# *Philip Morris vs. Uruguay*

# An Analysis of Tobacco Control Measures in the Context of International Investment Law

Report #1 for Physicians for a Smoke Free Canada

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# I. Introduction

You have asked me[1] to analyze two types of tobacco industry response to the implementation and enforcement of tobacco control measures: (1) compensation claims made under investment protection and promotion treaties; and (2) challenges brought under international trade agreements. To provide context for this analysis, my work will focus upon recent and ongoing disputes.

This first report addresses damages claims under investment treaties, analyzing a recently announced claim made by three subsidiaries of USA-based Altria Group, Inc., formerly Philip Morris Companies Inc., against the Government of Uruguay[2] under the *Accord entre la Confédération suisse et la République orientale de l'Uruguay concernant la promotion et la protection réciproques des investissements* (herein referred to as the Switzerland – Uruguay Bilateral Investment Treaty ("BIT")).[3]

## 1. The Claimant(s)

One of Altria's primary subsidiaries is USA-based Philip Morris International, Inc. (PMI), which was established in 2008 as part of a corporate strategy to separate Altria's slow-growth, big-dividend domestic tobacco business from its faster-growing international business.[4] PMI maintains its worldwide investments through various holding companies, including Switzerland-based FTR Holding S.A. and Switzerland-based *Philip Morris Products S.A.* Together, these two companies own and control Uruguay-based Abal Hermanos S.A., which is reported to enjoy a relatively small share of the dwindling market for tobacco products in

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[1] This opinion has been provided directly in response to questions submitted to me by Physicians for a Smoke Free Canada. Nothing in this opinion should be assumed to reflect the views of any of my other clients, past or present, not should its contents be presumed to apply to any matter in which I have previously served as counsel, expert or arbitrator. In any event, the views expressed herein are not inconsistent with any of the personal views I have previously advanced, particularly in my capacity as an academic, concerning the construction of BIT obligations and the operation of public international law generally.

[2] FTR Holding S.A. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay
(ICSID Case No. ARB/10/7), registered on 26 March 2010.

[3] English excerpts from the BIT, found below, do not constitute official translations of the treaty text. A copy of the Agreement, in French, can be found at the following URL (last visited 28 July 2010): <www.unctad.org/sections/dite/iia/docs/bits/switzerland_uruguay_fr.pdf>

[4] "Altria's Split: Where There's Smoke…", Bloomberg Business Week, 29 January 2008. See: <www.businessweek.com/bwdaily/dnflash/content/jan2008/db20080129_130365.htm>, last visited: 28 June 2010.

Uruguay, as both a manufacturer and importer cigarettes, cigars and "smokeless" tobacco products.[5] The arbitration has been launched by FTR Holding S.A., *Philip Morris Products S.A.* and Abal Hermanos S.A., but for the sake of ease, I will refer to these claimants together as "PMI".

It is likely that PMI is making a deliberate, political statement with this treaty claim, rather than a purely commercial one. Its share of the Uruguay market is not insignificant, but Uruguay is a small country with of population of only approximately 3.4 million people. While arbitration is not governed by rules of precedent, tribunals will consider previously issued awards, as relevant.[6] That PMI established its holding companies in Switzerland provides an additional clue. Whereas the United States of America has 34 of a total of 46 investment treaties currently in force,[7] Switzerland has 104 of 116 investment treaties currently in force worldwide.[8] If PMI were to be successful in its claim against Uruguay its choice of Switzerland as a corporate base indicates that more claims against other developing nations could follow.

## 2. The Respondent

Under the leadership of its former president, oncologist Dr. Tabaré Vázquez (2005-2010), Uruguay became a leader in tobacco control, receiving many plaudits for the measures that his Government implemented during his tenure,[9] and which his successor, José Mujica, has vowed to continue.[10] These measures

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[5] One estimate of PMI's current market share is 25%. A more detailed estimate, outlined below, indicates that the percentage market share for taxable sales was closer to 15%. See: Framework Convention Alliance, "The illicit tobacco trade in the MERCOSUR countries" (2008). <www.fFCTC.org/dmdocuments/INB3_fact_sheet_illicit_trade_MERCOSUR_report.pdf >, last visited 28 June 2010.

[6] August Reinisch, "The Role of Precedent in ICSID Arbitration" (2008) Austrian Arbitration Yearbook 495-510.

[7] <www.unctad.org/sections/dite_pcbb/docs/bits_us.pdf>; last visited 28 June 2010.

[8] <unctad.org/sections/dite_pcbb/docs/bits_switzerland.pdf>; last visited 28 June 2010.

9 Campana "Uruguay, libre de humo de tabaco", <*www.msp.gub.uy/uc_546_1.html*>; Uruguay fue distinguido por su politica de lucha contra el tabaco, <www.msp.gub.uy/uc_911_1.html>; Uruguay recibe reconocimiento del OPS por ser el primer pais de America 100% libre de humo de tabaco, 24 March 2006, <www.msp.gub.uy/uc_419_1.html>; Uruguay fue reconocido por su labor en pro de la salud, 28 March 2008, <www.msp.gub.uy/uc_1717_1.html>; XIX Conferencia mundial de salud y tabaco distingue a Uruguay por campana antitabaco, 6 March 2009, <www.msp.gub.uy/uc_2789_1.html>; Uruguay ocupa el primer lugar en el mundo por sus logros para combatir el consumo de tabaco, 12 March 2009, www.msp.gub.uy/uc_2806_1.html; last visited 28 June 2010.

10 Philip Morris vs Uruguay, online: Foreign Policy in Focus, <www.fpif.org/articles/philip_morris_vs_uruguay>; last visited 28 June 2010.

include: comprehensive bans on smoking in all covered public spaces; advertising prohibitions in sensitive sectors such as sports and entertainment and broader sales and marketing restrictions, in addition to the measures described below.

### 3. The Measures

In February 2006, [then] President Vázquez made a speech in which he laid out his vision of Uruguay as a "smoke free" country.[11] As indicated in a 2006 report, public opinion was broadly supportive of the prohibitions on smoking in public places that followed.[12] Particularly since 2005, Uruguay has been very successful in adopting measures that have reduced domestic tobacco consumption.[13]

Uruguay established a structure for tobacco control within its health ministry as early as 1968.[14] Smoking was prohibited in all health sector buildings in 1977 and by 1981, tobacco advertising and smoking were banned from public transportation by executive decree. 1989 brought mandatory nicotine disclosure rules and in 1996, the scope of smoking bans was increased. As such, even when PMI made its original investment in Uruguay, by acquiring Abal Hermanos SAS, in 1979,[15] tobacco control was already part of the business and regulatory culture. The steady increase in regulation continued in 2004, with

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11 Tabaré Vázquez, Palabras del Présidente de la Republica, Tabaré Vázquez, en el salon de actos del edificio libertad, February 2006, online: MSP <www.msp.gub.uy/uc_346_1.html>; last visited 28 June 2010.

12 PAHO, Estudio de conocimiento y actitudes hacia el decreto 268/005, online from: <www.msp.gub.uy/uc_911_1.html>; last visited 28 June 2010.

13 See, generally: <www.cdc.gov/tobacco/global/gats/countries/amr/fact_sheets/uruguay/2009/index.htm>; last visited 28 June 2010; A. Blanco-Marquizo, B. Goja, A. Peruga, M.R. Jones, J. Yuan, J.M. Samet, P.N. Breysse, & A. Navas-Acien, "Reduction of second hand tobacco smoke in public places following national smoke-free legislation in Uruguay" 19 (2010) Tobacco Control 231-234.

14 See, generally: "No fume aqui," el Pais <www.elpais.com.uy/Suple/LaSemanaEnElPais/06/02/10/lasem_delo_200458.asp>; "Smokefree Success Stories: Spotlight on smokefree countries," <tobaccofreecenter.org/files/pdfs/en/SF_success_uruguay_en.pdf> ; Powerpoint presentation established by Doctors Eduardo Bianco and Marcelo Boado and based on Public Health Ministry information, Tobacco control in Uruguay, <www.powershow.com/view/6149-NTM3N/TOBACCO_CONTROL_IN_URUGUAY_2006>; "Control del tabaquismo en Uruguay," <www.interamericanheart.org/ficnet/onet/archivos/ rec_imagenes/bases_juridicas.doc>; Rueda, Abadi, Pereira, "Sabe Usted Cual es el Marco Actual de Negocios en el Uruguay," <www.rap.com.uy/spa/publicaciones/pdf/2010/Presentacion_v20100521.pdf> (Slide 66); El Programma nacional para el control del tabaco en el contexto del nuevo gobierno, December 22, 2005, <www.msp.gub.uy/uc_227_1.html> last visited 28 June 2010; and S. Meresman, "Uruguay: ants versus elephants" 12 (2003) Tobacco Control 122-123.

15 Marsh and Mac Lennan, Philip Morris Companies, <legacy.library.ucsf.edu:8080/i/p/w/ipw06c00/Sipw06c00.pdf>; last visited 28 June 2010.

Uruguay's ratification of the WHO Framework Convention on Tobacco Control (FCTC).[16] Then, in March 2008, a new tobacco control law was implemented, which consolidated the contents of previous presidential decrees and set the stage for the measures that form the subject of PMI's BIT Claim, introducing new requirements for health warnings to be placed on 50% of all tobacco packaging. This law was soon followed by a regulatory decree that increased fines for noncompliance; limited advertising point-of-sale locations; and extended smoking bans to the private hospitality sector.[17]

The three measures that form the basis of the PMI treaty claim were imposed in 2009. They are as follows:

1. Presidential Decree Nº 287/009, which was promulgated on 15 June 2009 and came into force on 12 December 2009,[18]
    - the existing mandate for 50% of the bottom portion of all cigarette packs to contain prescribed health messages was increased to 80%.

2. Ordinance Nº 466, issued on 1 September 2009 and in force on 28 February 2010,[19]
    - the six images mandated under the aforementioned decree were designated.

3. Ordinance Nº 514, issued on 18 August 2009 and in force on 14 February 2010,[20]
    - existing prohibitions on the use of misleading product names (such as "light" or "mild") were extended to limit the use of brands to a single line of products.[21]

The reason for the latter of these three measures requires some explication. In the tobacco industry, the most valuable assets are not plant, inventory or equipment. The most valuable investments maintained by any tobacco

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[16] Ley Nº 17.793 de 16 de julio de 2004.
[17] Ley Nº 18.256 de 6 de marzo de 2008 & Decreto Nº 284/008 de 9 de junio de 2008.
18 Presidencia de la Republica Oriental de Uruguay <www.presidencia.gub.uy/_web/decretos/2009/06/CM751%20.pdf>; last visited 28 June 2010.
19 Ministerio de Salud Publica: <www.msp.gub.uy/uc_3410_1.html>; last visited 28 June 2010.
20 Ministerio de salud Publica <www.msp.gub.uy/uc_2046_1.html>; last visited 28 June 2010.
[21] An additional measure raises the cigarette tax to 70%, Decreto Nº 287/010 de 9 de Febrero de 2010. This rate is not out of line with those of other countries and therefore does not appear to be regarded by PMI as a prelude to expropriation by means confiscatory taxation.

enterprise are its brands.[22] Supported by associated trademark rights, Premium brands afford considerably higher margins to tobacco producers and importers, as compared to lesser-known brands. Tobacco companies typically maximize the value of their premium brands by applying them to an entire "family" of cigarette product lines. For example, PMI currently maintains many dozens of variations of its Marlboro® brand in different markets worldwide, in addition to manufacturing limited runs, such as Marlboro® Ferrari 'racing edition' cigarettes.[23]

These product line brand variations have changed over the past five years, as regulations have come into force worldwide banning the use of misleading descriptive terms in tobacco branding, such as "mild" or "ultra-light." In response, the larger tobacco companies began effectively colour-coding their brand lines. For example, "Brand X Menthol" would become "Brand X" in green packaging while "Brand X Regular" (aka "Full Flavour") would remain "Brand X" in red packaging. While major brand holders such as PMI still vehemently deny this practice,[24] it appears obvious that the practice has taken root with stunning consistency amongst the large tobacco companies worldwide.[25]

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[22] M.J. Roberts and Larry Samuelson, "An empirical analysis of dynamic, nonprice competition in an oligopolistic industry" 19 Rand J. Econ. (1988) 200 at 201; P. Boatwright, J. Cagan, D. Kapur, A. Saltiel, "A step-by-step process to build valued brands" 18 (2009) 38 at 46; and D. Haigh, "Brand valuation: what it means and why it matters?" Brands in the Boardroom, IAM Supplement No.1; www.brandfmance.com/Uploads/pdfslBrandValuation_Whatandwhy.pdf; last visited 28 June 2010. As another demonstration of the importance of branding in the tobacco industry, when one searches the University of California at San Francisco's Legacy Tobacco Documents Library for the term "brand equity" over eleven thousand documents from Philip Morris and the other members of Big Tobacco are found. <legacy.library.ucsf.edu/action/search/basic?q=%22brand+equity%22&ps=10&df=er&fd=0&rs=false&ath=true&drf=ndd&p=2&ef=true>; last visited 28 June 2010.

[23] See, e.g.: <www.cigarettespedia.com/index.php/BrandMarlboro> & <tobacco.wikia.com/index.php/Marlboro>; last visited 28 June 2010.

[24] "Coded to obey the law" New York Times, 18 February 2010; <nytimes.com/2010/02/19/business/19smoke.html?partner=rss&emc=rss>; last visited 28 June 2010; "A colourful death by tobacco" Los Angeles Times, 24 June 2010 <articles.latimes.com/2010/jun/24/opinion/la-oe-daum-camellights-20100624>; last visited 28 June 2010.

[25] "Ban on Deceptive Cigarette Labels "Light" and "Low-Tar" Takes Effect June 22, Campaign for Tobacco-Free Kids"; www.tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=1216; last visited 28 June 2010. It will likely be necessary for Uruguay to provide a sufficient evidentiary showing on this point in particular, not to decisively prove it correct but to demonstrate its plausibility as a basis for regulatory action.

## II. Applicable Law

PMI brought its claim under the Switzerland-Uruguay Bilateral Investment Treaty (BIT) on 19 February 2010.[26] The notice of arbitration has not yet been made public. There are approximately three thousand BITs currently in force worldwide.[27] Most include the same basic protections for foreign investors in the territory of the other treaty party. Unlike trade treaties, BITs typically provide foreign investors with the means to submit damages claims directly to international arbitration before an *ad hoc* tribunal. Before BITs, would-be investors would need to enlist the support of their home country to take up claims on their behalf with the Host State (a process known as espousal). Damages awards can be enforced by successful claimants in the courts of most countries, much like any commercial arbitral award.[28]

The field of international investment law is dynamic and expanding rapidly. As such, it is not possible to provide a full account of all possible claims involving tobacco control measures, especially because the customary rules of treaty interpretation require one to focus on the particular wording of the treaty at hand. Nevertheless, there are useful lessons to be learned from the PMI case against Uruguay, should it proceed.

The applicable law in an investment treaty case typically consists of the terms of the instant treaty augmented by recourse to general international law, as required.[29] The following are the relevant provisions of the BIT for the PMI claim:

> **Article 1 – Definitions**
> **For the purpose of this Agreement:**
> **(1) The term "investor" refers with regard to either Contracting Party to**
> **…**
> **(b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;**

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[26] Available, in French, at: <www.unctad.org/sections/dite/iia/docs/bits/switzerland_uruguay_fr.pdf>; last visited 28 June 2010.
[27] J.W. Salacuse, The Law of Investment Treaties (OUP: Oxford, 2010) at (i).
[28] It should be noted that respondent States have won more cases than they have lost and that the damages awarded have been only a fraction of the amounts originally claimed. See: S. Franck, "Development and Outcomes of Investment Treaty Arbitration," 50 Harv. Int'l L. Rev. 435 (2009).
[29] "NAFTA Article 1105 and the Principles of International Economic Law" 41 (2003) Columbia Journal of Transnational Law 35; C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) at secs. 3.66 & 4.76–4.79.

**(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party.**
**(2) The term "investments" shall include every kind of assets and particularly:**
**(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;**
**…**
**(d) rights in the field of intellectual property (such as copyrights, patents, trade or service marks, trade names, indications of origin), technical processes, know-how and goodwill;**
**…**

**Article 2 – Promotion of investments**
**(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 laws and regulations.**
**...**

**Article 3 – Protection and treatment of investments**
**(1) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so, happen, liquidation of such investments. In particular, each Contracting Party shall issue the necessary authorizations mentioned in Article 2, paragraph (2) of this Agreement.**
**(2) 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 this latter treatment is more favourable.**
**…**

**Article 5 – Dispossession, compensation**
**(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto without regard to its residence of domicile.**
**…**

> **Article 6 – Pre-agreement investments**
> **The present Agreement shall also apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party prior to the entry into force of this Agreement.**
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> **Article 9 – Disputes between a Contracting Party and an investor of the other Contracting Party**
> **1. Disputes between a Contracting Party and an investor of the other Contracting Party in relation to an "investment" as defined under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.**
> **2. If a dispute within the meaning of paragraph (1) cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent courts of the Contracting Party accepting the investment. If the court has not rendered a final decision within eighteen months from the initiation of the court proceeding, the investor may submit the dispute to an arbitral tribunal which will decide upon all aspects of the dispute.**

With respect to treaty interpretation, Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT) is generally regarded as expressing the applicable customary international law rules:

> **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;**
> **(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:**
> **13**
> **(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.**

Finally, as explained further below, the following provisions of the FCTC are also applicable:

**Article 1 – Use of Terms**
**For the purposes of this Convention:**
**…**
**(c) "tobacco advertising and promotion" means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly;**
**(d) "tobacco control" means a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke;**
**(e) "tobacco industry" means tobacco manufacturers, wholesale distributors and importers of tobacco products;**
**(f) "tobacco products" means products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing;**
**(g) "tobacco sponsorship" means any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly;**

**Article 2 – Relationship between this Convention and other agreements and legal instruments**
**1. In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.**
**…**

**Article 3 – Objective**
**The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.**

**Article 4 – Guiding principles**
**To achieve the objective of this Convention and its protocols and to implement its provisions, the Parties shall be guided, inter alia, by the principles set out below:**
**1. Every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke.**
**2. Strong political commitment is necessary to develop and support, at the national, regional and international levels, comprehensive multisectoral measures and coordinated responses, taking into consideration:**

**(a) the need to take measures to protect all persons from exposure to tobacco smoke;**
**(b) the need to take measures to prevent the initiation, to promote and support cessation, and to decrease the consumption of tobacco products in any form;**
**…**

**Article 7 – Non-price measures to reduce the demand for tobacco**
**The Parties recognize that comprehensive non-price measures are an effective and important means of reducing tobacco consumption. Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.**

**Article 11**
**Packaging and labelling of tobacco products**
**1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:**
**(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"; and**
**(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:**
**(i) shall be approved by the competent national authority,**
**(ii) shall be rotating,**
**(iii) shall be large, clear, visible and legible,**
**(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,**
**(v) may be in the form of or include pictures or pictograms.**
**2. Each unit packet and package of tobacco products and any outside packaging and labelling of such products shall, in addition to the warnings specified in paragraph 1(b) of this Article, contain information on relevant constituents and emissions of tobacco products as defined by national authorities.**
**3. Each Party shall require that the warnings and other textual information specified in paragraphs 1(b) and paragraph 2 of this Article will appear on each unit packet and package of tobacco products and any outside packaging and labelling of such products in its principal language or languages.**
**4. For the purposes of this Article, the term "outside packaging and labelling" in relation to tobacco products applies to any packaging and labelling used in the retail sale of the product.**

## III. The PMI Claim

I have not reviewed the notice of arbitration filed by PMI because it has not been made public. As a tribunal has yet to be established, there has been no requirement for Uruguay to provide a formal response. The following is an approximation of the type of claims that PMI is likely to pursue, if it does proceed with the arbitration. Below I address the legal issues that are likely to arise in the arbitration, starting with jurisdiction and admissibility. Next, I set out the arguments for compensation that PMI is likely to make. Finally, I will explain why these arguments are not likely to be successful.

### 1. Jurisdiction and Admissibility

There is little doubt that a tribunal established to hear the PMI claim would have jurisdiction to do so. Two of the three corporations listed as claimants were established in Switzerland, which is a party to the BIT. They qualify as "investors" under Article 1(1)(b) of the BIT. The third claimant, *Abal Hermanos S.A.*, similarly qualifies as an investor under Article 1(1)(c) of the BIT, as it is a legal entity established under the laws of Uruguay. While ownership of the investment enterprise began in 1979, predating the BIT, which came into force on 22 April 2001, Article 6 of the BIT clearly contemplates coverage for prior-established investments, on going forward basis.[30]

It would also appear beyond doubt that the PMI claim constitutes a "legal dispute arising directly out of an investment," which is a requirement for submission of any dispute to the World Bank Group body that would be responsible for administering the PMI arbitration: the International Centre for the Settlement of Investment Disputes (ICSID).[31] Article 1(2)(d) explicitly names intellectual property rights, including trademarks, as constituting an "investment" under the BIT, which its press release indicates will be the focus of the claim.

PMI's claim appears to be that the measures impair its use and enjoyment of the intellectual property rights that support its brand; it will likely also argue that its use and enjoyment of the Marlboro brand itself has been impaired. Such impairment can be valued in the same manner that one would assess the

[30] In addition, the cigarette brands at issue, and the intellectual property used to sustain them, also constitute investments in the territory of Uruguay.
[31] Article 25, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Mar. 18, 1965, 4 I.L.M. 524 (ICSID Convention).

damages for a municipal law trademark infringement case.[32] Reports are that the new measures have forced PMI to withdraw 7 of the 12 tobacco product lines it was marketing in Uruguay before they came into force.[33]

On the other hand, PMI's claim appears to suffer from two very serious defects in admissibility, which arguably makes it premature on both counts. First, PMI has failed to attempt to amicably settle the dispute over each claimed measure for the six months required under Article 9 of the BIT. Ordinance Nº 512 only came into effect on 14 February 2010 while Ordinance Nº 466 came into force on 28 February 2010. Reports indicate, however, that PMI filed its notice of arbitration on 19 February 2010.[34] Not only does it appear that PMI did not engage in a serious attempt to amicably resolve its dispute with Uruguay in the six months following the measures coming into force; it did not even wait until the third ordinance, prescribing the images mandated for use on its packages, came into force. Either of these faults could give rise to a preliminary objection by Uruguay, on the grounds that it did not consent to arbitration with an investor with whom it has not had the prescribed period of time to attempt an amicable settlement of the dispute.[35]

Second, PMI also appears to have failed to comply with another requirement of BIT Article 9: that disputes must be submitted to the Courts of Uruguay when an amicable resolution has been sought, but not achieved, over the prescribed six month period. Under this provision, disputes are only supposed to be moved to the international plain after the courts of the Host State have been accorded an opportunity to resolve the matter. The prescribed period of time for this purpose is 18 months. PMI has initiated administrative appeals to strike down the new

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[32] "Municipal law" refers to the law of a Host State, as opposed to international law. From the perspective of an international law analysis, all 'local' or 'domestic' standards or rules are considered to form part of the municipal law of a given State.

[33] "Tabacalera Philip Morris demanda a Uruguay" Uruguay Dia, 28 February 2010 <www.uruguayaldia.com/2010/02/tabacalera-philip-morris-demanda-a-uruguay> last visited 28 June 2010; and "Tabacalera Philip Morris demanda a Uruguay" BBC Mundo, 12 March 2010 <www.bbc.co.uk/mundo/economia/2010/03/100312_uruguay_tabacaleras_philip_morris_demanda_estado_jp.shtml>; last visited 28 June 2010.

[34] Luke Eric Peterson, "Uruguay: Philip Morris files first-known investment treaty claim against tobacco regulations" 3 March 2010;
<www.iareporter.comhttp://www.iareporter.com> last visited 28 June 2010.

[35] In Ethyl Corp. v. Canada, 38 I.L.M. 708 (1999) (NAFTA/UNCITRAL Trib., June 24, 1998) (award on jurisdiction), a NAFTA Tribunal proceeded with the arbitration, but assessed a costs award against the investor for having "jumped the gun" in a very similar fashion.

measures,[36] which are still pending.[37] Setting aside the six-month negotiation requirement, and treating the date the measures were announced (rather than the date they came into force) as operative for Article 9 of the BIT, it still appears that the Courts of Uruguay are entitled to consider and resolve the matter until mid-2011 at the earliest.

What PMI has likely attempted to do, in order to avoid the timing requirements set out in Article 9, is to obtain the treatment provided by Uruguay to other foreign investors under one of its other thirteen BITs. PMI is arguably entitled to make this argument under Article 3(2) of the BIT, which promises most-favoured-nation (MFN) treatment to Swiss investors, vis-à-vis certain other foreign investors. For example, under the Australia-Uruguay BIT, Uruguay permits Australian investors to submit claims to arbitration arising from investment disputes without prescribing a six-month negotiation period or requiring the matter to first be submitted to a local court.[38]

This particular legal manoeuvre is one of the most controversial issues of foreign investment law today, with different tribunals coming down both for and against the proposition that a MFN rule can be used to alter requirements set out in the base treaty as conditions precedent to submitting the dispute to arbitration.[39] Given the turbulent state of the law on this point, it would be difficult to

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[36] Las Tabacaleras recurren decreto del Ejecutivo, EL Pais, 4 October 2009; <www.elpais.com.uy/091004/pecono-445826/economia/las-tabacaleras-recurren-decreto-del-ejecutivo>; last visited 28 June 2010.

[37] Confirmed by Tribunal de lo Contencioso Administrativo, via email on file with author, dated 9 June 2010.

[38] <www.unctad.org/sections/dite/iia/docs/bits/australia_uruguay.pdf> last visited 28 June 2010.

[39] Examples of cases in favour: *Maffezini v. Spain*, Decision on Objections to Jurisdiction, 25 January 2000, 5 ICSID Rep. 396 at para's. 46-56; *Siemens A.G. v. Argentina*, Decision on Jurisdiction, 3 August 2004, 12 ICSID Rep. 174 at para. 106; *AWG Group Ltd. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, (UNCITRAL 2006), at paras. 52-68; *Suez S.A. & Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, at paras. 52-68; *Suez S.A. & InterAguas S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, at paras. 52-66; *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/I 0, Decision on Preliminary Questions on Jurisdiction, 17 June 2005, at paras. 26-31. Examples of cases opposed: *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, at para. 93; *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction, 8 February 2005,13 ICSID Rep. 272 at paras. 222-23; *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004, at para. 115 (W. Bank 2004); *Maffezini v. Spain*, Decision on Objections to Jurisdiction, 25 January 2000, 5 ICSID Rep. 396 at para. 63; and *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008, at paras. 108-197.

handicap the likely result for PMI's claim, except to note that PMI has not done itself any favours by rushing so quickly to arbitration.[40]

Uruguay should ask the tribunal to have the claim struck in its entirety, for failure to comply with Article 9 of the BIT. As an alterative remedy, Uruguay should also consider asking the Tribunal to adjourn the arbitration until such time as PMI has taken the necessary steps, laid out in BIT Article 9, before being permitted to continue. After all, PMI is not entitled to injunctive relief from an ICSID tribunal, and an award of damages could satisfy any additional losses suffered by PMI while the prescribed 6- and 18-month periods elapsed. Such a remedy could fairly preserve both parties' rights, including Uruguay's sovereign right to have its own courts resolve disputes with foreign investors before they are elevated to the international level, thereby respecting the original terms of the Switzerland-Uruguay BIT.

### 2. Impairment of Use by "Unreasonable or Discriminatory" Measures

Article 3(1) of the BIT contains a treaty standard that commonly appears in BITS, although it rarely appears in new and renegotiated BITs. This provision prohibits the Host State from imposing "unreasonable or discriminatory measures" that "impair… the management, maintenance, use, enjoyment, extension, sale and … liquidation" of foreign investments made in its territory. There are differing opinions as to whether the terms "unreasonable or discriminatory" express a single standard or two alternative standards.[41] PMI will take the position that it need only prove that the measures either "unreasonably impair" or "discriminatorily impair" its use or enjoyment of the Marlboro® and its other local brands.

PMI will likely ask the tribunal to construe the term "unreasonable" literally, in light of the object and purpose of the BIT, which is to promote and protect investments made in the territories of the parties. Based upon this construction, PMI would attempt to argue that limiting the use of its trademarks to 20% of package space, and prohibiting the practice of applying branding to multiple product lines, is unreasonable because Uruguay cannot conclusively prove that such restrictions will have any impact upon tobacco consumption. It will argue that its customers will switch to counterfeit and contraband cigarette products,

[40] In any event, it is clear that there will be a preliminary hearing if the PMI claim moves forward, extending the timeline for a final result by at least one year.
[41] See, e.g.: *Siag and Vecchi v Egypt*, Award, ICSID Case No ARB/05/15, IIC 374 (2009), 11th May 2009, despatched 1st June 2009, ICSID, at para. 459; contrasted with: Plama Consortium Limited v Bulgaria, Award, ICSID Case No ARB/03/24, IIC 338 (2008), despatched 27th August 2008, ICSID, at para. 184.

rather than giving up smoking, avoiding the fact that removal of these brand variations, which can mislead consumers about their relative safety when compared with a "normal" cigarette, will likely result in an overall reduction in consumption.[42]

Most likely, PMI will additionally argue that these measures are discriminatory because they will reduce competition, thereby protecting the dominant tobacco company in Uruguay, Cía Industrial de Tabacos Monte Paz SA (CITMP). In 2008, this locally owned tobacco producer is reported to have held only 0.6% of the Latin American market,[43] down from 1% in 2001. By contrast, PMI's share of the continental market grew rapidly from 25.7% in 2001 to 34.2% in 2008. In Uruguay's sharply declining market, however, CITMP is reported to hold a commanding 78.9%, compared to PMI's 15.7%.[44]

### 3. Fair and Equitable Treatment

Contained within a majority of BITs, the fair and equitable treatment ("FET") standard has been the subject of considerable attention over the past decade. Consensus exists on the proposition that FET is an absolute standard, below which no State conduct shall fall.[45] It is also generally accepted that the breach of municipal law does not necessarily prove a breach of the FET, 'without more.'[46] FET is required from all branches of government (legislative, executive and judicial) and it is not necessary for the claimant to prove the existence of bad faith to demonstrate that it has been breached.[47] It is also generally agreed that the FET standard must be applied in a manner respectful of the

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[42] At any rate, the measures need not even be justified on the basis that they definitely will reduce rates of consumption, because the intermediate goal is ensuring that individuals are not misled about the tobacco products they are consuming.

[43] "Latin American" refers to the entire market in the Americas, excluding the markets of Canada, the USA and Caribbean countries.

[44] Campaign for Tobacco-Free Kids, "Tobacco Industry Profile – Latin America" (September 2009); <www.tobaccofreecenter.org/.../IW_facts_countries _%20LatinAmerica.pdf>; last visited 28 June 2010.

[45] See, e.g.: R. Dolzer & C. Schreuer, *Principles of International Investment Law* (OUP: Oxford, 2008), at 122-123.

[46] See, e.g. *GAMI Investments, Inc.* v. *Mexico*, NAFTA/UNCITRAL Tribunal, Final Award, 15 November 2004 at para. 97; *Elettronica Sicula S.P.A. (ELSI) (United States* v. *Italy)*, 1989 ICJ. Rep. 15, 28 ILM 1109 (1989). International Court of Justice, 20 July 1989.

[47] See, e.g.: *Mondev International Ltd v United States*, Award, ICSID Case No ARB(AF)/99/2; IIC 173 (2002), 11 October 2002, at para. 116; *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2; IIC 247 (2003); 10 ICSID Rep 130, 29 May 2003, at para 153; *Azurix Corp v Argentina*, Award, ICSID Case No ARB/01/12; IIC 24 (2006), 23 June 2006, at para's 369-372; *Glamis Gold Ltd v United States*, Award, Ad hoc – UNCITRAL Arbitration Rules; IIC 380 (2009), 14 May 2009, at para. 560.

legitimate right of sovereigns to exercise State authority in the public interest, balanced against the legitimate expectations of foreign investors to own and operate investments legally established in the territory of a Host State.[48]

PMI can be expected to adopt up to three alternative, but complimentary, arguments against the measures, based upon the FET standard. First, it will essentially repeat the arguments it made about the measures being "unreasonable," in an effort to demonstrate that they are also unfair and inequitable in effect. Second, PMI will argue that it was denied due process in the manner in which the measures were promulgated, possibly attempting to rely upon public statements by officials such as Dr. Vázquez to demonstrate that there was never any legitimate chance for its concerns to be fairly considered in Uruguay. Third, PMI may argue that, as a trademark holder, it was entitled to hold a legitimate expectation that it would be able to make full use of its marks, just like rights holders operating outside of the tobacco business.

PMI may also be contemplating asking for compensation from Uruguay on the basis that it has breached its obligations under the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Neither the BIT nor the WTO Dispute Settlement Understanding (DSU) contemplates compensation claims (by either States or persons) for measures that are inconsistent with a WTO Member's TRIPS obligations.[49] As such it is more likely that PMI will refer to Uruguay's TRIPS obligations as underlying the legitimate expectations for which it will claim to have enjoyed protection under the FET standard.

### 4. Compensation for Indirect Expropriation

Finally, PMI will allege that its Marlboro® and other brands have been indirectly expropriated in Uruguay, without the payment of prompt, adequate and effective compensation. Under virtually every BIT, the Host State has promised to pay full compensation, in a convertible currency, for both direct takings (where the investor is deprived of ownership rights in the investment) and indirect takings (where a measure or series of measures has the effect of effectively depriving the investor of its use or enjoyment of the investment). PMI

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[48] See, e.g.: *Saluka Investments v. Czech Republic*, ad hoc – UNICTRAL, Partial Award 17 March 2006, at para's. 299-307; *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2; IIC 247 (2003); 10 ICSID Rep 130, 29 May 2003, at para's. 150-160.

[49] There is a policy precedent for the USA and Switzerland effectively espousing complaints against other WTO Members, on behalf of their own investors, traders and intellectual property rights holders. One might therefore assume that PMI has thus far been unable to convince either the Government of the United States of America or the Government of the Swiss Federation to launch complaints under the WTO DSU.

will argue that Uruguay's three new measures, taken together, substantially interfere with its brand investments in Uruguay, depriving PMI of a majority of their value. Publicly, it claims that it has been forced to withdraw seven of its 12 product lines from the market, including Marlboro Gold®, Marlboro Green® and Marlboro Blue®.[50] It would appear, however, that at least seven PMI brands remain active in the market: Next®, Marlboro®, Philip Morris® , Benson® , L&M®, Fiesta® and Casino®.[51]

In this regard, PMI may not only argue that the new restrictions on its use of the trademarks, which underpin its brands, substantially interfere with its use and enjoyment of them, but also that Uruguay's restrictions on tobacco advertising and marketing have combined with these new trademark use restrictions to dramatically undermine the value of its brands. As noted above, this appears to be a strategic claim, given how low the damages are likely to be for a small, declining market such as Uruguay's.[52] It should accordingly be expected that PMI make its arguments with an eye towards the measure whose implementation it likely fear most: the universal adoption[53] of plain packaging measures.[54]

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[50] "Philip Morris demanda a Uruguay," Tabacalera, 12 March 2010, online: <blogsofbainbridge.typepad.com/adriana/>

[51] Centro de Investigacion para la Epidemia del Tabaquismo, "Control del Tabaquismo en Uruguay: 2009" 10 June 2010; copy on file with author.

[52] It is also important to note that PMI has thus far abstained from taking BIT action against a number of other countries requiring large portions of package surfaces to be devoted to graphic health warnings, including: Djibouti, Egypt, Hong Kong, India, Iran, Jordan, Latvia, Malaysia, Mauritius, Mexico, Mongolia, Pakistan, Panama, Paraguay, Peru, Philippines, Romania, Singapore, Thailand and Venezuela. See, e.g.: <www.tobaccolabels.ca/labelima> or <www.smoke-free.ca/warnings/>; last visited 28 June 2010.

[53] As indicated by a PMI executive in what was then a confidential internal memorandum: "we don't want to see plain packaging introduced anywhere regardless of the size or importance of the market." Dangoor D., PMI Corporate Affairs Meeting, Rye Brook 950215 & 950216. 1 March 1995. Bates No: 2048207342/346. <legacy.library.ucsf.edu.proxy1.lib.uwo.ca:2048/action/document/page?tid=dcg24c00>; last accessed 28 June 2010.

[54] In effect, PMI can be seen as drawing a line in the sand on plain packaging, which appears to lie somewhere between the 56% now mandated by its putative home country, Switzerland; the 65% mandated by countries such as Mexico and Mauritius and the 80% now mandated by Uruguay. PMI undoubtedly recognized that it might be more advantageous to launch its first BIT claim against a country with relatively less resources, but a market large enough to make its damages claim plausibly worthwhile. The market of tiny Mauritius likely did not suit PMI's purposes, and while the market in Mexico is substantially larger, that country has had significant experience with investment arbitration and has an established institutional capacity to fully respond to new claims. In other words, it would appear that PMI is trying to make an example of Uruguay, because it likely believes that it may not have the resources or expertise available to put on the best possible defence, and because Uruguay is an acknowledged world leader in tobacco control.

Given the potentially symbolic, and therefore strategic, nature of PMI's threatened claim, it will be important for Uruguayan leaders to consider whether there truly is any need for them to take steps to respond at this time. When faced with similar claims, the three NAFTA Parties will commonly wait on the erstwhile claimant, thereby testing its mettle and resolve. Uruguay would be well advised to follow the example of these Host States, each of which has considerable experience as a respondent in investment treaty disputes. Given the legitimate defences that appear to exist for Uruguay in defence of PMI's threatened claim, a simple cost-benefit analysis suggests that it would be more reasonable for it to contest PMI's case rather than to capitulate by amending any of its measures.[55]

## IV. Uruguay's Successful Response

Below I explain why the PMI claims should fail. My understanding is that PMI has not yet exercised its right, under Article 38 of the ICSID Arbitration Rules, to compel the establishment of a Tribunal.[56] It may well be that PMI is attempting to cure some of the timing defects outlined above, by waiting until at least 28 August 2010 (6 months after Ordinance Nº 466 came into force) before moving forward. It may also be that PMI has thought better of its decision to launch the arbitration, given the strong likelihood that its claims will not succeed.

### 1. Impairment of Use by "Unreasonable or Discriminatory" Measures

While PMI can be expected to use its claim under Article 3(1) to attack the objective 'reasonableness' of Uruguay's measures, past practice suggests that it should not be able to do so. BIT obligations prohibiting "unreasonable or discriminatory," "unreasonable and discriminatory," "arbitrary or discriminatory" and "arbitrary and discriminatory" measures are typically construed as being

[55] It must also be recalled that the policy precedent that PMI seeks would have considerable value, both to large, multinational tobacco enterprises and to Host States. To date, no Host State has amended proposed measures solely for the purposes of avoiding responsibility under an investment treaty. Some point to Canada's experience with tobacco control measures, some of which were amended in response to legal threats from Big Tobacco, but these threats principally involved allegations that free speech rights under Canada's constitution would be abridged, with claims about potential NAFTA Chapter 11 breaches arguably only being included for added political impact.

[56] It became eligible to do so on 24 June 2010 (90 days after the date the case was registered by the ICSID Secretariat, on 26 March 2010).

aimed at State actions that are manifest in their arbitrariness.[57] They are not generally seen as a legitimate means of engaging in a thoroughgoing review of substantive policy choices made by a Host State.

The 'discrimination' referred to in these provisions is not the sort of discrimination targeted under a national treatment standard, which is also commonly found in investment treaties. National treatment standards typically require Host States to accord "treatment no less favourable" to investors and investments, thereby establishing an equality of opportunity norm, which can be violated by measures that do not appear *prima facie* discriminatory. The object of this type of standard is to ensure competitive equality by promising individual foreign investors that they will always receive the best treatment made available by the Host State to comparable domestic investors. By contrast, the better view of the minimum standard found in Article 3(1) of the BIT is that it only prohibits cases of intentional discrimination on the basis of foreign nationality.[58]

There does not appear to be any evidence whatsoever that Uruguay's measures were adopted with an intent to discriminate against foreign investors, or PMI in particular, on the basis of nationality. Similarly, there does not appear to be any evidence that the measures Uruguay has imposed to reduce tobacco consumption were taken for any reason other that the stated public health purposes. Tobacco control has been the focus of significant national attention since 2005 and these measures appear to be the reasonable result of a good faith exercise of regulatory authority, for the purposes of protecting and promoting human health.

In the unlikely event that a tribunal construed Article 3(1) as allowing it to actually engage in a *de novo* review of the reasonableness of Uruguay's measures, it can nonetheless be expected that PMI's arguments would ultimately fail. The tribunal's 'objective reasonableness' analysis would likely focus upon the issue of whether Uruguay's measures represented a proportionate response to the risks identified by the Government which necessitated the imposition of these measures. Even if a tribunal believed that it could scrutinize the objective reasonableness of a measure on a *de novo* basis,

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[57] See, e.g. *LG&E Energy Corp and ors v Argentina*, Decision on Liability, ICSID Case No ARB 02/1; IIC 152 (2006); (2007) 46 ILM 36, 3 October 2006, at para. 158; or *Enron Corporation and Ponderosa Assets, LP v Argentina*, Award, ICSID Case No ARB/01/3; IIC 292 (2007) 22 May 2007 at para's. 281-282.

[58] See, e.g.: *CME Czech Republic BV v Czech Republic*, Final Award and Separate Opinion, Ad hoc – UNCITRAL Arbitration Rules, IIC 62 (2003), 14 March 2003, at para. 162; En*ron Corporation and Ponderosa Assets, LP v Argentina*, Award, ICSID Case No ARB/01/3; IIC 292 (2007), 15 May 2007, at para. 281.

it would still be obliged to accord considerable deference to both legislative and regulatory authorities in undertaking its review.[59] Under this type of minimum standard, absent evidence of an abuse of right (such as proof of discrimination on the basis of nationality or evidence that the measure was being applied in an arbitrary manner, or for an improper purpose), it is generally not the place of an international tribunal to second-guess the policy choices of a Host State under a "reasonable or discriminatory impairment" standard.

Uruguay's measures were justified by legislative and administrative officials on the basis of evidence of their effectiveness in reducing tobacco consumption.[60] Reducing tobacco consumption is inextricably linked to the promotion of health, which is an eminently reasonable policy objective. It should not be necessary for Uruguay to prove that the analyses undertaken by its legislature or health authorities were ultimately correct to satisfy a minimum standard provision of the kind found in Article 3(1) of the BIT. It is enough for Uruguay to demonstrate that these decisions were taken in good faith, with a rational connection apparent between the stated objectives and legitimate scientific evidence, which appears to be beyond doubt in this case.

### 2. Fair and Equitable Treatment

As stated above, there are three likely arguments PMI could make with respect to the FET standard contained in Article 3(2) of the Treaty: (i) fairness/proportionality; (ii) due process; and (iii) legitimate expectations.

#### (i) Manifest Unfairness (i.e. Substantive Fairness)

PMI's first line of attack under the FET standard could be based upon a literal construction of the FET standard. There has been significant debate, between and amongst tribunals, the parties and publicists, over whether the FET standard is synonymous with the "customary international law minimum standard of treatment for aliens" or whether certain FET provisions represent an autonomous treaty standard.[61] The reason for this debate is a belief, held by some authorities

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[59] It can be argued that legislative authorities are owed considerable deference, within the context of the standard articulated in Article 3(1) of the BIT, because their decisions normally reflect the authoritative outcome of democratic consensus on specific public policy issues. It can be argued further that regulatory authorities are owed considerable deference, within this context, because they possess scientific and technical expertise that a treaty tribunal normally will not possess.

[60] <www.msp.gub.uy/uc_3103_1.html>; last visited 28 June 2010.

[61] See, e.g.: *Biwater Gauff (Tanzania) Limited v Tanzania*, Award, ICSID Case No ARB/05/22, IIC 330 (2008), 18th July 2008

and a few States, that the customary international law minimum standard is less onerous than an autonomous version of the standard.[62] PMI's argument would be that Article 3(2) is an autonomous example of the standard, requiring a tribunal to review the measures on a standard of objective fairness and equity, requiring little or no deference to be shown to the right of a sovereign to take measures that it believes to be in the public interest.

My view of the customary/autonomous debate is that it is an unnecessary distraction. In the vast majority of cases there will be no practical difference between the customary international law and autonomous versions of the FET standard.[63] The FET standard does not provide investors with a *de facto* appellate mechanism for the substantive scrutiny of domestic policy decisions. For "treatment" to rise to the level of a breach of the FET standard (customary or otherwise) any claim about the substantive fairness and/or equity inherent in a measure or in its application must be founded upon evidence of manifestly unfair or inequitable conduct (i.e. conduct that cannot be rationally supported by recourse to a legitimate and otherwise non-discriminatory public policy goal).[64]

There is nothing manifestly unfair about the measures Uruguay has imposed over the past two years, on its domestic tobacco industry, including PMI's local subsidiary, Abal Hermanos S.A. On the contrary, there is ample evidence to support the proposition that graphic health warnings are an effective means of reducing tobacco consumption and that restrictions on advertising and marketing, which impair the establishment and maintenance of tobacco brands, have a salutary impact upon public health.[65] The very fact that PMI has

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[62] See, e.g. *Merrill & Ring Forestry LP v Canada*, Award, Ad hoc – UNCITRAL Arbitration Rules; IIC 427 (2010), 31 March 2010.

[63] See, e.g.: *Occidental Exploration and Production Company v Ecuador*, Award, LCIA Case No UN 3467, IIC 202 (2004), 1 July 2004, at para's 188-190; *Saluka Investments v. Czech Republic*, ad hoc – UNICTRAL, Partial Award 17 March 2006, at 291; *Azurix Corp v Argentina*, Award, ICSID Case No ARB/01/12; IIC 24 (2006), 23 June 2006, at para. 361; Noble Ventures Inc v Romania, Award, ICSID Case No ARB/01/11; IIC 179 (2005), 5 October 2005, at para. 165; *LG&E Energy Corp and ors v Argentina*, Decision on Liability, ICSID Case No ARB 02/1; IIC 152 (2006); (2007) 46 ILM 36, 3 October 2006, at para's. 123-124 & 128; *CMS Gas Transmission Company v Argentina*, Award, ICSID Case No ARB/01/8, IIC 65 (2005), 12 May 2005, at para's. 281-284.

[64] See, e.g.: International Thunderbird Gaming Corporation v Mexico, Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 136 (2006), 26 January 2006, at para. 194.

[65] See, e.g.: R. Cunningham, "Cigarette package warning size and use of pictures: international summary," (Ottawa: Canadian Cancer Society; 7 July 2009); B. Freeman, S. Chapman & M. Rimmer, "The case for the plain packaging of tobacco products" 17 (2008) Addiction 103 at 580–90; J. Scheffels, "A difference that makes a difference: young adult smokers' accounts of cigarette brands and package design," 17 (2008) Tobacco Control 118–22; and M.A. Wakefield, D. Germain & SJ. Durkin, How does increasingly plainer cigarette packaging influence adult

launched this claim demonstrates its perception of the effectiveness of the measures at issue. That is why PMI propaganda consistently includes allegations that these measures only change consumption patterns – by shifting market share to contraband and counterfeit brands – rather than reducing consumption or uptake overall.[66]

If PMI were ever to admit that these types of measures, which it vigorously challenges in any number of municipal and international fora, had the effect of reducing overall consumption, rather than merely displacing it as amongst competing producers and importers (both "legal" and "illicit"), it would not only lose the policy debate. It would no longer have any basis upon which to claim that these measures – in and of themselves – violate even a liberally-construed FET standard.

In any event, it is not necessary for the Respondent to demonstrate that its legitimate policy choices have led to the most efficient or the least economically restrictive measures for them to be consistent with an FET obligation. When evaluating the substance of a measure under an FET provision, tribunals will typically show appropriate deference to the sovereign right of States to make their own policy choices in furtherance of legitimate regulatory objectives, including the reduction of tobacco consumption. The FET standard was never meant to prevent the good faith and non-discriminatory exercise of regulatory (aka "police") powers by the Host State unless the adoption, implementation or effects of a measure are manifestly arbitrary, grossly inequitable or patently unfair.

(ii) Procedural Fairness (Due Process)

PMI may elect to base its claim on an allegation that due process was somehow not afforded to it during the drafting and/or implementation process for the new measures. Procedural fairness is a very common basis for successful FET claims.[67] Nevertheless, tribunals will still accord deference to the municipal decision-making process, essentially requiring the presence of "something more" than just a procedural defect that would give rise to a successful application for judicial review by a municipal court. What constitutes "something more" will vary from case to case, but it should suffice to say that international tribunals are generally

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smokers' perceptions about brand image? An experimental study," 17 (2008) Tobacco Control 416–21.

[66] See, e.g.: <www.plain-packaging.com/IllicitTrade>; last visited 28 July 2010.

[67] As with the judicial review of administrative action before municipal courts, arbitrators may find it more palatable to find liability on the basis of a defect in due process than on the basis of a substantive complaint.

unwilling to find fault with the product of a legitimate decision-making process, particularly if an opportunity exists for the matter to be resolved within the municipal legal order.

In this regard, it would be useful to recall the provision of Article 9 of the BIT, which mandates that a dispute should be submitted to the courts of the Host State for resolution over a period of no more than eighteen months. Even if a tribunal determined that this requirement could be waived for PMI through recourse to the MFN standard found in Article 3(2) of the BIT, in my opinion it could be less accepting of a PMI due process claim that only revealed a minor defect in due process or transparency, especially if the matter could have been resolved through recourse to the municipal court system.

To bolster its due process arguments, PMI may point to Article 5(3) of the FCTC, which provides: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law." The FCTC is binding upon Uruguay, both as a matter of international and municipal law. From the perspective of PMI, this obligation likely appears to institutionalize a bias against tobacco industry members.

PMI will probably point to the years of public relations work that it and affiliated companies have devoted to cultivating the image of a responsible corporate citizen seeking to alert its consumers to the health risks inherent in tobacco consumption and to stamp out youth smoking altogether. PMI will accordingly attempt to argue that it was fundamentally unfair for Uruguay to adopt a confrontational policy towards the tobacco industry when establishing and implementing its tobacco control regime, and especially the latest three measures. In order to credibly sustain such an argument, it would be necessary for PMI to demonstrate precisely how Uruguay's measures were developed and implemented in a non-transparent or procedurally unfair manner. This issue is a matter of process, rather than result.

My review of the record indicates that the domestic legal order in Uruguay generally meets international minimum standards, providing constitutional and administrative protections for all persons in its territory. As I am not qualified to opine upon the law of Uruguay, I cannot comment about whether there exists an obvious defect in the manner in which the Decree and Ordinances were issued. It is clear, however, that in order to establish that an FET obligation has

been breached, it is necessary to prove more than just that the measure is inconsistent with governing norms for the municipal legal order.[68]

It is apparent from the public statements of former President Vasquez, and from Uruguay's ratification of the FCTC, that the Government's policy goal was to dramatically reduce tobacco consumption through implementation of these measures. Given the seminal importance of brand investments in the tobacco industry, it only stands to reason that measures taken to restrict or hinder the maintenance and use of brands by tobacco industry members should have a negative impact upon tobacco consumption (particularly with respect to uptake and youth smoking). In other words, achieving this policy goal necessitates the implementation of measures that are contrary to the economic interests of PMI.

FET standards, such as the one contained in Article 3(2) of the BIT, were never intended to operate as an insurance policy against disappointing public policy outcomes. From a procedural standpoint, the FET standard protects foreign investors from manifest defects in due process or transparency that clearly result in losses for the foreign investor or its investment. There does not appear to be compelling evidence of such defects in this case.

(iii) Legitimate expectations

Finally, PMI can be expected to claim that Uruguay's measures are inconsistent with the expectations it was legitimately entitled to hold in respect of the use and enjoyment of its the Marlboro® and other brands, and their supporting trademarks. There are two responses to this argument. First, Uruguay can argue that the FET only protects legitimate expectations grounded in explicit assurances made by a governmental official exercising authority properly vested in her.[69] The doctrine on this issue is far from settled, however.

A number of tribunals have found that legitimate expectations about the relative fairness, stability and transparency of the local legal regime are protected under the FET standard.[70] Under this theory, the Host State owes a

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[68] See, e.g.: ADF Group Inc v United States, Award, ICSID Case No ARB(AF)/00/1; IIC 2 (2003) 9 January 2003, at para. 190.
[69] See, e.g.: *International Thunderbird Gaming Corporation v Mexico*, Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 136 (2006), 26 January 2006, at para. 147.
[70] See, e.g.: *Occidental Exploration and Production Company v Ecuador*, Award, LCIA Case No UN 3467, IIC 202 (2004), 1 July 2004; *CMS Gas Transmission Company v Argentina*, Award, ICSID Case No ARB/01/8, IIC 65 (2005), 12 May 2005; or *CME Czech Republic BV v Czech Republic*,

general duty to provide a transparent and stable regulatory and business climate to foreign investors. In this context an investor can refer to elements in both the municipal legal order, and in applicable international law, as giving rise to its legitimate expectations.[71] In this case, PMI would point to the provisions of Uruguay's trademark laws as granting an exclusive and effectively unlimited right to use validly registered marks in establishing and growing the Marlboro and other brands.

PMI would attempt to bolster its alleged entitlement by recourse to certain provisions of the TRIPS Agreement, including Article 15(4), which provides: "The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark." The allegation would be that Uruguay's measures categorically discriminate against PMI's trademarks on the basis of the nature of the goods to which they apply (tobacco).[72] The problem with this analysis is that it ignores the plain meaning of the text of Article 15(4), which pertains only to the ***registration*** of marks, rather than regulations concerning their use. This text is consonant with Article 7 of the *Paris Convention*, which WTO Members obviously attempted to replicate with TRIPS Article 15(4).[73]

It is patent from the structure of TRIPS Section 2 that Article 15 concerns registration of trademarks; Article 16 concerns rights generated through the grant of registration; that Article 18 concerns the minimum length of protection; that Article 19 concerns requirements that a mark be used to maintain registration; that Article 17 concerns exceptions that can be imposed upon the use of registered marks; and that Article 20 concerns the imposition of encumbrances upon its continued use.

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Final Award and Separate Opinion, Ad hoc – UNCITRAL Arbitration Rules, IIC 62 (2003), 14 March 2003.

[71] See, e.g.: *GAMI Investments, Inc v Mexico*, Final Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 109 (2004), 15 November 2004; *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2; IIC 247 (2003); 10 ICSID Rep 130, 29 May 2003; or *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7; IIC 174 (2004), 25 May 2004.

[72] Lalive LLP, "Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris Convention" 23 July 2009, at Sec. 3.1; <www.plain-packaging.com/downloads/LALIVE_Analysis_23_July_2009.pdf>; last visited 28 June 2010.

[73] There are numerous references to the Paris Convention in Section 2 of the TRIPS Agreement, which provide context for interpretation of a provision such as Article 15(4). In addition, please note how TRIPS Article 2(1), provides: that nothing in the relevant parts of the Agreement "shall derogate from existing obligations that Members may have to each other under the Paris Convention..." This provision provides further indication that WTO Members intended to faithfully refer to, and incorporate, their obligations from this earlier treaty into the TRIPS agreement.

Again, assuming the applicability of a 'general expectations' theory, another critical element in informing PMI's expectations would be TRIPS Article 17. This provision appears to provide WTO Members with considerable discretion to impose "… limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties." Article 17 does not delineate the types of exception that will be considered valid under WTO law, although under the *ejusdem generis* rule one could argue that the types of exception envisioned for Article 17 should be similar to the fair use doctrine common to many municipal trademark laws.

In this regard it is crucial to recall that PMI is not entitled to obtain a finding of TRIPS non-compliance from a BIT tribunal. Its jurisdiction is limited to the provisions listed above. The theory of liability in which TRIPS obligations may be relevant in the BIT context is that PMI may have enjoyed a legitimate expectation that it would be entitled to use its marks without restrictions related to the goods with which they are associated, on the grounds that the TRIPS regime has been incorporated into the municipal legal order by Uruguay, which is bound by the general international law principle of good faith to implement its TRIPS obligations.[74] Given that the FET obligation has been consistently construed with deference to the sovereign right of a Host State to take decisions that it believes are in the best interests of its citizens, however, PMI could not seriously claim a legitimate entitlement to enjoy unfettered use of its marks in perpetuity.

In other words, TRIPS Article 17 envisages the possibility that exceptions could be taken by WTO Members, leaving the issue of whether individual exceptions taken fell within the scope of Article 17 to the Members, or the WTO DSB, to decide. It would not be reasonable for any investor to hold an expectation that its use of a mark would never be affected by some kind of exception, given the simple fact that it is not crystal clear precisely what types of measure would, or would not, fall into the category of measures contemplated with Article 17.

PMI would also be expected to argue that TRIPS Article 20 prohibits Uruguay from burdening its use of its marks with "encumbrances" such as limiting their application to a single product or limiting their use on product packaging.

[74] In this regard, one could argue that only Article 7 of the Paris Convention would be relevant in PMI's general legitimate expectations claim because its investment was made in 1979, years before the TRIPS came into force. There are two faults with this theory: (1) Article 7 of the Paris Convention only deals with registration; not use; and (2) it would not be reasonable for any investor to assume that the regulatory regime would remain permanently frozen in amber from the day its investment was made (in this case over three decades ago).

Again, absent WTO jurisprudence on the point, it is not clear exactly which types of measure should be classified as an "encumbrance," rather than an "exception" or something else altogether. Moreover, Article 20 only prohibits ***unjustifiable*** encumbrances on the use of trademarks. The issue of whether an encumbrance would be justifiable must also be placed within the context of the applicable FET general reliance theory.

In my opinion, the benefit of the doubt – concerning both this justifiability issue and the determination of whether Uruguay's measures constitute an "exception," an "encumbrance," both, or neither – would rest with the Host State, Uruguay. It would be simply unreasonable for PMI to sustain a general detrimental reliance claim on the basis of such uncertain interpretative outcomes.[75]

Moreover, when evaluating a general reliance claim based under an FET standard, it is also necessary to examine the regulatory context within which the investor maintains its investment.[76] Uruguay has been regulating tobacco since 1984 and the tobacco industry is generally considered to be one of the most highly regulated industries worldwide. As such it is submitted that PMI could not legitimately hold an expectation that it would never encounter any regulation of the manner in which its marks could be used in Uruguay's market for tobacco products.

### 3. Compensation for Indirect Expropriation

The test of whether a measure constitutes an indirect expropriation focuses upon evidence of "substantial interference" with an investment, such that the investor has effectively been deprived of the use and enjoyment of its investment.[77] PMI may have a *prima facie* claim that Uruguay's new measures, particularly when combined with its existing tobacco control regime (including

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[75] Contrast this case, for example, with one where the general reliance claim is based upon legal expectations arising out of an international instrument that does not provide discretion for the taking of reservations and exceptions on a forward-going basis or a comparatively settled body of municipal or international law, where the doctrine obviously justifies some general expectations about governmental behaviour.

[76] *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7; IIC 174 (2004), 25 May 2004 at para. 122.

[77] See, e.g.: *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/04/05; IIC 329 (2007) 26 September 2007, at para. 245; citing: *Pope & Talbot Inc v Canada*, Interim Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 192 (2000), signed 26 June 2000, at para. 100; or *MCI Power Group LC and New Turbine Inc v Ecuador*, Award, ICSID Case No ARB/03/6; IIC 296 (2007) 26 July 2007, at para. H10.

its blanket bans on tobacco advertising and other restrictions on marketing), meet the threshold for substantial interference. Not only is PMI restricted to occupying only 20% of the area of its packages for the application of its marks; it has also been forced to abandon the colour-coded, brand variation strategy it was pursuing to maintain the 'brand families' it formerly maintained using misleading terms such as "low tar," "light" and "ultra mild."[78]

Indeed, it would appear that Uruguay's measures were deliberately designed to interfere substantially with PMI and its competitors' use of their brands, which are their most important investments in any given market. In addition, there appears to be little dispute that PMI has not received any compensation for the impairment it will suffer, particularly with respect to the impressive restrictions being now imposed by Uruguay upon its of its use and enjoyment of the notorious Marlboro® brand.

That is not the end of the story, however. The commonly accepted position is that, except in rare circumstances, the obligation to pay compensation for indirect expropriation does not subsist in cases where a non-discriminatory measure of general application has been adopted and applied, in good faith, for the protection of legitimate public welfare objectives, such as health, safety and the environment.[79] In this regard, tribunals have normally considered the economic impact of the measure in relation to the "reasonable investment-backed expectations" of an affected investor.[80]

In other words, the obligation to pay compensation for indirect expropriation is not based upon a *prima facie* finding of substantial interference with the affected investment. Rather, tribunals have typically considered whether a

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[78] "Tabacalera eleva demanda contra el Estado uruguayo," El Espectador 27 February 2010; <www.espectador.com/1v4_contenido.php?m=&id=175247&ipag=2>; Last viewed 28 June 2010. The brands withdrawn from the market as a consequence of Ley 18.256 were: "Richmond Light de 100," "Richmond Light común," "Nevada Light," "Coronado ultra," "Coronado Light," "J&M Light," "J&M Light box," "Marlboro Light" and "Fiesta Light."

[79] See, e.g.: *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, Ad hoc – UNCITRAL Arbitration Rules; IIC 167 (2005). It should be noted that I have elsewhere criticized this approach to the construction of an expropriation obligation as being "expropriation light," because it imports the FET legitimate expectations analysis into the expropriation analysis, thereby diluting the property rights that are supposed to be protected in extreme cases where a taking has, in fact, occurred. Nevertheless, both State practice and arbitral decisions have moved away from my position, such that it could not be safely assumed by any claimant that advancing my position would result in success before a BIT tribunal. 3 August 2005, at Part IV Chapter D, para. 7.

[80] Fireman's Fund Insurance Company v Mexico, Award, ICSID Case No ARB(AF)/02/01; IIC 291 (2006) 17 July 2006, at para. 176.

single investor, or class of investors, was forced to suffer a *de facto* taking, thereby bearing a heavier burden than others in order to achieve a valid public policy goal, as well as whether the investor was reasonably entitled to hold an expectation, backed by its investment, that if such measures were ever imposed, it would be fairly compensated for its losses.

As explained in the previous section, the proposition that PMI could have been entitled to hold a legitimate expectation that it would enjoy the unfettered use its marks in perpetuity is simply unrealistic. While there is a case can be made that Uruguay's measures do interfere substantially with PMI's use and enjoyment of both its trademarks and the brands they support, there is also a valid and overwhelming public policy basis for these measures, about which PMI's forward-looking expectations concerning the use of its brands in FCTC countries would necessarily have been tempered from the date of its adoption.

Uruguay's measures do not appear to single out any member of the tobacco industry for more burdensome treatment. The evidence further indicates that the measures were adopted in good faith, in furtherance of a valid public policy. As such, Uruguay should succeed in arguing that even if PMI's intellectual property investments have been effectively taken as a result of its measures, no compensation is owed. These measures constitute a valid exercise of Uruguay's police power, vested in the sovereign as a matter of customary international law.[81]

### 4. Superior Position of the FCTC over the BIT

Until now I have largely omitted my analysis of the obligations undertaken by Uruguay pursuant to the FCTC. In my opinion, the claims contemplated by PMI are likely to fail even if the FCTC had never existed. Of course the FCTC does exist, and the application of its terms to the facts of PMI's case only strengthen my opinion that it will fail.

FCTC Article 7 is a self-executing obligation, which mandates that parties to it "shall adopt and implement… measures necessary to implement [their obligations pursuant to Articles 8 to 13 [of the Convention]." It is binding upon Uruguay both as a matter of customary international law and under Uruguayan municipal law.[82] As such, its impact upon the treatment expectations of an

[81] See, e.g.: *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2; IIC 247 (2003); 10 ICSID Rep 130, 29 May 2003, at para. 119.
[82] 36, the Convention entered into force on 27 February 2005, 90 days after it has been acceded to, ratified, accepted, or approved by 40 States. VCLT Article 25(1)(a)

investor such as PMI cannot be precluded. As soon as this mandatory obligation came into force, in 2005, Uruguay was obliged to bring itself into compliance with FCTC Article 11, which concerned its regulation of the packaging and labelling of tobacco products.

Uruguay took immediate steps to bring itself into compliance with these FCTC obligations, starting with Presidential Decree N° 168/05, issued 31 May 2005. On its face, FCTC Article 11 encourages FCTC Parties to take further steps to decrease tobacco consumption with the measures it governs. The plain meaning of this provision is reinforced by FCTC Article 4, which provides, in part:

> **…**
> **2. Strong political commitment is necessary to develop and support, at the national, regional and international levels, comprehensive multisectoral measures and coordinated responses, taking into consideration:**
> **(a) the need to take measures to protect all persons from exposure to tobacco smoke;**
> **(b) the need to take measures to prevent the initiation, to promote and support cessation, and to decrease the consumption of tobacco products in any form;**
> **…**
> **4. Comprehensive multisectoral measures and responses to reduce consumption of all tobacco products at the national, regional and international levels are essential so as to prevent, in accordance with public health principles, the incidence of diseases, premature disability and mortality due to tobacco consumption and exposure to tobacco smoke.**

FCTC Article 11(1)(a) requires Parties to "… ensure that tobacco product packaging and labelling do not promote a tobacco product by any means that are… likely to create an erroneous impression about its characteristics… including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products." As indicated in Ordinance N° 514, the reason that it has become necessary to limit the use of trademarks to a single line of tobacco products is that tobacco companies have almost universally adopted colour-coding schemes in an attempt to circumvent prohibitions on the use of terms such as "low tar," "ultra-light," or "mild" in municipal legislation (and as explicitly set out in Article 11(1)(a)).

Philip Morris and the world's other large, multinational tobacco brand holders (aka "the Majors" or "Big Tobacco") appear to have responded in lockstep fashion to these new prohibitions on misleading descriptors, informally adopting what appears to be an industry wide colour-coding scheme to assist consumers

in identifying their old brands.[83] A regulatory nexus accordingly exists between the additional limitations on PMI's use of the Marlboro® brand and supporting trademarks imposed by this measure and the terms of FCTC Article 11(1)(a).[84]

FCTC Article 11(1)(b) requires the imposition of health warnings on cigarette packages, mandating that no less than 30% of the principal display areas must be reserved for this purpose. Sub-paragraph (iv) further provides that such areas "should" take up 50% of the principal display areas of these packages, while sub-paragraph (v) provides that these warnings and messages "may be in the form of or include pictures or pictograms." In addition, FCTC Article 2 again provides:

> **In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter**

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[83] See, e.g.: J. Peace, N. Wilson, J. Hoek, R. Edwards & G. Thomson, "Survey of descriptors on cigarette packs: still misleading consumers?" 25 (2009) NZ Med. J., 122(1303) at 90-6; and "The marketing of tobacco products in 2007. The Return of cigarette advertising," Non-Smokers' Rights Association, March 2008 at 7-8; <www.nsraadnf.ca/cms/file/pdf/tobacco_promotion_2008.pdf>; last viewed 28 June 2010.

[84] With respect to PMI's current brand strategies and practices, including its adoption of a method to maintain its valuable "brand families," it may be useful to recall that one of the advantages that will accrue to the Government of Uruguay, as a consequence of defending PMI's claim, is that it will arguably have the opportunity to participate in document discoveries, both with PMI and its affiliates in the USA. PMI has chosen to pursue this arbitration under the ICSID Rules. The seat of the ICSID is Washington D.C., which arguably provides a jurisdictional basis for calling upon a US Court for its assistance under section 1782 of U.S. Code Title 28. Under 28 U.S.C. § 1782(a), United States district courts have authority to assist in gathering evidence from domestic companies and individuals for use in proceedings before foreign and international tribunals. See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004). The statute provides in pertinent part:
(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal ... The order may be made . . . upon the application of any interested person and may direct the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. While US District Courts have yet to decide whether an ICSID arbitration is a "tribunal" within the meaning of the statute, U.S. case law supports a broad reading of the term, so as to include all arbitral tribunals, including an ICSID tribunal. See e.g., In re Application of Roz Trading Ltd., 469 F. Supp.2d 1221 (N.D. Ga. 2006). Moreover, no U.S. court has refused an arbitral body established by governments or sovereign nations the status of "tribunal" within the meaning of Section 1782. See: In the Matter of the Application of Oxus Gold PLC, MISC No. 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); In the Matter of the Application of Oxus Gold PLC, MISC No. 06-82-GEB, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007); see In Re Application of Chevron Corp., No. M-19-111, 2010 WL 1801526, at *6 (S.D.N.Y. May 6, 2010)..

> **requirements that are consistent with their provisions and are in accordance with international law.**

The FCTC thereby explicitly authorised Parties, such as Uruguay, to go beyond the minimum requirements set out in its provisions. There can be little doubt that Decree Nº 287/009 and Ordinance Nº 466 are a reasonable manifestation of such discretionary authority. Returning to the manner in which the existence of the FCTC bears upon a legitimate expectations argument, the existence of these rights and obligations renders any potential PMI claim utterly illusory. Moreover, the fact that authority has been explicitly provided to FCTC Parties to exceed the mandate set out in Articles 7 and 11 eradicates any room for PMI to argue that Uruguay's latest measures somehow constitute an abuse of right. Proving that sovereign authority has been exercised in a manifestly arbitrary or unreasonable manner is the cornerstone of many successful claims under an FET standard or an expropriation provision.

As indicated in the applicable law section, above, Article 31(1) of the VCLT mandates that 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." FCTC Article 4 establishes the "guiding principles" for implementation of its provisions. In this context, it patently clear that the purpose of FCTC Article 11 was to vest Parties with the authority to implement measures precisely like the ones now at issue in PMI's claim. Given this state of affairs, in effect since 2005, it would simply not be rational for an investor such as PMI to suggest that it nonetheless maintained a legitimate expectation that its brand investments in Uruguay would not be subjected to substantial impairment as part of a larger tobacco control strategy, and that such impairment would never be increased over time.

Uruguay could also make a strong argument that the provisions of the FCTC must trump the operation of any provisions contained in the BIT, the *Paris Convention* or the WTO TRIPS Agreement, to the extent that measures authorized under the FCTC could be considered inconsistent with any obligations contained within these earlier treaties, as a matter of customary international law. This argument would be based upon the customary international law approach memorialized in VCLT Article 30, which provides:

> **Article 30 – Application of successive treaties relating to the same subject matter**
> **1.Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.**

> **2.When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.**
> **3.When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.**
> **4.When the parties to the later treaty do not include all the parties to the earlier one:**
> **(a) as between States Parties to both treaties the same rule applies as in paragraph 3;**
> **(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.**
> **5.Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.**

Pursuant to VCLT Article 30(3), the provisions of the BIT, the *Paris Convention*, and the TRIPS Agreement only apply – as between Uruguay and Switzerland – to the extent that their provisions are compatible with the provisions of the FCTC. This is because both Switzerland and Uruguay are "Parties" to all four of the aforementioned treaties.[85] The fact that Switzerland has not yet ratified the FCTC does not detract from the fact that it shall remain a "Party" to this treaty until such time as its Government elects to renounce its consent to the FCTC's terms.[86]

Because FCTC Article 2(1) provides that Parties must ensure that their measures are "in accordance with international law," a plausible argument could be

[85] When construing the application of respective treaty obligations, regardless of whether any of those obligations can be enforced by an individual under an applicable investor-state arbitration mechanism, the focus of the analysis is on the parties to the treaties concerned. In this context, one can expect PMI to rely upon obligations Uruguay has undertaken in multilateral treaties, for the protection of intellectual property, to which both it and its jurisdictional "home" state (i.e. Switzerland) are parties.

[86] As memorialized in VCLT Article 30, this analysis applies in all cases where the two (or more) States concerned are parties to the relevant treaty (i.e. they have agreed to be bound by its obligations, regardless of whether they have taken whatever steps might be necessary to ratify the treaty, satisfying any municipal rules governing application of the treaty as a matter of national, as opposed to international, law). In other words, despite the fact that Switzerland has not ratified the FCTC, its agreement to become a party to this treaty entitles Uruguay to enjoy a good faith expectation that the manner in which both states will now observe any extant international obligations between them will be in conformity with the obligations to which they have agreed under the FCTC.

made that, as treaties are one of the three primary sources of "international law," FCTC Parties remain obliged to meet all of their other treaty obligations in exercise of any rights or obligations under the FCTC. The problem with this argument is that it does not meet the test of VCLT Article 30(2), which requires the Parties to a newer treaty to articulate which earlier treaties should be considered complementary or superior to its provisions. The FCTC contains no such language.

Moreover, the interpretative tools already exist by which any potential conflict between the FCTC and earlier treaties could be mitigated. As a general rule, treaty provisions capable of more than one construction must be interpreted in a manner that does not lead to conflict with extant treaty obligations.[87] BIT practice requires that appropriate deference be shown to any sovereign exercise of authority. Both Articles 17 and 20 of the TRIPS Agreement contemplate some discretion for the application of "exemptions" and "encumbrances" upon the use of trademarks. FCTC Articles 2, 4 and 11 similarly envisage that some discretion lies with FCTC Parties to adopt the most appropriate measures in the circumstances. Absent any evidence that Uruguayan officials demonstrated a lack of good faith in carrying out their duties, the most appropriate construction to apply to all of these treaty provisions is one where discretionary authority remains with Host States, under FCTC Articles 2, 4 and 11, to take increasingly aggressive steps to combat tobacco consumption using the types of measure delineated therein.

Uruguay is accordingly well-placed to make a forceful argument that BIT Articles III and V both contemplate a certain margin of appreciation, or discretionary policy space, in which governmental decisions can be made in good faith. TRIPS Articles 17 and 20 similarly contemplate the existence of similar discretion with respect to limitations that a WTO Member can impose upon the use of trademarks in its territory. FCTC Articles 2, 4 and 11 vest Parties to the Convention with authority to impose such limitations, and encourage them to progressively strengthen those limitations in order to achieve – in good faith – the fundamental policy goals of protection of human life and health.

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[87] See, generally: Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP: Cambridge, 2003); M. Hirsch, "Interactions Between Investment and Non-Investment Obligations" *Oxford University Handbook of International Investment Law*, P. Muchlinski, F. Ortino and C. Schreuer, eds. (OUP: Oxford, 2008) at 154; and A. van Aaken, "Defragmentation of Public International Law Through Interpretation: A Methodological Proposal" 16 (2009) Indiana J. Gbl. Leg. Stds. 483-512.

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## V. The FCTC Dispute Settlement Mechanism

Because Switzerland has not yet ratified the FCTC, it would not be possible for Uruguay to submit a dispute related to PMI's BIT claim to arbitration under FCTC Part IX. For the sake of argument, however, we shall assume that Switzerland has ratified the FCTC, rather than only having participated in its negotiation and having agreed to become a Party to it with its signature dated 25 June 2004.[88]

The primary question about whether the FCTC dispute settlement mechanism is relevant in the investment treaty context would be whether Uruguay could use it to direct the entire matter to an FCTC dispute settlement body,[89] taking it out of the hands of an ICSID Tribunal. The answer is unequivocal: no. The dispute settlement mechanism found in the typical BIT grants specific, substantive rights to investors as regards Host State compliance with BIT obligations. These rights cannot be abridged by the invocation of a dispute settlement regime found under another treaty or, for that matter, under the very same BIT.[90]

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[88] The more difficult question would be on what basis Uruguay would engage the FCTC dispute settlement process in respect of PMI's claim. PMI's claim concerns Uruguay's compliance with its obligations under the BIT. As explained in more detail above, Uruguay's FCTC obligations are certainly relevant, if not controlling, in respect of a determination of whether PMI's BIT claims are valid. Nevertheless, Switzerland has not provided any indication that it has the slightest concern about whether Uruguay is complying with its FCTC obligations. As such, there are no grounds for Uruguay to submit the matter to (what, of necessity would be) consensual mediation or conciliation under Article 27 of the FCTC.

One might also add, however, that there is nothing to prevent Uruguay from utilizing normal diplomatic channels to raise the matter of PMI's threatened claim as an issue for discussion as between the two States. If it was so minded, the Government of Switzerland could make its views about the interpretation of both the BIT and the FCTC known to an ICSID Tribunal established to hear PMI's claim. It could do so either by way of an amicus submission to the Tribunal, or by agreeing to an exchange of diplomatic notes between itself and Uruguay agreeing to a shared interpretation their mutual obligations under the BIT and the FCTC. Obviously no ICSID Tribunal would look lightly upon such an exchange of notes, undertaken explicitly for the purposes of stating a shared interpretation of how the Parties' BIT obligations must be construed in light of their FCTC obligations.

[89] It is important to note, in this case, that the FCTC does not provide for binding arbitration of disputes between FCTC Parties. It only provides for resolution of disputes via diplomatic channels and/or voluntary mediation or voluntary conciliation.

[90] In this regard it is important to distinguish between: (1) the obligations undertaken or otherwise owed by two States towards each other, concerning their treatment of the investors of the other State; and (2) the treaty obligations under which those two States permit individuals to bring international claims against them based upon their compliance with the former obligations (vis-à-vis the other State). The obligations contained within the FCTC are relevant only to the former type of obligation, regulating the conduct of States, qua States.

Accordingly, there is also no reason why an FCTC mediation or conciliation between a home State and a host State could not take place at the same time that an investment treaty arbitration is underway between an investor and that same host State. It is not uncommon for disputes arising from the same set of facts to simultaneously foster more than one international dispute settlement proceeding.

## VI. Conclusion

PMI's BIT claim against Uruguay is emblematic of its long standing strategy to vehemently oppose the adoption of measures that might some day lead to plain paper packaging of their products, or other measures that substantially interfere with the use and enjoyment of its crucial investment in its tobacco brands. In my opinion, the claim is nothing more than the cynical attempt by a wealthy multinational corporation to make an example of a small country with limited resources to defend against a well-funded international legal action, but with a well-deserved reputation as a worldwide leader in tobacco control.

Even if one ignores the devastating impact of the FCTC upon PMI's claim, the bottom line is that the BIT provisions available to PMI all require international tribunals to show deference to the legitimate and good faith exercise of regulatory authority by a Host State. Given the circumstances of its case, it is highly doubtful that PMI could ever surmount such a threshold. It is not enough for PMI to convince three objective international jurists that Uruguay's choice of tobacco control measures was sub-optimal. Absent evidence of discrimination or manifest unfairness, these are the kinds of policy decision that international investment law leaves in the hands of the Host State.