
UNDER THE 2010 ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

PHILIP MORRIS ASIA LIMITED
Claimant

and

THE COMMONWEALTH OF AUSTRALIA
Respondent

**AUSTRALIA'S RESPONSE TO THE
NOTICE OF ARBITRATION**

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SECTION 1: INTRODUCTION

1. The Commonwealth of Australia (“Australian Government”) provides this Response to the Notice of Arbitration received from Philip Morris Asia Limited (“PM Asia”) on 21 November 2011, pursuant to Article 4 of the 2010 Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Arbitration Rules”).
2. PM Asia seeks to challenge Australia’s enactment and enforcement of legislation to require all tobacco products to be manufactured and sold in Australia in plain packaging (“plain packaging legislation”) **pursuant to the Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments of 1993 (“BIT”).**
3. The plain packaging legislation forms part of a comprehensive government strategy to reduce smoking rates in Australia. This strategy is designed to address one of the leading causes of preventable death and disease in Australia, **which kills around 15,000 Australians each year, causes chronic disease for many others and is a significant burden both on productivity and on Australia’s health care system. The implementation of these measures is a legitimate exercise of the Australian Government’s regulatory powers to protect the health of its citizens.**
4. **PM Asia is incorporated in Hong Kong and asserts that the plain packaging measure impacts on investments that PM Asia owns or controls in Australia, namely its shares in Philip Morris Australia Limited (“PM Australia”), the shares that are held by PM Australia in Philip Morris Limited (“PML”), and the intellectual property and goodwill of PML. PM Asia acquired its shareholding in PM Australia (and hence a purported indirect interest in the shares and assets of PML) only on 23 February 2011.**
5. This recent acquisition was made by PM Asia against the backdrop of:
 - a) the Australian Government’s long-standing regulation and control of the manufacture and sale of tobacco in Australia, and its ratification of the World Health Organization (“WHO”) Framework Convention on Tobacco Control (“FCTC”);
 - b) the Australian Government’s establishment of a National Preventative Health Taskforce (“Taskforce”) in April 2008 to consider how to reduce harm from tobacco usage, which led to the Taskforce considering the impacts of packaging on tobacco usage, engaging in a consultation exercise in which PML participated and, ultimately, recommending in June 2009 that the Australian Government mandate the sale of cigarettes in plain packaging and increase the required size of graphic health warnings;
 - c) the Australian Government’s announcement, on 29 April 2010, of its decision to implement plain packaging and to mandate updated and larger graphic health warnings for all tobacco products; and

- d) continuing objections or public complaints on the part of PM Australia, PML and also Philip Morris International Inc. (the ultimate holding company for the Philip Morris group) – in the course of the remainder of 2010 and early 2011 – to the effect that the plain packaging legislation would breach Australia’s international trade and treaty obligations.
6. Thus, PM Asia acquired its shares in PM Australia on 23 February 2011, both in full knowledge that the decision had been announced by the Australian Government to introduce plain packaging, and also in circumstances where various other members of the Philip Morris group had repeatedly made clear their objections to the plain packaging legislation, whereas such objections had not been accepted by the Australian Government.
7. Against this backdrop, PM Asia’s claims under the BIT inevitably fail, both as to jurisdiction and the merits:
- a) Article 10 of the BIT does not confer jurisdiction on an arbitral tribunal to determine pre-existing disputes that have been re-packaged as BIT claims many months after the relevant governmental measure has been announced.
 - b) **The plain packaging legislation cannot be regarded as a breach of any of the substantive protections under the BIT. PM Asia made a decision to acquire shares in PM Australia in full knowledge that the decision had been announced by the Australian Government to introduce plain packaging. An investor cannot make out a claim for breach of (say) the fair and equitable treatment standard or of expropriation in circumstances where (i) a host State has announced that it is going to take certain regulatory measures in protection of public health, (ii) the prospective investor – fully advised of the relevant facts – then acquires some form of an interest in the object of the regulatory measures, and (iii) the host State then acts in the way it has said it is going to act.**
8. The Australian Government returns to the issues of application of the BIT in Sections 3 and 4 below. Before doing so, it is useful to outline in further detail the factual background relevant to the current claim.

SECTION 2: FACTUAL BACKGROUND

A. AUSTRALIA’S LONG-STANDING ENGAGEMENT IN THE REGULATION OF TOBACCO

9. **The WHO has stated that tobacco “is the only legal consumer product that kills when used exactly as intended by the manufacturer.”**¹ The health risks of tobacco smoking are well documented. The risks from tobacco increase with the level of use, but even light smoking or passive smoking is dangerous. Tobacco products are, of course, highly addictive.

¹ World Health Organisation, “Call for Pictorial Warnings on Tobacco Packs” (29 May 2009), http://www.who.int/mediacentre/news/releases/2009/no_tobacco_day_20090529/en/index.html (accessed 2 December 2011).

10. From 1950 (when initial reports identifying smoking as a cause of lung cancer were published) to 2008, smoking is estimated to have killed 900,000 Australians.² According to the latest available estimates, smoking is responsible for about 15,000 deaths annually in Australia,³ causing significant harm to families and individuals, to communities and to the national economy.
11. Since at least the early 1970s, the Australian Government, in conjunction with the Governments of the States and Territories of Australia, have progressively implemented a series of measures designed to reduce smoking.⁴ Foremost among these measures are progressively tightened restrictions on tobacco advertising and promotion: the advertising of cigarettes on television and radio has been banned in Australia since 1976, and the advertising of tobacco products in all newspapers and magazines has been prohibited from December 1990.
12. **In 1992, Australia enacted the *Tobacco Advertising Prohibition Act 1992* (Cth) (“TAP Act”), which imposes wide-ranging restrictions on the broadcasting and publishing of tobacco advertisements across different media and other means and advertising on tickets, billboards and public transport. Under successive Australian, State and Territory Governments, Australia has progressively tightened tobacco advertising restrictions under the TAP Act, including the phasing out of tobacco company sponsorship of sporting and cultural events.**
13. Alongside these increasingly stringent controls on tobacco advertising, the first mandatory health warning requirements for tobacco products were implemented from 1973. The Australian Government, in conjunction with the Governments of the States and Territories, has successively strengthened health warning requirements since this time. In particular, the Australian Government has increased the required coverage of graphic health warnings on tobacco packaging and has, since 2006, required companies to include pictorial images displaying, in graphic terms, the real and distressing health effects of smoking.
14. Other measures introduced since the 1970s to help reduce smoking rates and better inform consumers about the health effects of smoking include: minimum age restrictions on the purchase of tobacco products, price increases through excise measures, minimum pack sizes to make cigarettes less affordable (particularly to young people), public and school-based education programs, bans on smoking in workplaces and public spaces, provision of “Quitlines” and other smoking cessation support services, provision of public subsidies for nicotine replacement therapies and other smoking cessation medications, support for indigenous communities to reduce smoking rates, retailer licensing in some jurisdictions, and prohibitions on certain flavoured cigarettes.
15. **Australia’s anti-smoking measures have helped reduce smoking rates in Australia from some 36 per cent of the adult population in 1977 to around**

² National Preventative Health Taskforce, *Australia: The Healthiest Country By 2020: A Discussion Paper Prepared by the National Preventative Health Taskforce* (2008), p 19.

³ Australian Government, *Taking Preventative Action - A Response to Australia: The Healthiest Country by 2020* (2010), p 22.

⁴ Further information on these measures can be found in MM Scollo and MH Winstanley (eds), *Tobacco in Australia: Facts and Issues* (Melbourne: Cancer Council Victoria, 3rd ed, 2008).

15 per cent in 2010.⁵ This has resulted in a fall in the number of daily smokers in Australia by more than half a million in the last decade alone.⁶ Nonetheless, some three million Australians (aged 14 or over) continue to smoke daily or weekly.⁷

16. Australia's history of progressively more comprehensive and stringent tobacco regulation is consistent with trends in countries around the world, and also international steps to combat the global health epidemic posed by tobacco smoking through the FCTC. The FCTC was adopted by the 56th World Health Assembly in May 2003, was opened for signature on 16 June 2003, and entered into force on 27 February 2005. There are 174 States Parties to this treaty, including Australia and China, making it one of the most widely ratified treaties.
17. The FCTC imposes a comprehensive set of obligations for Parties to implement and manage tobacco control programmes. Article 11 of the FCTC requires Parties to adopt and implement effective measures in respect of the packaging and labelling of tobacco products, including health warnings and other appropriate messages. Further, Article 13(2) obliges each Party "in accordance with its constitution or constitutional principles, [to] undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship." The Guidelines for the implementation of Articles 11 and 13, adopted by the Conference of the Parties to the FCTC in November 2008, recommend that Parties should consider adopting a suite of measures, including plain packaging, to give effect to the FCTC.⁸

B. AUSTRALIA'S RECENT DEVELOPMENT OF FURTHER TOBACCO CONTROLS

18. In 2008, the Australian Government and the Governments of the States and Territories signed the Council of Australian Governments National Healthcare Agreement which set the goal of reducing the national (adult) smoking rate to 10 per cent of the population by 2018.
19. Also in 2008, the Australian Government established the Taskforce, an independent advisory group comprised primarily of leading Australian and international public health experts to develop strategies to tackle the health challenges caused by tobacco, alcohol and obesity. The Taskforce conducted extensive research and reviews of available evidence and undertook widespread consultation with stakeholders (including PML, which made a submission to the Taskforce on 2 January 2009, in which it contended that mandating plain

⁵ MM Scollo and MH Winstanley (eds), *Tobacco in Australia: Facts and Issues* (Melbourne: Cancer Council Victoria, 3rd ed, 2008) and Australian Institute of Health and Welfare 2011 National Drug Strategy Household Survey report pp 22. Drug statistics series no.25. Cat. No. PHE 145. Canberra: Australian Institute of Health and Welfare.

⁶ Australian Institute of Health and Welfare 2011 National Drug Strategy Household Survey report pp 22-23. Drug statistics series no.25. Cat. No. PHE 145. Canberra: Australian Institute of Health and Welfare.

⁷ Australian Institute of Health and Welfare 2011 National Drug Strategy Household Survey report pp 22-23. Drug statistics series no.25. Cat. No. PHE 145. Canberra: Australian Institute of Health and Welfare.

⁸ *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (May 2011), p 59 and 95-96, available at: http://www.who.int/fctc/protocol/guidelines/adopted/guidel_2011/en/index.html (last accessed 2 December 2011).

packaging would “violate international treaty obligations”, including obligations relating to the expropriation of trademarks).⁹

20. In its June 2009 report, *Australia: The Healthiest Country by 2020*, the Taskforce provided a comprehensive set of recommendations to target obesity, tobacco and excessive alcohol use as the key preventable health risks. In particular, the introduction of plain packaging was recommended.¹⁰
21. On 29 April 2010, having considered the recommendations of the Taskforce, the Australian Government announced its decision to adopt a new series of tobacco control measures as part of a comprehensive strategy to promote public health and awareness of the risks of smoking. This decision was also recorded in *Taking Preventative Action – A Response to Australia: The Healthiest Country by 2020*, the May 2010 Australian Government response to the Taskforce.¹¹ These reforms, which include the measures that are at the heart of the current claims by PM Asia, include:
 - a) **an increase in tobacco excise by 25 per cent, from 30 April 2010;**
 - b) legislation to bring restrictions on tobacco advertising on the internet into line with restrictions in other media and at retail points of sale;
 - c) increased anti-smoking public health campaigns;
 - d) through working with State and Territory Governments, the prevention of tobacco advertising and promotion at the point of retail sale, as well as bans on smoking in further public places and in cars with children;
 - e) continuing enforcement efforts to combat illicit tobacco trade; and
 - f) **the introduction of plain packaging and updated and expanded graphic health warnings.**
22. The introduction of plain packaging has now been implemented through legislation enacted by the Australian Parliament, namely the *Tobacco Plain Packaging Act 2011* (Cth) (“TPP Act”), which received Royal Assent on 1 December 2011.
23. The TPP Act prohibits the display on tobacco products and their packaging of all tobacco company logos, symbols, and other images that may have the effect of advertising or promoting tobacco products. The Act requires that all tobacco packaging be in a particular shade of drab dark brown, chosen through consumer research as the optimal colour for achieving the objectives of the plain packaging legislation. It also imposes restrictions on the dimensions and make-up of tobacco packaging, preventing unique or “novelty” cigarette packets, including so-called “soft packs”. However, brand names and variant names can continue to appear on tobacco packaging in specified locations, and in a standard colour,

⁹ PML, *Philip Morris Limited’s Submission to the National Preventative Health Taskforce Consultation* (2 January 2009), pp 26-28.

¹⁰ National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020* (30 June 2009), p 18; and *Technical Report 2 – Tobacco Control in Australia: Making Smoking History*, pp 20-21.

¹¹ Australian Government, *Taking Preventative Action – A Response to Australia: The Healthiest Country by 2020* (May 2010), pp 65, 68-71.

position, font style and size, enabling tobacco companies to continue to distinguish their products.

24. **The manufacture and packaging in Australia of non-compliant tobacco products will be prohibited from 1 October 2012, and the retail sale of such products will be prohibited from 1 December 2012.**
25. **The WHO and the Secretariat of the FCTC have each made submissions to the Australian Government strongly supporting the legislation. In its submission, the WHO stated its view that:**¹²

[I]mplementing the proposed legislation aiming to prevent tobacco advertising and/or promotion on tobacco product packaging will achieve its stated goals of: reducing the attractiveness and appeal of tobacco products to consumers, particularly young people; increasing the noticeability and effectiveness of mandated health warnings; and reducing the ability of the tobacco product packaging to mislead consumers about the harms of smoking.

26. **Together with the plain packaging legislation, the Australian Government is also amending the graphic health warnings requirements for tobacco products. In particular, graphic health warnings will be expanded to cover 75 per cent of the front of cigarette packets (graphic health warnings will remain at 90 per cent of the back of cigarette packs), with commensurate measures for other tobacco products. The new graphic health warnings are intended to be made as an Information Standard under the Australian Consumer Law.**
27. **Both before and since the Australian Government announced its decision to introduce plain packaging on 29 April 2010, the Philip Morris group has consistently expressed its opposition to plain packaging. In addition to the written submission made by PML to the Taskforce on 2 January 2009 (noted in paragraph 19 above), such opposition is demonstrated by the following examples, being only two of many:**

a) **On 17 November 2010, the Chairman and Chief Executive Officer of Philip Morris International Inc. publicly stated (at a Morgan Stanley Global Consumer and Retail conference in New York) that the plain packaging measure announced by Australia would constitute an expropriation of the company's trademarks, and it foreshadowed litigation against the decision.**

b) **On 26 November 2010, the Australian Government held individual consultations with each of the three major tobacco companies in Australia, including PML, and the PML representative stated that Philip Morris would defend its right to use its intellectual property, which was protected "under a range of international trade and treaty obligations".**

28. **At this time, being prior to 23 February 2011, PM Asia had no interest in PM Australia or PML. It was a Swiss company, Philip Morris Brands Sarl,**

¹²

Submission of the WHO *Re: Australia Plain Packaging Legislation*

[http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/8EA505E09FEA1631CA2579540005F686/\\$File/World%20Health%20Organization.pdf](http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/8EA505E09FEA1631CA2579540005F686/$File/World%20Health%20Organization.pdf) (last accessed 21 December 2011).

which owned the shares in PM Australia, and PM Australia in turn owned the shares in PML.

SECTION 3: JURISDICTIONAL ISSUES

29. The Australian Government objects to the jurisdiction of the arbitral tribunal (by way of a preliminary objection). This objection follows inevitably from PM Asia's acquisition of shares in PM Australia subsequent to the announcement of the decision to introduce plain packaging legislation and PM Asia's artificial invocation of a dispute by reference to the BIT.
30. PM Asia had no interest in PM Australia prior to 23 February 2011. It follows that PM Asia did not have an "investment" in PM Australia (and, it would inevitably follow, PML or assets held by PML) at the time that the introduction of the plain packaging measures was announced on 29 April 2010, and nor did it have an "investment" in the ensuing months when a dispute developed over plain packaging. PM Asia only acquired its interest in PM Australia on 23 February 2011, some 10 months after the governmental announcement in relation to plain packaging and after a dispute had already arisen in relation to plain packaging.
31. In such circumstances, there could be no "investment" for the purposes of Article 10 of the BIT and any reliance on Article 10 of the BIT would constitute an abuse of right. It follows that the arbitral tribunal lacks jurisdiction or that the claims that PM Asia now seeks to bring under the BIT are inadmissible.
32. As a separate matter, the Australian Government notes that, under Article 1(e) of the BIT, "investments" are only protected inter alia to the extent that they are "admitted" by the relevant Contracting Party "subject to its law and investment policies applicable from time to time". It will be for PM Asia to seek to establish that each of the investments on which it relies (i) is "owned or controlled" by PM Asia within the meaning of Article 1(e) of the BIT, and (ii) has been admitted in accordance with Article 1(e) of the BIT.
33. A further separate matter is that PM Asia's claim is heavily dependent on, and seeks to invoke breaches of, a series of treaties over which an arbitral tribunal established under Article 10 of the BIT could have no jurisdiction. **Thus, PM Asia asserts that the plain packaging legislation is in breach of Australia's obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), the WTO Agreement on Technical Barriers to Trade ("TBT Agreement"), and the Paris Convention for the Protection of Industrial Property ("Paris Convention"). It is said that breach of such obligations in turn amounts to a breach of Article 2(2) of the BIT.**
34. Such claims are plainly outside the scope of protection of the BIT, whether as a matter of the fair and equitable treatment standard established under Article 2(2) or the "umbrella clause" in Article 2(2), which provides that each Contracting

Party to the BIT has an obligation to “observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party”.

35. Even if it were correct (which it is not) that Article 2(2) could somehow be understood as extending an arbitral tribunal’s jurisdiction to obligations owed by Australia to other States under various multilateral treaties, the treaties that PM Asia seeks to invoke all contain their own dispute settlement mechanisms. It is not the function of a dispute settlement provision such as that contained at Article 10 of the BIT to establish a roving jurisdiction that would enable a BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties. This is all the more so in circumstances where such bodies enjoy exclusive jurisdiction.
36. The Australian Government will request that jurisdictional objections be heard in a preliminary phase of the proceedings, subsequent to service of a Statement of Claim by PM Asia and in advance of any merits phase. The jurisdictional objections outlined above are not intended to be exhaustive, and the Australian Government reserves its rights to develop and formulate objections as it sees fit once it has seen PM Asia’s Statement of Claim.

SECTION 4: RESPONSE TO PM ASIA’S CLAIMS

A. PRELIMINARY

37. Before responding in brief terms to PM Asia’s individual claims of breach of the BIT, Australia makes a number of preliminary observations.
38. First, the Australian Government is implementing plain packaging to protect the public health of Australia’s population from an addictive and dangerous substance that causes widespread death and disease in Australia (and around the world). The protection of public health is an objective of fundamental importance to all Governments, and the WHO and the FCTC Secretariat have indicated their strong support for plain packaging as an effective public health measure.
39. Secondly, the Australian Government’s plain packaging initiatives are based on a broad range of studies and reports, and supported by leading Australian and international public health experts. The evidence demonstrates that use of logos, symbols, designs, colours and other forms of advertising on tobacco packaging increases attractiveness to consumers, can mislead consumers into thinking some tobacco products are safer than others, and also decreases the prominence and effectiveness of health warnings. Tobacco advertising can be particularly effective on young people, the age group most likely to become addicted to smoking.
40. Thirdly, in so far as PM Asia contends that plain packaging measures will lead to a decline in cigarette prices (and hence increased consumption) and to an increase of market participation in illicit tobacco products (cf Notice of Arbitration, para. 6.3), those contentions are not accepted. Further, even if correct, the Australian Government has power to implement a range of measures, including further increases to the rate of excise, to ensure that cigarette prices do not fall to a level which would lead to an increase in consumption. In addition, the

Australian Government will continue to vigorously enforce its laws against illicit trade in tobacco.

41. Fourthly, plain packaging is not an alternative to other tobacco control measures but is an integral part of the comprehensive suite of measures adopted by Australia to respond to the public health problems caused by tobacco. These measures, as set out at paragraph 21 above, are based on the comprehensive tobacco control strategy recommended by the Taskforce in 2009. The implementation of this wide-ranging set of measures will be critical to achieving significant reductions in smoking rates in Australia.
42. Fifthly, PM Asia claims at various junctures in its Notice of Arbitration that plain packaging eliminates branding. PML will however retain the ability to place brand names, including any variant, on tobacco packaging. Plain packaging does not prevent product differentiation or identification of a product's place of origin on its packaging (cf. Notice of Arbitration, para. 1.4).
43. What the plain packaging measure in fact restricts is the ability of tobacco companies to advertise their products by packaging them with attractive branding and other designs. This is the real substance of PM Asia's concern. By preventing such advertising on retail tobacco packaging, as one of the principal remaining means for PML and other tobacco companies to advertise tobacco, the Australian Government intends that plain packaging will contribute to efforts to reduce smoking rates in Australia.

B. RESPONSE TO PM ASIA'S INDIVIDUAL CLAIMS

Expropriation (cf. Notice of Arbitration, paras. 7.3-7.5)

44. The Australian Government rejects PM Asia's claim that it has breached the obligation under Article 6 not to deprive investors of their investments or subject investors to measures having effect equivalent to such deprivation.
45. **PM Asia has not in fact been deprived of the purported investments it made on 23 February 2011**; nor has PM Asia been subjected to measures having equivalent effect.
46. **Further, plain packaging measures are non-discriminatory regulatory actions of general application designed and adopted by the Australian Government to achieve the most fundamental public welfare objective** – the protection of public health. Such measures do not amount to expropriation, are not equivalent to expropriation, and do not give rise to a duty of compensation.

Fair and equitable treatment (cf. Notice of Arbitration, paras. 7.6-7.8)

47. The Australian Government rejects PM Asia's claim that it has breached its obligation under Article 2(2) of the BIT to accord fair and equitable treatment to investments of PM Asia.
48. **When PM Asia acquired its interest in PM Australia on 23 February 2011, it did so in full knowledge and with the expectation that the Australian Government would implement the plain packaging measure announced on 29 April 2010.** The Australian Government has now done what it had said it was going to do. PM Asia's marked emphasis on its "legitimate expectations" (cf. Notice of Arbitration, paras. 6.6-6.12 and 7.3-7.5) is thus wholly misconceived.

PM Asia could have no expectation other than that the Australian Government would act in accordance with its announcement. It is difficult to conceive of governmental action further removed from the unfair or inequitable treatment of an investor.

49. It is noted also that PM Asia contends for a notably low threshold so far as concerns the fair and equitable treatment standard, and that nowhere does PM Asia assert that the plain packaging measure is arbitrary. In fact, the plain packaging measure is based on a broad range of studies and reports on which the Australian Government has relied in good faith, and is supported by leading Australian and international public health experts. It was adopted following a transparent process which included consultations with PML. Its adoption, as part of a comprehensive suite of tobacco control measures, is a reasonable regulatory response which has been adopted by the Australian Government in good faith to address a severe, pervasive and long-standing threat to public health.
50. PM Asia's allegations of breach of various multilateral treaties are not a matter for an arbitral tribunal constituted under Article 10 of the BIT. Were those allegations to be made in an appropriate forum, they would certainly be contested by Australia.

Impairment by unreasonable and discriminatory measures (cf. Notice of Arbitration, paras. 7.9-7.11)

51. The Australian Government likewise rejects PM Asia's claim that it has breached the obligation under Article 2(2) not to impair, by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of PM Asia's investments.
52. PM Asia both mis-states and mis-characterises the provision on which it relies.
 - a) PM Asia fails to refer to the fact that the non-impairment obligation in the BIT is expressly qualified as being "without prejudice to [the Government's] laws". As to this key qualification, the plain packaging legislation was passed in accordance with Australian law and received Royal Assent on 1 December 2011, and is therefore a valid law of the Commonwealth of Australia.
 - b) Even were there no such qualification, the non-impairment obligation is not correctly characterised as restricting "the host State's discretion to regulate to those measures which are demonstrably reasonable" (cf. Notice of Arbitration, para. 7.9).

53. Further, even assuming PM Asia could show relevant impairment, the plain packaging legislation is neither unreasonable nor discriminatory. It is a measure of general application, and it is based on a considerable body of sound evidence and has been adopted in good faith following extensive consultations to pursue a fundamental public welfare objective – the protection of public health.

Full protection and security (cf. Notice of Arbitration, paras. 7.12-7.14)

54. The Australian Government rejects PM Asia's claim that it has breached the obligation to ensure that investments of PM Asia enjoy full protection and security under Article 2(2) of the BIT.

55. PM Asia similarly mis-characterises the scope of the full protection and security provision under the BIT. The provision is not a due diligence obligation “to prevent damage”, and does not extend beyond an obligation to take reasonable steps to provide physical protection for investments covered under the BIT. The Australian Government has not failed to comply with this obligation.

Umbrella clause (cf. Notice of Arbitration, paras. 7.15-7.17)

56. The Australian Government rejects PM Asia’s claim that it has breached its obligations under other international treaties, the two WTO Agreements (TRIPS and TBT) and the Paris Convention, and that this amounts to a breach of the “umbrella clause” in Article 2(2) of the BIT.
57. The “umbrella clause” in Article 2(2) of the BIT requires that each Contracting Party “observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party”. The meaning and scope of such provisions is a matter of great controversy. However, it is clear in the instant case that, whether as a matter of jurisdiction (as the Australian Government has explained above) or on the substance, the “umbrella clause” in Article 2(2) cannot be understood as encompassing general obligations in multilateral treaties.
58. Rather, consistent with the wording of Article 2(2), the established origins of the “umbrella clause”, and also relevant jurisprudence, the “umbrella clause” in Article 2(2) only covers commitments that a host State has entered into with respect to specific investments. In this regard, the obligations under the multilateral treaties invoked by PM Asia are not “obligations” which have been “entered into with regard to investments of investors” of Hong Kong, but are rather obligations that operate on the inter-State level, with their own particular inter-State dispute resolution procedures.

General

59. This Response (pursuant to Article 4(1)(b) of the UNCITRAL Arbitration Rules) is not of course intended to be exhaustive and the Australian Government reserves its rights to develop and formulate its defence on the merits (if they are reached) as it sees fit (including with respect to the alleged losses of PM Asia, which are said somehow to be “of the order of billions of Australian dollars”).

SECTION 5: RESPONSE TO RELIEF SOUGHT

60. The Australian Government notes the relief sought by PM Asia at Section 8 of its Notice of Arbitration. As follows from the Response as set out above, the arbitral tribunal should decline to grant the relief sought. The Australian Government respectfully requests the arbitral tribunal:
- a) to declare that it has no jurisdiction over PM Asia’s claims, or that they are inadmissible;
 - b) alternatively, to dismiss PM Asia’s claims in their entirety; and

- c) to order that PM Asia bear the costs of the arbitration, including Australia's costs of legal representation and assistance, pursuant to Article 42 of the UNCITRAL Arbitration Rules.

SECTION 6: PROCEDURAL MATTERS

61. The Australian Government is represented and assisted as follows:

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62. Service of correspondence in this matter may be effected through the Australian Government Solicitor.
63. Australia confirms that the parties have agreed on the procedural matters set out in paragraph 9.1 of PM Asia's Notice of Arbitration.
64. Pursuant to Article 9 of the UNCITRAL Arbitration Rules, Australia notifies PM Asia that it appoints Professor Don McRae of the University of Ottawa as an arbitrator in this case.

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Simon Daley
A solicitor employed by
Australian Government Solicitor
Solicitor for the Respondent, Commonwealth of Australia

Date: 21 December 2011