



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London**  
**International Arbitration Case Law**

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**Award Name and Date:**

Philip Morris Asia Limited v The Commonwealth of Australia (PCA Case No. 2012-12)  
Award on Jurisdiction and Admissibility, 17 December 2015

**Case Report by:**

Marina Kofman\*\* and Erika Williams\*\*\* Edited by Ignacio Torterola

**Summary:**

Claimant brought a claim against Respondent under the bilateral investment treaty between Hong Kong and Australia in respect of Respondent's introduction of legislation mandating the plain packaging of tobacco products. Claimant undertook a restructure in 2011 whilst Respondent was considering the introduction of plain packaging measures. Following the restructure, Claimant became the sole shareholder of the Australian entities which were a part of the global group of companies. The Tribunal found that Claimant's restructure was for the principal, if not the sole, purpose of gaining protection under the Treaty. The Tribunal held that the claims were inadmissible and it was precluded from exercising jurisdiction over the dispute.

**Main Issues:**

Jurisdiction – control – admission – *ratione temporis* (temporal jurisdiction) – abuse of rights – legal test for establishing a 'dispute' - foreseeability of dispute in corporate restructuring cases – bad faith - burden of proof

**Tribunal:** Professor Karl-Heinz Böckstiegel (President), Professor Gabrielle Kaufmann-Kohler (Arbitrator), Professor Donald M. McRae (Arbitrator)

**Claimant's Counsel:** Dr. Stanimir A. Alexandrov, Mr. James Mendenhall, Ms. Marinn Carlson (Sidley Austin LLP) , Mr. Joe Smouha Q.C., Mr. Salim Moollan (Essex Court Chambers), Mr. Simon W. B. Foote (Bankside Chambers)

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## Digest:

### 1. *Relevant Facts*

Philip Morris International ("**PMI**"), a company incorporated in New York, United States, produces cigarettes (¶ 95). PMI owns a number of subsidiaries and affiliates globally ("**PMI Group**"), including Philip Morris Asia Limited ("**Claimant**") which has its Asia regional headquarters in Hong Kong (¶ 95). Claimant is the sole shareholder of holding company Philip Morris (Australia) Limited ("**PM Australia**"), which in turn is the sole shareholder of Philip Morris Limited ("**PML**"), a trading company incorporated in Australia which operates PMI Group's tobacco product sales in Australia under license from Philip Morris companies in Switzerland and the United States.(¶ 6 and ¶ 96). Until February 2011, PM Australia and PML were owned by a Swiss company which is part of the PMI group of companies (¶ 97).

In December 2007, shortly after the election of the Australian Labor Party, Prime Minister Kevin Rudd launched a National Preventative Health Taskforce which conducted various consultations and investigations on preventative health programs and strategies, including further regulation of the tobacco industry by way of mandating plain packaging of tobacco products (¶¶ 101-103). PMI Group and PML participated in the consultation process and expressed their opposition to plain packaging on a number of occasions (¶¶ 104, 111, 121, 127 and 163).

In April 2010, Prime Minister Rudd announced the Government's intention to introduce mandated plain packaging of tobacco products by 1 July 2012 (¶ 119).

From late 2010 to early 2011, PMI Group undertook a restructuring process which took into account the political risk it was facing in various countries in respect of a number of new regulations in relation to plain packaging of tobacco products (¶ 98). In January 2011, legal counsel for PMI Group filed the Foreign Investment Application for the proposed change in

ownership of PM Australia and PML whereby Claimant would acquire the two entities (¶ 157).

On 11 February 2011, the Treasury issued a formal letter to the effect that there were no objections to the Claimant's Foreign Investment Application in terms of Respondent's foreign investment policy ("**No-objection Letter**").

On 23 February 2011, the Claimant formally acquired PM Australia and PML which resulted in the ownership structure set out above (¶ 163).

On 21 November 2011, the Tobacco Plain Packaging Bill was enacted (¶ 176). Claimant served its Notice of Arbitration on the same day (¶ 176).

## **2. Procedural History**

On 21 November 2011, Claimant served a Notice of Arbitration on Respondent, submitting the dispute to international arbitration pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010 ("**UNCITRAL Rules**") and in accordance with Article 10 of the bilateral Agreement between the government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments dated 15 September 1993 ("**Treaty**") (¶ 13). Claimant appointed Professor Gabrielle Kaufmann-Kohler as the first arbitrator and proposed Singapore as the place of arbitration (¶ 13).

On 21 December 2011, Respondent served a Response to the Notice of Arbitration on Claimant pursuant to Article 4 of the UNCITRAL Rules. Respondent raised its jurisdictional objections and indicated it would request jurisdictional objections be heard in a preliminary stage of the proceedings (¶ 15). Claimant appointed Professor Donald M. McCrea as the second arbitrator (¶ 16). Respondent later proposed London as the place of arbitration (¶ 26).

On 15 May 2012, the Secretary-General of the Permanent Court of Arbitration appointed Professor Karl-Heinz Böckstiegel as the president of the Tribunal pursuant to Article 9 of the UNCITRAL Rules (¶ 17).

On 30 July 2012, the Tribunal held the First Procedural Hearing where the Parties were heard on their proposals regarding the place of arbitration, confidentiality regime and bifurcation of proceedings (¶ 27). On 3 August 2012, the Tribunal issued a Procedural Order setting out a timetable for submissions on these three issues (¶ 29).

On 26 October 2012, following submissions by the Parties, the Tribunal decided that the place of arbitration was Singapore, in accordance with Article 18(1) of the UNCITRAL Rules (¶ 34).

On 30 November 2012, the Tribunal established the confidentiality regime including that the Tribunal's awards would be published subject to prior redaction (¶ 36).

On 28 March 2013, Claimant submitted its Statement of Claim; on 8 April 2013, Claimant submitted an Amended Statement of Claim; on 23 October 2013, Respondent submitted its Statement of Defence; and on 26 November 2013, Claimant submitted its Opposition to Bifurcation (¶ 41).

On 20 and 21 February 2014, the Tribunal held the Hearing on Bifurcation and decided to bifurcate the proceedings on 14 April 2014 (¶ 42-43). The Tribunal determined that the Respondent's Non-Admission of Investment Objection and Temporal Objection would be heard in the first phase of the proceeding (¶ 43).

On 7 July 2014, Respondent filed its Counter-Memorial on Preliminary Objections; on 1 December 2014, Respondent filed its Reply on Preliminary Objections; and on 12 January 2015, Claimant filed its Rejoinder on Preliminary Objections (¶¶ 45, 61 and 63).

From 16 to 19 February 2015, the Tribunal held the Hearing on Preliminary Objections in Singapore (¶ 79).

On 6 April 2015, the Parties both submitted First Post-Hearing Briefs on Preliminary Objections (¶ 85).

On 17 December 2015, the Tribunal issued its Award on Jurisdiction and Admissibility.

### **3. *Requests of the Parties***

#### **3.1. *Claimant's request***

Claimant requested the Tribunal order Respondent to withdraw its plain packaging measures or refrain from applying them against Claimant's investments or, in the alternative, award damages upwards of USD4,160 plus interest and legal fees and expenses (¶ 89). Claimant also sought the dismissal of Respondent's two preliminary objections, a procedural order for the merits phase of the arbitration and its costs in connection with the bifurcated proceeding (¶ 90).

#### **3.2. *Respondent's request***

Respondent requested its preliminary objections be heard and determined and for the Tribunal to dismiss each of the claims in Respondent's Amended Statement of Claim (¶¶ 91-92). Respondent also sought that the Tribunal find it has no jurisdiction to determine the dispute or that it is inadmissible and for the Tribunal to award Respondent all its fees and expenses including legal costs (¶¶ 91-93).

### **4. *Position of the Parties***

The legal arguments deemed suitable for consideration in the preliminary phase of the arbitration centred on whether Claimant properly became an investor in Australia by its acquisition of shares in PML during PMI Group's corporate restructure and during the period in which Australia announced the introduction of plain packaging measures and enacted those measures into legislation (¶185).

#### **4.1. *Claimant's position***

Claimant asserted that had met all the jurisdictional requirements to bring its claim in arbitration against Australia under the treaty as follows:

- (a) Claimant is and was a company incorporated under the laws of Hong Kong at all relevant times and is therefore a covered investor under the Treaty;

- (b) Claimant satisfies the "investment" requirement under the Treaty as it owns or controls assets through its direct and indirect shareholdings in PM Australia and PML, respectively, PML's brands and PML's ownership and/or licence of intellectual property rights;
- (c) Claimant's investments have been admitted by Australia and are legal under Australian law; and
- (d) the dispute resolution provisions in the treaty are satisfied (¶ 183).

Claimant argued that it has continuously controlled, managed and supervised PML's business since 2001 and qualifies as an investor for the purpose of the Treaty, regardless of its 2011 restructure (¶ 186).

#### 4.2. Respondent's position

Respondent raised three preliminary objections as follows:

- (e) Claimant's purported investment is not an investment admitted by Australia "subject to its law and investment policies from time to time";
- (f) Claimant's claim falls outside the scope of the Treaty because it relates to a pre-existing dispute, or, alternatively, Claimant's claim amounts to an abuse of right because the purpose of its restructure was to gain Treaty protection over a pre-existing or reasonably foreseeable dispute (¶ 184).

Respondent raised a third objection that neither the shares in PML nor PML's assets constitute investments for the purposes of the Treaty however this objection was not the subject of the preliminary phase of the arbitration (¶¶ 184-185).

### 5. *Did Claimant exercise control over PML prior to the restructure?*

The Parties disagreed on the meaning of the term "controlled" in Article 1(e) of the Treaty (¶ 188). Claimant asserted that oversight and management control is sufficient and Respondent asserted that to establish control, demonstrated legal and economic interest is required (¶ 188).

Article 1(e) of the Treaty provides that the Treaty covers investors that own or control assets in a contracting party's jurisdiction and defines "control" as circumstances in which a person or company has a substantial interest in the company or the investment (¶ 188).

#### 5.1. Claimant's position

Claimant argued that "substantial interest" is not the determinative of the definition of control (¶ 190) and contended that ownership and control as provided for in the Treaty are two distinct and independent bases for establishing an investment is covered by the Treaty (¶ 191).

Claimant asserted that oversight and management is sufficient to demonstrate control for the purposes of establishing treaty protection (¶ 196).

#### 5.2. Respondent's position

Respondent contended that the mandatory language of Article 1(e) necessarily means that "control" is defined exclusively by reference to "substantial interest" (¶ 201) and the definition of substantial interest is "that the putative investor must have a right or power over an asset which is sourced in a legal arrangement, and which is capable of being exercised in some significant way that affects the economic returns from and disposition of the asset" (¶ 202).

Respondent asserted that control over an investment must entail an economic relationship and to support this, relied on Articles in the Treaty which refer to "investments and returns' of investors" and provisions that investors should be compensated for any loss suffered (¶ 202). Respondent noted that until 2011, Claimant did not have an economic relationship with PM Australia or PML from which it could have expected an economic return from its "control" (¶ 202).

Respondent also argued that, even if management control was sufficient, Claimant failed to demonstrate such control over PM Australia or PML prior to the restructure in 2011 (¶ 219) as the ultimate decision making power rested with PMI (¶ 223).

### 5.3. *Tribunal's analysis*

The Tribunal considered that the definition of control needed to be interpreted by reference to "substantial interest" and regarded Respondent's suggested definition of substantial interest as the most plausible reading of the term (¶ 502).

The Tribunal was not ultimately required to determine the meaning of control as, even if it did find that management control was sufficient to demonstrate substantial interest for the purpose of the Treaty, Claimant had failed to prove that it had exercised any significant management control over PM Australia or PML prior to the restructure (¶ 506-507).

## 6. ***Was Claimant's investment admitted under Australian law and investment policies?***

The Parties had a different view on whether Claimant's investment in Australia was admitted by Australia subject to its law and investment policies as required by Article 1(e) of the Treaty (¶ 244).

### 6.1. *Claimant's position*

Claimant submitted that the requirement in Article 1(e) of the Treaty that an investment be admitted by the other contracting party subject to its law and investment policies was satisfied (¶ 244) and that the Respondent bears the onus of proving that the admission requirement was not satisfied (¶ 251).

Claimant submitted that it met the requirements of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and its Regulations by providing basic details about the company acquiring the shares in PM Australia and PML, noting that its activities are legal in Australia and that Claimant made its investments openly and with proper notice to the relevant body of the Respondent (¶ 266). Claimant also drew attention to the very public differences of opinion between the Parties in relation to plain packaging (¶ 266).

Further, Claimant argued that a technical violation of Australian law is not sufficient to deny an investment the benefit of the Treaty protection (¶ 251).

## 6.2. Respondent's Position

Respondent contended that Claimant's investment was not admitted because the Foreign Investment Application Claimant submitted in January 2011 was false or misleading and, consequently, the investment cannot enjoy protection under the Treaty (¶ 244).

Respondent pointed to the following aspects of Claimant's Foreign Investment Application in support of its argument that the application was false or misleading:

- (a) Claimant's failure to advise that it intended to bring a claim under the Treaty ("**BIT Intention**");
- (b) Claimant did not state that the purpose of the investment was to put it in a position where it could bring a claim under the Treaty ("**BIT Reason**");
- (c) The BIT Intention and BIT Reason were directly relevant to Respondent's assessment of whether Claimant's investment was contrary to Australia's national interest (¶ 268-271).

Respondent argued that the admission of an investment must be free from material non-compliance with its investment policies (¶ 248). In this respect, Respondent argued that because Claimant's Foreign Investment Application did not comply with Respondent's investment policies the Foreign Investment Application was invalid and the No-objection Letter issued in response to Claimant's application was void (¶ 308).

## 6.3. Tribunal's analysis

The Tribunal found that Respondent's No-objection Letter was prima facie evidence that Claimant's investment was validly admitted (¶ 513) and the burden of proof to establish the investment was not admitted rested with Respondent (¶ 514).

Respondent failed to provide sufficient evidence that, although Claimant's investment initially admitted through the No-objection Letter, that admission was rendered ineffective by Claimant's false or misleading Foreign Investment Application (¶ 515).

This conclusion primarily came down to the fact that Respondent was not able to establish that the requirement for Claimant to disclose the BIT Intention and BIT Reason in its Foreign Investment Application was mandatory and that Claimant's failure to do so resulted in the non-admission of the investment (¶ 517). Further, the Tribunal could not associate the failure by Claimant to disclose the BIT Intention and BIT Reason in its Foreign Investment Application to a concern of national interest especially considering Respondent was aware of the Treaty and Claimant's highly-publicised intention to challenge Respondent's plain packaging measures (¶ 518).

Accordingly, the Tribunal held that Claimant's investment was admitted for the purpose of Article 1(e) of the Treaty (¶ 523).

**7. *Whether Claimant’s claim relates to a pre-existing dispute that falls outside the Tribunal’s jurisdiction or otherwise constitutes an abuse of right***

The Parties disagreed about whether Claimant’s claim fell outside the scope of Article 10 of the Treaty because it related to a dispute which pre-dated the making of the investment (the *Ratione Temporis* Argument) and/ or whether Claimant’s claim amounted to an abuse of right because Claimant restructured its investment to gain Treaty protection over a pre-existing or reasonably foreseeable dispute (the “Abuse of Right Argument”) (¶ 351). The Parties made broadly two sets of submissions in relation to the *Ratione Temporis* argument, firstly, on the application of Article 10 of the Treaty to existing disputes, and secondly, on the legal test for establishing the existence of a “dispute”.

**7.1. *The application of article 10 of the Treaty to existing disputes***

Article 10 provides

A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the territory of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may have been agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force (¶ 353).

**7.1.1. *Respondent’s position***

Respondent considered that under Article 10 the other contracting party does not consent to the submission of claims to arbitration where the dispute that is invoked predates the making of the investment (¶ 354). Respondent invoked Article 31(1) of the *Vienna Convention on the Law of Treaties* (‘VCLT’) to support this interpretation. According to Respondent, the ordinary meaning of the phrase “dispute... concerning an investment” suggests that there must first be an investment before there can be a ‘dispute’. The object and purpose of the Treaty, it was argued, does not support an interpretation of Article 10 that would allow an international company to first engage in a pre-existing dispute, and then to arbitrate this dispute once ownership of its subsidiary is transferred to a company incorporated in the other contracting state (¶ 355).

Respondent found contextual support in the text of the Treaty, in Articles 6(1) and 2(1) for its argument that Article 10 does not permit the arbitration of a dispute where the investment post-dates the alleged deprivation (¶ 356). Respondent then turned to case law to support its interpretation.

Respondent relied on *Amco v. Indonesia* to argue that pre-existing disputes can only be submitted to arbitration if the parties to the treaty are “considered as having reasonably and legitimately envisaged” this result. Respondent also argued the *Lao Holdings v. Lao* tribunal’s findings in relation to forum shopping - that the relevant treaty is not to be viewed “as intending to provide legal weapons to investors for the purpose of re-engaging in a pre-existing legal dispute...” should apply to the present case (¶ 357).



Respondent did not consider there to be a presumption, let alone an absolute rule that in cases of doubt, jurisdiction in an international agreement embraces *all* disputes. Rather, what matters in any given case is the interpretation of the specific wording of the treaty in light of “well established principles reflected in article 28 and 31 of the VCLT.” In relation to specific cases relied on by Claimant, Respondent considered *Georgia v. Russia* was not relevant and distinguished *Mavrommatis Palestine Concessions* on the basis of the particular characteristics of the treaty there in question (¶ 358). Respondent also distinguished *Vivendi v. Argentina (II)*, both relied on by Claimant, on the basis that neither case considered the issue of pre-existing disputes in an analogous factual context (¶ 359).

Finally, Respondent discounted the relevance of the International Law Commission’s *Draft Articles on the Law of Treaties with Commentaries* cited by Claimant to suggest that the term “disputes”, without further qualification, covers all disputes existing after the entry into force of the agreement. Respondent argued the Commentary clearly distinguishes between treaties establishing dispute resolution fora whose jurisdiction extends to all disputes existing after the entry into force of the agreement, and treaties containing a jurisdictional clause that is attached to substantive treaty provisions and to which “the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause.” Respondent argued Claimant mischaracterised the Treaty as falling into the former category (¶ 360).

#### 7.1.2. Claimant’s position

Claimant argued it was not necessary to examine whether Article 10 extends the Tribunal’s jurisdiction to considering pre-existing disputes, since both Parties agreed that the dispute existed when Claimant initiated arbitration on 21 November 2011, after the entry into force of the Treaty. Second, the jurisdiction of the Tribunal *ratione temporis* is limited by the date on which the dispute ended, rather than commenced (¶ 361).

Claimant referred to the *travaux préparatoires* of the VCLT to support the argument that *continuing* disputes, insofar as they continue to exist at the time of a Notice of Arbitration, are contemplated under Article 10, and use of the word “disputes” without qualifications is understood as accepting jurisdiction with respect to all disputes *existing* after the entry into force of the agreement (¶ 361). Claimant submitted that nothing in the text of Article 10 or of other provisions excludes pre-existing disputes from the scope of dispute settlement. Neither Article 2 nor Article 6 implies any limit on the temporal scope of Article 10 (¶ 362).

Claimant argued that Respondent’s reliance on analysis of legal principles in *Lao Holdings v. Lao* was misleading because the relevant BIT, unlike in the present case, imposed an explicit temporal limitation on the jurisdictional scope of the treaty. Respondent made the same point about *Luccetti v. Peru* (¶ 363). Claimant submitted that the PCIJ established a presumption in *Mavrommatis Palestine Concessions* that absent a specific provision to the contrary, a dispute settlement clause extends to all qualifying disputes *existing* at the time the clause is invoked, regardless of when the dispute arose. Claimant cited academic commentaries in support, as well as the ICJ decision in *Georgia v. Russia* (¶ 364). Claimant submitted the findings in *Chevron v. Ecuador (I)* also confirm the broad interpretation of the term “disputes.” Claimant cited as further authority the observations of the tribunal in *Vivendi v. Argentina (II)* that the relevant date to determine the existence of the dispute is the date on which the proceedings are deemed to have been instituted (¶ 365).

Absent specific language to the contrary, Claimant argued an agreement that refers “disputes” to arbitration covers any disputes that exist when the arbitration clause is invoked, including those that exist after the Treaty becomes applicable through a change in the nationality of the investor. Claimant referred to ILC *Draft Articles on the Law of Treaties with Commentaries* in support (¶ 366).

## 7.2. Legal test for establishing the existence of a dispute

### 7.2.1. Respondent’s position

Respondent submitted the legal test for establishing whether a dispute has arisen is that established by the PCIJ in *Mavrommatis Palestine Concessions* and subsequently affirmed by the ICJ in *Georgia v. Russia*. Respondent submitted the legal test is “a disagreement on a point of law or fact; a conflict of legal views or of interests between two persons. In *Georgia v. Russia* the ICJ stated further that the existence of a dispute in a given case is a matter for objective determination and that “[i]t must be shown that the claim of one party is positively opposed by the other”. Respondent referred to *Murphy v. Ecuador* and *Teinver v. Argentina* in which the tribunals reiterated the standard (¶ 368).

Respondent disagreed with Claimant’s contention, in light of the *Mavrommatis* test, that in order for there to be a dispute, the challenged measure must have passed into law. Respondent submitted that the possibility that a government may withdraw a measure before the legislature enacts it, or that the legislature might reject it, are alternative means by which a dispute might be resolved, and not grounds to deny the existence of the dispute. Respondent distinguished *Lao Holdings v. Lao* to the facts of the present case. No dispute was found in *Lao* because in that case “the final position of the government was not certain,” so the parties could not be said to be in dispute (¶ 369).

Respondent disagreed with Claimant’s position that the actions taken by both Parties prior to the enactment of the plain packaging legislation were solely preparatory acts and conduct that cannot give rise to a legal dispute (¶ 372). Respondent relied on findings by the tribunal in *Achmea v. Slovak Republic (II)* that “[i]t does not follow from the fact that international responsibility can arise only after an internationally wrongful act has occurred, that an internationally wrongful act is required for a legal dispute to exist.” (¶ 373) Rather, in that case the tribunal found that a dispute existed when “the two Parties h[e]ld radically opposing views” on the proper interpretation of the treaty provision (¶ 374).

Respondent submitted that the manner in which Claimant formulated its claims, i.e. that the claims only arise from the enactment of the legislation, was relevant but not decisive. This, in Respondent’s view, conflated the formulation of a claim with the question of whether a dispute existed. The correct test in Respondent’s view was that set by the ICJ in the *Fisheries Jurisdiction Case*, namely that it is for the tribunal to determine the real dispute that has been submitted to it. In support of its assertion that the dispute prior to the enactment of the legislation was the same dispute then before the tribunal, Respondent pointed to the finding in *Luccetti v. Peru* that the “critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter.” (¶¶ 375-376)

### 7.2.2. Claimant's position

Claimant disagreed with Respondent's position that the PCIJ in *Mavrommatis Palestine Concessions* endorsed the general principle that a mere conflict of views between two parties about a measure gives rise to a dispute even if that measure had not been adopted. Claimant distinguished the case as not having decided the issue that was before the present tribunal – whether preparatory activity gives rise to a dispute. Claimant contended the correct interpretation of *Georgia v. Russia* was that the ICJ's analysis focused on the “specific crystallization” of the dispute necessary to invoke the ICJ's jurisdiction, and that such crystallization occurred only subsequent to the allegedly wrongful State conduct (¶ 379).

Claimant distinguished *Murphy v. Ecuador* on the basis that the position relied on by Respondent was that of the dissenting arbitrator, and in any event the conclusion of the dissenting opinion was that the dispute arose *after* the relevant measure. A similar conclusion was reached by the tribunal in *Teinver v. Argentina* (¶ 380).

Claimant's position was that the question before the present tribunal had been conclusively decided in international law. Claimant cited the decisions of the tribunals in *Mobil Corporation v. Venezuela* and *Lao Holdings v. Laos* in support, and pointed to Laos's failure to discharge its burden of proof in establishing that the dispute arose earlier than the claimant had alleged (¶ 381). Claimant also relied on *Teinver v. Argentina*, *RosInvestCo v. Russian Federation* and *RDC v. Guatemala* to further support its position that a measure must pass into law before it can form the subject of a legal dispute (¶ 382). Claimant emphasised the *Gremcitel* award.

Claimant relied on ICJ case *Rights of Passage Over Indian Territory*, which it argued established that a dispute cannot “arise until all its constituent elements ha[ve] come into existence.” Claimant referred to *Electricity Company of Sofia and Bulgaria* as supporting a similar proposition (¶ 383). Announcements of decisions to introduce specific legislation were in Claimant's view better characterised as preparatory acts. This is because such statements, in the words of the ICJ in *Gabcikovo-Nagymaros Project*, do not “‘predetermine the final decision to be taken’ on the issue”. Claimant pointed to the decisions in *CMS Gas Transmission Company v. Argentina* and *Pac Rim v. El Salvador*, and *Achmea v. the Slovak Republic (II)* in support. Claimant also quoted ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* in support of the distinction (¶¶ 384-385).

Claimant contended that if the Tribunal were to find that a dispute can arise on the basis of a threat to enact a law that will violate the Treaty, the tribunal must examine Claimant's pleadings to determine which acts or omissions claimant asserts breached the Treaty and forms the basis of its claims, in the present case, the enactment and enforcement of its plain packaging measures (¶ 386).

Finally, Claimant disagreed with Respondent's test for ascertaining whether two disputes are the same, and pointed to the “triple identity” test applied by previous investor state tribunals, that requires an examination of the cause of action, object, and parties to the two disputes. Claimant observed that applying the *Luccetti v. Peru* test, as suggested by Respondent, would lead to the same result as the triple identity test (¶ 388).

### 7.3. Evidence concerning the time when the Parties' dispute arose

In relation to evidence supporting their respective positions, the Parties' essential disagreement was twofold. Firstly, whether the representations of the Australian government could be considered sufficiently definite and precise to indicate the proposed measures were likely to be implemented and affect Claimant's rights; and secondly, whether Claimant's subsequent communications indicated that Claimant's understanding was that the measures were highly probable by January or February 2011 (¶¶ 389-399).

### 7.4. Tribunal's analysis - whether the Claimant's claim falls outside of the temporal scope of Article 10 of the Treaty

The Tribunal started by distinguishing between the *Ratione Temporis* Argument and the Abuse of Rights Argument. The Tribunal relied heavily on the *Gremcitel* tribunal's analysis in this regard, which found that even if a tribunal has jurisdiction *ratione temporis*, it may be precluded from exercising its jurisdiction if the acquisition is abusive (¶ 527). Again endorsing the approach in *Gremcitel*, the Tribunal found "whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred," (¶ 529) and "the critical date is when the State adopts the disputed measure." In this case, it was the date of enactment of the *Tobacco Plain Packaging Act 2011*, as before that moment Claimant's rights could not be affected (¶ 533). The Tribunal observed that the dispute normally follows the alleged breach and arises when an aggrieved investor "positively opposes" the measures adopted or any claim of the other party that derives from them (¶ 532). The Tribunal concluded that the requirements for its jurisdiction *ratione temporis* were met (¶ 534).

### 7.5. Abuse of Rights Argument

#### (a) Content of the abuse of rights doctrine

#### 7.5.1. Respondent's position

Respondent argued that the abuse of rights doctrine forbids Claimant from exercising its right in Article 10 of the Treaty (¶ 400). Respondent argued that the doctrine has been widely applied in national systems, the European Union legal order, and by international courts and tribunals including investment tribunals (¶ 401). The doctrine has been specifically applied in relation to corporate restructuring to achieve treaty protection. The two key factors to be taken into consideration, from the case law, are a) knowledge of the existing or foreseeable dispute and b) the timing and purpose of, or motivation for the corporate restructuring (¶ 402). The other relevant factors are the timing of the claim, the transparency of the corporate restructuring and whether the restructuring was followed by subsequent economic activity in the host state (¶ 403).

Respondent submitted the doctrine of abuse of rights is based on the principle of good faith, and whether a corporate restructuring amounts to an abuse of right depends on the facts and circumstances of the case and not any presumption of good faith in the claimant's favour (¶ 404). The foreseeability of the dispute and the motivation of the restructuring establish bad faith and an abuse of right where they result in a manipulation of the international system of investment arbitration and procure for the investor an unfair advantage in light of the

obligations assumed (¶ 405). Respondent referred to the tribunals in *Phoenix Action v. Czech Republic* and *Cementownia v. Turkey* in support. Respondent rejected Claimant's assertion that a State must establish bad faith or egregious conduct on an investor's part to make out an abuse of rights case and reiterated that investment disputes involving a corporate restructure turn on their facts (¶ 410).

#### 7.5.2. Claimant's position

Claimant considered that the scope and content of the abuse of rights doctrine is uncertain and exceptionally applied (¶ 411), and only comes into play if the tribunal has already determined it has jurisdiction over the dispute and a claimant has a right to arbitrate. Claimant referred to *Chevron v. Ecuador (I)* and *ConocoPhillips v. Venezuela* in support (¶ 412). Claimant argued a presumption exists in favour of a right to bring a bilateral investment treaty ("BIT") claim and Respondent must prove Claimant acted in a legally reprehensible way, referring to *Chevron v. Ecuador* for the presumption of good faith in abuse of rights cases and the proposition that it is for Respondent to prove abuse of right as a defence (¶¶ 413-414). Claimant submitted that for the Tribunal to uphold an abuse of right objection, the Tribunal must find Respondent has met the very high evidentiary burden and has proven bad faith. Claimant also referred to ICJ case *Tacna-Arica Question* in support. Claimant pointed out that abuse of rights objections have been rejected in all but four cases that involved egregious facts giving rise to bad faith, and sought to distinguish these cases on the facts (¶¶ 417-18).

Claimant asserted that the purpose of or motivation for a corporate restructure does not amount to bad faith even if a claimant could reasonably foresee a potential future dispute with the host State at the time (¶ 416).

#### (b) the "Foreseeability" criterion

#### 7.5.3. Respondent's position

Respondent asserted that the abuse of rights resides in the manipulation of corporate nationality at a time when the dispute is in existence or is foreseeable to a sufficient degree (¶ 420). Respondent submitted that a foreseeability test comes down to what was in the reasonable contemplation of the putative claimant (¶ 422), and that in an abuse of right objection context, tribunals expressly applied a foreseeability approach. Respondent referred to *Pac Rim v. El Salvador* and *Tidewater v. Venezuela* in support, and distinguished the failure of the abuse of right objection in *ConocoPhillips v. Venezuela* on the facts (¶¶ 423-425).

Respondent rejected Claimant's assertion that there must be foreseeability to a very high standard of probability. In Respondent's view, and citing the *Gremcitel* award, the tests in *Pac Rim v. El Salvador*, *Tidewater v. Venezuela* and *ConocoPhillips v. Venezuela* are analogous and establish a foreseeability standard that requires that a dispute must be in reasonable contemplation of the investor, or whether a claim is in prospect (¶ 426). Respondent rejected Claimant's assertion that the proximity of the dispute must have been near-immediate as inconsistent with the foreseeability standard in the cases, citing especially *Mobil Corporation v. Venezuela* (¶ 427). Respondent dismissed the relevance of *Autopista Concesionada de Venezuela v. Venezuela* and *RosInvestCo v. Russian Federation*. Finally, Respondent asserted that the critical date with respect to foreseeability is the date on which

restructuring occurred, referring in support to *Pac Rim v. El Salvador* and *ConocoPhillips v. Venezuela* (¶ 429).

#### 7.5.4. Claimant's position

Claimant rejected the temporal focus of Respondent's position, and reiterated that the critical point in establishing abuse of rights was evidence of bad faith (¶ 431). Claimant submitted there is no coherent - much less settled - principle of international law underlying Respondent's objection, and no consistent doctrine of foreseeability had emerged from the case law. Claimant further asserted that there cannot be a doctrine of abuse of rights based on restructuring of an investment when a dispute is foreseeable since such a test would be highly subjective and difficult to administer (¶ 434). Claimant rejected Respondent's interpretation of *Gremcitel* as a misinterpretation on the foreseeability point, and rejected Respondent's assertion that the cases it relied on employed a "foreseeability test" (¶¶ 435-438). To the extent that cases did consider foreseeability, tribunals asserted a very high standard of foreseeability (¶ 439). Finally, Claimant asserted that since the abuse of rights doctrine is based on the principle of good faith, the core question for an abuse of rights objection is always whether there was a *bona fide* investment (¶ 440).

#### (c) the motivation criterion

#### 7.5.5. Respondent's position

Respondent submitted that where the motivation for a corporate restructuring is to bring a specific preconceived BIT claim, this will be an abuse of right (¶ 441). Respondent explained that where there is a corporate restructuring in the knowledge of an actual or specific future dispute and a preconceived BIT claim is then brought, the investor then benefits from an unfair advantage. It is not the restructuring *per se* that is abusive, but that the investor has benefited from the inequality of position.

#### 7.5.6. Claimant's position

Claimant asserted that restructuring to secure BIT protection does not amount to bad faith, even if the claimant could reasonably foresee a potential future dispute (¶ 444). Claimant submitted that the findings in *Mobil Corporation v. Venezuela* and *ConocoPhillips v. Venezuela* supported its position: in both cases the tribunals found that even if the sole or predominant motivation for the restructuring is to gain access to investor-State arbitration that does not constitute an abuse of right (¶ 445).

#### (d) evidence of foreseeability of a dispute and of the claimant's intention to bring a claim

#### 7.5.7. Respondent's position

Claimant submitted that by 3 September 2010 and no later than January-February 2011, Claimant had crystallised an intention to bring a claim against Respondent under the BIT if and when the Government's decision to introduce the plain packaging measures was implemented. Respondent emphasised various pieces of evidence in support, in the nature of an extensive record of preparations for BIT litigation (¶ 449). Respondent also pointed to oral testimony from Claimant's witness, Mr Pellegrini, who agreed that he approved the acquisition in February 2011 for the purpose, amongst others, of placing Claimant in a

position where it could and would sue Australia were the legislation passed (¶ 452). Respondent asserted that the evidence established beyond doubt that Claimant had the intention to bring a claim as at the date of the foreign investment application in January 2011 (¶ 450). Respondent referred to Claimant's public statements and internal documents as evidence of its understanding that the government was determined to introduce the measure (¶ 451).

#### 7.5.8. *Claimant's position*

Claimant insisted that Respondent was unable to demonstrate that Claimant had the intention to sue Respondent either in September 2010 or January 2011, and the earliest time when it could be said that a dispute was foreseeable to a very high probability was late May/June 2011 (¶ 454). Claimant disputed Respondent's interpretation of the communications it had with its lawyers and stated that Claimant's lawyers were simply reviewing its options, which they had been doing for years (¶ 456). Claimant submitted it assumed in August 2010 the legislation would not pass parliament (¶ 457), and the dispute was not foreseeable at the time of the restructuring in June 2011 (¶ 459)

#### *(e) evidence of the Claimant's motivation for restructuring*

#### 7.5.9. *Respondent's position*

According to respondent, giving Claimant a vehicle to carry out the claim where none otherwise existed was a, or the, true reason for the restructuring. This was evident by the nature and volume of Revised Privilege Log entries from May 2010 onwards, from Mr Pellegrini's testimony, and the absence in the record of communications about any other reason for the restructuring (¶ 460). Respondent submitted that each of the purported business rationales for the restructuring besides the BIT strategy is inconsistent with the contemporaneous documents, the detailed and uncontradicted evidence of Respondent's expert, Professor Lys, and the oral testimony of Mr Pellegrini (¶ 462). Respondent also questioned the reliability of Mr Pellegrini's evidence as he was not a witness who could speak to any of the relevant issues in anything but vague terms based on second or third hand versions, and there were inconsistencies in his testimony (¶ 465).

#### 7.5.10. *Claimant's position*

According to Claimant, the restructuring of the Australian subsidiaries took place within the context of a PMI Group restructuring in progress since 2005, which was done with the purpose of "rationalising" or "streamlining" the corporate structure (¶ 466), and would achieve other benefits such as minimization of tax liability, alignment of ownership with control and optimizing cash flow, as well as added BIT protections (¶ 467).

#### 7.5.11. *Tribunal's analysis*

The Tribunal found that it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith (¶ 539). The Tribunal quoted from the awards in *Tidewater v. Venezuela*, *Mobil Corporation v. Venezuela*, *Gremcitel v. Peru*, and *Aguas del Tunari SA v. Bolivia* to support its finding that the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate (¶¶ 540-544). The Tribunal

recognised that, at the same time, it may amount to an abuse of process to restructure an investment to obtain BIT benefits in respect of a foreseeable dispute (¶ 545), quoting again the cases in support (¶¶ 546 -553).

The Tribunal found that despite the variations in formulations used in the decisions quoted, the Tribunal considered the legal tests on abuse of right largely analogous, revolving around the concept of foreseeability, with a standard resting between the two extremes of “a very high probability and not merely a possible controversy”. 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 (¶ 554).

The Tribunal went on to juxtapose developments occurring at the corporate level within the PMI Group of companies and events arising at the political level within the Australian Government (¶¶ 555-565).

Based on the evidence on the record the Tribunal concluded that it was clear the dispute contemplated was about rights and not merely about policy. By 29 April 2010, when Prime Minister Rudd and Health Minister Roxon unequivocally announced the Government’s intention to introduce the plain packaging measures, there was no uncertainty about the Government’s intentions at that point. Accordingly, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted, which would trigger a dispute (¶ 566).

The Tribunal made further observations that the length of time it takes to legislate is not a decisive factor, due to the characteristics of a democratic system. This does not make the outcome any less foreseeable (¶ 567). The Tribunal also noted that the Australian Government never withdrew from its position, announced in April 2010, despite a change of political leaders and a change to a minority government. What became uncertain, the Tribunal found, was not whether the Government intended to introduce plain packaging, but whether the Government could maintain a majority or would be replaced. If this were treated as a basis for saying that there was no reasonable prospect of a dispute, it would create one rule for majority governments and another for minority governments, which would create difficulties for States whose electoral processes can result in minority governments (¶ 568). The Tribunal concluded that at the time of restructuring, the dispute that materialised subsequently was foreseeable to Claimant (¶ 569).

In the Tribunal’s view, it would not normally be an abuse of right to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently of the possibility of bringing such a claim (¶ 570). Based on an evaluation of the evidence on the record, the Tribunal was not persuaded that tax or other business reasons were determinative factors for Claimant’s restructuring. In particular, the Tribunal noted Claimant did not present in the proceedings any witness who was familiar with the rationale of the restructuring. Nor was the Tribunal presented with contemporaneous corporate memoranda or other internal correspondence sufficiently explaining the business case for the restructuring in detail (¶ 582). The Tribunal was inclined to place limited weight on Mr Pellegrini’s testimony, and found Professor Lys’ report did carry weight, especially as it remained unrebutted and Professor Lys was not called for cross-examination (¶ 583). The Tribunal concluded that Claimant was unable to prove that tax or other business reasons were determinative for the restructuring, and found that the main and determinative, if not the sole, reason for the restructuring was the intention to bring a claim under the Treaty (¶ 584).



The Tribunal concluded the initiation of the arbitration constituted an abuse of rights, that the claims raised in the arbitration were inadmissible and the Tribunal was precluded from exercising jurisdiction over the dispute (¶ 588).

**8. *Whether the Parties have established their burden of proof with respect to the preliminary objections***

The Tribunal found no general disagreement between the Parties on burden of proof. Specifically, it is for Claimant to allege and prove facts establishing the conditions for jurisdiction under the Treaty; for Respondent to allege and prove the facts on which its objections are based; and, to the extent that Respondent has established a *prima facie* case, for Claimant to rebut this evidence (¶ 495).

**9. *Conclusion***

The Tribunal found that it had no choice but to conclude the arbitration was an abuse of rights as Claimant's corporate restructure was undertaken for the principal, if not the sole, purpose of gaining protection under the Treaty when a dispute was not only reasonably foreseeable, but actually foreseen by Claimant. (¶¶ 585-588) Accordingly, the Tribunal deemed the claims raised in the arbitration inadmissible and consequently, the claims were beyond the jurisdiction of the Tribunal (¶ 585-588).

The Tribunal will hear the parties on costs and then fix and allocate the costs of the arbitration in a final award (¶ 590).