

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)

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**DECISION ON JURISDICTION**

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*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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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 responsabilité 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.<sup>1</sup> 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*

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<sup>1</sup> 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.<sup>2</sup> 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*<sup>3</sup>, except that any party asserting a fact shall have to prove it.<sup>4</sup>
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

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<sup>2</sup> 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."

<sup>3</sup> *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.

<sup>4</sup> *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.<sup>5</sup>

#### 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.

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<sup>5</sup> Schreuer, *The ICSID Convention, A Commentary* (2<sup>nd</sup> 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.<sup>6</sup>
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)*<sup>7</sup>, 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".<sup>8</sup> Accordingly, the Court did not accept jurisdiction due to the failure to comply with the pertinent conditions.<sup>9</sup>
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

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<sup>6</sup> 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).

<sup>7</sup> *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).

<sup>8</sup> *Ibid.*, para. 88.

<sup>9</sup> *Ibid.*, para. 126.

failure to comply with that requirement would result in a determination of lack of jurisdiction”.<sup>10</sup>

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”.<sup>11</sup>
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.<sup>12</sup> 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*.

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<sup>10</sup> *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.

<sup>11</sup> *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.

<sup>12</sup> 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".<sup>13</sup> 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

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<sup>13</sup> *Compañía 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<sup>14</sup> 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".<sup>15</sup> 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<sup>16</sup>, 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

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<sup>14</sup> *Supra*, para. 34.

<sup>15</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, UNCITRAL Award on Jurisdiction, 10 February 2012, para. 272.

<sup>16</sup> *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”.<sup>17</sup> 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.<sup>18</sup>

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”<sup>19</sup> or to matters that are specifically mentioned.<sup>20</sup> These differences demonstrate that the drafters

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<sup>17</sup> Memorial, para. 69.

<sup>18</sup> *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports, para.396.

<sup>19</sup> Argentina-Spain BIT dated 3 October 1991, Article IV.2. See *Maffezini v. Spain*, cit., para. 60.

<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>
  
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”.<sup>24</sup> 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.<sup>25</sup>
  
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”.<sup>26</sup> 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

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<sup>21</sup> *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.

<sup>22</sup> *Wintershall v. Argentina*, cit., para. 167.

<sup>23</sup> *Impregilo S.p.A. v. Argentine Republic*, cit., para. 103.

<sup>24</sup> *ICS v. Argentina*, cit., para. 320.

<sup>25</sup> *Ibid.*, paras 323-324.

<sup>26</sup> *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”.<sup>27</sup>

## 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.”

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<sup>27</sup> *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.<sup>28</sup>
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

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<sup>28</sup> 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<sup>29</sup>, 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

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<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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

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<sup>30</sup> The TCA Decision 970 on Abal's Request for Annulment of Ordinance 466, dated 22 November 2011 (C-114).

<sup>31</sup> 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.<sup>32</sup> 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,

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<sup>32</sup> 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.<sup>33</sup>
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

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<sup>33</sup> 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.<sup>34</sup>

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".<sup>35</sup> 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

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<sup>34</sup> Memorial, para. 38.

<sup>35</sup> *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.<sup>36</sup> 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.<sup>37</sup>

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".<sup>38</sup>

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:

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<sup>36</sup> *Supra*, paras 57-59 as to Ordinance 514; paras 62-63 as to Decree 287; para. 65 as to Ordinance 466.

<sup>37</sup> 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).

<sup>38</sup> Transcript, Day One, page 78, lines 3-6.

- a) The Claimants failed to litigate their treaty dispute in Uruguayan courts<sup>39</sup>,
- b) Even if they had submitted the dispute to Uruguayan courts, the Claimants were required to litigate for 18 months before initiating arbitration.<sup>40</sup>

99. According to the Respondent, jurisdiction is wanting on either of these grounds or both of them.<sup>41</sup> 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”.<sup>42</sup> In its view, what must be submitted to the Uruguayan courts is “the actual dispute arising under the BIT”.<sup>43</sup> 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.

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<sup>39</sup> Reply, para. 75.

<sup>40</sup> *Ibid.*, para. 76.

<sup>41</sup> Transcript, Day One, page 14, lines 10-25.

<sup>42</sup> Transcript, Day One, page 15, lines 22-24.

<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>
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<sup>46</sup>, 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.<sup>47</sup>
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”.<sup>48</sup> In each case, the Claimants

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<sup>44</sup> *Ibid.*, para. 30

<sup>45</sup> *Ibid.*, para. 31.

<sup>46</sup> Rejoinder, para. 36, citing Uruguay BITs with Canada, Chile, the United States and Venezuela.

<sup>47</sup> 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.

<sup>48</sup> 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).<sup>49</sup> 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.<sup>50</sup>

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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.”).

<sup>49</sup> The TCA Decision 512 on Abal’s Request for Annulment of Decree 287, dated 28 August 2012, under VIII (C-116).

<sup>50</sup> 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.<sup>51</sup>
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,<sup>52</sup> 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.<sup>53</sup>

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(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.

<sup>51</sup> Transcript, Day One, page 11, lines 8-15; 19-25; page 12, lines 1-3.

<sup>52</sup> *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 Cercanías 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).

<sup>53</sup> 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”<sup>54</sup>. 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”<sup>55</sup>, or “in connection with investments within the meaning of this Agreement”<sup>56</sup>, “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”<sup>57</sup>.
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*,<sup>58</sup> 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.

<sup>54</sup> Cit., *supra*, fn. 52, para. 138.

<sup>55</sup> As in the France-Argentina BIT in the *Vivendi v. Argentina* case (*supra*, fn. 52).

<sup>56</sup> As in the Argentina-Spain BIT on which the *Teinver v. Argentina* case was based (*ibidem*).

<sup>57</sup> *Vivendi v. Argentina*, cit., para 55. This holding is endorsed by the tribunal in *Teinver v. Argentina*, cit., para. 112.

<sup>58</sup> 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.<sup>59</sup>
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

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<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup>

(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.<sup>62</sup> The Respondent contends rather that the Claimants should have followed the special procedure established by Law 16,110 of 7 May 1990<sup>63</sup>, which they concededly did not do.<sup>64</sup>

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".<sup>65</sup> This is hardly consistent with the

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<sup>60</sup> 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.

<sup>61</sup> *Supra*, para. 3.

<sup>62</sup> 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).

<sup>63</sup> Uruguayan Law 16,110 of 7 May 1990 (RL-83).

<sup>64</sup> Transcript, Day One, page 9, lines 5-17.

<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> Nonetheless, the Tribunal, in view of the duty to satisfy itself that it has jurisdiction to hear the case,<sup>68</sup> notes the following.

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<sup>66</sup> See "Assertion and Reservation of Rights" under the various Requests for Annulment (C-041, Chapter VII; C-049, Chapter V; C-050, Chapter VI).

<sup>67</sup> 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".

<sup>68</sup> *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”.<sup>69</sup>
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

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<sup>69</sup> Dr. Daniel Hugo Martins’ Expert Report annexed to the Reply, para. 22.



rejected them.<sup>70</sup> 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"<sup>71</sup> was satisfied since this phrase does not "necessarily mean annulment and damages combined".<sup>72</sup> 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

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<sup>70</sup> 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.

<sup>71</sup> Transcript, Day One, page 176, lines 12-16.

<sup>72</sup> 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”.<sup>73</sup>

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.<sup>74</sup> 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”.<sup>75</sup>

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”.<sup>76</sup> 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

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<sup>73</sup> Dr. Martins’ Expert Report, paras 14-15.

<sup>74</sup> Dr. Martins’ Expert Report, para. 22.

<sup>75</sup> Dr. Daniel Hugo Martins, *Algunos Aspectos del reparatorio patrimonial*, in *Reflexiones sobre la Reforma Constitucional del 1996*, 1998, para. 130,134 (CLA-097).

<sup>76</sup> 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”.<sup>77</sup> 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.<sup>78</sup>
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<sup>79</sup>. 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.<sup>80</sup>

## 2. The second ground of the First Objection.

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<sup>77</sup> *Ibidem*, para. 3.3.1.

<sup>78</sup> 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).

<sup>79</sup> *Supra*, para. 99.

<sup>80</sup> “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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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

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<sup>81</sup> *Supra*, para. 12.

<sup>82</sup> *Supra*, para. 60.

<sup>83</sup> *Supra*, para. 65.

<sup>84</sup> *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.<sup>85</sup> 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,<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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 artículo*”) but also when “the timely issuance of such decision exists but the dispute

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<sup>85</sup> For example, in *Burlington 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 cases, Schreuer, First Legal Opinion attached to the Memorial, paras 31-32.

<sup>87</sup> *Supra*, para. 67.

<sup>88</sup> *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”.

<sup>89</sup> 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”.<sup>89</sup> 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”,<sup>90</sup> 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”.<sup>91</sup> 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”,<sup>92</sup> since, allegedly, the domestic court would not be in a position to render a decision within the time-limit prescribed by the applicable treaty.<sup>93</sup> 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

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<sup>89</sup> *TSA*, para. 110.

<sup>90</sup> *Ibid.*, para. 111.

<sup>91</sup> *Ibid.*, para. 112.

<sup>92</sup> The latter is the expression used in *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 224.

<sup>93</sup> 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.<sup>94</sup>

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.

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<sup>94</sup> *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”.<sup>95</sup>

The Court referred to the “fundamental principle of consent”<sup>96</sup> 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...”.<sup>97</sup>

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.<sup>98</sup> 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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<sup>95</sup> *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).

<sup>96</sup> *Ibid.*, para. 131.

<sup>97</sup> *Case Concerning Armed Activities in the Territory of the Congo*, cit. (*supra*, para. 33).

<sup>98</sup> 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.<sup>99</sup>

144. The domestic litigation requirement had not been satisfied at the time this arbitration was instituted.<sup>100</sup> 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<sup>101</sup> or of any actions by the investor to address its claims to the domestic court before resorting to arbitration.<sup>102</sup> 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<sup>103</sup> 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”.<sup>104</sup>

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<sup>99</sup> 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).

<sup>100</sup> *Supra*, para. 131.

<sup>101</sup> As in the case of *Burlington v. Ecuador*, fn. 85.

<sup>102</sup> As in the case of *Wintershall v. Argentina*, leading to the dismissal of the case for lack of jurisdiction.

<sup>103</sup> *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”.

<sup>104</sup> *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”.<sup>105</sup>

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.<sup>106</sup> 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

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<sup>105</sup> *Mavrommatis Palestine Concession* case, Judgment No. 2, 30 August 1924, PCIJ, Series A, No. 2, p. 34.

<sup>106</sup> Transcript, Day Two, p. 463, lines 14-19.

is taken.<sup>107</sup> 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".<sup>108</sup> 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.***

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<sup>107</sup> *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.

<sup>108</sup> *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.<sup>109</sup>
  
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

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<sup>109</sup> 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*,<sup>110</sup> 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

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<sup>110</sup> 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",<sup>111</sup> 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.<sup>112</sup>

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,<sup>109</sup> 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,..." .

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<sup>111</sup> Article 2 is reproduced in its entirety *supra*, para. 163.

<sup>112</sup> 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.<sup>113</sup> 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<sup>114</sup> and that the right to admit is the same as the right to regulate whether to “allow [investments] to enter”.<sup>115</sup>

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”.<sup>116</sup> 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.<sup>117</sup> 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.

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<sup>113</sup> 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”.

<sup>114</sup> 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”.

<sup>115</sup> In the Memorial, para. 109, the Respondent accepts that the ordinary meaning of “to admit” is “to allow to enter”.

<sup>116</sup> Memorial, para. 108.

<sup>117</sup> 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.<sup>118</sup>
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,<sup>119</sup> 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.

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<sup>118</sup> Declaration of Promoted Activity for Investment Project of ABAL HNOS dated 14 March 2002, paras 1-3 (C-029).

<sup>119</sup> 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".<sup>120</sup> They are problematic to the extent they provide for a fixed and inflexible test which may contradict

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<sup>120</sup> *Biwater Gauff 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.<sup>121</sup> 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,

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<sup>121</sup> *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,<sup>122</sup> 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.<sup>123</sup> 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<sup>124</sup>. 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))".<sup>125</sup> To understand this statement, it must be recalled that the question of whether and how to define the concept of "investment" was one

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<sup>122</sup> *Supra*, para. 183.

<sup>123</sup> See, *infra*, para. 207.

<sup>124</sup> *Supra*, para. 106.

<sup>125</sup> 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).<sup>126</sup>
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.<sup>127</sup> 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.<sup>128</sup>
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.

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<sup>126</sup> 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.

<sup>127</sup> Para. 22, *supra*, reproduces Article 1(2) of the BIT defining the term “investment”.

<sup>128</sup> 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. Argentina* 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*.<sup>129</sup> 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

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<sup>129</sup> *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”.<sup>130</sup>

206. The *Salini* test has received varied applications by investment treaty tribunals and doctrinal writings.<sup>131</sup> 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”.<sup>132</sup> 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.<sup>133</sup> 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

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<sup>130</sup> *Salini v. Morocco*, cit., para. 52.

<sup>131</sup> 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).

<sup>132</sup> Schreuer, *The ICSID Convention. A Commentary*, Art. 25, para. 171.

<sup>133</sup> 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”.<sup>134</sup> 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”.<sup>135</sup>

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”.<sup>136</sup>

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”.<sup>137</sup> 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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<sup>134</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, Award, 31 October 2012, para. 306.

<sup>135</sup> *Alpha v. Ukraine*, cit., para. 312.

<sup>136</sup> *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.

<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>
212. In the Rejoinder,<sup>140</sup> 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".<sup>141</sup>
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.<sup>142</sup> 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".<sup>143</sup> Following a

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<sup>138</sup> Counter-memorial, fn. 46.

<sup>139</sup> *Ibidem*.

<sup>140</sup> Rejoinder, para. 213.

<sup>141</sup> The TCA Decision 801 Rejecting Abal's Appeal for Clarification, 29 September 2011 (C-056).

<sup>142</sup> Transcript, Day One, pages 218-221.

<sup>143</sup> *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”.<sup>144</sup>

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”.<sup>145</sup>

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.”<sup>146</sup>

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”.<sup>147</sup>

## **2. Arguments of the Respondent**

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<sup>144</sup> Transcript, Day Two, page 483, lines 2-8.

<sup>145</sup> *Ibid.*, page 480, lines 13-20, 25; page 481, lines 1-2.

<sup>146</sup> *Ibid.*, page 490, lines 7-25; page 492, lines 3-14

<sup>147</sup> *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”.<sup>148</sup>
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”.<sup>149</sup>
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”.<sup>150</sup>
220. At the hearing, the Respondent agreed that the Claimants’ denial of justice claim would come within Article 46 of the ICSID Convention.<sup>151</sup>

### **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<sup>152</sup>. 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

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<sup>148</sup> Reply, para. 72.

<sup>149</sup> Transcript, Day Two, page 487, lines 24-25; page 488, lines 1-8.

<sup>150</sup> *Ibid.*, page 489, lines 1-8.

<sup>151</sup> *Ibid.*, page 486, lines 17-19.

<sup>152</sup> 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,<sup>153</sup> 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

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<sup>153</sup> *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.<sup>154</sup> 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".<sup>155</sup> The Respondent's reference being clearly to the six-month attempt for an amicable settlement,<sup>156</sup> 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,<sup>157</sup> 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

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<sup>154</sup> 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).

<sup>155</sup> Transcript, Day Two, page 487, lines 1-8.

<sup>156</sup> No views are expressed by the Tribunal regarding whether this requirement is an element of the State's consent to arbitration.

<sup>157</sup> 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.<sup>158</sup>

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.<sup>159</sup> 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<sup>160</sup> 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.<sup>161</sup>

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.<sup>162</sup> However, as apparent from its text, the letter in question refers to the Germany-

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<sup>158</sup> *Supra*, para. 218.

<sup>159</sup> *Supra*, para. 218.

<sup>160</sup> At the hearing the Respondent stated: “That is the interpretation of the Government of Uruguay” (*supra*, para. 212).

<sup>161</sup> 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.

<sup>162</sup> *Supra*, para. 215.

Uruguay Treaty,<sup>163</sup> the text of which was in the process of being examined by the Senate in view of its ratification.<sup>164</sup>

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.<sup>165</sup>

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<sup>163</sup> The text of the Germany- Uruguay Treaty is in Exhibit RL-31.

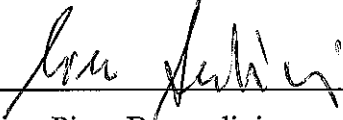
<sup>164</sup> The agenda of the Senate Session and the text of Eduardo Jimenez de Aréchaga’ letter are in Exhibit R-75 (see Transcript, Day Two, page 490, lines 17-18). As clearly mentioned therein, the analysis made by the letter is based on the Germany-Uruguay Treaty, specifically “the clauses on disputes recorded in Articles X and XI of the Treaty...”.


<sup>165</sup> *Supra*, para. 137.

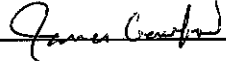
235. In the light of all the foregoing, the Tribunal affirms the Centre's jurisdiction and its competence to hear the Claimants' claim for denial of justice.

## **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