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**(Un)lucky Strike and the Winnie Blues: Tobacco Plain Packaging,
Investment Treaties, and the Framework Convention on Tobacco
Control**

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Abstract

In recent years, tobacco has been the subject of increasingly more stringent regulatory attention. At the same time there has been a proliferation of bilateral and multilateral investment agreements. While the former compels state Parties to take action to reduce tobacco consumption, many of the latter provide a guarantee to foreign investors that states will not enact measures which result in a substantial reduction of the value of their property.

Recent disputes illustrate that these two sets of obligations are not capable of coexistence.

In 2012 Australia took regulatory action, enacting legislation obliging the sale of tobacco products in “plain” packets. Philip Morris, Japan Tobacco International and British American Tobacco took to a number of different fora to challenge the measures as being in violation of their rights under national constitutional law, world trade law, and under international investment law.

While the domestic law claims were limited to an assessment of the measure in the context of the companies’ constitutional rights, and the WTO claims face a significant hurdle because of the public interest nature of the regulations, the claims brought as international investment arbitrations are not subject to these same constraints.

The result is a conflict of obligations. States are left in a position where they must take steps to reduce tobacco consumption while at the same time refraining from action amounting to expropriation of an investment. Does one of these obligations take priority of the other? Or must they both, as the Vienna Convention on the Law of Treaties suggests, be performed in good faith?

The application of various conflicts rules imported from domestic and private international law into the international law sphere more generally yields some answers, goes some way to resolving the conflict, and reconstitutes the otherwise increasingly fragmented international law.

Keywords: Investment Arbitration, Tobacco Regulation, Expropriation, Fragmentation

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I Introduction

Tobacco's particularly damaging effects, on both an individual level and a societal level, means it is a ripe target for legislative action. Recent years have seen an increasingly strong surge in anti-tobacco or tobacco control regulation. Around the same time the ever-increasing volumes of global trade and investment has given rise to a progressively denser network of bilateral investment treaties, the purpose of which is the protection, preservation, and downstream encouragement of further investment.

Recent regulations in Australia have all but extinguished the ability of tobacco companies to represent and market their brands effectively. As a result, they have taken action – through national courts, through the World Trade Organisation, and through investment arbitration using the investor state dispute mechanism available under several bilateral investment treaties to which Australia is a party. In this latter forum, the essence of their claim (at least in part) is that the measures are a taking of their property – an expropriation - and failure to pay compensation is a violation of Australia's obligations in respect of the investments.

This paper will assess the measures in the context of international investment law, with a particular focus on the investment arbitration proceedings recently launched by one of the world's largest tobacco manufacturers, Philip Morris, and against the background of the Framework Convention on Tobacco Control.

To this end, the paper will advance in six substantive parts. Part II will provide some context to the measures and to the complaints, assessing the historical and social background. Part III will briefly examine the various fora available for claims relating to tobacco plain packaging, and examine why investment arbitration is of particular significance.

Part IV begins a substantive assessment of the claims, looking first at the protection against expropriation provided under the BIT and assessing the plain packaging measures against the various tests for expropriation. The section concludes that the measures amount to expropriation and on that basis are compensable.

Shifting to a more policy-based discussion, Part V examines the congruence of the obligations owed under BITs and under a recent global public health innovation, the Framework Convention on Tobacco Control. The section concludes that there are conflicting obligations under the treaties, and examines tools for resolving this conflict.

II Historical and Social Background

Long the subject of regulation, tobacco is an unusual consumer good. It is perhaps the only readily available product that, when used as intended, contributes to the ill health and, in many cases death, of the consumer.¹ It is one of the leading causes of preventable death and disease in much of the developed world, branded a “public health problem of epic proportions” and one of the “major public disasters of the past century”, tobacco has long been the subject of regulation.² As early as 1604 King James VI and I described smoking as:³

a custome loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black stinking fume thereof, nearest resembling the horrible Stigian smoke of the pit that is bottomless

and authorising the 1st Earl of Dorset to levy an excise tax and tariff on any tobacco imported.⁴

Though it has been in vogue at a number of points in history, recent years have seen governments in a number of nations take an increasingly strong stance in their efforts to reduce tobacco consumption, and the downstream health effects. Most recently, Australia has implemented so-called “plain packaging” regulations.

A What is ‘Plain Packaging’?

¹ World Health Organisation *WHO Report on the Global Tobacco Epidemic* (World Health Organisation, 2008)

² World Health Organisation *History of the WHO Framework Convention on Tobacco Control* (World Health Organisation, 2009)

³ James I *A Counterblaste to Tobacco* (R Barker, London, 1604)

⁴ at 1.

The Tobacco Plain Packaging Act requires that as of 1 December 2012 all tobacco products be sold packaging that both externally and internally is drab dark brown in colour,⁵ free from logos or stylized brand and variant indicia.⁶ Packaging must have a matte finish, and must not have any decorative ridges, embossing, texture, or other embellishments on either the internal or the external surfaces. Cartons must be rigid and made only from cardboard, rectangular when closed, and with surfaces that meet at 90-degree angles. Packets must open with a flip-top lid hinged only at the back, and must comply with regulations prescribing dimensions. Packets must not include features designed to change the packaging in any way after retail sale (for example heat-activated ink, or surfaces that may be scratched off to reveal an image).

Australia is the first government to enact plain packaging legislation, though the proposal is by no means new. The New Zealand government first proposed the measure in 1989, but made no serious efforts toward its adoption.⁷

Canada was the first state to actually take steps toward implementation,⁸ though the experience was far from positive.

The tobacco industry had just come out of a lengthy campaign to reduce Canada's high tobacco taxes. In an effort to offset the accelerated uptake due to lower prices, the Canadian legislature began developing plain packaging regulations.

Wary of debating plain packaging regulation in the context of public health, the tobacco industry, led by R J Reynolds (a subsidiary of British American Tobacco) shifted the goalposts: they turned to international trade and investment law and framed plain packaging as an issue of law distinct from any public health considerations.⁹

⁵ The colour is perhaps better described as "olive", but the name was changed following resistance from the Australian Olive Association.

⁶ Tobacco Plain Packaging Act 2011 (Cth) [*Tobacco Plain Packaging Act 2011 (Cth)*], ss 18-25.

⁷ University of California, San Francisco "Generic Packaging Meeting 22/9/93: Reference Documents" (14 November 2006) Legacy Tobacco Documents Library <<http://legacy.library.ucsf.edu>>

⁸ R Cunningham and K Kyle "The Case for Plain Packaging" (1995) 4 Tobacco Control 80.

⁹ See R J Reynolds Tobacco Company "Submission to House of Commons Standing Committee on Health Re: Plain Packaging of Tobacco Products 2" 18 (1994).

Ultimately the Supreme Court of Canada found the Tobacco Products Control Act 1995 invalid, and so put an end to the plain packaging debate.¹⁰ The lingering threat of claims under the North American Free Trade Agreement (NAFTA) (especially given the agreement was very new and largely unchartered at the time) and the substantial compensation that could result is thought to have dissuaded any government considering further legislative action.¹¹

Since the mid 1990s, momentum has built. Recent governmental action has come under attack by the tobacco industry. Uruguay has taken legislative action to extend the surface area of tobacco packaging that must be covered with warning labels,¹² and Australia has implemented plain packaging measures.

Though restrictions on the sale and marketing of tobacco are by no means new, at least as far as some countries are concerned this latest wave of measures represents the destruction of the last bastion of tobacco advertising in marketing. Over the last three decades, governments have gradually eroded the ability to advertise on television, in magazines, and even at point of sale. New Zealand first introduced legislation to prohibit advertising in broadcast media in 1962.¹³ The United Kingdom followed in 1965,¹⁴ the United States in 1971,¹⁵ and Australia between 1973 and 1976¹⁶.

The tobacco industry has challenged the measures taken by both Australia and Uruguay. However, unlike the Canadian experience 20 years before, the governments concerned are actively fighting the claims (and, at least in Australia,

¹⁰ *RJR-Macdonald Inc and Imperial Tobacco Ltd v The Attorney General of Canada* [1995] 3 SCR 199, 204.

¹¹ Matthew Porterfield and Christopher Byrnes "Philip Morris v Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?" (12 July 2011) Investment Treaty News < www.iisd.org >.

¹² For general information on the various measures taken by Uruguay, see Tobacco Epidemic Research Centre *International Tobacco Control Policy Evaluation Project: ITC Uruguay National Report* (Tobacco Epidemic Research Centre, August 2012).

¹³ Trish Fraser "Phasing out point-of-sale tobacco advertising in New Zealand" (1998) 7 Tobacco Control 82; now regulated by the Smoke-Free Environments Act 1990 and the Smoke-free Environments Regulations 2007.

¹⁴ Television Act 1964.

¹⁵ Public Health Cigarette Smoking Act 15 USC § 1335.

¹⁶ Broadcast and Television Amendment Act 1976 (Cth), s 100.

have had partial success in this regard).¹⁷ The tobacco industry, and countries with significant interests in tobacco production have launched proceedings in every possible forum: through national courts, through the World Trade Organisation, and through investment arbitration.

III The Question of the Forum

Though the focus of this paper is on the treatment of plain packaging in investment arbitration, it would not be complete without at least a survey of the forums in which the claims have been made. This assessment is by no means comprehensive; but it serves to illustrate the particular characteristics of each forum and why the claims brought as investment arbitration proceedings are of particular significance.

A National Courts

The latest round of regulations gave rise to a challenge in Australia's national courts, the resultant case being *JT International Limited v Commonwealth of Australia*.¹⁸ In the case, the High Court of Australia considered the Australian plain packaging legislation, and reviewed its constitutional compatibility.

The Court was of the opinion that, contrary to the tobacco companies' claims, the legislation was entirely within the legislative competence of Parliament. Plain packaging proponents celebrated the case as being a clear indication that the legislation did not have the effect of 'taking' property (and thus the claims raised by the tobacco industry in the context of investment arbitration were equally futile).¹⁹

However, the assessment of the claim in a national constitutional context is one significant factor that distinguishes the *JTI* case from the investment disputes. Though the mechanics of the investment dispute (or at least one element of it) will be discussed in greater detail in Part IV, *infra*, a high-level summary at this point will illustrate the difference.

¹⁷ See *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia* [2012] HCA 43 [*JTI v Australia*], discussed in more detail below.

¹⁸ *JTI v Australia*.

¹⁹ See, for example John Lowe, Alistair Woodward and Jeanne Daly "The plain facts about tobacco's future" (2012) 36(5) *Australian and New Zealand Journal of Public Health*

The Australian constitution grants limited legislative powers to the Australian Parliament. Most relevantly:²⁰

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxix) *the acquisition of property on just terms from any State or person* for any purpose in respect of which the Parliament has power to make laws

The tobacco companies alleged that, among other things, the Tobacco Plain Packaging Act 2012 had the effect of taking intellectual property on terms other than those that were just (that is, against compensation).

The High Court disagreed; opining that in order for there to be an “acquisition” for the purposes of s 51, there had not only to be a reduction in the property of one person, but also a corresponding increase in the property of the Commonwealth of Australia.²¹ Because the Tobacco Plain Packaging Act had the effect of limiting the ability of the tobacco companies to use their intellectual property, but did not result in the transfer of that property to the State, there could be no acquisition (even if there was a ‘taking’).

This position differs from that in the investment arbitration context. Under the Hong Kong-Australia BIT, in order for expropriation to occur there need only be a decrease in the property of a private party as a result of State action.²² The absence of an increase in the property of the relevant government is not therefore determinative (as it is under Australian constitutional law). Part IV will examine this point in greater detail.

²⁰ Commonwealth of Australia Constitution Act 1900 (Imp), s 51 [emphasis added].

²¹ *JTI v Australia*, above n 17, at 42.

²² Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, 1748 UNTS 385 (signed 15 September 1993, entered into force 15 October 1993) [*Hong Kong-Australia BIT*].

Far from being the roadblock that it has been held out by plain packaging proponents to be, the result of the *JTI* case merely serves to illustrate the existence of the national court system as one forum for the resolution disputes of this nature.

In addition to national courts, a number of interested countries have also lodged disputes in the World Trade Organisation.

B WTO

Principally the WTO exists to facilitate the liberalisation of trade between nations. Originally formed in the inter-war years, the WTO displaced the GATT in 1995.²³ As a forum, the WTO's dispute settlement body exists to resolve disputes between states, rather than between private entities and the state. Though it is states that bring claims, that is not to say that private entities have no role to play: in many situations cases only come before the WTO as a result of private lobbying of the responsible government.

Thus far, five countries in the World Trade Organisation (WTO) have challenged the measures: Ukraine,²⁴ Honduras,²⁵ the Dominican Republic,²⁶ Cuba,²⁷ and most recently Indonesia.²⁸ At the time of writing, the Dominican Republic, Cuba and

²³ Though note that the GATT 1947 still remains in force under the World Trade Organisation framework, subject to the modifications of the GATT 1994.

²⁴ *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the establishment of a Panel by Ukraine* WT/DS434/11 (17 August 2012).

²⁵ *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the establishment of a Panel by Honduras* WT/DS435/16 (17 October 2012).

²⁶ *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the establishment of a Panel by Dominican Republic* WT/DS441/15 (9 November 2012).

²⁷ *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for Consultations by Cuba* WT/DS458/1 (7 May 2013).

²⁸ *Australia - Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for Consultations* WT/DS467 (20 September 2013).

Indonesia remain in consultations and the proceedings involving Ukraine and Honduras have had panels established but not composed.²⁹

Though subtly different the various WTO claims all run along the same broad lines. The complainants have alleged violations of the General Agreement on Tariffs and Trade (the GATT),³⁰ the Agreement on Technical Barriers to Trade (the TBT Agreement),³¹ and the Agreement on Trade-Related Aspects of Intellectual Property.³²

1 The GATT

The complainant states maintain that the measures violate the national treatment obligations imposed by Article III:4 as the plain packaging measure mean that foreign trademark right holders are impaired in terms of their competitive opportunities vis-à-vis domestic rightholders and producers. Similar arguments have been raised under Article 3.1 of TRIPS, and Article 2.1 of the TBT.

2 TRIPS

The impaired states argue that the measure are in violation of TRIPS as they discriminate against tobacco-related trademarks, fail to give effect to the trademark holder's legitimate rights with respect to the trademark (essentially arguing that the trademark confers positive 'use' rights).

Additionally, the states contend that the legislation forces companies to refrain from employing the trademarks in the manner in which they were intended, the effect of which is detrimental to their capability to distinguish tobacco products from one another.

²⁹ World Trade Organisation "Dispute Settlement – Current Status of Disputes" (28 September 2013 World Trade Organisation) <www.wto.org>.

³⁰ General Agreement on Tariffs and Trade 1867 UNTS 187 (opened for signature 15 April 1994, entered into force 1 January 1995) [*GATT*].

³¹ Agreement on Technical Barriers to Trade 1868 UNTS 120 (adopted 15 April 1992, entered into force 1 January 1995)[*TBT*].

³² Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 UNTS 299 (adopted 15 April 1994, entered into force 1 January 1995) [*TRIPS*].

3 *The TBT*

The states maintain that the measures are contrary to Article 2.2 of the TBT because the technical regulations imposed by the Tobacco Plain Packaging Act create unnecessary obstacles to trade, and are more trade restrictive than necessary to fulfil a legitimate objective taking into account the risks that non-fulfilment would create

As will be shown, there are serious limitations on the usefulness of the WTO for the resolution of plain packaging disputes (at least from the tobacco companies' perspectives) However, a number of features mean that the proceedings are particularly significant.

The most significant feature is the ability of other countries to effectively insert themselves into the dispute through requests to join consultations. Thus far, Canada, El Salvador, the European Union, Guatemala, New Zealand, Nicaragua, Norway, the Philippines, South Africa, Uruguay, and Zimbabwe have each had their request to join one or more of the consultations approved by the dispute settlement body.³³ Many of these nations (notably New Zealand and the European Union) have joined the proceedings because they intend to enact regulations similar to those in Australia and thus have a particular interest in the outcome of the disputes.

The WTO is not the perfect forum, however. The greatest limiting factor in resolving this particular kind of dispute is the significant carve-out for measures taken in pursuit of the enhancement of public health. Article XX of the GATT provides that:³⁴

[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

³³ World Trade Organisation "Dispute Settlement: Dispute DS434" (18 December 2012) World Trade Organisation <www.wto.org>; World Trade Organisation "Dispute Settlement: Dispute DS435" (20 November 2012) World Trade Organisation <www.wto.org>; World Trade Organisation "Dispute Settlement: Dispute DS441" (18 December 2012) World Trade Organisation <www.wto.org>.

³⁴ *GATT*, Article XX.

(b) necessary to protect human, animal or plant life or health

Though historically the Dispute Settlement Body has been reluctant to permit measures that have a trade-limiting effect by applying one of the exceptions, usually positing alternatives that are (at least in its opinion) less trade restrictive,³⁵ the instant dispute appears to be ripe for such permission.

A further limitation, at least from the tobacco companies' perspective, is the range of remedies available. The Dispute Settlement Understanding employs what is essentially a compliance-compensation-retaliation regime.³⁶

Where a measure places a state in breach of its obligations under a WTO agreement, the preferred remedy (consistent with the aims of the WTO) is compliance. This is unlikely to ever eventuate (at least in this context, where the justification is public health). As a second step, the disputing parties are encouraged to explore mutually acceptable compensation. The acceptability of the compensation will, however, be a function of the harm that may result from the third step (retaliation). Should compensation negotiations fail the aggrieved state can seek authorisation from the Dispute Settlement Body to impose retaliatory action. This action is capped at the quantum of the harm that the aggrieved nation has suffered.

Honduras, Ukraine and Cuba are all parties to the Framework Convention on Tobacco Control. The convention is in force in in the former two, and all three supported the adoption of the guidelines that suggest plain packaging as a smoking

³⁵ Since the establishment of the WTO, Article XX of the *GATT* has been invoked by a respondent in 34 proceedings, and the equivalent Article XIV in the *GATS* has been invoked once. The general exceptions were deemed to be relevant in 26 of those proceedings, they succeeded in only one – in *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* WT/DS135/AB/R (5 April 2001). For a general discussion of the exceptions, see Simon Lester and others *World Trade Law: Text, Materials and Commentary* (HART publishing, Portland, 2008) at 385.

³⁶ Kyle Bagwell "Remedies in the World Trade Organisation: An Economic Perspective" in Merit Janow, Victoria Donaldson and Alan Yanovich (eds) *The WTO: Governance, Dispute Settlement & Developing Countries* (Juris Publishing, Inc, Huntington, New York, 2008)

reduction mechanism. On the same day Ukraine made its request for consultations, its President signed into force a law banning tobacco advertising.³⁷

Furthermore, the existing trade relationships between Australia and all claiming nations (with the exception of Indonesia) are of minimal value in terms of Australia's total trade.³⁸ Unlike Turkey, Zimbabwe (all of which export raw tobacco leaves to Australia), most of the claiming nations have little interest in exporting tobacco to Australia. Indonesia does, however, export raw tobacco leaves to Australia and so has some vested interest in the case. In the case of Ukraine, there has been no trade in tobacco with Australia since 2005, and the head of the Tobacco Control Unit in the Ukrainian Ministry of Health has said, "there is no economic interest whatsoever... no one in Ukraine will suffer from Australian Plain Packaging".³⁹

It would be surprising, therefore, if Australia were even remotely concerned about the retaliatory action that it may face because of the measures. For this reason it is highly unlikely that consultations and subsequent compensation negotiations will be successful from the claimant nations' perspectives – the result being that those nations raise tariffs on the selected Australian imports which, given the relative trade volumes, will have a significant positive impact on domestic prices in the claiming states but a negligible impact in Australia.

Furthermore, the nations have not been particularly forthcoming with reasons for the claims; perhaps because to do so would ultimately result in a discussion centred on the conflicting position they have put themselves in. What seems likely, however, is that it is principally a push by the tobacco companies in an effort to get some form of precedent that, if favourable, can be taken to a less innocuous forum; or alternatively

³⁷ Tobacco World News "Yanukovych signs law to ban tobacco advertising" (14 March 2012) <www.tobaccocampaign.com/>.

³⁸ The complainant countries are worth relatively little to Australia in terms of Australia's total trade volumes. Trade with Ukraine amounted to AUD 117m for the 2012 year, the Dominican Republic amounted to AUD 34.5m, Honduras amounted to AUD 22.3m and Cuba amounted to AUD 15m. In terms of their ranking as trade partners they were 75th, 101st, 115th, 134th respectively. By comparison Honduras considers Australia its 22nd largest trading partner. Australian Government: Department of Foreign Affairs and Trade "Country, economy and regional information - Australia Government Department of Foreign Affairs and Trade" (June 2013) Australian Government <www.dfat.gov.au/>.

³⁹ Amy Corderoy "Mystery over Ukraine tobacco law challenge" (27 March 2012) <www.smh.com.au/>.

to discourage other nations from taking similar action for fear that deep-pocketed tobacco companies will haul them before international tribunals.

The remaining forum, and the one with which the remainder of this paper is principally concerned is investment arbitration.

C International Investment Arbitration

Like many nations, Australia is party to bilateral and multilateral investment treaties, and free or preferential trade agreements with investment chapters.⁴⁰ These exist to encourage investment in a state. In pursuit of this goal, the contracting states make certain guarantees to one other in respect of the protection and treatment of investments originating in the other's state.

Australia and Hong Kong are party to one such BIT, the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (the Hong Kong-Australia BIT).⁴¹ Under this BIT, the governments agree not to expropriate investments (except in certain limited circumstances) and to treat investments in a manner that is fair and equitable (among other things).⁴² Crucially, the Hong Kong-Australia BIT contains an 'investor-state dispute mechanism' (ISDM) which allows investors to claim directly against a state by submitting disputes that cannot be amicably resolved to arbitration under the UNCITRAL rules.⁴³ The result of the ISDM is that investors are not forced to resort to use of diplomatic protection mechanism in order to seek redress.

Following the passage of Australia's tobacco plain packaging legislation, Philip Morris Asia Limited, a company based in Hong Kong and which holds the various Philip Morris trademarks (including Marlboro),⁴⁴ commenced proceedings against

⁴⁰ Note that throughout this paper the relevant agreements will be referred to as bilateral investment treaties, or BITs, but the comments are of more general application and will apply equally to multilateral treaties, or those trade agreements that include an investment regime.

⁴¹ Hong Kong-Australia BIT, above n 22.

⁴² at Articles 2 and 6.

⁴³ Hong Kong-Australia BIT, above n 22, Article 10.

⁴⁴ Philip Morris International "Philip Morris International Hong Kong" (2012) Philip Morris International <www.pmi.com>.

the Government of Australia⁴⁵ The statement of claim alleges violations of both the prohibition on expropriation, and of the fair and equitable treatment standard.⁴⁶

Philip Morris International, Philip Morris Asia's parent company, has also commenced action against Uruguay citing concerns in relation to its packaging restrictions.⁴⁷ In 2005 Uruguay mandated that 80 per cent of external packaging of cigarettes must bear warning labels, an increase from the previous requirement of 50 per cent. Though tobacco companies are still permitted to use their branding and can utilise other design elements (such as texture or bevelling), the measures are similar in effect to plain packaging insofar as the space available to place branding is so minimal (once a barcode and various manufacturer information is included along with the warnings) that the packages become virtually indistinguishable. In addition, cigarette advertising and sponsorship was banned, and significant restrictions placed on where smoking is permitted.⁴⁸

Like the Australian dispute, the Uruguayan dispute is based on a BIT between Uruguay and Switzerland that protects investments from expropriation in terms virtually identical to the Hong Kong-Australia BIT.⁴⁹ In July 2013 the panel determined that it has jurisdiction to decide on the substantive claim.⁵⁰

What makes investment arbitration perhaps the most important forum for disputes of this nature is the significant impact that the outcome (and subsequent action or inaction) may have. Bilateral investment treaties provide a means by which a state can encourage investment – by providing guarantees to potential investors regarding the security of their investments, states provide much needed certainty. If regulatory

⁴⁵ *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12 [*PMA v Australia*]; Notice of Claim, Notice of Arbitration

⁴⁶ *PMA v Australia*, Notice of Claim

⁴⁷ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*) [*PMI v Uruguay*], Statement of Claim.

⁴⁸ Smoking is now only permitted in private homes and in open public spaces

⁴⁹ Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments 1976 UNTS 389 (signed 7 October 1988, entered into force 22 April 1991) [*Switzerland-Uruguay BIT*], Articles 3 and 4.

⁵⁰ *PMI v Uruguay (Decision on Jurisdiction)*, 2 July 2013.

action taken by the state is found to be non-expropriatory then there may be a “chilling” effect, and the benefit provided by the BIT is unwound.

In addition, the nature of investment arbitration means that decisions that ultimately impact the public purse are made outside of the hands of the state. In the instant case, it is difficult if not impossible to quantify the tobacco companies’ loss. As the investment has no end date, applying the orthodox method of discounted future cash flow results in a theoretically infinite loss.⁵¹ The potential damage to state funds, then, is enormous.

This paper will now move to assess the various aspects of the investment arbitration claims, beginning first with expropriation.

IV Expropriation

The most crucial argument launched by the tobacco companies relates to the expropriatory nature of plain packaging regulations. It is said that plain packaging is expropriatory as the effect of the measure is to reduce (or entirely remove) the value of the investment, specifically the intellectual property that comprises the trademarked brand names, and associated designs.⁵²

This part will address the issue of expropriation. Section A will outline the argument advanced by Philip Morris, Section B will examine the impinged right, assessing the scope of that right. Section C will assess the plain packaging measures in the context of the protection offered by the BIT (and BITs more generally). Finally, Section D will look at a potential “public health exception” that has been developed through some arbitral awards. The part will conclude that the measure is likely expropriatory, and that there is no public health exception (and that if there is, its application in this context is illogical).

A The Philip Morris Argument

Philip Morris operates in Australia through a number of subsidiaries. Philip Morris Asia (PMA) owns all of the available shares in Philip Morris (Australia) Limited,

⁵¹ Sergey Ripinsky and Kevin Williams *Damages in International Investment Law* (British Institute of International and Comparative Law, London, 2008) at 63, 188.

⁵² *PMA v Australia*, Notice of Arbitration at [7.3] – [7.5].

which in turn owns all of the available shares in Philip Morris Limited (PML). Philip Morris Asia and Philip Morris Australia though Philip Morris Limited import, market and distribute cigarettes (among other tobacco products) for sale in the Australian market.⁵³ In addition, Philip Morris Limited operates a manufacturing plant in Moorabbin, Victoria, which produces cigarettes and other tobacco products for domestic sale and for export to New Zealand.⁵⁴

Philip Morris, in its notice of arbitration, argues that Australia's plain packaging legislation is plainly equivalent to deprivation of PMA's investments.⁵⁵ The legislation, it is said, deprives PMA of the value of its shares in Philip Morris Australia, and consequently Philip Morris Limited, which is dependent upon the ability to use the intellectual property. Further, the loss of the commercial use of the intellectual property interferes with PML's ability to denote the origin of its products, to differentiate between it and its competitor's products, and to distinguish it from illicit products.⁵⁶ The result of the plain packaging legislation is the destruction of the commercial value of the intellectual property and goodwill.

Because the plain packaging regulation amounts to expropriation, it must be implemented against compensation.⁵⁷ The absence of this compensation, and the lack of a proven public purpose related to the internal needs of Australia mean that the expropriation is unlawful.

Before this claim can be assessed on its merits, we must first gain an understanding of the protection offered by the bilateral investment treaty.

B Expropriation

The first factor to consider is who gains the protection of a treaty of this nature. A comprehensive assessment of whether Philip Morris is an "investor" for the purposes of the Hong Kong-Australia BIT is outside the scope of this paper. However, for completeness the requirements will be assessed in brief.

⁵³ *PMA v Australia*, Notice of Arbitration at [5].

⁵⁴ Philip Morris International "Philip Morris International Australia" (2013) Philip Morris International <www.pmi.com>.

⁵⁵ *PMA v Australia*, Notice of Arbitration at [7.3].

⁵⁶ at [7.3(b)].

⁵⁷ at [7.4] – [7.5].

1 “Investor”

“Investor” is a defined term under the Hong Kong-Australia BIT. Article 1(f) provides that:⁵⁸

“investors” means:

- (i) in respect of Hong Kong:
 - (A) physical persons who have the right of abode in its area; and
 - (B) companies as defined in paragraph (1)(b)(i) of this Article; and
- (ii) in respect of Australia:
 - (A) physical person possessing Australian citizenship or who are permanently residing in Australia in accordance with its laws; and
 - (B) companies as defined in paragraph (1)(b)(ii) of this Article.

Article 1(b) provides:⁵⁹

“companies” means:

- (i) in respect of Hong Kong : corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in its area or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by a physical person who have the tight of abode in its area, regardless of whether or not the entities referred to in this sub-paragraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

⁵⁸ Hong Kong-Australia BIT, above n 22.

⁵⁹ at Art 1(b).

- (ii) in respect of Australia : corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in its area or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by a physical person who is an investor of Australia under its law, regardless of whether or not the entities referred to in this sub-paragraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

Prima facie, Philip Morris is able to satisfy this definition. As Australia has noted in its Response to Notice of Arbitration, however, the structure of the entities within the Philip Morris group of companies is hardly serendipitous. Against the backdrop of a number of Australia's anti-tobacco regulatory measures, PMA acquired its shareholding in PM Australia as late as February 2011.⁶⁰

What is significant about the point at which this acquisition took place is that in 2008 the Australian Government established the National Preventative Health Taskforce.⁶¹ This taskforce engaged in substantial consultation (in which PML participated⁶²) and in 2009 recommended the Government mandate the sale of tobacco products in plain packaging.⁶³ The Government subsequently announced, in 2010, its intention to implement plain packaging.⁶⁴

⁶⁰ *PMA v Australia*, Australia's Response to the Notice of Arbitration at [4] – [5].

⁶¹ Preventative Health Taskforce "Terms of Reference" (6 September 2008) Preventative Health Taskforce <www.preventativehealth.org.au>.

⁶² Philip Morris Limited "Philip Morris Limited's Submission to the National Preventative Health Taskforce Consultation: Australia: The Healthiest Country By 2020" (2 January 2009) at 22.

⁶³ Preventative Health Taskforce "Technical Report 2: Tobacco Control in Australia: making smoking history" (2009) Preventative Health Taskforce <www.preventativehealth.org.au> at vii, 21.

⁶⁴ Australian Government: Department of Health and Ageing "Plain Packaging of Tobacco Products" (31 July 2013) Australian Government <www.health.gov.au>.

PMA, therefore, acquired its shareholding in the knowledge that the Government intended to implement plain packaging measures. In addition, members of the Philip Morris group had, throughout the consultation process, objected to plain packaging on the basis that it would put Australia in breach of its various international trade and investment law obligations. At no time did Australia acknowledge any merit in these objections, instead showing clear indication that it intended to forge ahead with the regulations.⁶⁵

This raises a preliminary question regarding jurisdiction, but also a question on the merits as to whether there can be a breach when an investment was made in the knowledge that it may at some later point be subject to adverse regulatory measures. More crucially, this date has the potential to impact the compensation Philip Morris may be entitled to should there be a positive finding on the question of expropriation. Article 6 of the BIT itself provides:⁶⁶

...[c]ompensation shall amount to the real value of the investment immediately before the deprivation or *before the impending deprivation became public knowledge* whichever is the earlier.

Rather unusually, PMA argues that the measures substantially eliminate the value of their investment, and acknowledge their participation in the consultation process that pre-dates the transfer of the investment to a Hong Kong based entity. Philip Morris had no investment before the point at which a policy announcement was made, and as Mark Davison candidly explains in his commentary on the issue “as a general rule, the value of nothing is nothing”.⁶⁷

A full assessment of this point falls outside the scope of this paper. For the purposes of the assessment of whether the measures are expropriatory we will take as given that the investor is genuine.

⁶⁵ *PMA v Australia*, Australia’s Response to the Notice of Arbitration at [5] – [6].

⁶⁶ Hong Kong-Australia BIT, above n 22, art 6 (emphasis added).

⁶⁷ Mark Davison "Big Tobacco vs Australia: Phillip Morris scores an own goal" (20 January 2012) Monash University <www.monash.edu.au>.

What then falls for consideration is whether the property at issue is capable of being expropriated; or, to frame the question in an alternate way, whether there is an “investment” for the purposes of the BIT.

2 “Investment”

Expropriation not only affects tangible personal or real property, but also and increasingly a vast array of intangible assets – intellectual property, equitable interests and contractual rights are each capable of expropriation. Like tangible property, intangible property is of economic value to an investor; and in many cases the value will be significantly more than that investors’ tangible property.

The case law of the PCIJ and a number of arbitral tribunals supports the inclusion of intangible property within the definition of property capable of expropriation. In *Chorzów Factory* the PCIJ was asked to consider the effect of Polish measures on Bayerische, a German company, which had been contracted to manage a nitrate plant that was owned by another German company, Oberschlesische.⁶⁸ The Court held that property of Oberschlesische had been expropriated, but also that:⁶⁹

it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licences, experiments etc, have been directly prejudiced by the taking over of the factory by Poland.

Of course, intangible property can be expressly excluded from the protection of a BITs, but absent any express exclusion intangible property is likely to be included (if only impliedly) within the meaning of “investment” or “property”.

In any event, most BITs are sufficiently broad in their definitions of “property” or “investment” to include such intangible forms of property. The Hong-Kong Australia BIT is no exception. Article 1(e) defines an investment as:⁷⁰

⁶⁸ *Case concerning certain German interest in Polish Upper Silesia (Germany v Poland)* (Judgment)(1926) PCIJ (series A) No 7 [*Chorzów Factory*]

⁶⁹ at 22.

⁷⁰ Hong Kong-Australia BIT, above n 22, art 1(e).

[e]very kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time, and in particular, though not exclusive includes:

(ii) shares in and stock, bonds and debentures of a company and any other form of participation in a company;

(iv) intellectual property rights including rights with respect to copyright, patents, trademarks, trade names, industrial designs trade secrets, know-how and goodwill.

Having regard to this provision, and setting aside the timing issues, there can be no doubt that the trademarks involved in the recent tobacco cases are property of a kind that can be the subject of expropriation.

The question, then, is whether plain packaging regulation amounts to expropriation. To answer this, we move to assess the mechanics of the measures, and the elements to be satisfied to make out a claim of expropriation.

3 *Direct or Indirect*

Expropriation has been an issue in international law for much of recent history. Communist reforms and the Mexican nationalist measures of the 1920s developed expropriation into an issue of great significance, a status which was carried through to the oil concessions of the 1960s, and the Iranian nationalisations in the late 1970s.⁷¹

Gone, however, is the age of *direct* taking of private property by the State; today the primary form of expropriation is indirect, and it is indirect expropriation with which we are principally concerned in the instant case. There is no dispute that customary international law (and treaty law) extend to cover indirect expropriation. As early as

⁷¹ August Reinisch "Expropriation" in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2012), at 408 - 410.

1967 the OECD Draft Convention on the Protection of Foreign Property provided that:⁷²

No party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment.

Further, international law is well settled on the specific conditions giving rise to *lawful* expropriation – the taking must be for a public purpose, it must comply with principles of due process, be non discriminatory, and be compensated.⁷³ It is this formulation that is employed in the Hong Kong-Australia BIT, Article 6 of which provides:⁷⁴

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

As transparent as those conditions may appear the concept of ‘expropriation’ is somewhat more opaque. Add where the contention arises is in determining what amounts to expropriation (lawful or otherwise) in the first place. In many cases takings will occur, but they will not reach a threshold sufficient to enter the realm of expropriation,⁷⁵ or there may be some public-interest factor that operates to legitimise the taking.

⁷² OECD Draft Convention on the Protection of Foreign Property (1968) 7 ILM 117.

⁷³ OECD Directorate for Financial and Enterprise Affairs "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law" (September 2004) OECD <www.oecd.org>.

⁷⁴ Hong Kong-Australia BIT, above n 22[emphasis added]

⁷⁵ *Pope & Talbot Inc v The Government of Canada (Interim Award)* UNCITRAL, 26 June 2000 [*Pope & Talbot*] at [28].

The vast majority of BITs do not define expropriation, and there is no universally accepted or settled definition at international law.⁷⁶ Nowhere is this more evident than in the area of indirect expropriation.⁷⁷

Beyond just lacking a definition, indirect expropriation *evades* clear definition. Various descriptions as “de facto”, “disguised”, “constructive”, “regulatory”, “consequential” and “creeping”,⁷⁸ indirect expropriation is a nebulous concept, and the criteria identified as giving rise to it are as diverse as the labels for it. However, there are some unifying features: indirect expropriation may occur in situations where state action “[results] in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor” but which otherwise falls short of an actual taking.⁷⁹

In *Técnicas Medioambientales TECMED SA v The United Mexican States* the tribunal took the view that expropriation would occur if “any exploitation” of an investment had ceased to be possible, or if the “economic value of the use, enjoyment, or disposition of the assets or rights affected by the administrative action or decision have been neutralised or destroyed”.⁸⁰ The tribunal in *LG&E* took a similar view, but was clear that the substantial deprivation must be permanent and of lasting consequence.⁸¹

Perhaps the greatest contributor to the definitional difficulties is the nature of the act itself. Unlike direct expropriation, indirect expropriation is not usually a single act

⁷⁶ Reinisch, above n77, at 408.

⁷⁷ L Yves Fortier and Stephen L Drymer "Indirect Expropriation in the Law of International Investment: Know it When I See It, or Caveat Investor" (2005) 13 Asia Pacific Law Review 79, at 82.

⁷⁸ Campbell McLachlan, Laurence Shore and Matthew Weiniger *International Investment Arbitration: Substantive Principles* (Oxford University Press, Auckland, 2007) at 8.128; see also Draft Articles on State Responsibility for Internationally Wrongful Acts in *Report of the International Law Commission on the Work of its Fifty-Third Session* [2001] vol 2, pt II YILC, Article 15.

⁷⁹ August Reinisch "Legality of Expropriations" in August Reinisch (ed) *Standards of Investment Protection* (Oxford University Press, Auckland, 2008).

⁸⁰ *Técnicas Medioambientales TECMED SA v The United Mexican States (Award)* ICSID Case No ARB(AF)/00/2, 29 May 2003 [*Tecmed*] at [116].

⁸¹ *LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc v The Argentine Republic (Decision on Liability)* ICSID Case No ARB/02/1, 3 October 2006 [*LG&E v Argentina*], at [200].

like a compulsory transfer of title. More often it is a process, the effect of which is the gradual erosion of the some fundamental right of property, the end result of which is an expropriation.⁸² In the case of tobacco, this could be considered the net sum of the various restrictions placed on the companies' use of their trademarks. In Australia this consists of the inability to advertise, sponsor sports or other events under the tobacco brand names, or, now, display the logo on cigarette packaging (the very product that provides the *raison d'être* for the branding).⁸³

Does plain packaging, then, amount to expropriation? To answer this, we must assess the pain packaging measures against the ordinary framework of acts that constitute expropriation.

International law recognises that “measures taken by a state can interfere with property to such an extent that the rights are rendered to useless they must be deemed to have been expropriated.”⁸⁴ What are left after the previously legitimate uses of tobacco branding have been removed are pieces of intellectual property for which there is no use, and thus no value; and goodwill, the value of which has been all but extinguished. The effect of plain packaging, therefore, is to deprive the investors of the economic value that they would have otherwise realised from their investment, and to cause the loss of the normal control that could be exercised over the property.⁸⁵

In assessing whether indirect expropriation has occurred, arbitral tribunals examine whether the challenged measure led to a “substantial deprivation” of the investment (or corresponding economic benefit). The standard of deprivation was identified in *Pope & Talbot Inc v The Government of Canada*⁸⁶ there are a number of factors that may signify indirect expropriation, including the continuing ability of the investor to control the investment; whether the investor remains capable of directing the day to day business; whether employees have been detained; whether the host state collects

⁸² International law recognises that ‘creeping regulation’ can amount to indirect expropriation, see: McLachlan, Shore and Weiniger, above n 78, at 8.128.

⁸³ Tobacco Advertising Prohibition Act 1992; Tobacco Advertising Prohibition Regulations 1993; Tobacco Advertising Prohibition Amendment Regulations 2012 (No 1).

⁸⁴ *Starret Housing Corp v Iran* (1983) 16 IRAN-US CRT Rep 112, at 154.

⁸⁵ *Tippets, Abbett, McCarth, Stratton v TAMS-AFFA Consulting Engineers of Iran* (1984) 6 IRAN-US CRT Rep 219.

⁸⁶ *Pope & Talbot*, above n 75, at [101].

revenues from the company; whether the host state has take over supervision of the investment; whether the host state interferes in the activities of managers or shareholders;⁸⁷ and whether the investor is still able to “use, enjoy, or dispose of the property”.⁸⁸ In keeping with this discussion, attempts to define indirect expropriation have focussed on the (un)reasonableness of the interference with the property.

4 *Partial Nature of the Expropriation*

Some commentators have argued that this expropriation is only partial: the effect of plain packaging is to restrict the use of trademarks and brand names attached to tobacco products. The legislation does not prohibit the sale of tobacco, and nor does it affect the ownership of any property. The right to prevent others from using a certain design or trade name remains, and so too does the title to the property itself (and thus so too does at least *part* of the value of the property). If this is true, a question therefore arises as to whether the partial nature of the taking precludes a finding of expropriation. Although never assessed in this specific context, the issue of so-called “partial expropriation” has come before arbitral tribunals before; the outcomes have been varied.

(a) Partial expropriation does not amount to expropriation

Some tribunals have explicitly denied that partial expropriation is expropriation. In *Marvin Feldman v Mexico* the investor exported various products including cigarettes and alcohol.⁸⁹ The challenged measure was found to deprive the investor of the possibility of exporting tobacco products. The investor remained in control of its business and remained able to export other products.⁹⁰

In *Telenor Mobile Communications AS v The Republic of Hungary* the tribunal applied a similar test, that being: “whether, viewed as a whole, the investment has

⁸⁷ at [101].

⁸⁸ at [102].

⁸⁹ *Marvin Roy Feldman Karpa v. United Mexican States (Final Award)* ICSID Case No ARB(AF)/99/1, 16 December 2002.

⁹⁰ at [52], [111], [142], [209]; Andrew Mitchell and Sebastian M Wurzberger “Boxed in? Australia's Plain Tobacco Packaging Initiative and International Investment Law” (2011) 27 *Arbitration International* at 11.

suffered a substantial erosion of value.”⁹¹ This test requires an investor to show either that the investment as a whole has suffered significantly, or, alternately, that a single significant piece of their investment has suffered.

In cases of large and diversified businesses this may be difficult to satisfy. However, in the case of tobacco the threshold is almost certainly crossed. The whole of Philip Morris’ business is the manufacture, sale and distribution of cigarettes or other tobacco products;⁹² the question however remains open and is discussed in more detail below.

Contrastingly, some tribunals have expressed mild support for the concept of partial expropriation.

(b) Partial expropriation *may* amount to expropriation

In *SD Myers Inc v Government of Canada* the tribunal was open to the idea, and was of the opinion that a “lasting removal” of the ability of an owner to make use of its rights is expropriatory, and that “in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, *even if it were partial or temporary*.”⁹³

The tribunal in *Waste Management Inc v United Mexican States (No 2)* in considering the standard set by Article 1110 of the NAFTA adopted a similar position (though not as expressly). It suggested that one step in its consideration process involved an examination of “whether (even if there was no wholesale expropriation of the enterprise as such) *the facts establish a partial expropriation*.”⁹⁴

If this reasoning is to be adopted, expropriation can still exist even in situations where the challenged measures do not undermine the entire business of the investor. If, for example, tobacco companies were part of a broader company or had

⁹¹ *Telenor Mobile Communications AS v The Republic of Hungary (Award)* ICSID Case No ARB/04/15, 13 September 2006, at [67].

⁹² Philip Morris International Inc "2012 Philip Morris International Inc. Annual Report " (2012) Philip Morris <www.investors.pmi.com>.

⁹³ *SD Myers, Inc v Government of Canada (Partial Award)* UNCITRAL (NAFTA), 13 November [*SD Myers*], at [283] (emphasis added).

⁹⁴ *Waste Management, Inc v United Mexican States (No 2) (Award)* ICSID Case No ARB(AF)/00/3 (NAFTA), 30 April 2004, at [141] (emphasis added).

substantially diversified interests (as British American Tobacco through their ownership of Saks Fifth Avenue, Kohl's, Marshall Field's (now Macy's) and their stake in the Zurich Financial Services Group) then a claim of expropriation could still succeed.⁹⁵

The final view is that, irrespective of specific circumstances, company structure and diversification or other considerations, partial expropriation will always amount to expropriation.

(c) Partial expropriation *is* expropriation

In *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* a tribunal, in assessing whether there was expropriation of large portion of a company's asset base, separately examined each asset (treating it as though it were an independent investment).⁹⁶ The tribunal ultimately determined that a prohibition on the exercise of rights under certain import licences was expropriatory (but other actions were not).

Of the three approaches, the latter would be most beneficial to the tobacco companies. Each asset would be assessed independent of other elements of "investment"; though the outcome for each variant (that is, brand) would ultimately be the same, there is the benefit of divorcing the assessment from other possible business ventures (like income from the licencing of a variant). As Mitchell argues, under this conception "infringement tantamount to expropriation would be sufficient to make out the claim even if other elements of the business remained intact."⁹⁷

Though the full details of Philip Morris' investments, diversity and losses are not yet clear, it seems likely based on this preliminary assessment that the plain packaging measures amount to expropriation. The question then becomes whether the state possesses the "right" to regulate (and whether this right operates to permit the expropriation without payment of compensation), and what the effect of the public health nature of the regulation is.

⁹⁵ British American Tobacco "British American Tobacco - Recent past: 1969 – now" 2012) <www.bat.com>

⁹⁶ *Middle East Cement Shipping and Handling Co, SA v Arab Republic of Egypt (Award)* ICSID Case No ARB/99/6, 12 April 2002 at [107] et seq.

⁹⁷ Mitchell and Wurzberger, above n 90, at 12.

C Public Health & the “Right to Regulate”

Though international law does not expressly grant states a “right to regulate”, there can be no doubt that states have the power to enact within their borders whatever regulations they deem suitable. This is a crucial element of territorial sovereignty.⁹⁸

That does not mean to say that states have a plenary power to regulate without consequence. The tribunal in *ADC Affiliate Ltd v The Republic Of Hungary* considered that a BIT could have the effect of circumscribing a states regulatory power (or at least submits them to certain consequences should they elect to use it).⁹⁹

[while] a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such a right is not unlimited and must have its boundaries...[W]hen a State enters into a bilateral investment treaty...it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State’s right to regulate.

This creates a tension between the rights of investors and the rights of a state to regulate; in many cases the resolution will be clear – the regulation will be expropriatory. However, where measures are taken in the public interest, such as for reasons of public health, the situation is arguably less clear.

The investment and regulatory environment is dynamic. The rights of investors and the rights of the state (or the exercise of the plenary powers of the state) will oftentimes conflict. Whether the “right to regulate” operates to prevent compensation being payable is really a broader question about the allocation of risk in the foreign investment sphere. For BITs to encourage investment in the manner that they are intended to, investors should not be forced to ensure regulation that undermined the value of their investment without compensation. Nor should they be forced to internalise what are very clearly public risks (and which should be socialised).¹⁰⁰ The flipside is that communities ought not be required to pay for ordinary commercial

⁹⁸ Rudolph Dolzer and Christoph Schreuer *Principles of International Investment Law* (Oxford University Press, Auckland, 2008) at 89.

⁹⁹ *ADC Affiliate Ltd, ADC & ADMC Management Ltd v The Republic of Hungary (Award)* ICSID Case No ARB/03/16, 2 October 2006, at [423].

¹⁰⁰ *SD Myers*, above n 93, at [212].

risks that materialise to the detriment of the investor, and nor should their welfare suffer to the benefit of an investor.¹⁰¹ There will always need to be some balance struck between these two sets of competing interests.

To this end, there is some acceptance of circumstances in which states are not liable to pay compensation. Restatement (Third) of Foreign Relation of the United States provides that states will not commit an expropriation (and therefore there is no need to compensate) where it adopts regulation that “[is] commonly accepted as within the police powers of a state”.¹⁰² Unfortunately, there is no bright line as to what is within the police powers of a state and what is not. Similarly, recent cases suggest that states will not be liable where they adopt, in a non-discriminatory manner, bona fide regulations for the purpose of enhancing general welfare.¹⁰³

Further complicating the problem is that more often than not, investment treaties do not explicitly list the conditions under which a host state can restrict inventor’s rights (despite a clear opportunity to do so).¹⁰⁴ However, this is changing. Recently-negotiated BITs do make provision for this, in large part as a result of the North American experience with Chapter 11 of the NAFTA and the modifications made to the US model BIT as a result.¹⁰⁵

Perhaps the greatest indication that the right to regulate does not excuse the payment of compensation is the test itself, though even this has met with mixed reception. The assessment mechanism under the Restatement Third appears to put the cart before the horse: logically the tribunal must first assess whether a measure is expropriatory, and

¹⁰¹ at 93, at [212].

¹⁰² American Law Institute *Restatement of Foreign Relations Law of the United States* (3d ed, St Paul, Minnesota, 1987), at §171.

¹⁰³ *Saluka Investment VB (The Netherlands) v The Czech Republic (Partial Award)* PCA, 17 March 2006 [*Saluka*]. The ILA also supported such a rule at its 36th conference; see S Friedman *Expropriation in International Law* (Stevens & Sons Limited, London, 1953), at 2.

¹⁰⁴ Benedict Kingsbury and Stephan W Schill "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality" in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Auckland, 2010), at 89.

¹⁰⁵ OECD "Novel Features in Recent OECD Bilateral Investment Treaties" in OECD *International Investment Perspectives* (OECD, 2006), at 162.

then decide on its legality.¹⁰⁶ As earlier discussed, most BITs provide that expropriation will be legal where it is non-discriminatory, enacted for the public benefit, in accordance with due process and against compensation. It seems unusual, then, to suggest that takings which are for public benefit and non-discriminatory (and are therefore an exercise of a police power and the right to regulate) somehow automatically fall outside the scope of expropriation.

The Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments provides in Article 6(1):¹⁰⁷

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

This provision, like most others, sets up a category of things that are expropriatory, and then carve out of this a limited category of things that are, notwithstanding their expropriatory nature, legal. One requirement of legality is public interest or benefit.

Whether regulation for public benefit could be expropriatory has been considered on a number of occasions.

Methanex Corporation v United States of America, concerned a ban placed on the use or sale in the state of California of a gasoline additive, MTBE. Methanex, a Canadian company, submitted a claim to arbitration under the UNCITRAL rules alleging injury resulting from the ban.

In considering whether the public-interest nature of the prohibition had any impact on its expropriatory nature, the tribunal held that:¹⁰⁸

¹⁰⁶ *Fireman's Fund Insurance Company v Mexico (Award)* ARB(AF)/02/1, 17 July 2007 at [174].

¹⁰⁷ Hong Kong-Australia BIT, above n 58.

¹⁰⁸ *Methanex Corporation v United States of America (Final Award on Jurisdiction and Merits)* UNCITRAL, 3 August 2005 [*Methanex*], at Part IV, Chapter D, [7].

as a matter of general international, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

Applying this to the instant situation, unless Australia gave specific assurances that plain packaging would not be implemented at the time the investment was made there could be no compensable expropriation when plain packaging was implemented. No such assurance was made, but Philip Morris has attempted to argue around this point by suggesting that Australia did make assurance that it would act in accordance with its international trade and investment obligation (and that implicit in this was an assurance that there would be no measures taken subsequently that would reduce the value of the investment).¹⁰⁹

Though the case generally is not directly on point, the discussion of expropriation in *SD Myers v Canada* is useful. *SD Myers* saw an American investor complain about a Canadian temporary ban on the export of poly-chlorinated biphenol waste. Canada argued that there were health and environmental reasons for the policy, though the tribunal disagreed ultimately finding that the regulations were intended to protect the Canadian PCB disposal industry from that of the United States.

What makes the case notable in this context is the tribunal's approach in relation to expropriation (which they ultimately found did not exist, principally because of the temporary nature of the measures). The tribunal considered that "international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures" and that the "general body of precedent usually does not treat regulatory action as amounting to expropriation".¹¹⁰

Similarly, in *LG&E*, the tribunal held that:¹¹¹

¹⁰⁹ *Philip Morris v Australia*, Notice of Arbitration at [6.5].

¹¹⁰ *SD Myers*, above n 93, at [281]

¹¹¹ *LG&E v Argentina*, above n 81 at [195].

[it] can generally be said that the State has the right to adopt measure having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed.

This reasoning mandates that a balancing exercise take place. As assessment of the claimed benefits of plain packaging is well outside the scope of this paper, though it should be noted at this point that this balance exercise would essentially weight those public health benefits (in the form of a reduction of smoking prevalence or an increase in the effectiveness of the health warnings) against the restrictiveness of the measure. This is likely to involve a counterfactual positing alternative and proven means of reducing smoking that are available to Australia.

Inherent in the reasoning of *Methanex*, *SD Myers* and *LG&E* is a contradiction. The tribunal in *Azurix* explained that according to the *SD Myers* reasoning:

[a] BIT would require that investments not be expropriated except for a public purpose and that there be compensation if such expropriation takes place and, at the same time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose.¹¹²

Most BITs contain provisions that render expropriation lawful only if there is a public interest, but applying the reasoning of these three cases, the public purpose would mean that there was no expropriation to begin with. The use of public purpose to deny the very existence of expropriation when it is built in to a provision which rendering expropriation lawful is difficult to reconcile.

However, taking this reasoning as given for the moment the effect would be that plain packaging measures implemented for reasons of genuine public health (and it is hard to argue that they are not) are non-compensable for want of expropriation. This is the case no matter the substance of the resulting deprivation.

¹¹² *Azurix Corp v The Argentine Republic (Award)* ICSID Case No ARB/01/12, 14 July 2006 [*Azurix*], at [311]

A more persuasive (and logically consistent) line of reasoning can be found in *Compañía del Desarrollo de Santa Elena v The Republic of Costa Rica*. The case concerned the taking of 15,000 ha of property (Santa Elena) that Compañía del Desarrollo de Santa Elena, S.A. had purchased with the intention of developing into a residential community and tourist resort. The Government of Costa Rica issued a decree that the land was to be taken for conversion into a national park. There was no question that the taking was expropriation (and the Government had admitted as much), the question was whether the expropriation was compensable given the underlying public purpose. The tribunal considered that:¹¹³

[while] an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, *the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid.*

This reasoning is consistent with an ordinary reading of a BIT containing a provision rendering expropriation for public purpose lawful.

Perhaps the greatest support for this latter interpretation is the practice of States in their approach to more recent BIT negotiations. Australia itself has attempted to close off the issue, and a recently concluded BIT with Chile provides that:¹¹⁴

[e]xcept in rare circumstances, non-discriminatory regulatory action by a Party that are designed and applied to protect legitimate public welfare objectives such as public health, safety and the environment, do not constitute indirect expropriations.

Identical provision was made in the 2004 US Model BIT,¹¹⁵ though this has been removed in the 2012 revision.¹¹⁶

¹¹³ *Compañía del Desarrollo de Santa Elena SA v The Republic of Costa Rica (Final Award)* ICSID Case No ARB/96/1, 17 February 2000, at [71] – [72] [emphasis added, footnote omitted].

¹¹⁴ Australia-Chile Free Trade Agreement, 2694 UNTS 1 (opened for signature 30 July 2008, entered into force 6 March 2009), Article 3(b).

D Conclusion

If both the investor and investment test are satisfied, then the inquiry turns to whether expropriation has actually occurred.

Unlike a tax, which is designed both to reduce consumption and compensate for future harm (and arguably only the latter given the inelasticity of demand for tobacco products), the sole purpose of plain packaging is to make packets less attractive in an effort to curb smoking uptake and re-uptake.¹¹⁷ There is a clear deprivation of the investment into branding, and the effect of outright prohibition of the use of that branding is to prevent that investor from extracting the expected quasirents from the property.¹¹⁸

The resultant effect of the plain packaging measures is the permanent deprivation of the ability to use, or generate value from a trademark. Even where the trademarks (and their use in the sale or distribution of cigarettes) concerned comprise only a portion of a wider investment, the significance of their value when considered as a portion a wider suite of investments is likely to mean that the investments are expropriated, notwithstanding that the investment in its entirety is not destroyed.

Though impetus for the measures is public health, the wording of the relevant provision in the BIT precludes the use of public health to fundamentally alter the nature of the measures from expropriatory to non-expropriatory.

Taking a step backward, it would appear that the specific driver of the plain packaging regime is a multilateral agreement on tobacco control. The next section will examine the obligations under this agreement, and under the relevant BIT.

V External Regime (In)coherence

¹¹⁵ Office of the United States Trade Representative, 2004 Model Bilateral Investment Treaty.

¹¹⁶ Office of the United States Trade Representative, 2012 Model Bilateral Investment Treaty.

¹¹⁷ Cancer Council Australia "Plain Packs will stop kids smoking" (press release, 7 April 2012)

¹¹⁸ Manuel Abdala and Pablo Spiller "Damage Valuation of Indirect Expropriation in International Arbitration Cases" (2003) 14(4) American Review of International Arbitration 447.

One key driver of the tobacco packaging regulations, both in Australia and overseas, and something that will invariably be used by other states in an effort to justify any regulations that they may enact is the World Health Organisation Framework Convention on Tobacco Control (Framework Convention).¹¹⁹

The convention, though not binding in its entirety, may operate to require governments to take positive steps in an effort to reduce tobacco-related harm. This obligation, however, does not automatically strip investors of their intellectual property rights, nor relieve governments of the obligations that they owe under other treaties they have entered into.

This Part explores the interface between plain packaging measures and obligations incumbent on State parties (generally) under the Framework Convention, and under the Bilateral Investment Treaty network.

To this end it will proceed in three sections. Section A outlines the Framework Convention, and will discuss the nature of the obligations created under it. Section B will assess this apparent conflict. Section C will examine tools that have developed to reconcile the conflict and seek to apply them in the instant case.

A The Framework Convention

1 Background to the Convention

The objective of the convention as set out in its text is:¹²⁰

[To] protect present and future generations from the devastating health social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by Parties at the national regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

¹¹⁹ World Health Organisation Framework Convention on Tobacco Control 2032 UNTS 166 (adopted 21 May 2003, entered into force 27 February 2005) [*Framework Convention*]

¹²⁰ at Article 3.

The Framework Convention was developed in response to the globalisation of the tobacco epidemic.¹²¹ It recognises the complex set of interrelated factors that have contributed not only to the export of tobacco products, but also the export of the associated harm: trade liberalisation; foreign direct investment; global marketing and tobacco advertising, promotion and sponsorship; and the international movement of counterfeit cigarettes.¹²²

Ordinarily, a framework convention operates by creating a broad base of non-binding goals and a framework for negotiations. This framework and these goals are then supplemented by binding protocols.¹²³ What makes the Framework Convention on Tobacco Control different (and quite unique) is that it consists of some binding and some non-binding provisions, each with varying degrees of specificity. The latter provisions are intended to encourage (rather than compel) Parties to take measures to curb tobacco related harm.¹²⁴

The Convention was the first (and currently only) treaty to have been negotiated under the auspices of the WHO's legislative power.¹²⁵ It entered into force in early 2005, having opened for signature in June 2003 and having achieved the necessary number of signatures within 12 months. Current membership stands at 177.¹²⁶ Members include Australia, China (including Hong Kong), Cuba, Honduras, New Zealand, Switzerland, the United States, and Ukraine.¹²⁷

¹²¹ World Health Organisation, above n 2.

¹²² Framework Convention, above n 119, Foreword V.

¹²³ Kate Lannan "The WHO Framework Convention on Tobacco Control: The International Context for Plain Packaging" in Tania Voon et al (eds) *Public Health and Plain Packaging of Cigarettes* (Edward Elgar Publishing, Melbourne, 2012) at 15. See, for example, the United Nations Framework Convention on Climate Change, 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994), the associated Kyoto Protocol to the United Nations Framework Convention on Climate Change 2302 UNTS 148 (opened for signature 16 March 1999, entered into force 16 February 2005) and Montreal Protocol on Substances that Deplete the Ozone Layer 1522 UNTS 3 (opened for signature 16 September 1987, entered into force 1 January 1989).

¹²⁴ Lannan, above n 123, at 16.

¹²⁵ at 12.

¹²⁶ World Health Organisation "Parties to the WHO Framework Convention on Tobacco Control" (7 December 2012) World Health Organisation <www.who.int>.

¹²⁷ Cuba, Switzerland and the United States have signed but not yet ratified the Framework Convention. The Convention is not yet in force in any of those three territories.

Though extremely diverse in its operation, the Convention is most relevant for this paper to the extent that it establishes a number of mechanisms for tobacco control. These measures are by no means the high-water mark; and parties are encouraged to (and guidelines provide mechanisms to) go beyond the requirements of the Convention.¹²⁸

2 *Operation*

The tobacco control measures provided for by the Convention operate on both the demand-side and the supply-side. This represents a “paradigm shift in developing regulatory strategy to address addictive substances”¹²⁹ and stands in stark contrast to most other drug-control treaties, which are significantly weighted toward supply-side measures.¹³⁰

The Foreword to the Framework Convention identifies a number of key demand reduction mechanisms that are then translated into specific provisions in the body of the Convention. Broadly these fall into two categories: price, and non-price.

Article 6 provides non-binding encouragement to parties. It provides that “[w]ithout prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should adopt” taxation, price and customs measure in an effort to reduce consumption.¹³¹ Parties are, however, obliged to provide information regarding rates of taxation and trends in consumption to the Conference of the Parties in their periodic reports.¹³²

Non-price measures are far broader: Article 7 contains a self-executing, binding obligation:¹³³

Each party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations...and shall cooperate, as appropriate, with each other

¹²⁸ Lannan, above n 124, at 17.

¹²⁹ Framework Convention, above n 119, Foreword, V.

¹³⁰ Lannan, above n 124, at 16.

¹³¹ Framework Convention, above n 119, Article 6(2)(a) and (b).

¹³² at Article 6(3), Article 21.

¹³³ at Article 7.

directly or through competent intentional bodies with a view to their implementation.

Some scholars have argued that Article 7, in addition to imposing an obligation to implement measures to reduce demand, also imposes an obligation to *defend* such measures.¹³⁴

The specific obligations in the contemplation of Article 7 are found in Articles 8 through 13. These variously provide that Parties shall adopt measures to protect its citizenry from exposure to tobacco smoke in workplaces, public places and public transport;¹³⁵ effective measures for the measuring and testing of the contents of tobacco products in accordance with guidelines established by the Conference of the Parties;¹³⁶ require tobacco manufacturers and importers to disclose to governmental authorities information about the contents and emissions of tobacco products, and disclose to the public information about the toxic constituents of tobacco products;¹³⁷ and measures to promote and strengthen public awareness of tobacco related issues.¹³⁸

Most relevant for the purposes of the instant paper are those obligations described in Articles 11 and 13. Article 11 concerns packaging and labelling of tobacco products, and provides that parties shall adopt measures to ensure that:

(a) tobacco labelling does not promote tobacco by means that are false, misleading or deceptive, or create an erroneous impression about its characteristics, health effects, or hazards in particular through the use of descriptors or trademarks that suggest a particular product is relatively less harmful than others;¹³⁹ and

¹³⁴ Todd Weiler *Philip Morris vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law* (Physicians for a Smoke Free Canada, 2010), at 29-32.

¹³⁵ Framework Convention, above n 119, Article 8.

¹³⁶ at Article 9.

¹³⁷ at Article 10.

¹³⁸ at Article 12.

¹³⁹ Such as the use of “ultra light”, “light” or “mild”. In response to this tobacco companies changed the names of some variants, Philip Morris, which markets the *Marlboro* brand of

(b) each packet carries health warnings describing the harmful effects of tobacco use. Such warnings shall cover more than 30 per cent of the principal display areas, and will ideally cover more than 50 per cent.

This has been supplemented by Guidelines for the Implementation of Article 11. The guidelines recommend that, in addition to implementing measures regarding size, colouring, placement, language, attribution and content of health warnings,¹⁴⁰ Parties consider¹⁴¹

adopting measures to restrict or prohibit the use of logos, colours brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style.

The rationale behind this measure is that one way of minimising demand is to make tobacco products less attractive, plain packaging (in addition to removing aesthetic appeal) enhances the noticeability and effectiveness of the health warnings,¹⁴² and prevents misleading consumers through design and branding techniques.¹⁴³

Australia has essentially given full effect to these guidelines through its plain packaging legislation.

Relevant to the extent that it restricts the use of trademarks and other brand indicia is Article 13. Through this article, the Convention imposes restrictions on the marketing of tobacco, compelling Parties to undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship, or, where it is unable to do so as a result of its constitutional principles, apply restrictions on the same.

cigarettes in New Zealand, changed the name ‘Marlboro Lights’ to ‘Marlboro Gold’, for example. This is also addressed in the Guidelines at [43].

¹⁴⁰ Guidelines for Implementation of Article 12 of the WHO Framework Convention on Tobacco Control FCTC/COP3(10) (2008) [*Article 12 Guidelines*] at [8]-[42].

¹⁴¹ at [46].

¹⁴² Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control FCTC/COP3(10) (2008) [*Article 11 Guidelines*].

¹⁴³ Such as describing cigarettes as “light”, “ultra light” or “slim”, which imply a lower tobacco content than non-light variants.

Many countries have taken steps to ban advertising, promotion and sponsorship outright. In the case of Australia and New Zealand, these measures were taken well before the Framework Convention was contemplated.

Having outlined the framework and the mechanism by which the convention operates, this Section will now drill down into the packaging elements of the convention, and look specifically at the plain packaging suggested in the Guidelines.

3 *Obligation*

Some provisions are framed in non-obligatory or nebulous terms. Article 6 begins “without prejudice to the sovereign rights of the Parties...”. Others, however, are framed in much more hard-line language. Article 11 is one such provision. Before describing the particular measures that must be taken,¹⁴⁴ Article 11 provides that “[e]ach Party *shall, within a period of three years* after entry into force of this Convention for that Party adopt...”.¹⁴⁵ A similar approach is taken in the Guidelines.

Though by their nature the Guidelines are drafted in less firm terms, there is still variation within them. While some provide that “Parties should require...”, others are less firm and merely provide that “Parties should consider...”. Plain packaging (as described in paragraph 46 of the Guidelines) falls into the latter category and so is arguably ‘less mandatory’ than other measures, many of the other Guidelines which contribute to plain packaging (such as those regarding labelling) are framed in terms more aligned with the former category.

In any event, the Guidelines are not per se binding on the parties in the way that the Framework Convention proper is. However, by adopting the Guidelines the Parties have agreed to the principles and definitions they embody. When coupled with the obligation to interpret and implement the Framework Convention in good faith,¹⁴⁶ the Guidelines are essentially elevated to a practical description of the steps necessary to

¹⁴⁴ Which are described above.

¹⁴⁵ Framework Convention, above n 119, Article 11, [emphasis added].

¹⁴⁶ Vienna Convention on the Law of Treaties 1144 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980) [*VCLT*], Article 26.

meet the obligations imposed by the Convention.¹⁴⁷ This is true notwithstanding the various phrasing of the Guidelines on an individual level.

In practice plain packaging consist of two elements: a negative element, which obliges manufacturers and imported to refrain from using trademarks or designs in the packaging of their products; and a positive element which ensures the use of consistent and uniform designs across all manufacturers, importers and variants, and the inclusion of warnings or graphic imagery and health warnings.

For the purposes of assessing the compliance with BIT obligations, we are mainly concerned with the first negative element. As discussed in Part IV, the obligation to refrain from employing a trademark – both on packaging and in advertising – renders the trademark and associate goodwill effectively valueless. While, legally speaking, the right to enforce that trademark remains (that is to say the trademark owner can prevent other people using it), the circumstances in which it can be used cease to exist. The right, therefore, has no practical value absent some positive right to *use* rather than simply *enforce* the trademark. It is in this circumstance where the positive element becomes relevant.

What arise in the case of plain packaging are two sets of conflicting obligations incumbent upon a state, and a resultant fragmentation of international law. The next section in this part will examine is conflict in greater detail.

B Conflict & Fragmentation

Generally speaking, treaties operate as closed systems. Each is self-sufficient; each operates according to its own internal rules and resolves disputes using its own internal mechanisms.¹⁴⁸ For the most part this operation exists entirely independently of other treaties.¹⁴⁹ However, there are exceptions: the Vienna Convention on the Law of Treaties acts as a meta-treaty of sorts, providing mechanism of the

¹⁴⁷ Global Smoke-free Partnership “Framework Convention on Tobacco Control: Article 8 Toolkit” World Heart Federation <www.world-heart-federation.org>.

¹⁴⁸ There are some obvious exceptions, the WTO for example. Though comprised of a number of different treaties, it is perhaps better conceived of as a network of treaties that, together, form a single closed and coherent system.

¹⁴⁹ Treaties can, of course, be used to interpret each other and so the systems are not truly “closed”.

interpretation of other treaties and other customary rules. Treaties do not, however, operate in a normative vacuum: there is a certain basic level of interlinkage through operation,¹⁵⁰ and also at the level of interpretation.¹⁵¹

If the Framework Convention includes some binding obligations which compel states to take certain action, as this paper has argued that it does, and the result of that is the expropriation of private property contrary to guarantees made under a BIT then there is a clear conflict of obligations. States are left in a difficult position: one the one had a state must take measures to reduce tobacco consumption; on the other, they must avoid action that reduces the commercial value of tobacco companies' investments. The difficulty is that action states take in pursuit of the public health, particularly the reduction of tobacco consumption will necessarily have an adverse impact on an investor's investment insofar as the value of the brand they are seeking to sell is reduced and it becomes increasingly less attractive.

The result of this is the fragmentation of international law, and the consequences in this context are serious. The ultimate purpose of a BIT is to encourage foreign trade and investment. However, where states take action contrary to the guarantees they have provided under the BITs to which they are a party, the value of those treaties is reduced, and the network as a whole undermined. Secondly, where the Framework Convention (or similar public-interest treaties) are met with substantial resistance and states, as a result, must defend them, then states may be discouraged from entering into treaties of this nature in the future. In either case, the populace suffers. Perhaps more damaging, though, is the harm done to the overall perspective of the law.¹⁵²

Kelsey argues that there is an implicit acknowledgement of this tension in the Framework Convention, and an attempt made at resolution. Article 2(2) provides:¹⁵³

¹⁵⁰ Niklas Luhmann "Operational Closure and Structural Coupling: The Differentiation of the Legal System" [1992] 13 Cardozo Law Review 1419, at 1427.

¹⁵¹ Martti Koskeniemi *Study on the Function and Scope of the lex specialis Rule and the Question of "Self-Contained" Regimes* (2004), at 7; Bruno Simma and Dirk Bulkowski "Of Planets and the Universe: Self-contained Regimes in International Law" (2006) 17(3) The European Journal of International Law 483, at 492.

¹⁵² Report of the Study Group of the ILC, 58th Session (2006) A/CB.4/L.682, at [4].

¹⁵³ Framework Convention, above n 119, at Article 2.2

The provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are comparable with their obligations under the Convention and its protocols.

The wording of the provision was a compromise between two irreconcilable positions.¹⁵⁴ Several states were of the view that the Framework Convention should (expressly) take priority, and suggesting the wording:¹⁵⁵

Priority should be given to measures taken to protect public health when tobacco control measures contained in this Convention and its protocols are examined for compatibility with other international agreements.

While others were of the view that investment and trade treaties should take priority:¹⁵⁶

Trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on international trade.

And later formulated as:¹⁵⁷

¹⁵⁴ Jane Kelsey *International Trade Law and Tobacco Control* (Tobacco Control Research Tūranga, 2012), at 17.

¹⁵⁵ Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, Fourth Session, Provisional agenda item 4, “WHO Framework convention on Tobacco Control’ Co-Chairs’ working papers: Final Revisions: Working Group 2,” Guiding Principle D.5, January 24, 2002, A/FCTC/INB4/2(a).

¹⁵⁶ Intergovernmental Negotiation Body off the WHO framework convention on Tobacco Control, First Session, Provisional agenda Item 8, “Proposed draft Elements for a WHO convention on tobacco control: provisional texts with comments of the working group,” Guiding principle 4, July 26 2000, A/FCTC/INB1/2.

¹⁵⁷ Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, Fourth Session, Provisional agenda Item 4, “WHO Framework convention on Tobacco Control’ Co-Chairs’ working papers: Final Revisions: Working Group 2,” Guiding Principle D.5, January 24, 2002, A/FCTC/INB4/2(a).

Tobacco control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade.

Contrary to Kelsey's view, a plain reading of this provision would seem to suggest its application is limited to circumstances where Parties intend to enter into regional agreements that are at least broadly similar in scope to the Framework Convention.¹⁵⁸

the right of Parties to enter into bilateral or multilateral agreements, ...
on issues relevant or additional to the Convention and its protocols...

Regional agreements on trade in illicit tobacco products, or a multi-state agreement relating to the cross-border advertising of tobacco would fall within the ambit of this provision. Investment treaties, however, would not (unless specific provision was made for tobacco products).

In this respect the provision does little to resolve tensions arising between the Framework Convention and agreements that are largely dissimilar (such as investment treaties). Absent one treaty subordinating itself to another, the default position at international law, and a fundamental principle that has been codified in the Vienna Convention, is that of *pacta sunt servanda*. Article 26 of the Vienna Convention provides that:¹⁵⁹

[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.

States must therefore wrangle with the impossible task of discharging their obligations under *both* the Framework Convention and the BIT. Some conflict resolution must still take place, however, and the nature of the instant conflict is zero-sum. To resolve this, we must look outside of the two conflicting treaties to international law more generally.

C Resolving the Conflict / Defragmentation

There are no clear rules for dealing with conflict in the international law space. Rules do, however, exist in both domestic law and private international law and these may

¹⁵⁸ Framework Convention, above n 119, Article 2.2 (emphasis added).

¹⁵⁹ VCLT, Article 26.

have some valuable application to international law disputes of the instant kind. This section will examine those rules presented in domestic and private international law systems, and then assess their applicability in the international law space and to this conflict.

1 Domestic law solutions

Domestic law routinely encounters internal conflicts that require resolution. To this end, rules to deal with pluralism have developed: in domestic law these can be broken down into two general groupings. The first set examines the relative hierarchal status of the conflicting laws, while the second assesses their temporality and their specificity

Which is applied in a given setting is ultimately a product of the specific conflict situation, but as between the two sets of rules, those based on hierarchy will take priority for reasons that will become apparent as we examine the rules' content.

The conflict of norms rules work first by assessing the relative hierarchical status of the conflicting rules.¹⁶⁰ Under the rule *lex superior derogate legi inferiori* the hierarchically superior rule will take priority over the hierarchically inferior rule.¹⁶¹ In practice, the application of this rule within a domestic legal system is usually very clear: rules with constitutional status take priority over statutes, which in turn take priority over the common law; legislation over regulations; mandatory rules over party autonomy.

Difficulty arises, of course, where there is no hierarchy. Where this is the case, the second set of rules will come into play.

This second set of rules seeks to examine the legal fiction of the relevant lawmaker's intent. The doctrine *lex posterior derogate legi priori* dictates that more recently made law will take priority over older law (to the extent that both laws concern the

¹⁶⁰ Ralf Michaels and Joost Pauwelyn "Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law" (2012) 22(3) Duke Journal of Comparative and International Law 349, at 354.

¹⁶¹ Aulis Aarnio *The Rational as Reasonable: A Treatise on Legal Justification* (Kluwer, Dordrecht, Holland, 1987) at 98.

same subject matter).¹⁶² The doctrine *lex specialis derogate legi generali* provides that more specific law will override more general law. Both of these rules presume an intention on the part of the lawmaker that specific and recent should be applied in favour older of more general law; though not immediately obvious this also involves the application of a legal fiction wherein all law-making acts are imputed to a single lawmaker with a coherent regulatory intent. While this legal fiction may not strictly mirror reality (in situations where regulators are frequently changing, regulation is ordinarily delegated, or, as in the common law, where multiple groups perform a law-making function this will *rarely* be the case), it is unlikely to present any significant problems in the domestic law setting.

By the very nature of their origin, domestic law conflicts rules exist to resolve conflicts within a single system. But what happens when a conflict exists *between* systems? Private international law (or “conflict of laws” in North American parlance) exists to resolve conflicts *between* systems. Though “international” would suggest it has application only in the international law sphere, the rules are suited to the resolution of most inter-state¹⁶³ conflicts.

2 *Private International Law Solutions*

There are a multitude of private international law solutions, and states have put their own spin on even the generally accepted approaches. However, like domestic law, the rules can be broadly grouped into three sets: the traditional approach, the state interest approach, and the functional approach.¹⁶⁴

(a) The traditional approach

The traditional approach is the principal approach employed in both Europe and the United States. It seeks to determine the law applicable to a factual situation in an abstract sense (that is, without regard to the substantive law), through the application of so called “choice-of-law” rules that are specific to the subject of the dispute.¹⁶⁵

¹⁶² at 98.

¹⁶³ ‘state’ is used here both in the sense of a Nation State, but also in a federal sense.

¹⁶⁴ Michaels and Pauwelyn, above n 160, at 357.

¹⁶⁵ A F M Maniuzzaman "International Commercial Arbitration: The Conflict of Laws Issues in Determining the Applicable Substantive Law in the Context of Investment Agreements"

First, the ‘problem’ is characterised (as one of tort, contract, and so on).¹⁶⁶ Different areas of law have different ‘choice of law’ rules; the aim at this stage is to determine the area of law in which the problem arises such that the correct choice of law rule can be identified.¹⁶⁷

Second, the choice of law rule of the identified applicable area of law is applied. Generally this involves assessing the dispute for a number of connecting factors (territory, nationality, domicile) that point toward the particular law that will ultimately be applied.¹⁶⁸

Finally unless there is some overriding public policy ground that would prevent the application of the law in the forum state, the determined law is applied.¹⁶⁹

(b) The state interest approach

Professor Brainerd Currie developed the state or governmental interest approach as a response to the traditional approach.¹⁷⁰ It directs the forum to assess the interest of each government in having its own law applied; and unlike the traditional approach there is a focus on the *substance* of the law. In view of the text of the law and the legislative intent, the first step is to determine which rule claims applicability in the situation presented, which will more often than not result in multiple states’ law claiming applicability (or, more accurately, multiple states claiming the applicability of their law).

(1993) Netherlands International Law Review, XL 201, at 205; see generally Lord Collins and others (eds) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012), at [1-001] et seq, [2-002] et seq, at [5-001] et seq.

¹⁶⁶ Note however, that there is substantial debate as to whether characterization is a preliminary or an incidental question. See generally Lord Collins and others, above n 165, at [2-002] et seq.

¹⁶⁷ Michaels and Pauwelyn, above n 160, at 358.

¹⁶⁸ Lord Collins and others, above n 165, at [1-078] - [1-088].

¹⁶⁹ at [5-001] et seq.

¹⁷⁰ See Brainerd Currie "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function" (1958) 26 University of Chicago Law Review 9; Brainerd Currie "Notes on Methods and Objectives in the Conflict of Laws" (1958) Duke Law Journal 171 and Brainerd Currie "Survival of Actions: Adjudication versus Automation in the Conflict of Laws" (1958) 10 Stanford Law Review 205.

This “true” conflict can be resolved in one of a number of ways, though the most common is an assessment of ‘relative’ or ‘comparative’ impairment’.¹⁷¹ The result of this assessment is to require the decision maker to apply the law that would suffer the greater impairment as a result of non-application.¹⁷² Importantly, this inquiry involves the balancing of governmental *interests* rather than balancing government *policy*.¹⁷³

(c) The functional approach

The functional approach, like the traditional approach is subject to different treatment in different states. However framed, the ultimate goal is the same: the identification of the law that is most appropriate, in that it has the closest connection to the factual matrix presented by the dispute.¹⁷⁴ It is difficult to comprehensively summarise the mechanics of the functional approach (because of the diversity illustrated in the various state- and issue-specific manifestations). By way of illustration, however, the approach in the United States is to look to factors such as the relevant strength of the policies, the control that the states whose law is potentially applicable can exercise over the matter, and the commonness between states of particular elements of policy.¹⁷⁵

Having set out a number of possible approaches The question now becomes: how suitable are these approaches for application, both in the international law sphere on a general level, and also to the conflict that arises between BITs and the Framework Convention.

¹⁷¹ Jessica Freiheit "Choice of Law Issues: Selecting the Appropriate Law" in Proskauer Rose LLP (ed) *Proskauer on International Litigation and Arbitration: Managing, Resolving and Avoiding Cross-Border Business or Regulatory Disputes* (2011), at [IV.D.5].

¹⁷² at [IV.D.2].

¹⁷³ Michaels and Pauwelyn, above n 160, at 360, citing *Tucci v Club Mediterranee, SA*, 89 Cal App 4th 180 (2001).

¹⁷⁴ The approach developed in the area of contract law, for a specific discussion see Russell Weintraub "Functional Developments in Choice of Law for Contracts" in *Volume 187 of Académie de droit international, recueil des cours, 1984-IV* (Martinus Nijhoff, Leiden, 1985) at 249 – 260. For a more general discussion, see F A Mann "The Proper Law in the Conflict of Laws" (1987) 46 *International Law & Comparative Law Quarterly* 437, at 437 – 438.

¹⁷⁵ Michaels and Pauwelyn, above n 160, at 360.

3 *Application in International Law Conflicts*

The effectiveness of the rules when applied to international law conflicts ultimately hinges on how we conceive of international law. If it is a single system, then domestic law rules will be the most appropriate solution. If it is several systems, which, at times, interact, then the private international law solutions will be most appropriate. Michaels and Pauwelyn argue that this question is moot: whether international law behaves like a single system or like multiple systems is a product of the rules that are applied.¹⁷⁶ This is true to an extent, though the decision of which rules to apply, as a matter of principle, should be based on the *appropriateness* of the application rather than the behaviour of the object subject to that decision.

This paper has taken the position the international law conflict between BITs and the Framework Convention is principally a result of the relevant treaties operating as separate systems. For this reason the most appropriate conflict-resolution method is the application of private international law rules. For completeness, however, we will also examine the application of domestic law solutions.

(a) Domestic law solutions

Domestic law solutions are perhaps the most intuitively attractive: they are (relatively) straightforward, virtually uniform between common and civil law, and present the clearest outcomes. However, as a result of the very presumptions that grant intra-systemic conflicts rules efficacy, the rules do not operate well in the context of inter-systemic conflict.

In the first instance, there is no clear hierarchy between legal systems. Jus cogens are superior, but they are few and specific.¹⁷⁷ What remains after the removal of superior norms is relative anarchy.

Within international law *subsystems*, hierarchy can sometimes be established: Article XVI:3 of the Agreement Establishing the World Trade Organisation provides that it

¹⁷⁶ at 362.

¹⁷⁷ Enzo Cannizzaro *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, Auckland, 2011) at 144; see generally Ian Brownlie *Principles of International Law* (5th ed, Oxford University Press, Auckland, 1998) at 517.

is superior to and will prevail over all other WTO agreements.¹⁷⁸ Generally, however, the priority of systems is only that which each system claims for itself over others.¹⁷⁹ The difficulties are even more acute when it is not the treaties *themselves* that conflict but rather it is the actions taken by states in an effort to implement those treaties (as in the instant case).

The other limiting factor is the presumption of internal coherence. As discussed above, domestic legal systems – albeit by legal fiction – are presumed to have coherent legislative intent that is imputed to a unitary lawmaker.¹⁸⁰ This allows for the application of the doctrines of *lex specialis* and *lex posterior*. While these doctrines have long been recognised at international law,¹⁸¹ and on occasion played a significant role in international jurisprudence,¹⁸² the presumption on which they rely is far less legitimate in an international law setting.

In the instant case the Framework Convention post-dates the relevant bilateral investment treaty. It could be argued that as a more recent treaty, the Framework Convention will take priority.

The Vienna Convention, however, makes clear that this is limited to situations where there is an overlap in the substantive content of the treaties. Article 30(3) provides that when states are party to multiple treaties concerning the *same subject matter* “[t]he earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty”. Similarly, the “generalia rule can only apply where both the specific and general provision concerned deal with the same subject matter”.¹⁸³

It could, of course, be argued that the Framework Convention is more specific than the BIT (it concerns *cigarettes* whereas the BIT concerns *trade and investment* in a more general sense). However, to construct the subjects of the treaties this way is

¹⁷⁸ Marrakesh Agreement establishing the World Trade Organization 1867 UNTS (concluded 15 April 1994, entered into force 1 January 1995), Article XVI:3.

¹⁷⁹ Michaels and Pauwelyn, above n 160.

¹⁸⁰ Simma and Bulkowski, above n 151, at 489.

¹⁸¹ See *Ambatelos Case (Greece v United Kingdom) (Merits)* [1952] ICJ Rep 28, dissenting opinion of Judge Hsu at [87].

¹⁸² *Gabčíkovo–Nagymaros Project (Hungary v. Slovakia)* ICJ Rep (1997), at [132]; *INA Corporation v Iran* 75 ILR 1987, at [378].

¹⁸³ Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Points” (1957) 33 BYIL at 203.

somewhat artificial. When the “public health” lenses are removed and the situation viewed through international trade or international economic law lenses then the situation could just as legitimately be interpreted the opposite way.¹⁸⁴

Ultimately, whether there is an overlap between the BIT and the Framework Convention turns on how broadly one construes the “subject matter” of the treaty; in this particular case to suggest that there is identity of subject sufficient to invoke a priority rule would require an unreasonably broad interpretation.

This is not to say that the domestic rules are of no use. There are, of course, some circumstances where the rules will have successful application – within treaty subsystems, for example,¹⁸⁵ though this largely because the systems exhibit the same characteristics as the domestic systems the rules developed to serve. More broadly, though to decline application of the rules for want of relationships exhibited in domestic law elements is to make the mistake of presuming that that in order for international law as a system to operate things must manifest in much the same manner as they do in a domestic law sense.

To this end, Article 53 of the Vienna Convention refers to the “international community of states” as being the creator of jus cogens. While the “billiard ball”¹⁸⁶ model of international relations law is rightly considered inadequate and dated for many purposes,¹⁸⁷ it is still possible to legitimately construct a legal fiction in which the ‘unitary lawmaker’ is the *community* as a whole rather than some supra-national government.

Even if we adjust our view to reflect this different manifestation, it does not overcome what is perhaps the more fundamental problem of a lack of coherent law-making intent. Treaty-making is largely heterogeneous (that’s not, however to say

¹⁸⁴ Kelsey, above n 154, at 18.

¹⁸⁵ To use the WTO as an example again, applying *les specialis* to a conflict between the GATT and the TBT would provide that the more specific rules of the latter prevail over the more general rules of the former, subject always to the overriding agreement establishing the WTO.

¹⁸⁶ The model avoids looking to the internal politics of a state to understand international relations, instead focusing only on the external pressures of a unitary state in assessing the interactions between states.

¹⁸⁷ Simma and Bulkowski, above n 180, at 489.

that this is true of all international lawmaking).¹⁸⁸ Negotiations in different subject matters often fall within the competence of different ministries (or even different regional levels, as in the case of the European Union). As Martti Koskenniemi explained in his Preliminary Report for the International Law Commission:¹⁸⁹

There is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives – they are “bargains” and “package-deals” and often result from spontaneous reactions to events in the environment.

It is clear, then, that these domestic law rules *can* work in international law (at least to the extent that the actors can be broadly analogised to actors in a domestic system). However, where the conflict exists between “two treaties concluded with no conscious sense that they are part of the ‘same project’” then the rules are of little use, and we must employ an alternative – the private international law rules.¹⁹⁰

(b) Private international law

The private international law approaches present a somewhat brighter future, though they are still not without limitation.

The traditional approach – that is, the examination of connecting factors – principal limit in this respect is its presumption that the systems it is examining are both complete (or at least essentially complete) legal orders.¹⁹¹ The Framework Convention and the BIT do not exhibit anything even close to completeness – both are highly specific and do not give any consideration to law on a level of broad application.

Furthermore the application of the traditional approach requires there to be something extant in the system to which a connecting factor can attach. A cursory inspection of the connecting factors reveals that they are very clearly geared toward application to

¹⁸⁸ See Jean D’Aspremont “The Doctrinal Illusion of the Heterogeneity of the International Lawmaking Process” in Hélène Ruiz-Fabri and others (eds) *Selected Proceedings of the European Society of International Law: 2008* (Hart Publishing, 2010) Vol 2, 297.

¹⁸⁹ Martti Koskenniemi *Study on the Function and Scope of the lex specialis Rule and the Question of “Self-Contained” Regimes* (2004).

¹⁹⁰ Report of the Study Group of the ILC, 58th Session (2006) A/CB.4/L.682, at [255].

¹⁹¹ Michaels and Pauwelyn, above n 160 at 361.

the law of a *state*. Territory, nationality, and domicile naturally mirror the traditionally accepted requirements of statehood (territory, government, and permanent population).¹⁹²

However, international law systems – and in specific the treaties at issue – do not possess these characteristics: the treaties arguably have no population, they have no territory, and though a treaty may have an entity that performs some governmental function (the Framework Convention has the Conference of the Parties, for example) it cannot truly be said to have a “government” in the ordinary sense of the word.

The state interest approach is limited in its application for essentially the same reason. The approach presumes the existence of at least two governments whose interests are competing. To see why this is problematic, one need only look to the instant conflict.

The WHO and the Conference of the Parties are both entities comprised of a number of governments.¹⁹³ As can be seen from the history of the Framework Convention, the interest of those individual governments are at times quite diverse. The mere fact that those various governments have been aggregated to form a single entity does not automatically unify their interests (at least on the whole). There is no internal consistency.

Secondly when the entities are disaggregated is clear that even within a given state government there is conflict: while one arm has signed a treaty pledging to act to reduce tobacco consumption, another has signed a treaty guaranteeing rights to inbound foreign investors (which may or may not include tobacco companies). There is no internal consistency. This presents a problem in that without internal consistency the outward facing interest to be balanced cannot be identified. In any event, the nature of the dispute is such that there is no acceptable standard for balancing those interests that can be identified.¹⁹⁴

The functional approach is perhaps the most useful. It addresses both the problem of conflict (in so far as it is capable of resolving it), but also the problem of

¹⁹² Brownlie, above n 177, at 83-85.

¹⁹³ WHO and COP are comprised of governments.

¹⁹⁴ Michaels and Pauwelyn, above n 160 at 357.

fragmentation. Within a system the goal is *coherence* and this is achieved through compromise solutions. Between systems the goal is *coordination*, which is achieved by maintaining the internal integrity of each independent system by minimising friction between systems by designating one over the other.

(c) An alternative approach?

There are two further approaches that ought to be considered (and which are specific to international law). Some commentators have suggested that rather than making an assessment of the substantive obligations, the focus should be on the enforcement mechanisms available under the treaties imposing the obligations.¹⁹⁵

The Framework Convention has no enforcement mechanism (it is, however, open to the Conference of the Parties to develop and adopt one as a protocol at some subsequent point). Contrastingly, the BIT between Australia and Hong Kong has an enforcement mechanism in the form of an investor state dispute mechanism. The result of this is that the absence of the mechanism in the Framework Convention pushes the obligations in the BIT to the fore. An ICSID tribunal established under the BIT's ISDM exists to determine whether the state Party to the BIT¹⁹⁶ has complied with its obligations. For the most part, this allows the tribunal to assess the obligations in a vacuum and without regard to obligations under other treaties. Arguably for a tribunal to consider other when assessing a claim of breach would be to overstep their obligations. In any event, Treaty parties are obliged to perform their obligations under treaties that bind them in good faith even if the result is that obligations are conflicting and compensation is payable.¹⁹⁷

The consequence of this approach is that there will be conflicts in cases where the facts mean the outcome is marginal. This is not merely an academic problem. In what has been described as “the ultimate fiasco in investment arbitration”¹⁹⁸ *Laude v The Czech Republic* and *CME Czech Republic BV v The Czech Republic* saw a London

¹⁹⁵ Kelsey, above n 154, at 18.

¹⁹⁶ Unless of course the state is the Claimant, though this is comparatively rare.

¹⁹⁷ VCLT, Article 26.

¹⁹⁸ August Reinisch “The Proliferation of International Dispute Settlement Mechanisms” in Buffard and others (eds) *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Matrinus Nijhoff, 2008) at 116.

tribunal and a Stockholm tribunal consider the same set of facts (and apply the same law).¹⁹⁹ The awards rendered by the tribunals were diametrically opposed in virtually every sense. The result of this is the much-feared fragmentation of international law.

Recognising that this is perhaps the most workable approach, and that the problem will only increase as states take greater measures in the interest of public health and safety, some states have acted to remove the ISDM from subsequently negotiated investment treaties.²⁰⁰ Subject to local remedies requirements, investors must therefore revert to the traditional diplomatic protection avenues to recover lost investments.²⁰¹

VI Conclusion

The conflict between Bilateral Investment Treaties and multilateral public-interest treaties such as the Framework Convention on Tobacco Control presents a novel conflict. Often states will take regulatory action that has an adverse impact on an investor in the name of the public interest. Less frequently, though, will this regulation be the result of (or compelled by) another international agreement.

National courts present a domestic solution. Though outcome will ultimately turn on the domestic legislative substance and the constitutional framework in which the regulations are enacted. The WTO presents another, perhaps the more publically recognised forum, though this forum is again subject to constraint. The vast carve-out for measures taken in the interests of public health and the small range of remedies mean that the forum is of limited utility to the claiming nations (and thus also to the tobacco companies).

Investment arbitration is different, however. Its limits are drawn only by the relevant BIT, and the tribunal need only assess whether a violation of the BIT has occurred – not weigh it against other factors as in the constitutional case, nor change the manner

¹⁹⁹ *Lauder v The Czech Republic (Award)* 9 ICSID Reports 66; *CME Czech Republic BV v The Czech Republic (Partial Award)* 9 ICSID Reports 121.

²⁰⁰ Australia being one such state.

²⁰¹ Sachet Sing and Sooraj Sharma “Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap” (2013) 29(76) *Utrecht Journal of International and European Law* 88, at 89-90.

of application through carve-outs in the law (unless so prescribed by the BIT itself) in the WTO case.

This presents a unique conflict. It is undeniable that tobacco is harmful, and to this end states have become party to a convention which seeks to reduce consumption and mitigate tobacco related harm. States, however, sought to encourage investment by extending to investors a minimum level of certainty with respect to the security of their investment. Can it be that this public interest overrides the private interest of investors? There can be no doubt that states possess the power to regulate in the public interest. States very clearly have a plenary power to legislate, but this power is constrained by consequence (if nothing else). Where legislation has an adverse consequence on an investment, then states open themselves to claims of expropriation.

In the instant case Philip Morris arguably made an investment in Australia, establishing a number of lines of cigarettes and other tobacco products to which significant goodwill attaches. The plain packaging regulations reduce the value of this goodwill and the value of the underlying trademarks. *Prima facie*, the regulations are expropriatory. It could be that there is an “out” for states – that regulation in the public interest does not amount to expropriation, though an analysis of the very provision providing protection against expropriation would suggest that this reasoning is flawed.

What arises then is a significant tension. States have offered protection to tobacco companies investing within their borders on the one hand, but on the other they have signed a convention and supported various implementing guidelines that call for action which will negatively affect those investors. States are effectively forced to choose between the implementation of two sets of obligations which cannot comfortably co-exist. The result is fragmentation of international law, and the undermining of both the Framework Convention (and related public health issues) and the BIT system.

There are some tools to deal with this – conflict rules imported from domestic and private international law – though none are particularly well suited to application in a

case like the present. There are also rudimentary alternatives: looking at enforcement mechanisms to determine effective priority.

Ultimately the answer appears to be that the rights and obligations cannot be reconciled. Unfortunate as it may be for states, cigarettes and other tobacco products are subject to the ordinary rules of trade and investment, and the same standards of review as other, less harmful, products. That states signed a convention committing to reduce tobacco consumption does not excuse them from obligations under other treaties.

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