

ARBITRATION UNDER
THE RULES OF THE INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES

FTR HOLDING S.A. (SWITZERLAND)

and

PHILIP MORRIS PRODUCTS S.A. (SWITZERLAND)

and

ARAL HERDANOS S.A. (URUGUAY)

vs.

ORIENTAL REPUBLIC OF URUGUAY

REQUEST FOR ARBITRATION

19 February 2010

LALIVE

FTR Holdings et al. v. Uruguay
Request for Arbitration

LALIVE
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INTRODUCTION

1. FTR Holding S.A. ("FTR"), Philip Morris Products S.A. ("PMP") and Abal Hermanos S.A. ("Abal" and, together with FTR and PMP, "Philip Morris" or the "Claimants") file the present Request for Arbitration to institute arbitration proceedings against the Oriental Republic of Uruguay ("Uruguay"). The proceedings are initiated in accordance with Article 36 of the Convention on Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965 (the "ICSID Convention") and Article 10 of (including Ad Article 10 of the Protocol to) the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments dated 7 October 1988 (the "Switzerland-Uruguay BIT" or "BIT").¹ Uruguay ratified the BIT on 30 March 1991, whereas under Swiss law no ratification of the BIT was required by the Swiss Confederation ("Switzerland").² The BIT entered into force on 22 April 1991, as provided by Article 12 of the BIT.
2. The Claimants' claims arise out of the enactment by the Uruguayan Ministry of Public Health of Ordinance 514 dated 18 August 2008³ (the "Ordinance" or "Ordinance 514") and the enactment by the President of Uruguay of Decree 287/009 dated 15 June 2009 ("Decree 287/009").⁴
3. Article 3 of the Ordinance, which requires each cigarette brand to have a "single presentation," prohibits different packaging or presentations for cigarettes sold under a given brand. Until the enactment of the Ordinance, Abal sold multiple product
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¹ Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, 7 October 1988, at EXHIBIT C-1.

² Art. 12 of the BIT provides that the treaty enters into force when both parties notify each other of having completed their domestic procedures needed for the BIT to enter into force. Switzerland and Uruguay notified each other of having completed their domestic procedures needed for the treaty to enter into force through an exchange of notes on 22 April 1991 (Exchange of Notes between Uruguay and Switzerland regarding the ratification of the Uruguay-Switzerland BIT, 8 and 22 April 1991, at EXHIBIT C-2).

³ Ministry of Public Health Ordinance 514, 18 August 2008, at EXHIBIT C-3.

⁴ Presidential Decree 287/009, 15 June 2009, at EXHIBIT C-4.

varieties under each of its brands (for example "Marlboro Red," "Marlboro Gold," "Marlboro Blue" and "Marlboro Green (Fresh Mint)"). However, Article 3 has forced Abal to cease selling all but one of those product varieties under each brand that it owns or licenses. Thus, for example, Abal is now forbidden to sell previously lawful products, such as "Marlboro Gold," "Marlboro Green (Fresh Mint)" and "Marlboro Blue." With one exception, the presentations of each of these product varieties were registered as trademarks in Uruguay and were the property either of PMP or Abal itself.³ In addition, sales of these now forbidden products represented a significant portion of Abal's total sales.

4. Article 1 of the Ordinance mandates graphic images ("pictograms") that are purported to illustrate the adverse health effects of smoking reflected in the text warnings, but in fact go beyond this purpose. Many of these pictograms are not designed to warn of the actual health effects of smoking; rather they are highly shocking images that are designed specifically to invoke emotions of repulsion and disgust, even horror. Thus the effective function of the pictograms is to undermine and indeed destroy the good will associated with Abal's and PMP's legally protected trademarks, and not to promote legitimate health policies.
5. Decree 287/009 imposes an increase in the size of health warnings on cigarette packages to 80 per cent of the surface of the front and back of the packages. The 80 per cent health warning coverage requirement unfairly limits Abal's right to use its legally protected trademarks and prevents Abal from displaying them in their proper form. It also compounds the demeaning effect of the pictograms mandated by Article 1 of Ordinance 514.
legally protected trademarks and prevents Abal from displaying them in their proper form. It also compounds the demeaning effect of the pictograms mandated by Article 1 of Ordinance 514.
6. Not surprisingly, Ordinance 514 has caused a decrease in Abal's sales, notably because Abal has been forced to discontinue a number of its product varieties. It has also caused a deprivation of PMP's and Abal's intellectual property rights, and a substantial reduction in the value of Abal as a company. As a result, the Claimants have already sustained, and will continue to sustain, substantial losses.

³ The registration of the "Marlboro Green (Fresh Mint)" trademark is still pending. See Uruguayan registration documents for "Marlboro," "Fiesta," "L.&M" and "Philip Morris" trademarks, at EXHIBIT C-8.

7. The Claimants do not challenge the Uruguayan Government's sovereign right to promote and protect public health. However, the Government cannot abuse that right and invoke it as a pretext for disregarding the Claimants' legal rights. As the Claimant will demonstrate in the course of the arbitration, in the present case the Respondent has chosen means that amount to gross violations of the Claimants' rights under the Switzerland-Uruguay BIT and international law.
8. The Claimants have sought to reach an amicable solution by way of consultations with the Respondent, as well as through administrative and legal action in Uruguay, but these attempts have so far proven futile. Accordingly, the Claimants are compelled to pursue their rights by way of arbitration.

1. PARTIES AND COUNSEL

9. FTR and PMP are *sociétés anonymes* organized under the laws of Switzerland and have their registered office in Neuchâtel, Switzerland. FTR was incorporated on 14 December 1924 and registered in the Commercial Register of Neuchâtel on 15 January 1943.¹ PMP was incorporated on 22 December 1988 and registered in the Commercial Register of Neuchâtel on the same day.² Abal is a *sociedad anonima* organized under the laws of Uruguay and has its registered office in Montevideo, Uruguay.³ The company was incorporated in December 1945.
10. FTR is the direct owner of 100% of Abal.⁴ PMP is the owner of the "Marlboro," "Fiesta," "L&M" and "Philip Morris" trademarks which it licenses to Abal.⁵ PMP, like Abal, is 100% owned by FTR.

¹ Extract of the Commercial Register of Neuchâtel and Articles of Association of FTR Holding S.A., at EXHIBIT C-5.

² Extract of the Commercial Register of Neuchâtel and Articles of Association of Philip Morris Products S.A., at EXHIBIT C-6.

³ Notarized attestation of Abal's status as a limited liability company organized under the laws of Uruguay, 5 November 2009, at EXHIBIT C-16.

11. Abal produces and sells the “Marlboro,” “Fiesta,” “L&M,” “Philip Morris,” “Casino” and “Premier” brands of cigarettes in Uruguay; it owns the “Casino,” “Premier” and associated trademarks,¹¹ and it licenses the “Marlboro,” “Fiesta,” “L&M,” and “Philip Morris” and associated trademarks from PMP.¹² Abal is the holder of these licenses and has been the owner of the “Casino” and “Premier” trademarks at all relevant times.
12. The Claimants have taken all necessary internal actions to authorize the preparation and filing of this Request for Arbitration and have mandated LALIVE to represent them.¹³ All correspondence should accordingly be sent to:

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13. To the Claimants’ knowledge, the Respondent is not represented by outside counsel in this matter. The Respondent’s address is:

¹¹ Uruguayan registration documents for “Marlboro,” “Fiesta,” “L&M” and “Philip Morris” trademarks, at EXHIBIT C-8; License Agreement and Amendment between PMP and Abal, at EXHIBIT C-9 (it should be noted that there is a clerical error in the title of Schedule B to the Amendment to License Agreement, which should read “Uruguay” instead of “Paraguay”).

¹² Uruguayan registration documents for “Casino” and “Premier” trademarks, at EXHIBIT C-11.

¹³ License Agreement and Amendment between PMP and Abal, at EXHIBIT C-9 (it should be noted that there is a clerical error in the title of Schedule B to the Amendment to License Agreement, which should read “Uruguay” instead of “Paraguay”).

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II. FACTUAL BACKGROUND

A. Abal's origin and operations

14. Abal was formally established in its present form in 1945, but the company was founded much earlier. Indeed, Abal has been manufacturing and marketing tobacco products in Uruguay since 1877. Today, Abal is the second largest Uruguayan tobacco producer and manufactures cigarettes for the Uruguayan market, as well as other South American markets, in a manufacturing facility located in Montevideo.
15. Abal manufactures and sells cigarettes in Uruguay under the brand names "Marlboro," "Fiesta," "L&M," "Philip Morris," "Premier" and "Casino." It has marketed cigarettes in Uruguay under various brands since 1877. In 1979, Abal was acquired by Philip Morris Inc., a United States corporation. In 1999, Abal was transferred to

¹² Power of Attorneys from FTR, PMP and Abal, at EXHIBIT C-12.

- FTR.¹⁴ Following its acquisition, Abal concluded license agreements to manufacture and sell cigarettes under various Philip Morris brands. The most recent license agreement between PMP and Abal became effective on 15 October 2002. The agreement grants Abal a license to use a number of trademarks owned by PMP, including trademarks associated with the “Marlboro,” “Fiesta,” “L&M,” and “Philip Morris” brands.¹⁵
16. At the time Ordinance 514 and Decree 287/009 came into force, Abal was using numerous trademarks registered by PMP in Uruguay. Among these were seven trademarks used to sell products under the “Marlboro” brand, five trademarks used to sell products under the “Fiesta” brand, and two trademarks used to sell products under the “Philip Morris” brand.¹⁶ Abal also used a number of Uruguayan trademarks registered in its own name to sell products under the “Premier” and “Casino” brands.¹⁷
17. Abal is the second-largest tobacco producer in Uruguay by market share and volume. Abal’s market share, all brands included, was approximately 20 per cent before Ordinance 514 came into force. In February 2009, Abal’s market share was 19.6 per cent. At that time, its “Marlboro” brand products accounted for 7.6 per cent of the market in Uruguay, while “Fiesta” brand products accounted for 6.6 per cent, “Philip Morris” brand products for 3.2 per cent, and “Casino” and “Premier” brand products together for 2.2 per cent.
18. Until Ordinance 514 came into effect on 31 March 2009, Abal sold each of these brands of cigarettes in different product varieties, which were recognized on the market as individual sub-brands. Indeed, under its five families of brands, Abal sold a total of twelve different product varieties. For example, Abal’s flagship “Marlboro” brands of cigarettes in different product varieties, which were recognized on the market as individual sub-brands. Indeed, under its five families of brands, Abal sold a total of twelve different product varieties. For example, Abal’s flagship “Marlboro”

¹⁴ Notarized attestation of FTR’s ownership of 100% of Abal, 6 November 2009, at EXHIBIT C-7.

¹⁵ License Agreement and Amendment between PMP and Abal, 15 October 2002, at EXHIBIT C-9 (certain information that is irrelevant for the present purposes has been redacted for confidentiality reasons; it should also be noted that there is a clerical error in the title of Schedule B to the Amendment to License Agreement, which should read “Uruguay” instead of “Paraguay”).

¹⁶ Uruguayan registration documents for “Marlboro,” “Fiesta,” “L&M” and “Philip Morris” trademarks, at EXHIBIT C-3.

¹⁷ Uruguayan registration documents for “Casino” and “Premier” trademarks, at EXHIBIT C-11.

brand was produced and sold as four distinct products: "Marlboro Red," "Marlboro Green (Fresh Mint)," "Marlboro Gold" and "Marlboro Blue." Each of these products was distinct in its flavor characteristics, the tobacco blends it contained and its trademarked packaging. For example, "Marlboro Green (Fresh Mint)" had a mentholated flavor which distinguished it from the other "Marlboro" product varieties. The eight other product varieties sold by Abal were the following: "Fiesta," "Fiesta Blue," "Fiesta 50&50," "Philip Morris," "Philip Morris Blue," "Premier Extra," "Premier" and "Casino."

19. A significant proportion of sales for each brand were attributable to the various product varieties or sub-brands. For example, in 2008, sales of "Marlboro Gold," "Marlboro Blue" and "Marlboro Green (Fresh Mint)" amounted to 40.5 per cent of sales of "Marlboro" brand cigarettes, while the original "Marlboro Red" variety accounted for the remaining 59.5 per cent of sales. The "Fiesta Blue" and "Fiesta 50&50" varieties accounted for 6.4 per cent of "Fiesta" brand sales; 15.9 per cent of "Philip Morris" brand sales were attributable to the "Philip Morris Blue" variety; and 24.4 per cent of "Premier" sales were sales of the "Premier" variety. The different products within these brand families therefore have played an important role in Abal's business.

B. The single presentation requirement in Ordinance 514

20. In the context of its public health policy relating to tobacco products, the Uruguayan Parliament, on 6 March 2008, passed Law 18.256, prohibiting the use of descriptors which may directly or indirectly create a false impression that a specific tobacco product is less harmful than another. Article 3 of Law 18.256 provided as follows:

[T]he use is hereby forbidden of terms, descriptive features, trademarks, figurative signs or of any other kind of sign which may have the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another.¹⁵

¹⁵ Law 18.256, 6 March 2008 (unofficial translation).

21. Law 18.256 was subsequently implemented by Decree 284/008, signed by President Vázquez on 9 June 2008. While the Decree mostly mirrored the language of Law 18.256, it also provided additional details as to the meaning of the terms “any other kind of sign.” Indeed, it added that such signs could include “colors or combination[s] of colors, numbers or letters.” Article 12 of the Decree provided as follows:

The use of terms, descriptive features, trademarks, figurative signs or signs of any other kind such as colors or combination of colors, numbers or letters, which may have the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another is forbidden.¹⁹

22. The stated purpose of Law 18.256, and of the Decree implementing it, was therefore to forbid cigarette packaging which could create a false impression as to the relative harmfulness of a specific product. Abal was confident that its packaging adhered to the requirements of Law 18.256 and continued to manufacture and sell all its product varieties under its five brands after the enactment of Law 18.256. Abal’s confidence in this respect proved to be justified, in that it was never notified by the Uruguayan authorities that the packaging of any of its twelve product varieties or presentations created a false impression with respect to their relative harmfulness. Abal has also never raised any objection to or sought to challenge the proscription of misleading descriptors.
23. However, despite the clear language of Law 18.256, and of the implementing Decree, the Ministry of Public Health adopted a distorted and vastly expanded interpretation that would have an unexpected and adverse impact on Abal’s business.
24. On 18 August 2008, the Ministry of Public Health issued Ordinance 514 with the stated purpose of implementing Law 18.256 and Decree 284/008. However, instead of that would have an unexpected and adverse impact on Abal’s business
24. On 18 August 2008, the Ministry of Public Health issued Ordinance 514 with the stated purpose of implementing Law 18.256 and Decree 284/008. However, instead of merely implementing the language of the Law and the Decree, the Ordinance tacked a completely new substantive provision onto the language of Decree 284/008, effectively prohibiting all tobacco companies from selling different product varieties under the same brand (the “single presentation requirement”). Article 3 of Ordinance 514 reads as follows:

¹⁹ Presidential Decree 284/008, 9 June 2008 (unofficial translation).

Each brand of tobacco products shall have a single presentation, such that it is forbidden to use terms, descriptive features, trademarks, figurative signs or signs of any other kind such as colors or combination of colors, numbers or letters, which may have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than another, varying only the pictograms and the warning according to article 1° of the present Ordinance.²⁰

25. Abal became aware of Ordinance 514 on 9 September 2008 through a telephone conversation with a Ministry of Public Health official.²¹ Given the inconsistency of the Ordinance with the Law and the Decree it purported to implement, and the Claimants' grave concerns as to the effects of the single presentation requirement on their overall business and trademarks, the Claimants have since that date consistently sought its revocation on multiple fronts. It should be noted that no other jurisdiction has adopted a single presentation requirement like the one in Ordinance 514.
26. First, both Abal and PMP actively sought an amicable solution. Indeed, up to the date of filing of the present Request for Arbitration, Abal has engaged in numerous consultations with Ministry of Public Health officials and other high-ranking government officials to seek the voluntary withdrawal of the Ordinance.
27. Abal also repeatedly requested an express decision from the Ministry of Public Health clarifying the way in which it would interpret and apply Article 3 of Ordinance 514. The first such request was sent in a letter dated 23 September 2008.²² After more than three months without a response, Abal sent a second letter on 26 December 2008.²³
28. When the Ministry of Public Health did finally respond to Abal's requests on 28 January 2009, it did so only orally. Its response made clear that it would consider the ~~three months without a response. Abal sent a second letter on 26 December 2008.~~
29. When the Ministry of Public Health did finally respond to Abal's requests on 28 January 2009, it did so only orally. Its response made clear that it would consider the single presentation requirement to be the operative part of Article 3 of the Ordinance and would disregard the remaining language. Additional presentations would be

²⁰ Ministry of Public Health Ordinance 514, 18 August 2008, at EXHIBIT C-3 (unofficial translation; emphasis added).

²¹ Letter from Abal to the Ministry of Public Health, 10 September 2008, at EXHIBIT C-13.

²² Letter from Abal to the Ministry of Public Health, 23 September 2008, at EXHIBIT C-14.

barred even if they created no risk that consumers would be misled as to the relative health risks of the products. Abal later sought written confirmation of the Ministry's position in a letter it sent to the legal department of the Ministry on 3 February 2009, but never received a response.²³ The clarifications of the Ministry of Public Health confirmed Abal's initial fears about the sweeping consequences of the single presentation requirement: the "single presentation" clause added in Ordinance 514 required Abal to choose one product variant per brand and discontinue all other product variants.

29. In addition to consultations with the Ministry of Public Health and other government officials, Abal and PMP submitted administrative oppositions to Ordinance 514 to the Ministry of Public Health on 18 and 19 September 2008 respectively. Abal supplemented its initial complaint with a more detailed submission on 7 November 2008. The oppositions requested the revocation of the Ordinance based on various administrative and constitutional law grounds, but also on the basis of international trade, intellectual property and investment law.
30. On 9 February 2009, Abal, invoking its constitutional rights, also filed a request for an injunction (*amparo constitucional*) before the *Juzgado Letrado de Primera Instancia en lo Contencioso Administrativo de Primer Turno*, a first instance court, seeking the suspension of the implementation of the Ordinance pending a decision in the ongoing administrative proceedings before the Ministry of Public Health. Abal requested that the Ministry be ordered to

abstain from enforcing the Illegal Application of the Ordinance, and therefore authorize the sale of Marlboro cigarettes in the red, gold, blue and green packs.
the Ministry be ordered to

abstain from enforcing the Illegal Application of the Ordinance, and therefore authorize the sale of Marlboro cigarettes in the red, gold, blue and green packs, as well as the sale of other brands currently commercialized, until such times as the Supreme Administrative Court rules on the merits of the case or upholds the petition to suspend the enforcement of Article 3 of the Ordinance.

The request for the injunction was denied by a judgment rendered on 18 February 2009 on procedural grounds. An appeal of that judgment before the *Tribunal de*

²³ Letter from Abal to the Ministry of Public Health, 26 December 2008, at EXHIBIT C-15

²⁴ Letter from Abal to the Ministry of Public Health, 3 February 2009, at EXHIBIT C-16.

Apelaciones en lo Civil de Primer Turno, a civil court of appeals, was also rejected on 27 April 2009, again on procedural grounds.

31. As a result of the Ministry of Public Health's failure to decide on Abal's administrative opposition within the 200 days provided by Uruguayan law,²³ the opposition was deemed to be rejected on 13 April 2009, giving Abal the right to bring the matter before the *Tribunal Contencioso Administrativo*, a special, final-instance administrative court. Abal filed its annulment action on 10 June 2009, seeking the annulment of Article 3 of Ordinance 514 and an interim suspension of the application of the Ordinance during the course of the proceedings. The appeal states, in relevant part:

[Abal] hereby request[s] the following from the Supreme Administrative Court

...

3. On the grounds included in Chapter IV and V, that the total interim suspension of the execution of the Ordinance be ordered.

4. After the usual procedures, that the Court annul article 3 of Ordinance 514, dated August 18, 2008, the grounds set out in this complaint.

Abal argued, *inter alia*, that under Uruguayan law, (1) an ordinance that exceeds or contradicts the law it implements is manifestly illegal; (2) the Ministry of Public Health does not have any jurisdiction to create the entirely new single presentation requirement; and (3) only a formal law enacted by Parliament can restrict the constitutional rights of Abal pursuant to the *reserva de la ley* (legal reserve) principle.

32. Abal also asserted, on its own behalf and on behalf of other Philip Morris companies, its rights under the Switzerland-Uruguay BIT and other relevant international treaties, constitutional rights of Abal pursuant to the *reserva de la ley* (legal reserve) principle.
33. Abal also asserted, on its own behalf and on behalf of other Philip Morris companies, its rights under the Switzerland-Uruguay BIT and other relevant international treaties, expressly reserving its rights to bring claims under the BIT. These proceedings are currently pending.

²³ Law 15,869, Art. 5 as amended by Law 17,392, Art. 41.

C. The excessive (80 per cent) health warning requirement

33. Starting in 1982, successive Uruguayan laws and decrees made written health warnings on tobacco product packages mandatory. Initially, these warnings consisted of the text "Warning: smoking is harmful for your health," and could be placed anywhere on a package provided it was printed in at least font size No. 8.²⁶ The textual warnings were modified in 2003 to read "Smoking may cause cancer, lung and heart diseases. Smoking during pregnancy harms your child."²⁷ In 2005, the size of the warnings was increased to cover at least 50% of the area of each side of the package, with letters printed at least in font size No. 14.²⁸ Abal complied at all times with Uruguay's tobacco regulations.
34. In early June 2009, Abal became aware from the press of a new decree issued by the President of Uruguay which would require an increase in the size of health warnings on cigarette packages to 80 per cent of the surface of the front and the back of the package.²⁹
35. In a letter dated 5 June 2009 sent to the Ministry of Public Health, Abal expressed its concerns about the Decree. It also notified the Ministry that Abal and its parent company considered the Decree to be illegal and that it would constitute a breach of the Switzerland-Uruguay BIT and other relevant international treaties.³⁰
36. The Claimants' arguments and their efforts to seek an amicable solution again proved to be futile. On 25 June 2009, Decree 387/009 was published in the official Gazette and thereby enacted without any consultation and in complete disregard of the Claimants' objections. As anticipated, the Decree imposed an increase in the size of health warnings on cigarette packages to 80 per cent of the surface of the front and and thereby enacted without any consultation and in complete disregard of the Claimants' objections. As anticipated, the Decree imposed an increase in the size of health warnings on cigarette packages to 80 per cent of the surface of the front and

²⁶ Decree No. 263/983, 22 July 1983.

²⁷ Law 17.714, 12 October 2003.

²⁸ Decree No. 36/2005, 31 January 2005.

²⁹ El Observador article entitled "Vázquez lleva a la ONU lucha contra el tabaco," 2 June 2009, at EXHIBIT C-17.

³⁰ Letter from Abal to the Ministry of Public Health, 5 June 2009, at EXHIBIT C-18.

back of the packages. Like the single presentation requirement in Ordinance 514, the 50 per cent health warning is novel and has not been introduced by any other country.

37 Under Uruguayan law, Abal had ten days from the publication of Decree 287.009 to file an administrative opposition to the Decree to the Office of the Presidency, and it did so on 16 July 2009 (the ten day term was suspended from 1 July until 15 July due to a judicial holiday). The submissions requested the revocation of the Decree based on various constitutional law and trademark law grounds, as well as on the basis of the overall illegality of the Decree.

38 On 11 September 2009, Abal filed an action with the Constitutional Court, arguing that certain provisions of Law 18.256 are unconstitutional to the extent that they purport to grant the executive branch unlimited power to impose restrictions on individual rights. These proceedings are currently pending.

D. **The requirement to include demeaning pictograms on cigarette packaging**

39. Pictograms first became mandatory as part of health warnings on cigarette packages sold in Uruguay in 2005.³¹

40. Article 1 of Ordinance 514 provides that the mandatory health warnings on cigarette packaging must contain one of a new series of pictograms to be issued by the Ministry of Public Health.

41. However, as issued by the Ministry of Public Health, the pictograms imposed by Article 1 of Ordinance 514 do not warn of the actual health effects of smoking or

42. However, as issued by the Ministry of Public Health, the pictograms imposed by Article 1 of Ordinance 514 do not warn of the actual health effects of smoking or otherwise promote legitimate public health policies. They are highly shocking images that are designed to invoke emotions of repulsion and disgust, even horror, and effectively operate so as to undermine and indeed destroy the good will associated with Abal's and PMP's legally protected trademarks.

³¹ See Decree No. 171/005, 31 May 2005.

42. As such, the pictograms unfairly interfere with the Claimants' use of their legal rights under Uruguayan and international law, and effectively deprive the Claimants of those rights.
- E. **The Claimants have sustained substantial damage and losses as a result of the Respondent's measures**
43. The Claimants have sustained substantial damage and losses as a result of Articles 1 and 3 of Ordinance 514 and Decree 287/009. More specifically, the measures have led to a substantial reduction in Abal's sales in Uruguay, have deprived PMP and Abal of their intellectual property rights, as well as the goodwill and commercial value associated with those rights, have caused a reduction in the value of Abal as a company and therefore in FTR's ownership interest therein, and have imposed extraordinary costs on the Claimants.
44. After the enactment of Law 18,256 and Decree 284/008 in March and June 2008 respectively, Abal continued to manufacture and sell all its product varieties under its five brands and was never notified that its packaging was inconsistent with their provisions. However, the entry into force of the single presentation requirement in Article 3 of Ordinance 514 on 31 March 2009 forced Abal to remove from the Uruguayan market seven of the twelve cigarette products it previously sold. For example, the requirement forced Abal to discontinue the manufacturing and sale of "Marlboro Green (Fresh Mint)", "Marlboro Gold" and "Marlboro Blue" variants of Abal's flagship and popular "Marlboro" brand, leaving only the "Marlboro Red" variant on the market. Abal similarly was forced to discontinue its "Fiesta Blue," "Fiesta 50&50," "Philip Morris Blue" and "Premier Extra" product varieties. These products are otherwise lawful and have been banned solely as a result of the unlawful and arbitrary restriction on the use of established trademarks.
45. Article 3 of Ordinance 514 has translated into significantly reduced sales because it precludes Abal from marketing a number of product varieties which have been very successful over the years. As of 31 December 2009, Article 3 of Ordinance 514 has resulted in an approximately 15 per cent decrease in Abal's sales. The hardest hit brand has been "Marlboro," of which the discontinued "Marlboro Gold," "Marlboro

Blue” and “Marlboro Green (Fresh Mint)” varieties represented 40.5 per cent of total sales in 2008. Other discontinued product varieties also represented significant sales: 24.4 per cent under the “Premier” brand, 15.9 per cent under the “Philip Morris” brand and 6.4 per cent under the “Fiesta” brand. It should be noted that Philip Morris affiliates worldwide have invested significant amounts of time and money in developing a revision of the three sub-brands of the Marlboro family. As a result of Ordinance 514, Philip Morris has been prevented from introducing these innovations in Uruguay and accordingly has been deprived of the use of its intellectual property.

46. Article 3 of the Ordinance has also effectively eliminated a number of PMP’s and Abal’s intellectual property rights in Uruguay. Indeed, the commercial value of the intellectual property rights in the discontinued product varieties has been wiped out because they could no longer be used in the marketing of cigarettes. At least seven trademarks registered in Uruguay by either PMP or Abal have been so eliminated.
47. The excessive health warning requirement imposed by Decree 287.009, which provides that 80 per cent of a cigarette package be covered by the health warning, also severely and unfairly restricts the use by the Claimants of their remaining legally protected trademarks. The Claimants do not contest the public health policy of warning of the health risks associated with tobacco consumption. However, because of its size, the 80 per cent health warning prevents the Claimants from using the trademarks in their proper, legally protected form and therefore effectively deprives the Claimants of their right to use the trademarks.
48. As issued by the Ministry of Public Health, the pictograms required by Article 1 of Ordinance 514 associate the Claimants’ products with offensive images and thereby the Claimants of their right to use the trademarks.
48. As issued by the Ministry of Public Health, the pictograms required by Article 1 of Ordinance 514 associate the Claimants’ products with offensive images and thereby undermine the goodwill of their legally protected trademarks, in which the Claimants have invested heavily over the years. Indeed, as issued by the Ministry of Public Health, the pictograms go far beyond any legitimate public health goal and effectively operate so as to denigrate Abal’s products and to destroy the goodwill associated with the Claimants’ trademarks, thereby depriving them of their commercial value.
49. Abal’s reduced sales and the elimination of a great part of the trademarks and other intellectual property rights it either owns or licenses from PMP has also diminished.

and will continue to diminish, the commercial value of Abal itself as a company, and thus of FTR's ownership interest in Abal.

50. Finally, the Claimants face substantial extraordinary costs as a result the three measures. The discontinuance of certain product varieties and the reduction in sales result both in additional costs relating to the termination of contracts with local distributors and salespersons, and, in all likelihood, in the closing of Abal's manufacturing facilities in Uruguay. Abal also anticipates that the decrease in its sales is likely to lead to further costs associated with the lay-off of work force.

III. JURISDICTION AND PROCEDURAL REQUIREMENTS

51. The Claimants' claims fall within the jurisdiction of the Centre under the ICSID Convention and the Switzerland-Uruguay BIT in that the parties have consented to such arbitration (A), the Claimants are "investors" within the meaning of both the ICSID Convention and the BIT (B), and the Claimants have made an "investment" in Uruguay (C).
52. The Switzerland-Uruguay BIT imposes a six-month waiting period from the date the dispute is "raised." The Claimants have either complied with this requirement, as they raised the dispute with the Respondent regarding Ordinance 514 as early as 18 September 2008, or the waiting period requirement was made impossible or waived by the Respondent's own action, as is the case with the dispute regarding the Decree 287/009. In any event, even if the six-month waiting period had not expired, the Claimants are also entitled to dispense with this requirement under the Most-Favored Nation ("MFN") clause in Article 3(2) of the BIT (D). 287/009. In any event, even if the six-month waiting period had not expired, the Claimants are also entitled to dispense with this requirement under the Most-Favored Nation ("MFN") clause in Article 3(2) of the BIT (D).
53. The Switzerland-Uruguay BIT furthermore requires an investor to submit a dispute to the competent courts of the host State and to wait eighteen months for a judgment before instituting arbitral proceedings. However, the Claimant is entitled to dispense with this requirement under the MFN clause in Article 3(2) of the BIT (E).

A. Consent to ICSID jurisdiction

54 Both Switzerland and Uruguay are Contracting States to the ICSID Convention. Switzerland signed and ratified the ICSID Convention on 22 September 1967 and 15 May 1968, respectively.³² Uruguay signed and ratified the ICSID Convention on 28 May 1992 and 9 August 2000, respectively.³³

55. The requirements of consent set forth in Article 25 of the ICSID Convention and Rule 2(1)(c) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings are fulfilled, with respect to the Respondent, by virtue of its consent to arbitrate contained in Article 10 of the BIT as well as *ad Article 10* of the Protocol to the BIT, which reads:

In the event of both Contracting Parties having become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States, disputes with respect to investments between a Contracting party and an investor of the other Contracting Party shall, at the request of the investor, be submitted according to the provisions of the aforementioned Convention to the International Centre for Settlement of Investment Disputes.

56. The Claimants in the present Request for Arbitration accept the Respondent's offer to arbitrate and consent to the jurisdiction of ICSID over their claims.

B. The Claimants are "Investors"

57. FTR, PMP and Abal are all "investors" within the meaning of the BIT and the ICSID Convention. As set out above, FTR and PMP are incorporated as *sociétés anonymes*

57. FTR, PMP and Abal are all "investors" within the meaning of the BIT and the ICSID Convention. As set out above, FTR and PMP are incorporated as *sociétés anonymes* organized under the laws of Switzerland and have their seat in Neuchâtel, Switzerland.³⁴ FTR owned 100% of Abal at the time Ordinance 514 was enacted, and PMP owned the "Marlboro," "Fiesta," "L&M" and "Philip Morris" trademarks at that

³² List of ICSID Member States, online: ICSID (<www.worldbank.org/icsid>), at EXHIBIT C-19

³³ List of ICSID Member States, online: ICSID (<www.worldbank.org/icsid>), at EXHIBIT C-19

time. Both FTR and PMP remain Swiss *sociétés anonymes* as of today, date of their consent to ICSID jurisdiction.

58. FTR and PMP are accordingly:

- (a) juridical persons having the nationality of Switzerland and therefore “national[s] of another Contracting State” within the meaning of Article 25 of the ICSID Convention; and
- (b) “investors” within the meaning of Article 1(1)(b) of the Switzerland-Uruguay BIT, which provides that the term investor shall mean “legal entities, including companies, corporations, business associations and other organizations which are constituted or otherwise duly organized under the law of that Contracting Party [*i.e.* Switzerland] and have their seat in the territory of that same Contracting Party.”

59. Abal is:

- (a) a juridical person having the nationality of Uruguay and which, because of foreign control, the parties have agreed should be treated as a “national of another Contracting State” within the meaning of Article 25 of the ICSID Convention, this agreement resulting from Article 1(1)(c) of the BIT, as set out below; and
- (b) an “investor” within the meaning of Article 1(1)(c) of the Swiss-Uruguayan BIT, which provides that the term investor shall include “legal entities established under the law of any country which are, directly or indirectly, controlled by [legal entities organized under the law of that Contracting Party, *i.e.* Switzerland].”

²² Extract of the ‘Commercial Register of Neuchâtel’ and Articles of Association of FTR Holding S.A., at EXHIBIT C-5; Extract of the Commercial Register of Neuchâtel and Articles of Association of Philip Morris Products S.A., at EXHIBIT C-6.

60. As set out above, FTR today directly owns 100 per cent of Abal.³⁵ Legal control is generally considered sufficient to meet the requirement of “control” in investment treaties.³⁶ In addition, given the level of its shareholding, FTR in the present case clearly effectively controls Abal.

61. Based on the Parties’ agreement in Article 1(1)(c) of the BIT, Abal therefore qualifies as an “investor” for the purposes of this arbitration, being “controlled” by a Swiss national, FTR. Article 1(1)(c) of the BIT also satisfies the requirement set out in Article 25(2)(b) of the ICSID Convention, such that Abal is also “a national of another Contracting State [i.e. Switzerland]” within the meaning of the provision.

C. Philip Morris has made an “investment” in Uruguay

62. The Claimants have made an “investment” in the territory of Uruguay within the meaning of Article 25 of the ICSID Convention and Article 1(2) of the BIT.

63. While there is no specific definition of “investment” in Article 25 of the ICSID Convention, it is generally considered that in order to qualify as an “investment” under Article 25, the business activity in question must meet the definition of investment under general international law in that it should involve a commitment of capital, expectation of profit and the assumption of risk.³⁷

64. In the present case it is obvious, as demonstrated above, that over the course of the past century, Abal has made substantial investments in the Uruguayan tobacco market. Abal notably has established significant manufacturing facilities in Uruguay and registered several trademarks in Uruguay, including “Casino,” “Premier” and “Premier Extra.”

³⁵ Notarized attestation of FTR’s ownership of 100% of Abal, 6 November 2009, at EXHIBIT C-7.

³⁶ In *Aguas del Tunari [ATJ] v. Republic of Bolivia*, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, the majority of the tribunal concluded that the phrase “controlled directly or indirectly” referred to legal capacity rather than *de facto* control.

³⁷ See, e.g., CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press, 2001), at pp. 121-125.

license agreements with PMP for the manufacturing and marketing of product varieties under certain of PMP's trademarks. In addition, PMP has registered a number of trademarks in Uruguay, including its "Marlboro," "Fiesta," "L&M," and "Philip Morris" trademarks, and has licensed them to Abal and collects royalty payments from Abal for their use. FTR has also clearly made an investment in the meaning of Article 25 of the ICSID Convention by acquiring 100 per cent of Abal's shares.

65. Article 1(2) of the BIT defines protected "investments" broadly and includes such relevant categories as "movable and immovable property as well as any other rights in rem," "shares . . . in companies," "money claims and any entitlements of economic value" and "industrial property rights (including) trade or service marks, trade names, [and] goodwill."⁵⁸

66. The Claimants' immovable and movable property, shares and intellectual property rights clearly constitute "investments" in the territory of Uruguay within the meaning of Article 1(2) of the BIT. More specifically, Abal's manufacturing facilities constitute "movable and immovable property as well as any other rights in rem," and its trademarks qualify as "trade or service marks (or) trade names" pursuant to Article 1(2)(a) and (d) of the BIT, respectively. PMP's trademarks likewise constitute "trade or service marks (or) trade names" pursuant to Article 1(2)(d) of the BIT, and its right to royalty payments from Abal constitute "money claims and any entitlements of economic value" pursuant to Article 1(2)(c) of the BIT. Finally, FTR's acquisition and holding of all of the shares in Abal constitutes "shares, certificates or other kinds of participation in companies" pursuant to Article 1(2)(b) of the BIT.

and holding of all of the shares in Abal constitutes "shares, certificates or other kinds of participation in companies" pursuant to Article 1(2)(b) of the BIT.

⁵⁸ Art. 1(2) of the BIT reads as follows:

- "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 charges on real estate, mortgages, liens, pledges;
 - b) shares, certificates or other kinds of participation in companies;
 - c) money claims and any entitlements of economic value;
 - d) copyrights, industrial property rights (such as patents of inventions, utility models, industrial designs or models, trade or service marks, trade names, indications of source or appellation of origin), know-how and good-will;
 - e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of a public entity in accordance with the law."

D. The waiting period does not constitute a bar to the Claimants' claim

67. Article 10(2) of the Switzerland-Uruguay BIT provides that the Claimants can only submit a dispute to the competent Uruguayan courts if it could not be settled amicably within a period of six months after it was raised. Article 10 reads in full as follows:

(1) Disputes with respect to investments within the meaning of this Agreement between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties concerned.

(2) If a dispute within the meaning of paragraph (1) cannot be settled within a period of six months after it was raised, the dispute shall, upon request of either party to the dispute, be submitted to the competent courts of the Contracting Party in the territory of which the investment has been made. If within a period of 18 months after the proceedings have been instituted no judgment has been passed, the investor concerned may appeal to an arbitral tribunal which decides on the dispute in all its aspects.

68. As discussed above, the Claimants raised the dispute with the Ministry of Public Health with regard to the single presentation requirement in Ordinance 514 as early as 18 September 2008, shortly after Ordinance 514 was issued and brought to Abal's attention on 9 September 2008. Indeed, on 18 September 2008, Abal and PMP submitted simultaneous administrative oppositions to Ordinance 514 to the Ministry of Public Health, requesting the revocation of the Ordinance. Abal also engaged in consultations with the Ministry of Public Health and Uruguayan government officials with a view to reaching an amicable settlement to the dispute. In fact, Abal and the Ministry of Public Health were already engaged in consultations before Ordinance 514 was issued on 18 August 2008. These consultations began shortly after Abal was informed of the Ministry's plans to issue an Ordinance with the single presentation requirement on 9 June 2008. The consultations did not, however, bear fruit.

69. In the present case therefore, more than six months have elapsed since the date the Claimants raised the dispute. No settlement of the dispute over the single presentation requirement has been reached by the Parties since that time. In these circumstances any waiting period with respect to that dispute must be considered to have long expired.

70. In any event, it is established arbitral jurisprudence that, where there is no indication that negotiations could have led to a settlement, insistence on the waiting period would amount to “an unnecessary, formalistic approach which would not serve to protect any legitimate interests of the Parties.”³⁹ This is particularly true with respect to Decree 287/009, which was swiftly adopted without any public consultation and in complete disregard of the Claimants’ objections.
71. Moreover, even if the waiting period were considered to be applicable, in the present case the Claimants would not need to comply with it because, as noted above, Article 3(2) of the BIT contains an MFN clause providing that
- 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 favorable than that granted by each Contracting Party ... to the investments made within its territory by investors of the most favored nation, if this latter treatment is more favorable. (Emphasis added.)
72. Uruguay has concluded at least two other bilateral investment treaties which do not impose a waiting period and which allow investors to submit a dispute directly to arbitration.⁴⁰ Therefore, Philip Morris is entitled to rely upon Article 3(2) of the Switzerland-Uruguay BIT in order to benefit from the more favorable dispute resolution provisions in other treaties entered into by Uruguay. In particular, Philip Morris is not required to wait six months before initiating arbitration proceedings under the BIT. This would amount to “less favorable treatment” than that accorded to investors of third States and thus would be contrary to Article 3(2) of the BIT.
73. Accordingly, the Claimants cannot be held to adhere to the waiting period requirement in relation to the dispute regarding Ordinance 514, as well as in relation to the dispute
73. Accordingly, the Claimants cannot be held to adhere to the waiting period requirement in relation to the dispute regarding Ordinance 514, as well as in relation to the dispute regarding the Decree 287/009. It is manifest that the Respondent each time ignored

³⁹ *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 September 2001, at pp. 190-1. See also *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 18 ICSID Rev – F.I.L.J. 307 (2003); C. Schreuer, “Travelling the BIT Route” (2004) 5 I.W.I.T. 2, at pp. 238-9.

⁴⁰ See, e.g., Agreement between Australia and Uruguay on the Promotion and Protection of Investments, 3 September 2001, Art. 13, at EXHIBIT C-30. See also Agreement between Venezuela and Uruguay for the Reciprocal Promotion and Protection of Investments, 20 May 1997, Art. 9.

every attempt made by the Claimants to seek an amicable settlement, and in fact forced the Claimants to litigate the matter.

E. Philip Morris is not required to meet the domestic litigation requirement in Article 10(3) of the BIT

74. Article 10(2) of the Switzerland-Uruguay BIT allows the Claimants to initiate ICSID arbitration against Uruguay after the dispute is submitted to the competent domestic courts and the domestic courts have failed to render a decision within eighteen months. However, the Claimants are not required to comply with this requirement because of the MFN clause in Article 3(2) of the Switzerland-Uruguay cited above.

75. Uruguay has concluded a number of other bilateral investment treaties that do not require a dispute to be submitted to the competent courts of the host State before arbitration may be initiated.⁴¹ Philip Morris is therefore entitled to rely upon the MFN clause in order to benefit from the more favorable dispute resolution provisions in those other treaties entered into by Uruguay. In particular, Philip Morris is not required to submit a dispute to the competent courts of the host State or to wait eighteen months if no judgment is rendered in those domestic proceedings before initiating arbitration proceedings under the BIT. This would amount to "less favorable treatment" than that accorded to investors of third States and thus would be contrary to Article 3(2) of the BIT.

IV. THE CLAIMANTS' CLAIMS

76. Acting through its Ministry of Public Health, the Respondent has committed gross breaches of its obligations under the BIT and international law and has infringed the Claimants' rights by way of the measures outlined above.

77. More specifically, the Respondent's acts and omissions constitute breaches of its obligations to:

⁴¹ See, e.g., Agreement between Australia and Uruguay on the Promotion and Protection of Investments, 3 September 2001, Art. 13, at EXHIBIT C-20.

- (a) Refrain from subjecting the Claimants' investments to unreasonable measures impairing the management, maintenance, use, enjoyment, extension and sale of such investments (Article 3(1) of the Switzerland-Uruguay BIT);
- (b) Refrain from taking measures of expropriation or any other measure having the same nature or same effect against the Claimants' investments unless the measures are taken under due process of law and against effective and adequate compensation (Article 5(1) of the Switzerland-Uruguay BIT);
- (c) Provide fair and equitable treatment to the Claimants' investments in Uruguay (Article 3(2) of the Switzerland-Uruguay BIT); and
- (d) Observe the commitments it has entered into with respect to the investments of Swiss investors in Uruguay (Article 11 of the Switzerland-Uruguay BIT).

78. The single presentation requirement in Article 3 of Ordinance 514 constitutes a breach of the prohibition of unreasonable measures under the BIT for a variety of reasons. First, the measure bans the use of packaging regardless of whether the "terms, descriptive elements, trademarks, figurative signs or other signs" it contains create a false impression as to the harmfulness of the product. While Law 18,256 and Decree 384/008 purport to regulate the means which are used to distinguish between various tobacco products, and therefore recognize the legitimacy of varying product presentations, Article 3 of Ordinance 514 imposes the use of a single presentation and thus sweeps within its ambit presentations that do not create any false impressions. The measure is therefore overbroad and as such unreasonable.

79. Second, the single presentation requirement is also unreasonable because it bears no rational relationship to the Government's public health policy. The measure is therefore overbroad and as such unreasonable.

79. Second, the single presentation requirement is also unreasonable because it bears no rational relationship to the Government's public health policy. This is demonstrated by the fact that the cigarette companies were free to choose which product variety they would continue selling, and which varieties they would discontinue. There has been no finding or claim that any of the brand variations previously in use were misleading, or that having more than one variation of a brand is inherently misleading. The single presentation requirement therefore does not operate so as to remove packaging that creates a false impression of the relative harmfulness the product; instead, it arbitrarily reduces the number of available product varieties without any rational public health

justification and has resulted in forcing Philip Morris to remove from the market the majority of the product varieties it previously sold. This, in turn, has resulted in a significant negative financial impact on Philip Morris.

30. The grammatically clumsy incorporation of the single presentation language into the original language of Law 18.256 and Decree 284/008 demonstrates the absence of any link to the stated public health policy. It is apparent that the requirement was added to the original language without regard to its connection with the prohibition set out in Law 18.256 and Decree 284/008; indeed, it effectively superseded that prohibition.⁴² No reasons were provided for such a sweeping rewriting of the law. Thus the measure is also wholly arbitrary.
31. The excessive 80 per cent health warning requirement and the graphic pictograms, which have the effect of demeaning and indeed destroying Abal's and PMP's trademarks, also do not bear any rational relationship to a legitimate governmental policy. The stated policy of these measures is the protection of public health. However, they are overbroad as the same policy objective could have been achieved with a narrower and more appropriately tailored measure. For example, health warnings limited to a maximum of 50% of the cigarette package (which indeed have been found sufficient in other jurisdictions) could clearly warn about the dangers of smoking, without destroying the ability to use established trademarks. Similarly, pictograms specifically designed to associate the Claimants' products and their trademarks with offensive and repulsive imagery are neither necessary nor justified to warn consumers of the health risks associated with smoking – a goal that can be reached without denigrating the Claimants' products, and without destroying their trademarks with offensive and repulsive imagery are neither necessary nor justified to warn consumers of the health risks associated with smoking – a goal that can be reached without denigrating the Claimants' products, and without destroying their legally protected trademarks and the goodwill associated with such trademarks.
32. The single presentation requirement in Article 3 of Ordinance 514 constitutes a taking of Abal's and PMP's legally registered trademarks, to the extent that it has forced the

⁴² It is also noteworthy that the WHO Framework Convention for Tobacco Control ("FCTC"), which is the purported basis of Law 18.256 and Decree No. 284/008, contains no mention of a "single presentation" requirement or any similar concept, nor is any such requirement contained in the FCTC Guidelines for implementation. Amongst the 160 countries that are parties to the FCTC, not a single country other than Uruguay has adopted a single presentation requirement like that contained in Ordinance 514.

- Claimants to discontinue their use. The combined effect of the excessive health warning requirement set out in Decree 287/009 and the graphic pictograms mandated by Article 1 of the Ordinance amounts to an indirect expropriation of the Claimant's remaining trademarks.
83. Under Article 5 of the Switzerland-Uruguay BIT, an expropriation or a measure having the same effect is only lawful if it meets certain fundamental criteria, including that the measure is taken under due process of law and that effective and adequate compensation is provided. Uruguay's indirect expropriation of Abal's and PMP's intellectual property rights obviously fails to meet these requirements. The measures were not taken under due process of law, as Uruguay used public health regulations to effect the expropriation, nor was any compensation ever provided. The measures are therefore in breach of Uruguay's obligations under Article 5 of the BIT.
84. Moreover, while a host State has the sovereign right to change its regulatory framework, including for the purpose of pursuing its public health policies, such changes must be fair and equitable in light of the investor's legitimate expectations. By issuing Ordinance 514, which contains both the single presentation requirement and the requirement concerning the demeaning pictograms, and Decree 287/009 setting out the excessive health warning requirement, the Respondent failed to maintain a stable and predictable regulatory framework consistent with Philip Morris' legitimate expectations. In particular, the measures frustrate one of the most fundamental expectations that any investor may have, which is that a host State will comply with its own law and respect private property. As has been demonstrated by Abal in its submissions in domestic proceedings concerning Ordinance 514 and Decree 287/009, all three requirements are contrary to Uruguayan law and do not comply with its own law and respect private property. As has been demonstrated by Abal in its submissions in domestic proceedings concerning Ordinance 514 and Decree 287/009, all three requirements are contrary to Uruguayan law.
85. Ordinance 514 and Decree 287/009 must also be considered unfair and inequitable because they are incompatible, *inter alia*, with Uruguay's treaty obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") as well as the Paris Convention for the Protection of Industrial Property (the "Paris Convention"). Ordinance 514 and Decree 287/009 fail to respect the Claimants' intellectual property rights, as required by Uruguay's treaty obligations.

86. Finally, as a result of the inconsistency of Articles 1 and 3 of Ordinance 514 and Decree 287/009 with Uruguay's obligations under TRIPS and other relevant international treaties binding on Uruguay, including the Paris Convention, Uruguay is in breach of its obligation under Article 11 of the BIT to observe the commitments it has entered into with respect to the investments of Swiss investors.

V. RELIEF SOUGHT

87. Articles 1 and 3 of Ordinance 514 and Decree 287/009 have caused, and continue to cause, a substantial reduction in sales of Abal's products and have deprived PMP and Abal of their legally protected trademarks, resulting in a substantial reduction of the value of Abal as a company and FTR's shareholding therein and depriving the Claimants of substantial revenue and profit. The Claimants have also incurred and expect to continue to incur substantial costs and expenses relating to the reduction in their sales and the forced discontinuance of seven of the product varieties.

88. The Claimants respectfully request that the Arbitral Tribunal order the suspension of the application vis-à-vis the Claimants of the single presentation requirement in Article 3 of Ordinance 514, the pictogram requirement in Article 1 of the Ordinance, and the 80 per cent health warning requirement in Decree 287/009.

89. It is well-established under international law that restitution is the primary remedy for an internationally wrongful act committed by a State. This rule was first confirmed by the Permanent Court of International Justice in the famous *Chorzów Factory* case, where the Court held:

an internationally wrongful act committed by a State. This rule was first confirmed by the Permanent Court of International Justice in the famous *Chorzów Factory* case, where the Court held:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which

should serve to determine the amount of compensation due for an act contrary to international law.⁴³

90. The validity of the principle was confirmed by the International Law Commission in its Articles on State Responsibility:

The State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before a wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.⁴⁴

91. It is generally accepted that an ICSID tribunal, like any other international tribunal, has the power to order pecuniary or non-pecuniary remedies, including specific performance and restitution.⁴⁵

92. In the present case, the suspension of the application of Articles 1 and 3 of Ordinance 514 and of Decree 287/009 vis-à-vis the Claimants is clearly not materially impossible, nor would it involve a burden "out of all proportion to the benefit deriving from restitution instead of compensation."

93. However, the suspension of the application of the relevant provisions is not sufficient to compensate the Claimants for all of their losses. These include the loss of revenue

⁴³ *Ciorgio Factory (Indemnity) Case (Germany v. Poland)*, (1927) P.C.I.J. (ser. A), No. 17, at 47. The principle was recently confirmed by the International Court of Justice in *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at paras. 152-53, online: ICJ <<http://www.icj-cij.org>>.

⁴⁴ *Ciorgio Factory (Indemnity) Case (Germany v. Poland)*, (1927) P.C.I.J. (ser. A), No. 17, at 47. The principle was recently confirmed by the International Court of Justice in *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at paras. 152-53, online: ICJ <<http://www.icj-cij.org>>.

⁴⁵ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, annexed to the General Assembly Resolution 56/83, UN Doc A/RES/56/83, 12 December 2001, Art. 35.

⁴⁶ See C. Schreier, *Non-Pecuniary Remedies in ICSID Arbitration* (2004) 20(4) *Arb Int'l* 325. See also CAMPBELL MCLACHLAN QC ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (Oxford: Oxford University Press, 2007) p. 341. For case law see, e.g., *Euron Corporation and Ponderosa Assets, LP, v. Argentine Republic*, Decision on Jurisdiction, 14 January 2004, ICSID Case No. ARB/01/3, at para. 79 ("An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available."); *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL, and SC MultiPack SARL v. Romania*, Decision on Jurisdiction and Admissibility, 24 September 2008, ICSID Case No. ARB/05/20, at para. 166 ("The fact that restitution is a rarely ordered remedy is not relevant at this stage of the proceedings. Similarly, and contrary to Respondent's argument, the fact that such a remedy might not be enforceable pursuant to Article 54 of the ICSID Convention should not preclude a tribunal from ordering it. Remedies and enforcement are two distinct concepts").

and profit sustained by the Claimants as a result of their inability to market more than one product variety per brand, as well as the extraordinary costs incurred by the Claimants as a result of the enactment of Ordinance 514 and Decree 287/009. The Claimants are entitled to be compensated for these losses under Article 9(4) of the BIT and international law.¹⁶

94. Accordingly, the Claimants respectfully request that the Arbitral Tribunal:

- (a) declare that the Oriental Republic of Uruguay is in breach of its obligations under Articles 3(1), 3(2), 5 and 11 of the Switzerland-Uruguay BIT and international law;
- (b) order the Respondent to immediately suspend the application of Articles 1 and 3 of Ordinance 514 vis-à-vis the Claimants;
- (c) order the Respondent to immediately suspend the application of Decree 287/009 vis-à-vis the Claimants;
- (d) order the Respondent to pay compensation for loss of revenue and profit during the period in which Articles 1 and 3 of Ordinance 514 and Decree 287/009 were and will be applicable to the Claimants in an amount which the Claimants reserve the right to quantify in the course of this arbitration;
- (e) order the Respondent to compensate the Claimants for the extraordinary expenses incurred by them as a result of the application of Articles 1 and 3 of Ordinance 514 and Decree 287/009, including costs resulting from the termination of distribution, sales and manufacturing agreements, from laying-off workforce, and, as the case may be from the closing of Abaf's manufacturing facility.

¹⁶ See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, annexed to the General Assembly Resolution 56/83, UN Doc A/RES/56/83, 12 Dec. 2001, Art. 36(1). The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”)

- (f) order the Respondent to pay the costs of this arbitration, including all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, the International Centre for Settlement of Investment Disputes, legal counsel, experts and consultants, as well as their own internal costs;
- (g) order the Respondent to pay interest at a rate to be established on the amount of the award; and
- (h) order such other and further relief as the arbitrators shall deem just and proper.

95. The Claimants reserve the right to amend or supplement the present Request for Arbitration, to make additional claims, and to request such additional or different relief as may be appropriate, including conservatory, injunctive or other interim relief.

Respectfully submitted,

Geneva, 19 February 2010

For and on behalf of Claimants
FTR Holding S.A.
Philip Morris Products S.A.
Abai Hermanos S.A.



Veijo Heiskanen
Franz X. Stirnimann
Samuel Moss

LIST OF EXHIBITS

C-1	Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments. 7 October 1988.
C-2	Exchange of Notes between Uruguay and Switzerland regarding the ratification of the Uruguay-Switzerland BIT. 8 and 22 April 1991.
C-3	Ministry of Public Health Ordinance 514, 18 August 2008.
C-4	Presidential Decree 287/009, 15 June 2009.
C-5	Extract of the Commercial Register of Neuchâtel and Articles of Association of FTR Holding S.A.
C-6	Extract of the Commercial Register of Neuchâtel and Articles of Association of Philip Morris Products S.A.
C-7	Notarized attestation of FTR's ownership of 100% of Abal. 6 November 2009.
C-8	Uruguayan registration documents for "Marlboro," "Fiesta," "L&M," and "Philip Morris" trademarks.
C-9	License Agreement and Amendment between PMP and Abal.
C-10	Notarized attestation of Abal's status as a limited liability company organized under the laws of Uruguay, 5 November 2009.
C-11	Uruguayan registration documents for "Casino" and "Premier" trademarks.
C-12	Power of Attorneys from PMP, FTR and Abal.
C-13	Letter from Abal to the Ministry of Public Health. 10 September 2008.
C-14	Letter from Abal to the Ministry of Public Health. 23 September 2008.
C-15	Letter from Abal to the Ministry of Public Health. 26 December 2008.
C-13	Letter from Abal to the Ministry of Public Health. 10 September 2008.
C-14	Letter from Abal to the Ministry of Public Health. 23 September 2008.
C-15	Letter from Abal to the Ministry of Public Health. 26 December 2008.
C-16	Letter from Abal to the Ministry of Public Health. 3 February 2009.
C-17	El Observador article entitled "Vázquez lleva a la ONU' lucha contra el tabaco," 2 June 2009.
C-18	Letter from Abal to the Ministry of Public Health, 5 June 2009.
C-19	List of ICSID Member States.
C-20	Agreement between Australia and Uruguay on the Promotion and Protection of Investments, 3 September 2001.