exhibit REX-010].

[57] *See, e.g., Tudor Tudor v. Romania,* ECtHR Application No. 21911/03, Judgment, 24 March 2009, para. 41 ("in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty … this uncertainty deprive the applicant of a fair trial"); *Brumărescu v. Romania*, ECtHR Application No. 282342/95, Judgment (Merits), 28 November 1999, para. 61 ("One of the

52. The rendering of contradictory decisions, by co-equal courts within a single legal system is in tension with these basic objectives of transparency, stability, and predictability. Inconsistent decisions in cases involving similar legal issues do not reflect the rule of law, and instead reflect arbitrary and unprincipled chance. It is for precisely this reason that states which have co-equal judicial authorities also have mechanisms for reconciling the decisions of such tribunals.[58] In my view, the seven dissenting judges in *Şahin v. Turkey* adopted a sounder view of guarantees of a fair trial or protections against denials of justice than the ten judges in the majority of the ECtHR.

53. Importantly, however, resolution of the present case does not require deciding whether it was the majority, or the dissenting, judges of the ECtHR in *Şahin v. Turkey* that were correct. Instead, in my view, *Şahin v. Turkey* is plainly distinguishable from the present dispute, which involves a very different and significantly more troubling set of circumstances.

54. *Şahin v. Turkey* involved judicial decisions that were rendered in a number of different Turkish legal proceedings, brought by different private parties, each of whom received benefit payments, but in different amounts, from different Turkish military and administrative courts.[59] The parties who had received lower benefit payments from military courts complained that they had been treated differently from other parties, who had received larger payments from administrative courts.

55. In contrast, the present case involves not merely conflicting case-law by different courts in cases involving different parties, but proceedings brought by the *same* party, which was subject to directly contradictory decisions, rendered in closely related legal proceedings, interpreting the same statutory provision in irreconcilable ways. The Claimants in this arbitration do not complain that Abal was treated differently from other parties, in different proceedings, but that Abal itself was subjected to different treatment and contradictory interpretations of the same law, in the same dispute, with each of those contradictory interpretations then being applied to reject Abal's claims against the Uruguayan government.

56. Nothing in the ECtHR's reasoning in *Şahin v. Turkey* suggests that the Court would have found there was no violation of the right to access to justice or the rule of law where a state's courts not only adopted inconsistent interpretations of the law, but did so in closely-related proceedings involving the same party.[60] It is one thing for a state's judicial system to produce inconsistent interpretations of the law, and inconsistent results, in different cases, involving different parties. That circumstance involves "conflicting case-law," which might be "tolerated" for a period, as ten judges of the ECtHR held in *Şahin v. Turkey*.[61]

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fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.").

[58] As discussed in *Şahin v. Turkey*, such a mechanism existed in Turkey (in the form of a Jurisdiction Disputes Court), although the efficacy of that mechanism was disputed. *See above* para. 49, fn 52.

[59] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, paras. 25-32 [Exhibit REX-010].

[60] On the contrary, the ECtHR emphasized that the issue before it involved different parties in different legal proceedings, reasoning that "two courts, each with its own area of jurisdiction, examining different cases may very well arrive at divergent but nonetheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances." *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 86 [Exhibit REX-010].

[61] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 83 [Exhibit REX-010].

57. In my view, it is something very different for the law to be interpreted in diametrically opposed ways in the *same* dispute, involving the *same* party.[62] This latter result involves a state, through its courts, holding that the same law means exactly opposite things as applied to the same litigant in the same dispute.[63] That is the antithesis of the rule of law: it constitutes a much more direct and immediate instance of arbitrariness, incapable of explanation by differences in the identities of the litigants, the circumstances of the parties or their dispute or the parties' litigation conduct.[64]

58. Furthermore, in the present case, the contradictory Supreme Court and TCA decisions involved additional elements of arbitrariness. Here, a nation's highest civil court, relying on formal submissions from the nation's legislature and highest legal officer, reached a considered and reasoned decision about the meaning of a legislative act. The interpretation of Uruguayan legislation on which that judicial decision rested was then rejected by an administrative tribunal, in what can only be characterized as a brief and largely unreasoned decision (quoted above[65]), after that administrative tribunal had stayed its own proceedings pending the outcome of the judicial proceedings.

59. As discussed above, this case was the first time that the Uruguayan Supreme Court and TCA have rendered contradictory decisions about the meaning of a statutory provision.[66] As a consequence, it is an understatement for the Tribunal to characterize the contradictory Supreme Court and TCA decisions as only an unusual and surprising occurrence. In fact, this case was the first and only time that such a contradiction between the Supreme Court and the TCA has occurred in more than 60 years (since the TCA was established in 1952).

60. The foregoing circumstances give rise, in my mind, to a very serious question whether the contradictory decisions of the Supreme Court and TCA in the proceedings commenced by Abal, standing on their own, constituted a denial of justice in this case. In my view, the unprecedented rendering of directly contrary interpretations of the same legislative provision by different Uruguayan courts, in proceedings arising from a single dispute involving the same parties, is in very serious tension with guarantees of regularity and fairness that underlie protections against denials of justice.

61. This is particularly true in a case, such as this one, where the contradictory interpretations of law are both applied by a state's courts to deny a party relief against governmental actions. Here, the Supreme Court rejected Abal's claims by holding that Law

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[62] As discussed in *Şahin v. Turkey*, the Turkish legal system provided a mechanism to resolve "conflicts of judgments when the enforcement of a right is rendered impossible by a divergence between the final decisions adopted by at least two of the courts referred to in section 1, provided that those decisions concern the same subject and the same cause of action – but not matters of jurisdiction – *and that at least one of the parties [to the case] is the same* …." *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 24 [Exhibit REX-010] (alteration in original) (emphasis added). The existence of such a mechanism – and its inapplicability in *Şahin* due to the fact that multiple claims, involving multiple parties, were at issue – underscores the distinction between that case and this one.

[63] As noted above, the ECtHR made a point of observing that the issue before it in *Şahin v. Turkey* involved different parties in different legal proceedings, *See above* paras. 54-55.

[64] That is why domestic legal systems have mechanisms designed to prevent the same law from being applied in contradictory ways to the same litigants in the same dispute. In addition to mechanisms for avoiding or reconciling conflicting decisions by different tribunals (noted above), principles of *res judicata* and law of the case provide further protections against contradictory results being reached in proceedings involving the same parties. The failure of Uruguay's courts to apply such doctrines in this case materially heightens both the surprising character of their decisions (as the Tribunal correctly notes) and the arbitrariness of those decisions.

[65] *See above* para. 28.

[66] *See above* para. 33.

18,256 was constitutional because it *did not* authorize a requirement of graphic warnings larger than 50% of the surface of tobacco packaging, and the TCA rejected Abal's claims by holding that Decree 287/009 and Ordinance 466 were valid because Law 18,256 *did* authorize a requirement of graphic warnings larger than 50% of the surface of tobacco packaging. As discussed above, those holdings reflected a "Heads, I win; Tails, you lose" result. I find it very difficult to avoid concluding that these contradictory decisions, rendered against the same party in closely-related proceedings, violate guarantees of access to justice and adherence to the rule of law.

62. I am unpersuaded by the Tribunal's characterization of the foregoing circumstances as only a quirk.[67] Quirkiness is not a defense under international law. Rather, Article 3(2) of the BIT requires "fair and equitable treatment." It is neither fair nor equitable for a state to reject a party's claims against it by applying diametrically contradictory interpretations of the same law to the same party, in the same dispute, in each case as a basis for rejecting that party's claims against the state. Instead, that is arbitrary and irrational, denying parties the basic legal certainty, predictability and the fundamental fairness that the rule of law serves to ensure.

63. In the present case, however, there is an additional and even more serious procedural deficiency, not present in *Şahin v. Turkey*, which requires holding that the Uruguayan judicial system denied Abal access to justice. Here, the Uruguayan judicial system denied Abal access to justice not only by rendering contradictory decisions, on the same legal issue in cases involving the same parties, but by thereafter failing to provide Abal with any means of judicial recourse following these rulings.

64. Specifically, in my view, Uruguay denied Abal justice by failing to provide it with any means of asserting a constitutional challenge in the Supreme Court to Article 9 of Law 18,256 as that statutory provision had been authoritatively interpreted and applied to Abal by the TCA. In the particular circumstances of this case, that was not merely an unusual or surprising quirk, but was a classic denial of access to justice.

65. Put simply, Uruguayan law provided Abal (and others) with constitutional guarantees against legislation that excessively delegated legislative authority to executive officers and with a mechanism for asserting claims based on those guarantees in the Supreme Court. Abal availed itself of that mechanism to challenge Article 9 of Law 18,256, but the Supreme Court rejected Abal's challenge on the basis that Article 9 did not authorize a requirement of graphic warnings in excess of 50% of the surface of tobacco packages. Nonetheless, the TCA thereafter surprisingly, but authoritatively, held that Article 9 in fact did authorize warnings in excess of 50%, and it therefore upheld Decree 287/009 and Ordinance 466.

66. At that juncture, the evidence before this Tribunal is that Uruguay's judicial system provided Abal with no means to assert claims based on the constitutional guarantees against legislation like Article 9 of Law 18,256, as it had been interpreted authoritatively by the TCA and applied to Abal. In my view, the combination of the TCA's highly unusual, but authoritative, decision, contradicting the Supreme Court's prior decision on precisely the same issue, and the absence of any mechanism to reopen or reinitiate Abal's constitutional challenge

[67] The Tribunal concludes that the TCA's decision was "unusual, even surprising," but that "such a quirk" is not sufficiently "shocking" or "serious" to constitute a denial of justice. Award, paras. 528-529. Fine distinctions between unusual surprises and "shocking" or "serious" decisions are inherently susceptible to subjectivity. In my view, however, the unprecedented contradiction between two of Uruguay's highest courts, in cases involving the same claimant, was sufficiently serious and sufficiently inconsistent with the requirements of consistency and regularity to constitute a denial of justice.

in the Supreme Court, based on the TCA's contrary and authoritative interpretation of Law 18,256, manifestly constitutes a denial of justice.

67. Adopting the relatively conservative formula of Article 9 of the 1929 Harvard Draft Convention on State Responsibility, a "[d]enial of justice exists where there is a denial … of access to courts."[68] Other authorities are to the same effect, underscoring the simple point that access to a judicial forum is the most basic guarantee of justice.[69] Among other things, the ECtHR, considering Article 6 of the ECHR, has held that"[i]t would be inconceivable … that [Article 6(1)] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court."[70]

68. In the present case, Uruguay was free, under the BIT and otherwise, to establish the Supreme Court and the TCA as co-equal judicial tribunals with overlapping competence, and to provide that Law 18,256 was subject to authoritative interpretation by the TCA. One can assume that the TCA was also free to adopt surprising administrative interpretations of Law 18,256, in contradiction to the Supreme Court's interpretations of that same law. One might even assume that the TCA was free to do so even with respect to the same party that had been involved in Supreme Court proceedings challenging the same legislation.

69. However, in my view, Uruguay clearly was not entitled to, under either Article 3(2) of the BIT or international law, provide Abal with no possibility of asserting its constitutional rights in the Supreme Court, in a proceeding based on the TCA's authoritative interpretation and application (to Abal) of Article 9 of Law 18,256. That is not consistent with either Uruguay's commitment to the rule of law or rules of international law. Instead, in my view, Uruguay was required to provide a means by which its Supreme Court could hear constitutional challenges to Law 18,256, as that statute was finally interpreted and applied to Abal by the TCA.[71]

70. Given these very substantial and important differences between the present case, and the circumstances at issue in *Şahin v. Turkey*, I do not believe that the ECtHR's decision in that

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[68] Draft Convention on 'International Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners' prepared by the Harvard Law School (1920) in *Yearbook of the International Law Commission, 1956*, Vol. II, Annex 9, pp. 229-230 ("1929 Harvard Draft Convention on State Responsibility"). *See also* Harvard Draft Convention on the International Responsibilities of States for Injuries to Aliens (1961), Art. 7 [Exhibit CLA-236] (state responsibility is triggered by "the denial […] of a fair hearing in a proceeding involving the determination of […] civil rights or obligations.").

[69] *See* Universal Declaration of Human Rights (UDHR), Art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"); UDHR, Art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."); International Covenant on Civil and Political Rights (ICCPR), Art. 14 ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*."); *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights),* Inter-American Court of Human Rights, Advisory Opinion No. 9, para. 24 (a denial of justice occurs "when, for any reason, the alleged victim is denied access to a judicial remedy"). *See also* A. Freeman, *The International Responsibility of States for Denial of Justice* (1970), pp. 95, 229 [Exhibit CLA-231] (denial of justice defined as "the refusal or failure on the part of judicial officers to perform their legal functions" and "even where there has been an original acceptance of the petition by a court of first instance followed by proceedings which terminate in an adverse judgment, the refusal to grant an appeal allowed by law will itself constitute a denial of justice.").

[70] *Golder v UK*, ECHR Case No 4451/70, Judgment, 21 February 1975, para. 35.

[71] *See above* paras. 40-72.

case provides meaningful support for the Tribunal's decision that there has been no denial of justice. Put simply, *Şahin v. Turkey* involved a much different, and less problematic, set of circumstances than this case.

71. Instead, in my view, the *Şahin v. Turkey* decision supports, rather than contradicts, the Claimants' denial of justice claim. The well-reasoned views of the seven dissenting judges of the ECtHR apply *a fortiori* to the present case, while the additional concerns raised by the circumstances of the present case argue decisively that the Claimants were denied access to justice. As discussed above, the present case does not merely involve "conflicting case-law" applied to different parties which might be "tolerated" for a period, but instead involves contradictory decisions, applied to reject claims against governmental action, brought by the same party, followed by a denial of recourse to generally available judicial relief. If the present case was brought before the ECtHR, I do not believe that the Court would have viewed these circumstances as "tolerable," for either a period or at all.

72. In sum, I am unable to avoid concluding that Uruguay violated Article 3(2) of the BIT by failing to provide Abal with a possibility of asserting its constitutional rights in the Uruguayan Supreme Court, in a proceeding challenging Article 9 of Law 18,256 as it had been authoritatively interpreted and applied (to Abal) by the TCA. This conclusion in no way questions Uruguay's sovereign right to structure its judicial system as it deems fit, including with independent and co-equal courts with overlapping competence.[72] It only requires that a state then comply with the basic requirements of fairness and access to justice that international law demands.

D. Additional Observations

73. The foregoing analysis provides my reasons for rejecting the Respondent's defenses and the Tribunal's conclusions on this issue. Nonetheless, for the sake of completeness, I address several additional points.

74. First, the Respondent's position is not assisted by the observation, raised in questioning of the Respondent's counsel by the Tribunal, that different circuit courts of appeal in the United States can adopt conflicting rules, a conflict that may take the Supreme Court some time to resolve.[73] That analysis ignores critical differences between U.S. appellate practice and the Claimants' arguments in this case.

75. U.S. courts of appeal exercise a jurisdiction that is territorial, based upon a geographic division of the United States of America into a number of separate "Circuits," each with its own "Court of Appeals."[74] That is unsurprising in a state as large as the United States; likewise, it is unsurprising that other, similar states (such as Canada and Australia) adopt comparable

[72] This is not to say, however, that the structuring of a judicial system cannot found a claim for denial of justice. *See, e.g., Jacob Idler (US v Venezuela)*, J.B. Moore, *History and Digest of International Arbitrations to which the United States Has Been a Party* 3491, p. 3508 ("Venezuela could, of course, constitute her courts as she desired, but having established them, it was Idler's right, if his affairs were drawn in litigation there, to have them adjudicated by the courts established under the forms of law."); A. Freeman, *The International Responsibility of States for Denial of Justice* (1970), pp. 533, 671-2 [Exhibit CLA-231] ("If, through the composition of its courts or through its procedure, a State makes possible a decision which does not offer the minimum guarantees for the proper administration of justice which are inseparable from the idea of civilization, we consider that it is guilty of a denial of justice and must be held responsible therefor.").

[73] Evidentiary Hearing (Tr., 2/482/13-22) (Crawford).

[74] Administrative Office of the United States Courts, Court Role and Structure, (2016), http://www.uscourts.gov/about-federal-courts/court-role-and-structure.

geographical divisions.[75] There is also nothing unusual or surprising in the fact that different courts of appeal might adopt different interpretations of the same statute; indeed, it is inevitable and, at least arguably, a means of ensuring considered development of the law through robust debate and multiple opportunities for examination of difficult issues, prior to an authoritative ruling by the nation's highest appellate court.

76. The possibility that different courts of appeal may arrive at different interpretations of the same statute is not, however, in any way analogous to the basis for the Claimants' denial of justice claim here. As detailed above, the Claimants' denial of justice claim is not only that contradictory decisions were rendered by the Supreme Court and the TCA; instead, the Claimants' claim rests on the TCA's highly unusual decision, rejecting the Supreme Court's interpretation of Article 9 of Law 18,256 in proceedings involving the same party, and the absence of any mechanism for that party thereafter to reopen or reinitiate a constitutional challenge to Article 9 of Law 18,256, as it had been authoritatively interpreted and applied by the TCA. There is no suggestion in the materials before the Tribunal that the U.S. system of federal appellate courts, divided geographically into multiple circuits, permits such a result and I am aware of nothing, either in my own research or experience of U.S. appellate and Supreme Court proceedings, that would support such a conclusion.[76]

77. On the contrary, U.S. courts apply broad rules of claim and issue preclusion[77] which, in my view, would almost certainly preclude circumstances like those in which Abal found itself in this case. Alternatively, U.S. law also provides comparatively broad possibilities for constitutional challenges[78] which, again in my view, would enable a party in Abal's situation to institute new proceedings asserting such a challenge based on a new interpretation of legislation (such as that adopted by the TCA of Law 18,256). There is, in my view, no basis for concluding that the unexceptional existence of specialized courts – whether organized by geography or subject matter – is comparable to the very exceptional denial of access to a judicial forum that occurred here.

78. Second, I do not believe that the Tribunal's analysis is advanced by the *Mamidoil* award, which remarked that there was nothing inherently improper in a legal system that divides public and private, or civil and administrative, functions.[79] As discussed above,[80] nothing in my Opinion criticizes or questions to value or legitimacy of co-equal tribunals with

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[75] *See, e.g.*, Canada (Government of Canada, Department of Justice, The Judicial Structure, (April 4, 2016), http://www.justice.gc.ca/eng/csj-sjc/just/07.html); Australia (Australian Government, Attorney-General's Department, The Courts, (2016), https://www.ag.gov.au/LegalSystem/Courts/Pages/default.aspx).

[76] I also note that the U.S. judicial system has a mechanism (of review by the Supreme Court) for review of decisions of Courts of Appeals, which specifically takes into account the existence of so-called "circuit splits." (*International Union, United Auto., Aerospace and Agr. Implement Workers of America AFL-CIO, Local v. Scofield*, 382 U.S. 205 (1965)). It is conceded that Uruguay has no mechanism for resolving disagreements between the TCA and Supreme Court. (Evidentiary Hearing, Tr., 2/483/4- 7) (Crawford/Salonidis) (CRAWFORD: My question was is there any mechanism in Uruguayan law for resolving such discrepancies [between courts at the same level]? SALONIDIS: As far as I know, no.).

[77] *See B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015) ("If federal law provides a single standard, parties cannot escape issue preclusion simply by litigating anew in tribunals that apply that one standard differently."); *Christian v. McHugh*, 847 F. Supp. 2d 68 (D.D.C. 2012) ("By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, the two doctrines of claim preclusion and issue preclusion protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions.").

[78] *See* U.S. Federal Rules of Civil Procedure, Rule 5.1; *see generally* Moore's Federal Practice – Civil § 5.1.02 (2015).

[79] Award, para. 533.

[80] *See above* paras. 10-11.

over-lapping competency. That is true whether one considers a civil or a common law system. Rather, as also explained above, it is the particular and unprecedented manner in which Uruguay's divided legal system (with competence distributed between the Supreme Court and TCA) functioned in this particular case that resulted in a denial of justice.

79. Third, I also do not believe that the Respondent's defense is assisted by its argument that the Uruguayan system has a mechanism of review, in which the TCA may review decisions of the Supreme Court.[81] As the Respondent acknowledges, this mechanism of review is limited: "the *only* time the TCA is required to follow the [Supreme Court] is when the latter declares a law unconstitutional."[82] As discussed above, the basis for the Claimants' denial of justice claim is the absence of any avenue of judicial recourse after the TCA has, unusually, adopted a different interpretation than that of the Supreme Court.[83] In such circumstances, where the Supreme Court has upheld the constitutionality of a law and the TCA is not bound to follow its ruling, a litigant is left without remedy in event of conflicting decisions.

80. Finally, like the Tribunal, I am unpersuaded by the Respondent's argument that Uruguayan law has allowed the possibility of inconsistent Supreme Court and TCA decisions for decades. As discussed above, this is apparently the first case in Uruguay's history in which such contradictory results have ever been reached.[84] I see no basis, as a result, for concluding that the Claimants should have anticipated, or should be regarded as assuming the risk of, contradictory decisions of this character.

81. In any event, it is not the mere possibility of contradictory decisions under Uruguayan law that constitutes a denial of justice; rather, it was the failure of the Uruguayan legal system to provide an avenue for challenging Article 9 of Law 18,256 following the TCA's authoritative interpretation and application of that provision which constitutes a denial of justice. That denial of access to a judicial forum is a denial of justice, which both the BIT and Uruguay's commitment to the rule of law proscribe.

II. THE SINGLE PRESENTATION REQUIREMENT VIOLATES URUGUAY'S OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT

82. The second issue on which I part company from the Tribunal is the so-called "single presentation requirement," which required that only a single "presentation" be used for each brand of tobacco products. For the reasons discussed below, and unlike the Tribunal, I cannot avoid concluding that, on the evidentiary record in this case, the single presentation requirement is manifestly arbitrary and unreasonable, and thus a violation of Article 3(2) of the BIT.

83. The Claimants contend that the "single presentation requirement" imposed by Ordinances 514 and 466 violates the fair and equitable treatment guarantee contained in Article 3(2) of the BIT. The Claimants argue that there is no rational relationship between the single presentation requirement and the asserted regulatory purpose of the measure (namely, to avoid misleading consumers).[85] They also claim that the requirement was adopted without any

[81] Respondent's Rejoinder, para. 11.54; Respondent's Counter-Memorial, para. 1.29, 11.01, 11.112-11.125.
[82] Respondent's Rejoinder, para. 11.54; Respondent's Counter-Memorial, para. 1.29, 11.01, 11.112-11.125.
[83] *See above* paras. 36-39.
[84] *See above* paras. 33-35, 59.
[85] *See, e.g.*, Claimants' Memorial, paras. 20-42; 214, 219-230. Claimants' Reply, paras. 27-42, 236-245.

meaningful deliberation or consultation, and imposes an arbitrary limitation on the use of valuable intellectual property rights.[86]

84. The Respondent asserts that the single presentation requirement was a non-discriminatory measure, imposed on all tobacco companies, designed to prevent such companies from misleading consumers.[87] The Respondent claims that the existence of multiple brand variants leads consumers to believe that some variants are less harmful than others, thereby giving smokers and potential smokers less reason to quit smoking.[88] The Respondent also contends that the requirement was adopted as the result of an extensive deliberative process and is in keeping with Uruguay's commitments under the World Health Organization Framework Convention on Tobacco Control.[89]

85. The Tribunal largely adopts the Respondent's conclusions and analysis. The Tribunal applies a "margin of appreciation," derived from ECtHR decisions, and concludes that the single presentation requirement was "an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith."[90] It also concludes that the requirement was the product of "consultation" with the Ministry of Public Health's Advisory Commission, although the "paper trail of these meetings was exiguous," and that the requirement was in the nature of a "bright idea."[91]

86. In my view, analysis of the single presentation requirement is more difficult than the Tribunal suggests and the requirement is much less capable of rational justification than the Tribunal acknowledges. As discussed below, the measure is internationally unique – not required by the Framework Convention on Tobacco Control and not adopted by any other country in the world – with effects which are inherently both over-inclusive and under-inclusive. While fully acknowledging Uruguay's sovereign power and regulatory authority to protect the health of its population, I am persuaded that the single presentation requirement does not bear even a minimal relationship to the legislative objective cited by Uruguay for the requirement.

87. I also do not believe that the "margin of appreciation" adopted by the Tribunal is either mandated or permitted by the BIT or applicable international law. The "margin of appreciation" is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT (or to questions of fair and equitable treatment more generally). There are well-considered legal rules, already applicable to questions of fair and equitable treatment, which serve similar purposes to those of the "margin of appreciation," but in a more nuanced and balanced manner.

88. When these rules governing the fair and equitable treatment standard are applied, I am persuaded, based on the evidentiary record in this proceeding, that the single presentation requirement is arbitrary and irrational. I am also persuaded that, as a consequence, application

[86] *See, e.g.*, Claimants' Memorial, paras. 214, 222-230; Claimants' Reply, paras. 43-61, 242-245.
[87] *See, e.g.*, Respondent's Counter-Memorial, paras. 1.13, 4.11-8.21.; Respondent's Rejoinder, paras. 3.12-3.82.
[88] *See, e.g.*, Respondent's Counter-Memorial, paras. 4.88-4.143; Respondent's Rejoinder, paras. 3.12-3.24, 3.32-3.109.
[89] *See, e.g.*, Respondent's Counter-Memorial, paras. 1.14, 2.30-2.36, 3.78-3.95, 4.98-4.111; Respondent's Rejoinder, paras. 2.37-2.38, 3.57-3.60, 3.83-3.109, 7.40.
[90] Award, paras. 399, 409.
[91] Award, para. 407.

of the single presentation requirement would constitute a denial of fair and equitable treatment under Article 3(2) of the BIT.

A. Preliminary Matters

89. Preliminarily, it is important to reiterate that the Claimants' challenge to the single presentation requirement does not in any way question Uruguay's sovereign authority to adopt measures to protect the health and safety of its population. As the Award describes, Uruguay has adopted an extensive and comprehensive set of legislation and regulations that impose highly restrictive limitations and safeguards on the sale and use of tobacco.[92] The Claimants do not challenge any of these regulations. More fundamentally, nothing in the Award (or this Opinion) raises any question about the validity or lawfulness of any of these regulations.

90. Likewise, nothing in the Award or this Opinion raises any question about the authority of Uruguay (or other states) to regulate in the interests of public health and safety in the future. On the contrary, the Award makes clear that Uruguay possesses broad and unquestioned sovereign powers to protect the health of its population, both in the context of tobacco regulation and otherwise. Nothing in the BIT prevents Uruguay from exercising these powers.

91. Finally, this Opinion also does not conclude that Uruguay would violate Article 3(2) by forbidding misleading presentations of trademarks for tobacco products, including the misleading use of colors, descriptions, or other design features. On the contrary, the evidence submitted to the Tribunal convinces me that neither Article 3(2) nor any other provision of the BIT would preclude Uruguay from prohibiting the use of trademarks that suggested different health consequences (e.g., silver or white versions of trademarks suggesting "light" or "low tar" attributes of cigarettes). Critically, however, this is only one application of the single presentation requirement, which sweeps far more widely and indiscriminately, and, as a consequence, violates the fair and equitable treatment guarantee of Article 3(2) of the BIT.

B. Factual Background

92. In my view, it is important to consider the single presentation requirement in its factual context. That includes considering both the manner in which requirement was adopted and the surrounding legislative and regulatory regime in Uruguay.

1. The Framework Convention on Tobacco Control

93. As the Award describes, like other states, Uruguay has an extensive regime of legislation and regulations governing the sale and use of tobacco. Among other things, this regulatory regime implements the WHO Framework Convention on Tobacco Control ("FCTC" or "Convention") and Guidelines which have been adopted under the Convention.

94. The FCTC is a multilateral convention, drafted under the auspices of the World Health Organization ("WHO") in 2003, and ratified by Uruguay in 2004. The Convention is essentially global in its coverage, with 180 state parties. According to Article 3, the Convention "provid[es] a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke."[93]

[92] Award, paras. 78, 96-107.
[93] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Art. 3 [Exhibit RL-

95. The FCTC contains extensive provisions regarding the regulation of tobacco. Most importantly, Article 4(1) and Article 11(1)(a) provide, in relevant part:

> *Article 4. – (1) Every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke…*
>
> *Article 11. – (1) Each party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that: (a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"…*[94]

96. Articles 13(1), 13(2), 13(4)(a) and 13(5) of the Convention also provide:

> *Article 13. –*
>
> *1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.*
>
> *2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.*
>
> *4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall: (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions; …*
>
> *5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.*[95]"

97. The Guidelines to Article 11(1)(a) of the FCTC provide, in pertinent part:

> *Article 11.1(a) of the Convention specifies that Parties shall adopt and implement, in accordance with their national law, effective measures to ensure that tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about the product's characteristics, health effects, hazards or emissions, including any term, descriptor, trademark or figurative or other sign that directly or indirectly creates the false impression that a particular*

20].

[94] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 4(1), 11(1)(a) [Exhibit RL-20].

[95] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 13(1), 13(2), 13(4)(a), 13(5) [Exhibit RL-20].

> *tobacco product is less harmful than others. These may include terms such as 'low tar, 'light', 'ultra-light' or 'mild', this list being indicative but not exhaustive. In implementing the obligations pursuant to Article 11.1(a), Parties are not limited to prohibiting the terms specified but should also prohibit terms such as "extra", "ultra" and similar terms in any language that might mislead consumers.*[96]

98. The Guidelines to Article 13 provide, inter alia:

> *Parties should prohibit the use of any term, descriptor, trademark, emblem, marketing image, logo, colour and figurative or any other sign that promotes a tobacco product or tobacco use, whether directly or indirectly, by any means that are false, misleading or deceptive or likely to create an erroneous impression about the characteristics, health effects, hazards or emissions of any tobacco product or tobacco products, or about the health effects or hazards of tobacco use. Such a prohibition should cover, inter alia, use of the terms "low tar", "light", "ultra-light", "mild", "extra", "ultra" and other terms in any language that may be misleading or create an erroneous impression.*[97]

99. It is important to note that the single presentation requirement is not required by or referred to in the Convention. That is true although the Convention does mandatorily prescribe a number of other specific regulatory measures, which were developed through extensive international study and consultation. These include measures providing for protection from exposure to tobacco smoke in indoor workplaces and other public places (Article 8); measures to restrict advertising and promotion, including misleading use of trademarks (Article 13); measures to ensure that all unit packets and packages of tobacco products and any outside packaging are marked to determine the origin of the tobacco products (Article 15); and measures to prohibit the sales of tobacco products to minors (Article 16).[98]

100. Despite this detailed list of regulatory measures, and despite the Convention's "savings" clause (providing for further national regulations),[99] there is no suggestion in the text or history of the Convention that a single presentation requirement was either mandated or contemplated by the Convention. Likewise, there is nothing in the Guidelines to the Convention that suggests that a single presentation requirement was mandated or contemplated by the Convention's drafters. Although the Guidelines make reference to a variety of wide regulatory measures,[100] they contain no reference to a single presentation requirement.

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[96] *Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products),* adopted at the third Conference of the Parties (Nov. 2008), para. 43 [Exhibit RL-13].

[97] Conference of the Parties to the Framework Convention on Tobacco Control (COP-FCTC), Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship), FCTC/COP3(12), Nov. 2008, para. 39 [Exhibit RL-133].

[98] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 8, 15, 16 [Exhibit RL-20].

[99] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 2 and 13(5) [Exhibit RL-20].

[100] For example, the FCTC Guidelines to Article 11 provide that Parties "should prohibit the display of figures for emission yields" or "should prevent the display of expiry dates on tobacco packaging and labelling where this misleads or deceives consumers into concluding that tobacco products are safe to be consumed at any time":

101. Finally, it is also relevant that a single presentation requirement has never been imposed by any other state, either in Latin America or elsewhere, prior to Uruguay's adoption of Ordinance 514 and Ordinance 466. Instead, Uruguay was the first state to adopt or, so far as the evidentiary record indicates, to consider a single presentation requirement. Similarly, again so far as the evidentiary record indicates, no state other than Uruguay has subsequently adopted a single presentation requirement.[101] The single presentation requirement was (and remains), in a field with an extensive body of regulation, unprecedented.

2. Uruguayan Tobacco Legislation and Regulations

102. Uruguayan legislation and regulations contained detailed restrictions on the use and sales of tobacco prior to ratification of the FCTC (on 9 September 2004). These restrictions were preserved, and then expanded, after the Convention came into force for Uruguay. They provide important context for consideration of the single presentation requirement.

103. In summary:

a. In 1982, Uruguay's Parliament adopted Law 15,361. That legislation imposed a number of significant restrictions on the use and sale of tobacco, including (a) mandating inclusion of specific warnings on tobacco packaging; (b) prohibiting sales of cigarettes to minors; and (c) requiring quarterly publication of tar and nicotine levels of cigarette brands by tobacco companies.[102]

b. In 1996, Decree 203/996 prohibited smoking in offices, public buildings and other public establishments.[103]

c. In 1998, Decree 142/998 prohibited promotion of tobacco involving product giveaways.[104]

d. In 2005, Decrees 36/005 and 171/005 mandated inclusion of warning texts on tobacco packaging covering 50% of the surfaces of the front and back of packages, required periodic rotation of warnings and inclusion of administratively-specified images and pictograms, and prohibited use of terms such as "low tar" and "light."[105]

e. In 2005, Decree 169/005 limited smoking areas in restaurants and bars and

Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products), adopted at the third Conference of the Parties (Nov. 2008), paras. 44-45 [Exhibit RL-13].

[101] The Respondent suggests that other states (including Ecuador) have considered adoption of a single presentation requirement, but have allegedly been deterred by the pendency of this arbitration. (Respondent's Rejoinder, paras. 3.76-3.79; Uruguay's Comments on the Written Submission of the Pan American Health Organization (18 May 2015), para. 15.) There is no independent evidentiary support for this suggestion and it seems unlikely that states would refrain from adopting what they regard as important public health measures because of the possibility of future litigation.

[102] Law 15,361, December 24, 1982, *amended by* Law 17,714, December 10, 2003, Art. 2 [Exhibit C-274].

[103] V. Denis, et al., *Application of FODA Matrix on the Uruguayan Tobacco Industry* (2007), p. 141 [Exhibit R-180].

[104] V. Denis, et al., *Application of FODA Matrix on the Uruguayan Tobacco Industry* (2007), p. 140 [Exhibit R-180].

[105] Uruguayan Decree No. 36/005 (25 January 2005), Art. 1 [Exhibit C-031], Uruguayan Decree No. 171/005, Art. 1 (31 May 2005) [Exhibit RL-2].

advertisements on television (requiring "safe hours" for minors).[106]

f. In 2005, Decree 170/005 prohibited advertising and promotion of tobacco products in connection with sports events.[107]

g. In 2005, Decrees 214/005 and 268/005 declared that all public offices were "100% tobacco smoke-free environments" and that all enclosed public premises and work areas were subject to the same requirement.[108]

h. In 2005, Decree 415/005 required that all pictograms on tobacco packaging be approved by the Ministry of Public Health, specified images for use on tobacco packaging and required health warnings on one side of tobacco packages.[109]

i. In 2007, Decree 202/007 specified three images and legends for use on the surfaces of tobacco packaging.[110]

j. In 2007, Tax Law 18,083 significantly modified the previous tax regime and imposed a 22% value added tax on tobacco products.[111]

104. Following Uruguay's ratification of the FCTC, Uruguay's Parliament adopted Law 18,256, which restated and extended many of the foregoing regulations. Article 2 of Law 18,256 made specific reference to the Convention, providing "measures aiming at the control of tobacco are established, in order to reduce in a continuous and substantial manner the prevalence of tobacco consumption and exposure to tobacco smoke, pursuant to the World Health Organization Framework Agreement for Tobacco Control."[112]

105. As contemplated by Article 11 of the Convention, Article 8 of Law 18,256, titled "Packaging and labeling of tobacco products," imposed a broad prohibition against false or misleading packaging or labelling of tobacco products, including specific prohibitions against false or misleading use of trademarks:

> *It is forbidden for packages and labels of tobacco products to promote such products in a false, wrong or misleading way which may lead to a mistake regarding their features, health effects, risks or emissions. It is likewise forbidden to use terms, descriptive features, trademarks or brands, figurative signs or any other kind, which have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than others.*[113]

106. Article 8 was implemented by Decree 284/008, which contained an equally broad prohibition against misleading use of trademarks. Decree 284 provided in Article 12 as follows:

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[106] Uruguayan Decree No. 169/005 (6 June 2005) [Exhibit C-146].
[107] Uruguayan Decree 170/005 (6 June 2005) [Exhibit C-147].
[108] Uruguayan Decree 214/005 (5 July 2005) [Exhibit C-150], Uruguayan Decree 268/005 (5 September 2005) [Exhibit C-151].
[109] Uruguayan Decree 415/005 (26 October 2005) [Exhibit C-153].
[110] Uruguayan Decree 202/007 (20 June 2007) [Exhibit C-149].
[111] Uruguayan Tax Law 18,083 (1 July 2007).
[112] Law 18,256, Art. 2 [Exhibit C-033].
[113] Law 18,256, Art. 8 [Exhibit C-033].

> *The use of descriptive terms and elements, trademarks or brands, figurative signs or signs of any other nature, such as colors or combination of colors, numbers or letters, that have the direct or indirect effect of creating the misleading impression that a certain product is less harmful than others is forbidden.*[114]

It was against this regulatory background that the single presentation requirement was adopted in Ordinance 514 (and, subsequently, Ordinance 466).

3. Ordinances 514 and 466: Single Presentation Requirement

107. As noted above, the Respondent contends that the single presentation requirement was the product of a comprehensive and extensive deliberative process, which assertedly included a number of meetings concerning the requirement.[115] The Tribunal acknowledges that the "paper trail of these meetings was exiguous," although the Tribunal seems to accept the Respondent's assertion that the two measures were subject to at least some degree of consideration by the Advisory Commission of the MPH.[116]

108. In my view, the record does not support a conclusion that the single presentation requirement of Ordinance 514 or Ordinance 466 was preceded by any meaningful internal study, discussions or deliberations at the Ministry of Public Health, or by other Uruguayan authorities. On the contrary, I cannot avoid concluding that no serious study, discussion, deliberations, or consultations occurred with respect to the requirement, either within the Ministry of Public Health or otherwise.

109. It is significant that the evidentiary record contains no minutes, agendas, protocols, preparatory materials, memoranda, letters, emails or other documentary evidence suggesting that any meetings, conference calls or other interactions concerning the single presentation requirement ever occurred. If such meetings had occurred, there would inevitably have been substantial documentation generated in scheduling, organizing and reporting on them. More importantly, there would have been records of the rationale and evaluation of the single presentation requirement by the Ministry of Public Health or other government agencies. Uruguay was free to adduce documentary evidence of such meetings or other discussions, but it did not do so.

110. On the contrary, during document production, the Claimants requested all "[d]ocuments generated or obtained by/for the Ministry of Public Health in 2008 reflecting its deliberations on the [single presentation requirement]" including:[117]

> *(i) meeting minutes; (ii) documents establishing the date(s) on which the meetings regarding the SPR took place; (iii) correspondence regarding the SPR; (iv) documents showing that "new brands, entirely distinct from existing brands, do not convey the same messages as variations within the same brand;" (v) documents showing that brand variants are per se misleading, even if the "colors have not been used previously in Uruguay to convey linkage to specific banned variants that were formerly identified explicitly as 'light' or 'mild'; (vi) all drafts of proposed regulations that led to the SPR, including preliminary*

[114] Uruguayan Decree 284, Article 12 [Exhibit C-034].
[115] Respondent's Rejoinder, paras. 3.83-3.109.
[116] Award, para. 407; Respondent's Counter-Memorial, para. 1.1, 4.105-4.107; Respondent's Rejoinder, paras. 3.83, 3.85-3.87, 3.98-3.108.
[117] Procedural Order No. 2, January 13, 2015, Annex A, Request No. 7.

drafts of Ordinance 514; (vii) documents reflecting the Advisory Commission's consideration and/or rejection of alternative measures.

The Claimants also requested all "[d]ocuments that the MPH considered and/or relied upon as evidentiary support when considering or adopting the SPR."[118]

111. In response, the Respondent produced only six generic documents, none of which refer to the single presentation requirement and none of which involved meetings within or near the time period relevant to adoption of the single presentation requirement.[119] As indicated above, none of these materials evidenced any study, debate, or consultation regarding the single presentation requirement.

112. This is confirmed by an examination of the very limited documentary record surrounding the adoption of the single presentation requirement. That evidence shows that there was simply no time for – as well as no evidence of – any internal study, discussion, or consultation regarding the single presentation requirement.

113. The documentary record indicates that the first proposals for Ordinance 514 were presented in July 2008.[120] It is undisputed that the initial draft of the proposed ordinance (on 25 July 2008) did not include the single presentation requirement.[121]

114. The first reference to a single presentation requirement was included in a 28 July 2008 draft of Ordinance 514, prepared by the Ministry of Public Health's National Tobacco Control Program. The 28 July draft added the text of a single presentation requirement to the prior draft that the Ministry had received on 25 July,[122] without including any commentary or explanation for the addition.[123]

115. The 28 July draft was then sent to the Ministry of Public Health's Division of Population Health (*Division de Salud de la Poblacion*), which forwarded the draft on 30 July 2008, to the Director General of Health (*Direccion General de Salud*). The Director General of Health (Dr. Basso) reviewed the draft and made a single hand-written addition to the text of the draft; again, there was no explanation or discussion of the single presentation requirement.[124] The 28 July draft of Ordinance 514, with the 30 July edit, was then signed and

[118] Procedural Order No. 2, January 13, 2015, Annex A, Request No. 1.

[119] Five documents were general email announcements of upcoming meetings of the Advisory Commission and one was a scanned copy of personal calendar entries noting meeting dates of the Advisory Commission scheduled in April 2008. Email from Ministry of Public Health Commissions to Dr. Abascal et al, 1 July 2008 [Exhibit C-328]; Email from Ministry of Public Health Commissions to Dr. Abascal et al, 2 June 2008 [Exhibit C-329]; Email from Ministry of Public Health Commissions to Dr. Abascal et al, 18 June 2008 [Exhibit C-330]; Email from Ministry of Public Health Commissions to Dr. Abascal et al., 27 May 2008 [Exhibit C-331]; Email from Eduardo Bianco to Ministry of Public Health Commissions, 27 May 2008 [Exhibit C-332]; Personal Agenda of Eduardo Bianco, 2008 [Exhibit C-333]. The Government withheld no documents on grounds of privilege with regard to these requests.

[120] Ministry of Health Administrative File regarding Ordinance 514, pp. UGY0001810-1812 [Exhibit C-334].

[121] Respondent's Rejoinder, para. 3.102; Claimants' Reply, para. 52.

[122] Ministry of Health Administrative File regarding Ordinance 514, UGY0001836-1838 [Exhibit C-334].

[123] Ministry of Health Administrative File regarding Ordinance 514, p. UGY0001810-1812; Respondent's Rejoinder, para. 3.103; Claimants' Reply, para. 52.

[124] Ministry of Health Administrative File regarding Ordinance 514, pp. UGY0001824 [Exhibit C-334]. *See also,* Basso Witness Statement, paras. 11-12 [Exhibit RWS-004].

sent to the Minister of Public Health the next day (1 August 2008), again without any commentary or explanation relating to the single presentation requirement.[125]

116. As noted above, there was no time during this process for there to have been any meaningful discussions or consultations regarding the single presentation requirement. Rather, the requirement was formulated, drafted, and approved in the space of only a few days – with, as noted above, no documentary evidence of any governmental meetings, discussions, or study of the measure.

117. Shortly thereafter, on 18 August 2008, the amended 28 July 2008 draft was approved by the Minister of Public Health and Ordinance 514 was formally adopted.[126] When adopted, the relevant portions of Ordinance 514 provided as follows:

> *Article 3. – Every brand of tobacco products shall have a single presentation, such that it is forbidden to use terms, descriptive features, trademarks, figurative signs or signs of any other kind such as colors or combinations of colors, numbers or letters, which may have the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another, varying only pictograms and the warning according to article 1 of the present Ordinance.*[127]

118. Subsequently, in September 2009, the Ministry of Public Health adopted Ordinance 466, which amended the text of Ordinance 514. It is undisputed that these amendments were in the nature of clarifications, not substantive alterations, to the existing language of Ordinance 514. The revised ordinance restated the single presentation requirement as follows:

> *Article 3. – Each brand of tobacco products shall have a single presentation, varying only the pictograms and the warning according to article 1 of the present Ordinance.*[128]

119. As indicated above, there were no documents or other materials accompanying any of the drafts of the proposed ordinances (in either 2008 or 2009) that explained the purpose or background of the single presentation requirement or how the requirement was contemplated to work in practice, nor that addressed any empirical evidence that would bear upon the requirement's goals or efficacy. There are also no documentary records of any internal deliberations of the requirement nor edits or revisions to the requirement.

120. Likewise, there were also no documentary records of any external consultations by the Ministry of Public Health regarding the single presentation requirement, either with the National Advisory Commission for Tobacco Control, the National Program for Tobacco Control, or any other government body (nor with representatives of these or other governmental advisory bodies). Similarly, there are no documentary records of any consultations by the MPH regarding the single presentation requirement with representatives of the tobacco industry, nor of any notice to tobacco industry participants (or others), or any opportunity to comment on the proposed requirement.[129]

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[125] Basso Witness Statement, paras. 11-12 [Exhibit RWS-004].
[126] Ministry of Health Administrative File regarding Ordinance 514, UGY0001836-1838 [Exhibit C-334].
[127] Ministry of Public Health Ordinance 514, 18 August 2008, Article 3 [Exhibit C-003].
[128] Ministry of Public Health Ordinance 466, 1 September 2009, Article 3 [Exhibit C-043].
[129] There is evidence that BAT, another tobacco company, received informal information that a measure like the single presentation requirement was being considered in late July 2008. Email from Javier Ortiz to Chris Diller,

121. Uruguay did submit a limited amount of witness evidence indicating in general terms that the single presentation requirement was the subject of some, albeit very limited, internal discussion.[130] This oral testimony, even at its highest, indicates at most only very brief and general discussions within the Ministry of Public Health regarding the single presentation requirement, without any suggestion of any internal studies, reports on presentations, or external consultations.

122. Moreover, where the question is whether formal governmental consideration of proposed regulatory measures occurred (and, if so, to what extent), contemporaneous documentary evidence is much preferable to recollections and oral testimony. Here, the events in question occurred some eight years ago (in 2008), and involved a very brief period of time (between 28 July and 1 August 2008, as noted above). There is no question that contemporaneous documentary evidence is vastly more reliable in these circumstances than oral testimony about recollections of past meetings or discussions.

123. The documentary evidence is clear in demonstrating that no meaningful internal discussion or consideration of the single presentation requirement occurred within the Ministry of Public Health (or elsewhere in the Uruguayan government). There is no reliable evidence that any meeting was ever held to discuss the requirement in any meaningful way, in circumstances where contemporaneous documentation inevitably would have been generated in connection with such discussions.[131] Likewise, there are no documents recording or referring to any studies, internal discussions, or commentary regarding the single presentation requirement. In my view, the inescapable conclusion is that there was no serious internal discussion or deliberation at the Ministry of Public Health or within the Uruguayan government more generally about the requirement.

124. This absence of any study, analysis, or discussion of a measure that was not included in the FCTC's comprehensive list of recommended or mandatory tobacco controls and that had never been adopted (or even discussed) by any other state, is impossible to reconcile with the Respondent's claim that the requirement was the result of an "extensive deliberative process that involved input from both external advisors and government regulators."[132] On the contrary, I believe that the record makes clear that the single presentation requirement was adopted with

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July 24, 2008 [Exhibit C-343]; Attachment to Email from Javier Ortiz to Chris Dilley, July 24,2008 [Exhibit C-353]. The Claimants were provided no such notice and there is no evidence that any consultations between the Claimants (or other tobacco companies) ever occurred. Dilley Witness Statement, para. 6 [Exhibit CWS-005]; Second Dilley Witness Statement, para. 4 [Exhibit CWS-022].

[130] Abascal Witness Statement, paras. 7-12 [Exhibit RWS-001]; Bianco Witness Statement, paras. 7-11 [Exhibit RWS-002]; Basso Witness Statement, paras. 8-12 [Exhibit RWS-004]; Sica Witness Statement, paras. 6-10 [Exhibit RWS-005]; Lorenzo Witness Statement, paras. 11-15 [Exhibit RWS-006]; Abascal Second Witness Statement, paras. 4-5, 8 [Exhibit RWS-007]; Muñoz Witness Statement, paras. 15-19 [Exhibit RWS-001].

[131] It is impossible to conclude that meetings within the MPH, or with governmental advisory groups, would not have required agendas and presentations; would not have resulted in minutes or protocols; and would not later have been referred to in correspondence or reports.

[132] Respondent's Reply, para. 3.84 ("Uruguay engaged in an extensive deliberative process that involved input from both external advisors and government regulators, to consider how it should address the ongoing problem of consumers being misled into believing that some cigarettes are less dangerous than others. These discussions, which occurred over a period of months, drew upon the existing scientific and public health literature, and considered a variety of regulatory options. They ultimately yielded the recommendation that the MPH adopt the SPR. The Ministry subjected this recommendation to its own internal evaluation process and decided it was meritorious. Only after these processes had been completed was a draft Ordinance prepared, which was itself subjected to additional internal review within the MPH, before being officially adopted and signed into law by the Minister of Public Health.").

no meaningful study, discussion, deliberation, or consultation with the industry.

125. The absence of any evidence of deliberations regarding the single presentation requirement is, in my view, relevant to evaluating the Claimants' fair and equitable treatment claim.[133] This background is not decisive, but it nonetheless provides important context in evaluating the extent to which the challenged Uruguayan measure is arbitrary or disproportionate.

126. Put simply, claims that a governmental action is arbitrary, disproportionate, or not rationally related to any stated government objective are more plausible with respect to an unprecedented regulatory measure, adopted without any meaningful prior study, discussion, or consultation, which departs from a widespread and comprehensive international regulatory regime, than with respect to measures that have been adopted by other states, recommended by international bodies, or developed through careful domestic or other study, discussion, and consultation.[134] Or, put alternatively, claims that a governmental action is entitled to deference because of administrative or regulatory expertise are less persuasive where there is no indication that any such expertise was ever relied upon or brought to bear with respect to the challenged measures.

127. As discussed above, Uruguay's single presentation requirement was a significant departure from both prior international practice and internationally recommended regulatory measures. Although very substantial consideration had been given to issues of tobacco control generally, and tobacco packaging and labelling specifically, neither the FCTC nor its Guidelines, nor any national regulatory regime, had ever adopted or proposed a single presentation requirement. At a minimum, that deprives such a requirement of the support that would otherwise be provided by adoption of an international standard; more generally, it also inevitably raises questions as to the rationale of a measure which, despite very extensive international consideration of the subject, had never been proposed or adopted.

128. This also suggests that the requirement was not a "bright idea," as the Tribunal charitably puts it,[135] but instead was an unreflective directive, issued very hastily and without the checks and validation that internal study and discussion and/or external notice and consultation provide. Where a governmental measure encroaches on protected investor rights – as Ordinance 514 concededly does – these surrounding circumstances argue for particular care in considering claims that the measure is not arbitrary, disproportionate, or unfair.

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[133] *See, e.g., Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 Aug. 2005, Part III, Chapter B, para. 57; Part III, Chapter A, para. 101 ("the time-line of the California Senate legislation, scientific study, public hearing, executive order, and initiatives to secure an oxygenated waiver [were] all objectively confirmed" and scientific evidence was subject to "public hearings, testimony and peer review").

[134] Tribunals have often considered the relevance of state practice when determining whether a measure has breached the FET standard. *See, e.g., ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 188 [Exhibit RL-165] (challenged domestic content and performance requirements in governmental procurement "are to be found in the internal legal systems or in the administrative practice of many States."); *Noble Ventures Inc. v. Romania,* ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 178, 182 [Exhibit RL-165] (judicial reorganization proceedings for insolvency were "provided for in all legal systems"); *Link-Trading Joint Stock Company v Moldova,* UNCITRAL, Final Award, 18 April 2002 (challenged tax measures were "not dissimilar to the policies of many countries in the world").

[135] Award, para. 407.

C. Analysis

129. Turning to an analysis of the single presentation requirement, I find it impossible to avoid a conclusion that the requirement is a violation of the fair and equitable treatment standard in Article 3(2). Instead, notwithstanding the deference that is due sovereign regulatory measures and judgments, I am convinced that the requirement does not bear a rational relationship to its stated legislative objective, yet disproportionately injures important investor rights.

1. Fair and Equitable Treatment

130. The terms of the BIT are familiar, paralleling those of many other international investment treaties. Article 3(2) provides, among other things, that "[e]ach Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party."

131. As the Award correctly observes,[136] Article 3(2)'s guarantee of fair and equitable treatment cannot be equated with the traditional international minimum standard of treatment of aliens (whether the standard referred to in *Neer v. United Mexican States* or otherwise). There is no indication that Article 3(2) was meant merely to incorporate the international minimum standard,[137] much less the international minimum standard as it was sometimes phrased in the early decades of the 20th century.

132. As the Tribunal correctly concludes, Article 3(2)'s fair and equitable treatment guarantee is instead an autonomous standard, defined by the terms of the BIT and by evolving principles of international law. As the tribunal in *Mondev v. United States* concluded: "it is unconvincing to confine the meaning of 'fair and equitable treatment … to what these terms – had they been current at the time – might have meant in the 1920s…"[138]

133. One of the central elements of the guarantee of "fair and equitable treatment" is a protection against arbitrary treatment. This guarantee reflects a fundamental aspect of the rule of law: citizens are entitled to treatment, by their government, which is rational and proportionate. Irrational or arbitrary governmental measures, which are unrelated to any legitimate governmental objective, or which are gravely disproportionate to the achievement of such an objective, are neither fair nor equitable, and they betray, rather than advance, the rule of law.

134. This conclusion has been almost uniformly embraced by well-considered decisions interpreting international protections similar to those in Article 3(2) of the BIT. The tribunal in *Saluka v. Czech Republic* held that the fair and equitable treatment guarantee ensures that a state "will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e., unrelated to some rational policy), or discriminatory (i.e., based on unjustifiable distinctions)."[139] Similarly, the tribunal in *Waste Management, Inc. v. United Mexican States*

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[136] Award, paras. 316-324.

[137] The Respondent argues that Article 3(2) "refers to the minimum standard of treatment that must be accorded to aliens under customary international law.": Respondent's Counter Memorial, para. 8.3. The Tribunal correctly rejects this argument, as has the decisive weight of arbitral authority: Award, paras. 316-324.

[138] *Mondev International Ltd. v. United States of America*, ICSID Case NO. ARB(AF)/99/2, Award, 11 Oct. 2002, para. 210 [Exhibit CLA-280].

[139] *Saluka Investments B.V. (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 309 (emphasis added) [Exhibit CLA-227].

held that fair and equitable treatment provides protection against governmental action that is "arbitrary, grossly unfair, unjust or idiosyncratic, … discriminatory or [that] exposes the claimant to sectional or racial prejudice."[140]

135. More specifically, the guarantee of fair and equitable treatment provides protection against "a measure that inflicts damage on the investor without serving any apparent legitimate purpose"[141] or that is "done capriciously, without reason."[142] Or, in the words of the *Rumeli Telecom v. Kazakhstan* tribunal, "[t]he standard of 'reasonableness' has no different meaning than the 'fair and equitable treatment' standard with which it is associated. Therefore, it requires that the State's conduct bears a reasonable relationship to some rational policy."[143]

136. All of these formulations reflect a common principle. Governmental actions that encroach on individual rights must satisfy minimum standards of rationality and proportionality: they must be fair and equitable, not arbitrary or capricious.

137. It is important to recognize that the fair and equitable treatment standard, and the protection against arbitrary measures, does not empower this, or any other, tribunal to second-guess legislative or regulatory judgments. On the contrary, it is well-settled that the judgments of national regulatory and legislative authorities are entitled, under the fair and equitable treatment guarantee, to a substantial measure of deference.

138. In this regard, however, I am unable to agree with the Tribunal's application of the "margin of appreciation" as developed in ECtHR jurisprudence. As discussed below, that doctrine is based upon the specific language of the ECHR and its Protocols and, as the weight of other authority concludes, is not transferable to the specific terms of Article 3(2) of the BIT or to customary international law more generally.[144]

139. Instead, in my view, the proper degree of deference in considering claims under Article 3(2) must be derived from the terms and context of the BIT itself, in accordance with customary international law rules for treaty interpretation, and from decisions involving similar guarantees of fair and equitable treatment in other international instruments. In my view, these sources mandate substantial deference to Uruguay's regulatory and legislative judgments, and forbid any second-guessing of such judgments, but nonetheless require a minimum level of rationality and proportionality between the state's measure and a legitimate governmental objective.[145]

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[140] *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (emphasis added) [Exhibit CLA-225].

[141] *National Grid P.L.C. v. Argentine Republic,* UNCITRAL, Award, November 3, 2008, para. 198 [Exhibit CLA-221].

[142] *National Grid P.L.C. v. Argentine Republic,* UNCITRAL, Award, November 3, 2008, para. 198 [Exhibit CLA-221].

[143] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICISD Case No. ARB/05/16, Award, July 29, 2008, para. 671.

[144] *See below* paras. 181-191.

[145] A number of awards have considered the principle of proportionality in interpreting and applying fair and equitable treatment provisions in investment treaties. The basis for doing so is debated. *See* B. Kingsbury & S. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) New York University School of Law, Public Law & Legal Research Theory Research Paper Series, Working Paper No. 09-46, pg. 23; C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (CUP 2015), pp. 23, 70-71; G. Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015), pp. 193-199. For present purposes, it is sufficient to observe that Article 3(2)'s requirement for "fair and equitable" treatment necessarily connotes a measure of proportionality. Although related, the requirement of proportionality differs from that of rationality or reasonableness. Proportionality involves an analysis of the

140. The starting point for analysis is, as the tribunal in *S.D. Myers v. Canada* concluded with respect to fair and equitable treatment claims under the NAFTA, that such claims must be assessed "in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[146] The *S.D. Myers* tribunal concluded:

> *When interpreting and applying the 'minimum standard,' a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.*[147]

141. This observation reflects the presumptive lawfulness of governmental authority under customary international law, as well as respect for a state's sovereignty, particularly with regard to legislative and regulatory judgments regarding its domestic matters. Or, as another tribunal noted, a state would not violate its obligations towards an investor if the government authorities made "a decision which is different from the one the arbitrators would have made if they were the regulators"; "arbitrators are not superior regulators" and "they do not substitute their judgment for that of national bodies applying national laws."[148] It is not generally for arbitral tribunals to devise or impose different purposes or objectives (save for exceptional cases involving pretextual rationales[149]).

142. Nonetheless, deference to governmental measures is not a substitute for reasoned analysis, either under customary international law or Article 3(2) of the BIT: deference to sovereign measures is the starting point, but not the ending point, of evaluation of fair and equitable treatment claims. Rather, a sensitive and nuanced consideration of the nature of the governmental measure, the character and context of the governmental judgment, the relationship between the measure and its stated purpose, and the measure's impact on protected investments is necessary.

143. That consideration must occur in the specific context of the relevant treaty provisions

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legitimacy of a measure's objective and whether a measure is both necessary and suitable for that objective, while reasonableness or arbitrariness focus primarily on the relationship between the measure and investor's rights.

[146] *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 [Exhibit RL-155]. *See also Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 505 [Exhibit RLA-114].

[147] *S.D. Myers Inc. v Government of Canada*, Partial Award, para. 263 [Exhibit RLA-114]. Although the *S.D. Myers* tribunal was applying the customary international law minimum standard of treatment under Article 1105(1) NAFTA, tribunals have been guided by this formulation when considering autonomous FET standards as well. *See, e.g.*, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 115; *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. United Mexican States and Talsud S.A. v. United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, Part VI, para. 26.

[148] *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 283 [Exhibit RLA-114].

[149] *See, e.g., Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, 21 Nov. 2007, paras. 142, 149-150; *Methanex v. United States of America*, UNCITRAL, Partial Award, 7 Aug. 2002, para. 158; *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 Nov. 2000, para. 263 [Exhibit RL-155]; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Award, 18. Aug. 2009, para. 137.

applicable to the disputed measures. In the present case, the BIT does not contain language reserving any particular sphere of discretion or immunity for state actions. Language of this character exists in other contexts, including the ECHR, as discussed below,[150] or treaties mandating deference or providing exceptions to international guarantees.[151] No such text exists in Article 3(2) of the BIT. Rather, the BIT requires interpretation and application of the "fair and equitable treatment" standard in the context of the BIT, and applicable principles of international law more generally.

144. In my view, Article 3(2)'s guarantee of "fair and equitable treatment," and the related requirements of reasonableness and proportionality, require an objective consideration of the extent to which a governmental measure is rationally related to, or fairly advances, the state's articulated objectives. That consideration must give considerable deference to a state's choice among competing means to accomplish its objectives, its assessment of the likelihood that particular means will be effective, and its weighing of costs and benefits.

145. This deference does not, however, free a tribunal from its obligation, under the BIT or customary international law, to decide whether a particular measure is fair and equitable, or proportionate, in light of the state's articulated objectives. In turn, the tribunal must assess whether, viewed in the context of a state's legislative and regulatory actions, a particular measure is rationally related and fairly proportionate to the state's articulated objectives.

2. Uruguay's Single Presentation Requirement

146. Applying the foregoing standard, I am satisfied that the single presentation requirement, considered in the context of the Uruguayan regulatory regime, is arbitrary and disproportionate. As a consequence, and notwithstanding the deference appropriately afforded national regulatory and legislative judgments, I am persuaded that, the requirement violates the guarantee of fair and equitable treatment in the BIT.

147. Uruguay has very clearly explained the governmental objective of the single presentation requirement – namely, "to combat a practice that misled smokers and would-be smokers into believing that certain brand variants were less harmful than their parent brands, or other variants in the same brand family, and caused them to smoke the supposedly 'safer' variants in lieu of quitting."[152] In similar terms, Uruguay explained: "the existence of multiple variants of a single brand *per se* creates a risk of deception in the minds of some consumers"[153] and the goal of the single presentation requirement is to "diminis[h] the industry's ability to continue perpetrating this fiction."[154] The Respondent's witnesses identified the same objectives of the requirement in their testimony,[155] as did the TCA in its consideration of Law 18,256 and its implementing regulations.[156]

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[150] *See below* paras. 181-191.

[151] *See, e.g.,* Article 22(2) of the Australia-United States Free Trade Agreement ("Nothing in this Agreement shall be construed to preclude a Party from applying measures that *it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").

[152] Respondent's Counter-Memorial, para. 5.54. *See also* Evidentiary Hearing (Tr., 1/198/7-199/7) (Koh); (Tr., 1/231/11-18; 1/233/21-234/11) (Reichler).

[153] Respondent's Rejoinder, para. 3.34.

[154] Respondent's Rejoinder, para. 3.39.

[155] Evidentiary Hearing, (Tr., 3/797/7-798/8) (Lorenzo); (Tr. 1/186/7-187:10) (Basso).

[156] TCA Decision 512, Section VI [Exhibit C-116] ("evident objective of preventing the consumer from becoming familiarized and living with it without perceiving the harmful consequences attributed to tobacco products").

148. There is no question that these are legitimate and entirely proper governmental objectives. The protection of consumers from misleading or deceptive marketing in order to safeguard the public health is within the scope of any government's regulatory powers. That conclusion is non-controversial and indisputable.

149. There is also no question, in my view, that the Tribunal must accord deference to Uruguay's chosen legislative objectives. Although one might conceive of alternative or additional legislative purposes for the single presentation requirement, it is for the state, not the arbitral tribunal, to identify such objectives with regard to the measures it has adopted.[157]

150. With the foregoing stated objectives of the single presentation requirement in mind, the fair and equitable treatment standard requires at least some measure of objective consideration of the extent to which the requirement achieves, or is calculated to achieve, that objective. In doing so, it is important to consider both the terms of Ordinances 514 and 466, and the terms of previously-existing Uruguayan law directed at the same objective.

151. As detailed above, prior to adoption of Ordinance 514, Uruguayan law already contained prohibitions against the misleading packaging or labelling of tobacco products and, in particular, the misleading use of trademarks. Specifically, Article 8 of Law 18,256, titled "Packaging and labeling of tobacco products," provided:

> *It is forbidden for packages and labels of tobacco products to promote such products in a false, wrong or misleading way which may lead to a mistake regarding their features, health effects, risks or emissions. It is likewise forbidden to use terms, descriptive features, trademarks or brands, figurative signs or any other kind, which have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than others.*[158]

152. Article 8 was implemented by Decree 284, which provided in Section 12 as follows:

> *The use of descriptive terms and elements, trademarks or brands, figurative signs or signs of any other nature, such as colors or combination of colors, numbers or letters, that have the direct or indirect effect of creating the misleading impression that a certain product is less harmful than others is forbidden.*[159]

153. Together, Article 8 of Law 18,256 and Section 12 of Decree 284 provided express and extensive prohibitions against the misleading use of trademarks and other elements of tobacco packaging or labelling that had the "direct or indirect effect" of misleading consumers. In doing so, Uruguay gave effect to Article 11(1)(a) and 11(4) of the FCTC, which contained parallel provisions regarding the misleading use of trademarks, packaging, labelling and advertising.[160]

154. Uruguay also banned the use of descriptors such as "light" and "mild" in Presidential

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[157] *See, e.g., GAMI Investments, Inc. v. The Government of the United Mexican States,* UNCITRAL, Award, 15 Nov. 2004, para. 114; *Bilicon v. Government of Canada,* PCA Case No. 2009-04, Award, 17 May 2015, para. 598; *Teco Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 Dec. 2013, paras. 490-493, 629-638; *Parkerings Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 Sept. 2007, para. 332 [Exhibit RL-177].

[158] Law 18,256, Article 8 [Exhibit C-033].

[159] Decree 284, Section 12 [Exhibit C-034].

[160] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Article 11.1(a), 11(4) [Exhibit RL-20].

Decree 171/2005. Specifically, Article 1 provided:

> *The provisions of Decree No. 36/005 of 25 January 2005 are hereby extended insofar as health warnings shall occupy 50% of the total display areas in the packages and containers of tobacco products, shall be periodically rotated and shall include images and/or pictograms. It is also stipulated that expressions, terms, elements, marks or signs that have the direct effect of creating a false impression, such as "low tar", "light", "ultra-light", or "mild" [sic].*[161]

155. Given these provisions of Uruguayan law, one must ask what additional purpose the single presentation requirement would serve in achieving the measure's only stated purpose – namely, to prevent misleading use of trademarks. The simple point is that Uruguayan law already contained carefully drafted provisions, adopting international models, that achieved precisely this objective.

156. Notwithstanding this regulatory background, which already contained prohibitions against misleading packaging and labelling of tobacco products, Ordinance 514 and Ordinance 466 introduced a different measure regarding the use of tobacco-related trademarks, which (ultimately) provided:

> *Article 3. – Each brand of tobacco products shall have a single presentation, varying only the pictograms and the warning according to article 1 of the present Ordinance.*[162]

157. In my view, this provision is inherently ill-suited to achieving its asserted objective of prohibiting the deceptive or misleading use of trademarks. Instead, on considered reflection, I find it impossible to avoid concluding that the single presentation requirement is inevitably incapable of discriminating between misleading and non-misleading uses of trademarks, and therefore both arbitrary and disproportionate.

158. As finally adopted, Ordinance 466's single presentation requirement is a blunt and sweeping measure, that contains nothing that focuses on or refers to misleading, false or deceptive use of trademarks. The measure therefore almost inevitably prohibits many uses of trademarks that are not misleading or false, while allowing even more uses of trademarks that are in fact misleading and deceptive. Put simply, there is a fundamental mismatch between the character and terms of the single presentation requirement and its stated objective.

159. First, Ordinance 466's single presentation requirement is inherently overbroad. By its terms, the requirement forbids any use of tobacco-related trademarks other than in a single presentation. There is, however, no reason in either logic or empirical evidence to conclude that all of the myriad of different uses of trademarks that could be employed on tobacco products, apart from in a single presentation, are misleading and deceptive.

160. There is nothing the record in this proceeding that suggests that all presentations of a product, save a single presentation chosen by the manufacturer, are misleading or deceptive. At the most, the Respondent cites some (very limited) evidence that the use of some variations of colors in some trademark presentations could mislead consumers (e.g., silver or white presentations assertedly indicating "light" or "low tar" cigarettes).[163] In my view, this evidence

[161] Presidential Decree 171/2005, Article 1 [Exhibit C-148].
[162] Ministry of Public Health Ordinance 466, 1 Sept. 2009, Article 3 [Exhibit C-043].
[163] *See, e.g.,* Respondent's Counter-Memorial, paras. 4.118-4.143, 4.89-4.97; Respondent's Rejoinder, paras. 3.48-3.60, 5.1-5.45; Expert Report of Professor Joel Cohen, 19 September 2014, paras. 112-113, 127.

was tenuous, even with regard to the question of different colors of trademark, for the reasons detailed in the Claimants' expert evidence; that evidence concluded that the use of brand variations with different colors did not create the impression that cigarettes of one brand color entailed less of a health risk that other brand colors.[164]

161. Nonetheless, as applied to the use of at least some different colors of brands (e.g., silver, white, red, blue) and to "light" and "low tar" descriptors, I conclude on the record in this arbitration that Uruguay's prohibition against the use of brand variants was not arbitrary or disproportionate. Although the evidence supporting such a prohibition was, in my view, unimpressive, it was sufficient to uphold a prohibition against the use of these different colors of trademarks for tobacco packaging, particularly in light of the deference that is owed a state's regulatory and legislative judgments.

162. However, even accepting this evidence, it does nothing to support Ordinance 466's blanket requirement of a single presentation of all aspects of trademarks (including use of different design features, additional words or numbers, seasonal or geographic variations, different languages or scripts, all colors, etc.). The Respondent's evidence addresses only the use of colors as brand extensions or variants and the use of some descriptors (such as "light" and "low tar"),[165] but does not address other forms of brand variations.

163. In my view, this is insufficient to justify Ordinance 466's blanket prohibition against all but a single presentation of any tobacco trademark. Put simply, the fact that some uses of colors in some brands of tobacco products may be regarded as misleading in some circumstances does not suggest, even indirectly, that all other variations of trademarks are also misleading.

164. There is, for example, no reason to think, or evidence to show, that seasonal motifs on tobacco products would be misleading, or that brand variants with numbers corresponding to the number of cigarettes in a package would be misleading, or that brands in different languages or with different font sizes or styles would be deceptive. There is nothing at all in either logic or the evidentiary record that suggests that there is anything deceptive or misleading about any of these countless brand variants. In my view, it is impossible on the record in this arbitration to avoid the conclusion that the single presentation requirement is gravely overbroad.

165. Returning to the basic character of the single presentation requirement, it is inevitable that the requirement is ill-focused and over-inclusive in the extreme. Consider a regulation aimed at prohibiting misleading food or automobile advertisements – which required manufacturers to use only a single presentation for any trademark for food or automobile products. That prohibition would obviously do nothing – except perhaps accidentally – to discourage misleading food or automobile advertisements, while it would prohibit large categories of perfectly acceptable and desirable advertisements. Ordinance 466's single presentation requirement is no different.

166. The conclusion that Ordinance 466 is severely over-inclusive is particularly true given the existence, discussed above, of Article 8 of Law 18,256, Section 12 of Decree 284, and Presidential Decree 171/2005, which already specifically prohibited misleading and deceptive uses of trademarks. Given these existing prohibitions against misleading practices, it is

[164] *See* Expert Report of Mr. Alexander Chernev, 28 February 2014, paras. 4, 30 [Exhibit CWS-009]; Second Expert Report of Mr. Alexander Chernev, 17 April 2015, para. 130 [Exhibit CWS-020]; Expert Report of Mr. Jacob Jacoby, 17 April 2015, paras. 5, 42-45 [Exhibit CWS-021].
[165] Expert Report of Professor Joel Cohen, 19 September 2014, paras. 112-113, 127.

impossible to see how Ordinance 466's additional single presentation requirement was anything other than over-inclusive; indeed, it seems inescapable that Ordinance 466 added nothing to Law 18,256, Decree 284, and Presidential Decree 171/2005 except a prohibition against *non-misleading* uses of trademarks.

167. These conclusions have particular force because, as discussed above, the evidentiary record makes it clear that the single presentation requirement was adopted with no meaningful prior study, internal debate, or external consultation. Rather, so far as the evidence shows, the requirement was formulated, drafted and adopted in the space of only a few days, without any meaningful study or discussion of the measure.[166] The absence of internal checks and balances, or external consultation, both helps explain, and underscores the arbitrary and disproportionate character of the single presentation requirement.

168. Second, and conversely, Ordinance 466's single presentation requirement is also under-inclusive. In particular, Ordinance 466 has the effect of prohibiting multiple presentations of a single trademark, but did nothing to address the misleading presentation of different trademarks, and specifically, did nothing to prohibit the use of so-called "alibi brands" that used slightly different combinations of colors and designs to accomplish precisely the same results that the single presentation requirement was supposedly intended to prevent.

169. It is helpful to consider what Ordinance 466 forbids, and what it permits, in assessing whether its single presentation requirement is a fair, proportionate and non-arbitrary measure for preventing consumers from being misled. Specifically, the single presentation requirement of Ordinance 466 prohibits the use of the trademarks of the Claimant depicted below (marked with red "X"s):[167]

170. At the same time, Ordinance 466's single presentation requirement permits cigarettes to be sold under different, so-called "alibi" brands, using common branding elements and colors. The examples depicted below are products sold by a domestic Uruguayan producer (not by the Claimant, which in general used no alibi brands):[168]

[166] *See above* paras. 109-130.
[167] Claimants' Memorial, para. 36.
[168] Claimants' Memorial, paras. 40-41.

171. It is very difficult to see how there is any material difference between these two categories of trademarks from the perspective of consumer deception. There is no material difference in the use of colors (and, if anything, the "alibi" brands' use of light colors is more pronounced than those of the Claimants' brand-variants). As a consequence, it is impossible to avoid the conclusion that the single presentation requirement is gravely under-inclusive.[169]

172. In light of the foregoing, I believe that it is beyond dispute that the single presentation requirement is inherently over-inclusive and under-inclusive. Put simply, the single presentation requirement is inherently and inescapably unrelated to its only articulated objective – protecting consumers against deceptive uses of trademarks. There is simply no logical or empirical relationship between a blanket single presentation requirement and misleading advertisements or packaging. Instead, the single presentation requirement's only independent effects are to forbid a substantial range of uses of trademarks that are not deceptive and misleading, while allowing other uses of trademarks that plainly are deceptive and misleading.

173. Indeed, when the single presentation requirement is read together with the pre-existing provisions of Law 18,256, Decree 284, and Presidential Decree 171/2005, the requirement is *only* over-inclusive and under-inclusive. Put differently, everything that the single presentation requirement is assertedly intended to accomplish was already specifically accomplished by pre-existing provisions of Uruguayan law, while the requirement itself independently forbids nothing but things that do not further its stated objective. That result is neither fair nor equitable; it is arbitrary and capricious.

174. As noted above, I find significant the lack of evidence of any other international use or consideration of a single presentation requirement and of any meaningful study deliberation, or consultation regarding the single presentation requirement. If the single presentation requirement made serious regulatory sense, it would have been included in the FCTC's lengthy catalogue of regulatory measures or in the Guidelines' supplementation of those measures. Or,

[169] Although this case does not require a decision on the issue, a measure's under-inclusiveness would not ordinarily be an independent basis for concluding that the measure constituted a denial of fair and equitable treatment. In principle, states would be free to address some, but not necessarily all, aspects of a perceived ill. *See, e.g., Glamis Gold, Ltd. v United States*, UNCITRAL, Award, 8 June 2009, para. 805 [Exhibit RL-183] ("[t]he fact that [the measure] mitigates some, but not all, harm does not mean that it is manifestly without reason or arbitrary; it more likely means that it is a compromise between the conflicting desires and needs of the various affected parties."). There might be circumstances where under-inclusive measures would raise questions of discrimination or pre-textual conduct, but those considerations have not been raised here.

even if not, the measure would have been recommended in the extensive literature on anti-smoking regulations or, alternatively, would have been the product of study and deliberations counselling in favor of its adoption.

175. As already discussed, however, the single presentation requirement was none of these things: it was instead an inherently and inevitably arbitrary proposal that was never previously recommended, discussed, or adopted and that was adopted hastily without serious study, debate, or consideration.[170]

176. In these circumstances, and even accepting the Tribunal's "margin of appreciation" for the sake of argument, I cannot agree that the single presentation requirement satisfied the requirements of rationality and proportionality. Mindful of Uruguay's extensive legislative authority and broad regulatory discretion, it is still impossible to see how a hastily-adopted measure that is so ill-suited to its articulated purpose, and that treads so far onto protected rights and interests, can satisfy even the Tribunal's stated standard.

177. In identifying the inherent irrationality of the single presentation requirement, a tribunal would not undermine Uruguay's regulatory and governmental authority. As discussed above, Uruguay can already prevent everything that it asserts the requirement is intended to accomplish under Law 18,256, Decree 284, and Presidential Decree 171/2005, including the deceptive use of different colors of tobacco packaging.[171] The only things that Ordinance 466 can logically prohibit are things that Uruguay has not said that it wishes to forbid, but that its own citizens wish to undertake. It does not restrict Uruguay's sovereign authority, or encroach upon Uruguay's regulatory powers, to hold that these applications of Ordinance 466 would deny the Claimants fair and equitable treatment.

178. Finally, it is important to note the limits of the foregoing conclusion. It does not hold that Uruguay is forbidden from adopting other regulations of tobacco, with other objectives, as it already had done. It does not hold that Uruguay is forbidden from prohibiting the use of trademarks with different colored presentations or other presentations that are found to be deceptive (as with the use of at least some colors and descriptors). It also does not address the question whether Uruguay could adopt measures with the objective of reducing tobacco consumption or smoking prevalence, or even regulations with the objective of entirely eliminating smoking or tobacco sales. All of those are presumptively valid and lawful governmental purposes, which could support a wide range of presumptively valid and lawful tobacco-control measures.

179. But those objectives, and those measures, are not at issue in this arbitration. What is at issue is the single presentation requirement and the stated objective of forbidding misleading tobacco product packaging. And, for the reasons set forth above, I cannot avoid the conclusion that, in the circumstances of Uruguay's articulated regulatory purposes and existing regulatory regime, the requirement constitutes a denial of fair and equitable treatment.

D. Additional Observations

180. The foregoing analysis sets forth my disagreement with the Tribunal's conclusions, and the Respondent's defense, with regard to the single presentation requirement. In addition, several further points require brief discussion.

[170] *See above* paras. 107-128.
[171] *See above* paras. 148-159.

181. First, as noted above, I do not agree with the Tribunal's conclusion that "the 'margin of appreciation" is not limited to the context of the [ECHR] but 'applies equally to claims arising under BITs.'"[172] In my view, this conclusion is impossible to sustain with regard to the BIT at issue in this arbitration and also impossible to justify more generally, with regard to other investment instruments.

182. The doctrine of a "margin of appreciation" is, as the Tribunal acknowledges, derived from decisions of the ECtHR, applying the ECHR.[173] In turn, in formulating this "margin of appreciation," the ECtHR has relied upon Article 1 of Protocol 1 to the ECHR, which protects private property from seizure, subject to exceptions for the "public interest" and "general interest."[174]

183. Article 1 of Protocol 1 to the ECHR has been interpreted by the ECtHR to afford a very wide margin of appreciation to governmental authorities with respect to what constitutes "public interest."[175] Among other things, the ECtHR has held that "it should respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation."[176] This interpretation of the Convention and its Protocols is supported by the *travaux préparatoires* of the Convention, which indicate that the drafters intended to incorporate a "very wide" margin of appreciation.[177]

184. There is no provision in the text of the BIT that is equivalent to Article 1 of Protocol 1, or that could provide a textual basis for importing such a concept into Article 3(2) of the BIT. On the contrary, as the Tribunal acknowledges,[178] Article 3(2) is phrased broadly, referring only to the guarantee of "fair and equitable treatment," without incorporation of the international minimum standard or limitations like that in Article 1 of Protocol 1 to the ECHR. Nor, so far as the parties have suggested or I can discover, is there anything in the *travaux* of the BIT that suggests that its parties intended to incorporate the concept of a "margin of appreciation."

185. The "margin of appreciation" utilized under Protocol 1 to the ECHR was drafted and accepted in a specific geographic and historical context, in relation to a particular human rights instrument. The reasons that led to acceptance of the "margin of appreciation" in the context of the ECHR are not necessarily transferable to other contexts, including specifically to a BIT

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[172] Award, para. 399.
[173] Award, para. 399.
[174] Article 1 of Protocol 1 provides "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law; (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
[175] The scope of Article 1 is extremely broad in comparison to the approach taken under other international human rights treaties. For example, the UN Human Rights Committee does not apply the doctrine of the margin of appreciation in cases relating to the International Covenant on Civil and Political Rights (ICCPR): *see, e.g.*, General Comment No. 34, "Article 19: Freedoms of Opinion and Expression," UN Doc. CCPR/C/GC/34 (2011), at para. 36 ("the scope of this freedom is not to be assessed by reference to a "margin of appreciation"); *Ilmari Länsman v. Finland*, UN Hum. Rts. Com, 14 Oct. 1993, para. 9.4.
[176] *James and others v. United Kingdom*, ECtHR, Series A No. 98, 21 Feb. 1986, para. 46; *see also Broniowski v.* Poland, ECtHR., Application No. 31443/96, Judgment, 22 June 2005, para. 149 [Exhibit RL-190].
[177] *Travaux préparatoires* to the ECHR, 17th Sitting, 7 September 1949 , p. 1150 (Teitgen) ("Each country shall, through its own legislation, determine the conditions in which these guaranteed liberties shall be exercised within its territory, and, in defining the practical conditions for the operation of these guaranteed liberties, each country shall have a very wide freedom of action.").
[178] Award, paras. 316-319.

between Switzerland and Uruguay. Rather, just as the meaning of Article 3(2)'s "fair and equitable" treatment guarantee must be determined by interpretation of the BIT,[179] so the standard of review and degree of deference to state regulatory and legislative judgments must be determined by interpretation of the BIT, not of the ECHR and decisions interpreting that instrument.

186. This conclusion is consistent with the decisions of those arbitral tribunals and international courts which have addressed the issue. These decisions have consistently rejected the doctrine of a margin of appreciation when applying general rules of international law. They have instead treated the doctrine as a specific rule, limited to the particular context in which it was formulated.

187. Thus, the tribunal in *Siemens v. Argentina* concluded that "Article 1 of the First Protocol to the ECHR permits a margin of appreciation not found in customary international law or the [Germany-Argentina Bilateral Investment] Treaty."[180] Similarly, the tribunal in *Quasar de Valores v. Russian Federation* held that the protections guaranteed by the applicable bilateral investment treaty could not be overridden by the ECHR's margin of appreciation.[181] Likewise, the tribunal in *von Pezold v. Zimbabwe* refused to apply the margin of appreciation, reasoning that:

> *[D]ue caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law.*
>
> *This is a very different situation from that in which margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no "margin of appreciation" qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine.*[182]

188. Conversely, the only award which appears to have adopted a "margin of appreciation" based upon ECtHR jurisprudence has done so in the context of a BIT provision that contained express exceptions for the "public order" and "essential security interests."[183] In adopting a margin of appreciation, the tribunal relied specifically on these textual references,[184] while

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[179] Award, paras. 316-317.

[180] *Siemens v Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, para. 354 [Exhibit RL-198].

[181] *Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012, para. 22 [Exhibit RL-198] ("[W]here the value of an investment has been substantially impaired by state action, albeit a bona fide regulation in the public interest, one can see the force in the proposition that investment protection treaties might not allow a host state to place such a high individual burden on a foreign investor to contribute, without the payment of compensation, to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member.").

[182] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 465-466.

[183] *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, para. 187 [Exhibit CLA-096].;*see also* Claimants' Reply on the Merits, para. 173.

[184] *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, para. 181 [Exhibit CLA-096] ("[T]he expression 'its own security interests' implies that a margin of appreciation must be afforded to the Party that claims in good faith that the interests addressed by the measure are essential security interests or that its public order is at stake.").

cautioning against similar conclusions in the absence of a textual basis.[185]

189. Two other awards merit brief mention. In *Electrabel*, the tribunal stated that a "reasonable margin of appreciation" should be applied;[186] while in *Lemire*, the tribunal afforded "the high measure of deference" to the respondent state.[187] The language used by these tribunals does not indicate an application of the ECtHR's doctrine of a margin of appreciation but are general references to deference as a standard of review. It is uncontroversial that a degree of deference should be afforded to the state, but the Award errs, in my view, in endorsing a standard of review transposed from, and as wide as that afforded by, the ECtHR's margin of appreciation.

190. Other international courts and tribunals have also consistently refused to apply the concept of a margin of appreciation akin to that developed under the ECHR.[188] For example, the International Court of Justice has also repeatedly rejected the doctrine of a margin of appreciation in various contexts,[189] most recently holding in *Whaling in the Antarctic* that "an objective test of whether a program is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a program are reasonable in relation to achieving the stated research objectives."[190]

191. In sum, I cannot agree to the transposition of the doctrine of a margin of appreciation from the ECHR context to either the Switzerland-Uruguay BIT or international law more generally. Rather, I am persuaded by the conclusions of other international tribunals and courts that a more specific standard of review, focused on the terms and context of the relevant treaty, is mandated.[191] As discussed above, this standard results, in my view, in a substantial degree of deference for sovereign regulatory judgments, but it does not warrant incorporation of the ECtHR's understanding of the "public interest" in the ECHR into Article 3(2)'s protections.

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[185] *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, para. 187 [Exhibit CLA-096] ("Although a provision such as Art. XI, as earlier indicated, involves naturally a margin of appreciation by a party invoking it, caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in absence of clear textual or contextual indications.").

[186] *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicability and Liability, 30 Nov. 2012, para. 8.35 [Exhibit RL-200].

[187] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/8, Decision on Jurisdiction and Liability, 14 Jan. 2010, para. 505 [RLA-114]. *See also Saluka v. Czech Republic*, Partial Award, para. 272 [Exhibit CLA-227] ("[Czech Republic] enjoyed a margin of discretion"); *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 Nov. 2010, para. 527 [Exhibit CLA-105] ("States enjoy a certain margin of appreciation in determining what their own conception of international public policy is.").

[188] Well-reasoned commentary is to the same effect: J. Arato, 'The Margin of Appreciation in International Investment Law' (2013) 54(3) *Virginia Journal of International Law* 546, p. 578 (arguing that to apply the margin of appreciation would do "active harm" to investment law as a whole); E. Bjørge, 'Been There, Done That: The Margin of Appreciation and International Law' (2015) 4(1) *C. J. I. C. L.* 181.

[189] *See, e.g., Oil Platforms (Iran v US) [*2003] ICJ Rep 2003 161, para. 73 ("[T]he requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion".); *Gabcikovo/Nagymaros* (Hungary/Slovaki), 1997 ICJ 7, 40 ("[T]he state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.").

[190] *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* [2014] ICJ Rep 2014, para. 97.

[191] *See, e.g., Glamis Gold v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 617 [Exhibit RL-183] (finding that the standard of deference was "present in the standard as stated, rather than being additive to the standard" and "[t]he idea of deference is found in the modifiers "manifest" and "gross" that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking or exhibits a manifest lack of reasoning.").

192. Second, the Tribunal reasons that "there were no reasons for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures," because "[s]uch support was amply offered by the evidence-based FCTC provisions and guidelines adopted thereunder."[192] With respect to the single presentation requirement, I do not believe that the record in this arbitration supports this conclusion.

193. As discussed above, neither the FCTC nor its Guidelines make any reference to a single presentation requirement, nor provides any suggestion that this requirement was either required or contemplated.[193] I therefore cannot agree that the Convention and its Guidelines provided support for the single presentation requirement. In fact, the FCTC and its Guidelines provide no support at all for such a requirement, because they neither require nor mention it.

194. In my view, the opposite inference is more appropriate. In the course of extensive study and consultation, and compilation of a very extensive and thorough list of mandatory and recommended tobacco control measures, the drafters of the FCTC and its Guidelines did not choose to recommend or require a single presentation requirement. That omission gives rise to the natural inference that the requirement was not regarded as useful or supported by the studies associated with the Convention. In these circumstances, I cannot agree that the FCTC and its preparatory work provide any support for the single presentation requirement.

195. Third, the parties devoted some effort to demonstrating that the single presentation requirement either did, or did not, reduce both tobacco consumption and smoking prevalence.[194] I agree with the Tribunal that this evidence was largely inconclusive, both because of questions about the reliability of available surveys and statistics and because of difficulties in establishing causation.[195]

196. The fundamental point is that the single presentation requirement violated Article 3(2) for reasons other than an after-the-fact assessment of the measure's efficacy in reducing smoking. Rather, as discussed above, the single presentation requirement must be regarded as arbitrary and disproportionate because it is wholly unnecessary to accomplishing its only stated objective and instead prohibits substantial categories of conduct that do not accomplish that objective. It is that fundamental lack of rationality and proportionality that renders the requirement arbitrary and disproportionate.

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197. In sum, I agree with most of the Tribunal's conclusions, but part company with the Award on two important issues. My conclusions on these issues do not question the broad authority of Uruguay, or other states, to regulate in the interest of public health and safety. They do, however, go to the heart of guarantees of access to justice and protection from arbitrary state conduct and, with regret, I must therefore dissent.

[192] Award, para. 396.
[193] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Article 11 [Exhibit RL-20]; *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and Labelling of Tobacco Products)* [Exhibit RL-13].
[194] Claimants' Memorial, paras. 112-13; Respondent's Counter-Memorial, para. 6.45.
[195] Award, para. 408.

[Signed]

Mr. Gary Born
Arbitrator
Date: June 28, 2016