

# **THE CHILLING EFFECT: INVESTOR-STATE DISPUTE SETTLEMENT, GRAPHIC HEALTH WARNINGS, THE PLAIN PACKAGING OF TOBACCO PRODUCTS, AND THE TRANS-PACIFIC PARTNERSHIP**

MATTHEW RIMMER\*

*Investor-State Dispute Settlement (ISDS) poses significant challenges in respect of tobacco control, public health, human rights, and sustainable development. Two landmark ISDS rulings provide procedural and substantive guidance on the interaction between ISDS and tobacco control. The ISDS action by Philip Morris against Uruguay in respect of graphic health warnings raised important procedural and substantive issues. The ISDS matter between Philip Morris and Australia over the plain packaging of tobacco products highlighted matters in respect of abuse of process. In the Trans-Pacific Partnership (TPP), there was a special exclusion for tobacco control measures in respect of ISDS. There was also a larger discussion about the role of general public health exceptions. In the Comprehensive Economic and Trade Agreement (CETA), there was a debate about the application of ISDS to intellectual property rights. In the European Union, there has been discussion of the creation of an international investment court. In the renegotiation of the North American Free Trade Agreement (NAFTA), there has even been calls to abolish ISDS clauses altogether from both Republicans and Democrats. This article concludes there is a need to protect tobacco control measures implementing the WHO Framework Convention on Tobacco Control 2013 from further investor and trade challenges.*

## **I INTRODUCTION**

At the beginning of 2017, the United Nations (UN) reported that effective tobacco policies could save 8 million lives and \$1.4 USD trillion annually.<sup>1</sup>

In 2016, the United States National Cancer Institute (UNCI) and the World Health Organization (WHO) stressed that effective tobacco control policies could save 8 million lives and \$1.4 trillion annually.<sup>2</sup> In its study of the economics of tobacco and tobacco control, the leading institutions emphasized the importance of new advances in tobacco control – such as graphic health warnings and plain packaging of tobacco products.<sup>3</sup> The UNCI and the WHO maintain ‘[i]nformation failures provide an economic rationale for governments to intervene to increase public knowledge about the health harms of tobacco products’.<sup>4</sup> The report provides a further impetus for the implementation of the *WHO Framework Convention on Tobacco Control (FCTC)*.<sup>5</sup>

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\*Dr Matthew Rimmer (BA/LLB ANU, PhD UNSW) is a Professor in Intellectual Property and Innovation Law at the Faculty of Law in the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program (QUT IL GG). The author would like to thank the referees for their helpful comments, and the editor Hannah Cook-Tonkin for her thoughtful contribution.

<sup>1</sup> United Nations News Centre, *Effective Tobacco Policies Could Save Eight Million Lives and \$1 Trillion Annually: UN Reports* (10 January 2017) <<http://www.un.org/apps/news/story.asp?NewsID=55934#.WHUCP1MrKUK>>.

<sup>2</sup> United States National Cancer Institute and World Health Organization, ‘The Economics of Tobacco and Tobacco Control’ (National Cancer Institute Tobacco Control Monograph No 21, 2016) xix and 99 <<http://www.who.int/tobacco/publications/economics/nci-monograph-series-21/en/>>.

<sup>3</sup> Ibid, xix.

<sup>4</sup> Ibid 301.

<sup>5</sup> *World Health Organization Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) (FCTC). For a history of the agreement, see Gro Harlem Brundtland, *Madam Prime Minister: A Life in Power and Politics* (Farrar, Straus and Giroux, 2002); Heather Wipfli, *The Global War on Tobacco: Mapping the World’s First Public Health Treaty* (John Hopkins University Press, 2015).

The tobacco industry has used a range of legal measures to challenge tobacco control measures, such as graphic health warnings and plain packaging of tobacco products. The Reuters press agency has published internal documents of Philip Morris – which detail their legal strategies.<sup>6</sup> The tobacco industry mounted an unsuccessful constitutional challenge to Australia’s plain packaging of tobacco products in the High Court of Australia.<sup>7</sup> Likewise, there have been failed legal challenges to the introduction of plain packaging of tobacco products in the United Kingdom and France.<sup>8</sup> A number of nations also brought a challenge against Australia’s plain packaging of tobacco products in the World Trade Organization (WTO).<sup>9</sup> Australia has always had a strong case in respect of the legitimacy of plain packaging of tobacco products in the WTO.<sup>10</sup> Experts were of the view that tobacco control measures were compatible with the WTO.<sup>11</sup> The media reports have been that this challenge was unsuccessful before the first panel – but there still needs to be official confirmation of the decision.<sup>12</sup>

There has been controversy over Big Tobacco using Investor-State Dispute Resolution (ISDS) measures to challenge public health initiatives, such as graphic warnings and the plain packaging of tobacco products. This particular issue is the focus of this paper. The Director-General of WHO, Dr Margaret Chan, has warned of tobacco companies seeking to use investment clauses and trade challenges to undermine the *FCTC*, ‘[w]hen one country’s resolve falters under the pressure of costly, drawn-out litigation and threats of billion-dollar settlements, others with similar intentions are likely to topple as well’.<sup>13</sup> Chan worried about countries being dissuaded from adopting tobacco control measures by Big Tobacco’s ‘... aggressive scare tactics. It is hard for any country to bear the financial burden of this kind of litigation, but most especially so for small countries like Uruguay’.<sup>14</sup> In her view, ‘[i]t is horrific to think that an industry known for its dirty tricks and dirty laundry could be allowed to trump what is clearly in the public’s best interest’.<sup>15</sup> WHO has been worried about the chilling effect of ISDS on public health initiatives. Chan observed ‘[o]ne particularly disturbing trend is the use of foreign investment agreements to handcuff governments and restrict their policy space’.<sup>16</sup> She concluded ‘[i]n my view, something is fundamentally wrong in this world when a corporation can challenge government policies introduced to protect the public from a product that kills’.<sup>17</sup>

<sup>6</sup> Aditya Kalra et al. *Inside Philip Morris, Campaign to Subvert the Global Anti-Smoking Treaty* (13 July 2017) Reuters <<https://www.reuters.com/investigates/special-report/pmi-who-fctc/>>.

<sup>7</sup> *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012).

<sup>8</sup> *British American Tobacco Ltd v The Queen* [2016] EWHC 1169 (Admin) (19 May 2016); *British American Tobacco UK Ltd v The Secretary of State for Health* [2016] EWCA Civ 1182 (30 November 2016); *Société JT International SA, Société d'exploitation industrielle des tabacset des allumettes, Société Philip Morris France SA, Conseil d'Etat* [French Administrative Court], 23 December 2016.

<sup>9</sup> World Trade Organization, *Dispute Settlement DS434: Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm)>; World Trade Organization, *Dispute Settlement DS435: Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds435\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm)>; World Trade Organization, *Dispute Settlement DS441: Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds441\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm)>; World Trade Organization, *Dispute Settlement DS458: Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds458\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm)>; World Trade Organization, *Dispute Settlement DS467: Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds467\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm)>.

<sup>10</sup> *Australia - Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/441/458/467 (23 March 2016) (Integrated Executive Summary of Australia’s Submissions), 9 <<http://dfat.gov.au/international-relations/international-organisations/wto/wto-dispute-settlement/Documents/integrated-executive-summary-aus-submissions-tobacco-plain-packaging-ds435-441-458-467.pdf>>.

<sup>11</sup> John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, 2006); Tania Voon, and Andrew Mitchell, ‘Implications of WTO Law for Plain Packaging of Tobacco Products’ in Tania Voon, Andrew Mitchell and Jonathan Liberman with Glyn Ayres (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) 109; Mark Davison, ‘Plain Packaging of Tobacco Products and the WTO Challenge’ in Alberto Alemanno and Enrico Bonadio (eds), *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar, 2016) 163.

<sup>12</sup> ABC News, *Australia Wins Landmark WTO Tobacco Plain Packaging Case* (5 May 2017) <<http://www.abc.net.au/news/2017-05-05/australia-wins-landmark-wto-tobacco-packaging-case/8498750>>.

<sup>13</sup> Margaret Chan, ‘The Changed Face of the Tobacco Industry’ (Speech delivered at the 15<sup>th</sup> World Conference of Tobacco and Health, Singapore, 20 March 2012) <[http://www.who.int/dg/speeches/2012/tobacco\\_20120320/en/](http://www.who.int/dg/speeches/2012/tobacco_20120320/en/)>.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Margaret Chan, ‘Health has an Obligatory Place on Any Post-2015 Agenda’ (Speech delivered to the 67<sup>th</sup> World Health Assembly, Geneva, 19 May 2014) <<http://www.who.int/dg/speeches/2014/wha-19052014/en/>>.

<sup>17</sup> *Ibid.*

In this article, I argue that the ISDS system undermines tobacco control, public health, human rights, and sustainable development. Alfred de Zayas has been a critic of the system of ISDS.<sup>18</sup> His 2015 report to the UN Human Rights Council expressed concerns that ISDS arbitration was incompatible with fundamental principles of transparency and accountability.<sup>19</sup> Moreover, the UN Independent Expert raised concerns about adverse human rights, health and environmental impacts of so-called free-trade agreements such as the *Trans-Pacific Partnership*. In 2016, Alfred de Zayas called on States and Parliaments to ensure that all future trade agreements respect the primacy of human rights.<sup>20</sup> He feared ‘[i]nvestors and transnational enterprises have invented new rules to suit their needs, rules that impinge on the regulatory space of States and disenfranchise the public’.<sup>21</sup> In addition to a human rights framework, tobacco control can also be seen as part of the Sustainable Development Goals. The Sustainable Development Goals include an item on public health, which calls for governments to ‘ensure healthy lives and promote well-being for all at all ages’.<sup>22</sup> Article 3a of the Sustainable Development Goal on Health reads, ‘Strengthen implementation of the Framework Convention on Tobacco Control in all countries as appropriate.’<sup>23</sup> WHO has highlighted the tobacco epidemic undermines a number of the global goals of sustainable development.<sup>24</sup> In this context, tobacco is seen as a barrier to sustainable development. There has been concern about the impact of ISDS upon the sustainable development goals.<sup>25</sup>

In the context of this policy debate, there has been much discussion about the treatment of public health in light of ISDS. The issue of tobacco control has been a particularly sensitive aspect of this debate.<sup>26</sup> This article considers the recent disputes over tobacco control, ISDS and trade agreements. As a matter of methodology, this piece engages in discourse analysis of legal disputes, public policy papers, and media discussion, and considers the various statements and representations by the stakeholders in the policy discussions. First, it considers the ISDS matter between Philip Morris and Uruguay in respect to graphic health warnings. Second, it explores the ISDS matter between Philip Morris and Australia over the plain packaging of tobacco products. Third, it considers possible approaches for dealing with ISDS, including exclusions, exceptions, and other possible procedural and substantive reforms. This article draws the conclusion that there is a need to protect the *FCTC* from future investor and trade challenges.

## II GRAPHIC HEALTH WARNINGS: *PHILIP MORRIS V URUGUAY*

Graphic health warnings have proven to be an effective nudge in terms of behavioural economics to encourage consumers to avoid tobacco use.<sup>27</sup>

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<sup>18</sup> Alfred de Zayas, *UN Rights Expert Urges States Not to Sign the ‘Flawed’ CETA Treaty and Put it to Referendum* (28 October 2016) United Nations Human Rights Office of the High Commissioner

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20787&LangID=E>>.

<sup>19</sup> Alfred de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order on the Adverse Impacts of Free Trade and Investment Agreements on a Democratic and Equitable Order*, 13th sess, Human Rights Council, Agenda Item 3, UN Doc A/HRC/30/44 (14 May 2015).

<sup>20</sup> Alfred de Zayas, *Trade Agreements Should Mainstream Human Rights – UN Expert Urges*, United Nations News Centre (13 September 2016) <<http://www.un.org/apps/news/story.asp?NewsID=54903#.V9lUafl97IU>>.

<sup>21</sup> *Ibid.*

<sup>22</sup> United Nations, *Sustainable Development Goals* (25 September 2015) <<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>>.

<sup>23</sup> *Ibid.*

<sup>24</sup> World Health Organization, *World No Tobacco Day: Tobacco – A Threat to Development* (31 May 2017)

<<http://www.who.int/campaigns/no-tobacco-day/2017/event/en/>>; Margaret Chan, *Tobacco is a Deadly Threat to Global Development* (30 May 2017) World Health Organization <<http://www.who.int/mediacentre/commentaries/2017/tobacco-threat-development/en/>>; United Nations Development Programme, *Integrating the WHO Framework Convention on Tobacco Control into UN and National Development Planning Instruments* (February 2014)

<[http://www.who.int/ctc/publications/Development\\_Planning\\_and\\_Tobacco\\_Control\\_20140312.pdf](http://www.who.int/ctc/publications/Development_Planning_and_Tobacco_Control_20140312.pdf)>.

<sup>25</sup> Stephan Schill, *Reforming Investor-State Dispute Settlement: Conceptual Framework and Options for the Way Forward* (July 2015) International Centre for Trade and Sustainable Development and World Economic Forum <<http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>>.

<sup>26</sup> Tsai-yu Lin, ‘Disputes Regarding Tobacco Control Measures under Investor-State Arbitration’ in Andrew Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 126.

<sup>27</sup> Alberto Alemanno, ‘Unpacking Plain Packaging and Other Standardization Requirements in the Light of Behavioural Sciences’ in Alemanno, and Bonadio (eds), above n 11, 15; and Cass Sunstein, *The Ethics of Influence: Government in the Age of Behavioural Science* (Cambridge University Press, 2016).

Uruguay has been at the forefront of tobacco control in South America. Under the leadership of President Tabaré Vázquez (2005–2010, and 2015 to present) Uruguay has pursued an ambitious public health programme – particularly in respect of tackling smoking and tobacco use. Gustavo Sónora recalls that Vázquez ‘seized the opportunity to make a comprehensive pre-emptive strike against the horrors of smoking – through strong public health policy’.<sup>28</sup>

As part of the suite of measures of tobacco control, Uruguay introduced graphic health warnings. Uruguay demanded that tobacco companies increase the size of health warning labels on the front and back of cigarette packs from 50% to 80% of the package.<sup>29</sup> Moreover, Uruguay also passed regulations, preventing tobacco companies from selling different versions of the same brand of cigarettes. Uruguay has been an inspiration for other Latin American countries in respect of tobacco control.<sup>30</sup>

Relying upon an investment agreement between Switzerland and Uruguay, Philip Morris used international investment rules to challenge Uruguay’s restrictions on cigarette marketing.<sup>31</sup> In particular, the tobacco company has complained about the visceral graphic health warnings being used by the Uruguay Government.<sup>32</sup> Philip Morris protested ‘[t]he 80 per cent health warning coverage requirement unfairly limits Abal’s right to use its legally protected trademarks, and not to promote legitimate health policies’.<sup>33</sup>

There has been much academic debate and discussion about the role of charities and philanthropic foundations in the public health space of late.<sup>34</sup> Philanthropists Michael Bloomberg and Bill Gates launched a joint legal fund to assist developing countries in legal battles with the tobacco industry over trade and investment.<sup>35</sup> Bloomberg noted ‘[w]e are at a critical moment in the global effort to reduce tobacco use, because the significant gains we have seen are at risk of being undermined by the tobacco industry’s use of trade agreements and litigation.’<sup>36</sup> Bill Gates maintained ‘[c]ountry leaders who are trying to protect their citizens from the harms of tobacco should not be deterred by threats of costly legal challenges from huge tobacco companies’.<sup>37</sup> He extolled Australia’s leadership in respect of the plain packaging of tobacco products.<sup>38</sup> The Anti-Tobacco Trade Litigation Fund aims ‘to combat the tobacco industry’s use of international trade agreements to threaten and prevent countries from passing strong tobacco-control laws’.<sup>39</sup> Sue-Lynn Moses has highlighted the importance of the philanthropists’ initiative in establishing the Anti-Tobacco Trade Litigation Fund.<sup>40</sup>

### A Academic Commentary on the Dispute

The dispute raised larger commentary. As Matthew Porterfield and Christopher Byrnes noted:

Philip Morris’s challenge to Uruguay’s tobacco regulations raises a number of fascinating (although not entirely new) issues concerning international investment law, including the scope of fair and equitable treatment, the use of Most

<sup>28</sup> Tobacco Free Union, *Union Achiever, Gustavo Sónora: Tobacco control is not just public health, it’s about human rights* (25 November 2016) <<http://www.tobaccofreeunion.org/index.php/news-2/405-union-achiever-gustavo-sonora-tobacco-control-is-not-just-public-health-it-s-about-human-rights>>.

<sup>29</sup> Tobacco Labelling Resource Centre, *Uruguay* (2013) <<http://www.tobaccolabels.ca/countries/uruguay/>>.

<sup>30</sup> Oscar Cabrera and Juan Carballo, ‘Tobacco Control in Latin America’ in Mitchell and Voon (eds), above n 26, 235.

<sup>31</sup> *Request for Arbitration, FTR Holdings SA (Switzerland) v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (19 February 2010).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Joel Fleishman, *The Foundation: A Great American Secret; How Private Wealth is Changing the World* (Public Affairs, 2007); Michael Kinsley (ed), *Creative Capitalism: A Conversation with Bill Gates, Warren Buffett and Other Economic Leaders* (Simon & Schuster, 2008); Matthew Rimmer, ‘The Lazarus Effect: The (RED) Campaign, and Creative Capitalism’ in Thomas Pogge, Matthew Rimmer and Kim Rubenstein, (eds) *Incentives for Global Public Health: Patent Law and Access to Medicines* (Cambridge University Press, 2010) 313; Linsey McGoe, *No Such Thing as a Free Gift: The Gates Foundation and the Price of Philanthropy* (Verso, 2016).

<sup>35</sup> Bloomberg Philanthropies, ‘Bloomberg Philanthropies and the Bill and Melinda Gates Foundation Launch Anti-Tobacco Trade Litigation Fund’ (Press Release, 18 March 2015) <<http://www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund/>>.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> Sue-Lynn Moses, *Billionaires v Big Tobacco in the Global South* (19 December 2016) Inside Philanthropy <<http://www.insidephilanthropy.com/home/2016/12/19/bloomberg-philanthropies-grants-tobacco>>.

Favored Nation (MFN) provisions to invoke more lenient procedural standards, and the availability of injunctive relief in investment arbitration.<sup>41</sup>

In 2010, international lawyer and practitioner in investment treaty arbitration Todd Weiler stated:

PMI's BIT claim against Uruguay is emblematic of its long standing strategy to vehemently oppose the adoption of measures that might some day lead to plain paper of their products, or other measures that substantially interfere with the use and enjoyment of its crucial investment in its tobacco brands.<sup>42</sup>

He added that 'the claim is nothing more than the cynical attempt by a wealthy multinational corporation to make an example of a small country with limited resources to defend against a well-funded international legal action'.<sup>43</sup> Benn McGrady provided a preview of the ramifications of the dispute.<sup>44</sup> He highlighted how a number of issues raised by Philip Morris in respect of graphic health warnings would also have a bearing on plain packaging of tobacco products.

Professor Lawrence Gostin of Georgetown University considered the ISDS action by Philip Morris against Uruguay's graphic health warnings.<sup>45</sup> He maintained that the public health measures were entirely acceptable, especially given that 'research suggests that large and graphic health warnings are effective in reducing tobacco use'.<sup>46</sup> The larger considerations in respect of human rights and the right to health would also help support the use of graphic health warnings by the Uruguayan government. ISDS poses fundamental challenges to tobacco control, public health, human rights, and sustainable development.

## B Ruling

In a 2013 decision, the tribunal found that it had jurisdiction to hear the dispute.<sup>47</sup>

In October 2015, there were oral hearings on the merits of the case before an ICSID Arbitral Tribunal. The arbitrators included Professor Piero Bernardini of Italy, the international lawyer James Crawford of Australia (a Judge on the International Court of Justice in The Hague) and Gary Born of the USA.

In 2016, Uruguay prevailed in the final ruling in the ISDS conflict with Philip Morris.<sup>48</sup> The 304-page arbitration ruling by Professor Piero Bernardini and Judge James Crawford (including a dissent by Gary Born) is long and complex. The Tribunal ultimately rejected the arguments of Philip Morris. The Tribunal found that Uruguay did not violate its obligations under the Switzerland/Uruguay Bilateral Investment Treaty, or deny the tobacco company any of its protections afforded by that treaty.

The Tribunal found that Uruguay's regulatory measures did not 'expropriate' Philip Morris' property or intellectual property. The Tribunal emphasised that most countries place restrictions on the use of trademarks 'particularly in an industry like tobacco, but also more generally, there must be a reasonable expectation of regulation such that no absolute right to use the trademarks can exist'.<sup>49</sup> The Tribunal concluded that:

[U]nder Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power.<sup>50</sup>

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<sup>41</sup> Matthew Porterfield and Christopher Byrnes, *Philip Morris v Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing up in Smoke?* (12 July 2011) International Institute for Sustainable Development <<http://www.iisd.org/itm/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>>.

<sup>42</sup> Alexandra Nightingale, *The Significance of Uruguay's Win over Philip Morris International* (21 July 2016) Intellectual Property Watch <<http://www.ip-watch.org/2016/07/21/the-significance-of-uruguays-win-over-philip-morris-international/>>.

<sup>43</sup> *Ibid.*

<sup>44</sup> Benn McGrady, 'Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: *Philip Morris v Uruguay*' in Voon, Mitchell, and Liberman with Ayres (eds), above n 11, 173.

<sup>45</sup> Lawrence Gostin, *Global Health Law* (Harvard University Press, 2014) 233.

<sup>46</sup> *Ibid.* 234.

<sup>47</sup> Rushmi Sethi, 'International Arbitration: The Jurisdictional Award in *Philip Morris v Uruguay*, and Enforcement of Arbitration Awards' (2016) 32 *Arbitration International* 535.

<sup>48</sup> *Philip Morris Brands Sàrl v Uruguay* (ICSID Case No ARB/10/7, Award (8 July 2016).

<sup>49</sup> *Ibid.* 75 [269].

<sup>50</sup> *Ibid.* 76 [271].

In the Tribunal's view, there was 'not even a *prima facie* case of indirect expropriation by the 80/80 Regulation'.<sup>51</sup> There was also further analysis of the restrictions on variants. The Tribunal also commented '[i]t should be stressed that the SPR and the 80/80 Regulation have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health'.<sup>52</sup> The Tribunal concluded that the challenged measures were a valid exercise by Uruguay of its police powers for the protection of public health, and, as such, they did not constitute an expropriation of Philip Morris' investment.

The Tribunal ruled that the measures did not deny Philip Morris 'fair and equitable treatment'. The majority of the Tribunal was of the view that 'the SPR was a reasonable measure, not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure, and this is especially so considering its relatively minor impact on Abal's business'.<sup>53</sup> Discussing the graphic health warnings, the Tribunal observed that the legislative decision was a response to the strong scientific consensus as to the lethal effects of tobacco – '[s]ubstantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem'.<sup>54</sup> The Tribunal held '[h]ow a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk, is a matter of public policy, to be left to the appreciation of the regulatory authority'.<sup>55</sup>

The Tribunal found that the tobacco control measures did not 'unreasonably and discriminatorily' deny Philip Morris the use and enjoyment of its intellectual property rights, such as trademark rights. On the matter of intellectual property, the Tribunal rejected the arguments of the tobacco company that its trademark rights entitled it to block the introduction of graphic health warnings. The Tribunal observed that 'a trademark is not a unique commitment agreed in order to encourage or permit a specific investment'.<sup>56</sup> The Tribunal commented that trademark law was part of the framework of intellectual property laws.<sup>57</sup> The Tribunal commented '[a] trademark gives rise to rights, but their extent, being subject to the applicable law, is liable to changes which may not be excluded by an umbrella clause: if investors want stabilization they have to contract for it'.<sup>58</sup>

In conclusion, the Tribunal 'concluded that trademarks are not "commitments" falling within the intended scope of Article 11 of the BIT' (bilateral investment treaty).<sup>59</sup> The Tribunal found 'accordingly, the Claimants' claim of breach by the Respondent of Article 11 by the adoption of the Challenged Measures is rejected'.<sup>60</sup> Moreover, the Tribunal also found by a majority that Uruguay's courts did not 'deny justice' to Philip Morris.

In terms of the costs, the Tribunal ruled that 'each Party shall bear its own costs but the Claimants shall reimburse the Respondent for part of the latter's costs in the amount of US\$7 000 000 and, in addition, pay all fees and expenses of the Tribunal and ICSID's administrative fees and expenses'.<sup>61</sup> In respect of the award, the Tribunal decided that the claimants' claims should be dismissed.

There was a partial dissent by the arbitrator, Gary Born. The arbitrator did note '[m]y conclusions on these issues do not question the broad authority of Uruguay, or other states, to regulate in the interest of public health and safety'.<sup>62</sup> He maintained that his objections related to the heart of guarantees of access to justice and protection from arbitrary state conduct.<sup>63</sup>

## C Reactions to the Decision

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<sup>51</sup> Ibid 78 [276].

<sup>52</sup> Ibid 86 [302].

<sup>53</sup> Ibid 119 [410].

<sup>54</sup> Ibid 122 [418].

<sup>55</sup> Ibid 123 [419].

<sup>56</sup> Ibid 138 [481].

<sup>57</sup> Ibid 138 [482].

<sup>58</sup> Ibid 138 [482].

<sup>59</sup> Ibid 138 [482].

<sup>60</sup> Ibid 138 [480]-[482].

<sup>61</sup> Ibid 166 [588].

<sup>62</sup> Ibid 45 [197] dissent.

<sup>63</sup> Ibid.

The ISDS dispute outcome was a disappointment to the tobacco industry, and a relief to the public health community. There remains heated debate over whether there should be fundamental substantive and procedural reforms to the ISDS system.

In the face of the defeat, Marc Firestone, international senior vice president and general counsel of Philip Morris, asserted '[t]he arbitration concerned an important, but unusual, set of facts that called for clarification under international law'.<sup>64</sup>

WHO published a press release, noting that the 'international tribunal upholds states' rights to protect health through tobacco control'.<sup>65</sup> The international organisation noted that the Tribunal accepted submission of an amicus brief from the WHO on 'the basis that it provided an independent perspective on the matters in the dispute and contributed expertise from "qualified agencies"'.<sup>66</sup>

Uruguayan President Tabaré Vázquez said in a televised speech '[t]he health measures we implemented for controlling tobacco usage and for protecting the health of our people have been expressly recognized as legitimate and also adopted as part of the sovereign power of our republic'.<sup>67</sup>

Foley Hoag, the law firm that represented Uruguay, discussed the significance and the importance of the decision.<sup>68</sup> The firm stressed that 'this is a landmark decision because it affirms the sovereign rights not only of Uruguay but of all States to adopt laws and regulations to protect public health by regulating the marketing and distribution of cigarettes and other tobacco products'.<sup>69</sup>

Action on Smoking and Health (ASH) applauded Uruguay for winning the case, but said Phillip Morris 'accomplished its primary goal'.<sup>70</sup> Laurent Huber commented that Phillip Morris 'will no doubt shed some public crocodile tears, but their main goal in launching the suit has been realised, six years and millions of dollars have been spent defending a non-discriminatory law that was intended purely to protect public health'.<sup>71</sup>

Professor Tania Voon and Professor Andrew Mitchell from the University of Melbourne noted that the tribunal 'provides evidence of investment tribunals' ability to accord appropriate weight to sovereign regulatory objectives'.<sup>72</sup> However, the researchers noted that 'the existence of a partial dissent in that case highlights continuing uncertainties'.<sup>73</sup>

Enrico Bonadio from the University of London was hopeful that the decision would make it 'more difficult for tobacco companies to use lawsuits to produce a "chilling effect" and so discourage countries from introducing tobacco control policies'.<sup>74</sup> He opined that 'public health policies pursued by democratically-elected governments should not be overturned by the industry's trademark-based lawsuits, which seem predominantly aimed at scaring policymakers focused on protecting citizens' health'.<sup>75</sup>

The McCabe Centre for Law and Cancer has published a longer analysis of the dispute between Philip Morris and Uruguay.<sup>76</sup> The McCabe Centre reflected upon the dispute, '[t]he Tribunal's decision emphasises the policy

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<sup>64</sup> Malena Castaldi and Anthony Esposito, *Phillip Morris Loses Tough-on-Tobacco Lawsuit in Uruguay* (8 July 2016) Reuters <<http://www.reuters.com/article/us-pmi-uruguay-lawsuit-idUSKCN0ZO2LZ>>.

<sup>65</sup> World Health Organization, *International Tribunal Upholds States Rights to Protect Health Through Tobacco Control* (12 July 2016) <<http://www.who.int/fctc/mediacentre/news/2016/international-tribunal-states-rights-to-protect-health-through-t/en/>>.

<sup>66</sup> Ibid.

<sup>67</sup> Castaldi and Esposito, above n 64; Ingrid Torjesen, *Tobacco Giant Loses Legal Action over Uruguay's Tobacco Packaging Rules* (11 July 2016) BMJ <<http://www.bmj.com.ezp01.library.qut.edu.au/content/354/bmj.i3850>>.

<sup>68</sup> Foley Hoag, *Fact Sheet Award in Philip Morris Brands Sàrl, et al. v Oriental Republic of Uruguay: ICSID Case No ARB/10/7* (8 July 2016) <<http://bit.ly/2fR8TvG>>.

<sup>69</sup> Ibid.

<sup>70</sup> Castaldi and Esposito, above n 64.

<sup>71</sup> Ibid.

<sup>72</sup> Tania Voon and Andrew Mitchell, *Philip Morris v Tobacco Control: Two Wins for Public Health and Uncertainty Remains* (12 September 2016) Columbia Center on Sustainable Investment <<http://ccsi.columbia.edu/files/2013/10/No-182-Voon-and-Mitchell-FINAL.pdf>>.

<sup>73</sup> Ibid.

<sup>74</sup> Enrico Bonadio, *Uruguay's Victory against Big Tobacco is More than Just a Local Triumph* (15 July 2016) The Conversation <<https://theconversation.com/uruguays-victory-against-big-tobacco-is-more-than-just-a-local-triumph-62319>>.

<sup>75</sup> Ibid.

<sup>76</sup> McCabe Centre for Law and Cancer, *The Award on the Merits in Philip Morris v Uruguay: Implications for WHO FCTC Implementation* (August 2016) <[http://www.mccabecentre.org/downloads/Knowledge\\_Hub/McCabe\\_Centre\\_paper\\_on\\_Uruguay\\_award.pdf](http://www.mccabecentre.org/downloads/Knowledge_Hub/McCabe_Centre_paper_on_Uruguay_award.pdf)>.

space that states have under international investment treaties and affirms that it is not the role of international tribunals to second-guess states' regulatory decisions on complex public policy matters'.<sup>77</sup>

Cecilia Olivet and Alberto Villareal commented on the ruling:

So while Uruguay can celebrate this particular win over a corporate Goliath, perhaps the victory's most useful contribution would be to raise awareness among states of the dangers of signing up to a privatised court system that leaves decisions on public policies in the hands of corporate lawyers.<sup>78</sup>

Gustavo Sónora discussed the significance of the ruling for the introduction of tobacco control measures throughout the region. He noted: '[t]his was an important legal outcome, not just for Uruguay, or Latin America, but for public health in nations around the world'.<sup>79</sup> Mac Margolis commented '[w]hat caught the world's attention over the Uruguay case was the high drama of a Lilliputian country facing down a borderless behemoth'.<sup>80</sup> He commented '[t]he broader victory may have been that a trade treaty cannot be used as a delivery device for consumer products that a nation deems harmful to individual and public health'.<sup>81</sup>

In the wake of the ruling, Mike Bloomberg has been expanding his philanthropic investments in tobacco control.<sup>82</sup> The ruling will provide encouragement for other nation states to implement graphic health warnings around the world.<sup>83</sup> Uruguay's Minister for Health, Jorge Basso, has indicated on the 25 May 2017 that Uruguay would move to introduce plain packaging of tobacco products because the evidence had shown that such standardised packaging would reduce the incentives for smoking.<sup>84</sup>

### III PLAIN PACKAGING OF TOBACCO PRODUCTS: *PHILIP MORRIS V AUSTRALIA*

After a constitutional challenge by Big Tobacco companies, Australia defended the plain packaging of tobacco products scheme in the High Court of Australia.<sup>85</sup> In response to the introduction of plain packaging of products, Philip Morris shifted the shares of its Australian subsidiary to Hong Kong, China. After this corporate restructuring, Philip Morris brought an ISDS arbitration claim under the *Australia-Hong Kong Agreement on the Promotion and Protection of Investments* 1993.<sup>86</sup> The economist, Peter Martin, noted that the ISDS action 'masks a broader, more serious attempt to turn trade treaties into instruments that allow corporations to sue governments'.<sup>87</sup>

#### A Tribunal Argument

<sup>77</sup> Ibid 26.

<sup>78</sup> Cecilia Olivet and Alberto Villareal, 'Who Really Won the Legal Battle Between Philip Morris and Uruguay?', *The Guardian* (online), 28 July 2016 <<https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts>>.

<sup>79</sup> Tobacco Free Union, above n 28.

<sup>80</sup> Mac Margolis, *Big Tobacco Gets Crushed by Tiny Uruguay* (18 July 2016) Bloomberg <<https://www.bloomberg.com/view/articles/2016-07-18/big-tobacco-gets-crushed-by-tiny-uruguay>>.

<sup>81</sup> Ibid.

<sup>82</sup> Ariana Eunjung Cha, 'Michael Bloomberg may be Big Tobacco's Biggest Enemy', *The Washington Post* (online), 5 December 2016 <[https://www.washingtonpost.com/news/to-your-health/wp/2016/12/05/michael-bloomberg-may-be-big-tobaccos-biggest-enemy/?tid=ss\\_tw&utm\\_term=.b2943c72ade9](https://www.washingtonpost.com/news/to-your-health/wp/2016/12/05/michael-bloomberg-may-be-big-tobaccos-biggest-enemy/?tid=ss_tw&utm_term=.b2943c72ade9)>.

<sup>83</sup> Eric Crosbie, Patricia Sosa, and Stanton Glantz, *Defending Strong Tobacco Packaging and Labelling Regulations in Uruguay: Transnational Tobacco Control Network Versus Philip Morris International* (2017) Tobacco Control <<http://tobaccocontrol.bmj.com/content/early/2017/03/22/tobaccocontrol-2017-053690.citation-tools>>.

<sup>84</sup> Tobacco Free Union, Uruguay to Move on Plain Packaging' on Tobacco Free Union Twitter Post, 25 May 2017) <[https://twitter.com/TheUnion\\_TC/status/867713604287463424](https://twitter.com/TheUnion_TC/status/867713604287463424)>.

<sup>85</sup> *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012); Jonathan Liberman, 'Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia' (2013) *American Journal of Law and Medicine* 361; Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (eds) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014) 337.

<sup>86</sup> Attorney-General's Department (Cth), *Tobacco Plain Packaging: Investor-State Arbitration*, <<http://www.ag.gov.au/tobacoplainpackaging>>; *Australia-Hong Kong Agreement on the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

<sup>87</sup> Peter Martin, *Plain Packs: The New Lines of Attack, Big Tobacco Tries the WTO and TPPA*, *The Age* and *The Sydney Morning Herald* (online), (20 August 2012) <<http://www.petermartin.com.au/2012/08/plain-packs-new-lines-of-attack-cancer.html>>.

In its notice of claim in 2011, Philip Morris made a number of allegations that Australia's plain packaging of tobacco products contravened the *Australia–Hong Kong Agreement on the Promotion and Protection of Investments*.<sup>88</sup> First, the tobacco company argued:

Plain packaging legislation will result in the expropriation of PM Asia's investments due to the substantial deprivation of the intellectual property and goodwill, the consequent undermining of the economic rationale of its investments and substantial destruction of the value of PM Australia and PML.<sup>89</sup>

The company insisted that '[d]irect and indirect expropriation of investments without payment of adequate compensation is contrary to Article 6 of the Hong Kong–Australia BIT'.<sup>90</sup>

Second, Philip Morris maintained that the '[p]lain packaging legislation will not be fair and equitable, as is required by the Hong Kong–Australia BIT, given the substantial impairment of PM Asia's investments'.<sup>91</sup> This argument seems to echo the challenge by a number of nations to Australia's plain packaging of tobacco products in the WTO. Philip Morris alleged that 'a failure to afford fair and equitable treatment will contravene Article 2(2) of the Hong Kong–Australia BIT'.<sup>92</sup>

Third, Philip Morris contended that:

Plain packaging legislation will also constitute an unreasonable impairment to the investments, a failure to afford full protection and security to the investments and a failure to observe obligations in respect of the investments, all in contravention of Article 2(2) of the Hong Kong–Australia BIT.<sup>93</sup>

Tyler Mace, assistant general counsel for Philip Morris, asserted: '[p]lain packaging is a government program that takes private property from a legal business'.<sup>94</sup> He intimated that Philip Morris' brands were worth billions of dollars, and the tobacco company was deserving of compensation for the introduction of plain packaging of tobacco products.

In a robust defence of its plain packaging of tobacco products,<sup>95</sup> the Australian Government argued that the implementation of these measures was a legitimate exercise of its regulatory powers to protect the health of its citizens, '[t]he plain packaging legislation forms part of a comprehensive government strategy to reduce smoking rates in Australia'.<sup>96</sup> Australia argued that art 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 measure has been announced'.<sup>97</sup> Moreover, Australia argued that, in any case, 'the plain packaging legislation cannot be regarded as a breach of any of the substantive protections under the BIT'.<sup>98</sup> In its view, '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'.<sup>99</sup>

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<sup>88</sup> *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments* [1993] ATS 30 (entered into force 15 October 1993); Philip Morris Asia Ltd, *Written Notification of Claim Australia/Hong Kong Agreement for the Promotion and Protection of Investments* (15 September 1993)

<<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip-Morris-Asia-Limited-Notice-of-Claim-27-June-2011.pdf>>.

<sup>89</sup> *Ibid* 3.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Ibid*. There was reference made to the *Agreement on Trade Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, 33 ILM 81 (entered into force 1 January 1995) (*TRIPS*); *Paris Convention for the Protection of Industrial Property*, opened for signature 14 July 1967, 828 UNTS 306 (entered into force 26 April 1970); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Technical Barriers to Trade*).

<sup>92</sup> Philip Morris Asia Ltd, above n 88, 3.

<sup>93</sup> *Ibid*.

<sup>94</sup> Jess Hill, *ISDS: The Devil in the Trade Deal: Background Briefing* (14 September 2014) Radio National, <<http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490#transcript>>.

<sup>95</sup> Simon Daley, *Australia's Response to the Notice of Arbitration: Philip Morris Asia Ltd v Commonwealth of Australia* (21 December 2011)

<<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Australias%20Response%20to%20the%20Notice%20of%20Arbitration%2021%20December%202011.pdf>>.

<sup>96</sup> *Ibid* 1 [3].

<sup>97</sup> *Ibid* 2 [7(a)].

<sup>98</sup> *Ibid* 2 [7(b)].

<sup>99</sup> *Ibid* 2–3 [7(b)].

## B Academic Commentary

While the matter is being heard, there was a range of academic commentary in respect of the conflict between Philip Morris and Australia in respect of ISDS over plain packaging of tobacco products. Professor Tania Voon and Professor Andrew Mitchell of the University of Melbourne were critical of such claims by the tobacco industry.<sup>100</sup> Dr Kyla Tienhaara from the Australian National University observed '[t]he Philip Morris case perfectly highlights the many problems with investment arbitration, while the purported benefits of the system remain unproven'.<sup>101</sup> Professor Thomas Faunce lamented of investment tribunals, '[s]uch off-shore investment tribunals are not accountable to the Australian populace and have extremely limited capacity to refer to governance arrangements directly endorsed by Australian citizens'.<sup>102</sup> Professor Mark Davison of Monash University provided an extended analysis of the bilateral investment dispute between Australia and Philip Morris Asia.<sup>103</sup> He contended that the ruling of the High Court of Australia had implications for the investment dispute '[w]hile the BIT is a different legal beast from the Australian Constitution, it is difficult to see how a conclusion could be reached that there has been expropriation if that term is interpreted, in essence, as involving an acquisition of property'.<sup>104</sup> Professor Lawrence Gostin of Georgetown University discussed the ISDS action by Philip Morris against Australia's plain packaging of tobacco products.<sup>105</sup> He observed '[m]oreover, given Australia's progressively stricter tobacco regulation over the years, PMA could not have had a legitimate expectation that it would have full use of its trademarks'.<sup>106</sup> In his view, there were substantive grounds to defend plain packaging of tobacco products. ISDS clearly poses a significant threat to the paradigm of public health, human rights, and sustainable development.

## C The Ruling

The arbitral tribunal featured as Professor Karl-Heinz Böckstiegel of Germany (as President), Professor Gabrielle Kaufmann-Kohler of Switzerland, and Professor Donald McRae (a Canadian-New Zealand legal scholar based at the University of Ottawa). There was a long-running procedural dispute between Australia and Philip Morris, with a larger number of procedural decisions. In Procedural Order No 8, the Tribunal decided to bifurcate the dispute – with preliminary objections by Australia dealt with in a first phase. Australia had argued that the commencement of the arbitration shortly after the claimant's restructuring constituted an abuse of rights.

On 18 December 2015, the arbitration tribunal issued a unanimous decision, finding that the Tribunal has no jurisdiction to hear Philip Morris Asia's claim.<sup>107</sup> On 17 May 2016, the Tribunal published the decision (albeit with the parties' confidential information redacted).<sup>108</sup> The Tribunal found that Philip Morris Asia's claim was an abuse of process and an abuse of rights. The tribunal was concerned that Philip Morris Asia acquired an Australian subsidiary, Philip Morris (Australia) Ltd, for the purpose of initiating arbitration under the Hong Kong Agreement challenging Australia's tobacco plain packaging laws.

The arbitral tribunal provides a historical recounting of the passage of plain packaging of tobacco products under the Australian Labor Party governments of Prime Ministers Kevin Rudd and Julia Gillard. The Tribunal notes the influential work of the National Preventative Health Taskforce, and its recommendation that the

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<sup>100</sup> Tania Voon and Andrew Mitchell, 'Time to Quit?: Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14(3) *Journal of International Economic Law* 1.

<sup>101</sup> Kyla Tienhaara, *Government Wins First Battle in Plain Packaging War* (13 August 2012) The Conversation <<https://theconversation.edu.au/government-wins-first-battle-in-plain-packaging-war-8855>>.

<sup>102</sup> Thomas Faunce, *An Affront to the Rule of Law: International Tribunals to Decide on Plain Packaging* (29 August 2012) The Conversation <<http://theconversation.edu.au/an-affront-to-the-rule-of-law-international-tribunals-to-decide-on-plain-packaging-8968>>.

<sup>103</sup> Mark Davison, 'The Bilateral Investment Treaty Dispute Between Australia and Philip Morris Asia: What Rights are Relevant and How Have they Been Affected?' (2012) 9(5) *Transnational Dispute Management* 1 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2214833](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214833)>.

<sup>104</sup> Ibid.

<sup>105</sup> Gostin, above n 45, 236.

<sup>106</sup> Ibid 236.

<sup>107</sup> *Philip Morris Asia Ltd v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) <<http://www.pccases.com/web/sendAttach/1711>>.

<sup>108</sup> Ibid 184.

Australian Government implement the plain packaging of tobacco products. The Tribunal provides legislative history of the development of plain packaging of tobacco products.

By comparison, the arbitral tribunal considered the relationship between Philip Morris' corporate restructuring and the plan to introduce plain packaging measures. The timeline highlighted the close proximity of the policy development of plain packaging of tobacco products, and the decision to restructure the company. Significantly, the arbitral tribunal noted '[l]ess than a week after the share transfer on 23 February 2011, the Claimant, continuing its preparations for the present arbitration, made inquiries for the purposes of instructing additional counsel'.<sup>109</sup>

On the question of control, the Tribunal found:

[T]hat, while some (limited) management activity was exercised by PM Asia from Hong Kong prior to the 2011 restructuring, Mr Pellegrini acted in most relevant circumstances as a manager of PMI, rather than PM Asia, and that all significant strategic and budgetary decisions were either taken by or at least had to be approved by PMI.<sup>110</sup>

As a result, the Tribunal concluded 'that the Claimant, who bears the burden of proof on this issue, has failed to show that, prior to the 2011 restructuring, it had "control" with a "substantial interest" over the Australian investments in the sense of the definition in Article 1(e) of the BIT'.<sup>111</sup>

The Tribunal held that 'the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable'.<sup>112</sup> The Tribunal was of 'the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise'.<sup>113</sup>

In its Award on Jurisdiction and Admissibility, the Tribunal upheld Australia's objection about abuse of rights. In its conclusion, the Tribunal concluded that 'the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable'.<sup>114</sup> In its view, '[a] dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise'.<sup>115</sup>

The Tribunal elaborated that the adoption of plain packaging of tobacco products in Australia was foreseeable well before the decision to restructure was taken and then implemented, '[o]n 29 April 2010, Australia's Prime Minister Kevin Rudd and Health Minister Nicola Roxon unequivocally announced the Government's intention to introduce Plain Packaging Measures'.<sup>116</sup> The Tribunal also commented that its conclusion was reinforced by a review of the evidence regarding the reasons for the corporate restructuring, '[t]he record indeed shows that the principal, if not sole, purpose of the restructuring was to gain protection under the Treaty in respect of the very measures that form the subject matter of the present arbitration'.<sup>117</sup> The Tribunal found that 'the adoption of the Plain Packaging Measures was not only foreseeable but actually foreseen by the Claimant when it chose to change its corporate structure'.<sup>118</sup>

The Tribunal concluded that:

[T]he initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection.<sup>119</sup>

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<sup>109</sup> Ibid 31 [164].

<sup>110</sup> Ibid 158 [508]–[509].

<sup>111</sup> Ibid.

<sup>112</sup> Ibid 170 [554].

<sup>113</sup> Ibid.

<sup>114</sup> Ibid 184.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid 184–5.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid 185.

The Tribunal ruled that ‘the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute’.<sup>120</sup>

In July 2017, the Tribunal ordered Philip Morris to pay back the legal costs of the Australian Government in the ISDS dispute.<sup>121</sup> According to media reports, this sum was up to \$50 million.<sup>122</sup> However, the text of the ruling was heavily redacted. The fair trade organisation AFTINET has argued that there should be full transparency in relation to Australia’s costs in respect of the ISDS dispute.<sup>123</sup>

#### D Reactions to the Decision

There were an array of political, legal, and public policy responses to the decision in respect of Australia’s plain packaging of tobacco products under the ISDS system. Welcoming the decision, the then Deputy Leader of the Nationals and then Minister for Rural Health, Fiona Nash, commented ‘[t]he Coalition government has powered ahead with plain packaging and invested in reducing smoking rates across the board’.<sup>124</sup> Labor’s Health spokeswoman, Catherine King, has paid tribute to the Labor politicians who brought in the laws ‘[t]his is a great vindication of the work by (former Labor Attorney-General) Nicola Roxon and Tanya Plibersek to promote world leading health’.<sup>125</sup>

The Australian Greens’ Trade spokesman Senator Peter Whish-Wilson reflected upon the significance of the dispute.<sup>126</sup> He was concerned that Australia remained vulnerable because it had agreed to ISDS mechanisms in free-trade agreements with China and Korea.<sup>127</sup> He concluded, ‘ISDS is the Damocles Sword hanging over Australia’s sovereignty and our right to legislate in the public interest’.<sup>128</sup> South Australian Senator Nick Xenophon was concerned about the high costs involved in defending the ISDS action by Philip Morris.<sup>129</sup> He was also dissatisfied that Australia’s Health Department did not want to reveal its costs in the dispute.

Dr Kyla Tienhaara said that the decision was good news for the Australian Government.<sup>130</sup> Professor Tania Voon from Melbourne Law School has warned of the danger of further investor disputes against the Australian Government.<sup>131</sup> Glyn Moody commented that, just because Australia won its plain packaging case against Philip Morris does not mean that corporate sovereignty is not a threat.<sup>132</sup> Lori Wallach observed that ‘Australians saw more than \$50 million of their tax dollars go to legal costs to defend against the attack’.<sup>133</sup>

<sup>120</sup> Ibid.

<sup>121</sup> Patricia Karvelas, *Philip Morris to Cover Australian Government’s Legal Costs* (10 July 2017) ABC Radio National <<http://www.abc.net.au/radionational/programs/drive/philip-morris-to-cover-australian-governments-legal-costs/8694962>>.

<sup>122</sup> Christopher Knaus, *Philip Morris Cigarettes Charged Millions after Losing Plain Packaging Case against Australia* (10 July 2017) The Guardian <[https://www.theguardian.com/business/2017/jul/10/philip-morris-cigarettes-charged-millions-after-losing-plain-packaging-case-against-australia?CMP=share\\_btn\\_tw](https://www.theguardian.com/business/2017/jul/10/philip-morris-cigarettes-charged-millions-after-losing-plain-packaging-case-against-australia?CMP=share_btn_tw)>; Ashlynee McGee, *Failed Plain Packaging Fight Costs Tobacco Giant* (10 July 2017) ABC News <<http://www.abc.net.au/news/2017-07-10/philip-morris-ordered-to-pay-federal-government-legal-fees/8692792>>.

<sup>123</sup> Australian Fair Trade and Investment Network, ‘Government Should Release Philip Morris Plain Packaging Case Costs’ (Media Release, 10 July 2017) <<http://aftinet.org.au/cms/node/1434>>.

<sup>124</sup> Ibid.

<sup>125</sup> Karen Barlow, *Trade Pact Tested, Australia Wins Big Tobacco Fight* (18 December 2015) The Huffington Post <[http://www.huffingtonpost.com/2015/12/17/australia-plain-packaging-big-tobacco\\_n\\_8834270.html?utm\\_hp\\_ref=australia](http://www.huffingtonpost.com/2015/12/17/australia-plain-packaging-big-tobacco_n_8834270.html?utm_hp_ref=australia)>.

<sup>126</sup> Peter Whish-Wilson, ‘Plain Packaging Victory is Outstanding for Public Health but ISDS still Hangs like a Damocles Sword over Australian Democracy’ (Press Release, 18 December 2015) <<http://peter-whish-wilson.greensmps.org.au/content/media-releases/plain-packaging-victory-outstanding-public-health-isds-still-hangs-damocles-s>>.

<sup>127</sup> Department of Foreign Affairs and Trade (Cth), *China-Australia Free Trade Agreement* <<http://dfat.gov.au/trade/agreements/chafta/pages/australia-china-fta.aspx>>; Department of Foreign Affairs and Trade (Cth), *Korea-Australia Free Trade Agreement* <<http://dfat.gov.au/trade/agreements/kafta/pages/korea-australia-fta.aspx>>.

<sup>128</sup> Whish-Wilson, above n 126.

<sup>129</sup> Belinda Merhab, *Government Won’t Reveal Tobacco Case Costs* (19 October 2016) Australian Associated Press <<http://www.news.com.au/national/breaking-news/govt-wont-reveal-tobacco-case-costs/news-story/7a81f7003241d0290685b5ce1d83f6db>>.

<sup>130</sup> Kyla Tienhaara, ‘The Dismissal of a Case against Plain Cigarette Packaging is Good News for Taxpayers’, *The Sydney Morning Herald* (online), 20 December 2015 <<http://www.smh.com.au/comment/the-dismissal-of-a-case-against-plain-cigarette-packaging-is-good-news-for-taxpayers-20151218-qlrb53.html>>.

<sup>131</sup> Stephen Easton, ‘Sovereign Risk: First ISDS Dispute Won, but it won’t be the Last’, *The Mandarin* (online), 23 December 2015 <<http://www.themandarin.com.au/58636-australia-defends-regulatory-sovereignty-challenges-come/?pgnc=1>>.

<sup>132</sup> Glyn Moody, *Just Because Australia Won its Plain Packaging Case Against Philip Morris Doesn’t Mean Corporate Sovereignty isn’t a Threat* (23 December 2015) TechDirt <<https://www.techdirt.com/articles/20151221/10582033149/just-because-australia-won-plain-packaging-case-against-philip-morris-doesnt-mean-corporate-sovereignty-isnt-threat.shtml>>.

<sup>133</sup> Lori Wallach, *Public Interest Takes a Hit Even When Phillip Morris’ Investor-State Attack on Australia is Dismissed* (1 May 2016) The Huffington Post <[http://www.huffingtonpost.com/lori-wallach/public-interest-takes-a-h\\_b\\_8918010.html](http://www.huffingtonpost.com/lori-wallach/public-interest-takes-a-h_b_8918010.html)>.

Professor Tania Voon and Professor Andrew Mitchell from the University of Melbourne commented on the outcome, ‘Australia’s win on jurisdiction offered a political boost to countries implementing or considering standardized tobacco packaging, but the circumstances of Philip Morris’ investment in Australia may not be mirrored elsewhere’.<sup>134</sup>

There was also commentary on the delays and costs involved in the ISDS matter.<sup>135</sup>

#### IV TOBACCO CONTROL, ISDS, THE TRANS-PACIFIC PARTNERSHIP, AND REGIONAL TRADE AGREEMENTS

There has been a crisis of legitimacy in respect of the ISDS regime.<sup>136</sup> In response to the ISDS disputes, there have been a number of policy options to address the issue of tobacco control. As Professor Andrew Mitchell notes, ‘[t]he ability of governments to impose measures regulating health-related goods and the consequent effects on intellectual property create distinct challenges for international investment law’.<sup>137</sup> There have been a number of discernible positions in this debate. Global law firms and the investment arbitration community have argued for the further growth and expansion of ISDS. Some have called for procedural reforms in respect of ISDS. Others maintain that there is a need for substantive reforms of the ISDS – particularly in respect of healthcare and tobacco control. Critics of ISDS have called for the abolition of the system altogether.

Deborah Sy has provided a useful map of the options of full exclusions, partial exclusions, specific exceptions, and general exceptions.<sup>138</sup> The *Trans-Pacific Partnership* (TPP) created an ISDS exclusion in relation to tobacco control measures.<sup>139</sup> A number of other agreements seek to deal with the issue through general public health exceptions in ISDS. While the USA has departed the TPP negotiations under President Trump, the agreement is still being pursued by the remaining 11 countries.<sup>140</sup> The *Comprehensive Economic and Trade Partnership* (CETA) sought to limit the circumstances in which intellectual property owners could invoke ISDS.<sup>141</sup> There has also been a proposal for the development of an Investment Court mooted by the European Union. There are also a number of public policy makers who have argued that ISDS should be abolished altogether in discussions over the revision of the *North American Free Trade Agreement* (NAFTA).<sup>142</sup>

##### A The TPP and Tobacco Control Exclusions

The TPP is a regional agreement, spanning the Pacific Rim.<sup>143</sup> A centrepiece of the TPP is ch 9 of the agreement, which establishes an ISDS.<sup>144</sup> One of the most contentious issues was the question of tobacco control and ISDS. In light of actions by Philip Morris against Uruguay’s graphic health warnings and Australia’s plain packaging of tobacco products, there have been legitimate fears that the ISDS regime could be used to disrupt public health

<sup>134</sup> Voon and Mitchell, above n 72.

<sup>135</sup> Jarrod Hepburn and Luke Nottage, ‘Case Note: *Philip Morris Asia v Australia*’ (2017) 18 (2) *Journal of World Investment and Trade* 307.

<sup>136</sup> Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017).

<sup>137</sup> Andrew Mitchell, ‘Tobacco Packaging Measures Affecting Intellectual Property Protection under International Investment Law: The Claims against Uruguay and Australia’ in Alemanno and Bonadio (eds), above n 11, 213, 231.

<sup>138</sup> Deborah Sy, ‘Safeguarding Tobacco Control Measures from the Tobacco Industry’s Trade-Related Challenges Through Trade Treaty Design’ (2016) 11 *Asian Journal of WTO and International Health Law and Policy* 325.

<sup>139</sup> Department of Foreign Affairs and Trade (Cth), *Trans-Pacific Partnership Agreement* (2015)

<<http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>>.

<sup>140</sup> Shotaro Tani, ‘TPP 11’ Negotiators Make Headway Before Crucial Summit Next Week (1 November 2017) *Nikkei Asian Review*

<<https://asia.nikkei.com/Politics-Economy/International-Relations/TPP-11-negotiators-make-headway-before-crucial-summit-next-week>>.

<sup>141</sup> European Commission, *Comprehensive Economic and Trade Partnership* (CETA) (2017) <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>.

<sup>142</sup> *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (entered into force 1 January 1994) (NAFTA).

<sup>143</sup> Department of Foreign Affairs and Trade (Cth), *Trans-Pacific Partnership Agreement*, above n 139. For commentary, see Jane Kelsey (ed), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books, 2010); Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013); C L Lim, Deborah Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge University Press, 2012); Jane Kelsey, *Hidden Agendas: What We Need to Know about the Trans-Pacific Partnership Agreement* (TPPA) (Bridget Williams Books, 2013); Scott Sinclair and Stuart Trew (eds), *The Trans-Pacific Partnership and Canada: A Citizen’s Guide* (James Lorimer, 2016).

<sup>144</sup> *Trans-Pacific Partnership Agreement*, ch 9 <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/9-investment.pdf>>.

initiatives. In light of the ISDS matters involving Australia and Uruguay, there was fierce debate over the treatment of tobacco control in the *TPP*.

There was aggressive lobbying by industry groups during the period of the negotiations of the *TPP*.<sup>145</sup> Philip Morris has been a strong supporter of the inclusion of an ISDS regime in the *TPP*.<sup>146</sup> Under such a mechanism, Philip Morris would be able to challenge government regulations under the *TPP* – much like they have done so in disputes with Australia and Uruguay. In the end, the final text of the *TPP* deals with tobacco control in quite a minimalist way. The US Trade Representative notes that the *TPP* gives ‘each Party the right to decide that its tobacco control measures for manufactured tobacco products cannot be challenged by private investors under [ISDS]’.<sup>147</sup> Article 29.5 of the *TPP* provides:

A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.<sup>148</sup>

Footnote 12 provides ‘[f]or greater certainty, this Article does not prejudice: (i) the operation of Article 9.14 (Denial of Benefits); or (ii) a Party’s rights under Chapter 28 (Dispute Settlement) in relation to a tobacco control measure’.<sup>149</sup> Footnote 13 provides a definition of a tobacco control measure.<sup>150</sup>

Reading this text, it seems that only limited protection is afforded to tobacco control in respect of investor-state dispute settlement (if parties elect to use such protection). There is still scope for country-to-country disputes over tobacco control under ch 28 of the *TPP*. The text does not provide for an overarching recognition of the primacy and the significance of the *FCTC*.

Katherine Shats at the O’Neill Institute for National and Global Health Control provided a commentary upon the text on tobacco control in the *TPP*.<sup>151</sup> She noted: ‘[t]his kind of tobacco-specific carve-out is certainly unprecedented in the history of trade and investment agreements and sets a strong precedent for tobacco control and public health’.<sup>152</sup> Nonetheless, she questioned whether the text was adequate, sufficient, and comprehensive.<sup>153</sup> Shats highlights the prospect of state-to-state disputes over tobacco control under the *TPP* ‘convincing and funding a government to file a lawsuit on their behalf is something Big Tobacco is very good at’.<sup>154</sup> Robert Ireland also considered the significance of the tobacco carve-out in the *TPP*.<sup>155</sup> He suggested that it would be a precedent, which would be applied in other jurisdictions and contexts. Ted Alcorn has also discussed trade-offs for public health under the *TPP* in *The Lancet*.<sup>156</sup> He praised the explicit exemption of tobacco products from the ISDS regime. Scott Sinclair that ‘the *TPP* tobacco exception is a positive step for tobacco control regulation that makes it harder for multinational tobacco firms to make an ISDS claim’.<sup>157</sup> However, he observes that the specific carve-out for tobacco highlights the broader threats posed by ISDS and the *TPP*, ‘[t]he very need

<sup>145</sup> Matthew Rimmer, ‘Plain Packaging for the Pacific Rim: the Trans-Pacific Partnership and Tobacco Control’ in Voon (ed), *Trade Liberalisation and International Co-operation*, above n 43, 75.

<sup>146</sup> Philip Morris, ‘Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed *Trans-Pacific Partnership Trade Agreement*’, 22 January 2010 <<http://www.regulations.gov/#!documentDetail;D=USTR-2009-0041-0016.1>>.

<sup>147</sup> United States Trade Representative, ‘The Trans-Pacific Partnership: Chapter 29 – General Exceptions – Chapter Summary’, <<https://medium.com/the-trans-pacific-partnership/exceptions-1299fbf34b76#jcdabnhe>>.

<sup>148</sup> *Trans-Pacific Partnership* art 29.5 <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>>.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*.

<sup>151</sup> Katherine Shats, *Is the Trans-Pacific Partnership a Win for Tobacco Control?: A First Look at the Tobacco Carve-Out* (11 May 2015) O’Neill Institute for National and Global Health Law <<http://www.oneillinstituteblog.org/is-the-trans-pacific-partnership-a-win-for-tobacco-control-a-first-look-at-the-tobacco-carve-out/#.VjzgOFH21WA.twitter>>.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid*.

<sup>154</sup> *Ibid*.

<sup>155</sup> Robert Ireland, ‘The Trans-Pacific Partnership Tobacco Carve-Out Precedent’ (2016) 11(4) *Global Trade and Customs Journal* 165

<sup>156</sup> Ted Alcorn, ‘TPP: Trade-Offs for Health Behind Closed Doors’ (2016) 387(10022) *The Lancet* 929.

<sup>157</sup> Scott Sinclair, ‘The TPP and Health Care’, in Sinclair and Trew (eds), above n 143, 55.

for such a tobacco carve-out recognizes that ISDS poses a threat to health regulation'.<sup>158</sup> This raises questions about whether other fields of public health will be exposed to ISDS claims.<sup>159</sup>

Australia has said that it will avail itself of the protection for tobacco control against investor-state dispute settlement under the *TPP*.<sup>160</sup> Clearly, other remaining participants in the *TPP* should do likewise. Under the leadership of Justin Trudeau, the Government of Canada is considering the adoption of plain packaging of tobacco products.<sup>161</sup> Scott Sinclair has recommended '[i]f the *TPP* comes into effect, Canada should certainly take advantage of this opt-out to protect future plain packaging regulation'.<sup>162</sup> Australia also included a similar clause on tobacco control in an updated trade agreement with Singapore.<sup>163</sup> Article 22 of this updated agreement provides, in the section on Investor-State Dispute Settlement, that 'no claim may be brought under this Section in respect of a tobacco control measure of a Party'.<sup>164</sup>

## B The *TPP* and General Exceptions

There has been significant discussion about the use of general exceptions to address the protection of public health. Professor Julien Chaisse has explored the confines of domestic health protections under international investment law.<sup>165</sup> Section B of ch 9 of the *TPP* establishes the mechanism for ISDS.<sup>166</sup> Annex 9.B deals with the nature of expropriation. Clause 3(b) provides that '[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances'.<sup>167</sup> Chapter 29 of the *TPP* provides for general exceptions.<sup>168</sup> There is further language here on environmental measures necessary to protect human, animal or plant life, or health.

There has been significant debate about the efficacy about such general exceptions in respect of health in the context of ISDS in the *TPP*. Professor Peter Yu has commented that such safeguards are a limited, initial step.<sup>169</sup> He has maintained that there should be additional, complementary reforms. Professor Tania Voon and Professor Andrew Mitchell from the University of Melbourne have commented, '[t]he use of general exceptions covering objectives such as health or the environment may provide additional comfort to regulating states, but such exceptions do not preclude significant financial and personnel costs in successfully defending measures'.<sup>170</sup> Arbitration lawyer George Kahale III has commented that the provisions have loopholes, which leave nation states wide open to ISDS actions.<sup>171</sup> He argued that the system was so badly flawed that it should be abolished, and started again from the beginning. It remains to be seen whether there will be further revisions to the ISDS regime

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<sup>158</sup> Ibid.

<sup>159</sup> See Voon, Mitchell and Liberman (eds), above n 85; Alemanno, and Bonadio (eds), above n 11; Jay Sanderson, 'Health Conscious and Confused: Why "Healthy" Trade Marks Matter' (2016) 39(2) *University of New South Wales Law Journal* 658.

<sup>160</sup> Notification by Australia in Respect of Article 29.5 of the Trans-Pacific Partnership Agreement <<https://www.aph.gov.au/~media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/JSCT/2016/9Feb2016/Text/Draft%20Article%20295%20Notification%20by%20Australia%20%20ISDS%20and%20Tobacco%20Control%20Measures.pdf?la=en>>.

<sup>161</sup> Government of Canada, 'Minister Philpott Launches Public Consultations on Tobacco Plain Packaging: Measures Would Regulate the Size and Shape of Tobacco Products and Require Standardized Colour and Font,' 31 May 2016 <<http://news.gc.ca/web/article-en.do?nid=1077359>>.

<sup>162</sup> Sinclair, above n 157, 55.

<sup>163</sup> *Agreement to Amend the Singapore-Australia Free Trade Agreement* (2016) <<http://dfat.gov.au/trade/agreements/safta/Documents/agreement-to-amend-the-singapore-australia-free-trade-agreement.pdf>>.

<sup>164</sup> Ibid.

<sup>165</sup> Julien Chaisse, 'Exploring the Confines of International Investment and Domestic Health Protections – General Exceptions Clause as a Forced Perspective' (2013) 39(2/3) *American Journal of Law and Medicine* 332.

<sup>166</sup> *Trans-Pacific Partnership Agreement*, released 26 January 2016, ch 9 <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/9-investment.pdf>>.

<sup>167</sup> Department of Foreign Affairs and Trade (Cth), *Trans-Pacific Partnership Agreement*, above n 39.

<sup>168</sup> *Trans-Pacific Partnership Agreement*, released 26 January 2016, ch9 <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/29-exceptions-and-general-provisions.pdf>>.

<sup>169</sup> Peter Yu, *TPP Trade Pact Still Needs Improvements to Protect Governments from Foreign Suits* (15 February 2016) The Conversation <<https://theconversation.com/tpp-trade-pact-still-needs-improvements-to-protect-governments-from-foreign-suits-54078>>.

<sup>170</sup> Voon and Mitchell, above n 72.

<sup>171</sup> Jess Hill, *TPP's Clauses that let Australia be Sued are Weapons of Legal Destruction, Says Lawyer* (10 November 2015) The Guardian <<https://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer>>.

– especially as new Prime Minister Jacinda Ardern’s New Zealand Government has promised to reconsider the *TPP* and propose amendments.<sup>172</sup>

A number of other trade agreements, such as the *Korea-Australia Free Trade Agreement* 2014 and the *China-Australia Free Trade Agreement* 2015, rely just on exceptions to deal with public health matters.<sup>173</sup> Australia’s Productivity Commission has called for a new open and transparent approach for the negotiation of trade agreements, involving intellectual property rights.<sup>174</sup> The Productivity Commission has repeatedly warned successive Australian Governments against the inclusion of ISDS regimes in trade agreements.<sup>175</sup> The Productivity Commission has stressed ‘[i]n relation specifically to ISDS provisions, the government should seek to avoid accepting provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system’.<sup>176</sup> There has been a larger debate over the procedural and substantive architecture of ISDS in the Asia-Pacific.<sup>177</sup>

### C The Comprehensive Economic and Trade Partnership (CETA)

There has been much controversy over ISDS in the trade negotiations between Canada and the European Union in the *CETA*.<sup>178</sup> The Government of Canada was particularly disturbed by the action brought by Eli Lilly under an ISDS mechanism under the *NAFTA* over the rejection of drug patents. On the 17th March 2017, a Tribunal issued its award in the ISDS matter between Eli Lilly and Canada under *NAFTA*.<sup>179</sup> Eli Lilly had objected to the rejection of key drug patents in Canada. The Tribunal unanimously dismissed Eli Lilly’s claims and confirmed that Canada was in compliance with its *NAFTA* obligations. The decision will no doubt be significant in considerations about the interaction between intellectual property, investment, and public health.

In the final revisions of *CETA*, the new Trudeau Government sought to refine the ISDS system.<sup>180</sup> Then Canadian Trade Minister Chrystia Freeland and European Commissioner for Trade Cecilia Malmström commented on the changes:

With these modifications, Canada and the EU will ... move to a permanent, transparent and institutionalized dispute-settlement tribunal; revise the process for the selection of tribunal members, who will adjudicate investor claims; set out more detailed commitments on ethics for all tribunal members; and agree to an appeal system.<sup>181</sup>

As a result of the revisions, *CETA* has important text limiting the circumstances in which ISDS can be invoked in matters concerning intellectual property. For instance, art 8.12.5 notes that expropriation does not apply to the issuance of compulsory licensing.<sup>182</sup> Article 8.12.6 provides ‘[f]or greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the *TRIPS Agreement* and Chapter Twenty (Intellectual Property), do not constitute expropriation’.<sup>183</sup> Article 8.12.6 provides

<sup>172</sup> Stacey Kirk, *Jacinda Ardern: Changes to Trade Deals Possible – Walking Away from TPP ‘Not Necessary’* (22 October 2017) Stuff <<https://www.stuff.co.nz/national/politics/98132879/jacinda-ardern-changes-to-trade-deals-possible--walking-away-from-tpp-not-necessary>>; Jane Kelsey, *New Government’s TPPA Problems Start Next Week* (20 October 2017) Scoop <<http://www.bilaterals.org/?new-government-s-tpa-problems>>.

<sup>173</sup> *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* [2014] ATS 43 (entered into force 12 December 2014); *Free Trade Agreement between the Government of Australia and the Government of the Peoples Republic of China* [2015] ATS 15 (entered into force 20 December 2015).

<sup>174</sup> Productivity Commission (Cth), *Intellectual Property Arrangements: Draft Report* (2016); Productivity Commission (Cth), *Intellectual Property Arrangements*, Report No 78, 2016.

<sup>175</sup> Productivity Commission (Cth), *Bilateral and Regional Trade Agreements* (2010).

<sup>176</sup> *Ibid* xxxii.

<sup>177</sup> Luke Nottage, ‘The Limits of Legalization in Asia-Pacific Investment Treaty Arbitration?: *International Economic Law and Governance - Essays in the Honour of Mitsuo Matsushita* (Oxford University Press, 2016) 153.

<sup>178</sup> European Commission, above n 141.

<sup>179</sup> *Eli Lilly and Company v Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 <<https://www.italaw.com/cases/1625>>.

<sup>180</sup> Stephen Drymer, *CETA Under New Management: Why is Trudeau Changing the Game?* (12 May 2016) Centre for International Governance Innovation <<https://www.cigionline.org/publications/ceta-under-new-management-why-trudeau-changing-game>>.

<sup>181</sup> Government of Canada, *Joint Statement by European Commissioner for Trade and Canada’s Minister of International Trade on Canada-EU Trade Agreement* (29 February 2016) <<http://news.gc.ca/web/article-en.do?mthd=index&crtr.page=1&nid=1036759>>.

<sup>182</sup> European Commission, above n 141.

<sup>183</sup> *Ibid*.

‘[m]oreover, a determination that these measures are inconsistent with the *TRIPS Agreement* or Chapter Twenty (Intellectual Property) does not establish an Expropriation’.<sup>184</sup>

The European Commission and the Canadian Government have been working together on a proposal to establish a multilateral investment court in order to restore faith in the ISDS system.<sup>185</sup> It remains to be seen whether this proposal will be realised and be effective.

## D NAFTA 2.0

In addition to pulling the USA out of the *TPP* negotiations, the new US President Donald Trump has demanded revisions of *NAFTA*.<sup>186</sup> The new US Trade Representative Robert Lighthizer has questioned the need for ISDS, saying:

It’s always odd to me when the business people come around and say, ‘Oh, we just want our investments protected.’ ... I mean, don’t we all? I would love to have my investments guaranteed. But unfortunately, it doesn’t work that way in the market... You either are in the market, or you’re not in the market.<sup>187</sup>

Nobel Laureate Joseph Stiglitz, Professor Jeffrey Sachs and two hundred other law and economics Professors have urged President Trump to remove ISDS from *NAFTA*.<sup>188</sup> On the progressive side of politics, Senator Elizabeth Warren of the Democrats has called for the removal of ISDS clauses ‘ISDS provides a huge handout to global corporations while undermining American sovereignty’.<sup>189</sup> It remains to be seen whether the ISDS regime will be retained in the *NAFTA*, and if so, what form that will take.

## V CONCLUSION

The ISDS actions by Philip Morris against Uruguay and Australia have raised complex questions about the intersection of international trade, investment law, intellectual property, and public health. There was a great concern that such actions served to have a chilling effect on public policy development. ISDS poses significant challenges in respect of tobacco control, public health, human rights, and sustainable development. In the wake of Big Tobacco’s failed investor actions against Uruguay and Australia, there has been a new hope that graphic health warnings and plain packaging of tobacco products will be adopted by other nations and countries around the globe. There is a need for consideration of public policy options for the treatment of tobacco control measures under ISDS in regional trade agreements, such as *TPP*, *CETA*, and *NAFTA 2.0*.

At the end of her term as Director-General in 2016, Dr Margaret Chan reflected upon the battles with the tobacco industry in respect of public health policy.<sup>190</sup> She was heartened by the international support for the *FCTC*, ‘[t]he treaty is already one of the most widely embraced in UN history’.<sup>191</sup> She was hopeful that the tide of tobacco use was shifting ‘[f]rom Uruguay to Australia, countries large and small have stood up to the tobacco industry by implementing plain packaging and large pictorial health warning labels’.<sup>192</sup> Chan noted ‘[w]here tobacco companies have tried to threaten and bully nations, governments have responded with firm measures to protect

<sup>184</sup> Ibid.

<sup>185</sup> European Commission, ‘A Future Multilateral Investment Court’ (Press Release, 13 December 2016), <[http://europa.eu/rapid/press-release\\_MEMO-16-4350\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm)>.

<sup>186</sup> Office of the United States Trade Representative, *Summary of Objectives for the NAFTA Renegotiation* (17 July 2017) <<https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>>.

<sup>187</sup> Phil Levy, *Critique of NAFTA Provision Highlights Team Trump’s Misconceptions on Investment Abroad* (23 October 2017) *Forbes* <<https://www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/#4fe2dbb170b4>>.

<sup>188</sup> 230 *Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts* (25 October 2017) <[https://www.citizen.org/system/files/case\\_documents/isds-law-economics-professors-letter-oct-2017\\_2.pdf](https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf)>.

<sup>189</sup> Elizabeth Warren, ‘Warren Urges US Trade Rep to Remove ISDS Provisions During Next Round of NAFTA Negotiations’ (Press Release, 19 September 2017) <[https://www.warren.senate.gov/?p=press\\_release&id=1844](https://www.warren.senate.gov/?p=press_release&id=1844)>.

<sup>190</sup> Margaret Chan, *Every Tobacco Death is an Avoidable Tragedy: The Epidemic Must Stop Here* (6 November 2016) *The Guardian* <[https://www.theguardian.com/global-development/2016/nov/06/tobacco-death-avoidable-tragedy-epidemic-india-conference-margaret-chan-world-health-organisation?CMP=share\\_btn\\_tw](https://www.theguardian.com/global-development/2016/nov/06/tobacco-death-avoidable-tragedy-epidemic-india-conference-margaret-chan-world-health-organisation?CMP=share_btn_tw)>.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

public health'.<sup>193</sup> Chan trusted that national governments would adopt a range of tobacco control measures.<sup>194</sup> She was 'heartened by progress on standardised or "plain" packaging – a measure introduced by the treaty and pioneered in Australia, where smoking rates have now fallen to record lows'.<sup>195</sup> She stressed '[t]he early evidence from Australia shows that plain packaging, as part of a comprehensive approach to tobacco control, is diminishing the appeal of tobacco products, increasing the effectiveness of health warnings and reducing the ability of the pack to mislead'.<sup>196</sup> Chan noted that 'France and the UK have begun implementing plain packaging laws, and New Zealand and Hungary have recently passed legislation' and 'many other countries are close behind'.<sup>197</sup> Much will depend on the ability of her successor Dr Tedros Adhanom Ghebreyesus in carrying the work of WHO in respect of tobacco control.

As Chan has noted, it is imperative that national governments, seeking to protect public health of their citizens, are not handcuffed by investment clauses.<sup>198</sup> The implementation of the *FCTC* should not be frozen and chilled by the use of investor clauses and mega-trade agreements. There is a need to ensure that ISDS clauses do not undermine tobacco control, public health, human rights, and sustainable development.

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<sup>193</sup> Ibid. The position of Chan is that co-operation with tobacco companies is untenable. For an alternative view see Chang-fa Lo, 'Tobacco Companies Assisting Government Agencies in Fighting Against Illicit Trade in Tobacco Products: Regulating the Cooperative Relations in the Protocol' (2008) 3(2) *Asian Journal of WTO and International Health Law and Policy* 535.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid. See also Department of Health (Cth), *Post-Implementation Review Tobacco Plain Packaging* (2016).

<sup>197</sup> Ibid.

<sup>198</sup> Chan, above n 16.