

TIME TO QUIT? ASSESSING INTERNATIONAL INVESTMENT CLAIMS AGAINST PLAIN TOBACCO PACKAGING IN AUSTRALIA*

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I INTRODUCTION

In April 2010, the Australian government announced that it would pursue mandatory plain packaging of tobacco products.¹ This announcement was followed by concrete steps in April 2011, with the release of a consultation paper and exposure draft of the relevant legislation,² and in July 2011, with the introduction of a revised bill into the Australian House of Representatives.³ The scheme (which is expected to enter into force from 1 July 2012)⁴ will apply to all tobacco products, prescribing the shape, size and type of packs and cartons and specifying that all retail packaging (apart from brand names, health warnings and other legislative requirements) must have a matt finish and be coloured either ‘drab dark brown’ or as prescribed by regulation.⁵ No trademarks or other marks (eg graphics, symbols, letters) may appear on tobacco products or retail packaging or wrapping of tobacco products, except that on retail packaging the ‘brand, business or company name ... and any variant name for the tobacco products’ may appear in a prescribed place and form, alongside legislative requirements and any other marks permitted by regulation.⁶

The scheme contemplated by Tobacco Plain Packaging Bill 2011 (Cth) complements a comprehensive suite of tobacco control measures that have developed in Australia (at both federal and State/territory levels) over the last 30 years.⁷ Although Australia has been recognised as one of the highest achieving countries in relation to tobacco control,⁸ tobacco smoking continues to kill more than 15,000 Australians a year, at a social cost of \$31.5 billion per annum.⁹ The stated purpose of the Tobacco Plain Packaging Bill 2011 (Cth) is therefore to improve public health — including by discouraging smoking initiation, encouraging smoking cessation, discouraging relapse, and reducing exposure to second-hand smoke — and to implement certain of Australia’s international obligations¹⁰ as a party to the World Health Organization (‘WHO’) *Framework Convention on Tobacco Control* (‘FCTC’).¹¹

In their attempts to discredit Australia’s plain packaging scheme at an international level, tobacco companies are turning not only to the law of the World Trade Organization (‘WTO’),¹² but also to international investment law. Australia has 26 investment

¹ Prime Minister of Australia, *Media Release: Anti-Smoking Action* (29 April 2010).

² Australian Government, *Consultation Paper: Tobacco Plain Packaging Bill 2011 – Exposure Draft* (7 April 2011); Australian Government, *Tobacco Plain Packaging Bill 2011 – Exposure Draft* (7 April 2011).

³ Tobacco Plain Packaging Bill 2011 (Cth). See also Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth), introduced into the House of Representatives on the same day.

⁴ Tobacco Plain Packaging Bill 2011 (Cth), cl 2; Parliament of the Commonwealth of Australia, House of Representatives, *Tobacco Plain Packaging Bill 2011: Explanatory Memorandum* (6 July 2011) 6.

⁵ Tobacco Plain Packaging Bill 2011 (Cth), cl 18-19.

⁶ Tobacco Plain Packaging Bill 2011 (Cth), cl 20-22, 26.

⁷ ‘Australia Defends Tobacco Packaging Law as Backed by Solid Research’ (24 June 2011) 29(25) *Inside US Trade*.

⁸ See, eg, WHO, *Report on the Global Tobacco Epidemic 2011: Warning about the Dangers of Tobacco* (WHO, 2011) 33, 34, 39, 43, 47, 51.

⁹ Parliament of the Commonwealth of Australia, House of Representatives, *Tobacco Plain Packaging Bill 2011: Explanatory Memorandum* (6 July 2011) 1.

¹⁰ Tobacco Plain Packaging Bill 2011 (Cth), cl 3(1).

¹¹ 2302 UNTS 166 (adopted 21 May 2003, entered into force 27 February 2005).

¹² See Tania Voon and Andrew Mitchell, ‘Face Off: Assessing WTO Challenges to Australia’s Scheme for Plain Tobacco Packaging’ (2011) 22(3) *Public Law Review* (forthcoming).

protection agreements in force:¹³ 21 bilateral investment treaties ('BITs'),¹⁴ and five preferential trade agreements ('PTAs') containing investment provisions.¹⁵ An

¹³ Australia's bilateral investment treaty with Chile has been superseded by the investment chapter in Australia's preferential trade agreement with Chile: Commonwealth, *Parliamentary Debates*, Senate, 1 March 2011, 881 (Stephen Conroy).

¹⁴ *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol*, [1997] ATS 4 (signed 23 August 1995, entered into force 11 January 1997); *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, [1988] ATS 14 (signed and entered into force 11 July 1988); *Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments*, [1994] ATS 18 (signed 30 September 1993, entered into force 29 June 1994); *Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the promotion and protection of investments*, 2208 UNTS 362 (signed 3 May 2001, entered into force 5 September 2002); *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, 1748 UNTS 385 (signed 15 September 1993, entered into force 15 October 1993) ('Hong Kong – Australia BIT'); *Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments*, [1992] ATS 19 (signed 15 August 1991, entered into force 10 May 1992); *Agreement between the Government of Australia and the Government of the Republic of India on the promotion and protection of investments*, 2116 UNTS 145 (signed 26 February 1999, entered into force 4 May 2000); *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments*, [1993] ATS 19 (signed 17 November 1992, entered into force 29 July 1993); *Agreement between Australia and the Lao People's Democratic Republic on the Reciprocal Promotion and Protection of Investments*, [1995] ATS 9 (signed 6 April 1994, entered into force 8 April 1995); *Agreement between the Government of the Republic of Lithuania and the Government of Australia on the promotion and protection of investments*, 2336 UNTS 341 (signed 24 November 1998, entered into force 10 May 2002); *Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments*, 2483 UNTS 247 (signed 23 August 2005, entered into force 21 July 2007) ('Australia – Mexico BIT'); *Agreement between the Islamic Republic of Pakistan and Australia on the promotion and protection of investments*, 2044 UNTS 715 (signed 7 February 1998, entered into force 14 October 1998); *Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments*, [1991] ATS 38 (signed 3 September 1990, entered into force 20 October 1991); *Agreement between Australia and the Government of the Republic of Peru on the Promotion and Protection of Investments* [1997] ATS 8 (signed 7 December 1995, entered into force 2 February 1997); *Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments, and Protocol*, [1995] ATS 28 (signed 25 January 1995, entered into force 8 December 1995); *Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments*, [1992] ATS 10 (signed 7 May 1991, entered into force 27 March 1992); *Agreement between the Government of Australia and the Government of Romania on the Reciprocal Promotion and Protection of Investments*, [1994] ATS 10 (signed 21 June 1993, entered into force 22 April 1994); *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the promotion and protection of investments*, 2483 UNTS 169 (signed 12 November 2002, entered into force 14 March 2007); *Agreement between the Republic of Turkey and Australia on the reciprocal promotion and protection of investments*, [2010] ATS 8 (signed 16 June 2005, 29 June 2009); *Agreement between Australia and Uruguay on the promotion and protection of investments*, 2258 UNTS 379 (signed 3 September 2001, entered into force 12 December 2002); *Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments*, [1991] ATS 36 (signed 5 March 1991, entered into force 11 September 1991).

¹⁵ *Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area*, [2010] ATS 1 (signed 27 February 2009, entered into force 1 January 2010) ('AANZFTA') Ch 11; *Australia – Chile Free Trade Agreement*, [2009] ATS 6 (signed 30 July 2008, entered into force 6 March 2009) ('CAFTA') Ch 10; *Australia – Thailand Free Trade Agreement*, [2005] ATS 2 (signed 5 July 2004, entered into force 1 January 2005) ('TAFTA') Ch 9; *Australia – United States Free Trade Agreement*, [2005] ATS 1 (signed 18 May 2004, entered into force 1 January 2005) ('AUSFTA') Ch 11; *Singapore – Australia Free*

investment protocol relating to Australia's sixth PTA is expected to enter into force in the second half of 2011.¹⁶ In this article, we use one of Australia's BITs — the *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments* ('Hong Kong – Australia BIT')¹⁷ — and one of Australia's PTAs including investment provisions — the *Australia – United States Free Trade Agreement* ('AUSFTA')¹⁸ — as case studies to illustrate how plain packaging measures are likely to fare in international investment law. We chose the Hong Kong – Australia BIT because, even before the latest Australian plain packaging legislation was introduced into Parliament, Philip Morris Asia Limited ('PMA') launched an investment claim against Australia under that BIT in relation to plain packaging.¹⁹ We chose the AUSFTA because certain submissions to an Australian inquiry into plain packaging contended that plain packaging would be contrary to Australia's obligations under that PTA.²⁰

In Part II of this article, we examine Australia's relevant substantive obligations under the Hong Kong – Australia BIT, as well as certain related procedural issues concerning arbitral jurisdiction, the possibility of modifying, terminating or re-interpreting the BIT, and the enforcement of any adverse arbitral award against Australia. We conclude that, although jurisdiction is likely to be established under Article 10 of the Hong Kong – Australia BIT, most of the substantive claims of PMA are unlikely to be made out. The claim that plain packaging will constitute expropriation by the Australian government in violation of Article 6(1) of the BIT is probably the strongest, but Australia has valid arguments in response to that claim also and would have a reasonable chance of defending plain packaging as a legitimate non-compensable health regulation. In addition, Australia could halt certain aspects of the claim by acting quickly and in concert with Hong Kong to modify or reframe the BIT. In any case, Australia would be wise to review all its BITs with a potential claim against plain packaging in mind.

Part III of the article considers plain packaging in the context of the investment protection provisions in the AUSFTA, which offers a useful example of how certain substantive investment obligations can be set out in a more nuanced fashion paying greater attention to the exercise of sovereign power. In addition, at the level of procedure, the AUSFTA eschews investor-State dispute settlement ('ISDS'), which in

Trade Agreement between the Government of Australia and the Government of the Republic of Singapore, 2257 UNTS 103 (signed 17 February 2003, entered into force 28 July 2003) ('SAFTA') Ch 8.

¹⁶ *Protocol on Investment to the Australia – New Zealand Closer Economic Relations Trade Agreement* (signed 16 February 2011) ('ANZCER Investment Protocol').

¹⁷ See above n 14.

¹⁸ See above n 15.

¹⁹ Philip Morris Limited, *News Release: Philip Morris Asia Initiates Legal Action Against the Australian Government Over Plain Packaging* (27 June 2011); *Written Notification of Claim by Philip Morris Asia Limited to the Commonwealth of Australia pursuant to Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments* (27 June 2011) ('PMA Claim'). See also, eg, Chris Kenny, 'Big tobacco ignites legal war', *The Australian*, 27 June 2011; International Centre for Trade and Sustainable Development, 'Philip Morris Launches Legal Battle Over Australian Cigarette Packaging' 15(24) *Bridges Weekly Trade News Digest* (29 June 2011).

²⁰ See, eg, Gabriël Moens and John Trone, *Report on the Consistency of a Proposed Plain Packaging Requirement with Australia's International Obligations: Attachment 3 to the Submission by Philip Morris Limited to the Senate Community Affairs Legislation Committee* (30 April 2010) 1-3, 9-14; Tim Wilson, Institute of Public Affairs, *Governing in ignorance: Australian governments legislating, without understanding, intellectual property: Submission to the Senate Community Affairs Legislation Committee* (May 2010) 18.

our view cannot be indirectly introduced through the most-favoured nation obligation in Article 11.4 of the AUSFTA.

II CASE STUDY 1: THE HONG KONG – AUSTRALIA BIT

A *Jurisdiction of an Arbitral Tribunal*

1 *PMA's Notification of an Investment Claim: Art 10*

Article 10 of the Hong Kong – Australia BIT provides:

A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.

Under Article 3(2) of the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010 ('UNCITRAL Rules'),²¹ 'Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent'. However, these proceedings have not yet commenced. On 27 June 2011, PMA issued a 'written notification' of its claim pursuant to Article 10 of the BIT, contemplating a subsequent submission of the claim to arbitration in the absence of agreement being reached between Australia and PMA within three months (that is, by 26 September 2011) as to the substance of the dispute or alternative procedures for its resolution.²² Nevertheless, Article 10 of the BIT is unequivocal in requiring the parties to submit the dispute to arbitration at the end of the three-month period in that event.

2 *Exhaustion of Local Remedies*

The requirement to exhaust local remedies under general international law does not apply to ISDS: exhaustion of local remedies is not a '*procedural* requirement for the investor's treaty claims'.²³ However, exhaustion of local remedies might be necessary to establish that Australia has actually committed a breach of a substantive obligation in the Hong Kong – Australia BIT: 'With respect to *expropriation*, it has been a question of whether there was a persistent or irreparable obstacle to the enjoyment of the investment, or an actual and effective repudiation of it. In the context of *fair and equitable* treatment standards, neglect of local remedies has been one element in an overall act of balancing.'²⁴ Although PMA and its related companies may eventually be

²¹ UNCITRAL, *UNCITRAL Arbitration Rules (as revised in 2010)* (April 2011); *UNCITRAL Arbitration Rules as revised in 2010*, GA Res 65/22, UN GAOR, 65th sess, 57th plen mtg, UN Doc A/RES/65/22 (6 December 2010).

²² PMA Claim, [1]-[3].

²³ Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) [59] (emphasis added).

²⁴ Ole Spiermann, 'Premature Treaty Claims' in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 463, 466 (emphasis added). See also, eg, *Parkerings-Compagniet v Lithuania (Award)* (ICSID Arbitral

expected to pursue remedies under Australian law, its resort to Article 10 of the BIT could prove premature in that the outcome of any domestic claims is unknown at the time of notifying the investment claim.

3 *Relevant Investors and Investments: Art 1(e)-(f)*

The substantive investment protections discussed below apply to ‘investors’ in Australia and their ‘investments’ in Australia. An investment means ‘every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time’, including certain specified forms of investment as elaborated further below.²⁵ Although in general treaties have only prospective application,²⁶ the Hong Kong – Australia BIT specifically provides that ‘the term “investment” includes all investments, whether made before or after the date of entry into force of this Agreement’.²⁷ Accordingly, as long as PMA meets the definition of an investor in Australia and retains relevant investments in Australia, it makes no difference as a threshold matter when those investments were obtained.

PMA appears to be an investor of Hong Kong within the meaning of Article 1(f) of the BIT because it is a company incorporated under Hong Kong law.²⁸ On the face of Article 1(e)(ii) of the BIT, PMA also has investments in Australia that are covered by the BIT because PMA owns 100% of the shares in Philip Morris (Australia) Limited, which owns 100% of the shares in Philip Morris Limited.²⁹ In addition, PMA claims that it owns or controls investments within the BIT in the form of ‘intellectual property rights including rights with respect to ... trademarks ... and goodwill’,³⁰ because Philip Morris Limited owns or licenses trademarks relating to a number of brands — such as Marlboro, Alpine, and Peter Jackson — the use of which has generated ‘substantial goodwill’ in Philip Morris Limited.³¹ The registered owners of the relevant trademarks include Philip Morris Limited and related entities in Australia, the United States, and Switzerland.³² We assume for the purposes of this article that, as claimed by PMA, Philip Morris Limited either owns or licenses for use in Australia the relevant trademarks and that PMA thereby indirectly owns or controls those trademarks and the associated goodwill.

Unlike the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (‘ICSID Convention’),³³ the UNCITRAL Rules contain no separate reference to investment or investor. Accordingly, the traditional approach in UNCITRAL arbitrations would be to conclude that a relevant investment justifying jurisdiction exists simply because the investor can demonstrate its ownership or control

Tribunal, Case No ARB/05/8, 14 August 2007) [448]-[449], [453]-[454]. Cf *Siemens v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) [272].

²⁵ Hong Kong – Australia BIT, Article 1(e).

²⁶ VCLT, Article 28.

²⁷ Hong Kong – Australia BIT, Article 1(e).

²⁸ Hong Kong – Australia BIT, Articles 1(b)(i), 1(f)(i)(B); PMA Claim, [21].

²⁹ PMA Claim, [22], [25(a)], [25(b)]; IBISWorld, *IBISWorld Company Report: Philip Morris (Australia) Limited – Premium Report* (31 December 2010, with update as at 11 April 2011) 14-15.

³⁰ Hong Kong – Australia BIT, Article 1(e)(iv).

³¹ PMA Claim, [23], [25(c)].

³² Search of <http://pericles.ipaustralia.gov.au/atmosph/falcon.application_start> conducted 30 July 2011.

³³ 575 UNTS 159 (concluded 18 March 1965, entered into force 14 October 1966), Article 25(1).

of one of the assets enumerated in the BIT definition of investment (here, shares, intellectual property, and goodwill). On this basis, the debate surrounding the meaning of ‘investment’ in the ICSID Convention³⁴ does not arise.

However, Australia might succeed in advancing a more restrictive meaning of investment for the purposes of the Hong Kong – Australia BIT if it could clear a number of hurdles. First, Australia would need to show that the term ‘investment’ has an inherent meaning that involves something more than a mechanical application of the asset types identified in Article 1(e) of the BIT to the facts of the case. A relatively recent arbitral tribunal constituted under the UNCITRAL Rules did reach this conclusion.³⁵ Second, Australia would most likely have to establish that the meaning given to ‘investment’ in the Hong Kong – Australia BIT is informed by ICSID arbitral awards³⁶ such as *Salini*,³⁷ for example on the basis that such awards provide subsidiary means of interpreting this treaty term³⁸ or that they shed light on the ordinary meaning, context or purpose of the term.³⁹ Such an approach could also enhance consistency and coherence in international investment arbitration.⁴⁰ Third, Australia would have to persuade the arbitral tribunal to apply the element of the *Salini* test requiring that an investment contribute to the economic development of the host State (Australia).⁴¹ Fourth and finally, Australia would need to demonstrate that PMA’s investment in Australia does not satisfy that element because of the significant health and financial burdens imposed on Australia by tobacco products:⁴² rather than contributing to Australia’s economic development, PMA’s investment contributes to the deaths of more than 15,000 Australians a year, at a social cost of \$31.5 billion per annum.⁴³ These are

³⁴ See, eg, Emmanuel Gaillard, ‘Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 403.

³⁵ *Romak SA v Uzbekistan (Award)* (Permanent Court of Arbitration, Case No AA280, 26 November 2009) [178]-[179], [184], [188]. Cf Jean Ho, ‘The Meaning of “Investment” in ICSID Arbitrations’ (2010) 26(4) *Arbitration International* 633.

³⁶ See *Romak SA v Uzbekistan (Award)* (Permanent Court of Arbitration, Case No AA280, 26 November 2009) [193]-[196], [207]; cf *Chevron Corporation v Ecuador (Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 30 March 2010) [163]-[164].

³⁷ *Salini Costruttori SPA v Kingdom of Morocco (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/4, 23 July 2001) [52].

³⁸ Statute of the International Court of Justice, Article 38(1)(d). See also, eg, *Merrill v Canada (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 31 March 2010) [188].

³⁹ VCLT, Article 31(1). See also *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [284].

⁴⁰ See generally Laura Halonen, ‘Bridging the Gap in the Notion of “Investment” Between ICSID and UNCITRAL Arbitrations’ (2011) 29(2) *ASA Bulletin* 312. See also *Siemens v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) [269].

⁴¹ *Salini Costruttori SPA v Kingdom of Morocco (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/4, 23 July 2001) [52]. See also *Patrick Mitchell v The Democratic Republic of Congo (Decision on Annulment)* (ICSID Ad Hoc Committee, Case No ARB/99/7, 1 November 2006) [39]-[41]; *Malaysian Historical Salvors v Malaysia (Award on jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/10, 10 May 2007) [66], [68], [106](e), [113], [123], [124], [143], [146]. But see *Malaysian Historical Salvors v Malaysia (Decision on Annulment)* (ICSID Ad Hoc Committee, Case No. ARB/05/10, 16 April 2009) [61]-[62], [74], [78], [80]-[81], [83].

⁴² See Andrew Mitchell and Sebastian Wurzberger, ‘Boxed In? Australia’s Plain Packaging Initiative and International Investment Law’ (2011) *Arbitration International* (forthcoming).

⁴³ Parliament of the Commonwealth of Australia, House of Representatives, *Tobacco Plain Packaging Bill 2011: Explanatory Memorandum* (6 July 2011) 1.

all reasonable arguments, but the likelihood of Australia prevailing in relation to each of them is relatively modest.

B *Duration, Modification, and Termination of the Agreement: Art 14*

1 *Unilateral Termination*

The Hong Kong – Australia BIT entered into force on 15 October 1993 pursuant to Article 14(1). Article 14(2) states that the agreement will remain in force for an initial period of 15 years — that is, until 14 October 2008 — after which it will remain in force indefinitely unless terminated by either party under Article 14(3) with one year’s written notice. Article 14(4) states:

Notwithstanding termination of this Agreement pursuant to paragraph (3) of this Article, the Agreement shall continue to be effective for a second and final period of fifteen years from the date of its termination in respect of investments made before the date of termination of this Agreement.

On its terms, this provision means that if, for example, Australia gave notice on 1 August 2011 that it was terminating the agreement with effect from 1 August 2012, the agreement would remain in force until 31 July 2027 in respect of investments made before 1 August 2012. Thus, unilateral termination by Australia does not appear to present a realistic option for avoiding the current investment claim by PMA in respect of plain packaging.

2 *Modification, Interpretation or Termination by Agreement*

On the other hand, Australia and Hong Kong could together agree to modify the agreement in an attempt to preclude the continuation of the PMA claim or at least to prevent further claims. The parties might be expected to agree on such a move, given that both are parties to the WHO FCTC — Hong Kong through the extension of China’s participation in that treaty⁴⁴ — and both are at the forefront of global tobacco control efforts. Hong Kong’s Secretary for Food and Health recently received a WHO award for Hong Kong’s achievements in tobacco control, in connection with World No Tobacco Day 2011.⁴⁵ China’s significant disease burden arising from non-communicable diseases, much of which could be addressed by reducing tobacco consumption,⁴⁶ could also encourage treaty modifications to avoid future tobacco claims under the Hong – Kong Australia BIT. Australia may also wish to pursue similar modifications or re-interpretations of its other investment protection agreements, given the precedent set by the launch of the PMA claim.

If the parties agreed in this regard, the modification could, for example:

⁴⁴ See <<http://www.legislation.gov.hk/choice.htm>> and <<http://www.legislation.gov.hk/interlaw.htm>> (last accessed 18 July 2011); <http://www.who.int/fctc/signatories_parties/en/index.html> (last accessed 18 July 2011).

⁴⁵ ‘Hong Kong official wins WHO award for accomplishments controlling tobacco’, *Global Times* (30 May 2011).

⁴⁶ World Bank, ‘Toward a Healthy and Harmonious Life in China: Stemming the Rising Tide of Non-Communicable Diseases’, *World Bank.org Weekly Update* (26 July 2011).

- (i) Remove investments and investors in the tobacco industry from the scope of the agreement or from the ISDS mechanism in Article 10. Excluding tobacco from the scope of WTO obligations has been proposed, although in that context an exclusion is unlikely to achieve its public health purpose because WTO law already contains meaningful exceptions for public health measures and imposes disciplines that may be valuable to tobacco control, for example in limiting subsidies to the tobacco industry.⁴⁷ In contrast, the main effect of removing tobacco from a BIT would be to remove protections provided to tobacco investments and investors, increasing regulatory freedom with respect to tobacco control.⁴⁸ Although this might also indirectly discourage such investments in the host country, from a public health perspective this would be a positive rather than negative outcome. The parties could still, however, owe obligations to tobacco investors pursuant to general international law.
- (ii) Remove the ISDS mechanism altogether. The Australian government has already announced its plan to reduce reliance on ISDS, at least in the context of future PTAs.⁴⁹ This decision was based in part on recommendations made in 2010 by the Productivity Commission, which found:

[W]hile a range of potential benefits have been posited to accrue from ISDS provisions, there is little evidence that such provisions are necessary to address potential problems faced by investors or that they generate significant benefits in practice. ... ISDS provisions can further restrict a government's ability to undertake welfare-enhancing reforms at a later date, a problem known as 'regulatory chill'.⁵⁰

As discussed further below, ISDS is already absent from the AUSFTA. Australia previously pursued ISDS in PTAs with developing countries, and each of its BITs currently contains ISDS provisions.⁵¹ This approach (and the absence of nuance in the drafting of many of the substantive investment protection obligations in the BITs) may reflect the fact that all Australia's BITs are with countries typically characterised as developing, indicating that Australia has traditionally regarded its BITs as instruments to protect

⁴⁷ See Tania Voon, 'WTO Law and Risk Factors for Non-Communicable Diseases: A Complex Relationship' in Geert Van Calster and Denise Prévost (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar, UK, forthcoming 2012), available at <http://ssrn.com/abstract=1831966>.

⁴⁸ See Valentina Sara Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 482-483.

⁴⁹ Australian Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity* (April 2011) 14.

⁵⁰ Productivity Commission, *Research Report: Bilateral and Regional Trade Agreements* (November 2010) 271. Cf Luke Nottage, 'The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"', Sydney Law School Research Paper No. 11/32 (2011) 3-8, forthcoming in *Transnational Dispute Management*, available at <http://ssrn.com/abstract=1860505>; Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor – State Dispute Settlement', *ASIL Insights* (2 August 2011).

⁵¹ Productivity Commission, *Research Report: Bilateral and Regional Trade Agreements* (November 2010) 265.

Australian investors in developing countries. Yet some reports indicate that only one Australian investor has ever used ISDS in an Australian BIT to pursue a foreign government,⁵² and the typical direction of investment from developed to developing countries has clearly shifted.⁵³ The PMA claim highlights how significant the BITs may become in allowing foreign investors to challenge Australian government measures, including measures to protect vital public interests such as public health. This suggests that a more cautious approach may be warranted to future BIT negotiation,⁵⁴ as some have foreseen for several years, including in the context of tobacco control.⁵⁵

- (iii) Clarify the scope of investment obligations contained in the agreement, particularly regarding expropriation and fair and equitable treatment. For example, the Protocol to the Australia – Mexico BIT⁵⁶ clarifies that the obligation to accord fair and equitable treatment:

prescribes the customary international law standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of Investors of another Contracting Party. ...

do[es] not require treatment in addition to or beyond that which is required by the customary international law standard of treatment of aliens.

This could also be done by way of a side letter or other form indicating the parties' agreed *interpretation* of the relevant obligations (as opposed to modifying the agreement or its provisions). Further examples of clarifications (and exceptions) to traditional investment protection obligations are provided below in relation to the AUSFTA.

- (iv) Introduce one or more general exceptions to the substantive investment obligations imposed by the agreement, to protect non-discriminatory regulatory measures for the promotion of legitimate policy objectives such as public health. The exception could be expressed to prevail over other

⁵² See Luke Peterson and Rishab Gupta, 'Australian miner quietly pursuing arbitration under one of Australia's investment treaties; first such known case had been overlooked amidst Australia's own legal and policy upheaval' (7 July 2011) *Investment Arbitration Reporter*.

⁵³ Ko-Yung Tung, 'Foreign investors vs sovereign states: towards a global framework, BIT by BIT' in Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press, 2010) 243, 246, 247, 267.

⁵⁴ See Kate Miles, 'Reconceptualising international investment law: bringing the public interest into private business' in Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press, 2010) 295, 299, 319; Ko-Yung Tung, 'Foreign investors vs sovereign states: towards a global framework, BIT by BIT' in Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press, 2010) 243, 268. See also Jeff Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 275, 303.

⁵⁵ See, eg, Samrat Ganguly, 'The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health' (1999) 38 *Columbia Journal of Transnational Law* 113, 116, 124, 162-163, 166; Valentina Sara Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 452, 460.

⁵⁶ See above n 14.

provisions (for example using the word ‘Notwithstanding’), including the most-favoured nation (‘MFN’) obligation (discussed further below in the context of the AUSFTA), to ensure that the MFN obligation would not prevent the parties from relying on an exception that did not appear in all other BITs.⁵⁷ The Hong Kong – Australia BIT already includes exceptions to the MFN obligation relating to regional economic integration agreements and taxation agreements.⁵⁸ Article 19 of the investment chapter in the PTA between Singapore and Australia contains general exceptions modelled on Article XX of the WTO’s *General Agreement on Tariffs and Trade 1994*.⁵⁹ Another example of an exception is found in the new investment protocol to the PTA between Australia and New Zealand, which protocol has been signed but is not yet in force at the time of writing.⁶⁰ Article 24 of the protocol specifies:

Nothing in this Protocol shall be construed to prevent either Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Protocol that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 14(4) of the Hong Kong – Australia BIT would not affect any bilateral modification of the agreement because it concerns only termination (and, indeed, only unilateral termination). As the agreement does not contain provisions concerning amendment or modification, the modification would instead be governed by the *Vienna Convention on the Law of Treaties* (‘VCLT’),⁶¹ to which Australia and Hong Kong are parties,⁶² and of which most if not all provisions have the status of customary international law.⁶³ Article 39 of the VCLT allows amendment of a treaty by agreement between the parties. Similarly, under Article 30(3), if Australia and Hong Kong entered a new BIT without terminating or suspending the earlier one, the later BIT would prevail to the extent of any inconsistency.⁶⁴ The parties could also terminate or suspend the treaty by consent.⁶⁵ However, the question arises whether a modification or termination agreed by Australia and Hong Kong could be retrospective.

⁵⁷ See UNCTAD, *Most-Favoured-Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements II, 2010) 46; UNCTAD, *Most-Favoured-Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements, 1999) 15.

⁵⁸ Hong Kong – Australia BIT, Art 7.

⁵⁹ See above n 15; Tania Voon and Andrew Mitchell, ‘Face Off: Assessing WTO Challenges to Australia’s Scheme for Plain Tobacco Packaging’ (2011) 22(3) *Public Law Review* (forthcoming).

⁶⁰ See above n 16.

⁶¹ 1155 UNTS 331 (adopted 22 May 1969).

⁶² See <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTS&no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#4> (last accessed 24 July 2011); <http://www.legislation.gov.hk/choice.htm> and <http://www.legislation.gov.hk/interlaw.htm> (last accessed 24 July 2011). Hong Kong became a Special Administrative Region of the People’s Republic of China from 1 July 1997, and China acceded to the VCLT on 3 September 1997. See <http://treaties.un.org/pages/HistoricalInfo.aspx?#%22China%22>, Note 2 (last accessed 24 July 2011).

⁶³ See eg, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* [1997] ICJ Rep 7, [46], [99]; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, Manchester, 1984) 14.

⁶⁴ See also VCLT, Art 59.

⁶⁵ VCLT, Arts 54(b), 57(b).

3 *Retrospectivity of Modification, Interpretation or Termination by Agreement*

By consenting to ISDS in the Hong Kong – Australia BIT, Australia made an offer to investors that PMA has arguably accepted by issuing a notice of claim under Article 10 of the BIT,⁶⁶ even though this initial notice does not itself commence any formal arbitration.⁶⁷ These two steps may have already created a ‘consent agreement’ that is ‘binding’, ‘cannot be revoked unilaterally’, and ‘has an independent contractual existence even if the treaty or legislation underlying it has been terminated’.⁶⁸ According to that interpretation, as nothing in the BIT suggests otherwise, Hong Kong would have no legal interest in the PMA claim and would be unable to prevent the claim from proceeding even if it objected to it.⁶⁹ This conclusion accords with the prevailing modern understanding of ISDS, which regards investor rights not as derivative rights flowing from the rights of the investor’s home State⁷⁰ (here, Hong Kong) but as direct rights conferred on the investor either through the conclusion of the BIT itself⁷¹ or through the contingency of the investor accepting the host State’s offer of ISDS.⁷²

But does this approach accord with the relevant provisions of the VCLT? Under Article 70(1)(b) of the VCLT, the *termination* of the Hong Kong – Australia BIT by agreement between the parties would generally ‘not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination’.⁷³ The

⁶⁶ PMA Claim, [1].

⁶⁷ See above n 22 and corresponding text.

⁶⁸ Christoph Schreuer, ‘Investment Disputes’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008) online edition, www.mpepil.com, [22]-[23]. See also Brigitte Stern, ‘The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate’ in José Alvarez et al (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011) 174, 178-181; Christoph Schreuer, ‘Consent to Arbitration’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2011) 830, 831, 836-837, 856; Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 381; A. Mezgravis, ‘The Standard of Interpretation Applicable to Consent and its Revocation in Investment Arbitration’ (2011) 8(2) *Transnational Dispute Management* 15-17, 22; Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 381-382; Antonio Parra, ‘The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations’ in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 105, 110; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) [73]; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) [3.27]-[3.28].

⁶⁹ Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) [38]-[39].

⁷⁰ *Loewen v United States (Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, Case No ARB(AF)/98/3, 26 June 2003) [233].

⁷¹ *Corn Products International v United Mexican States (Decision)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, Case No ARB(AF)/04/01, 15 January 2008) [173]; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) [65]-[69]. See also Francesco Francioni, ‘Access to Justice, Denial of Justice, and International Investment Law’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 63, 65; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) [3.58].

⁷² Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) [73].

⁷³ Cf *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep 6, 37 (3 February 1994).

reference to ‘the parties’ would exclude PMA, hence PMA’s rights are not directly recognised in this provision, and the PMA claim is not a ‘legal situation of the parties’ (unlike, potentially, an ongoing dispute between the parties themselves).⁷⁴ PMA is also unlikely to be regarded as having ‘acquired rights’ under the BIT despite its termination, particularly since the sunset clause (allowing extension of the treaty’s protections after unilateral termination)⁷⁵ does not apply to termination by mutual agreement of the parties.⁷⁶

To the extent that the BIT imposed instantaneous obligations on Australia with respect to plain packaging and PMA before the date of termination (in particular, an obligation to resolve the PMA claim pursuant to the arbitration agreement discussed above), Australia would arguably need to fulfil those obligations pursuant to Article 70(1)(b). However, even that conclusion might be avoided by virtue of the opening words of Article 70(1): ‘Unless ... the parties otherwise agree’.⁷⁷ Hence, the parties might conceivably agree in terminating the BIT to also exclude the PMA claim retrospectively, although this would run counter to the prevailing understanding of the nature of investor rights and consent to arbitration in investment agreements as discussed above. Australia would in any case continue to be subject to any obligations towards PMA imposed under international law independently of the BIT.⁷⁸

A *modification* of the BIT might also not extinguish causes of action that have already crystallised or accrued, pursuant to the obligation of *pacta sunt servanda* in Article 26 of the VCLT,⁷⁹ which is a rule of CIL or a general principle of law.⁸⁰ Article 26 is also

⁷⁴ Hervé Ascensio, ‘Article 70: Consequences of the termination of a treaty’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Volume I* (Oxford University Press, 2011) 1585, 1596, 1603-1605. See also André Nollkaemper, ‘Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties’ in Ige Dekker and Harry Post (eds), *On the Foundations and Sources of International Law* (TMC Asser Press, 2003) 187, 189.

⁷⁵ Hong Kong – Australia BIT, Article 14(4).

⁷⁶ See Hervé Ascensio, ‘Article 70: Consequences of the termination of a treaty’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Volume I* (Oxford University Press, 2011) 1585, 1596-1597. Cf Lord Arnold McNair, *The Law of Treaties* (2nd ed, Clarendon Press, 1961) 532-533; André Nollkaemper, ‘Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties’ in Ige Dekker and Harry Post (eds), *On the Foundations and Sources of International Law* (TMC Asser Press, 2003) 187, 187, 190.

⁷⁷ See Bert Vierdag, ‘Some Remarks on the Effect of the Termination of a Treaty under Article 70 of the 1969 Vienna Convention on the Law of Treaties’ in Ige Dekker and Harry Post (eds), *On the Foundations and Sources of International Law* (TMC Asser Press, 2003) 179, 184-185.

⁷⁸ VCLT, Art 43. See also André Nollkaemper, ‘Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties’ in Ige Dekker and Harry Post (eds), *On the Foundations and Sources of International Law* (TMC Asser Press, 2003) 187, 191-192.

⁷⁹ VCLT Art 26: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’. This rule does not apply if a treaty is terminated or suspended: Anthony Aust, ‘*Pacta Sunt Servanda*’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008) online edition, www.mpepil.com, [10].

⁸⁰ Christina Binder, ‘The *Pacta Sunt Servanda* Rule in the Vienna Convention on the Law of Treaties: A Pillar and its Safeguards’ in Isabelle Buffard et al (eds), *International Law between Universalism and Fragmentation* (Brill, 2009) 317, 321; Jean Salmon, ‘Article 26: *Pacta sunt servanda*’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Volume I* (Oxford University Press, 2011) 659, 662-663, 681.

reflected in the broader notion of good faith in international law, which includes an obligation to resolve disputes in good faith and gives rise to the concept of estoppel.⁸¹

Despite the likely non-retroactivity of modification or termination of the Hong Kong – Australia BIT by agreement, modification or termination could be effective in containing the PMA claim because the claim was brought before the legislation had been introduced into Parliament, let alone enacted. Thus, even assuming the validity of the claim’s purported extension to subsequent developments in the Australian regulatory framework for tobacco products,⁸² a modification or termination of the BIT prior to the enactment or implementation of the plain packaging legislation would restrict the claim to events preceding enactment.⁸³ This could have a profound effect on PMA’s ability to establish any substantive violations of the BIT. In addition, an agreement by Hong Kong and Australia regarding the proper *interpretation* of the existing treaty (for example, clarifying the scope of investment obligations as suggested above) might have retrospective effect⁸⁴ and therefore be relevant in determining the PMA claim, despite the rather formalistic distinction between modification or amendment and interpretation.

C *Substantive Obligations*

The PMA claim maintains that Australia’s plain packaging legislation will violate Australia’s substantive obligations in the Hong Kong – Australia BIT relating to: expropriation; fair and equitable treatment; full protection and security; unreasonable impairment; and the so-called umbrella clause.⁸⁵ We consider each of these obligations in turn.

1 *Expropriation: Art 6(1)*

Article 6 of the Hong Kong – Australia BIT commences:

ARTICLE 6

Expropriation

1. Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except under due process of law, for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, and against compensation.

⁸¹ *Certain Norwegian Loans (France v Norway) (Judgment)* [1957] ICJ Rep 9, 53 (Separate Opinion of Judge Sir Hersch Lauterpacht); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States) (Judgment)* [1984] ICJ Rep 246, 305 (12 October 1984); Guy Goodwin-Gill, ‘State Responsibility and the “Good Faith” Obligation in International Law’ in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, 2004) 75, 87-88.

⁸² PMA Claim, [18], [47].

⁸³ Under VCLT Article 70(1)(a), termination ‘releases the parties from any obligation further to perform the treaty’.

⁸⁴ Philippe Sands, ‘Article 39: General rules regarding the amendment of treaties’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Volume I* (Oxford University Press, 2011) 963, 971.

⁸⁵ PMA Claim, [10], [26], [44]-[46].

An initial question that arises in interpreting and applying this provision is whether the reference in Article 6(1) to ‘deprivation’ is meaningfully distinct from ‘expropriation’. In our view, little turns on this distinction, given that Article 6 is titled ‘Expropriation’ and that arbitral tribunals frequently refer to deprivation in expounding the concept of expropriation.⁸⁶ Nor do we consider that the reference to measures with effect ‘equivalent to’ deprivation expands the scope of the provision, just as certain arbitral tribunals have concluded that an expropriation provision covering measures ‘tantamount to expropriation’ is not on that basis broader than any other expropriation provision.⁸⁷

The four elements identified in Article 6(1) of the Hong Kong – Australia BIT are common to expropriation provisions, namely the conditions for a lawful expropriation of: (i) due process of law; (ii) a public purpose; (iii) non-discrimination; and (iv) compensation. As one tribunal has explained:

one cannot start an inquiry into whether expropriation has occurred by examining whether [the four conditions] for avoiding liability in the event of an expropriation have been fulfilled. That would indeed be putting the cart before the horse ... [Those conditions] do not bear on the question as [to] whether an expropriation has occurred.⁸⁸

However, arbitral tribunals have found a number of different factors relevant in distinguishing non-compensable regulation by the State from compensable expropriation or deprivation,⁸⁹ some of which do relate to the first three conditions identified in Article 6(1). The factors most relevant to the PMA claim are:

- The degree and duration of *interference* with the investor’s property.⁹⁰ Ultimately, PMA could claim that Australia’s plain packaging initiative will

⁸⁶ See, eg, *Impregilo v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [270]; *Alpha Projektholding v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/16, 20 October 2010) [408]; *Biwater Gauff (Tanzania) v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 18 July 2008) [455], [463], [510]; *Parkerings-Compagniet v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 14 August 2007) [437], [449]; *Tokios Tokelès v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/18, 29 June 2007) [120]; *LG&E Energy Corp v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB 02/1, 3 October 2006) [194], [198], [200]; *Fireman’s Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Award, Case No ARB(AF)/02/01, 17 July 2006) [176(c)]; *Azurix v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 23 June 2006) [316]; *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [113]-[116]; *CME Czech Republic v Czech Republic (Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 September 2001) [150], [152], cf [151]; *SD Myers v Canada (First Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 November 2000) [282]-[283]; *Pope & Talbot v Canada (Interim Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 26 June 2000) [102]; *Compañía del Desarrollo de Santa Elena v Costa Rica (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/96/1, 17 February 2000) [77].

⁸⁷ *SD Myers v Canada (First Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 November 2000) [285]-[286]; *Pope & Talbot v Canada (Interim Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 26 June 2000) [104].

⁸⁸ *Fireman’s Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Award, Case No ARB(AF)/02/01, 17 July 2006) [174]. See also *Parkerings-Compagniet v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 14 August 2007) [441]-[442], [456].

⁸⁹ See *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [263]-[264].

⁹⁰ *Alpha Projektholding v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/16, 20 October 2010) [408]; *AES Summit Generation v Hungary (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/22, 17 September 2010) [14.3.1], [14.3.3]; *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/17, 30 July 2010) [122]-[123], [134]; *Toto Costruzioni Generali v Republic of Lebanon*

significantly and permanently interfere with its property in terms of the value of its shareholdings in Australia and the use and enjoyment of its registered trademarks. However, the extent of interference may not be known at least until the relevant legislation and associated regulations are established in final form.⁹¹ The current claim may therefore be premature:

By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. ... The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.⁹²

- The *acquisition*, taking or appropriation of ‘control, use or enjoyment of property through the exercise of State powers’.⁹³ Even assuming that plain

(*Decision on Jurisdiction*) (ICSID Arbitral Tribunal, Case No ARB/07112, 8 September 2009) [183]; *Biwater Gauff (Tanzania) v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 18 July 2008) [463]; *Sempra Energy v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 18 September 2007) [285] (but see *Sempra Energy v Argentina (Decision on Annulment)* (ICSID Ad Hoc Committee, Case No ARB/02/16, 10 June 2010) [229]); *Tokios Tokelès v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/18, 29 June 2007) [120]; *LG&E Energy Corp v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB 02/1, 3 October 2006) [190]-[191], [193], [200]; *Fireman's Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Award, Case No ARB(AF)/02/01, 17 July 2006) [176(c)-(d)]; *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [113]; *CME Czech Republic v Czech Republic (Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 September 2001) [116]; *Lauder v Czech Republic (Final Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 3 September 2001) [201]-[202]; *SD Myers v Canada (First Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 November 2000) [282]-[283]; *Pope & Talbot v Canada (Interim Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 26 June 2000) [96]; *Compañía del Desarrollo de Santa Elena v Costa Rica (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/96/1, 17 February 2000) [77]; Katia Yannaca-Small, ‘Indirect Expropriation and the Right to Regulate: How to Draw the Line?’ in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 445, 460-468; August Reinisch, ‘Expropriation’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2011) 407, 438-439; Anne Hoffmann, ‘Indirect Expropriation’ in August Reinisch, ‘Standards of Investment Protection’ (Oxford University Press, 2008) 151, 156, 158-159.

⁹¹ In relation to economic loss as opposed to other forms of injury justifying remedies such as injunctive relief or declarations, see *Biwater Gauff (Tanzania) v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 18 July 2008) [464]-[465].

⁹² *Siemens v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) [263]. See also *Biwater Gauff (Tanzania) v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 18 July 2008) [455].

⁹³ Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’ in Philippe Kahn and Thomas Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, 2007) 391, 413. See also *Toto Costruzioni Generali v Republic of Lebanon (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07112, 8 September 2009) [185]; *Biwater Gauff (Tanzania) v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 18 July 2008) [452]; *LG&E Energy Corp v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB 02/1, 3 October 2006) [199]; *Fireman's Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Award, Case No ARB(AF)/02/01, 17 July 2006) [176(c)]; *Azurix v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 23 June 2006) [322]; *Lauder v Czech Republic (Final Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 3 September 2001) [203]; *SD Myers v Canada (First Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 November 2000) [280], [287]; *Pope & Talbot v Canada (Interim Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 26 June 2000) [100]-[102]; Anne Hoffmann, ‘Indirect Expropriation’ in August Reinisch, ‘Standards of Investment Protection’ (Oxford University Press, 2008) 151, 153, cf 160-161. Cf *Técnicas Medioambientales Tecmed v Mexico (Award)*

tobacco packaging will interfere significantly with PMA's property rights, Australia may rightly point out that neither the Australian government nor any third party is acquiring any of those rights or otherwise appropriating control over PMA's investment. PMA's shareholding will remain intact and its related companies will remain registered owners of the relevant trademarks and will continue to be entitled to prevent third parties from using those trademarks. The trademarks will still be able to be used in the form allowed under the plain packaging scheme and in other forms, such as on corporate letterhead.⁹⁴

- The government's *intention*, even though an intent to expropriate is not necessary to establish expropriation.⁹⁵ Here, the intention of the Australian government is clearly not to expropriate PMA's investment; rather, the government's purpose is to promote health.⁹⁶
- The nature of the measure: whether it entails an exercise of the State's sovereign *police powers*.⁹⁷ Reinisch has gone so far as to conclude that '[i]n principle there is a widespread consensus that regulatory measures pursued for legitimate objectives cannot be regarded as indirect expropriation'.⁹⁸ In this regard, the legitimate public health purpose of the Australian government is again relevant.

(ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [113]; *CME Czech Republic v Czech Republic (Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 September 2001) [150]; *Metalclad v Mexico (Award)* (Ad Hoc Arbitral Tribunal, ICSID Additional Facility Rules, Case No ARB(AF)/97/1, 25 August 2000) [103] (but see *Metalclad v Mexico (Review by the Supreme Court of British Columbia)* (ICSID Case No ARB(AF)/97/1, 2 May 2001, [79]); August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2011) 407, 442-444.

⁹⁴ Parliament of the Commonwealth of Australia, House of Representatives, *Tobacco Plain Packaging Bill 2011: Explanatory Memorandum* (6 July 2011) 4.

⁹⁵ August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2011) 407, 446-447; Anne Hoffmann, 'Indirect Expropriation' in August Reinisch, 'Standards of Investment Protection' (Oxford University Press, 2008) 161-162; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) [8.101]; Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' in Philippe Kahn and Thomas Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, 2007) 391, 417. Cf *Siemens v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) [270].

⁹⁶ Tobacco Plain Packaging Bill 2011 (Cth) cl 3; Parliament of the Commonwealth of Australia, House of Representatives, *Tobacco Plain Packaging Bill 2011: Explanatory Memorandum* (6 July 2011) 1-2.

⁹⁷ *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/17, 30 July 2010) [128], [147]-[148]; *Fireman's Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Award, Case No ARB(AF)/02/01, 17 July 2006) [176(j)]; *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [254]-[255], [257]-[258], [261]-[262], [275]-[276]; *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [119], cf [121]; Katia Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: How to Draw the Line?' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 445, 470-472. Cf *Patrick Mitchell v The Democratic Republic of Congo (Decision on Annulment)* (ICSID Ad Hoc Committee, Case No ARB//99/7, 1 November 2006) [53]; *Pope & Talbot v Canada (Interim Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 26 June 2000) [99]; *Compañía del Desarrollo de Santa Elena v Costa Rica (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/96/1, 17 February 2000) [71]-[72]. See also *Methanex v United States (Final Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 3 August 2005) Part IV, Chapter D, [7]; Jeff Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 300-301, 305.

⁹⁸ August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2011) 407, 433, cf 437-438.

- The existence of *proportionality* between the public interest pursued and the interference with the investor's property.⁹⁹ Some tribunals have refused to accept that the public purpose of a measure necessarily means it is not expropriatory but have nevertheless considered the public purpose in a balancing exercise taking into account the degree of interference with investment. The proportionality between the Australian government's health objective and the mandatory plain packaging requirements will depend on the final requirements implemented and evidence surrounding the utility of those requirements from a health perspective.¹⁰⁰ The fact that both the WHO and the Convention Secretariat of the WHO FCTC have expressed support for Australia's initiative¹⁰¹ enhances Australia's position that plain packaging is a proportionate response to the adverse health effects of tobacco products.
- The *legitimate expectations* of investors¹⁰² (including the existence of specific assurances of protection by government).¹⁰³ For reasons explained below,¹⁰⁴ PMA cannot be regarded as having a legitimate expectation that a measure such as plain packaging would not be introduced in Australia at the time it made its investment.

⁹⁹ *LG&E Energy Corp v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB 02/1, 3 October 2006) [189], [195]; *Fireman's Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Award, Case No ARB(AF)/02/01, 17 July 2006) [176(j)]; *Azurix v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 23 June 2006) [311]-[312]; *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [122], [132]; Katia Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: How to Draw the Line?' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 445, 472-474; August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2011) 407, 450; Anne Hoffmann, 'Indirect Expropriation' in August Reinisch, 'Standards of Investment Protection' (Oxford University Press, 2008) 163-164, 168.

¹⁰⁰ See Quit Victoria, Cancer Council Victoria, *Plain packaging of tobacco products: a review of the evidence* (May 2011).

¹⁰¹ WHO, *Submission re Australia Plain Packaging Legislation* (June 2011); Convention Secretariat WHO FCTC, *Submission in respect of Australia's draft Tobacco Plain Packaging Bill 2011* (6 June 2011).

¹⁰² *Fireman's Fund Insurance Company v Mexico (Award)* (ICSID Arbitral Award, Case No ARB(AF)/02/01, 17 July 2006) [176(k)]; Anne Hoffmann, 'Indirect Expropriation' in August Reinisch, 'Standards of Investment Protection' (Oxford University Press, 2008) 162-163; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) [8.104]-[8.105]; Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' in Philippe Kahn and Thomas Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, 2007) 391, 417; Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 311-312.

¹⁰³ *Grand River Enterprises Six Nations Ltd v United States (Award)* (ICSID Arbitral Tribunal, Case No Case ARB/10/5, UNCITRAL Rules, 12 January 2011) [127], [141]; *Methanex v United States (Final Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 3 August 2005) Part IV, Chapter D, [7]; *Metalclad v Mexico (Award)* (Ad Hoc Arbitral Tribunal, ICSID Additional Facility Rules, Case No ARB(AF)/97/1, 25 August 2000) [107] (but see *Metalclad v Mexico (Review by the Supreme Court of British Columbia)* (ICSID Case No ARB(AF)/97/1, 2 May 2001, [79]); August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2011) 407, 448-449; W Michael Reisman and Rocío Digón, 'Eclipse of Expropriation?' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007* (Martinus Nijhoff Publishers, 2009) 27, 43-44.

¹⁰⁴ See below nn 110-121 and corresponding text.

An arbitral tribunal's assessment of these different factors would depend on the evidence presented by the parties and developments in the implementation of the scheme at the time of arbitration. However, on balance, Australia has a strong argument with respect to a number of these factors that plain packaging would not amount to expropriation under Article 2(2) of the Hong Kong – Australia BIT.

2 *Fair and Equitable Treatment: Art 2(2)*

Pursuant to Article 2(2) of the Hong Kong – Australia BIT, '[i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment ... in the area of the other Contracting Party'. One significant controversy that often arises in applying the fair and equitable treatment ('FET') standard is whether the standard is linked or limited to the minimum standard of treatment of aliens imposed under customary international law or, alternatively, constitutes an autonomous standard independent of international law. Although some investment protection agreements include an express clarification in this regard, others (such as the Hong Kong – Australia BIT) are silent as to the relationship between the FET standard imposed under the agreement and the international minimum standard. The prevailing view is that, in the absence of language invoking the international minimum standard, the FET standard in an investment protection agreement is autonomous.¹⁰⁵

A subsequent question then arises as to the significance of classifying the FET standard as autonomous or linked to the international minimum standard. Most tribunals have indicated that the threshold for establishing a breach of the international minimum standard is high.¹⁰⁶ An autonomous FET standard may well be broader (that is, easier to breach) than the international minimum standard.¹⁰⁷ In contrast, some tribunals have concluded that the characterisation of the FET standard as autonomous or limited to the international minimum standard makes little difference, because the international minimum standard has in any case evolved as a result of developments in international investment agreements.¹⁰⁸ In our view, PMA's claim that Australia's plain packaging

¹⁰⁵ Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) *Journal of World Investment & Trade* 357, 360, 364; Hussein Haeri, 'A Tale of Two Standards: "Fair and Equitable Treatment" and the Minimum Standard in International Law' (2011) 27(1) *Arbitration International* 27, 34-35, 43; cf Santiago Montt, *State Liability in Investment Treaty Arbitration* (Hart Publishing, 2009) 303, 306.

¹⁰⁶ Hussein Haeri, 'A Tale of Two Standards: "Fair and Equitable Treatment" and the Minimum Standard in International Law' (2011) 27(1) *Arbitration International* 27, 32, 39. See also, eg, *Cargill v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 13 August 2009) [284]-[286], [296]; *Glamis Gold v United States (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 14 May 2009) [615]-[616]; *International Thunderbird Gaming Corporation v Mexico (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 26 January 2006) [194]; *Genin v Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/2, 25 June 2001) [367].

¹⁰⁷ *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [292]-[293]; Hussein Haeri, 'A Tale of Two Standards: "Fair and Equitable Treatment" and the Minimum Standard in International Law' (2011) 27(1) *Arbitration International* 27, 36-37. See also *Enron v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) [258]; but see *Enron v Argentina (Decision on Annulment)* (ICSID Ad Hoc Committee, Case No ARB/01/3, 30 July 2010) [406]-[407].

¹⁰⁸ *Merrill v Canada (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 31 March 2010) [193], [211], [213]; *Azurix v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 23 June 2006) [361]; *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [291]; *Mondev International v United States (Award)* (ICSID Arbitral Tribunal, Case No

scheme would violate the FET standard in Article 2(2) of the Hong Kong – Australia BIT fails regardless of whether that standard is limited to the international minimum standard as originally conceived or is a broader standard that is either autonomous of customary international law or that reflects the evolution of the minimum standard in customary international law.

Arbitral decisions concerning the FET standard have assessed government conduct according to principles of reasonableness, consistency, non-discrimination, transparency and due process.¹⁰⁹ Core to these principles and to the FET standard itself is the notion of protecting legitimate expectations of investors;¹¹⁰ this is also the element of the FET standard that is most relevant to PMA's claim. The pertinent question is whether Australia's plain packaging legislation, if enacted, would undermine PMA's legitimate expectations in investing in Australia. We answer that question in the negative, for the following reasons:

- Australia's *legitimate regulatory interests* in protecting and promoting public health are relevant in assessing PMA's legitimate expectations and whether those expectations are violated by mandatory plain packaging of tobacco products.¹¹¹
- The rational relationship between Australia's public health objectives and the plain packaging measure¹¹² means that the measure is not *arbitrary* and cannot be said on the basis of arbitrariness to violate PMA's legitimate expectations.¹¹³

ARB(AF)/99/2, 11 October 2002) [124]-[125]; cf *Duke Energy v Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/19, 12 August 2008) [333], [337]; *Occidental Exploration and Production Company v Ecuador (Award)* (London Court of International Arbitration, Case No UN 3467, 1 July 2004) [190], [192].

¹⁰⁹ Kenneth Vandeveld, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 *New York University Journal of International Law and Policy* 43, 52.

¹¹⁰ Arif Ali and Kassi Tallent, 'The Effect of BITs on the International Body of Investment Law: The Significance of Fair and Equitable Treatment Provisions' in Catherine Rogers and Roger Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 199, 214, 221; *Impregilo v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [285]; *EDF (Services) v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [216]; *Duke Energy v Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/19, 12 August 2008) [340]; *PSEG Global v Republic of Turkey (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/5, 17 January 2007) [240]; *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [302]; *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [154].

¹¹¹ *Total v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [123]; *Merrill v Canada (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 31 March 2010) [233], [235]-[236]; *EDF (Services) v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [217], [219]; *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [305]-[306]; *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [157]; *Genin v Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/2, 25 June 2001) [370].

¹¹² See Quit Victoria, Cancer Council Victoria, *Plain packaging of tobacco products: a review of the evidence* (May 2011); below n 133 and corresponding text.

¹¹³ On the relevance of arbitrariness see *Merrill v Canada (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 31 March 2010) [232], [239]; *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [154]; *Genin v Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/2, 25 June 2001) [368], [371].

- Particularly in view of Australia's public health interests, PMA cannot reasonably have expected that the regulatory environment for its tobacco products would remain *frozen* as at the time of its investment:¹¹⁴

On the one hand, stability, predictability and consistency of legislation and regulation are important for investors in order to plan their investments ... On the other hand, signatories of [BITs] do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed.¹¹⁵

- Australia has made no *specific assurances* to PMA or Hong Kong investors more generally (either in the Hong Kong – Australia BIT or otherwise) regarding the stability of the regulatory environment for tobacco products in Australia.¹¹⁶ On the contrary, Australia has over time adopted an increasingly stringent approach to tobacco regulation on the basis of public health.¹¹⁷ Similarly, the arbitral tribunal in a recent investment claim concerning tobacco noted:

[T]rade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor

¹¹⁴ *Impregilo v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [290]-[291]; *Total v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [120]; *AES Summit Generation v Hungary (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/22, 17 September 2010) [9.3.34]; *EDF (Services) v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [217]; *Continental Casualty Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [258]; *Parkerings-Compagniet v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 14 August 2007) [332]-[333]; *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [305]. See also *Enron v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) [261]; but see *Enron v Argentina (Decision on Annulment)* (ICSID Ad Hoc Committee, Case No ARB/01/3, 30 July 2010) [406]-[407].

¹¹⁵ *Total v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [114]-[115].

¹¹⁶ *GEA Group v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/08/16, 31 March 2011) [283]; *Total v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [116], [117], [119], [121]; *AES Summit Generation v Hungary (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/22, 17 September 2010) [9.3.17]-[9.3.18], [9.3.31]; *EDF (Services) v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [217]; *Glamis Gold v United States (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 14 May 2009) [620], [622]; *Continental Casualty Company v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [259]-[261]; *Plama Consortium v Republic of Bulgaria (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 27 August 2008) [219]; *Parkerings-Compagniet v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 14 August 2007) [331]; *PSEG Global v Republic of Turkey (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/5, 17 January 2007) [241].

¹¹⁷ See Jonathan Liberman, 'Plain tobacco packaging in historical and international context' in Andrew Mitchell, Tania Voon and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, UK, forthcoming 2012). Cf *PSEG Global v Republic of Turkey (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/5, 17 January 2007) [250].

entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation.¹¹⁸

- Finally, PMA invested in Australia by becoming the sole shareholder of Philip Morris (Australia) on 23 February 2011.¹¹⁹ PMA's investment in Australia therefore took place almost one year after the Australia's government's announcement that mandatory plain packaging of tobacco products would be implemented from mid-2012.¹²⁰ PMA therefore cannot maintain that, at the time of making its investment in Australia,¹²¹ it had a legitimate expectation that plain packaging would not be introduced in Australia.

3 Full Protection and Security: Art 2(2)

The first sentence of Article 2(2) of the Hong Kong – Australia BIT also provides that '[i]nvestments and returns of investors of each Contracting Party ... shall enjoy full protection and security in the area of the other Contracting Party'. This obligation is generally accepted as applying to situations of 'civil strife and physical violence' rather than broader circumstances of interference with investments.¹²² A few tribunals have interpreted the obligation more broadly.¹²³ On one view, the word 'full' indicates an intention to extend protection to security of intangible assets and stability of the legal framework¹²⁴ (as may an explicit reference in the clause to 'legal security'¹²⁵ or 'legal

¹¹⁸ *Grand River Enterprises Six Nations Ltd v United States (Award)* (ICSID Arbitral Tribunal, Case No Case ARB/10/5, UNCITRAL Rules, 12 January 2011) [144].

¹¹⁹ Philip Morris (Australia) Limited, *Financial Report 2010*; IBISWorld, *IBISWorld Company Report: Philip Morris (Australia) Limited – Premium Report* (31 December 2010, with update as at 11 April 2011) 14.

¹²⁰ Prime Minister of Australia, *Media Release: Anti-Smoking Action* (29 April 2010).

¹²¹ See *Frontier Petroleum Services v Czech Republic (Final Award)* (Permanent Court of Arbitration, 12 November 2010) [287]-[288]; *AES Summit Generation v Hungary (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/22, 17 September 2010) [9.3.8], [9.3.15], [9.3.26]; *Duke Energy v Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/19, 12 August 2008) [340], [347]; *Parkerings-Compagniet v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 14 August 2007) [331]; *LG&E Energy Corp v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB 02/1, 3 October 2006) [130].

¹²² *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/17, 30 July 2010) [167]; *Plama Consortium v Republic of Bulgaria (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 27 August 2008) [220], [267]; *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [483]-[484]. See also Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) [7.143], [7.151]; Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 213, 216.

¹²³ See, eg, *Frontier Petroleum Services v Czech Republic (Final Award)* (Permanent Court of Arbitration, 12 November 2010) [263], [273]; *CME Czech Republic v Czech Republic (Partial Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 13 September 2001) [613]; cf *Lauder v Czech Republic (Final Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 3 September 2001) [308]-[309].

¹²⁴ *Biwater Gauff (Tanzania) v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 18 July 2008) [729]; *Azurix v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 23 June 2006) [408].

¹²⁵ *Siemens v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) [303]; cf *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/17, 30 July 2010) [170].

protection'¹²⁶). However, other tribunals have suggested that the inclusion of the word 'full' does not have such an effect.¹²⁷

In one relatively recent case, considering a broadly worded clause requiring that investments 'enjoy the most constant protection and security',¹²⁸ the tribunal stated:

[T]he duty to provide most constant protection and security to investments ... can, in appropriate circumstances, extend beyond a protection of physical security, [but] it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals. ... To conclude that the right to constant protection and security implies that no change in law that affects the investor's rights could take place, would be practically the same as to recognizing the existence of a non-existent stability agreement as a consequence of the full protection and security standard.¹²⁹

Thus, even if government regulation is found to fall within the full protection and security clause in the absence of physical harm, policy objectives of the regulation may remain relevant in assessing whether the regulation is consistent with that clause. Moreover, the appropriateness of interpreting an obligation to ensure full protection and security as requiring legal stability or other factors already covered by the FET standard is questionable.¹³⁰ Yet even if an arbitral tribunal were to interpret Australia's obligation to provide full protection and security to PMA's investments pursuant to Article 2(2) of the Hong Kong – Australia BIT as extending *beyond* protection from physical harm, the reasons discussed above for finding no violation of the FET standard would similarly preclude any violation of this standard.¹³¹

4 *Unreasonable Impairment: Art 2(2)*

Article 2(2) of the Hong Kong – Australia BIT also provides that '[n]either Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party'. Claimants generally raise this 'non-impairment' obligation as a secondary matter in addition to primary claims of expropriation and fair and equitable treatment; arbitral tribunals also rarely focus their awards on this standard.¹³² Moreover, the obligation not to impair investors' use of their investments has much in common with the obligation to accord investors and investments fair and equitable treatment. Accordingly, a government measure that

¹²⁶ *Paushok v Mongolia (Award)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 28 April 2011) [326].

¹²⁷ *Parkerings-Compagniet v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 14 August 2007) [354]. See also Giuditta Cordero Moss, 'Full Protection and Security' in August Reinisch, 'Standards of Investment Protection' (Oxford University Press, 2008) 131, 134-136.

¹²⁸ *AES Summit Generation v Hungary (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/22, 17 September 2010) [13.3.1].

¹²⁹ *AES Summit Generation v Hungary (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/22, 17 September 2010) [13.3.2], [13.3.5].

¹³⁰ Giuditta Cordero Moss, 'Full Protection and Security' in August Reinisch, 'Standards of Investment Protection' (Oxford University Press, 2008) 131, 132, 150; *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/17, 30 July 2010) [167].

¹³¹ See *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/17, 30 July 2010) [165].

¹³² Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch, 'Standards of Investment Protection' (Oxford University Press, 2008) 87, 109.

violates the FET standard is likely to violate the non-impairment standard: if the State cannot show that its ‘conduct bears a reasonable relationship to some rational policy’,¹³³ then this will be unfair and inequitable, as well as unreasonable. Conversely, in the context of plain packaging, the demonstrated relationship between Australia’s proposed non-discriminatory measure and public health as already discussed confirms not only that plain tobacco packaging is consistent with the FET standard but also that it is consistent with the non-impairment standard established by Article 2(2) of the Hong Kong – Australia BIT.

5 *The Umbrella Clause – Compliance with Other Obligations: Art 2(2)*

Article 2(2) of the Hong Kong – Australia BIT also provides that ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party’. Significant debate exists as to whether ‘umbrella’ clauses of this kind elevate all contractual claims to treaty claims (that is, whether these clauses require States to comply with contractual obligations entered into with investors).¹³⁴ However, this debate makes little difference to plain packaging, given that (to our knowledge) the Australian government has not entered any contracts with tobacco investors.

Another question is whether umbrella clauses encompass obligations created under domestic legal or administrative acts.¹³⁵ On one view, umbrella clauses do protect investors from violation of domestic obligations, but such obligations must relate specifically to investments by investors of the other State party rather than being ‘of a general character’.¹³⁶ Accordingly, even if Australia violated obligations it owes PMA under Australian constitutional law or Australian intellectual property law by mandating plain tobacco packaging,¹³⁷ this violation is unlikely to lead to a violation of the umbrella clause because the relevant domestic obligations are not sufficiently specific to

¹³³ *Saluka Investments v Czech Republic (Partial Award)* (Permanent Court of Arbitration, 17 March 2006) [460].

¹³⁴ See, eg, Katia Yannaca-Small, ‘What About This “Umbrella Clause”?’ in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 479, 486-493, 502-503.

¹³⁵ See, eg, Katia Yannaca-Small, ‘What About This “Umbrella Clause”?’ in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 479, 497-499; Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 279-284; María Cristina Gritón Salias, ‘Do Umbrella Clauses Apply to Unilateral Undertakings?’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 490.

¹³⁶ *SGS Société Générale de Surveillance v Philippines (Decision on Jurisdiction and Separate Declaration)* (ICSID Arbitral Tribunal, Case No ARB/02/6, 29 January 2004) [121]-[122] (referring to an umbrella clause that covered ‘any obligation ... assumed with regard to specific investments in its territory by investors of the other Contracting Party’). See also *Al-Bahloul v Tajikistan (Partial Award)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case No 064/2008, 2 September 2009) [257]; *CMS Gas Transmission Company v Argentina (Decision on Annulment)* (ICSID Ad Hoc Committee, Case No ARB/01/8, 21 August 2007) [95(a)]; *LG&E Energy Corp v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB 02/1, 3 October 2006) [174]. Cf *Enron Corporation v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) [274]-[275].

¹³⁷ See Simon Evans and Jason Bosland, ‘Plain Packaging of Cigarettes and Constitutional Property Rights’ in Andrew Mitchell, Tania Voon and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, UK, forthcoming 2012).

PMA's investment or to investments by Hong Kong investors in general. Australia's constitutional and intellectual property laws cannot be regarded as having been intended to induce investment by PMA or similar investments; nor can they be analogised to an investor-State agreement with PMA.¹³⁸

The PMA claim as currently formulated in relation to the umbrella clause in the Hong Kong – Australia BIT, unusually, relies not on Australia's obligations under contract or domestic law but on Australia's obligations under WTO law¹³⁹ — specifically, the TRIPS Agreement and the *Agreement on Technical Barriers to Trade* ('TBT Agreement').¹⁴⁰ As both Australia and Hong Kong are WTO Members, PMA could contend that Australia owes relevant obligations under these two agreements. However, Australia's WTO obligations are arguably not specific enough to PMA's investment, investments of Hong Kong investors, or foreign investment generally, to enliven the umbrella clause. Indeed, as one tribunal has stated in relation to umbrella clauses:

Since States usually do not conclude, with reference to specific investments, special international agreements in addition to existing bilateral investment treaties, it is difficult to understand the notion 'obligation' as referring to obligations undertaken under other 'international' agreements. And given that such agreements, if concluded, would also be subject to the general principle of *pacta sunt servanda*, there would certainly be no need for a clause of that kind.¹⁴¹

Another reasonable response of Australia would be that its WTO obligations are owed to Hong Kong and other WTO Members rather than obligations 'with regard to investments of investors of' Hong Kong as envisaged by Article 2(2) of the Hong Kong – Australia BIT. However, even if this umbrella clause can be properly interpreted as encompassing Australia's WTO obligations (for example, on the basis that those are obligations with regard to investments of Hong Kong investors in the form of tobacco trademarks), we consider plain tobacco packaging consistent with those obligations.¹⁴² Therefore, PMA's claim under the umbrella clause seems tenuous. In the unlikely event that a WTO claim was completed prior to an arbitration on the PMA claim, the arbitral tribunal might rely on the WTO findings in assessing this question.¹⁴³

¹³⁸ See Katia Yannaca-Small, 'What About This "Umbrella Clause"?' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 479, 497; Stephan Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) *Minnesota Journal of International Law* 1, 90-94.

¹³⁹ PMA Claim, [28], [45]-[46].

¹⁴⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.

¹⁴¹ *Noble Ventures Inc v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/11, 5 October 2005) [51].

¹⁴² See Tania Voon and Andrew Mitchell, 'Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging' (2011) 22(3) *Public Law Review* (forthcoming).

¹⁴³ See, eg, *Cargill v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 13 August 2009) [194]; *Corn Products International v Mexico (Decision on Responsibility)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/1, 15 January 2008) [122]-[123]; *Archer Daniels Midland v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/05, 26 September 2007) [212]; *Canfor Corporation v United States (Decision on Preliminary Question)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 6 June 2006) [333].

D *Enforcing an Adverse Arbitral Award against Australia*

1 *Relevance of Public Policy under the New York Convention*

An award of an arbitral tribunal regarding the PMA claim pursuant to the UNCITRAL Rules would be ‘final and binding on the parties’.¹⁴⁴ All parties to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (‘New York Convention’),¹⁴⁵ including Australia and Hong Kong,¹⁴⁶ would need to recognise the award as binding and enforceable in accordance with the rules of procedure of the enforcing State.¹⁴⁷ However:

Recognition and enforcement of an arbitral award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that: ...

- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.¹⁴⁸

In Australia, the reasons for pursuing plain packaging¹⁴⁹ could well create public policy grounds against enforcing an adverse award. This conclusion would be strengthened by the existence of Australia’s obligations under the WHO FCTC, which would also influence conclusions regarding public policy in the other 173 parties to the WHO FCTC.¹⁵⁰

Another public policy ground for refusing enforcement (which may also come into play pursuant to Article III of the New York Convention to the extent that it is reflected in the rules of procedure of the enforcing State) is sovereign immunity.¹⁵¹ Although Article 10 of the Hong – Kong Australia BIT might amount to a waiver of sovereign immunity with respect to UNCITRAL arbitration and (together with participation in the New York Convention) with respect to the jurisdiction of a court of an enforcing State, the silence of the New York Convention as to immunity means that a corresponding waiver of immunity with respect to execution against sovereign assets is at best implied.¹⁵²

Andrea Bjorklund has explained:

¹⁴⁴ UNCITRAL Rules, Article 34(2).

¹⁴⁵ 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959).

¹⁴⁶ See <http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtmsg_no=XXII-1&chapter=22&lang=en#3> (last accessed 24 July 2011); <<http://www.legislation.gov.hk/choice.htm>> and <<http://www.legislation.gov.hk/interlaw.htm>> (last accessed 24 July 2011).

¹⁴⁷ New York Convention, Article III.

¹⁴⁸ New York Convention, Article V(2).

¹⁴⁹ See Parliament of the Commonwealth of Australia, House of Representatives, *Tobacco Plain Packaging Bill 2011: Explanatory Memorandum* (6 July 2011).

¹⁵⁰ See Convention Secretariat WHO FCTC, *Submission in respect of Australia’s draft Tobacco Plain Packaging Bill 2011* (6 June 2011).

¹⁵¹ Andrea Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes’ (2010) 21 *American Review of International Arbitration* 211, 219.

¹⁵² Andrea Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes’ (2010) 21 *American Review of International Arbitration* 211, 211-212, 215, 221.

The success of an implied waiver argument will depend on the municipal state immunity law in the jurisdiction where the victor seeks to enforce the award. ... [However,] the principle of execution immunity is so firmly entrenched in state practice that the argument of an implicit waiver of it is unlikely to prevail. ... It seems unlikely that states would have dispensed with that 'last bastion' [of State immunity] without having made clear their intent to do so.¹⁵³

2 *Invoking Immunity with respect to Execution against Sovereign Assets*

We now consider, as examples, how three different immunity laws would apply to a purported invocation by Australia of sovereign immunity with respect to executing an adverse arbitral award arising from the PMA claim against Australia's sovereign assets. We first consider the multilateral system represented by the *United Nations Convention on Jurisdictional Immunities of States and Their Property* ('UN Convention').¹⁵⁴ As that treaty has not yet entered into force (and, indeed, Australia is not a signatory or a party to it), it does not impose binding obligations on Australia. Nevertheless, it may provide useful guidance as to how immunity issues might be considered in some countries. We then consider the application of the *European Convention on State Immunity* ('European Convention'),¹⁵⁵ which has eight parties.¹⁵⁶ Finally, we address the relevant federal legislation in the United States: the *Foreign Sovereign Immunities Act of 1976* ('US Act').¹⁵⁷

Under Article 17 of the UN Convention, Australia could not invoke 'immunity from jurisdiction before a court of another State ... in a proceeding which relates to ... the confirmation' of an arbitral award issued pursuant to an 'agreement in writing with a foreign ... juridical person to submit to arbitration differences relating to a commercial transaction', which is understood to include an investment matter.¹⁵⁸ Although no arbitration agreement between Australia and PMA exists as a single written document, a written arbitration agreement arguably exists in the form of the Hong Kong – Australia BIT combined with PMA's notice of claim.¹⁵⁹ Accordingly, as suggested above, Australia could be taken to have waived immunity with respect to the jurisdiction of a court of a third State enforcing an award of the arbitral tribunal in the PMA claim.

However, the UN Convention draws a common distinction between jurisdictional immunity and execution immunity.¹⁶⁰ Under Article 19, '[n]o post-judgment measures

¹⁵³ Andrea Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' (2010) 21 *American Review of International Arbitration* 211, 223-225.

¹⁵⁴ Adopted by the General Assembly of the United Nations (GA Res 59/38, UN GAOR, 59th sess, 65th plen mtg, UN Doc A/RES/59/38 (2 December 2004)); opened for signature 17 January 2005 to 17 January 2007; not yet in force. China signed the Convention on 14 September 2005 but is not yet a party; Australia is neither a signatory nor a party: <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en> (last accessed 25 July 2011). See generally David Stewart, 'The UN Convention on Jurisdictional Immunity of States and Their Property' (2004) 99 *American Journal of International Law* 194.

¹⁵⁵ 1495 UNTS 181 (concluded 16 May 1972, entered into force 11 June 1976).

¹⁵⁶ See <<http://treaties.un.org/pages/showDetails.aspx?objid=08000002800c8eb2>> (last accessed 25 July 2011).

¹⁵⁷ 28 USC §1602 *et seq.*

¹⁵⁸ UN Convention, Annex, *Understanding with respect to article 17*.

¹⁵⁹ See below nn 65-67 and corresponding text.

¹⁶⁰ See Andrea Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' (2010) 21 *American Review of International Arbitration* 211, 222.

of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State' unless the State has *expressly* consented to such measures, the State has 'allocated or earmarked property' for the satisfaction of the relevant claim, or 'the property is specifically in use or intended for use by the State for *other than government non-commercial purposes* and is in the territory of the State of the forum'.¹⁶¹

The exception in Article 14 of the UN Convention preventing a State from invoking immunity with respect to certain intellectual property matters would be inapplicable in the context of enforcing an arbitral award against Australia in another country (say Singapore) pursuant to the PMA claim. The Article 14 exception concerns proceedings regarding, *inter alia*, the alleged infringement of the State in question (Australia) within the territory of the State of the forum (Singapore) of intellectual property rights belonging to a third person (PMA). In contrast, the alleged intellectual property infringement in the PMA claim is within Australia's own territory.

The European Convention is quite similar to the UN Convention in relevant respects. Under Article 12, where a 'Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a ... commercial matter, that State may not claim immunity from the *jurisdiction* of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to',¹⁶² *inter alia*, the setting aside of the award. However, under Article 23, 'No measures of *execution* or preventive measures against the *property* of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.'¹⁶³ Again, the exception in Article 8 in relation to certain intellectual property disputes is inapplicable in the context of the PMA claim.

Under the US Act, Australia would be likely to be regarded as having waived immunity from the jurisdiction of United States courts in connection with the confirmation of an arbitral award arising from the PMA claim, as a result of Australia's participation in the New York Convention and the Hong Kong – Australia BIT.¹⁶⁴ However, a distinction is again drawn between jurisdictional immunity and execution immunity. Foreign state property is generally immune from 'attachment arrest and execution'¹⁶⁵ upon a judgment of a United States court except (relevantly) where 'the judgment is based on an order confirming an arbitral award rendered against the foreign state' and it is 'used for a *commercial activity* in the United States'.¹⁶⁶

Accordingly, in several jurisdictions as shown in these examples, an arbitral award against Australia would have to be executed against commercial rather than sovereign

¹⁶¹ Emphasis added. See also UN Convention, Article 20.

¹⁶² Emphasis added.

¹⁶³ Emphasis added.

¹⁶⁴ 28 USC §1605(a)(1), (a)(6).

¹⁶⁵ 28 USC §1609.

¹⁶⁶ 28 USC §1610(a)(6) (emphasis added).

assets of Australia. This would require locating relevant assets and establishing their commercial nature, both of which could be difficult tasks.¹⁶⁷

III CASE STUDY 2: THE AUSTRALIA – UNITED STATES FREE TRADE AGREEMENT

A *Relevant Investors and Investments: Art 11.17.4*

The definition of ‘investment’ in the AUSFTA, like that in the Hong Kong – Australia BIT, is quite broad. Pursuant to Article 11.17.4 of the AUSFTA, an investment may take the form of shares or intellectual property rights, among other things. However, unlike the Hong Kong – Australia BIT, the AUSFTA provides further guidance as to the types of factors that may be relevant in establishing the existence of an investment. Article 11.17.4 specifies that an investment ‘means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’.

The reference in Article 11.17.4 of the AUSFTA to relevant characteristics of an investment calls to mind the first three elements of the *Salini* test, namely the making of a commitment of a sufficient duration that entails an element of risk (the fourth element being contribution to the economic development of the host State as discussed above).¹⁶⁸ On the one hand, the list of characteristics of an investment specified in Article 11.17.4 is clearly intended to be inclusive rather than exhaustive, such that an additional requirement of contributing to Australia’s economic development is not necessarily precluded. On the other hand, the deliberate inclusion of certain aspects of an investment without reference to the contentious element of contribution to economic development may indicate that the parties did not intend to include that element. Thus, although Australia could mount a legitimate argument that investments covered by the AUSFTA are those that contribute to Australia’s economic development in a way that tobacco investments do not, that argument has only a limited chance of success.

Significantly, as with the Hong Kong – Australia BIT, the AUSFTA extends to investments made either before or after the entry into force of the agreement.¹⁶⁹ Accordingly, a United States enterprise that owns or controls shares in a tobacco company or tobacco trademarks in Australia is quite likely to be regarded as an investor of the United States¹⁷⁰ that has made an investment in Australia covered by the AUSFTA.

B *Investor – State Dispute Settlement and Most-Favoured Nation Treatment: Art 11.4*

Unlike several other recent Australian PTAs,¹⁷¹ the AUSFTA does not include an ISDS mechanism.¹⁷² Nevertheless, a United States investor in the Australian tobacco industry could contend that ISDS is available to it by virtue of Australia’s obligation to accord

¹⁶⁷ Andrea Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes’ (2010) 21 *American Review of International Arbitration* 211, 211, 213, 225-226.

¹⁶⁸ See above nn 37 and 41 and corresponding text.

¹⁶⁹ AUSFTA, Article 1.2.3.

¹⁷⁰ AUSFTA, Article 11.17.6.

¹⁷¹ AANZFTA, Ch 11, Section B; CAFTA, Ch 10, Section B; TAFTA, Art 917; SAFTA, Ch 8, Art 14.

¹⁷² The ANZCER Investment Protocol also excludes ISDS. See above n 16.

most-favoured nation ('MFN') treatment to United States investors pursuant to Article 11.4 of the AUSFTA. Article 11.4.1 provides:

Each Party shall accord to *investors* of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.¹⁷³

Article 11.4.2 provides analogous protections to covered *investments*. A United States investor could rely on these provisions in maintaining an entitlement to ISDS to resolve an investment claim under the AUSFTA because ISDS is provided to investors from, say, Singapore under its PTA with Australia.¹⁷⁴ Making ISDS available to Singaporean investors as a dispute settlement option could be said to involve more favourable treatment than that accorded to United States investors, contrary to Article 11.4 of the AUSFTA.

The extent to which MFN provisions in investment protection agreements extend to procedural protections such as ISDS or other more favourable dispute settlement options is highly controversial,¹⁷⁵ and the cases in which MFN provisions have been found to cover procedural matters can generally be explained by the broad nature of the relevant MFN provision.¹⁷⁶ For example, in the classic case of *Maffezini v Spain*, the relevant MFN clause (in the Argentina – Spain BIT) was expressed to relate to 'all matters subject to this Agreement'.¹⁷⁷ The breadth of this formulation was significant in the ICSID tribunal's determination that the clause could extend to dispute settlement procedures.¹⁷⁸ The arbitral tribunal in *Gas Natural v Argentina* reached a similar conclusion, on the basis of the same MFN clause.¹⁷⁹ In contrast, in *Salini v Jordan*, faced with an MFN clause that was silent as to whether it extended to dispute settlement

¹⁷³ Emphasis added.

¹⁷⁴ SAFTA, Ch 8, Art 14.

¹⁷⁵ See, eg, Julie Maupin, 'MFN-Based Jurisdiction in Investor – State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14(1) *Journal of International Economic Law* 157; United Nations Conference on Trade and Development, *Most-Favoured-Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II* (United Nations, 2010) 66-84. See also Abby Cohen Smutny and Lee Steven, 'The MFN Clause: What are its Limits?' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 351, 364, 381.

¹⁷⁶ Stanimir Alexandrov, 'On the Perceived Inconsistency in Investor – State Jurisprudence' in José Alvarez et al (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011) 60, 63-64. Cf Julie Maupin, 'MFN-Based Jurisdiction in Investor – State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14(1) *Journal of International Economic Law* 157, 168; *Impregilo v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011), Concurring and dissenting opinion of Brigitte Stern, [46]-[47], [57].

¹⁷⁷ *Agreement between the Government of the Argentine Republic and the Kingdom of Spain for the Promotion and Reciprocal Protection of Investments* (signed 3 October 1991, entered into force 28 September 1992) Article IV:2; *Maffezini v Kingdom of Spain (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 25 January 2000) [38].

¹⁷⁸ *Maffezini v Kingdom of Spain (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 25 January 2000) [60], [64].

¹⁷⁹ *Gas Natural SDG SA v Argentina (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/10, 17 June 2005) [28]-[31], [47], [49]. See also *Impregilo v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [95]-[96], [99], [103], [108] (cf concurring and dissenting opinion of Brigitte Stern, [109]).

or to all matters subject to the relevant BIT, the tribunal found that the MFN clause did not enable resort to more favourable dispute settlement provisions in other BITs.¹⁸⁰

The MFN clause in the AUSFTA does not specify that it applies to all matters covered by the agreement or to dispute settlement procedures. It does detail the types of treatment covered by the MFN obligation, namely treatment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory’.¹⁸¹ Arguably these matters (as opposed, perhaps, to more general rights to use or enjoy the investments) do not encompass dispute resolution procedures to enforce the investor’s rights outside domestic courts.¹⁸² On that basis, a treaty interpreter could reasonably conclude that the MFN clause in the AUSFTA does not permit a United States investor to resort to ISDS as allowed under another Australian BIT.

Two other reasons support this conclusion. First, an attempt to introduce ISDS into the AUSFTA by virtue of the MFN clause would entail ‘chang[ing] the forum or displac[ing] the entire dispute resolution system selected by the basic treaty’.¹⁸³ This goes much further than the situations addressed by previous arbitral tribunals, which involved attempts to rely on an MFN clause, for example, to dispense with an obligation to first exhaust local remedies during a specific period¹⁸⁴ or to allow ISDS to address contractual claims in addition to treaty-based claims.¹⁸⁵ The tribunal in *Plama v Bulgaria* considered that even using an MFN clause to replace one form of arbitration with another would depart too much from the parties’ intentions:

It is ... not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria–Cyprus BIT (*ad hoc* arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.¹⁸⁶

¹⁸⁰ *Salini Costruttori v Jordan (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/13, 15 November 2004) [102], [104], [116]-[119].

¹⁸¹ AUSFTA, Article 11.4.1.

¹⁸² See, eg, *Wintershall Aktiengesellschaft v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/14, 8 November 2008) [162], [166]-[168], [171]; cf *National Grid PLC v Argentina (Decision on Jurisdiction)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 20 June 2006) [81]-[84], [93].

¹⁸³ Julie Maupin, ‘MFN-Based Jurisdiction in Investor – State Arbitration: Is There Any Hope for a Consistent Approach?’ (2011) 14(1) *Journal of International Economic Law* 157, 171. See also Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) 195.

¹⁸⁴ See, eg, *Maffezini v Kingdom of Spain (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 25 January 2000) [64]; cf *Impregilo v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011), Concurring and dissenting opinion of Brigitte Stern, [88], [97], [99], [101]. See also Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) 161.

¹⁸⁵ *Salini Costruttori v Jordan (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/13, 15 November 2004) [102]. See also United Nations Conference on Trade and Development, *Most-Favoured-Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II* (United Nations, 2010) 83.

¹⁸⁶ *Plama Consortium Limited v Bulgaria (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 8 February 2005) [209].

Similarly, the *Maffezini* tribunal recognised that ‘the beneficiary of the [MFN] clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor’.¹⁸⁷ Specifically, ‘if the agreement provides for a particular arbitration forum, such as ICSID, ... this option cannot be changed by invoking the [MFN] clause, in order to refer the dispute to a different system of arbitration’.¹⁸⁸ These statements provide strong support for the suggestion that the MFN clause in the AUSFTA could not be used as the basis for jurisdiction of an ISDS arbitral tribunal.¹⁸⁹

The final reason why a United States investor cannot engage in ISDS against Australia pursuant to the AUSFTA is found in the text of the treaty itself. Article 11.16.1 of the AUSFTA provides for the parties (that is, Australia and the United States) to enter consultations with each other with a view towards developing ISDS procedures ‘[i]f a Party considers that there has been a change in circumstances affecting the settlement of disputes ... and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of’ the investment chapter. This provision provides direct context in interpreting the MFN provision in Article 11.4, and it confirms the parties’ intention not to allow ISDS except if subsequently agreed by the parties pursuant to the procedure and requirements set out in Article 11.16.1.

For all these reasons, the terms of the AUSFTA are likely to preclude a United States investor from successfully invoking a right to ISDS on the basis of Australia’s obligation to accord MFN treatment.

C *Minimum Standard of Treatment: Art 11.5*

Under Article 11.5.1 of the AUSFTA, ‘[e]ach Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security’. This requirement of a minimum standard of treatment provides much greater specificity than the corresponding requirements of fair and equitable treatment and full protection and security discussed above in relation to the Hong Kong – Australia BIT. To begin with, as already noted, Article 11.5.1 specifies that the treaty obligation is based on the ‘customary international law minimum standard’, avoiding potential debates about whether that is the case. Article 11.5.2 also provides further details of the parties’ intentions regarding this standard:

For greater certainty, the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that

¹⁸⁷ *Maffezini v Kingdom of Spain (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 25 January 2000) [62].

¹⁸⁸ *Maffezini v Kingdom of Spain (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 25 January 2000) [63]. See also *Gas Natural SDG SA v Argentina (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/10, 17 June 2005) [49]; *National Grid PLC v Argentina (Decision on Jurisdiction)* (Ad Hoc Arbitral Tribunal, UNCITRAL Rules, 20 June 2006) [92]; *Impregilo v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011), Concurring and dissenting opinion of Brigitte Stern, [80]-[81].

¹⁸⁹ See also Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) [647], [673], [675]-[679].

standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: ...

(b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.

In addition, footnote 11-1 to Article 11.5 indicates that the provision is to be interpreted in accordance with Annex 11-A, under which ‘[t]he Parties confirm their shared understanding that ‘customary international law’ ... results from a general and consistent practice of States that they follow from a sense of legal obligation. ... [T]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.’

These clarifications of the standard of treatment required under Article 11.5 of the AUSFTA indicate that the standard is linked the minimum standard of treatment under customary international law and that, therefore, some form of egregious conduct would most likely be required in order to establish a breach of the standard.¹⁹⁰ However, even if the international minimum standard is regarded as having evolved as a result of caselaw developed in the investment treaty context,¹⁹¹ plain packaging as envisaged in Australia is unlikely to breach that standard either, for reasons already explained in relation to the Hong Kong – Australia BIT.¹⁹²

Finally, Article 11.5.3 makes clear that a ‘determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article’. Accordingly, if plain packaging violated WTO law or a BIT, this of itself would not establish a violation of the minimum standard of treatment required under Article 11.5 of the AUSFTA.

In summary, for reasons already discussed in relation to the provisions on fair and equitable treatment and full protection and security under the Hong Kong – Australia BIT, Australia’s plain packaging initiative is unlikely to violate the minimum standard of treatment required by the AUSFTA.

D *Expropriation: Art 11.7*

The expropriation provision in the AUSFTA is contained in Article 11.7, paragraph 1 of which provides:

Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (‘expropriation’), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law.

¹⁹⁰ See above nn 106-107 and corresponding text.

¹⁹¹ See above n 108 and corresponding text.

¹⁹² See above nn 110-121 and corresponding text.

At first glance, this provision seems quite similar to the corresponding obligation in Article 6(1) of the Hong Kong – Australia BIT as discussed above. However, on further examination it becomes clear that, as with the minimum standard of treatment, the AUSFTA provides in relation to expropriation much more guidance than does the Hong Kong – Australia BIT.

To begin with, Article 11.7.1 is subject to Article 11.7.5 in relation to intellectual property rights:

This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Seventeen (Intellectual Property Rights).

The intellectual property chapter of the AUSFTA is quite similar to the WTO's *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS Agreement'),¹⁹³ and indeed under Article 17.1.3 of the AUSFTA the 'Parties affirm their rights and obligations with respect to each other under the TRIPS Agreement'. Article 17.2.4 of the AUSFTA is analogous to Article 16.1 of the TRIPS Agreement. Article 17.2.4 provides:

Each Party shall provide that the owner of a registered mark shall have the exclusive right *to prevent all third parties not having the owner's consent* from using in the course of trade identical or similar signs, including geographical indications, for goods or services that are related to those goods or services in respect of which the owner's mark is registered, where such use would result in a likelihood of confusion.¹⁹⁴

Thus, like the TRIPS Agreement, the AUSFTA identifies the rights of a trademark owner as *negative* rights, that is, rights to prevent others from using the trademark, rather than *positive* rights to use the trademark. In turn, Article 17.2.5 of the AUSFTA (which corresponds to TRIPS Article 17) states that '[e]ach Party may provide limited exceptions to the rights conferred by a mark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interest of the owner of the mark and of third parties'. As trademark rights are negative rights pursuant to Article 17.2.4, plain packaging does not constitute an exception to those rights under Article 17.2.5.¹⁹⁵ Therefore, as plain packaging complies with the intellectual property chapter of the AUSFTA, the effect of Article 11.7.5 is arguably to preclude plain packaging from constituting an expropriation contrary to Article 11.7.1. We nevertheless continue our analysis to confirm that plain packaging in any case does not constitute an expropriation under the AUSFTA.

Article 11.7 must be interpreted in accordance with Annex 11-B,¹⁹⁶ which confirms the parties' 'shared understanding that Article 11.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation',¹⁹⁷ and which distinguishes between direct and 'indirect expropriation, where an action or series of

¹⁹³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C.

¹⁹⁴ Emphasis added.

¹⁹⁵ See Tania Voon and Andrew Mitchell, 'Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging' (2011) 22(3) *Public Law Review* (forthcoming).

¹⁹⁶ AUSFTA, n 11-9 to Article 11.7.

¹⁹⁷ AUSFTA, Annex 11-B, [1].

actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure'.¹⁹⁸ A determination whether a given action constitutes indirect expropriation involves a 'case-by-case, fact-based inquiry' taking into account factors including:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.¹⁹⁹

Annex 11-B also provides:

Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.²⁰⁰

Applying these provisions to plain packaging, the fact that the Australian measure is a non-discriminatory regulatory action designed to protect public health suggests that it is not an indirect expropriation, even though it may diminish the economic value of certain tobacco investments, keeping in mind what investors in the tobacco industry could reasonably have expected of the Australian government in this regard.

IV CONCLUSION

Several impediments exist to PMA's claim, including the possibility that it has been brought prematurely, the remaining chance (against that background) for Australia and Hong Kong to modify or re-interpret the terms of the Hong Kong – Australia BIT, and the potential difficulties of enforcing an adverse arbitral award against Australia due to concerns of public policy and sovereign immunity. More importantly, most of PMA's substantive claims under the Hong Kong – Australia BIT appear weak, in particular as regards fair and equitable treatment, full protection and security, unreasonable impairment, and the umbrella clause. PMA may have stronger arguments in relation to Australia's obligation not to engage in expropriation, but a number of relevant factors still weigh in favour of Australia's plain packaging measure as a legitimate non-compensable health regulation rather than a compensable expropriation. The outcome of that claim is likely to depend on the final form of the legislation that is enacted and implemented, as well as the evidence brought to bear by both sides and the arbitrators selected to make the decision. In the meantime, the AUSFTA provides a contrasting case study demonstrating the kind of clarifications that Australia, Hong Kong and other countries may wish to consider adding to their more traditional investment protection agreements if they wish to ensure control over their sovereign regulatory frameworks for purposes such as health and the environment. The AUSFTA also offers an example of excluding ISDS, which Australia is contemplating on a broader scale and which may be desirable for a number of countries.

¹⁹⁸ AUSFTA, Annex 11-B, [4].

¹⁹⁹ AUSFTA, Annex 11-B, [4(a)].

²⁰⁰ AUSFTA, Annex 11-B, [4(b)].