

## Tobacco Packaging Arbitration and the State's Ability to Legislate

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### INTRODUCTION

In February 2010, the cigarette manufacturer, Philip Morris International (“PMI”) filed a request for arbitration under the International Center for the Settlement of Investment Disputes (“ICSID”) against Uruguay, based on the Switzerland-Uruguay Bilateral Investment Treaty (“BIT”). PMI claimed that Uruguay’s legislation, which “prohibits different packaging or presentations for cigarettes sold under a given brand,” deprives the company of its intellectual property rights.<sup>1</sup> These regulations restrict the use of tobacco trademarks by allowing the brand names to be written in a standard format only.<sup>2</sup> More recently, in November 2011, the Asian subsidiary of PMI, Philip Morris Asia Limited (“PM Asia”), filed an arbitration claim against the Australian government, pursuant to the Hong Kong-Australia BIT, in response to Australia’s new legislation that further restricts the display of the brand names on cigarette cartons by mandating “plain packaging”—a complete prohibition on the use of any branding on cigarette covers.<sup>3</sup>

Both PMI and PM Asia asked for the suspension and “cessation”<sup>4</sup> and “discontinuance”<sup>5</sup> of Uruguay and Australia’s respective regulations. The complaints requested injunctive relief, the granting of which would be an extraordinary deviation from pecuniary damages that have thus far been the primary form of remedy offered by investment arbitration tribunals.<sup>6</sup> Broadening the scope of remedies to include non-pecuniary damages, particularly those that can impede the passage of national legislation, will have important ramifications for the effect of BITs on state sovereignty. On the one

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1. Philip Morris v. Uru., ICSID Case No. ARB/10/7, Request for Arbitration, ¶ 3 (Feb. 19, 2010) [hereinafter Request for Arbitration Against Uruguay].

2. *Id.* ¶ 21.

3. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case. No. 2012-12, Written Notification of Claim (Jun. 27, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/ita0664.pdf> [hereinafter Written Notification of Claim].

4. Request for Arbitration Against Uruguay, *supra* note 1, ¶ 88.

5. Written Notification of Claim, *supra* note 3, ¶ 11.

6. CAMPBELL McLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION SUBSTANTIVE PRINCIPLES 341 (2007).

hand, this expansion will allow states more flexibility in choosing how to comply with arbitral decisions, as they are no longer restricted to simply paying pecuniary damages. On the other, allowing injunctive relief gives foreign private, and often corporate, actors unprecedented authority over states' traditional lawmaking powers by allowing them to move to invalidate laws that they are unhappy with, even if the laws happen to be in the greater public interest.

This recent development piece proceeds in three parts. Part I outlines the Uruguayan and Australian investment treaty arbitration cases where claimant investors have asked for the suspension of cigarette packaging laws. Part II analyzes the authority of arbitral tribunals to grant injunctive relief resulting in overturning domestic laws and its implications on states' ability to legislate. Finally, Part III discusses the future of plain packaging arbitrations in light of the injunctive demands that have been made by cigarette manufacturers.

## I. URUGUAYAN AND AUSTRALIAN INVESTMENT TREATY ARBITRATION CASES

From 2008 to 2009, the Uruguayan Ministry of Public Health passed a series of ordinances<sup>7</sup> and the President of Uruguay issued a decree<sup>8</sup> constraining what is displayed on cigarette packets. On September 1, 2009, the Uruguayan Ministry of Public Health issued an ordinance that restricted "the typology, text, images and pictograms to be displayed on packs of tobacco products."<sup>9</sup> Under this ordinance, certain pictograms displaying the ill-health consequences of smoking must be printed on eighty percent of all packets of cigarettes; one of the two sides of the cigarette packet must, on its entire surface, display text specifying that the product contains nicotine, tar and carbon monoxide; and, crucially for the purposes of the ensuing litigation, "[e]ach brand of tobacco shall possess a single form of presentation."<sup>10</sup> This "single presentation" requirement effectively means that each cigarette producer can have only one product on the Uruguayan market, since different varieties of the same brand, for example Marlboro Red and Marlboro Gold, would no longer be permitted under the requirement.<sup>11</sup>

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7. Ord. No. 514, Aug. 18, 2008, Ministry of Public Health (Uru.), *available at* <http://www.tobaccocontrol.org/files/live/Uruguay/Uruguay%20-%20Ordinance%20No.%20514.pdf>; Ord. No. 466, Sept. 1, 2009, Ministry of Public Health (Uru.), *available at* <http://www.tobaccocontrol.org/files/live/Uruguay/Uruguay%20-%20Ordinance%20No.%20466.pdf> [hereinafter Ordinance 466].

8. Presidential Decree AT 101372-TRA-SE, Jun. 5, 2009, Ministry of Public Health (Uru.), *available at* [http://www.tobaccocontrol.org/files/live/Uruguay/Uruguay%20-%20Decree%20No.%20287\\_009.pdf](http://www.tobaccocontrol.org/files/live/Uruguay/Uruguay%20-%20Decree%20No.%20287_009.pdf).

9. Ordinance 466, *supra* note 7.

10. *Id.*

11. Request for Arbitration Against Uruguay, *supra* note 1, ¶ 3.

After these ordinances entered into force in February 2010, PMI, along with its corporate subsidiaries and owners, filed a request for arbitration under ICSID pursuant to the Switzerland-Uruguay BIT. PMI's Uruguayan subsidiary, Abal Hermanos ("Abal"), alleged, *inter alia*, that the requirement that each cigarette brand have a "single presentation" interfered with the use of its trademark by prohibiting "different packaging or presentations for cigarettes sold under a given brand,"<sup>12</sup> thereby depriving it of its intellectual property rights.<sup>13</sup> In addition to compensation for lost revenue and profits, PMI demanded injunctive relief.<sup>14</sup> The company asked for the suspension of certain portions of the ordinance and decree, including the single presentation requirement.<sup>15</sup>

The arbitral tribunal for this case was constituted on March 15, 2011. It has since issued a procedural order concerning confidentiality, and both parties have filed briefs on the question of jurisdiction.<sup>16</sup>

Although the Uruguay case generated some press, cigarette packaging requirements truly came into the media limelight when Australia passed its own plain packaging legislation.<sup>17</sup> The Tobacco Plain Packaging Act ("TPPA") was introduced in the Australian parliament on July 6, 2011 and was eventually passed on November 21, 2011.<sup>18</sup> All tobacco products that have been sold in the country since December 1, 2012 must comply with the latest plain packaging and health warnings requirements laid out by the TPPA.<sup>19</sup> Australia's legislation resembles Uruguay's in that it also devotes seventy-five percent of the front part and ninety percent of the back of the cigarette packet to graphic health warnings.<sup>20</sup> Australia's legislation goes even further than Uruguay's ordinances that still permit companies limited use of their branding by prohibiting altogether trademarks and logos on retail packaging other than the company name, which can only appear once on the outer surface of the package in the same orientation as the health

12. *Id.*

13. *Id.* ¶ 6.

14. *Id.* ¶ 94.

15. *Id.* ¶ 92.

16. Procedural Details, Philip Morris v. Uru., Case No. ARB/10/7, ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1000&actionVal=viewCase> (last visited, Jan. 27, 2013).

17. See, e.g., Alison Rourke, *Australia Passes Plain-Packaging Cigarette Law*, THE GUARDIAN, Nov. 10, 2011, available at <http://www.guardian.co.uk/world/2011/nov/10/australia-plain-packaging-cigarette-law>; Victoria Thieberger, *Philip Morris to Fight Australia Plain Packaging Laws*, REUTERS, (Dec. 20, 2011, 4:56 AM), <http://www.reuters.com/article/2011/12/20/us-philip-morris-australia-idUSTRE7BJ08K20111220>.

18. Press Release, Australian Government Department of Health and Ageing, Parliament Passes World First Plain Packaging of Tobacco Legislation (Nov. 21, 2011), available at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr11-nr-nr243.htm>.

19. *Id.*

20. *Tobacco, Health Warnings*, Australian Government Department of Health and Ageing, <http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-warn> (last visited, Jan. 27, 2013).

warning at a specified position on the pack or carton.<sup>21</sup> The manufacturer's details must appear on one side of the pack, in a specific font, size, and position.<sup>22</sup> In addition to this, the packaging cannot display any colors except "drab dark brown," or any decorations, and must meet specific physical requirements concerning its size, dimensions, and material makeup.<sup>23</sup>

PMI reacted almost immediately after the introduction of the bill to the Parliament by filing a notice of claim on June 27, 2011, warning that it would submit an investment dispute pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") and the Australia-Hong Kong BIT, since Australia's proposed legislation would "effectively prohibit Philip Morris from using [its] intellectual property."<sup>24</sup> The company claimed that without its trademarks and logos, its products would not be "readily distinguishable to the consumers from the products of its competitors."<sup>25</sup>

On the very day that the legislation was passed by the Australian parliament, PMI, true to its claim, filed a notice of arbitration.<sup>26</sup> This notice described the effect of the legislation as "extraordinary and severe" on PM Asia's investments as it eliminated the company's intellectual property and associated goodwill, fundamentally altering it from "a branded to a commoditized business."<sup>27</sup> It averred that the legislation would undermine its stated purpose since the "market likely will be penetrated by even cheaper illicit tobacco products," thereby increasing smoking prevalence.<sup>28</sup> It further contested that there is no "credible evidence that plain packaging will increase the effectiveness of health warnings or improve consumers' understanding of the health effects of smoking"<sup>29</sup> and that other proven and effective measures were available to Australia that would not interfere with the company's investments.<sup>30</sup> PM Asia alleged that Australia had violated its obligations under the Hong Kong-Australia BIT relating to expropriation, fair and equitable treatment, unreasonable impairment, full protection and security, and the umbrella clause.<sup>31</sup> Just like in the claim against Uruguay, PMI sought the abrogation of the plain packaging legislation, in addition to compensation for its costs and losses.<sup>32</sup> In the absence of suspension of the

21. *Tobacco Plain Packaging Act 2011* (Cth) ch 2, pt 2, div 1, ¶¶ 20–21 (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/num\\_act/tppa2011180/](http://www.austlii.edu.au/au/legis/cth/num_act/tppa2011180/) [hereinafter TPPA].

22. Written Notification of Claim, *supra* note 3, ¶ 15(e).

23. TPPA, *supra* note 21, ch 2, pt 2, div 1, ¶¶ 18–19.

24. Written Notification of Claim, *supra* note 3, ¶ 10(a).

25. *Id.*

26. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case. No. 2012-12, Notice of Arbitration (Nov. 21, 2011) available at <http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf>.

27. *Id.* ¶ 6.1.

28. *Id.* ¶ 6.3.

29. *Id.* ¶ 6.4.

30. *Id.* ¶ 6.5.

31. *Id.* ¶ 7.2.

32. *Id.* ¶ 8.2.

legislation, Philip Morris estimated that the compensatory damages would amount to “the order of billions of Australian dollars.”<sup>33</sup>

Australia submitted its response a month after PM Asia filed its notice for arbitration.<sup>34</sup> Australia contested the allegation that its actions amounted to expropriation, arguing that its measures were simply “non-discriminatory regulatory actions of general application . . . to achieve the most fundamental public welfare objective—the protection of public health.”<sup>35</sup> With respect to remedies, however, Australia merely asked that the tribunal dismiss all the claims, and did not respond specifically to the claim of injunctive relief by the claimant.

The tribunal for this case was formed on May 15, 2012, under the Permanent Court of Arbitration (“PCA”)<sup>36</sup> with the place of arbitration at Singapore, as requested by PM Asia.<sup>37</sup> The tribunal has set a timetable for 2013, according to which both parties have to submit their Statements of Claim and Defense together with all the evidence. The tribunal aims to hold a hearing on bifurcation of the arbitration, as requested by Australia, in September 2013.<sup>38</sup> It will then create a timetable for the rest of the proceedings.<sup>39</sup>

In both Uruguay and Australia, Philip Morris, along with other cigarette companies, has also initiated domestic proceedings. In Uruguay, PMI commenced administrative proceedings alleging that the ordinance exceeds the law it implements, making it manifestly illegal, and that the Ministry of Public Health does not have the requisite jurisdiction to create an entirely new single presentation requirement.<sup>40</sup> PMI claimed that such a requirement can only be created by a formal law enacted by the Uruguayan parliament.<sup>41</sup> The company also filed a request for an injunction invoking its constitutional rights, although this suit was denied on procedural grounds.<sup>42</sup>

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33. *Id.* ¶ 8.3.

34. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case. No. 2012-12, Australia’s Response to Notice of Arbitration (Dec. 21, 2011) available at <http://www.italaw.com/sites/default/files/case-documents/ita0666.pdf>.

35. *Id.* ¶ 46.

36. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case. No. 2012-12, Procedural Order No. 1, ¶ 3.3 (June 7, 2012) available at [http://www.italaw.com/sites/default/files/case-documents/italaw1212\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw1212_0.pdf).

37. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case. No. 2012-12, Procedural Order No. 3, ¶ 41 (Oct. 26, 2012) available at <http://www.italaw.com/sites/default/files/case-documents/italaw1214.pdf> [hereinafter Procedural Order 3].

38. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case. No. 2012-12, Procedural Order No. 4, ¶ 3 (Oct. 26, 2012) available at <http://www.italaw.com/sites/default/files/case-documents/italaw1215.pdf>.

39. *Id.*

40. Request for Arbitration Against Uruguay, *supra* note 1, ¶ 31.

41. *Id.*

42. *Id.* ¶ 30.

In Australia, leading tobacco manufacturers challenged the constitutionality of the plain packaging law in domestic courts,<sup>43</sup> claiming that the TPPA “would affect an acquisition of their property on other than just terms contrary to the guarantee provided by . . . the Constitution.”<sup>44</sup> In August 2012, the High Court of Australia upheld the TPPA, finding that it is “not a law with respect to the *acquisition* of property” (emphasis in original) since merely mandating the display of warnings or restricting the ability to package as the company would wish does not confer to the government a proprietary interest in the packaging or the company’s trademark.<sup>45</sup> The decision did not grant a right to appeal.<sup>46</sup>

Hence, at the moment the only route that remains open for Philip Morris, as well as others tobacco companies, is the international one.<sup>47</sup>

## II. SUSPENSION OF LEGISLATION AS AN INJUNCTIVE REMEDY

There is some disagreement over whether arbitral tribunals have the requisite authority to grant remedies other than pecuniary damages at all. In its complaint against Uruguay, PMI claimed “[i]t is well-established in international law that restitution is the primary remedy for an internationally wrongful act committed by a State,” citing Permanent Court of Interna-

43. *Australia Cigarette Plain Packaging Law Upheld By Court*, BBC NEWS, (Aug. 14, 2012, 9:56 PM), <http://www.bbc.co.uk/news/business-19264245>.

44. *JT International SA v. Austl.* (Unreported, High Court, Aug. 15, 2012) (Austl.) available at <http://www.italaw.com/sites/default/files/case-documents/italaw1103.pdf> (hereinafter Australian High Court Decision).

45. *Id.*

46. *High Court Rejects Plain Packaging Challenge*, ABC NEWS, (Aug. 15, 2012, 3:39 PM), <http://www.abc.net.au/news/2012-08-15/high-court-rules-in-favour-of—plain-packaging-laws/4199768>.

47. It should be noted that the Australian legislation has also sparked a number of trade cases. Honduras has requested a WTO panel on Australia’s measures concerning plain packaging requirements applicable to tobacco products and packaging, arguing that these provisions are inconsistent with Australia’s obligations under the Technical Barriers to Trade (“TBT”) and Trade-related Aspects of Intellectual Property Rights (“TRIPS”) Agreements, and cannot be justified as necessary to protect human health. Press Release, World Trade Organization, Honduras Requests Panel on Australia’s Tobacco Measures (Nov. 19, 2012), available at [http://www.wto.org/english/news\\_e/news12\\_e/dsb\\_19nov12\\_e.htm](http://www.wto.org/english/news_e/news12_e/dsb_19nov12_e.htm). Nicaragua and Zimbabwe have expressed similar concerns, and Ukraine and the Dominican Republic have already submitted their own requests for the establishment of a WTO panel to hear the matter. *Id.* Commentators have posited that the substantive violations alleged by complainant countries, particularly under TRIPS, hold some water. See Lukasz Gruszczynski, *The WHO Framework Convention on Tobacco Control as an International Standard under the TBT Agreement?*, 9 TRANSNAT’L DISP. MGMT. 10–11 (2012) (discussing the uncertainty revolving around whether Australia’s plain packaging laws would be considered a “standard” for TBT purposes); Alberto Alemanno & Enrico Bonadio, *Do You Mind My Smoking? Plain Packaging of Cigarettes Under the TRIPS Agreement*, 10 JOHN MARSHALL REV. INTELL. PROP. L. 450, 472–74 (2011) (arguing that Article 8(1) of TRIPS, in particular, may be susceptible to violation by plain packaging requirements since it may be difficult for the state to demonstrate a causal link between the measure and protection of a public health interest and that plain packaging was the least restrictive means available with respect to infringing intellectual property rights); Ben McGrady, *TRIPS and Trademarks: the Case of Tobacco*, 3 WORLD TRADE REV. 53, 73–79 (2004) (discussing the difficulties of meeting the requirements set out by Article 8(1) TRIPS and positing that even though Article 20 TRIPS probably does not grant a right to use a trademark, it is difficult to interpret and poorly worded, making the eventual outcome uncertain).

tional Justice jurisprudence.<sup>48</sup> PMI also cited the International Law Commission's Article 35 on state responsibility, according to which the State is under an obligation to provide restitution unless it is materially impossible and does not involve a disproportionate burden compared to compensation.<sup>49</sup> PMI then declared that "[i]t is generally accepted that an ICSID tribunal . . . has the power to order . . . non-pecuniary remedies, including specific performance and restitution."<sup>50</sup>

Commentators have also posited that ICSID tribunals have the ability to order non-pecuniary relief, even though Article 54(1) of the ICSID Convention only discusses enforcement of pecuniary obligations.<sup>51</sup> According to Schreuer, the *travaux préparatoires*, in this case the deliberations during the drafting of the Convention, indicate that "the restriction in Article 54 to pecuniary obligations was based on doubts concerning the feasibility of an enforcement of non pecuniary obligations and not on a desire to prohibit tribunals from imposing such obligations."<sup>52</sup> Therefore, tribunals have no prohibitions *per se* on their authority to order injunctive relief, even if it is practically unenforceable.

Some ICSID tribunals have expressed that they are able to order injunctive relief.<sup>53</sup> An example is the ICSID case of *Enron v. Argentine Republic*, where the tribunal addressed Argentina's objection that the tribunal lacked the power to grant injunctive relief under the Convention.<sup>54</sup> Argentina had argued that the tribunal could only issue a declaratory statement on whether there had been an expropriation but could not impede the expropriation itself that "falls exclusively within the ambit of State sovereignty."<sup>55</sup> Citing previous ICSID cases, as well as other international law cases, the tribunal decided that it had the power to order injunctive relief.<sup>56</sup> It relied specifically on language in the famous *Rainbow Warrior* arbitration,<sup>57</sup> which held

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48. Request for Arbitration Against Uruguay, *supra* note 1, ¶ 89.

49. *Id.* ¶ 90.

50. *Id.* ¶ 91.

51. Article 54(1) provides

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

ICSID Convention, Regulations and Rules (Apr. 2006).

52. Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT'L 325, 325 (2004).

53. *See, e.g.*, Goetz v. Burundi, Sentence, ICSID Case No. ARB/95/3, Feb. 10, 1999; Enron Corp. v. Argentina, Decision on Jurisdiction, Jan. 14, 2004, ICSID Case No. ARB/01/3; Micula v. Romania, Decision on Jurisdiction and Admissibility; ICSID Case No. ARB/05/20, Sept. 24, 2008.

54. Enron Corp. v. Argentina, *supra* note 53.

55. *Id.* ¶ 76.

56. *Id.* ¶¶ 77–81.

57. Note that *Rainbow Warrior* was not an investment-related arbitration. The case involved a dispute between New Zealand and France over the sinking by French foreign intelligence services of a Greenpeace ship called Rainbow Warrior that was docked in New Zealand. *Rainbow Warrior* (New Zealand v. France), 20 R.I.A.A. 217 (U.N. Secretary-General 1990).

The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force.<sup>58</sup>

As the *Enron* case demonstrates, ICSID tribunals have at least asserted that they have the power to grant injunctive relief.

However, this remedy has not been used frequently.<sup>59</sup> One of the few notable examples where injunctive relief was arguably rendered by an ICSID tribunal was the case of *Goetz v. Burundi*, where the tribunal offered Burundi the option between paying compensation agreed on by the parties or determined by the court if no agreement could be reached, or abrogating the order that had resulted in the claimant's losses by causing the deprivation of its mining license.<sup>60</sup> According to the tribunal, however, the choice rested with the sovereign powers of the Burundian government.<sup>61</sup> Based on this decision, the parties reached an agreement whereby Burundi agreed to pay the claimant partial compensation and reinstate its license, but did not fully abrogate the order.<sup>62</sup>

Although ICSID tribunals seem to have offered injunctive relief in some cases, PM Asia's arbitration against Australia is governed by UNCITRAL,<sup>63</sup> and, hence, a brief discussion of the relevant jurisprudence is warranted here. Neither the UNCITRAL rules<sup>64</sup> nor the Hong Kong-Australia BIT<sup>65</sup> explicitly contemplate or prohibit awarding non-pecuniary damages. Yet, as mentioned above, in several ad-hoc international arbitration cases, such as *Rainbow Warrior*, arbitral tribunals have awarded non-pecuniary damages, including injunctive relief. Non-pecuniary damages have also been awarded in investor-state arbitration cases specifically. One of the most prominent examples of this is *Texaco v. Libya*, where the tribunal decided that the Libyan government would be legally bound to perform certain contracts that it had previously established with the claimant.<sup>66</sup> More recently, in a 2004 arbitration proceeding under UNCITRAL brought by the Occidental Explo-

58. *Enron Corp. v. Argentina*, *supra* note 53, ¶ 79 (quoting *Rainbow Warrior* (New Zealand v. France), 20 R.I.A.A. 217, 270 (U.N. Secretary-General 1990)).

59. *See, e.g., Ioan Micula v. Rom.*, *supra* note 51, ¶ 166; MCLACHLAN ET AL., *supra* note 6, at 341.

60. *Goetz v. Burundi*, *supra* note 51, ¶ 135.

61. *Id.* ¶ 136.

62. R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1265 (2005).

63. Article 10 of the Australia-Hong Kong BIT only provides for investment disputes to be arbitrated under UNCITRAL Rules. Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments art. 10, Austl.-H.K., Sep. 15, 1993 [hereinafter *Australia-Hong Kong BIT*].

64. *See* G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (2011) (UNCITRAL Arbitration Rules as revised in 2010).

65. *See Australia-Hong Kong BIT*, *supra* note 63.

66. Schreuer, *supra* note 52, at 329.



ration and Production Company (“OEPC”) against Ecuador, the tribunal found in favor of the claimant and ordered Ecuador to refund OEPC taxes that it had improperly gained from the company.<sup>67</sup> Since the seat of arbitration was London, Ecuador challenged the award in British courts, claiming that the arbitral tribunal had exceeded its jurisdiction in deciding on such an award.<sup>68</sup> Interestingly, Ecuador conceded that the tribunal was generally “competent to order injunctive relief or specific performance” but not if the “effects of these orders is to purport to determine the internal validity and legal effect of measures of national law and to make orders that are directed at internal Ecuadorian legal procedures,” since such authority would violate Ecuador’s rights under international law.<sup>69</sup> The British High Court determined that the arbitral tribunal had acted within its jurisdiction since, under the facts of this specific case, it had merely made a declaratory judgment to effectuate its primary order granting OEPC monetary compensation.<sup>70</sup> Thereby, the High Court skirted the disputed issue of whether the arbitral tribunal would have been able to award injunctive relief resulting in the abrogation of a national law or order, seemingly by characterizing the tax refund as a monetary rather than injunctive form of relief.

Hence, despite the seeming openness of arbitral tribunals to granting injunctive relief, several factors suggest that tribunals have been cautious in doing so. Although arbitral tribunals have repeatedly claimed that they have the powers to order injunctive relief, examples of tribunals actually doing so are limited and, furthermore, tribunals seem to ultimately respect sovereignty as the final determiner of whether to adjust the challenged regulations. For example, the tribunal in *Goetz v. Burundi* left the ultimate choice on the Burundian government, calling it a “sovereign decision.”<sup>71</sup> Moreover, in the cases outlined above where a tribunal has specifically ordered some form of injunctive relief, the government action in question was administrative in nature and narrow in its scope and effect, such as a tax rebate or the reissuing of a license. This is vastly different from plain-packaging-sparked arbitrations where tobacco companies are calling into question an entire piece of democratically enacted legislation that aims to ameliorate public health.

In the event that the tribunal finds substantive violations that withstand Australia’s defenses, Philip Morris’ requested remedy for the suspension of Australia’s legislation has significant implications for the future of investment treaty arbitrations as it opens up the possibility of not just influencing but eliminating the state’s ability to legislate. This will add further fuel to one of the main critiques of the investment treaty arbitration regime—that

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67. Republic of Ecuador v. Occidental Exploration & Prod. Co, [2006] EWHC (Comm) 345, [34-35] (Eng.).

68. *Id.* ¶ 120.

69. *Id.* ¶ 120.

70. *Id.* ¶¶ 122–25.

71. *Goetz v. Burundi*, *supra* note 53, ¶ 136.

it grants enormous and unanticipated powers to arbitrators over the state's regulatory functions and, thereby, over the public. Van Harten discusses the dangers of the overreach of investment treaty arbitration, which transmutes disputes that belong in public international law domain, since they involve sovereign state decisions, into commercial law disputes where the state is treated just like any other private party to a contract.<sup>72</sup> Accordingly, he writes,

The effect is to trump the principle of legislative supremacy and, in the result, to alter a central tenet of representative democracy. Thus, international principles like the unity of the state are transformed from rules that facilitate and enforce inter-state bargains into a vehicle for arbitrators to sanction the decisions of elected officials, with limited judicial oversight.<sup>73</sup>

In the plain packaging case, an injunction ordered by an arbitral tribunal on behalf of a foreign investor seems to give the latter unprecedented veto powers over sovereign actions by states. This is particularly worrisome in the context of legislations established by democratic states that are meant to address social goods, such as public health. Independent research seems to confirm the Australian government's position that plain packaging will reduce the appeal of tobacco products,<sup>74</sup> especially among children, resulting in reduced rates of smoking.<sup>75</sup> Despite industry efforts to brand the measure as a "nanny state" regulation, plain packaging enjoys broad support among the Australian populace.<sup>76</sup>

Furthermore, arbitral decisions are not subject to appeals,<sup>77</sup> and the results of any following treaty renegotiations may not necessarily affect prior tribunal decisions, resulting in the attribution of a high level of finality to these decisions. This is especially problematic in light of critiques that challenge the legitimacy of the investment arbitration system. Such critiques include concerns about compulsory "arbitration without privity" imposed

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72. See generally GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (Vaughan Lowe ed., 2007).

73. *Id.* at 67.

74. Australian Government Press Release, *supra* note 18.

75. See, e.g., Rachel Pechey et al., *Impact of Plain Packaging of Tobacco Products on Smoking in Adults and Children: An Elicitation of International Experts' Estimates*, 13 *BMC PUB. HEALTH* 18 (2013); David Hammond, "Plain Packaging" Regulations for Tobacco Products: *The Impact of Standardizing the Color and Design of Cigarette Packs*, 52 *SALUD PUBLICA MEX.* 2 (2010).

76. Janet Hoek et al., *Strong Public Support for Plain Packaging of Tobacco Products*, 36 *AUSTRALIAN AND NEW ZEALAND JOURNAL OF PUBLIC HEALTH* 405, 405 (2012).

77. Although, recently annulment decisions have veered towards seemingly adopting more of a reviewing authority. See, e.g., *Enron Creditors Recovery Corp. v. Argentina*, Decision on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/3, Jul. 30, 2010; *Sempra Energy Int'l v. Argentina*, Decision on the Argentine Republic's Request for Annulment of the Award, ICSID Case No. ARB/02/16, Jun. 29, 2010.

on states,<sup>78</sup> and allegations of arbitrator bias in favor of investors.<sup>79</sup> Other international dispute resolution systems, after all, have mechanisms that allow them to ultimately respect state sovereignty. The World Trade Organization (“WTO”) dispute settlement mechanism, for example, has an appeals process<sup>80</sup> and offers complaining parties only compensation or retaliatory measures,<sup>81</sup> which the non-compliant state can choose to withstand. Moreover, states can always renegotiate around decisions proffered by the dispute settlement bodies.<sup>82</sup> Therefore, the WTO dispute resolution process appears to ultimately respect the state’s autonomy to uphold or withdraw the WTO-inconsistent measure.<sup>83</sup>

On the other hand, offering the state a choice between repealing the challenged laws and paying compensation is not in itself necessarily against a state’s interests. Several commentators have advocated for tribunals to consider non-pecuniary remedies, particularly if offered as a choice as in *Goetz v. Burundi*.<sup>84</sup> By moving away from a model solely based on monetary compensation, states are offered more flexibility on what types of remedies they can adopt. This can be particularly helpful for developing or cash-strapped states. Even developed states that are otherwise strongly protective of their sovereignty have contemplated this option. For example, in its model BIT, the United States specifically allows for arbitral awards to offer “restitution of property” to the claimant.<sup>85</sup> Although one may argue that the United States had inserted this language only for the benefit of its investors, this seems unlikely given that the country has been facing an increasing number of investment arbitration suits against it and recently had the opportunity to revise its model BIT to include greater protections for the state, but did not

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78. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INVESTMENT L.J. 232 (1995). See also, VAN HARTEN, *supra* note 68, at 62–68.

79. George Kahale, *Is Investor-State Arbitration Broken?*, TRANS. DISP. MGMT., Oct. 2012, at 2–4.

80. Article 17 of the Dispute Settlement Understanding provides for appellate review. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1884, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm).

81. *Id.* at art. 22 (providing for compensation or suspension of concessions in the event of non-compliance).

82. In many cases, for example, the non-complying WTO member has agreed to compensate the complainant member rather than abandon the non-complying legislation. For example, Brazil initiated a case against the United States, challenging the subsidies it provided to its farmers. The appellate body at the WTO decided in favor of Brazil. Rather than eliminate the subsidies, the United States negotiated with Brazil to pay it \$147 million per year, and Brazil agreed not to retaliate. Chana Joffe-Walt, *Why U.S. Taxpayers Are Paying Brazilian Cotton Growers*, NPR (Nov. 9, 2010, 3:05 PM), <http://www.npr.org/blogs/money/2011/01/26/131192182/cotton>.

83. Henning G. Ruse-Khan, ‘Gambling’ with Sovereignty: *Complying with International Obligations or Upholding National Autonomy* 141, 146, in INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY (Meredith Kolsky Lewis & Susy Frankel eds., 2010).

84. See, e.g., MCLACHLAN ET AL., *supra* note 6.

85. U.S. Model Bilateral Investment Treaty, art. 34 (2012), available at <http://www.state.gov/documents/organization/188371.pdf>.

change its provision on awards.<sup>86</sup> Hence, states may not be unwaveringly against the idea of tribunals awarding non-pecuniary damages, particularly if they are given the ultimate choice on which remedies to implement. However, given the billions of dollars claimed as damages by PMI in its case against Australia, and likely to be claimed by PMI and other potential claimants in any future cases, even if the tribunal offers a choice to the respondent state, this choice may be nothing more than illusory.

### III. THE FUTURE OF PLAIN PACKAGING ARBITRATION

One of the major consequences of the introduction of Australian plain packaging has been the revitalization of the anti-tobacco movement around the world. Countries that had previously considered plain packaging but had backed down under the threat of investment arbitration<sup>87</sup> may renew their efforts with an increased sense of optimism. Sensing the change in tides, governments around the world are using the opportune moment to adopt more prohibitive measures against cigarette packaging, if not plain packaging legislation itself. Following in the footsteps of its neighbor, New Zealand's government "agreed in principle" to plain packaging and is currently undergoing a consultation on the matter,<sup>88</sup> much to the opprobrium of cigarette manufacturers who have vowed to take legal action there as well.<sup>89</sup> Similarly, the United Kingdom announced in late 2011, around the same time as the passage of the Australian legislation, that it would "look at whether the plain packaging of tobacco products could be an effective way to reduce the number of young people who take up smoking," and, perhaps anticipating retaliatory legal action by cigarette companies, announced that it would "continue to defend tobacco legislation against legal challenges by the tobacco industry."<sup>90</sup> Since then, Parliament has debated the measure and seems to be waiting to see what happens with the Australian legislation.<sup>91</sup>

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86. Changes made were more protective of state's interests. For a summary, see *Model Bilateral Investment Treaty*, U.S. DEP'T OF STATE (Apr. 20, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm>.

87. For example, the Canadian parliament had considered plain packaging legislation in 1994, but the threat of NAFTA-based arbitration may have been one of the primary factors as to why the government did not pursue it. Physicians for a Smoke-Free Canada, *The Plot Against Plain Packaging* (Apr. 2008), available at [http://www.smoke-free.ca/pdf\\_1/plotagainstplainpackaging-apr11.pdf](http://www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr11.pdf).

88. Geoff Cumming, *Plain Packaging: This Time It's Serious*, THE NEW ZEALAND HERALD (Sept. 1, 2012, 5:30 AM), [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10830913](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10830913).

89. Brook Sabin, *Tobacco companies to battle on NZ ground*, 3 NEWS (Nov. 12, 2011, 6:25 PM), <http://www.3news.co.nz/Tobacco-companies-to-battle-on-NZ-ground/tabid/423/articleID/232543/Default.aspx>.

90. *Healthy lives, healthy people: a tobacco plan for England*, DEP'T OF HEALTH, PUBLIC POL'Y AND GUIDANCE, [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_124917](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_124917) (last visited, Mar. 2, 2013).

91. See generally LORRAINE CONWAY, HOUSE OF COMMONS LIBRARY REPORT, PLAIN PACKAGING OF TOBACCO PRODUCTS, 2012, SN/06175 (U.K.), available at <http://www.parliament.uk/briefing-papers/sn06175>.

The European Union ("EU") also held a period of consultation for the revision of its tobacco laws in 2010 at which time it considered plain packaging proposals.<sup>92</sup> Although the EU's most recent proposal stopped short of plain packaging, it still calls for graphic warnings to take up at least seventy-five percent of the cigarette package surfaces.<sup>93</sup> Turkey, with one of the highest rates of cigarette smoking, has also been reported to be working on regulations to "ban brand names, logos and designs on cigarette packaging,"<sup>94</sup> and the World Health Organization hopes that Turkey will be the first country in the European Region to adopt plain packaging legislation.<sup>95</sup> In India, a bill stipulating plain packaging of cigarettes and other tobacco products was introduced in the parliament in winter term 2012.<sup>96</sup>

The potential widespread adoption of plain packaging and other cigarette display restrictions across the globe will likely have a serious impact on big tobacco. Stocks of tobacco companies nose-dived in reaction to this news because of fears that other countries might undertake measures to restrict tobacco usage.<sup>97</sup> Asian and African markets are considered growth markets by cigarette companies<sup>98</sup> and, therefore, stricter regulations in these jurisdictions are particularly worrisome for tobacco companies. PMI, well aware of the trend, noted to its shareholders that "individual legislators and public health officials in various other countries" are supporting plain packaging legislation.<sup>99</sup>

Given the seemingly rapid spread of plain packaging and the potentially dire consequences it will have on the tobacco industry, tobacco companies are likely to pursue arbitrations in multiple jurisdictions regardless of the

92. See generally Public Health, EUROPEAN COMMISSION, [http://ec.europa.eu/health/tobacco/consultations/tobacco\\_cons\\_01\\_en.htm](http://ec.europa.eu/health/tobacco/consultations/tobacco_cons_01_en.htm) (last visited Mar. 2, 2013). See also Peter K. Henning & Leonid Shmatenko, *Plain Packaging on its Way to Europe: Competence Issues and Compatibility with European Fundamental Rights*, TRANSNAT'L DISP. MGMT, Nov. 5, 2012, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2171205](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171205).

93. *EU tobacco plan stops short of plain packaging*, ASIANTRADER (Jan. 10, 2013), <http://www.asiantrader.biz/industry-news/EU%20tobacco%20plan%20stops%20short%20of%20plain%20packaging/1144>.

94. Benjamin Harvey, *Turkey Working on Cigarette Branding Ban Law*, MILLIYET SAYS, BLOOMBERG (Sept. 7, 2011, 4:45 AM), <http://www.bloomberg.com/news/2011-09-07/turkey-working-on-cigarette-branding-ban-law-milliyet-says.html>.

95. World Health Organization, *Award to WHO Representative in Turkey to Support Tobacco Control Activities of the Ministry of Health* (Jan. 23, 2012), <http://www.euro.who.int/en/where-we-work/member-states/turkey/news/news/2012/01/award-to-who-representative-in-turkey-to-support-tobacco-control-activities-of-the-ministry-of-health>.

96. *Bill Submitted in Lok Sabha for Amending Tobacco Act 2003*, BUS. STANDARD (Sept. 14, 2012, 6:35 PM), <http://www.business-standard.com/generalnews/news/bill-submitted-in-lok-sabha-for-amending-tobacco-act-2003/56442/>; Koutenya Sinha, *Bill Seeks Plain Packs for Tobacco in India*, TIMES OF INDIA, Dec. 6, 2012, available at [http://articles.timesofindia.indiatimes.com/2012-12-06/india/35646821\\_1\\_plain-packs-tobacco-packs-tobacco-products](http://articles.timesofindia.indiatimes.com/2012-12-06/india/35646821_1_plain-packs-tobacco-packs-tobacco-products).

97. Bryce Elder, *Tobacco Groups Burnt by Antismoking Moves*, FT.COM (Sept. 7, 2012, 8:16 PM), <http://www.ft.com/intl/cms/s/0/15d6b688-f8b7-11e1-b4ba-00144feabdc0.html#axzz2IS9uz7Ga> (reporting that Imperial Tobacco's stock experienced the sharpest fall in three and a half years, along with other tobacco manufacturers, following reports that France would follow Australia in enforcing plain packaging legislation and Russia would seek to ban smoking in public places).

98. See *EU tobacco plan stops short of plain packaging*, supra note 93.

99. PHILIP MORRIS INTERNATIONAL, 2011 ANNUAL REPORT, 26 (2011).

outcome of the PM Asia-Australia case, particularly if they perceive the terms in the other BITs to be more investor-friendly. After all, different investment disputes have arisen in the past from the same nucleus, brought by different subsidiaries of the same corporation, where different arbitration forums have adopted conflicting decisions.<sup>100</sup>

Although there is debate on the matter, most commentators agree that PM Asia is unlikely to win on its substantive claims against Australia, and that Australia has a valid defense of its plain packaging laws as legitimate non-compensable regulation.<sup>101</sup> Yet, Australia's victory is more likely to stem from the specific facts of this case.<sup>102</sup> Phillip Morris did not become the sole shareholder of PM Asia until approximately one year after the Australian government announced its plans to introduce plain packaging.<sup>103</sup> Therefore, the company could not have had the legitimate expectation that its trademarks would not be affected after its investment since it was aware of the Australian government's plain packaging initiative. For this reason, the outcome of the Australian case may not be indicative of any future arbitrations, particularly if the Australia-PMI tribunal rules narrowly on the basis of legitimate expectations. Other tribunals sparked by plain packaging laws may still compel the payment of damages or even suspension of legislation, regardless of the similarity of those laws with Australia's. Hence, we may see not only a number of different cases, but also potentially a number of different outcomes ordered by arbitral tribunals.

However, the threat of significant backlash from states interested in passing such legislation could outweigh any arbitrator's ambitions to augment the investment arbitration system's authority. In the event that PM Asia does win the Australian arbitration, there is likely to be substantial backlash by countries, reacting to the perceived overreach of arbitral tribunals in annulling domestic legislation. Australia, anticipating the repercussions of a decision against it, has already eschewed the investor-state dispute settlement system altogether from its Free Trade Agreement with the United States<sup>104</sup> and from the Trans Pacific Partnership currently being negoti-

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100. For an example of parallel proceedings arising from the same set of events, see discussion of the CME and Lauder cases against the Czech Republic in Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1558–74 (2005).

101. See, e.g., Andrew D. Mitchell et al., *Boxed In—Australia's Plain Tobacco Packaging Initiative and International Investment Law*, 27 *ARB. INT'L* 623 (2011); Tania Voon & Andrew Mitchell, *Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia*, 14 *J. INT'L ECON. L.* 515 (2011); J. Martin Hunter, *Investor-State Arbitration and Plain Packaging: The New 'Anti-Tobacco Movement' Has Begun*, *KLUWER ARBITRATION BLOG* (Jan. 29, 2012), <http://kluwerarbitrationblog.com/blog/2012/01/29/investor-state-arbitration-and-plain-packaging-the-new-%E2%80%98anti-tobacco-movement%E2%80%99-has-begun/>.

102. Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements*, 15 *J. INT'L ECON. L.* 871, 910 (2012).

103. *Id.*

104. Voon & Mitchell, *supra* note 101, at 519.

ated.<sup>105</sup> It has also declared that it will no longer include investor-state arbitration clauses in its future BITs, claiming that “[i]f Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit investing in those countries.”<sup>106</sup> Given that a number of other countries are also seriously considering plain packaging or other similarly restrictive legislation, if the arbitral tribunal in the Australian case does claim to have the authority to order the suspension of democratically created legislation, there is bound to be similar backlash from prospective legislating states.<sup>107</sup> This will be particularly problematic for the investment arbitration regime if the states in question are typically capital-exporting ones, such as Australia, and move to renegotiate existing BITs or change their model BITs to exclude the option of investor-state arbitration for resolution of disputes.

### CONCLUSION

Australia’s plain packaging efforts seem to be resulting in a domino effect of similar legislation all around the world. If Australia succeeds in maintaining its law before the arbitration tribunal, other countries may redouble their efforts to pass similarly restrictive legislation as well. Regardless, big tobacco is likely to pursue arbitrations and other litigation efforts around the world, given the variety of forum choices and BITs available to it via the international arbitration system. Although acting with restraint, arbitral tribunals have, in the past, undertaken the authority to order injunctive relief. Even if not in the Australian case, other potential arbitral tribunals may, eventually, order the suspension of plain packaging or similarly restrictive tobacco packaging legislation. For some, this would represent yet another unwanted and un-consented-to overreach of investment arbitration over the state’s regulatory powers. Yet, on the other hand, it might allow states much-needed flexibility to comply with their obligations under BITs.

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105. Matthew Webb, *Treaty Shopping: How Philip-Morris Cherry-Picked Worst Case BITs*, INFOJUSTICE.ORG (Dec. 2, 2012), <http://infojustice.org/archives/28044>.

106. Press Release, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity (Apr. 2011), <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state>. See also Alan Beattie, *Intellectual Property: A New World of Royalties*, FT.COM (Sept. 23, 2012, 9:15 PM), <http://www.ft.com/cms/s/0/76166b6a-03ca-11e2-9322-00144feabdc0.html#axzz2IS9uz7Ga>.

107. Furthermore, domestic courts at the seat of the arbitration may be hesitant to enforce awards that result in the complete abrogation of another country’s national law, rather than merely a declaratory statement to help achieve the fulfillment of a monetary award. Notably, PM Asia chose Singapore as the seat of arbitration whereas Australia pushed for London. *Procedural Order 3*, *supra* note 35, ¶¶ 1, 2. This might reveal, on the part of PM Asia, a preference for a jurisdiction looking to attract more arbitration cases, and so where the domestic courts may be perceived to be more investor-friendly. Chris Cowe, *Singapore Pushes for Share of Asia’s Rising Arbitration Cases*, INTERNATIONAL BAR ASSOCIATION, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=ee8fce6d-008e-4477-b75b-245304814a39> (last visited Mar. 2, 2013).

Ultimately, tribunals' decisions regarding plain packaging are likely to be tempered to some extent by backlash from states, such as Australia, threatening to exit or weaken the investor-state arbitration system. The future of investment arbitration remains as yet uncertain as the Australian plain packaging controversy unfolds.