

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

**PHILIP MORRIS BRANDS SÀRL,
PHILIP MORRIS PRODUCTS S.A.
and
ABAL HERMANOS S.A.**

Claimants,

v.

**ORIENTAL REPUBLIC OF URUGUAY,
Respondent.**

ICSID Case No. ARB/10/7

URUGUAY'S MEMORIAL ON JURISDICTION

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I. INTRODUCTION

1. Pursuant to paragraph 13 of the Agreement of the Parties on Procedural Matters, Respondent the Oriental Republic of Uruguay (“Uruguay”) respectfully submits this Memorial objecting to the jurisdiction of the Tribunal.

2. The Tribunal lacks jurisdiction for at least two reasons:

- Claimants Philip Morris Brands Sàrl,¹ Philip Morris Products S.A., and Abal Hermanos S.A. have failed to comply with the domestic litigation requirement set forth in Article 10(2) of the Treaty between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection on Investments, including the Protocol thereto (the “BIT” or “Treaty”).² Because this requirement is a precondition to jurisdiction, Claimants’ failure to satisfy it means the Tribunal has no power to hear this case; and
- Article 2 of the BIT specifically excludes measures adopted for reasons of public health from the scope of the protections afforded to investors. As such, it removes disputes relating to public health measures from the Tribunal’s jurisdiction. Since the measures Claimants attack were indisputably taken for purposes of mitigating the universally-recognized harms to public health caused by the consumption of tobacco products, jurisdiction is absent.

¹ By letter dated 5 October 2010, Claimants requested that FTR Holding S.A. be replaced by Philip Morris Brands Sàrl. Letter from Claimants to Ms. Anneliese Fleckenstein, Secretary of the Tribunal (5 Oct. 2010) (R-52). Claimants reiterated this request on 17 March 2011. Letter from Claimants to Ms. Anneliese Fleckenstein, Secretary of the Tribunal (17 Mar. 2011) (R-59). As stated in Respondent’s responsive letter to ICSID, dated 25 March 2011, “[w]ith respect to all matters referred to in Claimants’ letter, Uruguay reserves its rights relating to jurisdictional or any other objections or defenses.” Letter from Respondent to Ms. Anneliese Fleckenstein, Secretary of the Tribunal (25 Mar. 2011), p. 2 (R-60).

² Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, signed 7 Oct. 1988, EIF 22 Apr. 1991 (hereafter “Uruguay-Switzerland BIT”) (RL-21).

3. Article 10(2) of the BIT provides that disputes between a Contracting Party and an investor of the other Contracting Party:

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.

4. In their Request for Arbitration, Claimants do not contend that they have complied with this requirement. Instead, they seek to avoid it altogether by relying on the most-favoured nation (“MFN”) clause contained in Article 3(2) of the BIT.³ This they cannot do. The language of Article 3(2) is narrowly tailored. By its terms, it does not apply to all of the BIT’s provisions. Instead, the MFN language relates only to the substantive undertaking to ensure fair and equitable treatment to investors of the other State. Article 3(2) cannot be stretched to cover the procedural preconditions for seisen of the Tribunal. This conclusion is supported not only by the plain text of the article but also by (1) the language of the domestic litigation requirement itself, (2) the drafting history thereof, and (3) the relevant jurisprudence.

5. Because the domestic litigation requirement is jurisdictional in nature, Claimants’ failure to comply with it deprives the Centre of the authority to hear this case.

6. With respect to the second reason the Tribunal lacks jurisdiction, Article 2 of the BIT affirms the mutual sovereign rights of Switzerland and Uruguay to prohibit economic activities for reasons of public health. In particular, Article 2(1) provides:

³ Claimants’ Request for Arbitration (19 Feb. 2010) (hereafter “RFA”), para. 74 (“Claimants are not required to comply with [the domestic litigation] requirement because of the MFN clause in Article 3(2) of the Switzerland-Uruguay [BIT]”).

The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.

7. This language is unique among BITs and is significantly stronger than the more typical "non-precluded measures" clauses litigated in prior cases. As detailed below, by mutually underscoring, at the very outset of the BIT, their mutual sovereign rights to prohibit economic activities for reasons of public health, Switzerland and Uruguay manifested their clear intent to exclude public health measures from the protections otherwise afforded to investors in the subsequent provisions of the Treaty, including the dispute resolution clause. Any other reading of Article 2 would render it meaningless, in violation of basic precepts of treaty interpretation. The conclusion is strengthened further by the structure of the BIT as a whole considered in light of its object and purpose.

8. For each of these reasons, as more fully elaborated in the pages that follow, Claimants' Request for Arbitration should be dismissed.

A. Background

9. Claimants are either manufacturers or the corporate parents of manufacturers of cigarettes that are sold to the public in Uruguay.

10. It is undisputed that the consumption of tobacco products, including the cigarettes manufactured and sold by Claimants, is the leading cause of preventable death around the globe.⁴ It is also undisputed that cigarette consumption causes many types of cancer and chronic disease

⁴ *E.g.*, World Health Organization (WHO), *Report on the Global Tobacco Epidemic, 2011: Warning about the dangers of tobacco* (2011) (hereafter "WHO, 2011 Report"), p. 8 ("Tobacco use continues to be the leading global cause of preventable death.") (R-56).

in smokers, as well as coronary heart disease and low infant birth weights in non-smokers who are exposed to second-hand smoke.⁵

11. Given this range of negative health effects, the consequences of widespread tobacco consumption to public health around the world are staggering. Tobacco use currently kills nearly six million people worldwide every year, and the annual death toll will rise to eight million by 2030 if current trends are allowed to continue. Indeed, the World Health Organization (“WHO”) recently projected that tobacco use will kill a billion people or more by the end of this century unless urgent action is taken.⁶ On 19 September 2011, the United Nations General Assembly adopted a Resolution emphasizing that “the global burden and threat of non-communicable diseases constitutes one of the major challenges for development in the twenty-first century, which undermines social and economic development throughout the world,” and concluding in this regard that “substantially reducing tobacco consumption” will have “considerable health benefits for individuals and countries.”⁷

12. The consequences of cigarette smoking on the people of Uruguay are consistent with the worldwide statistics. At least half of Uruguay’s well over half-million current smokers

⁵ *Ibid.*, p. 44, citing U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *How tobacco smoke causes disease: the biology and behavioral basis for smoking-attributable disease: A report of the Surgeon General* (2010); World Bank Publications, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL (1999) (hereafter “World Bank, CURBING THE EPIDEMIC (1999)”), pp. 2-3 (“The diseases associated with smoking are well documented and include cancers of the lung and other organs, ischemic heart disease and other circulatory diseases, and respiratory diseases such as emphysema ... Smoking also affects the health of non-smokers.”) (R-7).

⁶ WHO, *2011 Report*, p. 8 (R-56).

⁷ United Nations General Assembly, *Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases*, UN Document No. A/66/L.1, distributed 16 Sep. 2011, adopted 19 Sep. 2011, paras. 1 & 43(c) (RL-18).

will ultimately die from tobacco-related disease.⁸ Presently, more than 5,000 Uruguayans die each year from tobacco consumption, due mainly to cancer and cardiovascular diseases.⁹ Ten to fifteen percent of these deaths are caused by exposure to second-hand smoke.¹⁰

13. To address this global public health issue, starting in 2003, Uruguay and 173 other States from all parts of the world have joined together to adopt the World Health Organization's Framework Convention on Tobacco Control ("WHO Framework Convention" or "FCTC").¹¹ Its stated purpose 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.¹²

⁸ See *Centro de Investigación para la Epidemia del Tabaquismo (CIET), Uruguay and the Framework Convention on Tobacco Control*, Publication No. 2 (Oct. 2010) (hereafter "CIET, Publication No. 2 (2010)"), p. 14 (noting that the 2008 smoking rate in Uruguay was 550,000 smokers) (R-51); A. Ramos & D. Curti (PAHO), *Economics of Tobacco Control in Mercosur and Associated Countries: Uruguay* (2006), p. 3 (reporting that more than half of the world's 1.3 billion current smokers will die as a result of their addiction) (R-20); see also Uruguayan Ministry of Public Health (MSP), *National Guide to Smoking Cessation Treatment: Uruguay* (May 2009), p. 13 ("Tobacco is the only product legal for sale that kills half of its regular consumers when used as recommended by its manufacturer.") (R-36).

⁹ Global Adults Tobacco Survey (GATS), *Uruguay 2009*, Executive Summary (R-53); Uruguayan Ministry of Public Health (MSP), "The National Tobacco Control Program in the Context of the New Government" (22 Dec. 2005) ("In Uruguay, nearly 5,000 people die per year from tobacco-dependent illnesses. More than 500 of these people are non-smokers who reside or work in environments contaminated with tobacco smoke.") (R-19).

¹⁰ MSP, *Guide to Smoking Cessation* (2009), p. 13 (R-36).

¹¹ See "Parties to the WHO Framework Convention on Tobacco Control," on the Official Website of the WHO Framework Convention on Tobacco Control (http://www.who.int/fctc/signatories_parties/en/index.html) (RL-17).

¹² World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC) (hereafter "WHO FCTC"), opened for signature May 2003 through 29 Jun. 2004, EIF 27 Feb. 2005, Art. 3 (RL-20).

14. Among the WHO Framework Convention's provisions are the guiding principle that "[e]very person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke."¹³ The FCTC requires States Parties to "adopt and implement ... effective measures" to (1) prohibit *any* tobacco product packaging or labeling that "directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products,"¹⁴ and (2) require "each unit packet and package of tobacco products and any outside packaging and labelling of such products" to carry "large, clear, visible and legible" health warnings "describing the harmful effects of tobacco use" on "50% or more of the principal display areas," which "may be in the form of or include pictures or pictograms."¹⁵

15. In compliance with these and other provisions of the WHO Framework Convention, many States Parties have adopted new laws and regulations to augment and enhance their control of cigarettes and other tobacco products in the interests of public health.¹⁶

16. Largely due to the effectiveness of these and other tobacco control measures implemented in developed countries such as the United States, Italy and Australia, smoking rates

¹³ *Ibid.*, Art. 4.1.

¹⁴ *Ibid.*, Art. 11.1(a); *see also* Art. 13.4(a) ("each Party shall: (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions").

¹⁵ *Ibid.*, Art. 11.1(b); *see also* Art. 13.4(b) ("each Party shall: ... (b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship").

¹⁶ The Home Page for the Official Website of the WHO FCTC (<http://www.who.int/fctc/en/>) reports that, to date, 120 of the 174 States Parties to the FCTC have "adopted or strengthened their tobacco control legislation" since ratifying the Convention. (RL-14).

have steadily declined in the developed world – by an estimated 50% in the past 2-3 decades¹⁷ – which, by 2030, will prevent over one million tobacco-related deaths per year.¹⁸ This has caused cigarette manufacturers to increase their marketing and promotional activities in less developed countries, where tobacco control measures have traditionally been weaker.¹⁹ Thus, contrary to the declining smoking rates in developed countries, the rate of cigarette smoking in the less developed countries of Latin America, Asia and Africa has been increasing such that, by 2030, more than 80% of tobacco-related deaths will take place in developing countries.²⁰

17. In these countries, including Uruguay, the marketing and promotion of cigarettes and other tobacco products is targeted especially at adolescents, who are potential lifelong customers for the tobacco companies, especially due to the addictive nature of cigarette smoking.²¹ Studies show that it is precisely this segment of the non-smoking population which is

¹⁷ See, e.g., P. Jha, *Avoidable global cancer deaths and total deaths from smoking*, NATURE REVIEWS: CANCER, Vol. 9 (Sep. 2009), p. 655 (“The consumption per adult per day (the number of cigarettes smoked per day, divided by the population of smokers and non-smokers) has decreased by over 50% in the past 2-3 decades in the United States, the United Kingdom, Canada, France and other high-income countries.”) (R-41); see also P. Jha, et al., *Reducing the burden of smoking world-wide: effectiveness of interventions and their coverage*, DRUG AND ALCOHOL REVIEW, Vol. 25 (Nov. 2006), p. 598 (“As a result of early information linking smoking to health consequences, smoking prevalence has been declining for the past two decades in most high-income countries”) (R-24).

¹⁸ E.g., Campaign for Tobacco-Free Kids (CTFK), *The Global Tobacco Epidemic* (Jul. 2010) (illustrating that annual deaths from smoking in developed countries are projected to fall from 2.8 million in 2000 to 1.6 million in 2030) (R-49).

¹⁹ E.g., World Health Organization (WHO), *Report on the global tobacco epidemic, 2008: The MPOWER package* (2008) (hereafter “WHO, 2008 Report”), p. 21 (“The global tobacco industry now exploits the developing world by using the same marketing and lobbying tactics perfected – and often outlawed – in the developed world.”) (R-28).

²⁰ *Ibid.*, p. 16 (“Tobacco use is growing fastest in low-income countries, due to steady population growth coupled with tobacco industry targeting, ensuring that millions of people become fatally addicted each year. More than 80% of the world’s tobacco-related deaths will be in low- and middle-income countries by 2030.”).

²¹ As a Philip Morris employee wrote in an internal document in 1981, “Today’s teenager is tomorrow’s potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens.” Philip Morris Internal Document, *Young Smokers – Prevalence, Trends, Implications, and Related Demographic Trends* (31 Mar. 1981), p. 1, Bates No. 1000390808 (R-2). See also WHO, 2008 Report, p. 21 (“Tobacco companies have long targeted youth as ‘replacement smokers’ to take the place of those who quit or die. The industry knows that addicting youth is its only hope for the future. ... The younger children are when they first try smoking, the more

most vulnerable to the advertising of cigarette products, including the advertising presented on cigarette packages. Advertisements directed at adult non-smokers are less effective in attracting new customers than advertisements aimed at teenagers, since non-smokers over the age of 21 are not as likely to take up the habit as non-smokers who are in their teens.²²

18. In conformity with its obligation to the Uruguayan people to protect public health, as well as its international commitments under the WHO Framework Convention, Uruguay has implemented measures to reduce tobacco consumption by prohibiting tobacco companies – not just Claimants, but all tobacco companies operating in the country – from advertising or presenting their products in a way that encourages potential consumers to ignore the serious health consequences of cigarette smoking, or to falsely conclude that smoking one brand of cigarettes is less unhealthy than smoking another.

likely they are to become regular smokers and the less likely they are to quit.”) (R-28); U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), *Preventing Tobacco Use Among Young People: A Report of the Surgeon General (Executive Summary)*, MORBIDITY AND MORTALITY WEEKLY REPORT, Vol. 43, No. RR-4 (11 Mar. 1994) (hereafter “CDC, *Preventing Tobacco Use Among Young People* (1994)”), p. 6 (“Since most smokers try their first cigarette before age 18, young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases.”), p. 7 (“Since nicotine addiction also occurs during adolescence, adolescent tobacco users are likely to become adult tobacco users.”) & p. 9 (“Young people continue to be a strategically important market for the tobacco industry.”) (R-6).

²² WHO, *2008 Report*, p. 21 (“people who do not start smoking before age 21 are unlikely to ever begin”) (R-28); WHO, *2011 Report*, p. 20 (“people are most likely to begin to use tobacco as adolescents”) (R-56); CDC, *Preventing Tobacco Use Among Young People* (1994), p. vi (“The onset of tobacco use occurs primarily in early adolescence, a developmental stage that is several decades removed from the death and disability that are associated with smoking and smokeless tobacco use in adulthood. Currently, very few people begin to use tobacco as adults ... The earlier young people begin using tobacco, the more heavily they are likely to use it as adults, and the longer potential time they have to be users.”) & p. 8 (“Among addictive behaviors, cigarette smoking is the one most likely to become established during adolescence. People who begin to smoke at an early age are more likely to develop severe levels of nicotine addiction than those who start at a later age.”) (R-6).

19. Uruguay began enacting legislation to protect public health from the consequences of tobacco consumption in the 1970s.²³ Following its ratification of the WHO Framework Convention in 2005, the Government enacted various measures, including a comprehensive tobacco control law (Law 18,256) and an implementing decree (Decree 284/008), which both consolidated previous measures and created new tobacco control requirements, all in conformity with the FCTC. For instance, they expressly (1) prohibited “[a]ll forms of advertising, promotion and sponsorship of tobacco products,”²⁴ (2) prohibited any packaging or labeling likely to have “the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another,” including deceptive terms like “light” and “mild,”²⁵ and (3) required health warnings with rotating “images or pictograms” – to be promulgated by the Ministry of Public Health – “which describe the harmful effects of tobacco consumption” to appear on 50% of the principle surfaces of all packages of tobacco products.²⁶

20. Studies show that these measures had some effect on reducing tobacco consumption in Uruguay. Smoking rates fell from around 45% of the Uruguayan population in the 1990s²⁷ to approximately 32% of the Uruguayan population following increased regulation in the late-1990s and early-to-mid 2000s,²⁸ leveling off at approximately 25% of the population by

²³ See *infra*, para. 127.

²⁴ Uruguayan Law No. 18,256 (6 Mar. 2008), Art. 7 (RL-6); Uruguayan Decree No. 284/008 (9 Jun. 2008), Art. 7(a) (defining “advertising and promotion” to mean “any form of commercial activity, communication, or recommendation by any means with the purpose, effect, or possible effect of directly or indirectly promoting a tobacco product or its use”) (RL-3).

²⁵ Law No. 18,256 (2008), Art. 8 (RL-6); Decree No. 284 (2008), Art. 12 (RL-3).

²⁶ Law No. 18,256 (2008), Art. 9 (RL-6); Decree No. 284 (2008), Art. 12 (RL-3).

²⁷ GATS, *Uruguay 2009*, 1.2.1.1: Tobacco Consumption in Adults (R-53).

²⁸ See CIET, Publication No. 2 (2010), p. 4 (R-51).

2009.²⁹ However, in response to Uruguay's measures, the tobacco companies operating in the country developed new promotional and marketing approaches with the intent and effect of counteracting the Government's regulations.³⁰ Public health authorities therefore decided that additional measures were required to protect the public.

1. The Single Presentation Requirement

21. In 2008 and 2009, Uruguay adopted the three specific anti-tobacco measures that are the subject of this arbitration. The first is Article 3 of Ordinance 514, issued by the Ministry of Public Health on 18 August 2008.³¹ Article 3 requires that:

Each brand of tobacco products shall have a single presentation, such that it is forbidden to use terms, descriptive elements, commercial or factory trademarks, representational signs or any other type of signs, such as colors or combinations of colors, numbers or letters, which may have the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another ...

22. This "single presentation requirement" prohibits cigarette manufacturers from marketing more than one product under a single brand name. Thus, for example, prior to the adoption of Ordinance 514, Claimants had four types of "Marlboro" cigarettes on sale in Uruguay: "Marlboro Red," "Marlboro Gold," "Marlboro Blue," and "Marlboro Green (Fresh Mint)." Under Article 3 of Ordinance 514, however, they were prohibited from having more

²⁹ Global Adult Tobacco Survey (GATS), *Fact Sheet: Uruguay 2009* (Feb. 2010), p. 1 ("In Uruguay, 25.0% of people age 15 years and older; 30.7% of men and 19.8% of women, currently smoke tobacco.") (R-44).

³⁰ *See infra*, paras. 26-28 & 140-145.

³¹ Uruguayan Ordinance No. 514/08 (18 Aug. 2008) (RL-7).

than one presentation for their Marlboro brand. Claimants chose to continue marketing “Marlboro Red.”

23. According to Claimants’ own Request for Arbitration, Ordinance 514 was adopted “with the stated purpose of implementing Law 18.256 and Decree 284/008,”³² both of which were adopted and designed “to forbid cigarette packaging which could create a false impression as to the relative harmfulness of a specific product.”³³

24. The public health justification for the single presentation requirement is described in greater detail in Section II(B)(2)(a) below. Its fundamental purpose is to protect public health by prohibiting marketing practices that induce the false belief that certain versions of the same brand of cigarettes are less harmful to human health than others. The problem has its origin in the multi-billion dollar, worldwide marketing campaign carried out by major tobacco companies, including Claimants, to generate the impression that cigarettes, advertised as “light,” “ultra-light,” “mild” and the like, are less harmful to human health. To further distinguish the supposedly safer “light” or “mild” cigarettes, the tobacco companies presented them for sale in lighter-colored packages, typically gold (for “light”), silver (for “ultra light”), blue (for “fresh” or “mild”) and green (for mint or menthol-flavored). Over time, and with skilful advertising, the product descriptor (*e.g.*, “light”) became strongly identified in consumer consciousness with a particular color (*e.g.*, gold).³⁴ This practice had the effect of encouraging smokers to switch to a

³² RFA, para. 24.

³³ *Ibid.*, para. 22.

³⁴ *See infra*, paras. 140 & 144-145.

supposedly less harmful product rather than quit smoking altogether, and inducing non-smokers to take up the habit, on the belief that they were engaging in less harmful behavior.³⁵

25. The science is clear, however: there is no meaningful health distinction among cigarettes; they are all equally harmful.³⁶ It has been conclusively established that cigarettes promoted as “light,” “mild” or “low-tar” are just as harmful to human health as those not so labeled.³⁷ But, the research is equally clear that a significant percentage of smokers and the public at large do not know this: they continue to believe, as the tobacco companies originally claimed, that cigarettes designated as “light” or “low” or “mild” are less harmful to their health.³⁸

26. To avoid these misleading effects, and the consequent risks to public health brought about by increased tobacco consumption, many States took measures to prohibit the use of deceptive terms like “light” or “mild” in all forms of cigarette advertising, including cigarette packaging.³⁹ In 2005,⁴⁰ pursuant to its commitments under the FCTC,⁴¹ Uruguay prohibited

³⁵ *Ibid.*

³⁶ U.S. Department of Health and Human Services, National Institutes of Health (NIH), National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, NIH Publication No. 02-5074 (Oct. 2001) (hereafter “*Monograph 13 (2001)*”), e.g., p. 1 (“The absence of meaningful differences in smoke exposure when different brands of cigarettes are smoked (see Chapter 3) and the resultant absence of meaningful differences in risk (see Chapter 4) make the marketing of these cigarettes as lower-delivery and lower-risk products deceptive for the smoker.”) (R-11); *see also infra*, paras. 140-142.

³⁷ *Ibid.*

³⁸ E.g., GATS, *Fact Sheet: Uruguay 2009*, p. 1 (“1 in 4 adults are unaware that light, ultralight or mentholated cigarettes are as harmful as regular cigarettes.”) (R-44).

³⁹ At least 70 States have done so, including the United Kingdom, Italy, Australia and the United States. *See* CTFK, *How the Tobacco Industry Circumvents Bans on the Use of Misleading Terms* (2011) (R-65); *see also* WHO, *2011 Report*, pp. 120-131, tables 2.2.1-2.2.6 (“Additional characteristics of health warning labels on cigarette packages” in particular regions), column entitled “Ban on Deceitful Terms” (R-56).

⁴⁰ Uruguayan Decree No. 171/005 (31 May 2005), Art. 1 (RL-2).

tobacco companies from using the words “light,” “ultra light,” and “mild,” and other misleading product “descriptors,” in all forms of advertising, including cigarette packages.

27. In response to these public health measures by Uruguay and other States around the world, major tobacco companies, including Claimants, took counter-measures to maintain and increase cigarette sales. Although forced to remove the misleading descriptors and rename their cigarettes, they left their package designs, including colors, largely intact. Although the words “light” and “ultra light” were removed from the product name and package, the same cigarette products continued to be sold, each maintaining the color which distinguished it from the others, and which had over time become associated with a particular descriptor (*e.g.*, gold = “light” and silver = “ultra light”). “Marlboro Lights,” which had always been presented in a gold package (to set it apart from the original “Marlboro” and its red packaging), kept its gold packaging and became “Marlboro Gold”; and “Marlboro Ultra-Lights,” which had been presented in a silver package, kept that color and became “Marlboro Silver.”⁴²

28. The result was to perpetuate the widespread belief that gold-packaged cigarettes are “light” cigarettes, and those sold in silver packages are “ultra light,” and that either of these is

⁴¹ See WHO FCTC, Art. 11.1(a) (“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’.”); *see also* Art. 13.4(a) (“Each Party shall: (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions.”) (RL-20).

⁴² See D. Wilson, “Coded to Obey Law, Lights Become Marlboro Gold,” *New York Times* (19 Feb. 2010) (R-45); Example of New Color-Coded Packaging Flyer Given to Retailers in South Carolina by Philip Morris USA (2010), available at http://www.tobaccofreekids.org/what_we_do/industry_watch/low_tar_lie and provided as R-42.

safer to smoke than cigarettes of the same brand packaged in red or other darker colors. Specifically, research data show that consumers, including in Uruguay, continue to associate gold and silver colored cigarette sub-brands with the false health benefits of the former “light” brands, which they have been misled into believing are safer.⁴³ To respond to this problem, Uruguay adopted the single presentation requirement.⁴⁴ Uruguay concluded that limiting each brand of cigarettes to a single presentation – rather than a proliferation of different-colored sub-brands associated in consumer consciousness with false health benefits – would offer greater protection to public health, by reducing the risk that consumers will be misled into continuing, or beginning, to smoke based on the false belief that one version of the same brand of cigarettes is less harmful than another.

2. The Requirement to Use Pictograms

29. The second measure Claimants attack is Article 1 of the same Ordinance 514. Article 1 established a requirement that the mandatory health warnings on cigarette packaging include one of a new series of five pictograms to be issued by the Ministry of Public Health.⁴⁵ These pictograms, like those in many other jurisdictions around the world, are stark depictions of the consequences of tobacco consumption that are designed to decrease smoking rates by

⁴³ *See infra*, paras. 140 & 143-145.

⁴⁴ Ordinance No. 514 (2008), Art. 3 (RL-7).

⁴⁵ *Ibid.*, Art. 1. Article 1 of Ordinance 514 required the use of five specified pictograms to warn consumers of the health effects of smoking. On 1 September 2009, that article was superseded by Ordinance 466, which Claimants attempted to incorporate into this case via a letter sent to ICSID on 17 March 2011 (R-59). Claimants never took any action before any Uruguayan court with regard to either pictogram requirement prior to initiating this arbitration.

dissuading consumers, not only at the point of purchase, but also every time they reach for a pack of cigarettes they have already purchased.⁴⁶

30. The public health justification for the pictograms is clear: the research shows that pictorial health warnings are significantly more effective in communicating the health risks of smoking to consumers than text-only warnings.⁴⁷ Especially in the world of public health, a picture is worth a thousand words. The research also shows that more graphic warnings are more effective in communicating the dangers of smoking than less graphic warnings.⁴⁸ Thus, it has become increasingly common for States to require stark images of dire consequences on cigarette packages. In adopting Article 1 of Ordinance 514, Uruguay was following the path already tread by countries like Canada, Brazil, Singapore, and Venezuela, who have since been joined by more than 30 additional countries, including Australia and at least 10 European countries, including Claimants' own Switzerland.⁴⁹ In June of this year, the United States' Department of Health and Human Services issued a Final Rule requiring graphic pictograms to be displayed on all tobacco products sold within the country by September 2012, having found

⁴⁶ Copies of the graphic pictograms required in Uruguay under Ordinance 514 and Ordinance 466 are available at <http://www.tobaccolabels.ca/healthwarningimages/country/uruguay> and provided as exhibit R-67.

⁴⁷ See *infra*, para. 135.

⁴⁸ *Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products)*, adopted at the third Conference of the Parties (Nov. 2008) (hereafter "*FCTC Article 11 Guidelines* (2008)"), para. 26 ("Evidence suggests that health warnings and messages are likely to be more effective if they elicit unfavourable emotional associations with tobacco use and when the information is personalized to make the health warnings and messages more believable and personally relevant. Health warnings and messages that generate negative emotions such as fear can be effective, particularly when combined with information designed to increase motivation and confidence in tobacco users in their ability to quit.") (RL-13).

⁴⁹ See Tobacco Labelling Resource Centre, "Health Warning Images" by Country for Australia, Belgium, France, Latvia, Malta, Norway, Romania, Spain, Switzerland, Turkey, and the United Kingdom, *available at* <http://www.tobaccolabels.ca/healthwarningimages> and provided in R-69; see also Canadian Cancer Society, *Cigarette Package Health Warnings: International Status Report* (Oct. 2010), p. 3 (R-50).

“substantial evidence indicating that larger cigarette health warnings including a graphic component ... would offer significant health benefits over the existing [text-only] warnings.”⁵⁰

3. The 80% Health Warning Requirement

31. Finally, Claimants also complain about Decree 287/009, issued on 15 June 2009, which increased the required size of the health warnings on cigarette packages.⁵¹ Prior to the Decree, health warnings were required to cover the bottom 50% of the area on the front and back of the cigarette package.⁵² Decree 287/009 increased this requirement to 80% of the front and back of cigarette packages.

32. The public health justification for the 80% requirement is simple and indisputable: bigger is better. Just as the public health research shows that graphic, pictorial health warnings are more effective in communicating the health risks of smoking to consumers

⁵⁰ U.S. Food and Drug Administration, *Final Rule: Required Warnings for Cigarette Packages and Advertisements*, FEDERAL REGISTER, Vol. 76, No. 120 (22 Jun. 2011), (hereafter “FDA, *Final Rule* (2011)”) p. 36629; *see also* pp. 36633-34 (internal citations omitted):

The research literature clearly indicates that larger, graphic warnings are effective at communicating the health risks associated with smoking, encouraging users to quit smoking, and discouraging non-smokers from beginning to smoke ...

In addition ... the available evidence demonstrates that graphic health warnings are (1) more likely to be noticed than text-only warnings, (2) more effective for educating smokers about the health risks of smoking and for increasing the time smokers spend thinking about the health risks, and (3) associated with increased motivation to quit smoking ... [E]vidence from countries with graphic health warnings also indicates that such warnings are an important information source for younger smokers, and that pictures are effective in conveying messages to children. These important effects of graphic warnings are sustained longer than any impact from text-only warnings.

(R-63); *see also* Tobacco Labelling Resource Centre for the United States of America, *available at* <http://www.tobaccolabels.ca/healthwarningimages/country/unitedstates> and provided in R-69.

⁵¹ Uruguayan Decree No. 287/009 (15 Jun. 2009), Art. 1 (RL-4).

⁵² This requirement was first established in Article 1 of Decree No. 171 of 31 May 2005 (RL-2). It was then enshrined in Article 9 of Law 18,256 of 6 March 2008 (RL-6). Finally, it was reiterated in Article 1 of Ordinance 514 (RL-7).

than text-only warnings, it also shows that larger warnings are more effective than smaller warnings.⁵³ Other States with strong public health policies are increasingly taking this observation to its logical conclusion: requiring pictorial warnings to cover fully 100% of the front or back of cigarette packages.⁵⁴ Australia, the United Kingdom, New Zealand, Canada, Belgium, France, the European Union and others have also announced that they are actively considering the adoption of so-called plain packaging, which prohibits the use of all trademarks and logos, and requires “plain” cigarette packs that more vividly display the graphic warning labels.⁵⁵ In contrast to these plain packaging proposals, Uruguay’s 80% requirement leaves room for cigarette makers to continue to display their traditional logos.

B. The Request for Arbitration

33. Claimants Request for Arbitration was submitted to the Centre on 22 February 2010, 18 months and four days after the enactment of Ordinance 514, and eight months after the adoption of Decree 287/009. It was registered by the ICSID Secretariat on 26 March 2010.⁵⁶

⁵³ *FCTC Article 11 Guidelines* (2008), para. 12 (“Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible”) (emphasis added) (RL-13); *see also infra*, para. 151.

⁵⁴ For example, Brazil and Venezuela require graphic warning labels on 100% of the front or back of the package; Mexico requires 100% of the back of the package to be covered with a warning, while New Zealand and Australia require the warning label to cover 90% of the back of the package. *See* Tobacco Labelling Resource Centre, “Health Warning Images” by Country, available at <http://www.tobaccolabels.ca/healthwarningimages> and provided in R-69; *see also Cigarette Package Health Warnings: International Status Report* (2010), p. 4 (R-50).

⁵⁵ *See* Quit Victoria, Cancer Council Victoria, *Plain packaging of tobacco products: a review of the evidence* (May 2011), pp. 4-5, 16 & 23 (R-61).

⁵⁶ Notice of Registration sent from ICSID Secretary-General Meg Kinnear to the Parties (26 Mar. 2010) (R-47).

Claimants purport to ground jurisdiction on Article 10 of the BIT as well as *Ad* Article 10 of the Protocol thereto.⁵⁷

34. Claimants' Request for Arbitration does not deny – indeed it acknowledges – the serious health effects associated with tobacco consumption.⁵⁸ Nor does it deny Uruguay's right to legislate or regulate on this subject to protect the public health. At paragraph 7 of the Request for Arbitration, for example, Claimants state: "Claimants do not challenge the Uruguayan Government's sovereign rights to promote and protect the public health." Similarly, at paragraph 47, they state that they "do not contest the public health policy of warning of the health risks associated with tobacco consumption."

35. Nevertheless, Claimants allege that Uruguay's right to protect the public health must give way to their alleged rights under the BIT. According to Claimants, Uruguay's measures violate the following provisions of the Treaty:

- Article 3(1) (guaranteeing the right to be free from unreasonable measures);
- Article 3(2) (ensuring the right to fair and equitable treatment);
- Article 5(1) (prohibiting direct or indirect expropriations, or measures having the same effect, without effective and adequate compensation); and
- Article 11 (guaranteeing the observance of the commitments stated in the BIT).

36. For the reasons discussed in the following sections of this Memorial, Claimants' efforts to invoke the BIT are unavailing. This Tribunal does not have jurisdiction over their claims.

⁵⁷ RFA, paras. 1 & 55.

⁵⁸ *See ibid.*, e.g., paras. 41 (referring to "the actual health effects of smoking") & 47 (referring to "the health risks associated with tobacco consumption").

II. ARGUMENT

A. Claimants Have Not Satisfied the Mandatory Preconditions to the Centre's Jurisdiction

1. Article 10 Requires Domestic Litigation Prior to Recourse to Arbitration

37. Article 10 of the BIT establishes a series of preconditions before an investor may have recourse to an international arbitral tribunal. It states:

- (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.

38. Article 10 thus erects three hurdles. An investor must (1) raise the treaty dispute, (2) make efforts to settle it amicably for at least six months, and (3) pursue litigation of the dispute in domestic court until either a judgment has been entered or 18 months have passed, whichever occurs first.

39. Claimants' Request for Arbitration acknowledges each of these requirements.⁵⁹ And while it contends that Claimants satisfied the first two,⁶⁰ it conspicuously does *not* claim

⁵⁹ *Ibid.*, paras. 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.”) & 52-53 (noting that the BIT “imposes a six-month waiting period from the date the dispute is

that they complied with the third. Indeed, the Request for Arbitration implicitly admits that Claimants made no effort to satisfy the domestic litigation requirement. At paragraph 74, Claimants state:

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 [sic: BIT] cited above.

40. The reasons Claimants' effort to enlist the BIT's MFN clause fails are detailed in Section II(A)(3) below. The critical point here is that Claimants do not claim to have satisfied what they acknowledge is a precondition to arbitration.⁶¹ As discussed in the next section, that failure deprives this Tribunal of jurisdiction.

'raised'" and "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.").

⁶⁰ *Ibid.*, paras. 68-70. In fact, Claimants did not satisfy the requirement to raise a dispute under the BIT. Neither FTR Holding S.A. nor its replacement Claimant, Philip Morris Brands Sàrl, ever attempted to raise *any* aspect of the present dispute with Uruguay, let alone negotiate an amicable solution, prior to the filing of the RFA. Philip Morris Products S.A. also made no effort whatsoever to raise the graphic pictogram or 80% requirements with the Government, and its passing mention of the BIT in regards to the single presentation requirement of Ordinance 514 could not have appraised Uruguay of the substance of the present dispute or allowed for meaningful negotiations. Like its fellow Claimants, Abal Hermanos S.A. never meaningfully raised its current disputes regarding the graphic pictogram and 80% requirements with the Government, and it never raised its present Article 5 expropriation claim regarding the single presentation requirement. Given Claimants' admitted failure to submit the dispute to Uruguayan courts, the issue is largely academic. Nonetheless, Uruguay reserves all its rights on this point should it become pertinent later in these proceedings.

⁶¹ *See ibid.*, para. 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.") (emphasis added).

2. The Article 10 Requirements Are Jurisdictional

41. The Article 10(2) requirement to pursue domestic litigation is not merely a procedural nicety. It is a jurisdictional condition precedent. Unless and until it is satisfied, this Tribunal lacks the power to hear this case.

a) The Plain Text of Article 10(2) Makes Domestic Litigation an Essential Condition Precedent to Arbitration

42. The jurisdictional nature of the Article 10 preconditions, including the domestic litigation requirement, is evident first from the form of words used. By its plain terms, Article 10 establishes a sequence of mandatory conditions, each of which must be met before recourse to international arbitration may be had. It is evident from this language that international arbitration was intended to be a forum of last resort if – and only if – justice is not served in the host State.

43. Article 10's procedural requirements are stated in terms of a series of obligatory steps, compliance with which is required before the next step may be taken. Thus, Article 10(1) requires first that disputes with respect to investments "*shall*," as far as possible, be settled amicably. Thereafter, Article 10(2) mandates that "*if*" a dispute cannot be settled within six months, it "*shall*" be submitted to the competent courts of the host country. And only then, "*if*" no judgment has been passed within 18 months, "*may*" the investor appeal to an arbitral tribunal.

44. The choice of words is deliberate, and their meaning clear. The term “if”⁶² in combination with the mandatory “shall”⁶³ introduces sequential and cumulative conditions. Only when all of them are satisfied, “may” an investor appeal to an international arbitral body.

45. The use of the term “appeal” in the final clause of Article 10(2) strengthens this conclusion. The ordinary meaning of appeal is “[a] proceeding undertaken to have a decision reconsidered by bringing it to a higher authority.”⁶⁴ The use of the terms thus not only emphasizes the essential time element of recourse to arbitration but also the compulsory nature of a prior decision. Without a prior decision from a domestic court, no “appeal” to an arbitral tribunal is possible.

46. Article 9(8) similarly underscores the fact that domestic litigation is an indispensable precondition to seeking redress before an international arbitral tribunal. In contrast to the second sentence of Article 10(2), which addresses itself to the situation when the domestic court *does not* issue a decision within 18 months, Article 9(8) is concerned with the applicable rules of decision when the domestic court *does* issue a judgment. It states:

With respect to disputes that have been submitted, in accordance with Article 10 of this Agreement, to the competent courts of the Contracting Party in the territory of which the investment has been made, the arbitral tribunal according to this Article *may only*

⁶² The word “if” is the quintessential indicator of a condition precedent. The plain meaning and function of “if” as establishing a fundamental pre-requisite can be shown through an infinite number of examples. It is perhaps best exemplified by the Spartans’ reply when Philip of Macedon wrote to their magistrates: “If I enter Laconia I will level Lacedaemon to the ground.” The Spartans’ clear and succinct answer was: “If.”

⁶³ “The use of the word ‘shall’ ... is itself indicative of an ‘obligation’ – not simply a choice or option. The word ‘shall’ in treaty terminology means that what is provided for is *legally binding*.” *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (Nariman, Torres Bernárdez, Bernardini) (hereafter “*Wintershall v. Argentina*”), para. 119 (emphasis in original) (RL-82).

⁶⁴ *Black’s Law Dictionary* (9th ed. 2009), pp. 112-113: “Appeal” (RL-34).

*render an arbitral award to decide on the matter in all its aspects if it has determined that the national judgment infringes a rule of international law, including the provisions of [the Treaty], or is obviously unfair or there is a denial of justice.*⁶⁵

By specifying that an arbitral tribunal “may only” render an award “if” it finds that a domestic judgment violates international law, this article affirms domestic litigation as an essential precondition to an investor’s recourse to international arbitration.

47. The jurisdictional nature of these preconditions likewise flows from the language and structure of the BIT. It is Article 10 that expresses the Contracting States’ consent to international arbitration. (*Ad* Article 10 of the Protocol contains their statements of consent to ICSID arbitration.⁶⁶) It thus makes no sense to read the conditions as doing anything but imposing limits on the scope of their consent to arbitration.

48. Article 10(1) states that the parties to a dispute “shall” try to settle it amicably. Article 10(2) then states that they “shall” submit the dispute to the competent courts of the host country. Only “if” no judgment has been passed within 18 months “may” an investor appeal to an arbitral tribunal; that is, only then is the investor vested with the right to seek arbitration. In a

⁶⁵ Uruguay-Switzerland BIT, Art. 9(8) (emphasis added) (RL-21).

⁶⁶ *Ibid.*, *Ad* Art. 10 (“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.”).

formal sense, the conditions stated in Article 10 define the scope of the Tribunal's jurisdiction *ratione voluntatis*. Non-compliance defeats jurisdiction.⁶⁷

b) The Domestic Resolution Requirement Was a Critical Condition for the States Parties and to the Scope of Their Consent

49. The plain meaning of the language used in Article 10 is confirmed by the circumstances surrounding the conclusion of the BIT. The history of the Treaty's negotiation and ratification show that Uruguay deemed the domestic litigation requirement to be a critical element of the BIT, and an important limitation on the consent to international arbitration expressed therein.

50. The BIT's negotiating history makes clear that the domestic litigation requirement was a bargained-for term specifically included at Uruguay's insistence. The October 1988 Treaty signed with Switzerland was just Uruguay's third bilateral investment treaty. The two prior BITs predated it by only a short period: the Uruguay-Germany BIT was signed in May 1987 and the Uruguay-Netherlands BIT in September 1988.⁶⁸ All three were negotiated by the same Uruguayan team. In fact, the Dutch and Swiss BITs were completed during the same visit to Europe.

⁶⁷ "There is, in principle, an excess of power if a tribunal goes beyond its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis*." *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for Annulment (5 Jun. 2007), para. 42 (RL-60).

⁶⁸ Although the Uruguay-Switzerland BIT was the third BIT signed by Uruguay, it was the second BIT ratified. The BIT with Germany was ratified by Uruguay on 25 April 1990, the Swiss BIT was ratified on 30 March 1991, and the Dutch BIT was ratified on 21 May 1991.

51. The domestic litigation requirement is common to all three BITs.⁶⁹ A member of Uruguay's delegation responsible for the negotiation of the BIT with Germany (the first of the three BITs) noted in a speech to the Uruguayan Senate that that treaty was the product of eight years of laborious negotiation. He described how the domestic litigation requirement was included at Uruguay's insistence:

During all of those years, the resolution of conflicts and controversies was drafted in terms of the arbitration mechanism; recourse to local courts was not mentioned at all. When it was our turn to participate, in the final negotiation, I would say that the clear will of the Executive Branch and the experts involved was, exclusively, to try to impose the principle of the exhaustion of domestic remedies.⁷⁰

52. As a result of the Uruguayan delegation's insistence, the Uruguay-Germany BIT became "the first agreement signed in Latin America in which there is a recognition by a developed country that controversies are to be resolved through the local courts."⁷¹

53. The ratification history of the Uruguay-Switzerland BIT is to similar effect. Upon submitting the signed BIT to the Uruguayan Congress for ratification on 1 August 1989, the

⁶⁹ Uruguay-Switzerland BIT, Art. 10(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.") (RL-21); Uruguay-Germany BIT, signed 4 May 1987, EIF 29 Jun. 1990, Art. 11(2) ("If a dispute as described in Paragraph 1 cannot be settled within the period of six months counted from the date on which one of the interested parties raised it, it shall be submitted at the request of one of the parties to the competent courts of the Contracting Party in whose territory the investment was made.") (RL-31); Uruguay-Netherlands BIT, signed 22 Sep. 1988, EIF 8 Jan. 1991, Art. 9(2) ("In case that is [sic] dispute, in the sense of the previous paragraph, has not been settled within a period of six months counted from the date on which the dispute arose, this dispute shall, at the request of one of the parties concerned, be submitted to the competent tribunal of the Contracting Party in the territory of which the investment was made.") (RL-32).

⁷⁰ Speech of Dr. Julián Moreno of the Ministry of Economics & Finance to the Senate, in Minutes of Uruguayan Senate Sessions, No. 329, Vol. 324 (9 Aug. 1989), p. 52 (R-4).

⁷¹ *Ibid.*

Ministers responsible wrote in a letter that one of the “most notable aspects” of the Treaty was that disputes between investors and host States “will continue to be submitted to review by the competent national courts.”⁷² Paraphrasing Article 9(8), the letter explained:

Only in those cases in which the responsibility of the State is compromised by judicial authority, that is, when the sentence violates the rules of international law, when there has been denial of justice, or when the judgment passed was notoriously unjust, both parties will have recourse to an international arbitral tribunal.⁷³

54. Similarly, the Uruguayan legislators who ratified the Treaty made clear their understanding that the domestic litigation requirement was a critical condition of Uruguay’s willingness to submit to arbitration. In a 9 August 1990 report recommending the adoption of the Treaty, for instance, the Senate Committee on International Affairs explained that Article 10 establishes “a procedure that requires a prior attempt at amicable settlement of the dispute,” and only if attempts at settlement fail could the dispute be submitted “to the competent Tribunals of the party State in whose territory the investment was made” before referral could be made to an arbitral tribunal.⁷⁴

55. The Report explained further:

The aforementioned is complemented by Article 10 Number 2 which provides that when a judgment has not been obtained within eighteen months of having brought an action, the investor can have recourse to an Arbitration Tribunal constituted according to Article 9. Given what has been provided in Article 9 Number 8, said

⁷² Letter from the Uruguayan Ministries of Foreign Affairs and Economics & Finance to the President of the Uruguayan General Assembly (1 Aug. 1989), pp. 1-2 (R-3).

⁷³ *Ibid.*, p. 2.

⁷⁴ Report of the Senate Committee on International Affairs (9 Aug. 1990), in Minutes of Uruguayan Senate Sessions, No. 48, Vol. 332 (4 Sep. 1990), p. 42 (R-5).

Tribunal will also have the ability to recognize within the investor's assertions, whether the national judgment violates international law, is notoriously unjust, or if there has been a denial of justice.⁷⁵

56. The negotiating and ratification history therefore confirm the conclusion that follows from the plain text of the BIT: the requirement to pursue domestic litigation is a mandatory precondition that must be satisfied before an investor may have recourse to an international arbitral tribunal. If that condition is not satisfied, the tribunal does not have jurisdiction.

c) The International Jurisprudence Confirms the Domestic Litigation Requirement Is Jurisdictional in Nature

57. Consent is, of course, the cornerstone of ICSID jurisdiction.⁷⁶ Without one, the other does not exist. It therefore follows that any limitations on consent contained in a BIT must constitute limitations on the scope of the Tribunal's jurisdiction. As discussed below, the international jurisprudence, both from the International Court of Justice ("ICJ") and other ICSID tribunals, confirms that procedural preconditions like those set forth in Article 10 limit States' consent to arbitration.

58. Procedural preconditions to the submission of disputes to third-party dispute resolution are common. The legal nature of such conditions was recently explained by the ICJ:

[T]he terms "condition", "precondition", "prior condition", "condition precedent" are sometimes used as synonyms and sometimes as different from each other. There is in essence no

⁷⁵ *Ibid.*

⁷⁶ See International Bank for Reconstruction and Development (IBRD), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 Mar. 1965), para. 23 (RL-15).

difference between those expressions save for the fact that, when unqualified, the term “condition” may encompass, in addition to prior conditions, other conditions to be fulfilled concurrently with or subsequent to an event. *To the extent that the procedural requirements of [a dispute settlement clause] may be conditions, they must be conditions precedent to the seisin of the court even when the term is not qualified by a temporal element.*⁷⁷

59. As discussed above, there is no question but that Article 10 is structured as a set of sequential and cumulative conditions. The investor must (1) raise a dispute, (2) pursue amicable resolution for six months, and (3) submit unresolved disputes to the domestic courts before going to international arbitration. In effect, Article 10 expresses the will of the parties to create a series of doors through which an investor must pass before it may institute arbitration.

60. The international jurisprudence confirms the jurisdictional nature of conditions like these. In the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*,⁷⁸ for example, the Democratic Republic of Congo (“DRC”) sought to base jurisdiction in the ICJ on no less than eight treaties, many of which contained procedural preconditions similar to those found in Article 10 of the BIT.⁷⁹ In its Judgment, the Court held that where the applicable preconditions had not been met, the treaty could not provide jurisdiction. It stated:

⁷⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment on Preliminary Objections (1 Apr. 2011) (hereafter “*Georgia v. Russia*”), para. 130 (emphasis added) (RL-47).

⁷⁸ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment on Jurisdiction and Admissibility (3 Feb. 2006), I.C.J. Reports 2006, p. 6 (hereafter “*DRC v. Rwanda*”) (RL-48).

⁷⁹ *See ibid.*, para. 1. For instance, both Article 29 of the Convention on Discrimination Against Women and Article 14 of the Montreal Convention give the Court jurisdiction “on the condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration.” *Ibid.*, paras. 87 & 117.

[J]urisdiction is based on the consent of the parties and is confined to the extent accepted by them *When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.* The Court accordingly considers that *the examination of such conditions relates to its jurisdiction* and not to the admissibility of the application It follows that ... the conditions for seisin of the Court set out in [the compromissory clauses invoked by the DRC] must be examined in the context of the issue of the Court’s jurisdiction.⁸⁰

On this basis, the Court ruled that it “cannot accept any of the bases of jurisdiction put forward by the DRC in the present case” due to its failure to comply with the pertinent conditions.⁸¹

61. The Court came to an identical result in its recent decision denying jurisdiction in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*.⁸² Georgia attempted to ground jurisdiction on Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination, which provides that any dispute “which is not settled by negotiation or by the procedures expressly provided for in this Convention” could be submitted to the ICJ. The Russian Federation objected to the Court’s jurisdiction, arguing, *inter alia*, that the negotiation requirement had not been satisfied. The Court agreed, holding:

⁸⁰ *Ibid.*, para. 88 (emphasis added) (internal citations omitted).

⁸¹ *Ibid.*, para. 126. One of the specific examples of the Court’s application of this principle can be found in the DRC’s failed attempt to found the jurisdiction of the Court upon Article 75 of the WHO Constitution, which reads: “Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice” *See ibid.*, para. 94. With respect to this provision, the Court found that none of the preconditions to its seisin were met for the following reasons: “even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has in any event not proved that the other preconditions for seisin of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it.” *Ibid.*, para. 100.

⁸² *Georgia v. Russia*, para. 131 (RL-47).

[I]t is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. ... [P]rior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating *the limit of consent given by States*. ... The Court's jurisdiction is based on the consent of the parties and is confined to the extent accepted by them ... When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting the limits thereon*.⁸³

62. ICSID tribunals apply the same rule. In *Enron v. Argentina*, for example, the BIT at issue contained the requirement that “the parties to the dispute should initially seek a resolution through consultation and negotiation.”⁸⁴ In response to Argentina's jurisdictional objections, the tribunal concluded: “Such requirement is ... very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.”⁸⁵ The tribunal there found that the requirement was complied with and decided that the dispute was within the jurisdiction of the Centre.⁸⁶

63. Similarly, the tribunal in *Burlington v. Ecuador* recently affirmed that the requirements established in Article VI of the United States-Ecuador BIT providing that “the parties should initially seek a resolution through consultation and negotiation” and could only submit the dispute to arbitration “after six months had elapsed” were jurisdictional in nature. On

⁸³ *Ibid.* (first emphasis added; second emphasis in original, quoting *DRC v. Rwanda*, para. 88) (internal citations omitted).

⁸⁴ Argentina-US BIT, signed 14 Nov. 1991, EIF 20 Oct. 1994, Art. VII.2 (“In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution ...”) (emphasis added) (RL-24).

⁸⁵ *Enron Corp. & Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 Jan. 2004) (Orrego Vicuña, Gros Espiell, Tschanz), para. 88 (emphasis added) (RL-55).

⁸⁶ *Ibid.*, paras. 88 & 101.

that basis, the tribunal held that it did not have jurisdiction because claimant Burlington had failed to grant Ecuador the required opportunity to redress the dispute short of international arbitration. It held:

[B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. *That suffices to defeat jurisdiction.*⁸⁷

64. The specific condition at issue in this case – prior recourse to local courts for 18 months – has also been recognized as jurisdictional.⁸⁸ In *Wintershall v. Argentina*, the claimant, a German investor, failed to comply with the domestic litigation requirement set forth in Article 10(2) of the Germany-Argentina BIT. In response to Argentina’s jurisdictional objection, the tribunal first observed: “It is a general principle of the law of treaties that a third beneficiary of a

⁸⁷ *Burlington Resources Inc. v. Republic of Ecuador and Empresa Estatas Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 Jun. 2010) (Kaufmann-Kohler, Stern, Orrego Vicuña), para. 315 (emphasis added) (RL-49); *see also* *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Decision on Jurisdiction (15 Dec. 2010) (Oreamuno Blanco, Naón, Vinuesa), paras. 151 (arguing that the six-month waiting period “is not an inconsequential procedural requirement but rather a key component of the legal framework established in the BIT and in many other similar treaties, which aims for the parties to amicably settle the disputes that might arise”) & 156 (“the Tribunal rejects Claimant’s argument that the six-month waiting period required by Article VI(3)(a) does not constitute a jurisdictional requirement.”) (RL-68).

⁸⁸ *E.g.*, *Wintershall v. Argentina*, para. 170 (RL-82); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 Jun. 2011) (Danelius, Brower, Stern) (hereafter “*Impregilo v. Argentina*”), paras. 79-94 (Article 8(3) of the Argentina-Italy BIT “provides that international arbitration may be initiated where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in Article 8(2), the dispute between the investor and the Contracting Party has not been resolved. ... Article 8(3) contains a jurisdictional requirement that has to be fulfilled before an ICSID tribunal can assert jurisdiction. ... Impregilo not having fulfilled this requirement, the Tribunal cannot find jurisdiction on the basis of Article 8(3) of the Argentina-Italy BIT.”) (RL-61); *see also* *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000) (Orrego Vicuña, Buergethal, Wolf) (hereafter “*Maffezini v. Spain*”), paras. 34-36 (RL-54).

right under it must comply with the conditions for the exercise of the right provided for in the treaty.”⁸⁹ It then held:

[T]he eighteen-month requirement of a proceeding before local courts (stipulated in Article 10(2)) is an essential preliminary step to the institution of ICSID Arbitration, under the Argentina-Germany BIT; it constitutes an integral part of the “standing offer” (“consent”) of the Host State, which must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration for resolving its dispute with the Host State under the concerned BIT. ... The requirement of recourse to local courts for an eighteen-month period in Article 10(2) is *fundamentally a jurisdictional clause*⁹⁰

Because of the investor’s non-compliance with this condition, the tribunal determined that it had “no competence to entertain the claim and to proceed with it on merits.”⁹¹

65. The result is therefore clear: the conditions to international arbitration stated in a compromissory clause set limits on the Contracting States’ consent to jurisdiction. As such, they are conditions precedent to the seisin of an ICSID tribunal. Those conditions having not been satisfied here, this Tribunal lacks jurisdiction over the case.

3. The MFN Clause in Article 3(2) Does Not Apply to Dispute Resolution

66. Despite the jurisdictional significance of Article 10(2) and Article 9(8) of the BIT, the Claimants allege that the MFN clause in Article 3(2) of the BIT allows it not to comply with the Article 10(2) requirements of a six-month waiting period prior to submission of the dispute to dispute resolution, and that the dispute be submitted to the competent courts of Uruguay for a

⁸⁹ *Wintershall v. Argentina*, para. 114 (RL-82).

⁹⁰ *Ibid.*, paras. 160(2) & 172 (emphasis added).

⁹¹ *Ibid.*, para. 156.

decision, or for at least the passage of 18 months without one, before recourse may be had to an arbitral tribunal.⁹²

67. Article 3 of the BIT is entitled “Protection and Treatment of Investments.”

Article 3(2), upon which Claimants attempt to rely, provides:

Each contracting Party shall ensure *fair and equitable treatment* within its territory of the investments of the investors of the other Contracting Party. *This treatment* shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.

As shown below, the ordinary meaning of this language and international jurisprudence overwhelmingly confirm that the MFN clause in Article 3(2) is confined to fair and equitable treatment, and does not operate to allow the Claimant to escape the jurisdictional requirements of Article 10.

a) The Ordinary Meaning of the MFN Clause in Article 3(2)

68. The first step in the interpretation of a treaty provision is to examine its ordinary meaning.⁹³ The ordinary meaning of the MFN clause in Article 3(2) is apparent on its face. The first sentence of Article 3(2) provides that each Contracting Party “shall ensure *fair and equitable treatment* ...” The second sentence, which contains the MFN clause, continues: “*This*

⁹² RFA, paras. 71-75.

⁹³ Vienna Convention on the Law of Treaties (with annex) (23 May 1969), 1155 U.N.T.S. 331 (hereafter “Vienna Convention”), Art. 31.1 (“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.*”) (emphasis added) (RL-19).

treatment shall be no less favorable ...” It is clear from the phrase “this treatment” that the MFN language refers to the “fair and equitable treatment” mentioned in the preceding sentence. Thus, the language of Article 3(2) makes the MFN clause expressly applicable to the requirement of fair and equitable treatment set forth in the first sentence of the Article, and not to any other provision of the BIT, let alone the dispute resolution provisions of Article 10.

69. As a result of its explicitly limited scope, Article 3(2), pursuant to the *ejusdem generis* rule, can only “attract matters belonging to the same category of subject as that to which the clause itself relates.”⁹⁴ The ILC’s Commentary to the Draft Articles on Most-Favoured-Nation Clauses is instructive in this regard:

(1) The rule which is sometimes referred to as the *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice. ... [T]he clause can only operate in regard to the subject matter which the two States *had in mind* when they inserted the clause in their treaty.

...

⁹⁴ *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award (6 Mar. 1956), R.I.A.A. Vol. XII, pp. 83-153 (hereafter “*The Ambatielos Claim*”), at p. 107 (emphasis added) (RL-44); *see also Wintershall v. Argentina*, paras. 103 (quoting *ibid.*) & 162 (“it is well-settled, in this branch of the law, that a most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates – the issue being determined in accordance with the intention of the Contracting Parties, deduced from a reasonable, interpretation of the Treaty.”) (RL-82); Sir G.G. Fitzmaurice, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE*, Vol. I (1986), p. 324:

While there may be room for argument as to what exactly is covered by any particular most-favoured-nation clause, there can be no doubt in principle that clauses conferring most-favored-nation rights can (through the operation of a specific grant to another country) only attract rights of the same kind or order, or belonging to the same class, as those contemplated by the most-favoured-nation clause concerned. The subject-matter or category of subject-matter must be the same: the grant of most-favoured-nation rights on one subject, or order of subjects, cannot confer a right to enjoy the treatment granted to another country in respect of a different subject-matter or category of subject-matter.

(RL-39).

(10) No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.⁹⁵

70. The ILC's Commentary confirms that beneficiaries of an MFN clause acquire "only those rights which fall *within the limits of the subject-matter*" the Contracting Parties "had in mind when they inserted the [MFN] clause in their treaty."⁹⁶

71. The text of Article 3(2) demonstrates that Uruguay and Switzerland intended to confine the subject-matter of the article only to fair and equitable treatment. The narrow wording of Article 3(2) stands in stark contrast to the wording found in "broad" MFN clauses in other BITs, and, even more so, to BITs which explicitly grant MFN treatment to dispute resolution provisions.⁹⁷

72. The Argentina-Spain BIT, for example, accords MFN treatment to "*all matters* subject to this Agreement."⁹⁸ The Argentina-Germany BIT provides MFN status to "treatment"

⁹⁵ International Law Commission (ILC), *Draft Articles on most-favoured-nation clauses with commentaries*, Y.B.I.L.C., 1978, Vol. II, Part 2 (hereafter "ICL, *Draft Articles on MFN clauses* (1978)"), pp. 27 & 30, Commentary to Arts. 9 & 10 (RL-16); *see also* R. Geiß & M. Hilf, *Most-Favoured-Nation Clause*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Sep. 2009), para. 28 ("According to the *ejusdem generis* rule, no other rights can be claimed than those falling within the limits of the subject-matter of the clause.") (RL-40).

⁹⁶ ICL, *Draft Articles on MFN clauses* (1978), p. 27, Art. 9(1) (RL-16); McNair, stating: "The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty" (quoted in *ibid.*, Commentary to Arts. 9 & 10).

⁹⁷ As will be seen below, however, even the fact that MFN clauses in other treaties may be "broad" does not suffice to dislodge the dispute resolution provisions of the treaty in question.

⁹⁸ Argentina-Spain BIT, signed 3 Oct. 1991, EIF 28 Sep. 1992, Art. IV.2 ("In all matters governed by this Agreement, this treatment shall be no less favorable than that granted by each Party to the investments made within its own territory by investors of a third country.") (emphasis added) (RL-23).

in general.⁹⁹ It also provides for MFN treatment in matters of full protection and security, expropriation, and treatment in time of war, armed conflict, and other such events, but not specifically for fair and equitable treatment.¹⁰⁰ The Uruguay-Germany BIT is almost identical to the Argentina-Germany BIT in that regard.¹⁰¹ The Uruguay-Netherlands BIT provides MFN treatment *only* to the provision of full protection and security.¹⁰² Finally, the Uruguay-Switzerland BIT contains nothing like the MFN clause in the UK-Albania BIT's Article 3(3), which *explicitly* grants MFN treatment to dispute settlement and the consent to submit to conciliation or arbitration under ICSID found in Article 8 of that treaty.¹⁰³

⁹⁹ Argentina-Germany BIT, signed 4 Sep. 1991, EIF 8 Nov. 1993, Art. 3 (RL-22).

¹⁰⁰ *Ibid.*, Art. 4.

¹⁰¹ See Uruguay-Germany BIT, Art. 3(1) ("Each Contracting Party shall not subject in its territory the capital investments by nationals or corporations of the other Contracting Party or capital investments in which nationals or corporations of the other Contracting Party are participating, to a treatment less favorable than to the capital investments of its own nationals and corporation, or to capital investments of nationals and corporation of third States.") (RL-31).

¹⁰² Uruguay-Netherlands BIT, Art. 3.2 ("each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the investor") (RL-32).

¹⁰³ UK-Albania BIT, signed 3 Mar. 1994, EIF 30 Aug. 1995, Art. 3(3) (RL-30). Article 3 reads:

- (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
- (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own nationals or companies or to nationals or companies of any third State.
- (3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

There are twelve other agreements made by the United Kingdom that contain the same model clause. See also UK Model BIT (2005), Art. 3 (essentially the same) (RL-29).

73. These differences demonstrate that the drafters of treaties know how to provide for broad or narrow application of MFN treatment, as fits the circumstances, and that they have in fact specifically negotiated a differential application, in some cases broadly, and in other cases more narrowly and more specifically to the desired subject matter they had in mind. The ordinary meaning of the Uruguay-Switzerland BIT is clearly in line with other BITs¹⁰⁴ where the Contracting Parties restricted MFN treatment only to one discrete and substantive standard of treatment – “fair and equitable treatment” in this case – and not to the substantive provisions generally or to dispute resolution clauses.

74. Accordingly, the MFN clause cannot be used as a bootstrap to extricate Claimants from the BIT’s mandatory jurisdictional preconditions that must be met before arbitration may

¹⁰⁴ For example, Article 5 of the Spain-Russia BIT reads in relevant part:

1. Each Party shall *guarantee fair and equitable treatment* within its territory for the investments made by investors of the other Party.
2. The *treatment referred to in paragraph 1 above* shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State.

Quoted in *Renta 4 S.V.S.A, et al. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections (20 Mar. 2009) (Brower, Landau, Paulsson) (hereafter “*Renta 4 v. Russia*”), para. 68 (emphasis added) (RL-71).

Another example is the Russia-Mongolia BIT. Its Article 3 reads:

1. Each Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with investments fair and equitable treatment excluding the application of measures that might impair the operation and disposal with investments.
2. The treatment mentioned under paragraph 1 of this Article, shall not be less favorable than treatment accorded to investments and activities associated with investments of its own investors or investors of any third State.

Quoted in *Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 Apr. 2011) (Lalonde, Grigera Naón, Stern), paras. 562-563 (RL-75). *See also* Venezuela-Paraguay BIT, signed 5 Sep. 1996, EIF 14 Nov. 1997, Art. 4.2 (RL-33); Ecuador-Paraguay BIT, signed 28 Jan. 1994, EIF 18 Sep. 1995, Art. IV.2 (RL-27).

be commenced, or to create a *sui generis* dispute settlement clause the Contracting Parties never contemplated.

b) Investment Arbitration Jurisprudence in Regard to MFN Clauses

75. No investment arbitration award has ever gone so far as to extend an MFN provision as limited as Article 3(2) of the Uruguay-Switzerland BIT to incorporate dispute settlement provisions from other treaties. Even those arbitral decisions permitting the extension of MFN clauses to the domestic litigation requirement were based on provisions markedly broader than Article 3(2). In particular, investment arbitration tribunals have held that an MFN clause cannot incorporate by reference dispute settlement provisions in whole or in part, unless the clause clearly and unambiguously indicates that the contracting parties intended this effect.¹⁰⁵

76. Recently, in *Wintershall v. Argentina*, as in this case, the claimants sought to invoke the MFN clause to circumvent the jurisdictional requirement of submitting the dispute to

¹⁰⁵ *E.g., Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) (Salans, van den Berg, Veeder) (hereafter “*Plama v. Bulgaria*”), para. 223 (“an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”) (RL-70); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award (21 Apr. 2006) (Sjövall, Lebedev, Weiler) (hereafter “*Berschader v. Russia*”), para. 181 (“an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties”) (RL-81); *Wintershall v. Argentina*, para. 167 (“ordinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted”) (emphasis in original) (RL-82); see also *Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 Nov. 2004) (Guillaume, Cremades, Sinclair) (hereafter “*Salini v. Jordan*”), paras. 118-119 (RL-74); *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 Sep. 2006) (Goode, Allard, Marriott) (hereafter “*Telenor v. Hungary*”), paras. 89-95 (RL-78).

competent domestic courts for 18 months before resorting to arbitration.¹⁰⁶ The Argentina-Germany BIT¹⁰⁷ contained two MFN clauses:

Article 3(2)

Neither of the Contracting Parties shall grant in its territory to nationals or companies of the other Contracting Party *a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.*

Article 4

(1) The investments of nationals or companies of one of the Contracting Parties shall enjoy full legal protection and security within the territory of the other Contracting Party.

(2) [This paragraph deals with expropriation and compensation and is not necessary to reproduce for the present discussion.]

(3) The nationals or companies of one of the Contracting Parties that suffer losses on their investments as a result of war or other armed conflict, revolution, a state of national emergency or insurrection within the territory of the other Contracting Party shall not be treated by the latter less favorably than the latter's own nationals or companies as regards restitution, compensation, damages or other reimbursements. These payments must be freely transferable.

(4) The nationals or companies of each Contracting Party shall enjoy in the territory of the other Contracting Party the treatment of the most-favoured nation *in all matters covered in this Article.*

77. Having analyzed these provisions, the *Wintershall* tribunal underlined that “[o]n a plain reading of the Argentina-Germany BIT it is clear that there is *no general most-favoured-nation clause applicable to all articles of the treaty.*”¹⁰⁸ In regard to Article 3(2), the tribunal

¹⁰⁶ *Wintershall v. Argentina*, paras. 18.2-18.4 (RL-82).

¹⁰⁷ Argentina-Germany BIT (RL-22).

¹⁰⁸ *Wintershall v. Argentina*, para. 162 (emphasis added) (RL-82).

stressed that the MFN clause “*does not mention* that the most-favoured-nation ‘treatment’ as to investments, and investment related activities, *is to be in respect of ‘all relations’ or that it extends to ‘all aspects’ or covers ‘all matters in the treaty’.*”¹⁰⁹

78. In regard to Article 4, the tribunal concluded that “since the MFN Clause for all forms of ‘treatment’ described in Article 4 is expressly restricted to the provisions of that Article, they would not and could not be said to extend to Article 10 [containing the dispute settlement provisions].”¹¹⁰ The tribunal observed:

*Ordinarily, an MFN Clause would not operate so as to replace one means of dispute settlement with another. This is (presumably) why the drafters of the UK Model BIT had provided (in Article 3(3)) that “for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.”*¹¹¹

79. The *Wintershall* tribunal decided that the dispute resolution clause could not be dislodged “unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted: which is not so in the present case.”¹¹²

¹⁰⁹ *Ibid.* (emphasis added). Compare this to the MFN clause in *Maffezini*, which was interpreted to extend to all provisions in the treaty, including dispute resolution: “In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.” Spain-Argentina BIT, Art. IV.2, quoted in *Maffezini v. Spain*, para. 38 (RL-54).

¹¹⁰ *Wintershall v. Argentina*, para. 164 (RL-82).

¹¹¹ *Ibid.*, para. 167 (first emphasis added; second emphasis in original) (internal citations omitted).

¹¹² *Ibid.* Scholarly commentary is in accord. *E.g.*, Z. Douglas, THE INTERNATIONAL OF INVESTMENT CLAIMS (2009), p. 344 (“A most-favoured-nation (MFN) clause in the basic investment treaty does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.”) & p. 362 (“An MFN clause in the basic treaty can only be relied upon to incorporate jurisdictional provisions in a third treaty where the MFN clause clearly envisages that possibility. The most notable example is the UK Model BIT, Article 3(3) of which provides: ‘For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.’”) (RL-38).

80. As in *Wintershall*, the MFN clause of the Uruguay-Switzerland BIT does not “clearly and unambiguously indicate” that it should be interpreted “to replace one means of dispute settlement with another.” Moreover, the MFN clause here is narrower than Article 3(2) and Article 4 of the Argentina-Germany BIT. If those MFN clauses were found inapplicable to circumvent the 18-month domestic litigation requirement, then *a fortiori* the MFN clause in this case cannot apply to avoid a similar jurisdictional condition.

81. In *Wintershall*, the tribunal underscored “the significance that has been attached by the Contracting States to the eighteen-month [local remedies] requirement in Article 10(2),” because “it is part and parcel of [the host State’s] integrated ‘offer’ for ICSID arbitration” that “must be accepted by the investor on the same terms.”¹¹³ In this regard, the tribunal reaffirmed nearly *verbatim* the holding in *Telenor v. Hungary*:

In the absence of language or context to suggest the contrary, the ordinary meaning of “investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State” is that the investor’s *substantive* rights in respect to the investments are to be treated no less favourable [sic] than under a BIT between the host State and a third State. It is one thing to stipulate that the investor is to have the benefit of MFN treatment but *quite another to use a MFN clause in a BIT to bypass a limitation in the settlement resolution clause of the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this.*¹¹⁴

¹¹³ *Wintershall v. Argentina*, para. 162 (RL-82).

¹¹⁴ *Ibid.*, para. 168 (first emphasis in original; second emphasis added), affirming *verbatim* the holding of the *Telenor* tribunal, at para. 92 (RL-78).

The same rule applies here: Uruguay and Switzerland did not use language in Article 3(2) demonstrating an intention to entitle investors to use the MFN clause to bypass the limitations on consent to ICSID arbitration set out in Article 10.

82. Even where MFN clauses have been drafted in general terms, tribunals have still found the text insufficient to demonstrate the contracting parties' common intention to extend MFN treatment to dispute settlement. In *Salini v. Jordan*, the tribunal dismissed the claimants' invocation of the general MFN clause,¹¹⁵ finding that it was not broad enough to justify its application to dispute settlement provisions. It observed that "Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement," nor does it "envisage 'all rights or all matters covered by the agreement'."¹¹⁶ The tribunal also pointed out the claimants' failure to satisfy their burden of proof to demonstrate that "the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement."¹¹⁷ If the broader MFN clause in that case was found inapplicable, then the narrower clause in Article 3(2) of the Uruguay-Switzerland BIT cannot apply either.

83. A similar decision was reached in *Telenor v. Hungary*, which, as noted, was cited approvingly in *Wintershall*.¹¹⁸ In *Telenor*, the applicable MFN provision was worded in general

¹¹⁵ Jordan-Italy BIT, signed 21 Jul. 1996, EIF 17 Jan. 2000, Art. 3 ("National Treatment and Most Favoured Nation Clause: 1. Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States."). *Quoted in Salini v. Jordan*, para. 66 (RL-74).

¹¹⁶ *Salini v. Jordan*, para. 118 (RL-74).

¹¹⁷ *Ibid.*

¹¹⁸ *Wintershall v. Argentina*, para. 168 (RL-82).

terms.¹¹⁹ The tribunal concluded that even “[i]n these circumstances, to invoke the MFN clause to embrace the [different] method of dispute resolution is to *subvert the intention of the parties* to the basic treaty, *who have made it clear that this is not what they wish.*”¹²⁰ The tribunal held that an MFN clause does not incorporate by reference dispute settlement provisions in whole or in part, unless its text leaves no doubt that the contracting parties intended this effect.¹²¹

84. The claimants’ attempt to use a general MFN clause¹²² to incorporate “more favorable” dispute settlement provisions was also dismissed in *Plama v. Bulgaria*.¹²³ The tribunal in that case referred to the *Anglo-Iranian Oil Company* case in which the first attempt to rely on an MFN clause to establish the jurisdiction of a dispute settlement body was flatly rejected by the ICJ.¹²⁴

85. In the *Anglo-Iranian Oil Company* case, the United Kingdom sought to invoke the Court’s jurisdiction on the basis of the MFN clauses in treaties with Iran. In contrast to Article 3(2) of the Uruguay-Switzerland BIT, those clauses were drafted in the widest terms, granting

¹¹⁹ Hungary-Norway BIT, signed 8 Apr. 1991, EIF 4 Dec. 1992, Art. IV (“Most Favoured Nation Treatment”: 1. Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State.). *Quoted in Telenor v. Hungary*, para. 25 (RL-78).

¹²⁰ *Telenor v. Hungary*, para. 95 (emphasis added) (RL-78).

¹²¹ *Ibid.*, para. 92 (emphasis added).

¹²² Bulgaria-Cyprus BIT, signed 12 Nov. 1987, EIF 18 May 1988, Art. 3 (“1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states. 2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area.”), quoted in *Plama v. Bulgaria*, para. 187 (RL-70).

¹²³ *Plama v. Bulgaria*, para. 227 (RL-70).

¹²⁴ *Ibid.*, para. 214.

MFN treatment to the nationals of each state “*in every respect*” and “*in all respects*.”¹²⁵ The Court nevertheless dismissed the United Kingdom’s arguments, because the MFN clause “*has no relation whatever to jurisdictional matters*.”¹²⁶ President McNair appended a concurring opinion to the Judgment of the Court clearly distinguishing between substantive matters that could fall within the scope of an MFN clause and jurisdictional matters which are beyond its reach:

Unquestionably, *if the jurisdiction of the Court in this case had already been established* and if the Court was now dealing with the merits, the United Kingdom *would be entitled to invoke against Iran the most-favoured-nation clause* (Article 9) of the Anglo-Persian Treaty of 1857, for the purpose of claiming the benefit of the provisions of the Irano-Danish Treaty of 1934 as to the treatment of foreign nationals and their property. *But that is not the question now before the Court.*¹²⁷

86. The *Plama* tribunal observed that, in *Anglo-Iranian Oil Company*, the ICJ had concluded that “the MFN provisions in the Iran-United Kingdom treaties ‘*had no relation whatsoever to jurisdictional matters*’ between those two States.”¹²⁸ The *Plama* tribunal then concluded that, notwithstanding the generic nature of the MFN clause in the Cyprus-Bulgaria BIT, it still could not be interpreted as providing consent to submit to arbitration because the

¹²⁵ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Judgment (22 Jul. 1952), I.C.J. Reports 1952, p. 108, quoting Treaty of Peace between Great Britain and Persia, signed 4 Mar. 1957, Art. IX (“The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls, and Consular Agents, each shall be placed in the dominions of the other on the footing of the most-favoured nation; and that the treatment of their respective subjects, and their trade, shall also, *in every respect*, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation.”) (emphasis added) & Commercial Convention between the United Kingdom and Persia, signed 9 Feb. 1903, Art. II (“It is formally stipulated that British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy *in all respects*, the régime of the most-favoured nation.”) (emphasis added) (RL-45).

¹²⁶ *Ibid.*, p. 110 (emphasis added).

¹²⁷ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Individual Opinion of President McNair (22 Jul. 1952), I.C.J. Reports 1952, p. 122 (RL-46).

¹²⁸ *Plama v. Bulgaria*, para. 214 (emphasis added) (RL-70).

basic prerequisite for arbitration is an agreement of the parties to arbitrate and this agreement “should be clear and unambiguous.”¹²⁹ Accordingly, if such agreement is premised on an MFN clause, the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.¹³⁰

87. The tribunal stated that when concluding a “bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT).”¹³¹ As demonstrated above, the MFN clause of the BIT at issue here is not even generic; it applies MFN benefits only to the obligation to provide fair and equitable treatment.

88. The *Berschader* tribunal also followed “the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT *clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.*”¹³² The MFN clause under review in that case was again significantly broader than Article 3(2) of the Uruguay-Switzerland BIT. The Belgium-Russia BIT extended MFN treatment “to investors of the other Contracting Party in

¹²⁹ *Ibid.*, para. 198.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, para. 212.

¹³² *Berschader v. Russia*, para. 181 (emphasis added) (RL-81).

all matters covered by the present Treaty, and in particular in Articles 4, 5 and 6”.¹³³ Having analyzed the treaty text, the tribunal noted that “*the expression ‘all matters covered by the present Treaty’ certainly cannot be understood literally*. The MFN clause cannot be applied at all to several of the matters covered by the Treaty.”¹³⁴ The tribunal thus concluded that:

*[T]he expression ‘all matters covered by the present Treaty’ does not really mean that the MFN provisions extends to all matters covered by the Treaty. Therefore, the ‘ordinary meaning’ of that expression is of no assistance in the instant case, and the expression as such does not warrant the conclusion that the parties intended the MFN provision to extend to the dispute resolution clause.*¹³⁵

89. In arbitrations where the MFN clause has been interpreted as covering jurisdictional preconditions, the MFN provisions of the treaty at issue have been markedly broader than those of Article 3(2) of the Uruguay-Switzerland BIT. Unlike the MFN clause in this case, those provisions have granted MFN treatment in regard to “*all matters*” governed by the treaty. This difference in language is significant, as emphasized in *Maffezini v. Spain* and subsequent cases relying on *Maffezini*.

¹³³ Belgium-Russia BIT, signed 9 Feb. 1989, EIF 13 Oct. 1991, Art. 2, quoted in *ibid.*, para. 47 (emphasis added). The full text reads:

Each Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in Articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis

- of its participation in a customs union or other international economic organisations, or
- of an agreement to avoid double taxation and other taxation issues.

¹³⁴ *Berschader v. Russia*, para. 192 (emphasis added) (RL-81).

¹³⁵ *Ibid.*, para. 194 (emphasis added).

90. The *Maffezini* tribunal found that it had jurisdiction¹³⁶ on the basis of an MFN clause that granted most-favoured nation treatment “*in all matters subject to*” the Argentina-Spain BIT.¹³⁷ Notably, in order to distinguish the broad scope of the MFN clause interpreted in that case, the tribunal cited Spain’s treaty with Uruguay as a counter-example: “... of all the Spanish treaties it has been able to examine, the only one that speaks of ‘all matters subject to this Agreement’ in its most favored nation clause, is the one with Argentina. All other treaties, *including those with Uruguay and Chile*, omit this reference and merely provide that ‘this treatment’ shall be subject to the clause, *which is of course a narrower formulation.*”¹³⁸ Like the MFN clause in Uruguay’s treaty with Switzerland, the clause in the Uruguay-Spain treaty only referred to “this treatment,” without more. Thus, even the *Maffezini* tribunal distinguished between the broad MFN clause in the treaty that it was applying and the narrow MFN clause found in other treaties, including Uruguay’s, and it did nothing to suggest that the indisputably “narrower formulation” at issue here should be read to incorporate dispute resolution provisions.¹³⁹

¹³⁶ Article X(2) of the 1991 Argentina-Spain BIT applicable in that case requires the investor to first submit an investment dispute to the national courts of the host state. If no decision is rendered by the national courts within 18 months and the dispute still exists, then the investor is entitled to institute international arbitration proceedings against the host State. To avoid the application of this modified rule on the exhaustion of local remedies, the investor invoked the MFN clause of the basic treaty to rely on the dispute settlement clause of the Spain-Chile BIT that did not contain such requirement. *Maffezini v. Spain*, paras. 38-40 (RL-54).

¹³⁷ Under Art. IV.2 of the Argentina-Spain BIT, the application of the most-favored-nation benefit to fair and equitable treatment was expressly extended to “all matters subject to this Agreement.” The full provision states: “*In all matters subject to this Agreement*, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.” Quoted in *ibid.*, para. 38.

¹³⁸ *Maffezini v. Spain*, para. 60 (emphasis added) (RL-54).

¹³⁹ The seemingly broad language in the Argentina-Spain BIT has not, however, prevented severe criticism of the *Maffezini* decision. See, e.g., C. McLachlan, et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007), paras. 7.162 (“[I]t is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. It is submitted that

91. Cases following *Maffezini* took the same approach.¹⁴⁰ Most recently, in *Impregilo v. Argentina*, it was held that the “Arbitral Tribunal *must also attach special weight to the wording of the MFN clause*, which extends its scope to ‘*all other matters regulated by this Agreement.*”¹⁴¹ The majority of the *Impregilo* tribunal concluded that “[g]iven the breadth of this language, the clause must be considered to encompass dispute settlement provisions.”¹⁴² As noted, such an MFN clause was expressly distinguished by the *Wintershall* tribunal, which stressed that the MFN clause there at issue “*does not mention that the most-favoured-nation ‘treatment’ as to investments, and investment related activities, is to be in respect of ‘all relations’ or that it extends to ‘all aspects’ or covers ‘all matters in the treaty.*”¹⁴³ Likewise, as mentioned, the *Salini* tribunal also noted that the MFN clause in the Italy-Jordan BIT did not “envisage ‘all rights or all matters covered by the agreement.’”¹⁴⁴ Unlike the MFN clauses in *Maffezini* and *Impregilo* – but like the ones interpreted in *Wintershall* and *Salini* – the MFN

this is precisely the effect of the heretical decision of the Tribunal on objections to jurisdiction in *Maffezini v. Spain.*”) & 7.168 (“It is submitted that the reasoning of the Tribunal in *Plama* is to be strongly preferred over that in *Maffezini*. As the ICJ pointed out in *East Timor (Portugal v. Australia)*, the scope of application of a substantive obligation is an entirely separate question to the conferral of jurisdiction upon an international tribunal.”) (RL-41).

¹⁴⁰ See, e.g., *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 Jun. 2005) (Lowenfeld, Álvarez, Nikken) (hereafter “*Gas Natural SDG v. Argentina*”), paras. 41-49 (the applicable MFN clause referred to “all matters governed by this Treaty”) (RL-57); *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Jurisdiction (25 May 2006) (Sacerdoti, Brower, Siqueiros), para. 104 (the applicable MFN clause referred to “all matters” and the tribunal held that “excluding the 18-month requirement from the application of the MFN clause would not be justified in view of the explicit applicability of the clause to ‘all matters’ regulated by the BIT”) (emphasis added) (RL-77); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (11 May 2005) (Orrego Vicuña, Lalonde, Morelli Rico), paras. 120-121 (the applicable MFN clause referred to “all matters governed by the present Agreement”) (RL-50).

¹⁴¹ *Impregilo v. Argentina*, para. 103 (emphasis added) (RL-61).

¹⁴² *Ibid.*, para. 103.

¹⁴³ *Wintershall v. Argentina*, para. 162 (RL-82). Compare this to the MFN clause in *Maffezini*, which was interpreted to extend to all provisions in the treaty, including dispute resolution. *Maffezini v. Spain*, para. 64 (RL-54).

¹⁴⁴ *Salini v. Jordan*, para. 118 (RL-74).

clause in the Uruguay-Switzerland BIT does *not* apply to “all matters governed by the treaty.” Cases like *Maffezini* and *Impregilo*, therefore, have no application here, except to confirm that the MFN clause in Article 3(2) cannot be extended to dispute resolution.

92. Those cases, in any event, gave MFN benefits to the claimants on the basis of a dubious proposition: the assumption that prior resort to competent domestic courts is “less favorable treatment” than direct access to arbitration.¹⁴⁵ This appears to reflect a belief in the inherent (and universal) inferiority of recourse to domestic courts and the superiority of investment arbitration. Claimants here also make this assumption as the foundation of their claim to incorporate “more favorable” dispute settlement provisions from other treaties, so as to avoid recourse to Uruguay’s competent domestic courts.¹⁴⁶

93. Uruguay submits that this assumption is conceptually flawed, and certainly cannot be applied in the present case, taking into account that the Contracting Parties themselves specifically conditioned access to arbitration upon prior resort to domestic courts. There is no evidence or reason to believe that Uruguay and Switzerland considered this condition less favorable to the investors of either State than direct recourse to international arbitration. As distinguished commentators have pointed out: “Apart from considerations of fairness to the host

¹⁴⁵ See, e.g., *Maffezini v. Spain*, paras. 54-56 (RL-54); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004) (Sureda, Brower, Janeiro) (RL-76); *Gas Natural SDG. v. Argentina*, paras. 46-47 (RL-57).

¹⁴⁶ RFA, paras. 72 & 75.

State, there is also the point that in legal systems subject to the rule of law, local remedies will normally be more effective than international ones.”¹⁴⁷

94. Moreover, it is irrelevant whether an investor or a tribunal perceives direct access to arbitration as more favorable. The application of the *ejusdem generis* rule to an MFN clause does not depend upon the subjective perceptions of the relative value of treaty provisions that are attributed to investors as a general class. The *Telenor* tribunal’s observations on this point merit close attention:

Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to *apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.*¹⁴⁸

95. The attempt to bring dispute settlement provisions within the ambit of an MFN clause – under the guise of a more favorable “fair and equitable treatment” – was also rejected,

¹⁴⁷ This observation is equally applicable to the required pursuit of local remedies as it is to the required exhaustion of local remedies. J. Crawford & T.D. Grant, *Exhaustion of Local Remedies*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011), para. 7 (RL-37).

¹⁴⁸ *Telenor v. Hungary*, para. 95 (emphasis added) (RL-78). In a similar vein, scholarly commentary has noted: “[T]he balance struck in investment treaties between the various dispute settlement options is often the subject of careful negotiation between the State parties, selecting from a range of different techniques. It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State parties and in other circumstances.” McLachlan, et al. (2007), para. 7.168 (RL-41).

as in *Telenor*, by the arbitral tribunal in *Renta 4 v. Russia*.¹⁴⁹ In that case, the majority of the tribunal¹⁵⁰ noted that the subject-matter of the applicable MFN clause¹⁵¹ was limited only to fair and equitable treatment.¹⁵² It concluded that the MFN clause could not be read to incorporate dispute settlement provisions from other treaties, because its terms “restrict MFN treatment to the realm of FET as understood in international law.”¹⁵³ The majority held that the normative content of the *substantive* standard of “fair and equitable treatment” as applied in international law does not encompass the *procedural* issues of access to international arbitration:

Notwithstanding the existence of a BIT it may be the case that an investor has no other avenue for the enforcement of its rights except through the national courts of the host State. *There is no legal authority known to the present Tribunal in support of the proposition that this state of affairs would violate an FET undertaking in the treaty.* Instances of denial of justice by such courts may assuredly trigger the State's international responsibility. Yet that possibility *does not mean that access to international arbitration per se implies a higher level of FET.* The neutrality of an international tribunal may legitimately be said to enhance investor protection. Access to it may be more favourable than lack of access. *But that does not mean that failure to give access to such a tribunal is unfair or inequitable.*¹⁵⁴

¹⁴⁹ *Renta 4 v. Russia*, paras. 119-120 (RL-71).

¹⁵⁰ J. Paulsson (President) and T. Landau. Ch. Brower dissented. *Ibid.*

¹⁵¹ *See, i.e.*, Art. 5(2) of the Spain-USSR BIT, quoted in *ibid.*, para. 68 (emphasis added):

1. Each Party shall *guarantee fair and equitable treatment* within its territory for the investments made by investors of the other Party.
2. The *treatment referred to in paragraph 1 above* shall be no less favorable than that accorded by either Party in respect of investments made within its territory by investors of any third State.

¹⁵² *Renta 4 v. Russia*, para. 103 (RL-71).

¹⁵³ *Ibid.*, para. 119 (emphasis added).

¹⁵⁴ *Ibid.*, para. 106 (emphasis added).

96. The consequences of a contrary inference would be extraordinary. It would be “invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration.”¹⁵⁵ Here, the Contracting Parties have explicitly conditioned access to international arbitration upon a prior submission of the dispute to local dispute resolution. Had they considered this condition less than “fair and equitable” treatment, they, presumably, would not have included it in the first place.

97. For the reasons stated, international jurisprudence supports Uruguay’s interpretation that MFN clauses, especially narrow ones like Article 3(2) of the Uruguay-Switzerland BIT, do not apply to the dispute resolution provisions of the BIT, and do not nullify or otherwise affect jurisdictional preconditions for recourse to the international arbitration of disputes arising under the Treaty.

98. Accordingly, because Claimants have – as they admit – failed to fulfill the jurisdictional preconditions set forth in Article 10 of the Uruguay-Switzerland BIT, this Tribunal lacks jurisdiction in this matter.

B. Article 2 of the BIT Excludes Public Health Measures from the Scope of the Protections Afforded Investors

99. In addition to Claimants’ admitted failure to comply with the procedural preconditions to the seisen of this Tribunal, jurisdiction is also absent because Article 2 excludes the measures Claimants attack from the scope of the protections the BIT otherwise affords

¹⁵⁵ McLachlan, et al. (2007), para. 7.168 (RL-41).

investors. Thus, even if Claimants could get over the threshold requirement established by Article 10 (which they cannot), Article 2 shuts the door to their claims.

100. Article 2(1) states in relevant part:

The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.

101. This unusually strong language is, to Uruguay's knowledge, unique among BITs. Unlike the more commonly litigated "non-precluded measures" clauses (discussed below), Article 2(1) does not condition the Contracting States' right not to allow economic activities on grounds of necessity – or anything else, for that matter. Instead, the only constraint imposed on their right not to permit economic activities is that the measures in question be "for reasons of" public health, an issue about which there is no debate in this case. As explained below, this emphatic affirmation of Uruguay's and Switzerland's mutual sovereign rights to regulate in the interests of public health can only be understood as excluding such measures from the scope of the BIT and thus the jurisdiction of the Tribunal.

1. The Principle of Effectiveness Confirms that Public Health Measures Are Beyond the Scope of the BIT

102. The right to regulate in the public interest, including for reasons of public health, is an inherent attribute of State sovereignty. As such, it exists independent of Article 2 and constitutes a reason vitiating State liability. In *Chemtura v. Canada*, for instance, a United States manufacturer of the chemical lindane, a hazardous compound introduced during World War II as an insecticide on crops, brought an arbitration under the North American Free Trade Agreement ("NAFTA") complaining that Canada's prohibition on the use of lindane, following global

initiatives to restrict the chemical in recognition of its harmful effects on human health and the environment, breached the Treaty. The arbitral tribunal rejected the claim on several grounds, including the fact that Canada's ban on lindane constituted an appropriate exercise of its police powers to protect the public health. It stated:

[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.¹⁵⁶

103. The tribunal also noted "that it is not its task to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context" quoting with approval the claimant's acknowledgment that "the rule [sic: role] of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies."¹⁵⁷

104. In contrast to the Uruguay-Switzerland BIT, the NAFTA contains no public health exclusion analogous to Article 2 of the BIT.

105. In a similar vein, the arbitral tribunal in *LG&E v. Argentina* observed: "With respect to the power of the State to adopt its policies, it can generally be said that the State has

¹⁵⁶ *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 Aug. 2010) (Kaufmann-Kohler, Brower, Crawford), para. 266 (RL-53).

¹⁵⁷ *Ibid.*, para. 134.

the right to adopt measures having a social or general welfare purpose.”¹⁵⁸ The right to regulate in the public interest, including for reasons of public health, thus needs no affirmation in an investment treaty to render it applicable.

106. This fact has important implications for the interpretation of Article 2. It must be read as more than a bland restatement of pre-existing truth. To do otherwise would be to render it surplusage, in violation of the principle of effectiveness (*effet utile*).

107. In negotiating and concluding treaties, States are presumed to have included nothing which is illusory or purely nominal.¹⁵⁹ The *Cayuga Indians* case contains a classic statement of the rule. There, the United States argued that a provision in the Treaty of Ghent that required it to restore certain native tribes to their pre-war position was only “nominal” and was not intended to have any definite application. The arbitral tribunal disagreed, stating:

[W]e are asked to hold that the article was only a “nominal” provision, not intended to have any definite application. We cannot agree to such an interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do.¹⁶⁰

108. Article 2 must equally “be so interpreted as to give it a meaning rather than so as to deprive it of meaning.” The only plausible meaning that can be given to the language of this

¹⁵⁸ *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006) (de Maekelt, Rezek, van den Berg), para. 195 (RL-65).

¹⁵⁹ See, e.g., B. Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1956), p. 106 (RL-36).

¹⁶⁰ *Cayuga Indians (Great Britain) v. United States*, Award (22 Jan. 1926), R.I.A.A. Vol. VI, p. 184 (RL-51).

Article is that it was intended to exclude public health measures from the scope of the protections the BIT affords investors. That being the case, the Tribunal lacks jurisdiction over Claimants' claims.

a) Reading Article 2 in Context Confirms Uruguay's Interpretation

109. The “rights” language in Article 2(1) is contained in the provision’s second sentence. The prior sentence expresses the Parties’ reciprocal obligations to promote and admit investments. It provides: “Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its law.”¹⁶¹ By its plain terms, the obligation to “promote” and “admit” investments from the other Contracting State applies throughout the life-cycle of an investment, both before and during. The ordinary meaning of “admit,” as defined by Webster’s Dictionary, is “1. to allow to enter; grant or afford entrance to; 2. to give right or means of entrance to; 3. to permit to exercise a certain function or privilege.”¹⁶² Webster’s defines “promote” as “to help or encourage to exist or flourish.”¹⁶³

110. After stating the Contracting States’ obligations with respect to the promotion and admission of investments, Article 2 immediately and emphatically qualifies that obligation by affirming the Parties’ mutual recognition of their “right not to allow economic activities” for certain designated purposes. Logically, this structure can only mean that the Parties’ obligation

¹⁶¹ Uruguay-Switzerland BIT, Art. 2(1) (RL-21).

¹⁶² *Random House Webster's Unabridged Dictionary* (2nd ed. Oct. 1999), p. 26: “Admit” (R-9).

¹⁶³ *Ibid.*, p. 1548: “Promote”.

to promote and admit investments is made subject to and gives way in the face of each State's right to prohibit certain activities for the listed reasons. In other words, the Parties' right to regulate for reasons of public health trumps their obligations to promote and admit investments.

111. The location of Article 2 within the BIT as a whole similarly confirms that the Contracting Parties' right not to permit economic activities is a basic, structural limitation on the rights otherwise conferred upon investors. Article 1 of the BIT contains definitions of key terms: "investor," "investments," and "territory." Article 2 is the first substantive provision of the BIT, notably appearing immediately after the definitions but before the statement of rights afforded investors under Article 3 ("Protection and treatment of investment"), Article 4 ("Free transfer"), Article 5 ("Dispossession, compensation"), Article 6 ("Pre-agreement investments"), Article 7 ("More favourable provisions"), and Article 10 ("Disputes between a Contracting Party and an investor of the other Contracting Party"). This categorical affirmation and mutual recognition of the Contracting Parties' "right" not to permit economic activity for the purposes stated, coming as it does before any of the investors' rights are listed, must mean that the first enunciated right modifies the latter enunciated rights. In other words, the Contracting Parties' sovereign rights within the designated spheres supersede the individual rights of investors the Treaty elsewhere recognizes.

112. The jurisdictional nature of Article 2 likewise follows from reading it in conjunction with the provisions of Article 10. As discussed in the previous section of this Memorial, Article 10 provides that "[d]isputes with respect to investments within the meaning of the Agreement" may be brought to an arbitral tribunal, provided that the procedural preconditions stated therein are met. In order to invoke this dispute settlement provision and seise the Tribunal, Claimants must show that they have raised a "dispute with respect to

investments within the meaning of the Agreement.” This they cannot do in a case falling under Article 2, where the alleged dispute is over measures a Contracting State has taken for reasons of public health. Simply put, by affirming the Contracting Parties’ “right” to prohibit investors’ economic activities for reasons of public health, Article 2 precludes the existence of a “dispute” within the meaning of the BIT when a Contracting State has acted for such reasons. In those situations, the arbitral tribunal Article 10 contemplates can thus have no jurisdiction.

113. This conclusion finds additional support in the nature of the right to health in Uruguay. The Government of Uruguay not only has a *right* to take measures to protect public health; it has an affirmative Constitutional *duty* to do so. Under the Uruguayan Constitution, public health is a primordial right and supreme good (*bien supremo*), meaning that it is non-negotiable.¹⁶⁴ By virtue of these Constitutional guarantees, the State is mandated to protect public health and is entrusted with the regulation of all matters related to it.¹⁶⁵

114. The Constitutional priority given matters of public health is codified in the 1934 Organic Law of Public Health, which lays the statutory foundation for all public health regulations in Uruguay. The 1934 Organic Law reiterates the supremacy of public health, and provides the Ministry of Public Health with full authority to take *any* measures it deems

¹⁶⁴ See Uruguayan Supreme Court Decision No. 1713/2010 (10 Nov. 2010), p. 6 (“Public Health is an essential duty inherent to the State, and in cases such as legislation regarding smoking is a superior legal good that is part of the public order (Article 44 of the Constitution), such that it is natural that the said regulation should be entrusted to the Ministry of Public Health because, pursuant to the Organic Public Health Act, Law No. 9,202, it is responsible for adopting all measures it deems necessary to maintain the collective health, by issuing all the regulations and other provisions needed to achieve this primordial aim (Article 2) (cited on page 785).”) (RL-10).

¹⁶⁵ Constitution of the Oriental Republic of Uruguay (2004), Art. 44 (“The State shall legislate in all matters appertaining to public health and hygiene, to secure the physical, moral and social well-being of all the inhabitants of the country.”); Art. 46 (“The State will combat social vices, by means of the law and International Conventions.”); Art. 7 (“The inhabitants of the Republic have the right to protection in the enjoyment of their lives, liberty, security, employment and property. No one may be deprived of these rights except in accordance with laws established for reasons of public interest.”) (RL-1).

necessary to maintain the health of the population, and to control activities that harm or threaten to harm public health.¹⁶⁶ In contrast to other Ministries, the Ministry of Public Health needs no additional legal authorization to regulate matters under its authority.¹⁶⁷

115. The State's right/duty to regulate in the interest of public health thus occupies a unique place in the Uruguayan legal system. Indeed, as a *bien supremo*, public health matters are placed above other sovereign powers and obligations, and above other rights otherwise existing within the country.¹⁶⁸ Most other rights and duties, including those relating to economic activities, occupy a secondary plane, at least in comparison to the State's public health obligations.¹⁶⁹

116. It is against this background that Article 2 may best be understood. Because of the supreme duty Uruguay owes its people in matters of public health, it could not agree to

¹⁶⁶ Uruguayan Organic Law of Public Health No. 9,202 (20 Dec. 1934), Art. 2(1) ("Regarding Health, the Ministry of Public Health shall exercise the following authority: 1. The adoption of all measures deemed necessary to maintain collective health and their enforcement by its personnel, issuing all the regulations and provisions necessary for this primary objective. ... 9. Provide by all means the health education of the community.") & Art. 23 ("Taking preventive action in regards to prostitution, social vices in general, that decrease the capacity of individuals or threaten health, such as drug addicts, alcoholism, etc.") (RL-8).

¹⁶⁷ *Ibid.*; see also H. Cassinelli Muñoz, *Human Rights: § 61 - Uruguay*, in *"The Right to Health in the Americas"*, DERECHO CONSTITUCIONAL Y ADMINISTRATIVO: ESTUDIOS PUBLICADOS, COMPILADOS POR CARLOS SACCI (2010), pp. 866-867 (RL-35).

¹⁶⁸ See, e.g., Uruguayan Ministry of Public Health (MSP), Resolution of Administrative Opposition of Abal and Philip Morris Products S.A. regarding Ordinance 466 (28 Jan. 2010), para. VIII ("[T]he Constitution and legal Doctrine acknowledge the 'principle of protection,' which functions as a right that permits exercising other rights and resolving conflicts among equally acknowledged rights; in this case the right to the enjoyment of health should take priority, since it is given pre-eminence in the aforementioned international instruments, seeking to ensure the right to enjoy good health for the entire population, that necessarily must prevail over all commercial rights, industrial rights, or expression of thoughts on the part of the agents that market and industrialize tobacco, being indisputable that, according to our Constitution, all inhabitants are entitled to be protected in the enjoyment of their right to life, understood as the most precious good of a human being, and in the same respect, it is the State's constitutional obligation to look after the population's health in general.") (RL-9); Cassinelli Muñoz (2010), pp. 873-74 (RL-35).

¹⁶⁹ *Ibid.*

bestow rights on foreign investors that might conflict with this duty. Hence, it deliberately and expressly carved out from the BIT's protections to investors any actions it might need to take to restrict investors' economic rights for reasons of public health. Article 2 thus reflects Uruguay's longstanding, constitutionally-mandated policy of giving the right to public health priority over other rights, including economic ones. It expressly recognizes Uruguay's absolute right to restrict investors' economic rights for reasons of public health. It follows that investors may not "dispute" Uruguay's actions for reasons of public health, even if they restrict economic rights.

b) The Differences between Article 2 and Non-Precluded Measures Clauses in Other BITs Reinforce Article 2's Jurisdictional Nature

117. A comparison between Article 2 and the most closely analogous provisions of other BITs confirms that Article 2 excludes public health measures from the scope of the protections the Uruguay-Switzerland Treaty otherwise affords investors. The unqualified nature of the reservation of rights by the Contracting States in Article 2 is not found in other investment treaties.

118. Many investment treaties contain more familiar and more commonly litigated "non-precluded measures" provisions. These provisions, however, are significantly different from Article 2 and serve to demonstrate the latter's uniqueness and force. The Argentina-US BIT, for example, contains a paradigmatic non-precluded measures clause. Its Article XI states: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order"¹⁷⁰ The application *vel non* of such provisions has invariably been litigated on the merits; they have not been presented as a ground for precluding jurisdiction.

¹⁷⁰ Argentina-US BIT, Art. XI (RL-24).

They are, however, fundamentally different from Article 2 of the Uruguay-Switzerland BIT, and those differences underscore the jurisdictional nature of the Article 2 exclusion.

119. At the most obvious level, Article XI of the Argentina-US BIT occupies a different location in the scheme of the treaty than does Article 2 of the Uruguay-Switzerland BIT. The distinction is not merely numerical. As discussed above, Article 2 is the first substantive provision of the BIT here at issue. This placement strongly suggests that it is intended to limit the scope and application of the subsequent provisions. In contrast, Article XI of the Argentina-US BIT is embedded deep in the fabric of the treaty, *after* the enumeration of a variety of substantive rights afforded U.S. investors. It is therefore most natural to understand Article XI as a caveat or clarification to, not an intrinsic limitation upon, the rights protected by the BIT.

120. The language of the non-precluded measures clause in the Argentina-US BIT confirms this reading. The very use of the introductory phrase “[t]his Treaty shall not preclude the application by either Party of measures necessary” makes clear that the treaty very much applies. The contracting parties are simply making clear that nothing elsewhere in the treaty should be read to hinder necessary measures from being taken. Article 2 is very different. By recognizing their mutual unqualified right to prohibit economic activities for reasons of public health, Switzerland and Uruguay are most naturally understood to have intended to leave the exercise of that right, including any consideration of the manner in which such right was exercised, entirely outside the scope of the Treaty or its dispute resolution mechanisms.

121. There is a second, equally critical distinction between non-precluded measures clauses and Article 2. In particular, non-precluded measures clauses are often limited in their

application. That is, many apply, for example, only to measures that are “necessary” to the protection of a designated policy goal (*e.g.*, the maintenance of the public order).¹⁷¹

122. Article 2, in contrast, contains no such self-imposed limitation on the Contracting States’ discretion to exercise their protected sovereign rights to regulate in matters related to public health. It does not state that a State’s actions are limited by any requirement other than that they be done for reasons of public health (or another of the enumerated reasons).¹⁷² Since, as discussed in the next section, that limitation has indisputably been met here, the Tribunal does not have jurisdiction to review Uruguay’s exercise of its right in this case.

123. The uniqueness of Article 2 means that there is no jurisprudence directly on point. However, the ICJ’s reasoning in its Judgment on jurisdiction in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*¹⁷³ supports the conclusion that Article 2 operates as a jurisdictional bar.

124. In that case, Nicaragua attempted to ground jurisdiction on, *inter alia*, the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. Article XXI(1)(d) of the 1956 Treaty contained a non-precluded measures clause, which provided:

¹⁷¹ See, *e.g.*, *ibid.*; Canada-Egypt BIT, signed 13 Nov. 96, EIF 3 Nov. 1997, Art. XVII.3 (RL-26); Ecuador-US BIT, signed 27 Aug. 1993, EIF 11 May 1997, Art. IX.1 (RL-28).

¹⁷² See, *c.f.*, Canada-Czech Republic BIT, signed 6 Jun. 2009, Art. IX.1 (“*Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health ...*”) (emphasis added) (RL-25).

¹⁷³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment (27 Jun. 1986), I.C.J. Reports 1986, pp. 14-150 (RL-67).

The present treaty shall not preclude the application of measures ... necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.¹⁷⁴

125. The United States argued that because the acts at issue in the case were necessary to protect its essential security interests, this provision deprived the Court of jurisdiction under the 1956 Treaty.¹⁷⁵ The ICJ disagreed, finding that the provision afforded a defense on the merits, not a valid basis for objecting to jurisdiction. Its reasoning, however, is instructive and indicates that the opposite result is appropriate in this case. The Court stated:

[Article XXI] cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the "interpretation or application" of the Treaty lies within the Court's jurisdiction. Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such.¹⁷⁶

¹⁷⁴ *Ibid.*, para. 221.

¹⁷⁵ *Ibid.*, para. 222.

¹⁷⁶ *Ibid.*

126. The implication of the Court’s reasoning is clear: if Article XXI of the 1956 Treaty had employed language like that of the GATT and been obviously self-judging in nature, it would have given rise to a valid jurisdictional objection. That being the case, Article 2 of the BIT must also be deemed jurisdictional in character. Indeed, Article 2 of the BIT is worded more clearly and strongly than Article XXI of the GATT.¹⁷⁷ Article 2 does not require the adopting State to deem its measures “necessary” to achieve the intended policy aim. Nor does it contain any other conditions limiting the scope of the State’s discretion by, for example, requiring that the measures be “narrowly tailored,” subject to other provisions of the treaty, or the like. Article 2 requires nothing more than that the measures under consideration be taken “for reasons of” public health. As discussed in the following section, that is plainly the case here.

2. The Measures Claimants Challenge Were Taken for Reasons of Public Health

127. The three measures that Claimants attempt to challenge in this proceeding were indisputably taken by Uruguay for reasons of public health. They were taken against a background of persistent tobacco control efforts by the government, dating back to the 1970s,¹⁷⁸ which intensified in the 2000s, when the widespread and staggering impacts of tobacco consumption on public health finally gave rise to a global initiative to (1) educate the public

¹⁷⁷ The General Agreement on Tariffs and Trade (GATT) (Jul. 1986), Art. XXI: Security Exceptions, pp. 38-39 (“Nothing in this Agreement shall be construed ... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ...”) (RL-12).

¹⁷⁸ The Uruguayan National Tobacco Commission was created in 1966, by Decree No. 443/66. In the 1970s and 1980s, several decrees and laws were passed regulating tobacco sale and consumption, for example, Law No. 15,361 of 1982 required a label on cigarette packs warning consumers that smoking is bad for your health and prohibited sales to minors. (RL-5).

about the risks to life and health posed by cigarette smoking, and (2) legislate against marketing and promotional activities by tobacco companies that have the effect of masking these risks.

128. In 2005, for example, Uruguay prohibited tobacco companies from using words such as “light” and “mild” to describe their cigarettes because of the false impressions given to consumers that products so labeled were not damaging, or were less damaging, to their health.¹⁷⁹ Notwithstanding Uruguay’s educational and regulatory efforts, between 1998 and 2005, the percentage of smokers among the adult population remained steady at 32%.¹⁸⁰ Studies showed that tobacco consumption caused nearly 5,000 deaths per annum, as well as the widespread prevalence of diseases such as lung cancer, chronic bronchitis, emphysema, and various cardiovascular illnesses.¹⁸¹

129. Particularly alarming to Uruguay was the percentage of adolescents between 12 and 15 years of age who smoked: 23%, one of the highest rates in Latin America.¹⁸² Studies

¹⁷⁹ Decree No. 171 (2005) (Considering that “a comparison of the effectiveness of different health warnings on cigarette cartons revealed that there is a connection between these warnings and efforts to stop smoking, as well as the success of such efforts” and “that tobacco consumption causes significant harm to society, such that it is essential to adopt all the measures that will contribute to decreasing said consumption, precisely because of this general interest,” Article 1 banned tobacco packaging from carrying “expressions, terms, elements, brands or signs that may have the direct effect of creating a false impression, for example, ‘low in tar,’ ‘lights,’ ‘ultra-light,’ or ‘mild.’”) (RL-2).

¹⁸⁰ MSP, “National Tobacco Program in the Context of the New Government” (2005) (R-19); CIET, Publication No. 2 (2010), p. 4 (R-51); GATS, *Uruguay 2009*, 4.1: Tobacco Use (R-53).

¹⁸¹ MSP, “National Tobacco Program in the Context of the New Government” (2005) (R-19); MSP, *Guide to Smoking Cessation* (2009), p. 13 (R-36); GATS, *Uruguay 2009*, Executive Summary (R-53); Ramos & Curti (2006), pp. 3-4 (R-20).

¹⁸² *Second Global Survey on Smoking in Youth (EMTJ): Uruguay 2006* (Jul. 2007), pp. 4-5: Executive Summary (R-27).

show that adolescents are particularly vulnerable to marketing and promotional efforts by tobacco companies aimed at persuading non-smokers to begin smoking.¹⁸³

130. By the time Uruguay signed and ratified the Framework Convention on Tobacco Control, which had been promoted by the World Health Organization and has, to date, gained 174 States Parties, the Government considered the high rates of tobacco consumption among its population to constitute a public health crisis.¹⁸⁴ It was especially concerned about the marketing strategies tobacco companies were implementing to increase smoking rates and sales in developing countries like Uruguay in order to offset declining demand in more developed countries, where education levels were higher and governmental anti-smoking campaigns were more successful.¹⁸⁵ To better educate the public in Uruguay – including, especially, adolescents

¹⁸³ See CDC, *Preventing Tobacco Use Among Young People* (1994), pp. 6-9 (“The positive functions that many young people attribute to smoking are the same functions advanced in most cigarette advertising. Young people are a strategically important market for the tobacco industry. Since most smokers try their first cigarette before age 18, young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases.”), p. vi (“The onset of tobacco use occurs primarily in early adolescence, a developmental stage that is several decades removed from the death and disability that are associated with smoking and smokeless tobacco use in adulthood. Currently, very few people begin to use tobacco as adults ... The earlier young people begin using tobacco, the more heavily they are likely to use it as adults, and the longer potential time they have to be users.”) & p. 8 (“Among addictive behaviors, cigarette smoking is the one most likely to become established during adolescence. People who begin to smoke at an early age are more likely to develop severe levels of nicotine addiction than those who start at a later age.”) (R-6); WHO, *2008 Report*, p. 21 (“people who do not start smoking before age 21 are unlikely to ever begin”) (R-28); WHO, *2011 Report*, p. 20 (“people are most likely to begin to use tobacco as adolescents”) (R-56); M. Wakefield, et al., *The cigarette pack as image: new evidence from tobacco industry documents*, TOBACCO CONTROL, Vol. 11, Supp. 1 (2002), p. i77 (R-12); see also, *supra*, n. 21.

¹⁸⁴ See WHO FCTC Home Page (<http://www.who.int/fctc/en/>) (RL-14). See also, e.g., Decree No. 171 (2005) (“tobacco consumption causes significant harm to society, such that it is essential to adopt all the measures that will contribute to decreasing said consumption, precisely because of this general interest.”) (RL-2); MSP, “National Tobacco Program in the Context of the New Government” (2005) (“Tobacco dependence is an addictive disease which is a significant public health problem worldwide.”) (R-19).

¹⁸⁵ WHO, *2008 Report*, p. 16 (projecting that, by 2030, 80% of the more than eight million projected annual tobacco-related deaths will take place in developing countries) & p. 21 (“The global tobacco industry now exploits the developing world by using the same marketing and lobbying tactics perfected – and often outlawed – in the developed world. For example, in developing countries, the industry now targets women and teens to use tobacco while pressuring governments to block marketing restrictions and tax increases – the same tactics it has used for decades in developed countries.”) (R-28); A. Landman, “Philip Morris Pushing Smoking Hard in Foreign

– about the proven consequences of smoking, such as chemical addiction, debilitating diseases and premature death, in 2008 and 2009 the government adopted the three measures that Claimants now seek to challenge.¹⁸⁶

a) Ordinance 514

131. Two of the measures that Claimants would like to strike down are included in Ordinance 514, which was enacted by the Ministry of Public Health on 18 August 2008 and entered into force on 14 February 2009.¹⁸⁷ Claimants complain about Article 1, requiring all cigarette packages to include graphic pictograms illustrating the effects of smoking on human health, in addition to prescribed textual warnings, in order to better ensure that consumers are aware of those effects at the time they decide whether or not to make the purchase and later when they decide whether or not to smoke on a particular occasion. Claimants also seek to annul Article 3, which addresses the risk that consumers will be misled into thinking, for example by the use of different colors, that one presentation of the same brand of cigarettes is less unhealthy than another by requiring that each brand of cigarettes have a single presentation. Claimants cannot seriously question that Uruguay enacted these requirements for reasons of public health.

132. In discussing Ordinance 514 and its related regulations shortly after they went into effect, the Ministry of Public Health stated that these measures were adopted because “the

Countries,” *PR Watch* (8 Mar. 2010) (R-46); World Bank, *CURBING THE EPIDEMIC* (1999), p. 1, 14-17 (“by 2020, seven of every 10 people killed by smoking will be in low- and middle-income nations.”) (R-7); World Health Organization (WHO), “Trade, foreign policy, diplomacy and health: Tobacco” (“Tobacco companies have increased marketing activities in developing countries, where about 900 million smokers live, accounting for 70% of global consumption.”), available at <http://www.who.int/trade/glossary/story089/en/index.html#> (R-58).

¹⁸⁶ Ordinance No. 514 (2008) (RL-7); Decree No. 287 (2009) (RL-4).

¹⁸⁷ Ordinance No. 514 (2008) (RL-7).

Government is dedicated to minimizing the harm caused by tobacco use.”¹⁸⁸ The Ministry expressed concern resulting from national and international studies showing persistently high levels of smoking among young women, and high rates of lung cancer among all women, which necessitated greater outreach and public education.¹⁸⁹ As explained in this official statement, having previously banned the use of words like “light,” “ultra light,” or “mild” on cigarette packs because they mislead consumers into believing that certain cigarettes are less harmful than others, it was now necessary for Uruguay to take the next step and prohibit “advertising with emblems, colors, or references on tobacco products that induce consumers to believe that one type of cigarette is less harmful than another. ... because all of them produce the same adverse health effects.”¹⁹⁰

133. The public health reasons for these measures are just as clearly set forth in the Preamble of Ordinance 514, which states that the Minister of Public Health promulgated them because “it is the duty of the State to legislate in all matters regarding public health and hygiene, in order to achieve the physical, moral and social improvement of all residents of the country” and because of “what is established in Article 44 of the Constitution of the Republic, Organic Law of Public Health No. 9,202 of 12 January 1934, the World Health Organization Framework Convention on Tobacco Control, ratified by Law No. 17,793 of 16 July 2004, Law No. 18,256 of 6 March 2008, and Decree No. 284/008 of 9 June 2008.”¹⁹¹

¹⁸⁸ Uruguayan Ministry of Public Health (MSP), *Preventing Tobacco Use: Uruguay Leads the World in the Fight Against Diseases Caused by Smoking* (26 Feb. 2009) (R-35).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Ordinance No. 514 (2008) (RL-7).

134. In any event, the public health reasons for the measures are evident from the measures themselves. Article 1 of Ordinance 514 required one of five approved pictograms illustrating harms to human health proven to be caused by smoking to be displayed on 50% of each face of a cigarette package.¹⁹² This regulation was promulgated pursuant to Law No. 18,256, enacted on 6 March 2008, the stated objective of which is “to protect the inhabitants of [Uruguay] from the devastating health ... consequences of tobacco consumption and exposure to second-hand smoke.”¹⁹³ To this end, Article 9 of Law 18,256 provides:

All packets and packages of tobacco products, and all external packaging and labeling of such products, must include health warnings and images or pictograms describing the harmful effects of the consumption of tobacco or other appropriate messages. These warnings and messages must be approved by the Ministry of Public Health, must be clear, visible and legible, and must occupy at least 50% (fifty percent) of the total principal display surfaces. These warnings should be changed periodically as established by regulation.

135. When Law 18,256 and Ordinance 514 were enacted in 2008, Uruguay was well aware of the many international studies establishing that graphic warnings of the health risks of smoking are more effective than text-only warnings in increasing knowledge of the risks of tobacco use, conveying the severity of those risks, and discouraging initiation of smoking by non-smokers – especially adolescents and poorly educated people, who generally respond to, or

¹⁹² *Ibid.* Article 1 reads: “The pictograms to be displayed on tobacco product packs are hereby defined as five (5) images combined with five (5) statements, to be printed respectively on the lower half (50%) of each main display area on all cigarette packs and generally on all packs and containers of tobacco products...in the order and in the manner shown in the Annex attached hereto, which is made a part hereof. The same number of each type of pack shall be printed for each brand existing in the market.”

¹⁹³ Law No. 18,256 (2008), Art. 2 (RL-6).

understand, pictures better than written text.¹⁹⁴ In particular, Uruguay was aware of the successful use of pictograms on cigarette packages developed by Canada,¹⁹⁵ Brazil¹⁹⁶ and Singapore.¹⁹⁷ These studies show that pictograms are more likely to be noticed, communicate risks effectively, provoke thought about those risks, and remain salient over time.¹⁹⁸

¹⁹⁴ See, e.g., J.P. Liefeld, *The relative importance of the size, content and pictures on cigarette package warning messages* (15 Sep. 1999), Summary of Findings (“4. Pictures with warning messages were, on average, approximately 60 times more encouraging to stop / not start smoking than messages without pictures.”) & pp. 28-29, 32-33 (R-8); D. Hammond, et al., *Impact of the graphic Canadian warning labels on adult smoking behaviour*, TOBACCO CONTROL, Vol. 12, No. 4 (2003), p. 395 (finding that “graphic warnings labels are a salient means of communicating health risk information and may serve as an effective smoking cessation intervention.”) (R-17); M. O’Hegarty, et al., *Reactions of Young Adult Smokers to Warning Labels on Cigarette Packs*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE, Vol. 30, No. 6 (2006), p. 467 (“Both current and former smokers thought that cigarette warning labels with text plus graphics were substantially more of a deterrent than text-only labels. The perceived effectiveness of these labels was not only higher overall, but also for the specific areas of smoking-related health effects, prevention, cessation, and maintenance of abstinence.”) & pp. 469-71 (R-21); D. Hammond, et al., *Effectiveness of cigarette warning labels in informing smokers about the risks of smoking: findings from the International Tobacco Control (ITC) Four Country Survey*, TOBACCO CONTROL, Vol. 15, Supp. III (2006), pp. iii19 & iii24 (R-22); M. Siahpush, et al., *Socioeconomic and country variations in knowledge of health risks of tobacco smoking and toxic constituents of smoke: results from the 2002 International Tobacco Control (ITC) Four Country Survey*, TOBACCO CONTROL, Vol. 15, Supp. III (2006), p. iii69 (R-23); D. Hammond, et al., *Text and Graphic Warnings on Cigarette Packages: Findings from the International Tobacco Control Four Country Study*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE, Vol. 32, No. 3 (Mar. 2007), p. 207 (R-25); D. Hammond, *Health warnings on tobacco packages: Summary of evidence and legal challenges* (Jan. 2008), p. 1 (“Pictorial health warnings are especially important for reaching low-literacy smokers and children. Messages that depict health risks in a vivid and emotionally arousing manner are most effective.” (emphasis in original)) & pp. 3-12 (R-29); V. White, et al., *Do graphic health warning labels have an impact on adolescents’ smoking-related beliefs and behaviours?*, ADDICTION, Vol. 103, No. 9 (Sep. 2008), pp. 1562 & 1567-68 (finding that “the introduction of the graphic health warning labels led to an increase in the frequency of students attending to, and thinking and talking about them ... among both experimental and established smokers, suggesting that graphic health warnings influence students currently in the process of taking up smoking as well as established smokers. In addition, the introduction of graphic warning labels increased the frequency of experimental and established smokers thinking about quitting and forgoing cigarettes.”) (R-30).

¹⁹⁵ After Canada introduced large pictorial warning labels in 2000, 91% of smokers surveyed said they had read the warnings and were able to demonstrate a strong knowledge of the subjects the warnings covered. Smokers who had read and discussed the warnings were more likely to have quit or made quit attempts at the 3-month follow-up. Hammond, et al., *Impact of the graphic Canadian warning labels on adult smoking behaviour* (2003), pp. 391-95 (R-17).

¹⁹⁶ After Brazil introduced new pictorial warnings in 2002, 67% of smokers – and 73% of low-income smokers – said that the new warnings made them want to quit. See T.M. Cavalcante, National Cancer Institute, Health Ministry of Brazil, *Labelling and Packaging in Brazil*, published by the WHO (2003), p. 12 (R-14).

¹⁹⁷ Two years after Singapore introduced pictorial warning labels in 2004, a Health Promotion Board survey found that 71% of smokers reported knowing more about the health effects of smoking, more than one quarter (28%) said they consumed fewer cigarettes as a result of the warnings, and one out of six said they avoided smoking in front of children. Health Promotion Board of Singapore, “Graphic health warnings on tobacco packaging inspire smokers to

136. At the time Uruguay first required pictograms on cigarette packages, at least 15 other States had similar requirements.¹⁹⁹ That number has now surpassed 40, including Switzerland, the State of Claimants' nationality.²⁰⁰ Several other States, including the United States, will require graphic warnings on cigarette packages beginning in 2012.²⁰¹

137. Claimants may not like, or agree with, Uruguay's requirement that graphic warnings be included on cigarette packages. But they have no plausible argument that the measure was adopted for reasons other than protecting public health. To characterize the required pictograms as "highly shocking images that are designed to invoke emotions of repulsion and disgust, even horror" does not change this fact.²⁰² Even if, *quod non*, Uruguay's pictograms were more "shocking" than those of other States, all that matters, for purposes of

quit the habit" (2006), cited in World Health Organization (WHO), *Fact Sheet: Western Pacific Region (R-31) & Campaign for Tobacco-Free Kids (CTFK), Warning Labels: Countering Industry Arguments* (Feb. 2011), p. 3, n. 2 (R-57).

¹⁹⁸ See *supra*, nn. 194-197. Moreover, after Australia introduced pictorial warning labels in 2006: 63% of non-smokers and 54% of ex-smokers thought the new labels "would help prevent people from taking up smoking"; 22% of non-smokers and 35% of ex-smokers indicated that the new labels kept them from smoking; and the new labels made 57% of smokers think about quitting, helped 36% of smokers smoke less, helped 34% of smokers try to quit, and helped 55% of recent quitters remain abstinent. P. Shanahan & D. Elliott for the Department of Health and Ageing of the Australian Government, *Evaluation of the Effectiveness of the Graphic Health Warnings on Tobacco Product Packaging 2008* (2009), p. 17-19 (R-33).

¹⁹⁹ In addition to Uruguay, these countries included: Australia, Belgium, Brazil, Canada, Chile, Egypt, Hong Kong, Jordan, New Zealand, Panama, Romania, Singapore, Thailand, and Venezuela. *Cigarette Package Health Warnings: International Status Report* (2010), p. 3 (R-50); see also Tobacco Labelling Resource Centre, "Health Warning Images" by Country, available at <http://www.tobaccolabels.ca/healthwarningimages>.

²⁰⁰ The additional countries are as follows: Bolivia, Brunei, the Cayman Islands, Colombia, the Cook Islands, Djibouti, France, Guernsey, Honduras, India, Iran, Latvia, Malaysia, Malta, Mauritius, Mexico, Mongolia, Norway, Pakistan, Peru, Spain, Switzerland, Taiwan, Turkey, and the United Kingdom. See *ibid*.

²⁰¹ U.S. FDA, *Final Rule* (2011), pp. 36629 & 36631 ("FDA also explained that larger, graphic warnings communicate the health risks of smoking more effectively. The preamble to the proposed rule presented extensive evidence from other countries' experiences with graphic warnings ...") (R-63); U.S. Food and Drug Administration (FDA), "Tobacco Products: Cigarette Health Warnings" (2 Sep. 2011) ("The introduction of these warnings is expected to have a significant public health impact by decreasing the number of smokers, resulting in lives saved, increased life expectancy, and lower medical costs.") (R-66).

²⁰² RFA, para. 41.

Article 2 of the Uruguay-Switzerland BIT, is that they were imposed for reasons of public health. That is undeniable. In any event, for the record, Uruguay’s graphic warnings are well within the international norm – having been selected largely from the approved Mercosur database of tobacco warning pictograms²⁰³ – and are notably less “shocking” than those required by Switzerland, Malaysia, Brazil, and other States.²⁰⁴

138. The other measure in Ordinance 514 criticized by Claimants is the requirement in Article 3 that:

Each brand of tobacco products shall have a single presentation, such that it is forbidden to use terms, descriptive elements, commercial or factory trademarks, representational signs or any other type of signs, such as colors or combinations of colors, numbers or letters, which may have the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another.

139. The public health reasons for this regulation were stated by the Ministry of Public Health, as cited in paragraph 132 above, when it described the Ordinance in an official Press Release shortly after it went into effect. Further, as stated in the Preamble, the regulation was issued “in accordance with ... the Government’s duty to legislate all public health issues, thus seeking the physical, moral and social improvement of all citizens,” and, more specifically, in accordance with “Article 8 of Law 18,256 [which] prohibits the use of terms, descriptive elements, commercial or factory trademarks, representational signs or any other type of signs that may have the direct or indirect effect of creating the false impression that a certain tobacco

²⁰³ See Mercosur Inter-governmental Commission for Tobacco Control, Warning Label Database, *available at* <http://www.cictmercosur.org/esp/galeria.php>.

²⁰⁴ Examples of Graphic Pictograms on Cigarette Warning Labels from Switzerland, Malaysia, and Brazil, *available at* <http://www.tobaccolabels.ca/healthwarningimages> and provided as R-68.

product is less harmful than another.”²⁰⁵ The text of the regulation fulfills this public health objective by prohibiting the practice of selling a single tobacco brand in multiple forms – each with different descriptive features, figurative signs or colors – which have the effect of giving consumers the “false impression that a certain tobacco product is less harmful than another.”²⁰⁶

140. At the time Uruguay enacted this regulation, it was aware of studies showing that consumers are in fact misled by the use of such “descriptors” on cigarette packages and in cigarette advertising.²⁰⁷ In particular, these studies showed that significant percentages of smokers and non-smokers believe that smoking cigarettes labeled or advertised as a “light” or “ultra light” version of a popular brand (e.g. “Marlboro Light” as compared to “Marlboro”) is less unhealthy for them, even though this is false.²⁰⁸ Studies also show that consumers are also misled by the tobacco companies’ use of different colors to distinguish between different versions of the same brand (e.g. “Marlboro Gold” or “Marlboro Silver” as compared to “Marlboro Red”), with substantial percentages of both smokers and non-smokers believing that lighter colors like gold and silver (which were used to distinguish Marlboro “Light” and Marlboro “Ultra Light” cigarettes from regular Marlboros) themselves indicate that the product

²⁰⁵ Ordinance No. 514 (2008) (RL-7).

²⁰⁶ *Ibid.*

²⁰⁷ For instance, an ITC survey conducted in 2002 across four countries showed that a majority of smokers surveyed in each country except Canada continued to believe that light cigarettes offer some health benefit compared to regular cigarettes (Canada 43%, U.S. 51%, Australia 55%, U.K. 70%). R. Borland, et al., *Use of and beliefs about light cigarettes in four countries: Findings from the International Tobacco Control Policy Evaluation Survey*, NICOTINE AND TOBACCO RESEARCH, Vol. 6, No. 00 (2004), p. 1 (R-18); *see also*, WHO Scientific Advisory Committee on Tobacco Product Regulation (SACTob), *Conclusions on Health Claims Derived from ISO/FTC Method to Measures Cigarette Yield* (2002) (hereafter “WHO SACTob, *Conclusions on Health Claims* (2002)”), p. 2 (“many smokers currently believe that lower yield or light cigarettes deliver less tar, produce lower rates of disease and are therefore ‘safer’ ...”) (R-13); Wakefield (2002), p. i73 (“Many smokers are misled by pack design into thinking that cigarettes may be ‘safer’.”) & pp. i76 & i78 (R-12); R.W. Pollay & T. Dewhirst, *A Premiere example of the illusion of harm reduction cigarettes in the 1990s*, TOBACCO CONTROL, Vol. 12, No. 3 (2003) (R-16).

²⁰⁸ *Ibid.*

is less unhealthy.²⁰⁹ It was to dispel these false and dangerous impressions about the relative safety of “lighter” or “lighter colored” versions of the same brand that Article 3 of Ordinance 514 was adopted.

141. The tobacco industry’s practice of offering multiple presentations of a single brand of cigarettes was analyzed by a United States federal court in *United States v. Philip Morris*.²¹⁰ That case focused on the tobacco companies’ introduction and sale of “light” and “low tar” versions of popular brands after it became widely known in the 1970s that cigarette smoking causes lung cancer, causing the companies to fear a decline in sales.²¹¹ According to the findings of the U.S. court, the tobacco companies knew that the risks of lung cancer, other debilitating diseases and premature death were just as high for smokers of “light” and “low tar” cigarettes as for smokers of “regulars,” they nevertheless promoted and marketed their new

²⁰⁹ For example, a study of 8,243 smokers from Canada, the U.S., the U.K. and Australia in 2006 found that “[s]mokers of ‘gold’, ‘silver’, ‘blue’ or ‘purple’ brands were more likely to believe that their ‘own brand might be a little less harmful’ compared to smokers of ‘red’ or ‘black’ brands” and concluded:

Despite current prohibitions on the words “light” and “mild”, smokers in western countries continue to falsely believe that some cigarette brands may be less harmful than others. These beliefs are associated with descriptive words and elements of package design that have yet to be prohibited, including the names of colours ...

S. Mutti, D. Hammond, et al., *Beyond light and mild: cigarette brand descriptors and perceptions of risk in the International Tobacco Control (ITC) Four Country Survey*, ADDICTION, Vol. 106, No. 6 (Jun. 2011), p. 1166 (R-62). See also D. Hammond & C. Parkinson, *The impact of cigarette package design on perceptions of risk*, JOURNAL OF PUBLIC HEALTH, Vol. 31, No. 3 (27 Jul. 2009), pp. 345–53 (reporting that respondents rated packages with lighter colors and a picture of a filter as significantly more likely to taste smooth, deliver less tar, and present lower risk) (R-39); D. Hammond, et al., *Cigarette pack design and perceptions of risk among UK adults and youth*, EUROPEAN JOURNAL OF PUBLIC HEALTH, Vol. 19, No. 6 (2009), pp. 631-37 (finding that, compared with Marlboro packs with a red logo, Marlboro packs with a gold logo were rated as presenting lower health risks by 53% and easier to quit by 31% of adult smokers) (R-40); Wakefield (2002), p. i76 (R-12); Campaign for Tobacco-Free Kids (CTFK), *How the Tobacco Industry Circumvents Bans on the Use of Misleading Terms: Country Examples* (Aug. 2011) (R-65).

²¹⁰ Key excerpts of the 1,700+ page judgment are provided in Tobacco Control Legal Consortium, *The Verdict Is In: Findings from United States v. Philip Morris, Light Cigarettes* (2006) (RL-79).

²¹¹ *Ibid.*, p. 1.

products as healthier than the regular versions of the same products: “By engaging in this deception, [the tobacco companies, including Philip Morris] dramatically increased their sales of low tar/light cigarettes, assuaged the fears of smokers about the health risks of smoking, and sustained corporate revenues in the face of mounting evidence about the health effects of smoking”²¹² The Court sanctioned the cigarette companies, including Philip Morris’ U.S. entity, for their active deception of the American public, and the deceptive “light” descriptors remain banned.

142. Certain cigarettes were originally called “light” because they deliver less tar than other cigarettes when tested by a smoking machine.²¹³ When smoked by human consumers, however, they deliver no less tar or nicotine.²¹⁴ Smokers compensate by smoking “light” cigarettes more intensely – they typically puff longer, harder and more frequently to obtain their desired dose of nicotine.²¹⁵ As a result, scientific evidence and internal documents from tobacco

²¹² *Ibid.*, p. 8.

²¹³ The smoking machine is referred to as “ISO” internationally and “FTC” in the United States. *Monograph 13* (2001), pp. 13-35 (R-11).

²¹⁴ *Ibid.*, pp. 13-35, 39-60, 166 & 199.

²¹⁵ *Ibid.* As a 1974 internal document from Philip Morris put it, “People do not smoke like the machine. People smoke cigarettes differently. ... Generally people smoke in such a way that they get much more than predicted by machine.” Philip Morris Internal Document, *Some Unexpected Observations on Tar and Nicotine and Smoker Behavior* (1 Mar. 1974), Chart 16, Bates No. 0000260379 (R-1). See also WHO SACTob, *Conclusions on Health Claims* (2002), p. 1:

The ISO/FTC protocols were never designed to accommodate the variations in human smoking habits as opposed to the standard machine smoking methods. It is now clear that the combination of compensatory changes in smoking patterns by smokers and cigarette design changes (particularly ventilation holes in filters) which increase the yield of smoke can restore the smoke delivery of the so-called low-yield cigarettes to that of full flavour cigarettes with much higher machine measured yields. However, as a consequence of the conventional format for conveying tar and nicotine information, the consumer believes that the “low yield” cigarettes provide an alternative to smoking cessation. This belief persists even though it is now accepted that “low yield” cigarettes do not offer any proven health benefit in comparison to higher yield cigarettes.

companies have shown that there is no evidence of health benefits from “light” cigarettes.²¹⁶ As highlighted by the WHO Scientific Advisory Committee on Tobacco Product Regulation, “light” cigarettes have no health benefit, and any indications that cigarettes are “light” are misleading and should be banned.²¹⁷

143. That is exactly what more than 70 States – including Uruguay, the United Kingdom, Italy, Australia and the United States – proceeded to do. For reasons of public health, they banned the sale of tobacco products labeled as “light,” “low tar,” “mild,” or with other similarly misleading descriptors.²¹⁸ Uruguay first enacted this ban in 2005, in Decree 171/005.²¹⁹ Nevertheless, the false impressions generated by years of tobacco company

(Citations omitted) (R-13). Because of this compensatory behavior, smokers may inhale two to three times the amount of tar and nicotine from the same cigarette that produces lower numbers when tested by a machine. *Monograph 13* (2001), p. 166 (R-11).

²¹⁶ The National Cancer Institute of the U.S. Department of Health and Human Services has authored the most comprehensive and conclusive report showing that there is no health benefit to smoking light and low-tar cigarettes. The report establishes that smoking light cigarettes presents similar risks of lung cancer, heart attacks, and other tobacco-related diseases. *Monograph 13* (2001), pp. 65-158 (R-11); *see also The Verdict is In* (2006), p. 8:

Despite [the] knowledge [that there is no clear health benefit from smoking low tar/low nicotine cigarettes], Defendants extensively – and successfully – marketed and promoted their low tar/light cigarettes as less harmful alternatives to full-flavor cigarettes. Moreover, Defendants opposed any changes in the FTC Method which would more accurately reflect the effects of compensation on the actual tar and nicotine received by smokers, denied that they were making any health claims for their low tar/light cigarettes, and claimed that their marketing for these cigarettes was based on smokers’ preference for a “lighter,” “cleaner” taste.

(RL-79).

²¹⁷ WHO SACTob, *Conclusions on Health Claims* (2002), p. 4 (R-13).

²¹⁸ CTFK, *How the Tobacco Industry Circumvents Bans on the Use of Misleading Terms* (2011) (R-65); *see also* WHO, *2011 Report*, pp. 120-131, tables 2.2.1-2.2.6 (“Additional characteristics of health warning labels on cigarette packages” in particular regions), column entitled “Ban on Deceitful Terms” (R-56).

²¹⁹ Decree No. 171 (2005) (RL-2).

advertising persisted. According to the Global Adult Tobacco Survey (GATS),²²⁰ as late as 2009, at least one in four Uruguayan adults was unaware that smoking “light,” “ultralight” or mentholated cigarettes is as harmful to health as smoking regular cigarettes.²²¹

144. The tobacco industry fought the efforts by States to ban the use of these descriptors in many States where bans were enacted (and some other States where they succeeded in preventing enactment).²²² In response to bans on the use of *words* like “light,” “ultralight,” and “mild,” the companies pursued a deliberate policy of continuing to use the same *colors* that were linked in consumers’ minds to “healthier” cigarettes, especially colors like gold (identified with “light” cigarettes), silver (identified with “ultralights”), and blue (identified with “milds”).²²³ In Philip Morris’ case, “Marlboro Lights” became “Marlboro Gold”; “Ultra Lights” became “Marlboro Silver”; and “Milds” became “Marlboro Blue.”²²⁴ As an internal Philip Morris document explains: “lower delivery [of nicotine and tar] products tend to be featured in

²²⁰ The Global Adult Tobacco Survey (GATS) uses a global standardized methodology for systematically monitoring adult tobacco use. GATS is one of the surveys devised by the Global Tobacco Surveillance System (GTSS) – an initiative of the WHO, the CDC and other partners – for the collection of data. The GTSS was set up to assist States in establishing tobacco control surveillance and monitoring programs.

²²¹ GATS, *Fact Sheet: Uruguay 2009* (R-44).

²²² See, e.g., Physicians for Smoke-Free Canada, *Packaging Phoney Intellectual Property Claims: How multinational companies colluded to use trade and intellectual property arguments they knew were phoney to oppose plain packaging and larger health warnings* (Jun. 2009), pp. 34-36 (R-38).

²²³ CTFK, *How the Tobacco Industry Circumvents Bans on the Use of Misleading Terms* (2011) (R-65); Mutti, Hammond, et al. (2011), pp. 1166–1175 (R-62); Hammond & Parkinson (2009), pp. 345–53 (R-39).

²²⁴ Wilson (2010) (R-45); Example of New Color-Coded Packaging Flyer Given to Retailers in South Carolina by Philip Morris USA (2010) (R-42).

blue packs. Indeed, as one moves down the delivery sector, then the closer to white a pack tends to become. This is because white is generally held to convey a clean healthy association.”²²⁵

145. As Philip Morris predicted, consumers *do* associate lighter colors on cigarette packages with healthier products.²²⁶ A United Kingdom study, for example, found that, compared with Marlboro packs with a red logo, Marlboro sub-brands with a gold logo were rated as a lower health risk by 53% of adult smokers. For the same “reason,” a quarter of youths stated that they would favor these lighter-colored sub-brands if they were to take up smoking.²²⁷ Based on these and similar results from other studies, public health experts, including the WHO, have concluded that sales bans should include not only terms like “light” and “mild” but also colors, names, trademarks, imagery, numbers, and other means used by the tobacco companies to convey the impression that one cigarette product is healthier than another.²²⁸

²²⁵ See J.F. Thrasher, et al., *The alchemy of Marlboro: transforming “light” into “gold” in Mexico*, TOBACCO CONTROL, Vol. 19 (2010), pp. 342-43 (R-43).

²²⁶ See, e.g., Wakefield (2002), p. i76:

Companies discovered that lighter colours on the pack appeared to promote perceptions of lower cigarette strength. ... The colour blue is often associated with low tar cigarettes. For example, results of a mall intercept survey of smokers’ responses to new packaging for Marlboro Ultra Lights found that both Marlboro and other brand smokers “felt that both the red and blue Marlboro Ultra Lights packs were lower in tar and milder in taste than the majority of other brands, although the blue pack was reported to be somewhat lower in tar and milder in taste than the red pack”.

(R-12). See also *supra*, n. 209.

²²⁷ Hammond, et al., *Cigarette pack design and perceptions of risk among UK adults and youth* (2009), p. 633 (R-40).

²²⁸ See, e.g., WHO SACTob, *Conclusions on Health Claims* (2002), p. 4 (“The ban should include not only misleading terms and claims but also, names, trademarks, imagery and other means to conveying the impression that the product provides a health benefit.”) (R-13); Hammond & Parkinson (2009), p. 351 (“In addition to broadening the list of prohibited words on packs, the removal of color and other design elements – so-called ‘plain packaging’ – may also be required to eliminate misleading information from packaging.”) (R-39); Mutti, Hammond, et al. (2011), p. 9 (R-62); Campaign for Tobacco-Free Kids (CTFK), *“Light” and “Low Tar” Cigarettes: Major scientific findings and public health statements* (Apr. 2010) (R-48).

146. In this context, Uruguay enacted Law 18,256 in 2008, which reiterated the prohibition on deceptive terms like “light,” “ultralight,” and “mild,” but also prohibited the use of descriptive elements, trade or commercial marks, and figurative signs of other kinds, such as colors, combinations of colors, numbers or letters that have the direct or indirect effect of creating a false impression that one tobacco product is less harmful than another.²²⁹ Article 3 of Ordinance 514 implements this law. There can be no doubt that it was adopted for reasons of public health.

b) Decree 287/009

147. The third measure that Claimants seek to challenge in this proceeding is the requirement, set forth in Decree 287/009, enacted in June 2009, that the size of mandatory health warnings on tobacco products be increased from 50% to 80% of the front and back of each pack.²³⁰ As set forth in Article 1 of the Decree: “It is ordered that the health warnings to be used on tobacco product packages, that include images and/or pictograms and messages, shall cover 80% (eighty per cent) of the lower part of each of the main sides of every cigarette package....”²³¹

148. Like Ordinance 514, the public health reasons for the adoption of Decree 287/009 are evident. In publicly announcing the new Decree on 1 June 2009, shortly before it was enacted, the Minister of Public Health emphasized the importance of continuing to make the public more conscious of the “harmful effects” of tobacco consumption on human health,

²²⁹ Law No. 18,256 (2008), Art. 8 (RL-6).

²³⁰ Decree No. 287 (2009), Art. 1 (RL-4).

²³¹ *Ibid.*

“fundamentally due to its close association with lung cancer.”²³² The Minister explained that tobacco consumption has produced a “pandemic,” principally “in underdeveloped nations, where the [tobacco] industry has allocated and directed its greatest efforts to persuading people to use this product that is so harmful to families and, moreover, that is being used more frequently by women and by the sectors with the lowest income.”²³³ The Minister continued: “That is why it is to them that we are going to direct a more intense campaign. Through cigarette packs, the President has just signed a Decree increasing the warning of the harmful effects [smoking] produces to 80% of the size of the pack, as well as through publicity campaigns devoted to these issues.”²³⁴

149. The Preamble to the Decree cites the same public health justification as the Preamble to Ordinance 514: “the duty of the State to legislate in all matters related to public health and hygiene, to achieve the physical, moral and social betterment of all the inhabitants of the country.”²³⁵ The Preamble to the Decree likewise invokes Article 11 of the WHO Framework Convention on Tobacco Control, which requires Parties to adopt:

effective measures to ensure that ... (b) each unit 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: ... (iii) shall be large, clear, visible and legible, (iv) should be 50% or more of the principal display areas ...²³⁶

²³² Uruguayan Ministry of Public Health (MSP), *Commitment to the Health of the Population: Strengthening the Anti-Tobacco Campaign* (1 Jun. 2009) (R-37).

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ Decree No. 287 (2009) (RL-4), referencing Art. 44 of the Uruguayan Constitution.

²³⁶ WHO FCTC (RL-20).

150. In November 2008, the States Parties to the Framework Convention, assembled at the third Conference of the Parties in Durban, South Africa, unanimously adopted the following Guideline for the implementation of Article 11 of the Convention:

Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover *as much of the principal display areas as possible*.²³⁷

151. The Guidelines for Article 11 reflect the fact that the States Parties to the Framework Convention unanimously agree that, when it comes to graphic health warnings on cigarette packs, size matters: the bigger the better. Various studies have confirmed this. For both adults and adolescents the largest warnings are the most effective, because viewers are more likely to recall larger warnings and to equate the size of the warning with the size of the risk.²³⁸

²³⁷ *FCTC Article 11 Guidelines* (2008), para. 12 (emphasis added) (RL-13).

²³⁸ *See, e.g., ibid.* (“Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible.”); Pan American Health Organization (PAHO) & World Health Organization (WHO), *Showing the truth, saving lives: the case for pictorial health warnings* (2009) (R-34), p. 17 (“Larger warnings are more effective than smaller warnings. Larger warnings are more noticeable. Smokers are more likely to recall larger warnings than smaller ones, and even tend to equate the size of the warning with the magnitude of risk of tobacco use.”); Liefeld (1999), Summary of Findings (“1. Larger warning messages were more encouraging to stop / not start smoking for all sample groups ...”) & pp. 32-33 (R-8); Action on Smoking and Health, *Research findings on health warnings on tobacco products* (Aug. 2000), p. 2 (“The larger the health warning message, the more effective it is at encouraging smokers to stop smoking.”) (R-10); Institute of Medicine of the National Academies, *ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION* (2007), esp. pp. 294-296 (R-26); Hammond, et al., *Text and Graphic Warnings on Cigarette Packages* (2007), p. 208 (“larger, more comprehensive health warnings on cigarette packages are rated as more effective”) (R-25); Hammond, *Health warnings on tobacco packages* (2008), p. 12 (“Larger warnings are significantly more effective than more obscure warnings. Smokers are more likely to recall larger warnings, and have been found to equate the size of the warning with the magnitude of the risk. ... Larger warnings on front are more effective among youth.”) (emphasis in original) (R-29); D. Hammond, *Tobacco Labeling and Packaging Toolkit: A guide to FCTC Article 11* (Feb. 2009), p. 17 (same, and noting that “[o]ne Canadian survey found that smokers judged warnings that covered 80% of the package” – that is, exactly the size required by Uruguay under Decree 287 – “to be most effective” (emphasis added)) & pp. 18, 42 & 50-51 (R-32).

152. It was against this background that in June 2009, six months after the unanimous adoption of the Framework Convention Guidelines for Article 11, the President of Uruguay issued Decree 287/009 increasing the size of mandatory health warnings on cigarette packs from 50% of each face to 80%. Here again, as in the case of the two measures incorporated in Ordinance 514, there is no question that Uruguay took this step for reasons of public health.

153. Since Article 2 of the Uruguay-Switzerland BIT excludes measures taken by Uruguay or Switzerland for reasons of public health from the protections otherwise afforded to investors under the Treaty, including international arbitration, and since all three measures about which Claimants complain were indisputably taken by Uruguay for reasons of public health, the Tribunal is without jurisdiction to hear the claims Claimants seek to raise.

3. Claimants' Interests in Uruguay Do Not Constitute an "Investment" Under Article 25 of the ICSID Convention and the Tribunal Therefore Has No Jurisdiction in this Matter

154. In the previous sections, Uruguay showed that the measures Claimants attack are beyond the scope of the Tribunal's jurisdiction because they were adopted for public health reasons. In particular, they were adopted to combat the clear and present public health menace of tobacco use. The policy rationale of the Article 2 exclusion is simple: foreign "investors" should not be entitled to the protections of the Treaty when their activities endanger the public welfare. These same considerations equally prevent Claimants' activities in Uruguay from being considered an "investment" within the meaning of the ICSID Convention.

a) An “Investment” Must Contribute Positively and Significantly to Development

155. As demonstrated below, under Article 25(1) of the ICSID Convention, an investment must, among other things, be one that contributes positively and significantly to the development of the host State. Claimants’ interests in Uruguay, however, not only fail to make any such contribution; they actively impede and interfere with such development. Their interests, therefore, do not constitute the kind of investment to which the jurisdiction of the Centre extends.

156. Article 25(1) of the ICSID Convention provides in relevant part as follows: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”²³⁹ Thus, the existence of an “investment” within the meaning of the ICSID Convention is a critical element of this Tribunal’s jurisdiction.

157. It is well confirmed at this point that ICSID tribunals, in fact, apply a two-prong test to establish the existence of an investment in investor-State disputes. This dual test entails an examination of whether the investor’s particular activity complies with the requirements of the ICSID Convention, and whether it is within the scope of the parties’ consent under the particular investment treaty at issue.

158. As one tribunal put it: “[G]iven that the case at hand is submitted to an ICSID Tribunal, the Tribunal agrees ... that, for this Tribunal to have jurisdiction, it is not sufficient that

²³⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, EIF 14 Oct. 1966 (hereafter “ICSID Convention”) (RL-11).

the dispute arises out of an investment as per the meaning of ‘investment’ given by the parties in the Treaty, *but also as per the meaning of ‘investment’ under the ICSID Convention.*”²⁴⁰

159. Although there is no explicit definition of “investment” provided in the ICSID Convention, jurisprudence and legal authority have accepted that the term “investment” in the Convention has an objective meaning: “[T]he notion of ‘investment’, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply by reference to the parties’ consent. *The weight of authority is thus in favour of viewing the term ‘investment’ as having an objective definition within the framework of the ICSID Convention.*”²⁴¹ Furthermore, the objective definition of investment within the meaning of Article 25 of the ICSID Convention is controlling for the Centre’s jurisdiction. As one tribunal put it,

[T]here is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals. ... The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of

²⁴⁰ *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sep. 2009) (van Houtte, Feliciano, Moghaizel) (hereafter “*Toto v. Lebanon*”), para. 66 (emphasis added) (RL-80). *See also Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB00/4, Decision on Jurisdiction (23 Jul. 2001) (Briner, Cremades, Fadlallah) (hereafter “*Salini v. Morocco*”), para. 44 (“However, insofar as the option of jurisdiction has been exercised in favor of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that *its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.*”) (emphasis added) (RL-73); *Jan de Nul N.V., et al. v. Arab Republic of Egypt*, ICSID Case No. ARB04/13, Decision on Jurisdiction (16 Jun. 2006) (Kaufmann-Kohler, Mayer, Stern) (hereafter “*Jan de Nul v. Egypt*”), para. 90 (“It is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the existence of an ‘investment’ *within the meaning of Article 25 of the ICSID Convention* and of an investment under the BIT.”) (emphasis added) (RL-62); *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Decision on Jurisdiction (1 Dec. 2010) (Berman, Gaillard, Thomas) (hereafter “*Global Trading Resource Corp. & Globex International v. Ukraine*”), para. 43 (“it is now beyond argument that there are two independent parameters that must both be satisfied: what the parties have given their consent to, as the foundation for submission to arbitration; and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions.”) (RL-58).

²⁴¹ *Global Trading Resource Corp. & Globex International v. Ukraine*, para. 43 (emphasis added) (RL-58).

Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.²⁴²

160. Jurisprudence and legal authority have consistently interpreted the term “investment” in Article 25 as having to contain four objective criteria, sometimes called the “*Salini* criteria” or the “*Salini* test” after the first decision in an investor-State case articulating the criteria. One of those criteria is that the economic activity must contribute to the economic development of the host State. The criteria were articulated in the *Salini* case as follows:

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction In reading the Convention’s preamble, *one may add the contribution to the economic development of the host State of the investment as an additional condition.*²⁴³

161. Subsequent tribunals confirmed the *Salini* interpretation. For example, in the *Patrick Mitchell v. Democratic Republic of the Congo* annulment decision, the annulment committee stated: “There are four characteristics of investment identified by ICSID case law and

²⁴² *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (6 Aug. 2004) (Orrego Vicuña, Craig, Weeramantry) (hereafter “*Joy Mining Machinery v. Egypt*”), paras. 49-50 (emphasis added) (RL-63); confirmed in *Global Trading Resource Corp. & Globex International v. Ukraine*, para. 43 (“as noted in the *Joy Mining Machinery Limited v. Arab Republic of Egypt* case, the ‘parties to the dispute cannot by contract or a treaty define as investment, for the purposes of ICSID jurisdiction, *something which does not satisfy the objective requirements of Article 25 of the Convention.*”) (emphasis added) (RL-58). See also *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 Nov. 2006) (Dimolitsa, Dossou, Giardina) (hereafter “*Mitchell v. DRC*”), para. 31 (“the parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment ... before ICSID tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.”) (RL-69).

²⁴³ *Salini v. Morocco*, para. 52 (emphasis added) (RL-73).

commented on by legal doctrine *The fourth characteristic of investment is the contribution to the economic development of the host country*²⁴⁴

162. The tribunal in the recent *Toto Costruzione* case confirmed:

The notion of “investment” under the ICSID system has been clarified by legal scholars and jurisprudence. A number of legal scholars and some ICSID Tribunals follow the four criteria to be found in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* to determine whether a transaction qualifies as an “investment” in the sense of the ICSID Convention. These four criteria, sometimes called the *Salini* test, comprise a) duration, b) a contribution on the part of the investor, c) *a contribution to the development of the host state*, and d) some risk taking.²⁴⁵

163. The inescapable logic of the interpretation of the term “investment” as used in Article 25(1) of the ICSID Convention that requires a contribution to development has been summarized in scholarly commentary as follows:

Investment protection treaties, including the Washington Convention and bilateral investment treaties, constitute a conscious, and potentially costly, derogation of State sovereignty. The state’s sacrifice of freedom of action is done for a particular purpose The primary motivation for both developing and developed States in concluding these agreements is ... economic development.²⁴⁶

²⁴⁴ *Mitchell v. DRC*, para. 27 (emphasis added) (RL-69).

²⁴⁵ *Toto v. Lebanon*, para. 69 (emphasis added) (RL-80). See also *Jan de Nul v. Egypt*, para. 91 (RL-62); *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction (21 Mar. 2007) (Kaufmann-Kohler, Schreuer, Otton), para. 99 (RL-72); *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 Jul. 2007) (Fortier, Orrego Vicuña, Watts), para. 116 (RL-64).

²⁴⁶ N. Rubins, *The Notion of “Investment” in International Arbitration*, N. Horn & S.M. Kröll (eds.), *ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS* (2004), p. 285 (internal citations omitted) (RL-42).

164. Indeed, the requirement that an investment have a positive impact on the development of the host State is reinforced by the Preamble of the ICSID Convention which refers to “the need for international cooperation for *economic development*, and the role of private international investment therein.”²⁴⁷ The Executive Directors also emphasized the overriding objective of the Convention to “strengthen the partnership between countries in the cause of *economic development*.”²⁴⁸ It is notable that in the Preamble of the Uruguay-Switzerland BIT, the Contracting States agreed as to the object and purpose of the treaty by making two express references to the developmental goals of the Treaty:

Recognizing the important complementary role of foreign investment in the *economic development process* ...,

Recognizing that the key to achieving and maintaining an adequate flow of capital lies in ... their endeavouring to substantially *contribute to the development of the country*

165. Substantial ICSID jurisprudence supports the interpretation of the ICSID term “investment” as not only requiring that there be a contribution to the host State’s development, but that such contribution be significant. For example, in the *Helnan* case, the tribunal stated:

The Arbitral Tribunal accepts the Respondent’s suggestion, based on ICSID precedents, as summarized in the unchallenged statement by Prof. Ch. Schreuer, that to be characterized as an investment a project “must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State’s development.”²⁴⁹

²⁴⁷ ICSID Convention (emphasis added) (RL-11).

²⁴⁸ IBRD, *Report of the Executive Directors on the ICSID* (1965), para. 9 (emphasis added) (RL-15).

²⁴⁹ *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction (17 Oct. 2006) (Derains, Lee, Dolzer), para. 77 (emphasis altered) (RL-59). *See also Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on

166. Tribunals have found that an indication of the substantial or significant nature of an activity's contribution to development such as to meet the definitional requirements of "investment" is whether the activity serves the public interest. In one ICSID case, for example, the tribunal found that "[i]t is quite apparent that the transactions involved in this case are not ordinary commercial transactions and indeed involve a fundamental public interest. ... [T]here is clearly a significant relationship between the transaction and the development of the host State."²⁵⁰ In the *Salini* case itself, the tribunal put it this way:

Lastly, the contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. *It cannot be seriously contested that the highway in question shall serve the public interest.*²⁵¹

Another tribunal compared the facts in the case before it as compared to the situation in *Salini* as follows:

Jurisdiction (17 May 2007) (Hwang), annulled for other reasons (hereafter "*Malaysian Historical Salvors v. Malaysia*"), para. 123 ("*The Tribunal considers that the weight of the authorities cited above swings in favour of requiring a significant contribution to be made to the host State's economy. Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an 'investment.'*") (emphasis added) (RL-66); *Joy Mining Machinery v. Egypt*, para. 53 ("Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should ... *constitute a significant contribution to the host State's development.*") (emphasis added) (RL-63); *Ceskolovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) (Burgenthal, Bernardini, Bucher), para. 88 ("[The] undertaking involved *a significant contribution by CSOB to the economic development of the Slovak Republic ... within the meaning of the Convention.*") (emphasis added) (RL-52); *Toto v. Lebanon*, para. 86 ("In the present case, Toto's construction project meets the requirements deemed necessary by this Tribunal, i.e., a contribution by the investor, a profitability risk, a significant duration and *a substantial contribution to the State's economic development ...*") (emphasis added) (RL-80).

²⁵⁰ *Fedax NV v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction (11 Jul. 1997) (Orrego Vicuña, Owen, Heth), paras. 42-43 (RL-56).

²⁵¹ *Salini v. Morocco*, para. 57 (emphasis added) (RL-73).

Unlike the Construction Contract in *Salini* which, when completed, constituted an infrastructure that would benefit the Moroccan economy and serve the Moroccan public interest, the Tribunal finds that the Contract did not benefit the Malaysian public interest in a material way *or* serve to benefit the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant.²⁵²

Clearly, any particular activity or interest considered by itself may have *some* economic effect, however, the *Salini* test logically requires that if this activity or interest creates an overall negative effect on economic development, such as Claimants' interests, this would not meet the definition of investments protected by the ICSID Convention.²⁵³

b) The Claimants' Activities Have Harmed and Continue to Harm Uruguay's Economic Development

167. Claimants' interests in Uruguay unquestionably fail the fourth prong of the *Salini* test. Their so-called investments do *not* contribute positively to Uruguay's development, either significantly or otherwise. Still less do they serve the public interest. On the contrary, it is indisputable that their net effect is to harm Uruguay's development.

168. According to studies conducted in various countries and by World Bank economists, "the enormous health costs linked to smoking *far exceed* the economic benefit that tobacco generates from production, foreign trade and employment in this activity, and even more

²⁵² *Malaysian Historical Salvors v. Malaysia*, annulled for other reasons, para. 131 (emphasis added) (RL-66).

²⁵³ As explained by Professor Schreuer, "[a]ny concept of economic development ... should be treated with some flexibility. It should not be restricted to measurable contributions to GDP but should include development of human potential, political and social development and the protection of the local and global environment." C.H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2nd ed. 2009), p. 134, para. 174 (RL-43); *see also*, Rubins (2004), p. 322 ("The Washington Convention and other investment protection treaties were created not for the sake of directing all private-public disputes into arbitration, but specifically in order to increase salutary economic activities and feed the engine of sustained development and prosperity around the world." (RL-42).

so if we consider the economic and social repercussions of tobacco throughout the world.”²⁵⁴ As previously stated, it is undisputed that the consumption of tobacco products, including the cigarettes manufactured, promoted, and sold by Claimants, is the leading cause of preventable death around the globe.²⁵⁵ It is also undisputed that cigarette consumption causes many types of cancer and chronic disease in smokers, as well as coronary heart disease and low infant birth weights in non-smokers who are exposed to second-hand smoke.²⁵⁶ The WHO recently projected that tobacco use will kill a billion people or more by the end of this century unless urgent action is taken.²⁵⁷

169. The negative impact of the consumption of tobacco products on development has been confirmed by authoritative international institutions specialized in development work, including the Organisation for Economic Co-operation and Development (OECD), the World Bank and the WHO, as well as by authoritative government bodies and researchers in Uruguay. The following are just a few of the conclusions reached by such sources:

- Tobacco use has a profound effect on poverty and malnutrition in low-income countries, when poor families purchase addictive tobacco rather than food. There are grave poverty implications of the high prevalence of tobacco use among men with

²⁵⁴ Ramos & Curti (2006), p. 5 (emphasis added) (R-20).

²⁵⁵ E.g., WHO, *2011 Report*, p. 8 (“Tobacco use continues to be the leading global cause of preventable death.”) (R-56).

²⁵⁶ *Ibid.*, p. 44, citing United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *How tobacco smoke causes disease: the biology and behavioral basis for smoking-attributable disease: A report of the Surgeon General* (2010); World Bank, *CURBING THE EPIDEMIC* (1999), pp. 2-3 (“The diseases associated with smoking are well documented and include cancers of the lung and other organs, ischemic heart disease and other circulatory diseases, and respiratory diseases such as emphysema ... Smoking also affects the health of nonsmokers.”) (R-7).

²⁵⁷ WHO, *2011 Report*, p. 8 (R-56).

- low education and low incomes, which raises substantially the risks they run of serious diseases and premature death.²⁵⁸
- By 2030, tobacco is expected to be the single biggest cause of death worldwide, accounting for about 10 million deaths per year. Increased activity to reduce this burden is a priority for both the World Health Organization (WHO) and the World Bank as part of their missions to improve health and reduce poverty.²⁵⁹
 - Smoking imposes an enormous economic burden on society. It can lead to illness in both smokers and non-smokers exposed to secondhand smoke. The resulting smoking-related illnesses lead to the need for healthcare services and result in costs incurred in obtaining them. Smoking causes people to lose time from their regular activities and results in premature deaths.²⁶⁰
 - Tobacco also creates economic costs that extend beyond the direct cost of related illness and productivity losses, including health care expenditures from active and passive smokers, employee absenteeism, reduced labour productivity, fire damage due to careless smokers, increased cleaning costs, and widespread environmental damage. In the same way, home expenditures for cigarettes reduce national wealth in terms of gross domestic product (GDP) by as much as 3.6%.²⁶¹
 - Although the tobacco industry claims it creates jobs and generates revenues that enhance local and national economies, the industry's overriding contribution to any country is suffering, disease, death – and economic losses. Tobacco use currently costs the world hundreds of billions of dollars each year.²⁶²
 - Tobacco-related deaths result in lost economic opportunities. ... Lost economic opportunities in highly populated, developing countries – many of which are manufacturing centres of the global economy – will be severe as the tobacco epidemic worsens, because half of all tobacco-related deaths occur during the prime productive years. The economic cost of tobacco-related deaths imposes a particular burden on the developing world, where four out of five tobacco deaths will occur by 2030.²⁶³

²⁵⁸ Organisation for Economic Co-Operation and Development (OECD), *Poverty and Health* (2003), p. 38 (R-15).

²⁵⁹ World Bank, *CURBING THE EPIDEMIC* (1999), p. ix (R-7).

²⁶⁰ World Health Organization (WHO), *Economics of Tobacco Toolkit: Assessment of the Economic Costs of Smoking* (2011), p. 11 (R-54).

²⁶¹ World Health Organization (WHO), *Systemic Review of the Link Between Tobacco and Poverty* (2011), p. 6 (R-55).

²⁶² WHO, *2008 Report*, p. 18 (R-28).

²⁶³ *Ibid.*, pp. 18-20.

- At the family level, a large part of household income that could be used to purchase food, medicines, or clothing is diverted to buying tobacco. Thus, tobacco consumption *contributes to the impoverishment of both families and entire countries.*²⁶⁴
- From a social standpoint, smoking lowers workers' productivity, because smokers get sick more than non-smokers. Half the deaths caused by tobacco consumption occur prematurely between the ages of 35 and 69 years. Smoking is also a risk factor in occupational and traffic accidents. This in turn produced an overload on social security systems due to the increase in illnesses responsible for occupational disability or incapacity.²⁶⁵
- The costs that tobacco imposes on health systems are very high. The World Bank calculates that between 6% and 15% of all health costs in developed nations are due to tobacco addiction.²⁶⁶

170. As noted, the consequences of cigarette smoking in Uruguay are consistent with the worldwide statistics. In Uruguay, more than 5,000 people die each year from smoking-related illness; 10-15% of these deaths are caused by exposure to second-hand smoke.²⁶⁷ Uruguay will also lose a significant portion of its working population due to smoking-related illnesses. At least half of the deaths caused by tobacco consumption will occur prematurely between the ages of 35-69 years.²⁶⁸ The estimated direct health costs of smokers in Uruguay amount to approximately 150 million dollars a year.²⁶⁹ When the loss of productivity due to premature death, loss of work days and other non-health costs are accounted for, this figure increases by as much as 70%.²⁷⁰ The *Fondo Nacional de Recursos* (FNR), an Uruguayan public

²⁶⁴ MSP, *Guide to Smoking Cessation* (2009), p. 14 (R-36).

²⁶⁵ *Ibid.*

²⁶⁶ Ramos & Curti (2006), p. 4 (R-20).

²⁶⁷ MSP, *Guide to Smoking Cessation* (2009), p. 13 (R-36).

²⁶⁸ *Ibid.*, p. 14.

²⁶⁹ *Cited in* Ramos & Curti (2006), p. 4 (R-20); MSP, *Guide to Smoking Cessation* (2009), p. 14 (R-36).

²⁷⁰ Ramos & Curti (2006), p. 4-5 (R-20).

entity which provides financing for medical procedures, has calculated that the total cost of 51,126 medical procedures related to smoking pathologies borne by it alone came to nearly US\$783 million between 2004 to 2010.²⁷¹ These health care costs are an immense financial burden for a small, developing economy such as Uruguay.

171. The link between tobacco consumption in Uruguay and the harm to economic or any other kind of development in Uruguay is clear. The net “contributions” to development made by the Claimants’ interests and activities in Uruguay have been overwhelmingly negative. To maintain that such activities and interests are “investments” in the sense of the ICSID Convention would, as demonstrated above, fly in the face of ICSID jurisprudence and the meaning and purpose of the ICSID Convention (not to mention that of the BIT).²⁷² Because

²⁷¹ Table of Data Provided by Uruguayan *Fondo Nacional de Recursos* (Jul. 2011) (R-64).

²⁷² It is also to be considered that, in accordance with Article 31(3)(c) of the Vienna Convention of the Law of Treaties (RL-19), “any relevant rules of international law applicable in the relations between the parties” must also be taken into account in the interpretation of the notion of investment in Article 25(1) of the ICSID Convention (RL-11) and Article 2(2) of the BIT (RL-21). In other words, the jurisdictional requirements of the ICSID Convention and the BIT cannot be read and interpreted in isolation from other international law, including the obligations arising under the WHO Framework Convention on Tobacco Control.

In this context, Article 3 of the Framework Convention provides that:

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.*

(Emphasis added.) Article 5 sets out the general obligations of Parties which shall include the obligation to “adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.” Part III of the Convention sets forth measures relating to the reduction of demand for tobacco, which include measures for the regulation of tobacco product packaging and labeling. (RL-20).

The notion of investment under the ICSID Convention cannot conceivably be construed as requiring treaty protection when the international obligations of the parties, which inform its interpretation, require the opposite. Accordingly, it is submitted that Claimants’ alleged investment cannot be deemed a protected investment under the ICSID Convention.

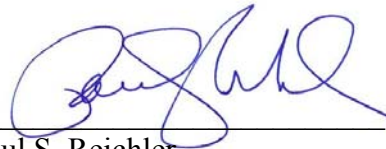
Claimants' activities and interests are not such investments, the jurisdiction of the Centre may not extend to disputes arising in connection with such activities or interests.

III. CONCLUSION AND REQUEST FOR RELIEF

172. For the foregoing reasons, Uruguay respectfully requests that this Tribunal render an award: (i) in favor of Uruguay and against Claimants, dismissing Claimants' claims for lack of jurisdiction in their entirety and with prejudice; and (ii) ordering that Claimant bear all the costs of this arbitration, including Uruguay's costs for legal representation and assistance, together with interest thereon.

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