

Bilateral Investment Treaty claim, Uruguay

PMI statement and background information regarding the company's Bilateral Investment Treaty (BIT) claim against the government of Uruguay

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A number of stories have recently appeared in the media relating to a Bilateral Investment Treaty (BIT) claim against the government of Uruguay. **Many of these stories contain inaccurate and misleading information.**

Philip Morris International (PMI) is not seeking to overturn public place smoking restrictions, lift advertising restrictions, prevent graphic warnings on cigarette packs or reverse bans on the descriptors such as *milds* or *lights*. In fact, we have supported regulations in each of these areas.

Our BIT claim only challenges three regulations implemented in 2009 by the former administration that go far beyond public health objectives:

- **a regulation that forces companies to sell only one pack variation per cigarette brand that required us to withdraw 7 of the 12 cigarette varieties we sold in Uruguay. We had already taken all descriptors off our cigarette packs such as *lights*, but the former government decided to force us to eliminate all brand variations as well.**
- **an increase in health warnings on tobacco packaging to 80%. Although we support regulations requiring prominent health warnings, the requirement of 80% leaves virtually no space on the pack for display of legally protected trademarks.**
- **a requirement to print images on tobacco packaging that include repulsive and shocking pictures, such as a grotesquely disfigured baby. We do not oppose the use of graphic health warnings but believe that images should accurately depict the health effects of smoking.**

We have supported and will continue to support effective and sensible tobacco regulations. The three measures challenged, however, are neither. They are extreme, have not been proven to be effective, have seriously harmed the company's investments in Uruguay and have deprived the company of its ability to use its legally-protected trademarks and brands.

Having exhausted all dialogue with the previous administration, we had no option but to seek legal recourse by filing an arbitration claim against the Government of the Republic of Uruguay at the International Centre for Settlement of Investment Disputes ("ICSID") invoking the Switzerland-Uruguay BIT. We have a powerful case, and in the absence of any change to these excessive regulations we will continue with our claim. We will also pursue a constructive dialogue with the government to promote sensible measures such as further enforcement of minimum age laws and illicit trade prevention.

Background:

On February 19, 2010, three Philip Morris International (PMI) companies filed a request for arbitration against Uruguay at the International Centre for Settlement of Investment Disputes ("ICSID"), a part of the World Bank. The companies contend that certain Uruguayan regulations, introduced by the previous Uruguayan government, on the packaging and labeling of tobacco products, **have substantially damaged the value of the companies' investments in Uruguay and deprived them of the ability to use their brands and trademarks.** The arbitration was initiated under an investment treaty between Uruguay and Switzerland, in which Uruguay consents that such claims by Swiss investors may be taken to ICSID arbitration.

The case name is *FTR Holdings S.A. (Switzerland) et al. v. Oriental Republic of Uruguay*.

Claimants: The companies bringing the case include two Swiss entities and Abal Hermanos S.A. Abal Hermanos is a Uruguayan company that has manufactured and marketed tobacco products there since 1877. It currently markets several of its own brands and licenses others, such as "Marlboro," from other PMI entities. The Swiss claimants ultimately own both Abal Hermanos S.A. and the relevant PMI trademarks.

Status: On September 1, 2010, the PMI companies appointed their arbitrator, and on September 24, 2010, Uruguay appointed its arbitrator, Mr. James Crawford. The Chair has not yet been appointed.

Facts of the Dispute: This Bilateral Investment Treaty claim is specific to three regulatory measures in Uruguay as described below. Prior Uruguayan governments have implemented numerous regulations, including smoking restrictions in public places, advertising restrictions, mandatory 50% health warnings, and a ban on the use of descriptive terms such as "light", "mild", "ultra light". The companies have not challenged any of these regulations.

The three measures challenged in the Request for Arbitration are, however, different. **They are extreme, and in some cases confiscatory, regulations that have seriously harmed the companies' investments in Uruguay and deprived the companies of their ability to use their legally registered brands.** First, under Article 3 of **Ordinance 514**, the Ministry of Public Health took the drastic and unprecedented step of prohibiting *any* brand variations. Until the enactment of the Ordinance, Abal Hermanos sold multiple product varieties under each of its brands. For example, under its "Marlboro" brand, it sold the "Red," "Gold," "Blue," and "Green" varieties. Article 3 has, however, forced the company to cease selling all but one of those product varieties under each brand that it owns or licenses, leading to the withdrawal of 7 out of the 12 product varieties that were previously sold in Uruguay. The ministry should not be surprised that, when it enacts arbitrary regulations which ban the sale in Uruguay of a popular legal product, consumers who prefer that product will largely turn to competitors' brands or to contraband and counterfeit cigarettes. **Illegal cigarettes are an increasingly serious problem in Uruguay. According to the Tobacco Atlas of 2009, one in four tobacco products consumed in Uruguay are counterfeit or contraband, one of the highest rates in the world.** It should also

be noted that no other country in the world has enacted such a measure. Although PMI has strictly complied with the letter and spirit of Ordinance 514, the single presentation requirement has not prevented other major market participants from evading the intent of the Ordinance by changing the names, but not the appearance, of their brand varieties. It is telling that, in the year and a half since Article 3 of Ordinance 514 has been implemented, the Uruguayan government has taken no action against these other manufacturers for their actions.

A second measure, Decree 287/09, expands the size of the mandatory warning labels on cigarette packaging from 50% to 80% of the front and back panels of the package. No such requirement is in effect in any other country in the world. **The size of the warning makes it virtually impossible for the companies to use their brands and trademarks to promote their own products or even distinguish them from other brands.** The companies -- along with most other countries worldwide -- consider the previously mandated 50% health warnings more than sufficient to clearly communicate the well-known health effects of smoking.

A third measure, **Ordinance 514 (1)**, requires the companies to include pictograms as part of the health warnings on packaging. The companies have no per se objection to regulations requiring pictograms.

However, the specific pictograms required by the Ministry of Public Health do not warn of the health effects of tobacco use, as would be appropriate; rather, **they include shocking and sensational images designed to evoke emotions of repulsion and disgust, even horror.** It is difficult to understand, for instance, what meaningful information can be drawn from seeing an image of what appears to be a burnt and grotesquely disfigured baby on a pack.

Consequences for the companies: As noted, the companies have had to stop selling 7 of their 12 brand variations in Uruguay. In the case of Marlboro, for example, Article 3 of Ordinance 514 has meant that the Gold, Blue and Green variations representing about 40% of Marlboro sales had to be taken off the market. Moreover, the size of the health warnings and the pictograms imposed by the Ministry of Public Health undermine the companies' legally protected trademarks. The companies have seen the value of their business and investment severely impaired as a result of the three regulations.

Legal claims: The companies' claims are based on a 1991 bilateral investment treaty between Switzerland and Uruguay, in which each country guarantees certain minimum standards of treatment for the other country's investors, and agrees to resort to international arbitration to resolve disputes with individual investors over alleged failures to live up to those commitments. The companies contend that, as a result of Uruguay's measures, and contrary to the Switzerland-Uruguay treaty, the use of their investments has been unreasonably impaired, the value of their investments has been taken without compensation, and they have been deprived of fair and equitable treatment.

The PMI companies consider legal action as a last resort. In Uruguay, the challenged measures go far beyond reasonable public health regulations, and the BIT proceedings and related litigation brought by the companies in the local courts were brought only after all attempts at dialogue had been exhausted.

Relief requested: The companies have asked for the suspension of the three regulations and for substantial monetary compensation for the losses they have incurred as a result of the regulations.