Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay)
(The Claimants)

and

Oriental Republic of Uruguay
(The Respondent)

(ICSID Case No. ARB/10/7)

Concurring and Dissenting Opinion

Mr. Gary Born, Arbitrator

Date of dispatch to the parties: July 8, 2016

CONCURRING AND DISSENTING OPINION

1. I agree with almost all of the conclusions in the Tribunal's Award. I also have the utmost respect for the members of the Tribunal, and the care and diligence that they have brought to this matter. I write separately, with respect to two limited issues, only because of my fundamental disagreement with the Tribunal's conclusions and reasoning on these matters. Apart from these issues, I concur with the Tribunal's conclusions in its Award.

2. The two issues on which I part company from the Tribunal concern the interpretation of Article 3(2) of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, dated 7 October 1988 ("BIT"). In particular, I am unable to agree that Uruguay's failure to provide the Claimants any means of judicial recourse following contradictory decisions by the Uruguayan Supreme Court and *Tribunal de lo Contencioso Administrativo* did not constitute a denial of justice or that Uruguay's "single presentation requirement" for tobacco products did not constitute a denial of fair and equitable treatment. Rather, with respect to each of these grounds, I conclude that Uruguay violated Article 3(2) of the BIT.

3. As a preliminary matter, it is important to emphasize the narrow scope of the two foregoing conclusions. My conclusions are not in any way a comment on the sovereign authority of Uruguay (or any other state) to safeguard its population's health or safety, to enact tobacco control legislation, or to prevent deceptive or misleading tobacco marketing or packaging. The adoption of such measures are within the regulatory sovereignty of Uruguay, which nothing in my Opinion questions. Rather, this Opinion concerns two highly unusual aspects of the Uruguayan legal system, neither of which implicates Uruguay's sovereign regulatory authority, but both of which entail violations of individual rights protected by Article 3(2) of the BIT.

4. First, this Opinion is directed towards a highly unusual aspect of the Uruguayan legal system, which produced a result in this case that has never previously occurred under Uruguayan law. As discussed below, two of the country's highest civil courts reached directly contradictory interpretations of precisely the same statutory provision, in closely-related proceedings involving claims by the same party against the government, with these contradictory interpretations then being applied, in each case, to deny that party relief. Moreover, that same party was then left with no judicial forum in which to assert otherwise available constitutional challenges to the relevant statutory provision, as it had been authoritatively interpreted and applied to that party. In my view, that unprecedented result plainly constituted a denial of justice under Article 3(2) of the BIT and basic principles of international law.

5. Second, this Opinion is directed towards an equally unusual aspect of Uruguay's regulatory regime for tobacco – namely, a "single presentation requirement" that permits only a single presentation of any trademark used in marketing tobacco products. It is undisputed that no other country in the world has adopted such a requirement, which is also neither required nor contemplated by the comprehensive international regulatory regime for tobacco products. In my view, given the factual background against which it was adopted and the evidentiary record in these proceedings, this unprecedented requirement is manifestly arbitrary and disproportionate and, as a consequence, constituted a denial of fair and equitable treatment under Article 3(2) of the BIT and international law.

I. THE FAILURE OF URUGUAY TO PROVIDE ANY MEANS OF RECOURSE FOLLOWING CONTRADICTORY DECISIONS BY THE SUPREME COURT AND *TRIBUNAL DE LO CONTENCIOSO ADMINISTRATIVO* CONSTITUTED A DENIAL OF JUSTICE

6. I first consider the Claimants' denial of justice claim based upon the disposition of their challenges to the so-called "80/80" requirement imposed by Decree 287/009 and Ordinance 466. In particular, the Claimants assert that Uruguay "effectively denied Abal the right to a decision on the legality of the 80/80 requirement," when the Supreme Court of Justice of Uruguay ("Supreme Court") and the *Tribunal de lo Contencioso Administrativo* ("TCA") rendered contradictory decisions regarding the meaning of Articles 9 and 24 of Law 18,256.[1] The Claimants argue that these assertedly contradictory decisions by the Supreme Court and TCA resulted in a denial of justice, in violation of the fair and equitable treatment guarantee of Article 3(2) of the BIT.[2]

7. The Respondent contends that the Supreme Court and the TCA are separate and independent governmental organs, and that Uruguayan law has for decades allowed the possibility that these organs will reach inconsistent conclusions.[3] The Respondent also contends, in at least some of its submissions, that the Supreme Court and TCA decisions are consistent, because the two tribunals addressed and resolved different issues.[4]

8. The Tribunal accepts the Respondent's conclusions in part, holding that the Supreme Court and TCA reached contradictory results, which were "unusual, even surprising,"[5] but that such a quirk is not sufficiently "shocking" or "serious"[6] to constitute a denial of justice. Adopting the Respondent's analysis, the Tribunal reasons that judicial systems in other national legal systems allow similar types of inconsistent results, citing a decision of the European Court of Human Rights ("ECtHR").[7]

9. In my view, in the particular circumstances of this case, the contradictory decisions of the Supreme Court and TCA operated to deny the Claimants access to justice. Those decisions were rendered in closely-related proceedings involving the same parties and interpreted the same provision of Uruguayan law to mean diametrically opposed and contradictory things, in each case as the basis for rejecting Abal's claims. As a consequence of these contradictory decisions, Abal was left without any judicial forum in which to pursue generally available constitutional challenges against Law 18,256, as it had been authoritatively interpreted and applied to Abal by the TCA. I am unable to avoid concluding that the operation of the Uruguayan judicial system in these circumstances amounted to a denial of justice in violation of Article 3(2) of the BIT.

A. Preliminary Matters

10. Preliminarily, it is important to be clear that the Claimants' claim does not require the Tribunal to decide whether the existence of parallel and co-equal judicial organs – that is, the Supreme Court and the TCA – constitutes a denial of justice. Many legal systems have

[1] Claimants' Memorial, II.C.2, p. 75.
[2] Claimants' Memorial, III.B., pp. 115-21; Claimants' Memorial, III.A.2., pp. 96-109.
[3] Respondent's Counter-Memorial, para. 11.113.
[4] Respondent's Counter-Memorial, para. 11.62 et seq.
[5] Award, para. 529.
[6] Award, para. 527, 529.
[7] Award, para. 529-532.

comparable divisions of legal authority, and the existence of specialized tribunals operating within a single legal system provides no independent basis for a denial of justice complaint. On the contrary, the existence of such specialized tribunals is intended precisely to ensure that justice is not denied and that the rule of law is enhanced.

11. The Claimants' claim also does not require the Tribunal to decide whether the rendering of contradictory decisions concerning the same issue of law, by parallel and co-equal judicial organs, constitutes a denial of justice. This result is theoretically possible in systems in which parallel and co-equal judicial tribunals exist and, as a consequence, virtually all legal systems have adopted mechanisms for avoiding or preventing contradictory decisions.[8] Again, however, the Claimants' claim does not require deciding whether these mechanisms are required as a matter of the BIT or customary international law.

12. Instead, what this dispute concerns is a highly unusual circumstance where parallel Uruguayan judicial tribunals – that is, the Supreme Court and the TCA – reached contradictory decisions interpreting the same statutory provision in closely related proceedings involving the same party, in each case applying those contradictory interpretations to deny that party relief on claims against the government. Moreover, following those contradictory decisions, the same party was also denied any opportunity of presenting a concededly serious constitutional challenge to Uruguayan legislation (specifically, Law 18,256), as that legislation had been authoritatively interpreted and applied to it by the TCA, to a competent Uruguayan judicial authority. In my view, that constitutes a paradigmatic denial of access to justice which cannot be dismissed as merely an unusual quirk or curiosity, but which is instead a violation of basic guarantees of international law.

B. Factual Background

13. In my view, it is important to begin consideration of this issue by recounting the relevant factual and procedural background. This background is essential to the appreciation and resolution of the Claimants' claim.

1. The Uruguayan Supreme Court and *Tribunal de lo Contencioso Administrativo*

14. Uruguay's highest civil court is the Supreme Court of Justice of Uruguay, established pursuant to the 1952 Uruguayan Constitution. The Supreme Court is empowered to interpret Uruguayan legislation and determine the constitutionality of such legislation.[9] The Supreme Court has the authority to review decisions of lower courts by cassation.[10]

[8] *See* L. Garlicki, 'Constitutional courts versus supreme courts,' (2007) 5(1) *Int J Constitutional Law* 44 (citing, e.g., German Constitutional Court (*Bundesverfassungsgericht*); *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 34 (citing Germany, Ukraine, Greece, and Bulgaria) [Exhibit REX-010].

[9] Uruguayan Constitution, Art. 256 ("Laws may be declared unconstitutional by reason of form or content, in accordance with the provisions of the following articles."); Art. 257 ("The Supreme Court of Justice has original and exclusive jurisdiction in the hearing and decision of such matters; and must render its decision in accordance with the requirement for final decisions.").

[10] Rotondo Opinion, para. 25 [Exhibit REX-007] ("The Supreme Court exclusively reviews the constitutionality of laws and acts as the last stage in any action where the parties have filed a petition for cassation against the judgments of the Courts of Appeals.").

15. The TCA is a governmental organ established pursuant to the Uruguayan Constitution.[11] The TCA is, in all material respects, a judicial body but, nonetheless, is not formally part of the Uruguayan judiciary and is independent from both the Uruguayan government and the Uruguayan judiciary, including the Uruguayan Supreme Court of Justice.[12] The TCA is granted jurisdiction by the Uruguayan Constitution[13] and Law No. 15,869 of 6/22/1987.[14] Specifically, the TCA is empowered to adjudicate disputes regarding the validity of administrative acts, including the interpretation of Uruguayan legislation to authorize or annul such administrative acts.[15]

16. The only respect in which the Uruguayan Constitution limits the TCA's independence vis-à-vis the Supreme Court is Article 258 of the Constitution, which provides that the TCA must abide by a Supreme Court determination that a statute is unconstitutional.[16] The Respondent's legal expert on Uruguayan law describes the institutional divide between the TCA and Supreme Court as "*sui generis*."[17]

2. Law 18,256 and Decree 287/009

17. The Claimants' denial of justice claim arises out of challenges under Uruguayan law by Abal to Law 18,256 and Decree 287/009. In particular, Abal challenged the constitutionality of Law 18,256 in the Uruguayan Supreme Court and the validity of Decree 287/009 in the TCA. It is important to appreciate the issues raised in these two proceedings and the relevant Uruguayan statutory provisions at issue in those proceedings.

18. The Uruguayan Parliament adopted Law 18,256 on 6 March 2008. The relevant portions of Law 18,256 for present purposes were Articles 9 and 24, which provided:

> *Article 9. (Health warnings). – All packages and containers of tobacco products, and all external labeling and packaging thereof, shall bear health warnings and images or pictograms describing the harmful effects of tobacco consumption or other appropriate messages. Such warnings and messages shall be approved by the Ministry of Public Health; shall be clear, visible, and legible; and shall take up at least 50% (fifty percent) of the total exposed primary surfaces. These warnings shall be modified periodically in accordance with regulations. All packages and containers of tobacco products and all packaging and labeling thereof, as well as the warnings described in the preceding paragraph, shall contain information on all components of the tobacco products and their emissions, in accordance with the provisions of the Ministry of Health.*

[11] Rotondo Opinion, para. 48 [Exhibit REX-007].
[12] Rotondo Opinion, paras. 5, 7, 48 [Exhibit REX-007].
[13] Uruguayan Constitution, Art. 309.
[14] Rotondo Opinion, para. 5 [Exhibit REX-007].
[15] Rotondo Opinion, para. 6 [Exhibit REX-007] ("The TCA has jurisdiction to hear the cases of actions for annulment of final administrative acts issued by any Government entity which are contrary to a 'legal rule,' which includes those that are affected by misuse, or abuse or excess of power … The TCA annuls or confirms the challenged administrative acts, without modifying them.").
[16] Uruguayan Constitution, Art. 258 ("In [the] case [that a law is declared unconstitutional], the [TCA] proceedings shall be suspended and the case referred to the Supreme Court of Justice.").
[17] Rotondo Opinion, para. 55 [Exhibit REX-007] ("Based on everything that has been asserted in this report, it may be concluded that: a) The Uruguayan jurisdictional system is *sui generis*…").

> *Article 24. (Regulation). – The Executive Branch shall regulate this law within a period of ninety days from its date of enactment.*[18]

19. In implementation of Law 18,256, the Uruguayan President issued Presidential Decree 287/009 on 15 June 2009. That Decree provided for the so-called 80/80 graphic warning requirement, mandating that tobacco companies include graphic health warnings on at least 80% of the surfaces of tobacco packages:

> *It is ordered that the health warnings to be included on packages of tobacco products, including images and/or pictograms and messages, shall cover 80% (eighty per cent) of the lower part of each of the main sides of every cigarette package and in general of every packet and container of tobacco products and of any similar packaging and labelling.*[19]

20. The Uruguayan Ministry of Public Health adopted Ordinance 466 on 1 September 2009, giving effect to Presidential Decree 287/009. Ordinance 466 provided for the 80/80 graphic warning requirement, in Section 1, as follows:

> *The pictograms to be used on packs of tobacco shall be defined by six (6) images associated with the corresponding texts (front and back), which shall be printed on the lower 80% of both principal display areas of all packets of cigarettes and in general all packets and packs of tobacco products and all similar wrappings and labels in the order and manner shown in the annexed model, which is an integral part of this Order, an equal number of each type of pack design being printed for each brand available on the market.*[20]

As noted above, the Claimants' denial of justice claim arises from the handling of the challenges which Abal initiated to Law 18,256 and Decree 287/009 in Uruguay's courts.

3. Abal's Challenges to Law 18,256 and Decree 287/009

21. Shortly after promulgation of Ordinance 466, on 11 September 2009, Abal filed an action in the Supreme Court – *Abal Hermanos S.A. v. Legislative Power and Ministry of Health* – challenging the constitutionality of Article 9 of Law 18,256.[21] The basis of Abal's action was that a grant of authority by Article 9 to the President and Ministry of Public Health to require graphic warnings in excess of 50% of the surface of tobacco packages would violate limitations on the delegation of legislative authority under the Uruguayan Constitution.

22. Six months later, on 22 March 2010, Abal filed an action (an *accion de nulidad*) in the TCA requesting annulment of the 80/80 requirement in Ordinance 466 and Decree 287/009.[22] The basis of Abal's action was that Ordinance 466 and Decree 287/009 exceeded the scope properly permitted by Law 18,256, by requiring 80% graphic warnings, while, properly interpreted, Law 18,256 only permitted a requirement of 50% graphic warnings.

23. Immediately after Abal filed its action in the TCA, the TCA suspended its proceedings pending a decision by the Supreme Court on Abal's constitutional challenge to Law 18,256. According to the TCA, the Supreme Court's decision would involve a "threshold question"

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[18] Uruguayan Law No. 18,256 (6 Mar. 2008), Arts. 9, 24 [Exhibit RL-6].
[19] Uruguayan Decree No. 287/009 (15 June 2009), Article 1 [Exhibit RL-4].
[20] Ministry of Public Health Ordinance 466, September 1, 2009, Articles 1-2 [Exhibit C-043].
[21] Abal's Complaint Challenging Law 18,256 before the SCJ, September 11, 2009 [Exhibit R-216].
[22] *See* Abal's Request for Annulment of Decree 287 Before the TCA, March 22, 2010 [Exhibit C-049].

(*cuestion previa*) which therefore warranted suspension of the TCA proceedings until the Supreme Court had rendered its decision.[23]

24. In the Supreme Court proceedings initiated by Abal challenging the constitutionality of Article 9 of Law 18,256, the Uruguayan Legislature made formal submissions regarding Abal's claim. The Legislature took the position that Law 18,256 was constitutional because Article 9 did not authorize graphic warnings in excess of 50% of the surface of tobacco packages; the Legislature also acknowledged that, if Law 18,256 did delegate authority to require graphic warnings in excess of 50%, then the statute would have been subject to challenge under the Uruguayan Constitution as an excessive delegation of legislative authority. The Legislature's submission in the Abal proceeding concluded:

> *3.9 When the law says 'at least 50%' it is setting the quantitative limit on the fundamental right, that is, the size of the health warning. This legal determination has a dual consequence:*
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> *1. It imposes an obligation on the tobacco companies to include a warning that takes up at least 50% of the package or container—which means that it could take up more space, if the tobacco company so wished—never less; and*
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> *2. It imposes an obligation on the Ministry of Public Health to reject a request to approve a health warning that takes up less than 50% of the above-referenced surface areas.*
>
> *3.* But it does not allow the regulation to set a higher percentage: … That is not what the law allows, because there is no reason whatsoever to support [the view] that said percentage should fluctuate periodically. …
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> *3.10. … What the law establishes is that said containers cannot display a warning of less than fifty percent (at least 50%) and that the Ministry shall not approve them. The* only *thing that the law attributed to regulation is the periodic regulation of the modification of the warning, regarding things that the law cannot reasonably determine, which is not the percentage of surface area affected.*
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> *… [D]espite the fact that* the limiting of rights is reserved for statute, *it is reasonable for the law to have the [Executive] make an exact determination of the limitation when the Legislative Branch does not have the information, aptitude or technical advice to compose 'clear; visible, legible' warnings … Therefore, the possibility of a '… narrow exception for delegation …' … is fully present here, on account of being '… justified by technical or practical necessities.'* But that is not with respect to the percentage of affected surface areas that must be taken up by the health warnings; rather, it is with respect to the periodic modifications of said warnings …[24]

25. The Uruguayan State Attorney General (*Fiscal de Corte y Procuraduria General de la Nacion*)[25] also made formal submissions in Abal's Supreme Court proceedings. Like the

[23] *See* Motion of Abal Hermanos S.A., Motion to Suspend Proceedings, TCA Case No. 132/2010, May 3, 2010 [Exhibit R-224].

[24] Legislature's Answer, paras. 3.9-3.10 [Exhibit C-046].

[25] The Uruguayan State Attorney General is empowered by the Organic Law of the State Attorney General's Office (Decree-Law No. 15,365) to: (i) be the exclusive representative of the State Attorney General's Office before the Supreme Court of Justice; (ii) represent the State Attorney General's Office in the proceedings of exclusive jurisdiction of the Supreme Court of Justice and be heard in all other proceedings conducted before the

Uruguayan Legislature, the State Attorney General took the position that Article 9 of Law 18,256 was constitutional because the legislation did not authorize graphic warnings in excess of 50% of the surface of tobacco packages, again indicating that a contrary interpretation of the law would render it unconstitutional.

26. According to the State Attorney General, "the provision as to the percentage limits itself to establishing that it cannot be less than 50% of the [packaging]. … [T]he Ministry of Health, to whom approval of these warnings is entrusted, will not be able to approve them if they occupy less than this 50%." The State Attorney General noted that there were "no references to the Executive having the power to establish a higher percentage," and thus, "the provision does not contain any delegation whatsoever."[26]

27. The Uruguayan Supreme Court accepted the arguments advanced by the Legislature and the State Attorney General. In a thoroughly reasoned decision, the Court held that Article 9 of Law 18,256 did not authorize the Ministry of Public Health to require graphic warnings that covered more than 50% of the surface of tobacco packages, while indicating that a contrary interpretation of the legislation would render it unconstitutional (by reason of an excessive delegation of legislative authority).

28. The Supreme Court interpreted Article 9's requirement that graphic warnings "be clear, visible, and legible… and shall take up at least 50% (fifty percent) of the total exposed primary surfaces" as not delegating additional authority to require warnings occupying more than 50% of the surfaces of tobacco packages. In the Supreme Court's words:

> *[Law 18,256]* does not delegate to the Executive Power a discretionary power to impose restrictions on top of said [50%] minimum, *but imposes on the tobacco company the obligation that the exterior labeling of their packs must contain a warning that occupies 'at least 50% of the total exposed principal surfaces.' As asserted by the representatives of the Legislative Power, the text of the norm 'at least' should be understood in the sense that the health warning may occupy more space—if the tobacco company wants that—but never less than the minimum fixed at 50%.*
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> *Further, it emerges from the text that the only thing left by the norm in the field of the Executive Power (Ministry of Public Health) is to control—for the purpose of its approval—that the health warnings and messages are clear, visible, legible and occupy at least the 50% (fifty per cent) of the total exposed principal surfaces, and also the periodical modification of such warnings, [an] aspect that clearly refers to the message* and not to their size. In consequence, *since the [statute] determines the minimum limit of the warnings so they can be approved by the Ministry of Public Health, and to leave to the discretion of the regulatory power only certain aspects that [relate] to its execution,* it cannot be considered that the principles of legality and non delegation have been infringed.[27]

Supreme Court of Justice when laws or constitutional principles are involved, or when the general interests of the Society, the State, or the Treasury are, or may be, at stake; (iii) intervene in the unconstitutionality proceedings; and (iv) be heard in the conflicts of jurisdiction to be resolved by the Supreme Court of Justice. (*See* Claimants' Memorial, fn. 217.)

[26] State Attorney General's Opinion at Section 2 [Exhibit C-197].

[27] Supreme Court Decision No. 1713 at 4 [Exhibit C-051].

In sum, the Supreme Court was unambiguous in its conclusion that Law 18, 256 did not authorize the Ministry of Health, or the Uruguayan Executive Branch more generally, to require graphic warnings occupying more than 50% of the surface of tobacco packages.

29. Following the Supreme Court's decision, the suspension of Abal's TCA proceedings was lifted and the TCA rendered a decision on Abal's claim that Decree 287/009 and Ordinance 466 were invalid because, under Article 9 of Law 18,256, the Uruguayan Executive Branch was not empowered to require graphic warnings that covered more than 50% of the surface of tobacco packages. The TCA rejected Abal's challenge, as well as the Supreme Court's prior conclusion that Article 9 of Law 18,256 did not authorize the requirement of graphic warnings covering more than 50% of the surface of tobacco packages.

30. The TCA's brief statement of reasons in Abal's proceeding was quoted from a decision in another proceeding, which had been initiated by another tobacco company against Law 18,256 and Decree 287/009. In relevant part, the TCA's opinion was as follows:

> *[The Framework Convention on Tobacco Control] is composed by a preamble and 38 sections. In the first it is explicitly stated that addiction to tobacco [is] an epidemic with grave consequences to Global Health inasmuch: '... the cigarettes and other products containing tobacco are designed in a very sophisticated manner with the end of creating and maintaining dependency…,' to this respect is that the Framework's provisions seek to regulate warnings in the cigarette packs in order to allow the population to access truthful information regarding the chemicals they are ingesting and consuming.*
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> *Reason for which, Section 18.256 enters in direct and frank legal accordance with the international provisions, legislating and regulating the Convention's provisions, in compliance with the obligations towards humankind and the international community adopted by the Oriental Republic of Uruguay. In this sense,* Statute 18.256 clearly shows the legal minimum for the warning and entrusts to regulations its enlargement and/or modification, *with the evident objective of preventing the consumer from becoming familiarized and living with it without perceiving the harmful consequences attributed to tobacco products.*[28]

31. In reaching this conclusion, the TCA rejected the interpretation of Article 9 of Law 18,256 that the Supreme Court had previously adopted.[29] As discussed above, the Supreme Court, Legislature, and State Attorney General had all concluded that Law 18,256 did not authorize the Uruguayan executive branch to require graphic warnings that covered more than 50% of the surface of tobacco packages. In contrast, the TCA reached the opposite conclusion, holding with minimal explanation that Article 9 of Law 18,256 authorized precisely such a result (and therefore provided authorization for the 80% requirement of Decree 287/009 and Ordinance 466).

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[28] TCA Decision 512, Section VI [Exhibit C-116].

[29] The TCA's interpretation of Law 18,256, quoted in relevant part above, provides no insight into its reasons for rejecting the views of the Uruguayan Legislature and State Attorney General.
Testimony of the Respondent's expert witnesses at the evidentiary hearing indicated that the TCA has a very heavy case load (with some 1,000 cases being decided each year by a five judge tribunal). (Evidentiary Hearing (Tr., 6/1745/3-12) (Abal) ("…[The TCA] is made up of five members and [they have] to decide yearly about 1,000 that are submitted to its consideration …")). The consequences of this caseload are apparent in the Claimants' challenge to the TCA's decision regarding the single presentation requirement, where, as the Tribunal describes, the TCA's decision confused the Claimants' proceedings and submissions with those of another company, in a different proceeding.

32. It is undisputed that the TCA's interpretation of Article 9 of Law 18,256 is authoritative as a matter of Uruguayan law, having been issued pursuant to the TCA's constitutional and statutory mandate to interpret legislative authorizations of regulatory action.[30] On the basis of that interpretation of Article 9 by the TCA, Decree 287/009, Ordinance 466, and the 80/80 requirement were upheld. It is also undisputed that there was no basis for appealing from the TCA decision to the Supreme Court, or to any other body, whether by cassation or otherwise.[31]

33. It is also clear that, so far as the record shows, this case was the first time that the Uruguayan Supreme Court and TCA have rendered contradictory decisions about the meaning of a statutory provision.[32] The Respondent asserted that other examples of such cases existed, but it cited only a single instance allegedly involving such a contradiction.[33]

34. On examination, however, the one case cited by the Respondent did not in fact involve contradictory decisions, but instead involved a decision by the Supreme Court upholding the constitutionality of a particular procedure and a decision by the TCA holding that the same procedure was not permitted as a statutory matter.[34] As the Tribunal appears to accept,[35] that is not a conflicting or contradictory set of decisions, but an example of entirely consistent decisions about different legal rules.

35. The present case is fundamentally different: it involves a direct and irreconcilable conflict between the Supreme Court and the TCA with regard to the interpretation of Article 9 of Law 18,256. The Supreme Court held, directly and explicitly, that Article 9 only authorized the Executive to require graphic warnings covering 50% of the surface of tobacco packages, while the TCA held, equally directly and explicitly, that Article 9 authorized the Executive to require graphic warnings covering 80% (or more) of the surface of tobacco packages. These two interpretations could not be more diametrically opposed, yet both were applied to Abal, in each case in order to reject claims that it had brought against the application of Law 18,256 by the Uruguayan government to its activities.

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[30] Abal Opinion, para. 94 [Exhibit CWS-014] ("It is undisputed that the TCA is the 'highest entity' (and the only entity) in the Uruguayan legal system that can resolve challenges of nullity against administrative acts."); Respondent's Counter-Memorial, para. 9.26 ("Uruguay's highest administrative tribunal, the *Tribunal de lo Contencioso Administrativo*").

[31] Abal Opinion, para. 94 [Exhibit CWS-014] ("It is [ ] undisputed that 'there is no possible appeal' against TCA judgments. It is also absolutely undisputed that the Supreme Court cannot review TCA judgements.") (citing Rotondo Opinion, para. 22 [Exhibit REX-007] ("… [T]here is no appeal or petition for cassation against judgments of the TCA."); Respondent's Counter-Memorial, para. 11.113 ("[the TCA] is not subject to the cassation review of the Supreme Court").

[32] *See* Abal Opinion, para. 94 ("The contradiction that arose in this case between decisions of the [Uruguayan Supreme Court] and the TCA is unusual, and there is no Court in Uruguay that has the authority to hear the controversy generated by the TCA's decision."); *see also* Evidentiary Hearing (Tr., 6/1804/11-17) (Abal) ("… I don't know of any case, apart from this one right here, where [ ] a contradiction [between the Uruguayan Supreme Court and the TCA] has transpired … I have searched, and I have found no instances where the SCJ has contradicted the TCA or the TCA has contradicted a decision of the Supreme Court of Justice.").

[33] Respondent's Rejoinder, paras. 11.56-11.58; Pereira Opinion, paras. 293-296, [Exhibit REX-015] (citing Case No. 2-3871/2006, Supreme Court of Justice, Decision No. 47/2007 (May 2, 2007), Conclusion of Law I [Exhibit SPC-049] ("the Henderson case")).

[34] *See* Evidentiary Hearing (Tr. 7/2119/3-19) (Pereira) (**"**In my opinion, there is no contradiction in the judgments.").

[35] Award, paras. 527-528.

4. No Possibility of Constitutional Challenge to Article 9 of Law 18,256 in the Supreme Court Following the TCA Decision

36. The record in this arbitration also establishes that, following the TCA's decision, Abal was unable to return to the Supreme Court to challenge the constitutionality of Article 9 of Law 18,256 as it had been authoritatively interpreted by the TCA. As the Tribunal acknowledges,[36] there was no procedure available under Uruguayan law that would have allowed Abal to reopen proceedings in the Supreme Court challenging Article 9 of Law 18,256. Rather, as the Claimants contend, the prior Supreme Court decision, rejecting Abal's constitutional challenge to Article 9, was *res judicata* and foreclosed further litigation of that challenge by Abal in the Supreme Court.[37]

37. As indicated by the Tribunal, the Respondent did not argue during these arbitral proceedings that Abal could have returned to the Supreme Court to challenge the constitutionality of Article 9 following the TCA decision, nor that Abal's failure to do so constituted a failure to exhaust its local remedies. Rather, although the Respondent argued that Abal could have challenged the constitutionality of *Article 8*[38] of Law 18,256 in the Supreme Court,[39] it never suggested that Abal could have reopened its previously decided challenge to *Article 9* of Law 18,256. Likewise, none of the Respondent's experts on Uruguayan law made any such suggestion in their expert reports or oral testimony.[40]

38. On the final day of the evidentiary hearing, counsel for the Respondent suggested, in answer to questions from the Tribunal, that Abal could in fact have reopened proceedings in the Supreme Court challenging the constitutionality of Article 9 of Law 18,256 based on the "new fact" of the TCA decision.[41] As indicated above, that suggestion was inconsistent with the Respondent's position throughout the course of the arbitration[42] and was unsupported by any expert testimony or other evidence regarding procedural avenues available to Abal in the Supreme Court.[43] In contrast, Claimants' expert evidence concluded (without prior contradiction by the Respondent's experts) that Abal had exhausted its local remedies.[44]

39. In these circumstances, I see no basis for concluding that Abal could have either

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[36] Award, paras. 522-523.

[37] As the Tribunal notes, the Respondent did not suggest during the course of this arbitration that Uruguayan law permitted Abal to return to the Supreme Court and revive its constitutional challenge to Law 18,256 based on the TCA's interpretation of the statute. Award, para. 521 ("The Respondent does not suggest that there was a failure to exhaust local remedies in relation to this claim.").

[38] Article 8 of Law 18,256 was designed to prohibit misleading packaging (*see* full text of Article 8 at para. 151 below) This is distinct from Article 9 of the Law which requires graphic heath warming on tobacco packages (*see* full text of Article 9 at para. 20).

[39] Respondent's Counter-Memorial, para. 1.28.

[40] In particular, the expert opinions of Professor Rotondo and Schrijver made no suggestion that Abal could have reopened its Article 9 challenge in the Supreme Court or that the failure to do so constituted a failure by Abal to exhaust its local remedies.

[41] Evidentiary Hearing (Tr., 9/2640/6-9) (Salonidis) ("In our submission, we believe yes [it would have been possible to challenge the constitutionality of Article 9 in the Supreme Court as that Article had been interpreted by the TCA], because the TCA interpretation would be definitely a new fact to be considered by the Supreme Court.").

[42] The Respondent argued that Abal could have challenged a different provision of Law 18,256 (Article 8, rather than Article 9) in new proceedings in the Supreme Court. Respondent's Counter-Memorial, para. 11.89 et seq. ("…Claimants could have sought a declaration of unconstitutionality of Article 8 of Law 18,256, whose provisions the SPR was intended to 'enable.'").

[43] *See generally* Rotondo Opinion [Exhibit REX-007]; Schrijver Opinion [Exhibit REX-008].

[44] *See* Abal Opinion, para. 94; Paulsson Opinion, paras. 45-46.

reopened its challenge to Article 9 of Law 18,256 in the Supreme Court, or initiated new proceedings in the Supreme Court making such a challenge. Rather, after the TCA's decision, Abal was left with a Supreme Court ruling upholding Law 18,256's constitutionality because Article 9 *did not* authorize graphic health warnings in excess of 50% of the surface of tobacco packages, and a TCA ruling upholding Decree 287/009 and Ordinance 466 because Law 18,256 *did* authorize graphic health warnings in excess of 50% of the surface of tobacco packages.

C. Analysis

40. In light of the foregoing, I am unable to avoid the conclusion that the operation of the Uruguayan judicial system in this case constituted a denial of justice. Specifically, Uruguay denied Abal justice when its courts rendered directly contradictory decisions interpreting Article 9 of Law 18,256 in proceedings involving Abal, but did not thereafter provide Abal access to a judicial forum in which to present a presumptively serious constitutional challenge to Article 9 as that provision had been authoritatively interpreted and applied to it. In my view, this amounted to "Heads, I win; tails, you lose" treatment, without affording Abal the possibility of subsequent judicial recourse, which is contrary to Article 3(2)'s guarantee of fair and equitable treatment and the rule of law.

41. The Tribunal observes that the TCA's refusal to follow the interpretation of Article 9 of Law 18,256 which the Supreme Court (and the Uruguayan Legislature and State Attorney General) had adopted was "unusual, even surprising."[45] That is correct. The TCA's decision was both unusual and surprising because the interpretation of a statutory provision to mean diametrically opposed things, by different judicial tribunals within the same legal system, is in conflict with the basic values of the rule of law and prohibitions against denials of justice.[46]

42. The rule of law serves to ensure predictability, stability, neutrality, and objectivity; it ensures that generally applicable legal rules, rather than personal or political expedience, govern human affairs. Where different courts within a single legal system adopt contradictory interpretations for the same law, the rule of law is undermined, exposing individuals to inconsistent, unpredictable, and arbitrary treatment. Put simply, "[t]he fact that litigants can receive diametrically opposite answers to the same legal question depending on which type of court examines their case can only undermine the credibility of courts and weaken public confidence in the judicial system."[47]

43. Despite its surprise at the contradictory interpretations of Law 18,256 by the Supreme Court and TCA, the Tribunal nonetheless concludes that these decisions are not a denial of justice. According to the Tribunal, while unusual and surprising, the TCA's decision was the result of a "quirk," which is not sufficiently "serious" or "shocking" to violate Article 3(2) of the BIT.

[45] Award, para. 529.

[46] Like the Tribunal, I do not accept the Respondent's argument that the Supreme Court and TCA decisions were not inconsistent, because they addressed different issues (namely, whether Law 18,256 was constitutional and whether Decree 287/009 and Ordinance 466 were authorized by Law 18,256). The critical point is that the Supreme Court and TCA interpreted Article 9 of Law 18,256 in diametrically opposite ways (namely, that Article 9 did not authorize graphic warnings larger than 50% and that Article 9 did authorize such warnings). In my view, it is impossible to regard these decisions as anything other than squarely inconsistent or contradictory.

[47] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011, para. 17 [Exhibit REX-010].

44. The sole basis for the Tribunal's conclusion on this point appears to be a decision of the ECtHR in *Nejdet Şahin and Perihan Şahin v. Turkey* ("*Şahin v. Turkey*").[48] In my view, as detailed below, the ECtHR's decision does not support the Tribunal's holding and, on the contrary, requires the opposite conclusion from that reached by the Tribunal. Simply put, even if the ECtHR's interpretations of the European Convention on Human Rights ("ECHR") were decisive in interpreting Article 3(2) of the BIT, which they are not, the *Şahin v. Turkey* decision involved a vitally different factual setting than this case. When those differences are taken into account, the ECtHR's decision does not support, and instead contradicts, the Tribunal's interpretation of Article 3(2). More fundamentally, the decisions of the Uruguayan courts in this case violated basic precepts of the fair and equitable treatment standard, denying the Claimants access to vitally important judicial protections which are guaranteed by both Article 3(2) and general principles of international law.

45. As a preliminary matter, I do not agree that decisions interpreting the protection of the right to a fair trial in Article 6 of the ECHR are of decisive importance in interpreting the fair and equitable treatment guarantee of Article 3(2) of the BIT. Article 6's fair trial guarantee is contained in a particular human rights instrument, which was drafted and accepted in a specific geographic and historical context. Interpretations of Article 6 by the ECtHR may shed light on the general objects and purposes of the prohibition in Article 3(2) against denials of justice, but they provide little additional guidance in interpreting Article 3(2) or the standard of fair and equitable treatment under international law more generally.

46. Also preliminarily, the Tribunal relies on the ECtHR's decision for the proposition that the use of "separate administrative tribunals in the civil law tradition"[49] does not constitute a denial of justice. In my view, that proposition is undoubtedly correct, but irrelevant to the real grounds on which the actions of Uruguay's courts in this case are subject to challenge under Article 3(2) of the BIT.

47. There is in my view no basis for criticizing the existence or use of "separate administrative tribunals in the civil law tradition" (or in other traditions). As discussed above, this is a common feature of many legal systems, in both common law and civil law traditions.[50] As a general proposition, the existence of administrative tribunals (or other specialized types of tribunals), as well as other civil tribunals, is perfectly consistent with requirements for fair trials or prohibitions against denials of justice.

48. That general proposition is, however, of little relevance in this case. The existence of separate tribunals (the TCA and Supreme Court) in the Uruguayan legal system, is not the basis for either the Claimants' denial of justice argument or my own conclusion that Uruguay has violated Article 3(2). Rather, the challenge to Uruguay's actions rests on the fact that the Supreme Court and TCA rendered contradictory decisions, in proceedings involving the same party, without allowing that party any possibility of recourse to a judicial forum for constitutional challenges following the TCA's authoritative interpretation of Law 18,256. Even if authorities interpreting the ECHR were relevant to the meaning of Article 3(2) of the BIT, the ECtHR's decision in *Şahin v. Turkey* does not support the Tribunal's resolution of the real issues presented in this case.

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[48] Award, para. 530 (quoting *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011 [Exhibit REX-010]).
[49] Award, para. 530.
[50] *See above* paras. 11-12.

49. In *Şahin v. Turkey*, a narrow majority of the ECtHR held that the issuance of inconsistent decisions by Turkish military and administrative courts was not a violation of Article 6 of the ECHR. The ECtHR reasoned that "achieving consistency of the law may take time, and periods of conflicting case-law may therefore be tolerated without undermining legal certainty."[51] The Court also emphasized the existence of mechanisms in the Turkish legal system for avoiding inconsistent interpretations of the law,[52] and the deference that the ECtHR owed national courts in the administration of their judicial systems under Article 6 of the ECHR.[53]

50. Initially, it is appropriate to note that the *Şahin v. Turkey* decision on this point was rendered by a narrow majority of the European Court (ten judges) and was accompanied by a powerful dissent (by seven judges).[54] The dissent reasoned that the rendering of inconsistent judgments by different courts was a "flagrant malfunctioning" of the judicial system, which created the appearance of "arbitrariness," resulting in a violation of Article 6 of the ECHR.[55] Specifically, the dissent reasoned:

> *[W]e consider that a violation of the right to a fair hearing was caused by a malfunctioning of the machinery set in place to settle conflicts of jurisdiction, coupled with inconsistency in court decisions concerning the same factual situation. While domestic systems may comprise a variety of judicial structures, these structures should not give any appearance of arbitrariness in the public eye; when taking legal action litigants should be able to make decisions with a sufficient degree of foreseeability and based on clear, common and stable criteria.*[56]

51. In my view, there is substantial force to the reasoning of the dissenting opinion in *Şahin v. Turkey*. The concept of the rule of law implies regularity, stability, and lack of arbitrariness. In the words of the dissenting judges, the rule of law ensures that private parties are "able to make decisions with a sufficient degree of foreseeability and based on clear, common and stable criteria." The dissent's reasoning is also consistent with the approach taken by the ECtHR in its earlier jurisprudence, where the Court has routinely held that conflicting judicial decisions, producing legal uncertainty and unpredictability, are contrary to Article 6(1) of the ECHR.[57]

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[51] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 83 [Exhibit REX-010].

[52] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, paras. 87, 91-92 [Exhibit REX-010] The Court reasoned that Turkish courts had established mechanisms for "respecting the boundaries of their respective areas of jurisdiction and refraining from both intervening in the same area of the law," and that a Jurisdiction Disputes Court had issued rulings on the issue before the Turkish administrative and military courts, which had been applied by those courts in the matters before the ECtHR. *Ibid*.

[53] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, paras. 88-89 [Exhibit REX-010].

[54] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011 [Exhibit REX-010].

[55] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011, para. 2 [Exhibit REX-010].

[56] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Joint Dissenting Opinion, 20 October 2011, paras. 3, 15-16 [Exhibit REX-010].

[57] *See, e.g., Tudor Tudor v. Romania,* ECtHR Application No. 21911/03, Judgment, 24 March 2009, para. 41 ("in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty … this uncertainty deprive the applicant of a fair trial"); *Brumărescu v. Romania*, ECtHR Application No. 282342/95, Judgment (Merits), 28 November 1999, para. 61 ("One of the

52. The rendering of contradictory decisions, by co-equal courts within a single legal system is in tension with these basic objectives of transparency, stability, and predictability. Inconsistent decisions in cases involving similar legal issues do not reflect the rule of law, and instead reflect arbitrary and unprincipled chance. It is for precisely this reason that states which have co-equal judicial authorities also have mechanisms for reconciling the decisions of such tribunals.[58] In my view, the seven dissenting judges in *Şahin v. Turkey* adopted a sounder view of guarantees of a fair trial or protections against denials of justice than the ten judges in the majority of the ECtHR.

53. Importantly, however, resolution of the present case does not require deciding whether it was the majority, or the dissenting, judges of the ECtHR in *Şahin v. Turkey* that were correct. Instead, in my view, *Şahin v. Turkey* is plainly distinguishable from the present dispute, which involves a very different and significantly more troubling set of circumstances.

54. *Şahin v. Turkey* involved judicial decisions that were rendered in a number of different Turkish legal proceedings, brought by different private parties, each of whom received benefit payments, but in different amounts, from different Turkish military and administrative courts.[59] The parties who had received lower benefit payments from military courts complained that they had been treated differently from other parties, who had received larger payments from administrative courts.

55. In contrast, the present case involves not merely conflicting case-law by different courts in cases involving different parties, but proceedings brought by the *same* party, which was subject to directly contradictory decisions, rendered in closely related legal proceedings, interpreting the same statutory provision in irreconcilable ways. The Claimants in this arbitration do not complain that Abal was treated differently from other parties, in different proceedings, but that Abal itself was subjected to different treatment and contradictory interpretations of the same law, in the same dispute, with each of those contradictory interpretations then being applied to reject Abal's claims against the Uruguayan government.

56. Nothing in the ECtHR's reasoning in *Şahin v. Turkey* suggests that the Court would have found there was no violation of the right to access to justice or the rule of law where a state's courts not only adopted inconsistent interpretations of the law, but did so in closely-related proceedings involving the same party.[60] It is one thing for a state's judicial system to produce inconsistent interpretations of the law, and inconsistent results, in different cases, involving different parties. That circumstance involves "conflicting case-law," which might be "tolerated" for a period, as ten judges of the ECtHR held in *Şahin v. Turkey*.[61]

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fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.").

[58] As discussed in *Şahin v. Turkey*, such a mechanism existed in Turkey (in the form of a Jurisdiction Disputes Court), although the efficacy of that mechanism was disputed. *See above* para. 49, fn 52.

[59] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, paras. 25-32 [Exhibit REX-010].

[60] On the contrary, the ECtHR emphasized that the issue before it involved different parties in different legal proceedings, reasoning that "two courts, each with its own area of jurisdiction, examining different cases may very well arrive at divergent but nonetheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances." *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 86 [Exhibit REX-010].

[61] *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 83 [Exhibit REX-010].

57. In my view, it is something very different for the law to be interpreted in diametrically opposed ways in the *same* dispute, involving the *same* party.[62] This latter result involves a state, through its courts, holding that the same law means exactly opposite things as applied to the same litigant in the same dispute.[63] That is the antithesis of the rule of law: it constitutes a much more direct and immediate instance of arbitrariness, incapable of explanation by differences in the identities of the litigants, the circumstances of the parties or their dispute or the parties' litigation conduct.[64]

58. Furthermore, in the present case, the contradictory Supreme Court and TCA decisions involved additional elements of arbitrariness. Here, a nation's highest civil court, relying on formal submissions from the nation's legislature and highest legal officer, reached a considered and reasoned decision about the meaning of a legislative act. The interpretation of Uruguayan legislation on which that judicial decision rested was then rejected by an administrative tribunal, in what can only be characterized as a brief and largely unreasoned decision (quoted above[65]), after that administrative tribunal had stayed its own proceedings pending the outcome of the judicial proceedings.

59. As discussed above, this case was the first time that the Uruguayan Supreme Court and TCA have rendered contradictory decisions about the meaning of a statutory provision.[66] As a consequence, it is an understatement for the Tribunal to characterize the contradictory Supreme Court and TCA decisions as only an unusual and surprising occurrence. In fact, this case was the first and only time that such a contradiction between the Supreme Court and the TCA has occurred in more than 60 years (since the TCA was established in 1952).

60. The foregoing circumstances give rise, in my mind, to a very serious question whether the contradictory decisions of the Supreme Court and TCA in the proceedings commenced by Abal, standing on their own, constituted a denial of justice in this case. In my view, the unprecedented rendering of directly contrary interpretations of the same legislative provision by different Uruguayan courts, in proceedings arising from a single dispute involving the same parties, is in very serious tension with guarantees of regularity and fairness that underlie protections against denials of justice.

61. This is particularly true in a case, such as this one, where the contradictory interpretations of law are both applied by a state's courts to deny a party relief against governmental actions. Here, the Supreme Court rejected Abal's claims by holding that Law

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[62] As discussed in *Şahin v. Turkey*, the Turkish legal system provided a mechanism to resolve "conflicts of judgments when the enforcement of a right is rendered impossible by a divergence between the final decisions adopted by at least two of the courts referred to in section 1, provided that those decisions concern the same subject and the same cause of action – but not matters of jurisdiction – *and that at least one of the parties [to the case] is the same* …." *Nejdet Şahin and Perihan Şahin v. Turkey*, ECtHR Application No. 13279/05, Judgment, 20 October 2011, para. 24 [Exhibit REX-010] (alteration in original) (emphasis added). The existence of such a mechanism – and its inapplicability in *Şahin* due to the fact that multiple claims, involving multiple parties, were at issue – underscores the distinction between that case and this one.

[63] As noted above, the ECtHR made a point of observing that the issue before it in *Şahin v. Turkey* involved different parties in different legal proceedings, *See above* paras. 54-55.

[64] That is why domestic legal systems have mechanisms designed to prevent the same law from being applied in contradictory ways to the same litigants in the same dispute. In addition to mechanisms for avoiding or reconciling conflicting decisions by different tribunals (noted above), principles of *res judicata* and law of the case provide further protections against contradictory results being reached in proceedings involving the same parties. The failure of Uruguay's courts to apply such doctrines in this case materially heightens both the surprising character of their decisions (as the Tribunal correctly notes) and the arbitrariness of those decisions.

[65] *See above* para. 28.

[66] *See above* para. 33.

18,256 was constitutional because it *did not* authorize a requirement of graphic warnings larger than 50% of the surface of tobacco packaging, and the TCA rejected Abal's claims by holding that Decree 287/009 and Ordinance 466 were valid because Law 18,256 *did* authorize a requirement of graphic warnings larger than 50% of the surface of tobacco packaging. As discussed above, those holdings reflected a "Heads, I win; Tails, you lose" result. I find it very difficult to avoid concluding that these contradictory decisions, rendered against the same party in closely-related proceedings, violate guarantees of access to justice and adherence to the rule of law.

62. I am unpersuaded by the Tribunal's characterization of the foregoing circumstances as only a quirk.[67] Quirkiness is not a defense under international law. Rather, Article 3(2) of the BIT requires "fair and equitable treatment." It is neither fair nor equitable for a state to reject a party's claims against it by applying diametrically contradictory interpretations of the same law to the same party, in the same dispute, in each case as a basis for rejecting that party's claims against the state. Instead, that is arbitrary and irrational, denying parties the basic legal certainty, predictability and the fundamental fairness that the rule of law serves to ensure.

63. In the present case, however, there is an additional and even more serious procedural deficiency, not present in *Şahin v. Turkey*, which requires holding that the Uruguayan judicial system denied Abal access to justice. Here, the Uruguayan judicial system denied Abal access to justice not only by rendering contradictory decisions, on the same legal issue in cases involving the same parties, but by thereafter failing to provide Abal with any means of judicial recourse following these rulings.

64. Specifically, in my view, Uruguay denied Abal justice by failing to provide it with any means of asserting a constitutional challenge in the Supreme Court to Article 9 of Law 18,256 as that statutory provision had been authoritatively interpreted and applied to Abal by the TCA. In the particular circumstances of this case, that was not merely an unusual or surprising quirk, but was a classic denial of access to justice.

65. Put simply, Uruguayan law provided Abal (and others) with constitutional guarantees against legislation that excessively delegated legislative authority to executive officers and with a mechanism for asserting claims based on those guarantees in the Supreme Court. Abal availed itself of that mechanism to challenge Article 9 of Law 18,256, but the Supreme Court rejected Abal's challenge on the basis that Article 9 did not authorize a requirement of graphic warnings in excess of 50% of the surface of tobacco packages. Nonetheless, the TCA thereafter surprisingly, but authoritatively, held that Article 9 in fact did authorize warnings in excess of 50%, and it therefore upheld Decree 287/009 and Ordinance 466.

66. At that juncture, the evidence before this Tribunal is that Uruguay's judicial system provided Abal with no means to assert claims based on the constitutional guarantees against legislation like Article 9 of Law 18,256, as it had been interpreted authoritatively by the TCA and applied to Abal. In my view, the combination of the TCA's highly unusual, but authoritative, decision, contradicting the Supreme Court's prior decision on precisely the same issue, and the absence of any mechanism to reopen or reinitiate Abal's constitutional challenge

[67] The Tribunal concludes that the TCA's decision was "unusual, even surprising," but that "such a quirk" is not sufficiently "shocking" or "serious" to constitute a denial of justice. Award, paras. 528-529. Fine distinctions between unusual surprises and "shocking" or "serious" decisions are inherently susceptible to subjectivity. In my view, however, the unprecedented contradiction between two of Uruguay's highest courts, in cases involving the same claimant, was sufficiently serious and sufficiently inconsistent with the requirements of consistency and regularity to constitute a denial of justice.

in the Supreme Court, based on the TCA's contrary and authoritative interpretation of Law 18,256, manifestly constitutes a denial of justice.

67. Adopting the relatively conservative formula of Article 9 of the 1929 Harvard Draft Convention on State Responsibility, a "[d]enial of justice exists where there is a denial … of access to courts."[68] Other authorities are to the same effect, underscoring the simple point that access to a judicial forum is the most basic guarantee of justice.[69] Among other things, the ECtHR, considering Article 6 of the ECHR, has held that"[i]t would be inconceivable … that [Article 6(1)] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court."[70]

68. In the present case, Uruguay was free, under the BIT and otherwise, to establish the Supreme Court and the TCA as co-equal judicial tribunals with overlapping competence, and to provide that Law 18,256 was subject to authoritative interpretation by the TCA. One can assume that the TCA was also free to adopt surprising administrative interpretations of Law 18,256, in contradiction to the Supreme Court's interpretations of that same law. One might even assume that the TCA was free to do so even with respect to the same party that had been involved in Supreme Court proceedings challenging the same legislation.

69. However, in my view, Uruguay clearly was not entitled to, under either Article 3(2) of the BIT or international law, provide Abal with no possibility of asserting its constitutional rights in the Supreme Court, in a proceeding based on the TCA's authoritative interpretation and application (to Abal) of Article 9 of Law 18,256. That is not consistent with either Uruguay's commitment to the rule of law or rules of international law. Instead, in my view, Uruguay was required to provide a means by which its Supreme Court could hear constitutional challenges to Law 18,256, as that statute was finally interpreted and applied to Abal by the TCA.[71]

70. Given these very substantial and important differences between the present case, and the circumstances at issue in *Şahin v. Turkey*, I do not believe that the ECtHR's decision in that

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[68] Draft Convention on 'International Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners' prepared by the Harvard Law School (1920) in *Yearbook of the International Law Commission, 1956*, Vol. II, Annex 9, pp. 229-230 ("1929 Harvard Draft Convention on State Responsibility"). *See also* Harvard Draft Convention on the International Responsibilities of States for Injuries to Aliens (1961), Art. 7 [Exhibit CLA-236] (state responsibility is triggered by "the denial […] of a fair hearing in a proceeding involving the determination of […] civil rights or obligations.").

[69] *See* Universal Declaration of Human Rights (UDHR), Art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"); UDHR, Art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."); International Covenant on Civil and Political Rights (ICCPR), Art. 14 ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*."); *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights),* Inter-American Court of Human Rights, Advisory Opinion No. 9, para. 24 (a denial of justice occurs "when, for any reason, the alleged victim is denied access to a judicial remedy"). *See also* A. Freeman, *The International Responsibility of States for Denial of Justice* (1970), pp. 95, 229 [Exhibit CLA-231] (denial of justice defined as "the refusal or failure on the part of judicial officers to perform their legal functions" and "even where there has been an original acceptance of the petition by a court of first instance followed by proceedings which terminate in an adverse judgment, the refusal to grant an appeal allowed by law will itself constitute a denial of justice.").

[70] *Golder v UK*, ECHR Case No 4451/70, Judgment, 21 February 1975, para. 35.

[71] *See above* paras. 40-72.

case provides meaningful support for the Tribunal's decision that there has been no denial of justice. Put simply, *Şahin v. Turkey* involved a much different, and less problematic, set of circumstances than this case.

71. Instead, in my view, the *Şahin v. Turkey* decision supports, rather than contradicts, the Claimants' denial of justice claim. The well-reasoned views of the seven dissenting judges of the ECtHR apply *a fortiori* to the present case, while the additional concerns raised by the circumstances of the present case argue decisively that the Claimants were denied access to justice. As discussed above, the present case does not merely involve "conflicting case-law" applied to different parties which might be "tolerated" for a period, but instead involves contradictory decisions, applied to reject claims against governmental action, brought by the same party, followed by a denial of recourse to generally available judicial relief. If the present case was brought before the ECtHR, I do not believe that the Court would have viewed these circumstances as "tolerable," for either a period or at all.

72. In sum, I am unable to avoid concluding that Uruguay violated Article 3(2) of the BIT by failing to provide Abal with a possibility of asserting its constitutional rights in the Uruguayan Supreme Court, in a proceeding challenging Article 9 of Law 18,256 as it had been authoritatively interpreted and applied (to Abal) by the TCA. This conclusion in no way questions Uruguay's sovereign right to structure its judicial system as it deems fit, including with independent and co-equal courts with overlapping competence.[72] It only requires that a state then comply with the basic requirements of fairness and access to justice that international law demands.

D. Additional Observations

73. The foregoing analysis provides my reasons for rejecting the Respondent's defenses and the Tribunal's conclusions on this issue. Nonetheless, for the sake of completeness, I address several additional points.

74. First, the Respondent's position is not assisted by the observation, raised in questioning of the Respondent's counsel by the Tribunal, that different circuit courts of appeal in the United States can adopt conflicting rules, a conflict that may take the Supreme Court some time to resolve.[73] That analysis ignores critical differences between U.S. appellate practice and the Claimants' arguments in this case.

75. U.S. courts of appeal exercise a jurisdiction that is territorial, based upon a geographic division of the United States of America into a number of separate "Circuits," each with its own "Court of Appeals."[74] That is unsurprising in a state as large as the United States; likewise, it is unsurprising that other, similar states (such as Canada and Australia) adopt comparable

[72] This is not to say, however, that the structuring of a judicial system cannot found a claim for denial of justice. *See, e.g., Jacob Idler (US v Venezuela)*, J.B. Moore, *History and Digest of International Arbitrations to which the United States Has Been a Party* 3491, p. 3508 ("Venezuela could, of course, constitute her courts as she desired, but having established them, it was Idler's right, if his affairs were drawn in litigation there, to have them adjudicated by the courts established under the forms of law."); A. Freeman, *The International Responsibility of States for Denial of Justice* (1970), pp. 533, 671-2 [Exhibit CLA-231] ("If, through the composition of its courts or through its procedure, a State makes possible a decision which does not offer the minimum guarantees for the proper administration of justice which are inseparable from the idea of civilization, we consider that it is guilty of a denial of justice and must be held responsible therefor.").

[73] Evidentiary Hearing (Tr., 2/482/13-22) (Crawford).

[74] Administrative Office of the United States Courts, Court Role and Structure, (2016), http://www.uscourts.gov/about-federal-courts/court-role-and-structure.

geographical divisions.[75] There is also nothing unusual or surprising in the fact that different courts of appeal might adopt different interpretations of the same statute; indeed, it is inevitable and, at least arguably, a means of ensuring considered development of the law through robust debate and multiple opportunities for examination of difficult issues, prior to an authoritative ruling by the nation's highest appellate court.

76. The possibility that different courts of appeal may arrive at different interpretations of the same statute is not, however, in any way analogous to the basis for the Claimants' denial of justice claim here. As detailed above, the Claimants' denial of justice claim is not only that contradictory decisions were rendered by the Supreme Court and the TCA; instead, the Claimants' claim rests on the TCA's highly unusual decision, rejecting the Supreme Court's interpretation of Article 9 of Law 18,256 in proceedings involving the same party, and the absence of any mechanism for that party thereafter to reopen or reinitiate a constitutional challenge to Article 9 of Law 18,256, as it had been authoritatively interpreted and applied by the TCA. There is no suggestion in the materials before the Tribunal that the U.S. system of federal appellate courts, divided geographically into multiple circuits, permits such a result and I am aware of nothing, either in my own research or experience of U.S. appellate and Supreme Court proceedings, that would support such a conclusion.[76]

77. On the contrary, U.S. courts apply broad rules of claim and issue preclusion[77] which, in my view, would almost certainly preclude circumstances like those in which Abal found itself in this case. Alternatively, U.S. law also provides comparatively broad possibilities for constitutional challenges[78] which, again in my view, would enable a party in Abal's situation to institute new proceedings asserting such a challenge based on a new interpretation of legislation (such as that adopted by the TCA of Law 18,256). There is, in my view, no basis for concluding that the unexceptional existence of specialized courts – whether organized by geography or subject matter – is comparable to the very exceptional denial of access to a judicial forum that occurred here.

78. Second, I do not believe that the Tribunal's analysis is advanced by the *Mamidoil* award, which remarked that there was nothing inherently improper in a legal system that divides public and private, or civil and administrative, functions.[79] As discussed above,[80] nothing in my Opinion criticizes or questions to value or legitimacy of co-equal tribunals with

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[75] *See, e.g.*, Canada (Government of Canada, Department of Justice, The Judicial Structure, (April 4, 2016), http://www.justice.gc.ca/eng/csj-sjc/just/07.html); Australia (Australian Government, Attorney-General's Department, The Courts, (2016), https://www.ag.gov.au/LegalSystem/Courts/Pages/default.aspx).

[76] I also note that the U.S. judicial system has a mechanism (of review by the Supreme Court) for review of decisions of Courts of Appeals, which specifically takes into account the existence of so-called "circuit splits." (*International Union, United Auto., Aerospace and Agr. Implement Workers of America AFL-CIO, Local v. Scofield*, 382 U.S. 205 (1965)). It is conceded that Uruguay has no mechanism for resolving disagreements between the TCA and Supreme Court. (Evidentiary Hearing, Tr., 2/483/4- 7) (Crawford/Salonidis) (CRAWFORD: My question was is there any mechanism in Uruguayan law for resolving such discrepancies [between courts at the same level]? SALONIDIS: As far as I know, no.).

[77] *See B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015) ("If federal law provides a single standard, parties cannot escape issue preclusion simply by litigating anew in tribunals that apply that one standard differently."); *Christian v. McHugh*, 847 F. Supp. 2d 68 (D.D.C. 2012) ("By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, the two doctrines of claim preclusion and issue preclusion protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions.").

[78] *See* U.S. Federal Rules of Civil Procedure, Rule 5.1; *see generally* Moore's Federal Practice – Civil § 5.1.02 (2015).

[79] Award, para. 533.

[80] *See above* paras. 10-11.

over-lapping competency. That is true whether one considers a civil or a common law system. Rather, as also explained above, it is the particular and unprecedented manner in which Uruguay's divided legal system (with competence distributed between the Supreme Court and TCA) functioned in this particular case that resulted in a denial of justice.

79. Third, I also do not believe that the Respondent's defense is assisted by its argument that the Uruguayan system has a mechanism of review, in which the TCA may review decisions of the Supreme Court.[81] As the Respondent acknowledges, this mechanism of review is limited: "the *only* time the TCA is required to follow the [Supreme Court] is when the latter declares a law unconstitutional."[82] As discussed above, the basis for the Claimants' denial of justice claim is the absence of any avenue of judicial recourse after the TCA has, unusually, adopted a different interpretation than that of the Supreme Court.[83] In such circumstances, where the Supreme Court has upheld the constitutionality of a law and the TCA is not bound to follow its ruling, a litigant is left without remedy in event of conflicting decisions.

80. Finally, like the Tribunal, I am unpersuaded by the Respondent's argument that Uruguayan law has allowed the possibility of inconsistent Supreme Court and TCA decisions for decades. As discussed above, this is apparently the first case in Uruguay's history in which such contradictory results have ever been reached.[84] I see no basis, as a result, for concluding that the Claimants should have anticipated, or should be regarded as assuming the risk of, contradictory decisions of this character.

81. In any event, it is not the mere possibility of contradictory decisions under Uruguayan law that constitutes a denial of justice; rather, it was the failure of the Uruguayan legal system to provide an avenue for challenging Article 9 of Law 18,256 following the TCA's authoritative interpretation and application of that provision which constitutes a denial of justice. That denial of access to a judicial forum is a denial of justice, which both the BIT and Uruguay's commitment to the rule of law proscribe.

II. THE SINGLE PRESENTATION REQUIREMENT VIOLATES URUGUAY'S OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT

82. The second issue on which I part company from the Tribunal is the so-called "single presentation requirement," which required that only a single "presentation" be used for each brand of tobacco products. For the reasons discussed below, and unlike the Tribunal, I cannot avoid concluding that, on the evidentiary record in this case, the single presentation requirement is manifestly arbitrary and unreasonable, and thus a violation of Article 3(2) of the BIT.

83. The Claimants contend that the "single presentation requirement" imposed by Ordinances 514 and 466 violates the fair and equitable treatment guarantee contained in Article 3(2) of the BIT. The Claimants argue that there is no rational relationship between the single presentation requirement and the asserted regulatory purpose of the measure (namely, to avoid misleading consumers).[85] They also claim that the requirement was adopted without any

[81] Respondent's Rejoinder, para. 11.54; Respondent's Counter-Memorial, para. 1.29, 11.01, 11.112-11.125.
[82] Respondent's Rejoinder, para. 11.54; Respondent's Counter-Memorial, para. 1.29, 11.01, 11.112-11.125.
[83] *See above* paras. 36-39.
[84] *See above* paras. 33-35, 59.
[85] *See, e.g.*, Claimants' Memorial, paras. 20-42; 214, 219-230. Claimants' Reply, paras. 27-42, 236-245.

meaningful deliberation or consultation, and imposes an arbitrary limitation on the use of valuable intellectual property rights.[86]

84. The Respondent asserts that the single presentation requirement was a non-discriminatory measure, imposed on all tobacco companies, designed to prevent such companies from misleading consumers.[87] The Respondent claims that the existence of multiple brand variants leads consumers to believe that some variants are less harmful than others, thereby giving smokers and potential smokers less reason to quit smoking.[88] The Respondent also contends that the requirement was adopted as the result of an extensive deliberative process and is in keeping with Uruguay's commitments under the World Health Organization Framework Convention on Tobacco Control.[89]

85. The Tribunal largely adopts the Respondent's conclusions and analysis. The Tribunal applies a "margin of appreciation," derived from ECtHR decisions, and concludes that the single presentation requirement was "an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith."[90] It also concludes that the requirement was the product of "consultation" with the Ministry of Public Health's Advisory Commission, although the "paper trail of these meetings was exiguous," and that the requirement was in the nature of a "bright idea."[91]

86. In my view, analysis of the single presentation requirement is more difficult than the Tribunal suggests and the requirement is much less capable of rational justification than the Tribunal acknowledges. As discussed below, the measure is internationally unique – not required by the Framework Convention on Tobacco Control and not adopted by any other country in the world – with effects which are inherently both over-inclusive and under-inclusive. While fully acknowledging Uruguay's sovereign power and regulatory authority to protect the health of its population, I am persuaded that the single presentation requirement does not bear even a minimal relationship to the legislative objective cited by Uruguay for the requirement.

87. I also do not believe that the "margin of appreciation" adopted by the Tribunal is either mandated or permitted by the BIT or applicable international law. The "margin of appreciation" is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT (or to questions of fair and equitable treatment more generally). There are well-considered legal rules, already applicable to questions of fair and equitable treatment, which serve similar purposes to those of the "margin of appreciation," but in a more nuanced and balanced manner.

88. When these rules governing the fair and equitable treatment standard are applied, I am persuaded, based on the evidentiary record in this proceeding, that the single presentation requirement is arbitrary and irrational. I am also persuaded that, as a consequence, application

[86] *See, e.g.*, Claimants' Memorial, paras. 214, 222-230; Claimants' Reply, paras. 43-61, 242-245.
[87] *See, e.g.*, Respondent's Counter-Memorial, paras. 1.13, 4.11-8.21.; Respondent's Rejoinder, paras. 3.12-3.82.
[88] *See, e.g.*, Respondent's Counter-Memorial, paras. 4.88-4.143; Respondent's Rejoinder, paras. 3.12-3.24, 3.32-3.109.
[89] *See, e.g.*, Respondent's Counter-Memorial, paras. 1.14, 2.30-2.36, 3.78-3.95, 4.98-4.111; Respondent's Rejoinder, paras. 2.37-2.38, 3.57-3.60, 3.83-3.109, 7.40.
[90] Award, paras. 399, 409.
[91] Award, para. 407.

of the single presentation requirement would constitute a denial of fair and equitable treatment under Article 3(2) of the BIT.

A. Preliminary Matters

89. Preliminarily, it is important to reiterate that the Claimants' challenge to the single presentation requirement does not in any way question Uruguay's sovereign authority to adopt measures to protect the health and safety of its population. As the Award describes, Uruguay has adopted an extensive and comprehensive set of legislation and regulations that impose highly restrictive limitations and safeguards on the sale and use of tobacco.[92] The Claimants do not challenge any of these regulations. More fundamentally, nothing in the Award (or this Opinion) raises any question about the validity or lawfulness of any of these regulations.

90. Likewise, nothing in the Award or this Opinion raises any question about the authority of Uruguay (or other states) to regulate in the interests of public health and safety in the future. On the contrary, the Award makes clear that Uruguay possesses broad and unquestioned sovereign powers to protect the health of its population, both in the context of tobacco regulation and otherwise. Nothing in the BIT prevents Uruguay from exercising these powers.

91. Finally, this Opinion also does not conclude that Uruguay would violate Article 3(2) by forbidding misleading presentations of trademarks for tobacco products, including the misleading use of colors, descriptions, or other design features. On the contrary, the evidence submitted to the Tribunal convinces me that neither Article 3(2) nor any other provision of the BIT would preclude Uruguay from prohibiting the use of trademarks that suggested different health consequences (e.g., silver or white versions of trademarks suggesting "light" or "low tar" attributes of cigarettes). Critically, however, this is only one application of the single presentation requirement, which sweeps far more widely and indiscriminately, and, as a consequence, violates the fair and equitable treatment guarantee of Article 3(2) of the BIT.

B. Factual Background

92. In my view, it is important to consider the single presentation requirement in its factual context. That includes considering both the manner in which requirement was adopted and the surrounding legislative and regulatory regime in Uruguay.

1. The Framework Convention on Tobacco Control

93. As the Award describes, like other states, Uruguay has an extensive regime of legislation and regulations governing the sale and use of tobacco. Among other things, this regulatory regime implements the WHO Framework Convention on Tobacco Control ("FCTC" or "Convention") and Guidelines which have been adopted under the Convention.

94. The FCTC is a multilateral convention, drafted under the auspices of the World Health Organization ("WHO") in 2003, and ratified by Uruguay in 2004. The Convention is essentially global in its coverage, with 180 state parties. According to Article 3, the Convention "provid[es] a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke."[93]

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[92] Award, paras. 78, 96-107.

[93] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Art. 3 [Exhibit RL-

95. The FCTC contains extensive provisions regarding the regulation of tobacco. Most importantly, Article 4(1) and Article 11(1)(a) provide, in relevant part:

> *Article 4. – (1) Every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke…*
>
> *Article 11. – (1) Each party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that: (a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"…*[94]

96. Articles 13(1), 13(2), 13(4)(a) and 13(5) of the Convention also provide:

> *Article 13. –*
>
> *1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.*
>
> *2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.*
>
> *4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall: (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions; …*
>
> *5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.*[95]"

97. The Guidelines to Article 11(1)(a) of the FCTC provide, in pertinent part:

> *Article 11.1(a) of the Convention specifies that Parties shall adopt and implement, in accordance with their national law, effective measures to ensure that tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about the product's characteristics, health effects, hazards or emissions, including any term, descriptor, trademark or figurative or other sign that directly or indirectly creates the false impression that a particular*

20].

[94] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 4(1), 11(1)(a) [Exhibit RL-20].

[95] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 13(1), 13(2), 13(4)(a), 13(5) [Exhibit RL-20].

> *tobacco product is less harmful than others. These may include terms such as 'low tar, 'light', 'ultra-light' or 'mild', this list being indicative but not exhaustive. In implementing the obligations pursuant to Article 11.1(a), Parties are not limited to prohibiting the terms specified but should also prohibit terms such as "extra", "ultra" and similar terms in any language that might mislead consumers.*[96]

98. The Guidelines to Article 13 provide, inter alia:

> *Parties should prohibit the use of any term, descriptor, trademark, emblem, marketing image, logo, colour and figurative or any other sign that promotes a tobacco product or tobacco use, whether directly or indirectly, by any means that are false, misleading or deceptive or likely to create an erroneous impression about the characteristics, health effects, hazards or emissions of any tobacco product or tobacco products, or about the health effects or hazards of tobacco use. Such a prohibition should cover, inter alia, use of the terms "low tar", "light", "ultra-light", "mild", "extra", "ultra" and other terms in any language that may be misleading or create an erroneous impression.*[97]

99. It is important to note that the single presentation requirement is not required by or referred to in the Convention. That is true although the Convention does mandatorily prescribe a number of other specific regulatory measures, which were developed through extensive international study and consultation. These include measures providing for protection from exposure to tobacco smoke in indoor workplaces and other public places (Article 8); measures to restrict advertising and promotion, including misleading use of trademarks (Article 13); measures to ensure that all unit packets and packages of tobacco products and any outside packaging are marked to determine the origin of the tobacco products (Article 15); and measures to prohibit the sales of tobacco products to minors (Article 16).[98]

100. Despite this detailed list of regulatory measures, and despite the Convention's "savings" clause (providing for further national regulations),[99] there is no suggestion in the text or history of the Convention that a single presentation requirement was either mandated or contemplated by the Convention. Likewise, there is nothing in the Guidelines to the Convention that suggests that a single presentation requirement was mandated or contemplated by the Convention's drafters. Although the Guidelines make reference to a variety of wide regulatory measures,[100] they contain no reference to a single presentation requirement.

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[96] *Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products),* adopted at the third Conference of the Parties (Nov. 2008), para. 43 [Exhibit RL-13].

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

[98] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 8, 15, 16 [Exhibit RL-20].

[99] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Arts. 2 and 13(5) [Exhibit RL-20].

[100] For example, the FCTC Guidelines to Article 11 provide that Parties "should prohibit the display of figures for emission yields" or "should prevent the display of expiry dates on tobacco packaging and labelling where this misleads or deceives consumers into concluding that tobacco products are safe to be consumed at any time":

101. Finally, it is also relevant that a single presentation requirement has never been imposed by any other state, either in Latin America or elsewhere, prior to Uruguay's adoption of Ordinance 514 and Ordinance 466. Instead, Uruguay was the first state to adopt or, so far as the evidentiary record indicates, to consider a single presentation requirement. Similarly, again so far as the evidentiary record indicates, no state other than Uruguay has subsequently adopted a single presentation requirement.[101] The single presentation requirement was (and remains), in a field with an extensive body of regulation, unprecedented.

2. Uruguayan Tobacco Legislation and Regulations

102. Uruguayan legislation and regulations contained detailed restrictions on the use and sales of tobacco prior to ratification of the FCTC (on 9 September 2004). These restrictions were preserved, and then expanded, after the Convention came into force for Uruguay. They provide important context for consideration of the single presentation requirement.

103. In summary:

a. In 1982, Uruguay's Parliament adopted Law 15,361. That legislation imposed a number of significant restrictions on the use and sale of tobacco, including (a) mandating inclusion of specific warnings on tobacco packaging; (b) prohibiting sales of cigarettes to minors; and (c) requiring quarterly publication of tar and nicotine levels of cigarette brands by tobacco companies.[102]

b. In 1996, Decree 203/996 prohibited smoking in offices, public buildings and other public establishments.[103]

c. In 1998, Decree 142/998 prohibited promotion of tobacco involving product giveaways.[104]

d. In 2005, Decrees 36/005 and 171/005 mandated inclusion of warning texts on tobacco packaging covering 50% of the surfaces of the front and back of packages, required periodic rotation of warnings and inclusion of administratively-specified images and pictograms, and prohibited use of terms such as "low tar" and "light."[105]

e. In 2005, Decree 169/005 limited smoking areas in restaurants and bars and

Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products), adopted at the third Conference of the Parties (Nov. 2008), paras. 44-45 [Exhibit RL-13].

[101] The Respondent suggests that other states (including Ecuador) have considered adoption of a single presentation requirement, but have allegedly been deterred by the pendency of this arbitration. (Respondent's Rejoinder, paras. 3.76-3.79; Uruguay's Comments on the Written Submission of the Pan American Health Organization (18 May 2015), para. 15.) There is no independent evidentiary support for this suggestion and it seems unlikely that states would refrain from adopting what they regard as important public health measures because of the possibility of future litigation.

[102] Law 15,361, December 24, 1982, *amended by* Law 17,714, December 10, 2003, Art. 2 [Exhibit C-274].

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

[104] V. Denis, et al., *Application of FODA Matrix on the Uruguayan Tobacco Industry* (2007), p. 140 [Exhibit R-180].

[105] Uruguayan Decree No. 36/005 (25 January 2005), Art. 1 [Exhibit C-031], Uruguayan Decree No. 171/005, Art. 1 (31 May 2005) [Exhibit RL-2].

advertisements on television (requiring "safe hours" for minors).[106]

f. In 2005, Decree 170/005 prohibited advertising and promotion of tobacco products in connection with sports events.[107]

g. In 2005, Decrees 214/005 and 268/005 declared that all public offices were "100% tobacco smoke-free environments" and that all enclosed public premises and work areas were subject to the same requirement.[108]

h. In 2005, Decree 415/005 required that all pictograms on tobacco packaging be approved by the Ministry of Public Health, specified images for use on tobacco packaging and required health warnings on one side of tobacco packages.[109]

i. In 2007, Decree 202/007 specified three images and legends for use on the surfaces of tobacco packaging.[110]

j. In 2007, Tax Law 18,083 significantly modified the previous tax regime and imposed a 22% value added tax on tobacco products.[111]

104. Following Uruguay's ratification of the FCTC, Uruguay's Parliament adopted Law 18,256, which restated and extended many of the foregoing regulations. Article 2 of Law 18,256 made specific reference to the Convention, providing "measures aiming at the control of tobacco are established, in order to reduce in a continuous and substantial manner the prevalence of tobacco consumption and exposure to tobacco smoke, pursuant to the World Health Organization Framework Agreement for Tobacco Control."[112]

105. As contemplated by Article 11 of the Convention, Article 8 of Law 18,256, titled "Packaging and labeling of tobacco products," imposed a broad prohibition against false or misleading packaging or labelling of tobacco products, including specific prohibitions against false or misleading use of trademarks:

> *It is forbidden for packages and labels of tobacco products to promote such products in a false, wrong or misleading way which may lead to a mistake regarding their features, health effects, risks or emissions. It is likewise forbidden to use terms, descriptive features, trademarks or brands, figurative signs or any other kind, which have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than others.*[113]

106. Article 8 was implemented by Decree 284/008, which contained an equally broad prohibition against misleading use of trademarks. Decree 284 provided in Article 12 as follows:

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[106] Uruguayan Decree No. 169/005 (6 June 2005) [Exhibit C-146].
[107] Uruguayan Decree 170/005 (6 June 2005) [Exhibit C-147].
[108] Uruguayan Decree 214/005 (5 July 2005) [Exhibit C-150], Uruguayan Decree 268/005 (5 September 2005) [Exhibit C-151].
[109] Uruguayan Decree 415/005 (26 October 2005) [Exhibit C-153].
[110] Uruguayan Decree 202/007 (20 June 2007) [Exhibit C-149].
[111] Uruguayan Tax Law 18,083 (1 July 2007).
[112] Law 18,256, Art. 2 [Exhibit C-033].
[113] Law 18,256, Art. 8 [Exhibit C-033].

> *The use of descriptive terms and elements, trademarks or brands, figurative signs or signs of any other nature, such as colors or combination of colors, numbers or letters, that have the direct or indirect effect of creating the misleading impression that a certain product is less harmful than others is forbidden.*[114]

It was against this regulatory background that the single presentation requirement was adopted in Ordinance 514 (and, subsequently, Ordinance 466).

3. Ordinances 514 and 466: Single Presentation Requirement

107. As noted above, the Respondent contends that the single presentation requirement was the product of a comprehensive and extensive deliberative process, which assertedly included a number of meetings concerning the requirement.[115] The Tribunal acknowledges that the "paper trail of these meetings was exiguous," although the Tribunal seems to accept the Respondent's assertion that the two measures were subject to at least some degree of consideration by the Advisory Commission of the MPH.[116]

108. In my view, the record does not support a conclusion that the single presentation requirement of Ordinance 514 or Ordinance 466 was preceded by any meaningful internal study, discussions or deliberations at the Ministry of Public Health, or by other Uruguayan authorities. On the contrary, I cannot avoid concluding that no serious study, discussion, deliberations, or consultations occurred with respect to the requirement, either within the Ministry of Public Health or otherwise.

109. It is significant that the evidentiary record contains no minutes, agendas, protocols, preparatory materials, memoranda, letters, emails or other documentary evidence suggesting that any meetings, conference calls or other interactions concerning the single presentation requirement ever occurred. If such meetings had occurred, there would inevitably have been substantial documentation generated in scheduling, organizing and reporting on them. More importantly, there would have been records of the rationale and evaluation of the single presentation requirement by the Ministry of Public Health or other government agencies. Uruguay was free to adduce documentary evidence of such meetings or other discussions, but it did not do so.

110. On the contrary, during document production, the Claimants requested all "[d]ocuments generated or obtained by/for the Ministry of Public Health in 2008 reflecting its deliberations on the [single presentation requirement]" including:[117]

> *(i) meeting minutes; (ii) documents establishing the date(s) on which the meetings regarding the SPR took place; (iii) correspondence regarding the SPR; (iv) documents showing that "new brands, entirely distinct from existing brands, do not convey the same messages as variations within the same brand;" (v) documents showing that brand variants are per se misleading, even if the "colors have not been used previously in Uruguay to convey linkage to specific banned variants that were formerly identified explicitly as 'light' or 'mild'; (vi) all drafts of proposed regulations that led to the SPR, including preliminary*

[114] Uruguayan Decree 284, Article 12 [Exhibit C-034].
[115] Respondent's Rejoinder, paras. 3.83-3.109.
[116] Award, para. 407; Respondent's Counter-Memorial, para. 1.1, 4.105-4.107; Respondent's Rejoinder, paras. 3.83, 3.85-3.87, 3.98-3.108.
[117] Procedural Order No. 2, January 13, 2015, Annex A, Request No. 7.

drafts of Ordinance 514; (vii) documents reflecting the Advisory Commission's consideration and/or rejection of alternative measures.

The Claimants also requested all "[d]ocuments that the MPH considered and/or relied upon as evidentiary support when considering or adopting the SPR."[118]

111. In response, the Respondent produced only six generic documents, none of which refer to the single presentation requirement and none of which involved meetings within or near the time period relevant to adoption of the single presentation requirement.[119] As indicated above, none of these materials evidenced any study, debate, or consultation regarding the single presentation requirement.

112. This is confirmed by an examination of the very limited documentary record surrounding the adoption of the single presentation requirement. That evidence shows that there was simply no time for – as well as no evidence of – any internal study, discussion, or consultation regarding the single presentation requirement.

113. The documentary record indicates that the first proposals for Ordinance 514 were presented in July 2008.[120] It is undisputed that the initial draft of the proposed ordinance (on 25 July 2008) did not include the single presentation requirement.[121]

114. The first reference to a single presentation requirement was included in a 28 July 2008 draft of Ordinance 514, prepared by the Ministry of Public Health's National Tobacco Control Program. The 28 July draft added the text of a single presentation requirement to the prior draft that the Ministry had received on 25 July,[122] without including any commentary or explanation for the addition.[123]

115. The 28 July draft was then sent to the Ministry of Public Health's Division of Population Health (*Division de Salud de la Poblacion*), which forwarded the draft on 30 July 2008, to the Director General of Health (*Direccion General de Salud*). The Director General of Health (Dr. Basso) reviewed the draft and made a single hand-written addition to the text of the draft; again, there was no explanation or discussion of the single presentation requirement.[124] The 28 July draft of Ordinance 514, with the 30 July edit, was then signed and

[118] Procedural Order No. 2, January 13, 2015, Annex A, Request No. 1.

[119] Five documents were general email announcements of upcoming meetings of the Advisory Commission and one was a scanned copy of personal calendar entries noting meeting dates of the Advisory Commission scheduled in April 2008. Email from Ministry of Public Health Commissions to Dr. Abascal et al, 1 July 2008 [Exhibit C-328]; Email from Ministry of Public Health Commissions to Dr. Abascal et al, 2 June 2008 [Exhibit C-329]; Email from Ministry of Public Health Commissions to Dr. Abascal et al, 18 June 2008 [Exhibit C-330]; Email from Ministry of Public Health Commissions to Dr. Abascal et al., 27 May 2008 [Exhibit C-331]; Email from Eduardo Bianco to Ministry of Public Health Commissions, 27 May 2008 [Exhibit C-332]; Personal Agenda of Eduardo Bianco, 2008 [Exhibit C-333]. The Government withheld no documents on grounds of privilege with regard to these requests.

[120] Ministry of Health Administrative File regarding Ordinance 514, pp. UGY0001810-1812 [Exhibit C-334].

[121] Respondent's Rejoinder, para. 3.102; Claimants' Reply, para. 52.

[122] Ministry of Health Administrative File regarding Ordinance 514, UGY0001836-1838 [Exhibit C-334].

[123] Ministry of Health Administrative File regarding Ordinance 514, p. UGY0001810-1812; Respondent's Rejoinder, para. 3.103; Claimants' Reply, para. 52.

[124] Ministry of Health Administrative File regarding Ordinance 514, pp. UGY0001824 [Exhibit C-334]. *See also,* Basso Witness Statement, paras. 11-12 [Exhibit RWS-004].

sent to the Minister of Public Health the next day (1 August 2008), again without any commentary or explanation relating to the single presentation requirement.[125]

116. As noted above, there was no time during this process for there to have been any meaningful discussions or consultations regarding the single presentation requirement. Rather, the requirement was formulated, drafted, and approved in the space of only a few days – with, as noted above, no documentary evidence of any governmental meetings, discussions, or study of the measure.

117. Shortly thereafter, on 18 August 2008, the amended 28 July 2008 draft was approved by the Minister of Public Health and Ordinance 514 was formally adopted.[126] When adopted, the relevant portions of Ordinance 514 provided as follows:

> *Article 3. – Every brand of tobacco products shall have a single presentation, such that it is forbidden to use terms, descriptive features, trademarks, figurative signs or signs of any other kind such as colors or combinations of colors, numbers or letters, which may have the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than another, varying only pictograms and the warning according to article 1 of the present Ordinance.*[127]

118. Subsequently, in September 2009, the Ministry of Public Health adopted Ordinance 466, which amended the text of Ordinance 514. It is undisputed that these amendments were in the nature of clarifications, not substantive alterations, to the existing language of Ordinance 514. The revised ordinance restated the single presentation requirement as follows:

> *Article 3. – Each brand of tobacco products shall have a single presentation, varying only the pictograms and the warning according to article 1 of the present Ordinance.*[128]

119. As indicated above, there were no documents or other materials accompanying any of the drafts of the proposed ordinances (in either 2008 or 2009) that explained the purpose or background of the single presentation requirement or how the requirement was contemplated to work in practice, nor that addressed any empirical evidence that would bear upon the requirement's goals or efficacy. There are also no documentary records of any internal deliberations of the requirement nor edits or revisions to the requirement.

120. Likewise, there were also no documentary records of any external consultations by the Ministry of Public Health regarding the single presentation requirement, either with the National Advisory Commission for Tobacco Control, the National Program for Tobacco Control, or any other government body (nor with representatives of these or other governmental advisory bodies). Similarly, there are no documentary records of any consultations by the MPH regarding the single presentation requirement with representatives of the tobacco industry, nor of any notice to tobacco industry participants (or others), or any opportunity to comment on the proposed requirement.[129]

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[125] Basso Witness Statement, paras. 11-12 [Exhibit RWS-004].
[126] Ministry of Health Administrative File regarding Ordinance 514, UGY0001836-1838 [Exhibit C-334].
[127] Ministry of Public Health Ordinance 514, 18 August 2008, Article 3 [Exhibit C-003].
[128] Ministry of Public Health Ordinance 466, 1 September 2009, Article 3 [Exhibit C-043].
[129] There is evidence that BAT, another tobacco company, received informal information that a measure like the single presentation requirement was being considered in late July 2008. Email from Javier Ortiz to Chris Diller,

121. Uruguay did submit a limited amount of witness evidence indicating in general terms that the single presentation requirement was the subject of some, albeit very limited, internal discussion.[130] This oral testimony, even at its highest, indicates at most only very brief and general discussions within the Ministry of Public Health regarding the single presentation requirement, without any suggestion of any internal studies, reports on presentations, or external consultations.

122. Moreover, where the question is whether formal governmental consideration of proposed regulatory measures occurred (and, if so, to what extent), contemporaneous documentary evidence is much preferable to recollections and oral testimony. Here, the events in question occurred some eight years ago (in 2008), and involved a very brief period of time (between 28 July and 1 August 2008, as noted above). There is no question that contemporaneous documentary evidence is vastly more reliable in these circumstances than oral testimony about recollections of past meetings or discussions.

123. The documentary evidence is clear in demonstrating that no meaningful internal discussion or consideration of the single presentation requirement occurred within the Ministry of Public Health (or elsewhere in the Uruguayan government). There is no reliable evidence that any meeting was ever held to discuss the requirement in any meaningful way, in circumstances where contemporaneous documentation inevitably would have been generated in connection with such discussions.[131] Likewise, there are no documents recording or referring to any studies, internal discussions, or commentary regarding the single presentation requirement. In my view, the inescapable conclusion is that there was no serious internal discussion or deliberation at the Ministry of Public Health or within the Uruguayan government more generally about the requirement.

124. This absence of any study, analysis, or discussion of a measure that was not included in the FCTC's comprehensive list of recommended or mandatory tobacco controls and that had never been adopted (or even discussed) by any other state, is impossible to reconcile with the Respondent's claim that the requirement was the result of an "extensive deliberative process that involved input from both external advisors and government regulators."[132] On the contrary, I believe that the record makes clear that the single presentation requirement was adopted with

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July 24, 2008 [Exhibit C-343]; Attachment to Email from Javier Ortiz to Chris Dilley, July 24,2008 [Exhibit C-353]. The Claimants were provided no such notice and there is no evidence that any consultations between the Claimants (or other tobacco companies) ever occurred. Dilley Witness Statement, para. 6 [Exhibit CWS-005]; Second Dilley Witness Statement, para. 4 [Exhibit CWS-022].

[130] Abascal Witness Statement, paras. 7-12 [Exhibit RWS-001]; Bianco Witness Statement, paras. 7-11 [Exhibit RWS-002]; Basso Witness Statement, paras. 8-12 [Exhibit RWS-004]; Sica Witness Statement, paras. 6-10 [Exhibit RWS-005]; Lorenzo Witness Statement, paras. 11-15 [Exhibit RWS-006]; Abascal Second Witness Statement, paras. 4-5, 8 [Exhibit RWS-007]; Muñoz Witness Statement, paras. 15-19 [Exhibit RWS-001].

[131] It is impossible to conclude that meetings within the MPH, or with governmental advisory groups, would not have required agendas and presentations; would not have resulted in minutes or protocols; and would not later have been referred to in correspondence or reports.

[132] Respondent's Reply, para. 3.84 ("Uruguay engaged in an extensive deliberative process that involved input from both external advisors and government regulators, to consider how it should address the ongoing problem of consumers being misled into believing that some cigarettes are less dangerous than others. These discussions, which occurred over a period of months, drew upon the existing scientific and public health literature, and considered a variety of regulatory options. They ultimately yielded the recommendation that the MPH adopt the SPR. The Ministry subjected this recommendation to its own internal evaluation process and decided it was meritorious. Only after these processes had been completed was a draft Ordinance prepared, which was itself subjected to additional internal review within the MPH, before being officially adopted and signed into law by the Minister of Public Health.").

no meaningful study, discussion, deliberation, or consultation with the industry.

125. The absence of any evidence of deliberations regarding the single presentation requirement is, in my view, relevant to evaluating the Claimants' fair and equitable treatment claim.[133] This background is not decisive, but it nonetheless provides important context in evaluating the extent to which the challenged Uruguayan measure is arbitrary or disproportionate.

126. Put simply, claims that a governmental action is arbitrary, disproportionate, or not rationally related to any stated government objective are more plausible with respect to an unprecedented regulatory measure, adopted without any meaningful prior study, discussion, or consultation, which departs from a widespread and comprehensive international regulatory regime, than with respect to measures that have been adopted by other states, recommended by international bodies, or developed through careful domestic or other study, discussion, and consultation.[134] Or, put alternatively, claims that a governmental action is entitled to deference because of administrative or regulatory expertise are less persuasive where there is no indication that any such expertise was ever relied upon or brought to bear with respect to the challenged measures.

127. As discussed above, Uruguay's single presentation requirement was a significant departure from both prior international practice and internationally recommended regulatory measures. Although very substantial consideration had been given to issues of tobacco control generally, and tobacco packaging and labelling specifically, neither the FCTC nor its Guidelines, nor any national regulatory regime, had ever adopted or proposed a single presentation requirement. At a minimum, that deprives such a requirement of the support that would otherwise be provided by adoption of an international standard; more generally, it also inevitably raises questions as to the rationale of a measure which, despite very extensive international consideration of the subject, had never been proposed or adopted.

128. This also suggests that the requirement was not a "bright idea," as the Tribunal charitably puts it,[135] but instead was an unreflective directive, issued very hastily and without the checks and validation that internal study and discussion and/or external notice and consultation provide. Where a governmental measure encroaches on protected investor rights – as Ordinance 514 concededly does – these surrounding circumstances argue for particular care in considering claims that the measure is not arbitrary, disproportionate, or unfair.

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[133] *See, e.g., Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 Aug. 2005, Part III, Chapter B, para. 57; Part III, Chapter A, para. 101 ("the time-line of the California Senate legislation, scientific study, public hearing, executive order, and initiatives to secure an oxygenated waiver [were] all objectively confirmed" and scientific evidence was subject to "public hearings, testimony and peer review").

[134] Tribunals have often considered the relevance of state practice when determining whether a measure has breached the FET standard. *See, e.g., ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 188 [Exhibit RL-165] (challenged domestic content and performance requirements in governmental procurement "are to be found in the internal legal systems or in the administrative practice of many States."); *Noble Ventures Inc. v. Romania,* ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 178, 182 [Exhibit RL-165] (judicial reorganization proceedings for insolvency were "provided for in all legal systems"); *Link-Trading Joint Stock Company v Moldova,* UNCITRAL, Final Award, 18 April 2002 (challenged tax measures were "not dissimilar to the policies of many countries in the world").

[135] Award, para. 407.

C. Analysis

129. Turning to an analysis of the single presentation requirement, I find it impossible to avoid a conclusion that the requirement is a violation of the fair and equitable treatment standard in Article 3(2). Instead, notwithstanding the deference that is due sovereign regulatory measures and judgments, I am convinced that the requirement does not bear a rational relationship to its stated legislative objective, yet disproportionately injures important investor rights.

1. Fair and Equitable Treatment

130. The terms of the BIT are familiar, paralleling those of many other international investment treaties. Article 3(2) provides, among other things, that "[e]ach Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party."

131. As the Award correctly observes,[136] Article 3(2)'s guarantee of fair and equitable treatment cannot be equated with the traditional international minimum standard of treatment of aliens (whether the standard referred to in *Neer v. United Mexican States* or otherwise). There is no indication that Article 3(2) was meant merely to incorporate the international minimum standard,[137] much less the international minimum standard as it was sometimes phrased in the early decades of the 20th century.

132. As the Tribunal correctly concludes, Article 3(2)'s fair and equitable treatment guarantee is instead an autonomous standard, defined by the terms of the BIT and by evolving principles of international law. As the tribunal in *Mondev v. United States* concluded: "it is unconvincing to confine the meaning of 'fair and equitable treatment … to what these terms – had they been current at the time – might have meant in the 1920s…"[138]

133. One of the central elements of the guarantee of "fair and equitable treatment" is a protection against arbitrary treatment. This guarantee reflects a fundamental aspect of the rule of law: citizens are entitled to treatment, by their government, which is rational and proportionate. Irrational or arbitrary governmental measures, which are unrelated to any legitimate governmental objective, or which are gravely disproportionate to the achievement of such an objective, are neither fair nor equitable, and they betray, rather than advance, the rule of law.

134. This conclusion has been almost uniformly embraced by well-considered decisions interpreting international protections similar to those in Article 3(2) of the BIT. The tribunal in *Saluka v. Czech Republic* held that the fair and equitable treatment guarantee ensures that a state "will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e., unrelated to some rational policy), or discriminatory (i.e., based on unjustifiable distinctions)."[139] Similarly, the tribunal in *Waste Management, Inc. v. United Mexican States*

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[136] Award, paras. 316-324.

[137] The Respondent argues that Article 3(2) "refers to the minimum standard of treatment that must be accorded to aliens under customary international law.": Respondent's Counter Memorial, para. 8.3. The Tribunal correctly rejects this argument, as has the decisive weight of arbitral authority: Award, paras. 316-324.

[138] *Mondev International Ltd. v. United States of America*, ICSID Case NO. ARB(AF)/99/2, Award, 11 Oct. 2002, para. 210 [Exhibit CLA-280].

[139] *Saluka Investments B.V. (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 309 (emphasis added) [Exhibit CLA-227].

held that fair and equitable treatment provides protection against governmental action that is "arbitrary, grossly unfair, unjust or idiosyncratic, … discriminatory or [that] exposes the claimant to sectional or racial prejudice."[140]

135. More specifically, the guarantee of fair and equitable treatment provides protection against "a measure that inflicts damage on the investor without serving any apparent legitimate purpose"[141] or that is "done capriciously, without reason."[142] Or, in the words of the *Rumeli Telecom v. Kazakhstan* tribunal, "[t]he standard of 'reasonableness' has no different meaning than the 'fair and equitable treatment' standard with which it is associated. Therefore, it requires that the State's conduct bears a reasonable relationship to some rational policy."[143]

136. All of these formulations reflect a common principle. Governmental actions that encroach on individual rights must satisfy minimum standards of rationality and proportionality: they must be fair and equitable, not arbitrary or capricious.

137. It is important to recognize that the fair and equitable treatment standard, and the protection against arbitrary measures, does not empower this, or any other, tribunal to second-guess legislative or regulatory judgments. On the contrary, it is well-settled that the judgments of national regulatory and legislative authorities are entitled, under the fair and equitable treatment guarantee, to a substantial measure of deference.

138. In this regard, however, I am unable to agree with the Tribunal's application of the "margin of appreciation" as developed in ECtHR jurisprudence. As discussed below, that doctrine is based upon the specific language of the ECHR and its Protocols and, as the weight of other authority concludes, is not transferable to the specific terms of Article 3(2) of the BIT or to customary international law more generally.[144]

139. Instead, in my view, the proper degree of deference in considering claims under Article 3(2) must be derived from the terms and context of the BIT itself, in accordance with customary international law rules for treaty interpretation, and from decisions involving similar guarantees of fair and equitable treatment in other international instruments. In my view, these sources mandate substantial deference to Uruguay's regulatory and legislative judgments, and forbid any second-guessing of such judgments, but nonetheless require a minimum level of rationality and proportionality between the state's measure and a legitimate governmental objective.[145]

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[140] *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (emphasis added) [Exhibit CLA-225].

[141] *National Grid P.L.C. v. Argentine Republic,* UNCITRAL, Award, November 3, 2008, para. 198 [Exhibit CLA-221].

[142] *National Grid P.L.C. v. Argentine Republic,* UNCITRAL, Award, November 3, 2008, para. 198 [Exhibit CLA-221].

[143] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICISD Case No. ARB/05/16, Award, July 29, 2008, para. 671.

[144] *See below* paras. 181-191.

[145] A number of awards have considered the principle of proportionality in interpreting and applying fair and equitable treatment provisions in investment treaties. The basis for doing so is debated. *See* B. Kingsbury & S. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) New York University School of Law, Public Law & Legal Research Theory Research Paper Series, Working Paper No. 09-46, pg. 23; C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (CUP 2015), pp. 23, 70-71; G. Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015), pp. 193-199. For present purposes, it is sufficient to observe that Article 3(2)'s requirement for "fair and equitable" treatment necessarily connotes a measure of proportionality. Although related, the requirement of proportionality differs from that of rationality or reasonableness. Proportionality involves an analysis of the

140. The starting point for analysis is, as the tribunal in *S.D. Myers v. Canada* concluded with respect to fair and equitable treatment claims under the NAFTA, that such claims must be assessed "in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[146] The *S.D. Myers* tribunal concluded:

> *When interpreting and applying the 'minimum standard,' a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.*[147]

141. This observation reflects the presumptive lawfulness of governmental authority under customary international law, as well as respect for a state's sovereignty, particularly with regard to legislative and regulatory judgments regarding its domestic matters. Or, as another tribunal noted, a state would not violate its obligations towards an investor if the government authorities made "a decision which is different from the one the arbitrators would have made if they were the regulators"; "arbitrators are not superior regulators" and "they do not substitute their judgment for that of national bodies applying national laws."[148] It is not generally for arbitral tribunals to devise or impose different purposes or objectives (save for exceptional cases involving pretextual rationales[149]).

142. Nonetheless, deference to governmental measures is not a substitute for reasoned analysis, either under customary international law or Article 3(2) of the BIT: deference to sovereign measures is the starting point, but not the ending point, of evaluation of fair and equitable treatment claims. Rather, a sensitive and nuanced consideration of the nature of the governmental measure, the character and context of the governmental judgment, the relationship between the measure and its stated purpose, and the measure's impact on protected investments is necessary.

143. That consideration must occur in the specific context of the relevant treaty provisions

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legitimacy of a measure's objective and whether a measure is both necessary and suitable for that objective, while reasonableness or arbitrariness focus primarily on the relationship between the measure and investor's rights.

[146] *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263 [Exhibit RL-155]. *See also Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 505 [Exhibit RLA-114].

[147] *S.D. Myers Inc. v Government of Canada*, Partial Award, para. 263 [Exhibit RLA-114]. Although the *S.D. Myers* tribunal was applying the customary international law minimum standard of treatment under Article 1105(1) NAFTA, tribunals have been guided by this formulation when considering autonomous FET standards as well. *See, e.g.*, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 115; *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. United Mexican States and Talsud S.A. v. United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, Part VI, para. 26.

[148] *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 283 [Exhibit RLA-114].

[149] *See, e.g., Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, 21 Nov. 2007, paras. 142, 149-150; *Methanex v. United States of America*, UNCITRAL, Partial Award, 7 Aug. 2002, para. 158; *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 Nov. 2000, para. 263 [Exhibit RL-155]; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Award, 18. Aug. 2009, para. 137.

applicable to the disputed measures. In the present case, the BIT does not contain language reserving any particular sphere of discretion or immunity for state actions. Language of this character exists in other contexts, including the ECHR, as discussed below,[150] or treaties mandating deference or providing exceptions to international guarantees.[151] No such text exists in Article 3(2) of the BIT. Rather, the BIT requires interpretation and application of the "fair and equitable treatment" standard in the context of the BIT, and applicable principles of international law more generally.

144. In my view, Article 3(2)'s guarantee of "fair and equitable treatment," and the related requirements of reasonableness and proportionality, require an objective consideration of the extent to which a governmental measure is rationally related to, or fairly advances, the state's articulated objectives. That consideration must give considerable deference to a state's choice among competing means to accomplish its objectives, its assessment of the likelihood that particular means will be effective, and its weighing of costs and benefits.

145. This deference does not, however, free a tribunal from its obligation, under the BIT or customary international law, to decide whether a particular measure is fair and equitable, or proportionate, in light of the state's articulated objectives. In turn, the tribunal must assess whether, viewed in the context of a state's legislative and regulatory actions, a particular measure is rationally related and fairly proportionate to the state's articulated objectives.

2. Uruguay's Single Presentation Requirement

146. Applying the foregoing standard, I am satisfied that the single presentation requirement, considered in the context of the Uruguayan regulatory regime, is arbitrary and disproportionate. As a consequence, and notwithstanding the deference appropriately afforded national regulatory and legislative judgments, I am persuaded that, the requirement violates the guarantee of fair and equitable treatment in the BIT.

147. Uruguay has very clearly explained the governmental objective of the single presentation requirement – namely, "to combat a practice that misled smokers and would-be smokers into believing that certain brand variants were less harmful than their parent brands, or other variants in the same brand family, and caused them to smoke the supposedly 'safer' variants in lieu of quitting."[152] In similar terms, Uruguay explained: "the existence of multiple variants of a single brand *per se* creates a risk of deception in the minds of some consumers"[153] and the goal of the single presentation requirement is to "diminis[h] the industry's ability to continue perpetrating this fiction."[154] The Respondent's witnesses identified the same objectives of the requirement in their testimony,[155] as did the TCA in its consideration of Law 18,256 and its implementing regulations.[156]

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[150] *See below* paras. 181-191.

[151] *See, e.g.,* Article 22(2) of the Australia-United States Free Trade Agreement ("Nothing in this Agreement shall be construed to preclude a Party from applying measures that *it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").

[152] Respondent's Counter-Memorial, para. 5.54. *See also* Evidentiary Hearing (Tr., 1/198/7-199/7) (Koh); (Tr., 1/231/11-18; 1/233/21-234/11) (Reichler).

[153] Respondent's Rejoinder, para. 3.34.

[154] Respondent's Rejoinder, para. 3.39.

[155] Evidentiary Hearing, (Tr., 3/797/7-798/8) (Lorenzo); (Tr. 1/186/7-187:10) (Basso).

[156] TCA Decision 512, Section VI [Exhibit C-116] ("evident objective of preventing the consumer from becoming familiarized and living with it without perceiving the harmful consequences attributed to tobacco products").

148. There is no question that these are legitimate and entirely proper governmental objectives. The protection of consumers from misleading or deceptive marketing in order to safeguard the public health is within the scope of any government's regulatory powers. That conclusion is non-controversial and indisputable.

149. There is also no question, in my view, that the Tribunal must accord deference to Uruguay's chosen legislative objectives. Although one might conceive of alternative or additional legislative purposes for the single presentation requirement, it is for the state, not the arbitral tribunal, to identify such objectives with regard to the measures it has adopted.[157]

150. With the foregoing stated objectives of the single presentation requirement in mind, the fair and equitable treatment standard requires at least some measure of objective consideration of the extent to which the requirement achieves, or is calculated to achieve, that objective. In doing so, it is important to consider both the terms of Ordinances 514 and 466, and the terms of previously-existing Uruguayan law directed at the same objective.

151. As detailed above, prior to adoption of Ordinance 514, Uruguayan law already contained prohibitions against the misleading packaging or labelling of tobacco products and, in particular, the misleading use of trademarks. Specifically, Article 8 of Law 18,256, titled "Packaging and labeling of tobacco products," provided:

> *It is forbidden for packages and labels of tobacco products to promote such products in a false, wrong or misleading way which may lead to a mistake regarding their features, health effects, risks or emissions. It is likewise forbidden to use terms, descriptive features, trademarks or brands, figurative signs or any other kind, which have the direct or indirect effect of creating a false impression that a certain tobacco product is less harmful than others.*[158]

152. Article 8 was implemented by Decree 284, which provided in Section 12 as follows:

> *The use of descriptive terms and elements, trademarks or brands, figurative signs or signs of any other nature, such as colors or combination of colors, numbers or letters, that have the direct or indirect effect of creating the misleading impression that a certain product is less harmful than others is forbidden.*[159]

153. Together, Article 8 of Law 18,256 and Section 12 of Decree 284 provided express and extensive prohibitions against the misleading use of trademarks and other elements of tobacco packaging or labelling that had the "direct or indirect effect" of misleading consumers. In doing so, Uruguay gave effect to Article 11(1)(a) and 11(4) of the FCTC, which contained parallel provisions regarding the misleading use of trademarks, packaging, labelling and advertising.[160]

154. Uruguay also banned the use of descriptors such as "light" and "mild" in Presidential

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[157] *See, e.g., GAMI Investments, Inc. v. The Government of the United Mexican States,* UNCITRAL, Award, 15 Nov. 2004, para. 114; *Bilicon v. Government of Canada,* PCA Case No. 2009-04, Award, 17 May 2015, para. 598; *Teco Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 Dec. 2013, paras. 490-493, 629-638; *Parkerings Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 Sept. 2007, para. 332 [Exhibit RL-177].

[158] Law 18,256, Article 8 [Exhibit C-033].

[159] Decree 284, Section 12 [Exhibit C-034].

[160] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Article 11.1(a), 11(4) [Exhibit RL-20].

Decree 171/2005. Specifically, Article 1 provided:

> *The provisions of Decree No. 36/005 of 25 January 2005 are hereby extended insofar as health warnings shall occupy 50% of the total display areas in the packages and containers of tobacco products, shall be periodically rotated and shall include images and/or pictograms. It is also stipulated that expressions, terms, elements, marks or signs that have the direct effect of creating a false impression, such as "low tar", "light", "ultra-light", or "mild" [sic].*[161]

155. Given these provisions of Uruguayan law, one must ask what additional purpose the single presentation requirement would serve in achieving the measure's only stated purpose – namely, to prevent misleading use of trademarks. The simple point is that Uruguayan law already contained carefully drafted provisions, adopting international models, that achieved precisely this objective.

156. Notwithstanding this regulatory background, which already contained prohibitions against misleading packaging and labelling of tobacco products, Ordinance 514 and Ordinance 466 introduced a different measure regarding the use of tobacco-related trademarks, which (ultimately) provided:

> *Article 3. – Each brand of tobacco products shall have a single presentation, varying only the pictograms and the warning according to article 1 of the present Ordinance.*[162]

157. In my view, this provision is inherently ill-suited to achieving its asserted objective of prohibiting the deceptive or misleading use of trademarks. Instead, on considered reflection, I find it impossible to avoid concluding that the single presentation requirement is inevitably incapable of discriminating between misleading and non-misleading uses of trademarks, and therefore both arbitrary and disproportionate.

158. As finally adopted, Ordinance 466's single presentation requirement is a blunt and sweeping measure, that contains nothing that focuses on or refers to misleading, false or deceptive use of trademarks. The measure therefore almost inevitably prohibits many uses of trademarks that are not misleading or false, while allowing even more uses of trademarks that are in fact misleading and deceptive. Put simply, there is a fundamental mismatch between the character and terms of the single presentation requirement and its stated objective.

159. First, Ordinance 466's single presentation requirement is inherently overbroad. By its terms, the requirement forbids any use of tobacco-related trademarks other than in a single presentation. There is, however, no reason in either logic or empirical evidence to conclude that all of the myriad of different uses of trademarks that could be employed on tobacco products, apart from in a single presentation, are misleading and deceptive.

160. There is nothing the record in this proceeding that suggests that all presentations of a product, save a single presentation chosen by the manufacturer, are misleading or deceptive. At the most, the Respondent cites some (very limited) evidence that the use of some variations of colors in some trademark presentations could mislead consumers (e.g., silver or white presentations assertedly indicating "light" or "low tar" cigarettes).[163] In my view, this evidence

[161] Presidential Decree 171/2005, Article 1 [Exhibit C-148].
[162] Ministry of Public Health Ordinance 466, 1 Sept. 2009, Article 3 [Exhibit C-043].
[163] *See, e.g.,* Respondent's Counter-Memorial, paras. 4.118-4.143, 4.89-4.97; Respondent's Rejoinder, paras. 3.48-3.60, 5.1-5.45; Expert Report of Professor Joel Cohen, 19 September 2014, paras. 112-113, 127.

was tenuous, even with regard to the question of different colors of trademark, for the reasons detailed in the Claimants' expert evidence; that evidence concluded that the use of brand variations with different colors did not create the impression that cigarettes of one brand color entailed less of a health risk that other brand colors.[164]

161. Nonetheless, as applied to the use of at least some different colors of brands (e.g., silver, white, red, blue) and to "light" and "low tar" descriptors, I conclude on the record in this arbitration that Uruguay's prohibition against the use of brand variants was not arbitrary or disproportionate. Although the evidence supporting such a prohibition was, in my view, unimpressive, it was sufficient to uphold a prohibition against the use of these different colors of trademarks for tobacco packaging, particularly in light of the deference that is owed a state's regulatory and legislative judgments.

162. However, even accepting this evidence, it does nothing to support Ordinance 466's blanket requirement of a single presentation of all aspects of trademarks (including use of different design features, additional words or numbers, seasonal or geographic variations, different languages or scripts, all colors, etc.). The Respondent's evidence addresses only the use of colors as brand extensions or variants and the use of some descriptors (such as "light" and "low tar"),[165] but does not address other forms of brand variations.

163. In my view, this is insufficient to justify Ordinance 466's blanket prohibition against all but a single presentation of any tobacco trademark. Put simply, the fact that some uses of colors in some brands of tobacco products may be regarded as misleading in some circumstances does not suggest, even indirectly, that all other variations of trademarks are also misleading.

164. There is, for example, no reason to think, or evidence to show, that seasonal motifs on tobacco products would be misleading, or that brand variants with numbers corresponding to the number of cigarettes in a package would be misleading, or that brands in different languages or with different font sizes or styles would be deceptive. There is nothing at all in either logic or the evidentiary record that suggests that there is anything deceptive or misleading about any of these countless brand variants. In my view, it is impossible on the record in this arbitration to avoid the conclusion that the single presentation requirement is gravely overbroad.

165. Returning to the basic character of the single presentation requirement, it is inevitable that the requirement is ill-focused and over-inclusive in the extreme. Consider a regulation aimed at prohibiting misleading food or automobile advertisements – which required manufacturers to use only a single presentation for any trademark for food or automobile products. That prohibition would obviously do nothing – except perhaps accidentally – to discourage misleading food or automobile advertisements, while it would prohibit large categories of perfectly acceptable and desirable advertisements. Ordinance 466's single presentation requirement is no different.

166. The conclusion that Ordinance 466 is severely over-inclusive is particularly true given the existence, discussed above, of Article 8 of Law 18,256, Section 12 of Decree 284, and Presidential Decree 171/2005, which already specifically prohibited misleading and deceptive uses of trademarks. Given these existing prohibitions against misleading practices, it is

[164] *See* Expert Report of Mr. Alexander Chernev, 28 February 2014, paras. 4, 30 [Exhibit CWS-009]; Second Expert Report of Mr. Alexander Chernev, 17 April 2015, para. 130 [Exhibit CWS-020]; Expert Report of Mr. Jacob Jacoby, 17 April 2015, paras. 5, 42-45 [Exhibit CWS-021].
[165] Expert Report of Professor Joel Cohen, 19 September 2014, paras. 112-113, 127.

impossible to see how Ordinance 466's additional single presentation requirement was anything other than over-inclusive; indeed, it seems inescapable that Ordinance 466 added nothing to Law 18,256, Decree 284, and Presidential Decree 171/2005 except a prohibition against *non-misleading* uses of trademarks.

167. These conclusions have particular force because, as discussed above, the evidentiary record makes it clear that the single presentation requirement was adopted with no meaningful prior study, internal debate, or external consultation. Rather, so far as the evidence shows, the requirement was formulated, drafted and adopted in the space of only a few days, without any meaningful study or discussion of the measure.[166] The absence of internal checks and balances, or external consultation, both helps explain, and underscores the arbitrary and disproportionate character of the single presentation requirement.

168. Second, and conversely, Ordinance 466's single presentation requirement is also under-inclusive. In particular, Ordinance 466 has the effect of prohibiting multiple presentations of a single trademark, but did nothing to address the misleading presentation of different trademarks, and specifically, did nothing to prohibit the use of so-called "alibi brands" that used slightly different combinations of colors and designs to accomplish precisely the same results that the single presentation requirement was supposedly intended to prevent.

169. It is helpful to consider what Ordinance 466 forbids, and what it permits, in assessing whether its single presentation requirement is a fair, proportionate and non-arbitrary measure for preventing consumers from being misled. Specifically, the single presentation requirement of Ordinance 466 prohibits the use of the trademarks of the Claimant depicted below (marked with red "X"s):[167]

170. At the same time, Ordinance 466's single presentation requirement permits cigarettes to be sold under different, so-called "alibi" brands, using common branding elements and colors. The examples depicted below are products sold by a domestic Uruguayan producer (not by the Claimant, which in general used no alibi brands):[168]

[166] *See above* paras. 109-130.
[167] Claimants' Memorial, para. 36.
[168] Claimants' Memorial, paras. 40-41.

171. It is very difficult to see how there is any material difference between these two categories of trademarks from the perspective of consumer deception. There is no material difference in the use of colors (and, if anything, the "alibi" brands' use of light colors is more pronounced than those of the Claimants' brand-variants). As a consequence, it is impossible to avoid the conclusion that the single presentation requirement is gravely under-inclusive.[169]

172. In light of the foregoing, I believe that it is beyond dispute that the single presentation requirement is inherently over-inclusive and under-inclusive. Put simply, the single presentation requirement is inherently and inescapably unrelated to its only articulated objective – protecting consumers against deceptive uses of trademarks. There is simply no logical or empirical relationship between a blanket single presentation requirement and misleading advertisements or packaging. Instead, the single presentation requirement's only independent effects are to forbid a substantial range of uses of trademarks that are not deceptive and misleading, while allowing other uses of trademarks that plainly are deceptive and misleading.

173. Indeed, when the single presentation requirement is read together with the pre-existing provisions of Law 18,256, Decree 284, and Presidential Decree 171/2005, the requirement is *only* over-inclusive and under-inclusive. Put differently, everything that the single presentation requirement is assertedly intended to accomplish was already specifically accomplished by pre-existing provisions of Uruguayan law, while the requirement itself independently forbids nothing but things that do not further its stated objective. That result is neither fair nor equitable; it is arbitrary and capricious.

174. As noted above, I find significant the lack of evidence of any other international use or consideration of a single presentation requirement and of any meaningful study deliberation, or consultation regarding the single presentation requirement. If the single presentation requirement made serious regulatory sense, it would have been included in the FCTC's lengthy catalogue of regulatory measures or in the Guidelines' supplementation of those measures. Or,

[169] Although this case does not require a decision on the issue, a measure's under-inclusiveness would not ordinarily be an independent basis for concluding that the measure constituted a denial of fair and equitable treatment. In principle, states would be free to address some, but not necessarily all, aspects of a perceived ill. *See, e.g., Glamis Gold, Ltd. v United States*, UNCITRAL, Award, 8 June 2009, para. 805 [Exhibit RL-183] ("[t]he fact that [the measure] mitigates some, but not all, harm does not mean that it is manifestly without reason or arbitrary; it more likely means that it is a compromise between the conflicting desires and needs of the various affected parties."). There might be circumstances where under-inclusive measures would raise questions of discrimination or pre-textual conduct, but those considerations have not been raised here.

even if not, the measure would have been recommended in the extensive literature on anti-smoking regulations or, alternatively, would have been the product of study and deliberations counselling in favor of its adoption.

175. As already discussed, however, the single presentation requirement was none of these things: it was instead an inherently and inevitably arbitrary proposal that was never previously recommended, discussed, or adopted and that was adopted hastily without serious study, debate, or consideration.[170]

176. In these circumstances, and even accepting the Tribunal's "margin of appreciation" for the sake of argument, I cannot agree that the single presentation requirement satisfied the requirements of rationality and proportionality. Mindful of Uruguay's extensive legislative authority and broad regulatory discretion, it is still impossible to see how a hastily-adopted measure that is so ill-suited to its articulated purpose, and that treads so far onto protected rights and interests, can satisfy even the Tribunal's stated standard.

177. In identifying the inherent irrationality of the single presentation requirement, a tribunal would not undermine Uruguay's regulatory and governmental authority. As discussed above, Uruguay can already prevent everything that it asserts the requirement is intended to accomplish under Law 18,256, Decree 284, and Presidential Decree 171/2005, including the deceptive use of different colors of tobacco packaging.[171] The only things that Ordinance 466 can logically prohibit are things that Uruguay has not said that it wishes to forbid, but that its own citizens wish to undertake. It does not restrict Uruguay's sovereign authority, or encroach upon Uruguay's regulatory powers, to hold that these applications of Ordinance 466 would deny the Claimants fair and equitable treatment.

178. Finally, it is important to note the limits of the foregoing conclusion. It does not hold that Uruguay is forbidden from adopting other regulations of tobacco, with other objectives, as it already had done. It does not hold that Uruguay is forbidden from prohibiting the use of trademarks with different colored presentations or other presentations that are found to be deceptive (as with the use of at least some colors and descriptors). It also does not address the question whether Uruguay could adopt measures with the objective of reducing tobacco consumption or smoking prevalence, or even regulations with the objective of entirely eliminating smoking or tobacco sales. All of those are presumptively valid and lawful governmental purposes, which could support a wide range of presumptively valid and lawful tobacco-control measures.

179. But those objectives, and those measures, are not at issue in this arbitration. What is at issue is the single presentation requirement and the stated objective of forbidding misleading tobacco product packaging. And, for the reasons set forth above, I cannot avoid the conclusion that, in the circumstances of Uruguay's articulated regulatory purposes and existing regulatory regime, the requirement constitutes a denial of fair and equitable treatment.

D. Additional Observations

180. The foregoing analysis sets forth my disagreement with the Tribunal's conclusions, and the Respondent's defense, with regard to the single presentation requirement. In addition, several further points require brief discussion.

[170] *See above* paras. 107-128.
[171] *See above* paras. 148-159.

181. First, as noted above, I do not agree with the Tribunal's conclusion that "the 'margin of appreciation" is not limited to the context of the [ECHR] but 'applies equally to claims arising under BITs.'"[172] In my view, this conclusion is impossible to sustain with regard to the BIT at issue in this arbitration and also impossible to justify more generally, with regard to other investment instruments.

182. The doctrine of a "margin of appreciation" is, as the Tribunal acknowledges, derived from decisions of the ECtHR, applying the ECHR.[173] In turn, in formulating this "margin of appreciation," the ECtHR has relied upon Article 1 of Protocol 1 to the ECHR, which protects private property from seizure, subject to exceptions for the "public interest" and "general interest."[174]

183. Article 1 of Protocol 1 to the ECHR has been interpreted by the ECtHR to afford a very wide margin of appreciation to governmental authorities with respect to what constitutes "public interest."[175] Among other things, the ECtHR has held that "it should respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation."[176] This interpretation of the Convention and its Protocols is supported by the *travaux préparatoires* of the Convention, which indicate that the drafters intended to incorporate a "very wide" margin of appreciation.[177]

184. There is no provision in the text of the BIT that is equivalent to Article 1 of Protocol 1, or that could provide a textual basis for importing such a concept into Article 3(2) of the BIT. On the contrary, as the Tribunal acknowledges,[178] Article 3(2) is phrased broadly, referring only to the guarantee of "fair and equitable treatment," without incorporation of the international minimum standard or limitations like that in Article 1 of Protocol 1 to the ECHR. Nor, so far as the parties have suggested or I can discover, is there anything in the *travaux* of the BIT that suggests that its parties intended to incorporate the concept of a "margin of appreciation."

185. The "margin of appreciation" utilized under Protocol 1 to the ECHR was drafted and accepted in a specific geographic and historical context, in relation to a particular human rights instrument. The reasons that led to acceptance of the "margin of appreciation" in the context of the ECHR are not necessarily transferable to other contexts, including specifically to a BIT

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[172] Award, para. 399.
[173] Award, para. 399.
[174] Article 1 of Protocol 1 provides "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law; (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
[175] The scope of Article 1 is extremely broad in comparison to the approach taken under other international human rights treaties. For example, the UN Human Rights Committee does not apply the doctrine of the margin of appreciation in cases relating to the International Covenant on Civil and Political Rights (ICCPR): *see, e.g.*, General Comment No. 34, "Article 19: Freedoms of Opinion and Expression," UN Doc. CCPR/C/GC/34 (2011), at para. 36 ("the scope of this freedom is not to be assessed by reference to a "margin of appreciation"); *Ilmari Länsman v. Finland*, UN Hum. Rts. Com, 14 Oct. 1993, para. 9.4.
[176] *James and others v. United Kingdom*, ECtHR, Series A No. 98, 21 Feb. 1986, para. 46; *see also Broniowski v.* Poland, ECtHR., Application No. 31443/96, Judgment, 22 June 2005, para. 149 [Exhibit RL-190].
[177] *Travaux préparatoires* to the ECHR, 17th Sitting, 7 September 1949 , p. 1150 (Teitgen) ("Each country shall, through its own legislation, determine the conditions in which these guaranteed liberties shall be exercised within its territory, and, in defining the practical conditions for the operation of these guaranteed liberties, each country shall have a very wide freedom of action.").
[178] Award, paras. 316-319.

between Switzerland and Uruguay. Rather, just as the meaning of Article 3(2)'s "fair and equitable" treatment guarantee must be determined by interpretation of the BIT,[179] so the standard of review and degree of deference to state regulatory and legislative judgments must be determined by interpretation of the BIT, not of the ECHR and decisions interpreting that instrument.

186. This conclusion is consistent with the decisions of those arbitral tribunals and international courts which have addressed the issue. These decisions have consistently rejected the doctrine of a margin of appreciation when applying general rules of international law. They have instead treated the doctrine as a specific rule, limited to the particular context in which it was formulated.

187. Thus, the tribunal in *Siemens v. Argentina* concluded that "Article 1 of the First Protocol to the ECHR permits a margin of appreciation not found in customary international law or the [Germany-Argentina Bilateral Investment] Treaty."[180] Similarly, the tribunal in *Quasar de Valores v. Russian Federation* held that the protections guaranteed by the applicable bilateral investment treaty could not be overridden by the ECHR's margin of appreciation.[181] Likewise, the tribunal in *von Pezold v. Zimbabwe* refused to apply the margin of appreciation, reasoning that:

> *[D]ue caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law.*
>
> *This is a very different situation from that in which margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no "margin of appreciation" qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine.*[182]

188. Conversely, the only award which appears to have adopted a "margin of appreciation" based upon ECtHR jurisprudence has done so in the context of a BIT provision that contained express exceptions for the "public order" and "essential security interests."[183] In adopting a margin of appreciation, the tribunal relied specifically on these textual references,[184] while

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[179] Award, paras. 316-317.

[180] *Siemens v Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, para. 354 [Exhibit RL-198].

[181] *Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award, 20 July 2012, para. 22 [Exhibit RL-198] ("[W]here the value of an investment has been substantially impaired by state action, albeit a bona fide regulation in the public interest, one can see the force in the proposition that investment protection treaties might not allow a host state to place such a high individual burden on a foreign investor to contribute, without the payment of compensation, to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member.").

[182] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 465-466.

[183] *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, para. 187 [Exhibit CLA-096].;*see also* Claimants' Reply on the Merits, para. 173.

[184] *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, para. 181 [Exhibit CLA-096] ("[T]he expression 'its own security interests' implies that a margin of appreciation must be afforded to the Party that claims in good faith that the interests addressed by the measure are essential security interests or that its public order is at stake.").

cautioning against similar conclusions in the absence of a textual basis.[185]

189. Two other awards merit brief mention. In *Electrabel*, the tribunal stated that a "reasonable margin of appreciation" should be applied;[186] while in *Lemire*, the tribunal afforded "the high measure of deference" to the respondent state.[187] The language used by these tribunals does not indicate an application of the ECtHR's doctrine of a margin of appreciation but are general references to deference as a standard of review. It is uncontroversial that a degree of deference should be afforded to the state, but the Award errs, in my view, in endorsing a standard of review transposed from, and as wide as that afforded by, the ECtHR's margin of appreciation.

190. Other international courts and tribunals have also consistently refused to apply the concept of a margin of appreciation akin to that developed under the ECHR.[188] For example, the International Court of Justice has also repeatedly rejected the doctrine of a margin of appreciation in various contexts,[189] most recently holding in *Whaling in the Antarctic* that "an objective test of whether a program is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a program are reasonable in relation to achieving the stated research objectives."[190]

191. In sum, I cannot agree to the transposition of the doctrine of a margin of appreciation from the ECHR context to either the Switzerland-Uruguay BIT or international law more generally. Rather, I am persuaded by the conclusions of other international tribunals and courts that a more specific standard of review, focused on the terms and context of the relevant treaty, is mandated.[191] As discussed above, this standard results, in my view, in a substantial degree of deference for sovereign regulatory judgments, but it does not warrant incorporation of the ECtHR's understanding of the "public interest" in the ECHR into Article 3(2)'s protections.

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[185] *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, para. 187 [Exhibit CLA-096] ("Although a provision such as Art. XI, as earlier indicated, involves naturally a margin of appreciation by a party invoking it, caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in absence of clear textual or contextual indications.").

[186] *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicability and Liability, 30 Nov. 2012, para. 8.35 [Exhibit RL-200].

[187] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/8, Decision on Jurisdiction and Liability, 14 Jan. 2010, para. 505 [RLA-114]. *See also Saluka v. Czech Republic*, Partial Award, para. 272 [Exhibit CLA-227] ("[Czech Republic] enjoyed a margin of discretion"); *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 Nov. 2010, para. 527 [Exhibit CLA-105] ("States enjoy a certain margin of appreciation in determining what their own conception of international public policy is.").

[188] Well-reasoned commentary is to the same effect: J. Arato, 'The Margin of Appreciation in International Investment Law' (2013) 54(3) *Virginia Journal of International Law* 546, p. 578 (arguing that to apply the margin of appreciation would do "active harm" to investment law as a whole); E. Bjørge, 'Been There, Done That: The Margin of Appreciation and International Law' (2015) 4(1) *C. J. I. C. L.* 181.

[189] *See, e.g., Oil Platforms (Iran v US) [*2003] ICJ Rep 2003 161, para. 73 ("[T]he requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion".); *Gabcikovo/Nagymaros* (Hungary/Slovaki), 1997 ICJ 7, 40 ("[T]he state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.").

[190] *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* [2014] ICJ Rep 2014, para. 97.

[191] *See, e.g., Glamis Gold v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 617 [Exhibit RL-183] (finding that the standard of deference was "present in the standard as stated, rather than being additive to the standard" and "[t]he idea of deference is found in the modifiers "manifest" and "gross" that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking or exhibits a manifest lack of reasoning.").

192. Second, the Tribunal reasons that "there were no reasons for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures," because "[s]uch support was amply offered by the evidence-based FCTC provisions and guidelines adopted thereunder."[192] With respect to the single presentation requirement, I do not believe that the record in this arbitration supports this conclusion.

193. As discussed above, neither the FCTC nor its Guidelines make any reference to a single presentation requirement, nor provides any suggestion that this requirement was either required or contemplated.[193] I therefore cannot agree that the Convention and its Guidelines provided support for the single presentation requirement. In fact, the FCTC and its Guidelines provide no support at all for such a requirement, because they neither require nor mention it.

194. In my view, the opposite inference is more appropriate. In the course of extensive study and consultation, and compilation of a very extensive and thorough list of mandatory and recommended tobacco control measures, the drafters of the FCTC and its Guidelines did not choose to recommend or require a single presentation requirement. That omission gives rise to the natural inference that the requirement was not regarded as useful or supported by the studies associated with the Convention. In these circumstances, I cannot agree that the FCTC and its preparatory work provide any support for the single presentation requirement.

195. Third, the parties devoted some effort to demonstrating that the single presentation requirement either did, or did not, reduce both tobacco consumption and smoking prevalence.[194] I agree with the Tribunal that this evidence was largely inconclusive, both because of questions about the reliability of available surveys and statistics and because of difficulties in establishing causation.[195]

196. The fundamental point is that the single presentation requirement violated Article 3(2) for reasons other than an after-the-fact assessment of the measure's efficacy in reducing smoking. Rather, as discussed above, the single presentation requirement must be regarded as arbitrary and disproportionate because it is wholly unnecessary to accomplishing its only stated objective and instead prohibits substantial categories of conduct that do not accomplish that objective. It is that fundamental lack of rationality and proportionality that renders the requirement arbitrary and disproportionate.

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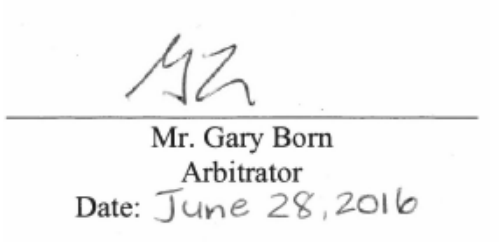
197. In sum, I agree with most of the Tribunal's conclusions, but part company with the Award on two important issues. My conclusions on these issues do not question the broad authority of Uruguay, or other states, to regulate in the interest of public health and safety. They do, however, go to the heart of guarantees of access to justice and protection from arbitrary state conduct and, with regret, I must therefore dissent.

[192] Award, para. 396.
[193] World Health Organization (WHO), Framework Convention on Tobacco Control (FCTC), Article 11 [Exhibit RL-20]; *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and Labelling of Tobacco Products)* [Exhibit RL-13].
[194] Claimants' Memorial, paras. 112-13; Respondent's Counter-Memorial, para. 6.45.
[195] Award, para. 408.



Mr. Gary Born
Arbitrator
Date: June 28, 2016