

PCA Case No. 2012-12

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT
BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF
AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS,
SIGNED ON 15 SEPTEMBER 1993 (THE “TREATY”)**

-and-

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF
ARBITRATION AS REVISED IN 2010 (“UNCITRAL RULES”)**

-between-

PHILIP MORRIS ASIA LIMITED

(“Claimant”)

-and-

THE COMMONWEALTH OF AUSTRALIA

(“Respondent”, and together with the Claimant, the “Parties”)

AWARD ON JURISDICTION AND ADMISSIBILITY

17 December 2015

ARBITRAL TRIBUNAL

Professor Karl-Heinz Böckstiegel (President)
Professor Gabrielle Kaufmann-Kohler
Professor Donald M. McRae

REGISTRY

Dr. Dirk Pulkowski
Permanent Court of Arbitration

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LEGAL REPRESENTATIVES OF THE PARTIES

The Claimant	Solicitors for the Claimant
<p>Philip Morris Asia Limited Level 28 Three Pacific Place 1 Queen's Road East Hong Kong</p>	<p>Dr. Stanimir A. Alexandrov Mr. James Mendenhall Ms. Marinn Carlson Sidley Austin LLP 1501 K Street NW Washington DC, 20005 United States Telephone: +1 202 736 8000 E-mail: salexandrov@sidley.com jmendenhall@sidley.com mcarlson@sidley.com</p> <p>Mr. David Roney Sidley Austin LLP Rue de Lausanne 139 Sixth Floor 1202 Geneva Switzerland Telephone: +41 22 308 00 44 E-mail: droney@sidley.com</p> <hr/> <p>Counsel for the Claimant</p> <p>Mr. Joe Smouha Q.C. Mr. Salim Moollan Essex Court Chambers 24 Lincoln's Inn Fields London WC2A 3EG United Kingdom Telephone: +44 20 7813 8000 Facsimile: +44 20 7813 8080 E-mail: jsmouha@essexcourt.net smoollan@essexcourt.net</p> <p>Mr. Simon W. B. Foote Bankside Chambers Level 22, Lumley Centre 88 Shortland Street Auckland 1140 New Zealand Telephone: +84 9 307 8184 Facsimile: +64 9 387 6895 E-mail: swbf@simonfoote.co.nz</p>
The Respondent	Solicitors for the Respondent
<p>The Commonwealth of Australia</p>	<p>Mr. Simon Daley P.S.M. Chief Solicitor (Dispute Resolution) Ms. Catherine Kelso</p>

	<p>Mr. Simon Sherwood Australian Government Solicitor Level 42, MLC Centre 19 Martin Place Sydney NSW 2000 Australia Telephone: +61 2 9581 7490 +61 2 6253 7405 Mobile: +61 419 418 082 Facsimile: +61 2 9581 7778 E-mail: simon.daley@ags.gov.au catherine.kelsoe@ags.gov.au simon.sherwood@ags.gov.au</p> <p>Ms. Laura Armstrong Australian Government Solicitor 4 National Circuit Barton ACT 2600 Australia Telephone: +61 2 6253 7155 Facsimile: +61 2 6253 7383 Mobile: +61 447 130 813 E-mail: laura.armstrong@ags.gov.au</p>
	<p>Counsel for the Respondent</p>
	<p>Mr. Justin T. Gleeson S.C. Solicitor-General of Australia Attorney-General's Department 3-5 National Circuit Barton ACT 2600 Australia Telephone: +61 2 6141 4139 Facsimile: +61 2 6141 4149</p> <p>Mr. Anthony Payne S.C. Sixth Floor Selborne Wentworth Chambers 6/174 Phillip Street Sydney NSW 2000 Australia Telephone: +61 2 9221 3609 Facsimile: +61 2 9233 3902 E-mail: ajpayne@sixthfloor.com.au</p> <p>Mr. James Hutton Eleven Wentworth Chambers 11/174 Phillip Street Sydney NSW 2000 Australia Telephone: +61 2 9223 9477 Facsimile: +61 2 8028 6060 E-mail: jhutton@wentworthchambers.com.au</p>

	<p>Mr. Samuel Wordsworth Q.C. Essex Court Chambers 24 Lincoln's Inn Fields London WC2A 3EG United Kingdom Telephone: +44 20 7813 8000 Facsimile: +44 20 7813 8080 E-mail: swordsworth@essexcourt.net</p> <p>Prof. Chester Brown 7 Selborne Chambers 7/174 Phillip Street Sydney NSW 2000 Australia Telephone: +61 2 9351 0466 Facsimile: +61 2 9351 0200 E-mail: cbrown@essexcourt.net</p> <p>Mr. Bill Campbell Q.C. General Counsel (International Law) Office of International Law Attorney-General's Department 3-5 National Circuit Barton ACT 2600 Australia Telephone: +61 2 6141 3365 Facsimile: +61 2 6141 3486 E-mail: bill.campbell@ag.gov.au</p>
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LIST OF DEFINED TERMS

ASoC	PM Asia’s Amended Statement of Claim, dated 8 April 2013
Australia	The Commonwealth of Australia
BIT	Bilateral Investment Treaty (also referred to as the “Treaty”)
Callinan Report	Legal opinion of Justice Ian Callinan Q.C.
Claimant	Philip Morris Asia Limited, a limited liability company incorporated in accordance with the laws of Hong Kong
December 2010 Minutes	Minutes prepared for the Health Minister Nicola Roxon by DoHA on 9 December 2010
DFAT	The Australian Government Department of Foreign Affairs and Trade
DoHA	The Australian Department of Health and Ageing
FATA	Foreign Acquisitions and Takeovers Act 1975
FATA notification	PMI Group’s application to the Foreign Investment Review Board made on 21 January 2011 (also referred to as the “Foreign Investment Application”)
FATA Regulations	Foreign Acquisitions and Takeovers (Notices) Regulations 1975
FCTC	World Health Organization Framework Convention on Tobacco Control
Fielding Bill	The Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009
FIRB	Australia’s Foreign Investment Review Board
First Objection	Respondent’s first preliminary objection to the Tribunal’s jurisdiction, also referred to as the Non-Admission of Investment Objection
First Procedural Meeting	First procedural meeting held in Singapore on 30 July 2012
FITPD	Foreign Investment and Trade Policy Division

	of Treasury
Foreign Investment Application	PMI Group’s application to the Foreign Investment Review Board made on 21 January 2011 (also referred to as “FATA notification”)
Foreign Investment Application Guide	A policy made by Australia’s FIRB and Australia’s Department of the Treasury entitled “How to Apply – Business Proposals”
Foreign Investment Policy Guide	A policy made by Australia’s Treasurer entitled “Foreign Investment Policy”
FTA	Free Trade Agreement
Hearing on Bifurcation	Hearing on bifurcation proceedings held in Toronto on 20–21 February 2014
Hearing on Preliminary Objections	Hearing on preliminary objections to the Tribunal’s jurisdiction held in Singapore on 16–19 February 2015
How-to-Apply Guide	The “How-to-Apply”—Business Proposals guide
ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
ILC	International Law Commission
IP	Intellectual Property
ISDS	Investor-State Dispute Settlement
LPP	Legal Professional Privilege
Minority Labor Government	Labor-Party led minority government formed by Prime Minister Julia Gillard
NAFTA	North African Free Trade Agreement, signed by Canada, Mexico and the United States
No-objection Letter	Formal response letter dated 11 February 2011 regarding the Foreign Investment Application from the Treasury
Non-Admission of Investment Objection	Respondent’s first preliminary objection to the Tribunal’s jurisdiction
November 2010 Minutes	Minutes prepared for Health Minister Nicola Roxon by DoHA on 23 November 2010

NPHS	Australia's Minister for Health and Ageing's National Preventative Health Strategy
NPHT	Australia's Minister for Health and Ageing's National Preventative Health Taskforce
OB/LRP	PML's Original Budget/Long Range Plan
OBPR	Office of Best Practice Regulations
Parties	The Claimant, PM Asia, and the Respondent, Australia
PCA	The Permanent Court of Arbitration, The Hague
PCIJ	Permanent Court of International Justice
Plain Packaging Measures	The measures enacted by the Tobacco Plain Packaging Act 2011 and the Tobacco Plain Packaging Regulations 2011
PM Asia	Philip Morris Asia Limited, a limited liability company incorporated in accordance with the laws of Hong Kong
PM Australia	Philip Morris (Australia) Limited, a holding company incorporated in accordance with the laws of Australia
PM Brands Sàrl	Philip Morris Brands Sàrl, a Swiss company that is part of the PMI Group
PM Holland	Philip Morris Holland Holdings B.V.
PMI	Philip Morris International Inc., a company incorporated in accordance with the laws of the United States
PMI Group	Philip Morris International group of companies
PML	Philip Morris Limited, a company incorporated in accordance with the laws of Australia
Request to Produce	Application by one party to request the production of documents from the other party
Respondent	The Commonwealth of Australia
RIS	Regulated Impact Statement
RPL	Revised Privilege Log
Rudd Government	The Government under the leadership of Australia's Prime Minister, Kevin Rudd

Second Objection	Respondent's second preliminary objection to the Tribunal's jurisdiction, also referred to as the Temporal Objection
September 2010 Minutes	Minutes prepared for the Health Minister Nicola Roxon by DoHA on 24 September 2010
SPIS	Special Political or Institutional Sensitivity
Temporal Objection	Respondent's second preliminary objection to the Tribunal's jurisdiction
TPP Act	Tobacco Plain Packaging Act 2011 (Act No. 148 of 2011)
TPP Bill	Tobacco Plain Packaging Bill 2011
TPP Regulations	Tobacco Plain Packaging Regulations 2011 (Selective Legislative Instrument 2011 No. 263)
Treaty	The Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments as signed on 15 September 1993 (also referred to as the "BIT")
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2010
UK	The United Kingdom
US	The United States of America
VCLT	The Vienna Convention on the Law of Treaties, signed on 23 May 1969
WTO	World Trade Organization

I. INTRODUCTION

A. THE CLAIMANT

1. The investor acting as claimant in the present arbitration is Philip Morris Asia Limited (“**PM Asia**” or the “**Claimant**”), a limited liability company incorporated under the laws of Hong Kong pursuant to the Hong Kong Companies Ordinance on 8 November 1994,¹ with its registered address at Level 28, Three Pacific Place, 1 Queen’s Road East, Hong Kong.
2. The Claimant is represented in these proceedings by Dr. Stanimir A. Alexandrov, Mr. James Mendenhall, Ms. Marinn Carlson, and Mr. David Roney of Sidley Austin LLP; Mr. Joe Smouha Q.C. and Mr. Salim Moollan of Essex Court Chambers; and Mr. Simon W. B. Foote of Bankside Chambers.

B. THE RESPONDENT

3. The respondent in this arbitration is the Commonwealth of Australia (“**Australia**” or the “**Respondent**”), a sovereign State.
4. The Respondent is represented by Mr. Simon Daley P.S.M., Ms. Catherine Kelso, Mr. Simon Sherwood, and Ms. Laura Armstrong of the Australian Government Solicitor; Mr. Justin T. Gleeson S.C., Solicitor-General of Australia, Mr. Bill Campbell Q.C. of the Attorney-General’s Department, Mr. Anthony Payne S.C. of Sixth Floor Selborne Wentworth Chambers; Mr. James Hutton of Eleven Wentworth Chambers; Mr. Samuel Wordsworth Q.C. of Essex Court Chambers; and Prof. Chester Brown of 7 Selborne Chambers.

C. BACKGROUND TO THE DISPUTE

5. A dispute has arisen between PM Asia and Australia (together the “**Parties**”) in respect of the Respondent’s enactment and enforcement of the *Tobacco Plain Packaging Act 2011* (the “**TPP Act**”) and the implementing regulations known as the *Tobacco Plain Packaging Regulations 2011* (the “**TPP Regulations**”) (collectively the “**Plain Packaging Measures**”). The Claimant commenced arbitration in relation to this dispute pursuant to the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments dated 15 September 1993 (the “**Treaty**” or “**BIT**”).

¹ Claimant’s Notice of Claim, para. 21.

6. The Claimant describes itself as the regional headquarters for the Asia region of the Philip Morris International group of companies (“**PMI Group**”).² PM Asia owns 100% of the shares of Philip Morris (Australia) Limited (“**PM Australia**”), a holding company incorporated in Australia, which in turn owns 100% of the shares of Philip Morris Limited (“**PML**”). PML is a trading company incorporated in Australia, which engages in the manufacture, import, marketing and distribution of tobacco products for sale within Australia and for export to New Zealand and the Pacific Islands.³ According to the Claimant, PML has rights with respect to certain intellectual property in Australia, including registered and unregistered trademarks, copyright works, registered and unregistered designs, and overall get up of the product packaging.⁴ It is the Claimant’s contention that its entire business, and that of PML and PM Australia, rests on its intellectual property, and in particular on the recognition of its brands.⁵
7. The Claimant alleges, *inter alia*, that “[t]he plain packaging legislation bars the use of intellectual property on tobacco products and packaging, transforming [the Claimant’s subsidiary in Australia] from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of [the Claimant’s] investments in Australia”.⁶
8. The Claimant seeks declaratory and compensatory relief from the Respondent for breach of its obligations under the Treaty and for causing it significant financial loss. In particular, the Claimant seeks an order that the Respondent “(i) take[s] appropriate steps to suspend enforcement of plain packaging legislation and to compensate [the Claimant] for loss suffered through compliance with plain packaging legislation; or (ii) compensate[s] [the Claimant] for loss suffered as a result of the enactment and continued application of plain packaging legislation”.⁷ The amount in dispute is described in the Notice of Arbitration as “an amount to be quantified but of the order of billions of Australian dollars”.⁸
9. The Respondent rejects the Claimant’s claims on the merits. In addition, the Respondent raises three preliminary objections relating to the jurisdiction of the Tribunal and the admissibility of the Claimant’s claims. Following a hearing on the question whether the Respondent’s

² Claimant’s Notice of Arbitration, para. 4.1; Statement of Claim, para. 20.

³ Claimant’s Notice of Arbitration, paras 4.1–4.2.

⁴ Claimant’s Notice of Arbitration, para. 1.3.

⁵ Claimant’s Notice of Arbitration, para. 1.4.

⁶ Claimant’s Notice of Arbitration, para. 1.5.

⁷ Claimant’s Notice of Arbitration, paras 1.7, 8.2.

⁸ Claimant’s Notice of Arbitration, para. 8.3.

preliminary objections were suitable for consideration at an initial stage, before any consideration of the merits, the Tribunal ordered the bifurcation of the proceedings such that only two preliminary objections would be addressed in a first phase: the Respondent's objection that the Claimant's investment was not properly admitted in the host State ("**Non-Admission of Investment Objection**" or "**First Objection**"); and the Respondent's objection that the Tribunal was barred from considering the Claimant's claim because the dispute had arisen before the Claimant had obtained the protection of the Treaty as a result of restructuring its investment in PML or because the Claimant's restructuring constitutes an abuse of right. ("**Temporal Objection**" or "**Second Objection**").

10. The present Award is interim in the sense that the matter of costs has yet to be dealt with, and may be designated "Interim Award (final save as to costs)".

II. PROCEDURAL HISTORY

11. The present case has given rise to sixteen procedural orders, each containing its own recitals of relevant procedural events, which are published on the website of the PCA. This section therefore constitutes an abridged summary of the course of the proceedings.

A. COMMENCEMENT OF THE ARBITRATION AND FIRST PROCEDURAL MEETING

12. On 22 June 2011, the Claimant served upon the Respondent a Notification of Claim in accordance with Article 10 of the Treaty.
13. As the Parties did not reach a settlement of their dispute within the three-month period from the date of the Notification of Claim, the Claimant served a Notice of Arbitration dated 21 November 2011 on the Respondent, submitting the dispute to international arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010 (the "**UNCITRAL Rules**") in accordance with Article 10 of the Treaty and pursuant to Article 3 of the UNCITRAL Rules. By its Notice of Arbitration, the Claimant informed the Respondent of its appointment of Professor Gabrielle Kaufmann-Kohler as the first arbitrator. Professor Kaufmann-Kohler's address is Lévy Kaufmann-Kohler, 3-5, rue du Conseil-Général, P.O. Box 552, CH-1211 Geneva 4, Switzerland.

14. In the Notification of Claim dated 22 June 2011 and the Notice of Arbitration dated 21 November 2011, the Claimant proposed Singapore as the place of arbitration.⁹
15. On 21 December 2011, the Respondent provided a Response to the Notice of Arbitration pursuant to Article 4 of the UNCITRAL Rules, in which the Respondent described its jurisdictional objections and stated that it would “request that jurisdictional objections be heard in a preliminary phase of the proceedings”.¹⁰
16. On the same date, the Respondent informed the Claimant of its appointment of Professor Donald M. McRae as the second arbitrator. Professor McRae’s address is 57 Louis Pasteur St., Room 340, Ottawa, Ontario K1N 6N5, Canada.
17. On 15 May 2012, in accordance with Article 9 of the UNCITRAL Rules, the Secretary-General of the Permanent Court of Arbitration (the “PCA”) appointed Professor Karl-Heinz Böckstiegel as the presiding arbitrator. Professor Böckstiegel’s address is Parkstraße 38, 51427 Bergisch Gladbach, Germany.
18. On 7 June 2012, having received comments from both Parties, the Tribunal issued Procedural Order No. 1 which sets out, *inter alia*, the applicable procedural rules, Tribunal’s fees and expenses, language, and the Tribunal’s immunity.
19. By letters dated 27 June 2012, responding to the Tribunal’s invitation to consult with each other in relation to the standard of confidentiality, the Respondent informed the Tribunal that it was committed to transparency and did not agree with the Claimant’s proposal that the hearings be held *in camera*, and the Claimant informed the Tribunal that the Parties disagreed on the standard of confidentiality applicable to the proceedings but that discussions on the matter were ongoing.
20. On the same date, the Respondent informed the Tribunal that it “propose[d] to continue to consult with the Claimant on the matter of a timetable, including the issue of a bifurcated procedure”. By letter of the same date, the Claimant set out its position that procedural economy and expediency would not favour bifurcation but that “should the Tribunal not be minded to refuse bifurcation at this point, PM Asia considers that the question of whether there should be bifurcation ought to be argued and determined only following full memorials from each [P]arty”.

⁹ Claimant’s Notification of Claim, para. 3; Claimant’s Notice of Arbitration, para. 9.2.

¹⁰ Response to Claimant’s Notice of Arbitration, paras 29–36.

21. By letter dated 10 July 2012, the Respondent proposed that there be an exchange of brief written submissions with regard to whether the proceedings should be bifurcated or not, and that, following such submissions, the issue of bifurcation would be ready for determination at the first procedural meeting in Singapore (“**First Procedural Meeting**”) or shortly thereafter.
22. By letter dated 11 July 2012, the Claimant objected to the Respondent’s proposal and reiterated that, should the Tribunal not refuse bifurcation at this stage, the issue of bifurcation should only be argued and determined following the delivery of full Memorials by each Party.
23. By letters dated 16 July 2012, the Parties informed the Tribunal that they were unable to agree either on the desirability of bifurcation or on the *timing* and *procedure* for the Tribunal to determine this particular issue. Accordingly, each Party set out its proposed timetable. On the same day, the Tribunal informed the Parties that it intended to discuss the procedure for reaching a decision on bifurcation at the First Procedural Meeting and that no further submissions on the issue of bifurcation would be required before the Meeting.
24. By letter dated 24 July 2012, the Claimant informed the Tribunal that no agreement had been reached between the Parties concerning the standard of confidentiality and requested, in accordance with Article 28(3) of the UNCITRAL Rules, that the First Procedural Meeting be held *in camera* and that “all documents created or held by or on behalf of the Tribunal concerning this proceeding, including any transcript of and any other records concerning the [First] Procedural Meeting, be kept confidential”.
25. By letter dated 25 July 2012, the Respondent agreed that the First Procedural Meeting be held *in camera* and that all documents held by the Tribunal be kept confidential except for those already in the public domain. This arrangement was approved by the Tribunal the following day.
26. By letter dated 26 July 2012, the Respondent informed the Tribunal that it had proposed to the Claimant that London be the place of arbitration, and indicated that the Claimant had nonetheless maintained that Singapore be the place of the arbitration.
27. On 30 July 2012, the Tribunal held the First Procedural Meeting, during which the Parties reiterated their respective proposals for the place of arbitration and presented oral arguments in support of their proposals. The Tribunal also discussed with the Parties the regime of confidentiality that should apply to the arbitration, the procedure for considering whether certain jurisdictional objections should be considered in a separate, preliminary phase, and various other procedural points.

28. Present at the First Procedural Meeting were:

The Tribunal:

Prof. Karl-Heinz Böckstiegel
Prof. Gabrielle Kaufmann-Kohler
Prof. Donald M. McRae

For the PCA:

Dr. Dirk Pulkowski

For the Claimant:

Mr. Joe Smouha Q.C.
Mr. David Williams Q.C.
Mr. Simon Foote
Mr. Peter O'Donahoo
Mr. Ricardo E. Ugarte
Mr. Marc Firestone
Mr. John Fraser

For the Respondent:

Mr. Stephen Gageler S.C.
Mr. Anthony Payne S.C.
Dr. Chester Brown
Mr. Mark Jennings
Mr. Simon Daley
Mr. Nathan Smyth
Mr. Will Story
Ms. Rosemary Morris-Castico

B. PLACE OF ARBITRATION, CONFIDENTIALITY REGIME AND BIFURCATION OF PROCEEDINGS

29. On 3 August 2012, after consultation with the Parties at the First Procedural Meeting, the Tribunal issued Procedural Order No. 2 which set out a timetable for the Parties to file further written submissions relating to the place of arbitration, confidentiality, and bifurcation of proceedings.
30. On 13 August 2012, 17 August 2012, 27 August 2012, and 3 September 2012, the Parties exchanged submissions on the place of arbitration in accordance with the timetable set out in Procedural Order No. 2.
31. On 13 August 2012, the Respondent also filed its submission on the issue of bifurcation in response to the Claimant's submission dated 30 July 2012. By letter dated 15 August 2012, the Claimant requested the Tribunal to clarify the scope of the Parties' submissions on the issue of bifurcation and, if needed, to require the Respondent to recast its submission accordingly. On 16 August 2012, the Tribunal confirmed that the Parties' submissions should be limited to the *timing and procedure* for reaching a decision on the bifurcation of the proceedings.
32. On 20 August 2012, 27 August 2012 and 3 September 2012, respectively, the Parties exchanged further submissions on the issue of bifurcation.
33. By letter dated 12 September 2012, the Parties set out their positions on confidentiality. By letter dated 17 September 2012, the Tribunal invited the Parties to continue their efforts to reach an agreement on the applicable standard of confidentiality and set out a timetable for further submissions in this regard. The Parties, accordingly, submitted their respective proposals for a Procedural Order on confidentiality on 28 September 2012 and provided their comments on the proposal of the other Party on 5 October 2012.

34. On 26 October 2012, the Tribunal, in Procedural Order No. 3, decided in accordance with Article 18(1) of the UNCITRAL Rules that Singapore was the place of arbitration.
35. On the same date, the Tribunal issued Procedural Order No. 4, in which it defined the procedure leading up to a decision on bifurcation.
36. On 30 November 2012, the Tribunal issued Procedural Order No. 5 regarding confidentiality. It held, *inter alia*, that the Tribunal's awards, decisions and orders shall be published by the PCA, subject to prior redaction; that all hearings, meetings and conferences shall be held *in camera* and their transcripts be kept in confidence; and that each Party shall be free to render its written submissions public, subject to appropriate redactions where applicable.
37. On the same date, the Tribunal issued Procedural Order No. 6 regarding outstanding procedural matters relating to communications and submissions, evidence, hearings, language and translations.
38. Following a change of the Claimant's counsel of record, by letter dated 3 December 2012, the Claimant requested an extension of the deadline for the filing of the Statement of Claim to 28 March 2013.
39. By letter dated 12 December 2012, the Respondent noted that, if the Claimant's request for an extension were granted, a corresponding extension should also be granted for the filing of the Statement of Defence.
40. By letters dated 12 and 14 December 2012, the Respondent and the Claimant acknowledged that it would be necessary to identify a new date for the filing of the Claimant's submissions on the aspects of bifurcation not covered in previous submissions.
41. On 31 December 2012, after consultation with the Parties, the Tribunal issued Procedural Order No. 7, in which the Tribunal set out a revised timetable for the filing of submissions. Pursuant to this revised timetable, the Claimant submitted its Statement of Claim on 28 March 2013; the Respondent submitted its Statement of Defence on 23 October 2013; and the Claimant submitted its Opposition to Bifurcation on 26 November 2013.
42. On 20 and 21 February 2014, a hearing on bifurcation was held in Toronto ("**Hearing on Bifurcation**"). Present at the Hearing on Bifurcation were:

The Tribunal:
Prof. Karl-Heinz Böckstiegel
Prof. Gabrielle Kaufmann-Kohler
Prof. Donald M. McRae

For the PCA:
Dr. Dirk Pulkowski

For the Claimant:

Mr. Joe Smouha Q.C.
Dr. Stanimir Alexandrov
Mr. James Mendenhall
Mr. Aaron Wredberg
Mr. Marc Firestone
Mr. Kevin Banasik

For the Respondent:

Mr. Simon Daley P.S.M.
Mr. Anthony Payne S.C.
Mr. Justin Gleeson S.C. (by video link)
Mr. Lucas Robson
Mr. Nathan Smyth
Mr. John Atwood
Ms. Esme Shirlow
Mr. Sam Wordsworth Q.C.
Prof. Chester Brown

43. On 14 April 2014, following the Hearing on Bifurcation, the Tribunal issued Procedural Order No. 8, deciding to bifurcate the proceedings in two phases and that two preliminary objections should be considered in an initial phase of the proceedings. The first phase of the proceedings was to deal with the Respondent's Non-Admission of Investment Objection and the Temporal Objection. A third objection raised by the Respondent was to be joined to the merits in the event that the first and second objections were not upheld by the Tribunal and the proceedings continued.

C. DOCUMENT PRODUCTION, SUBMISSIONS AND HEARING ON PRELIMINARY OBJECTIONS

44. On 16 May 2014, after consultation with the Parties, the Tribunal issued Procedural Order No. 9 regarding the timetable for the first phase of the bifurcated proceedings, and in which the Tribunal confirmed that the hearing on preliminary objections would commence on 16 February 2015 ("**Hearing on Preliminary Objections**").
45. On 7 July 2014, the Claimant filed its Counter-Memorial on Preliminary Objections, together with accompanying exhibits, witness statements and expert reports.
46. On 28 July 2014, pursuant to Procedural Order No. 9, each Party submitted to the other Party a reasoned application for the production of documents ("**Request to Produce**"), limited to material relevant to the Non-Admission of Investment Objection and Temporal Objection as set forth by the Respondent in its Statement of Defence.
47. On 15 August 2014, after the Parties consulted with each other with a view to amending certain aspects of the process for document production, the Respondent informed the Tribunal that the Parties had agreed to exchange privilege logs listing any documents that a Party wished to withhold on grounds of legal impediment or privilege ("**LPP**") or special political or institutional sensitivity ("**SPIS**") and informed the Tribunal that the Parties had failed to reach agreement on a timetable for the exchange of such privilege logs. A timetable was proposed for the Tribunal's consideration.

48. On 20 August 2014, the Claimant responded to the Respondent's letter by noting that the Respondent's proposed timetable was unworkable in view of the breadth of the Respondent's document requests. The Claimant therefore proposed an alternative timetable for the Tribunal's consideration.
49. On 22 August 2014, the Respondent conveyed to the Tribunal that it was prepared to narrow its document requests and confirmed that, while the Claimant's proposed timetable potentially left little time to incorporate certain documents into the Respondent's Reply, the Respondent was prepared to agree to the Claimant's timetable in order to avoid extended arguments.
50. On 26 August 2014, the Tribunal adopted a modified timetable for the proceedings in the form of Procedural Order No. 10, in which the Tribunal decided that the Parties were to "limit the requests that they will submit in their Redfern Schedules to those documents that are absolutely necessary for the limited purpose of dealing with the preliminary objections to be addressed at the Hearing on Preliminary Objections in February 2015".
51. On 8 September 2014, pursuant to Procedural Order No. 10, the Parties submitted to the Tribunal in the form of two separate Redfern Schedules all Requests to Produce that they maintained despite the other Party's objections.
52. On 19 September 2014, the Claimant expressed concerns about what it perceived as an overly broad character of the Respondent's Requests to Produce and presented a proposal to limit the scope of the Parties' Requests to Produce.
53. In its reply of 22 September 2014, the Respondent noted that "[it] does not agree to the Claimant's proposal for the production of documents relating to control" and requesting "that the Tribunal... decline to make an order reflecting this proposal", while expressing its agreement to limit the scope of e-mails that the Parties were required to review, subject to certain qualifications.
54. On 23 September 2014, the Tribunal in its Procedural Order No. 11, decided, on a document-by-document basis on the Parties' Requests to Produce and provided general procedural direction in respect of document production.
55. On 20 October 2014, in accordance with the timetable set out in Procedural Order No. 10, the Parties exchanged privilege logs listing any documents that a Party wished to withhold on LPP and SPIS grounds.

56. On 27 October 2014, the Parties exchanged objections in respect of the other Party's privilege claims, and on 31 October 2014, the Parties responded to the other Party's objections.
57. By letter dated 6 November 2014, the Claimant submitted its unresolved objections to the Respondent's privilege claims to the Tribunal.
58. Similarly, on 7 November 2014, the Respondent submitted its unresolved objections to the Claimant's privilege claims.
59. On 10 November 2014, the Claimant objected to redactions of documents which the Respondent had produced on 6 November 2014 based on privilege grounds.
60. On 14 November 2014, in Procedural Order No. 12, the Tribunal ruled on these unresolved privilege claims.¹¹
61. On 1 December 2014, the Respondent filed its Reply on Preliminary Objections together with accompanying exhibits, witness statements and expert reports.
62. On 9 December 2014, the Tribunal issued Procedural Order No. 13, concerning access by the Claimant to a set of documents that the Respondent considered sensitive.
63. On 12 January 2015, the Claimant filed its Rejoinder on Preliminary Objections in rebuttal of the Respondent's Reply on Preliminary Objections together with further evidence upon which the Claimant wished to rely.
64. On 16 January 2015, the Tribunal sent a draft procedural order regarding details of the Hearing on Preliminary Objections to the Parties inviting them to comment thereon.
65. By letter of the same date, the Respondent objected to the admissibility of new expert evidence on Australian law adduced by the Claimant, namely the legal opinion of Justice Ian Callinan Q.C. ("**Callinan Report**") addressing the Respondent's First Objection.¹²
66. By letter dated 19 January 2015, the Claimant objected to the Respondent's request to exclude the Callinan Report and requested the Tribunal, as a matter of procedural fairness, to allow it to file the said Report.

¹¹ Procedural Order No. 12, paras 4.8–4.9.

¹² See **Exhibit CWS-021**.

67. By letter of the same date, the Claimant sought leave from the Tribunal to introduce into the record a recent Award in the arbitration, namely, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*.¹³
68. On 20 January 2015, Procedural Order No. 14 was issued, in which the Tribunal denied the Respondent's request to exclude the Callinan Report from the record and permitted the Claimant to introduce the *Gremcitel* Award.
69. By letter dated 22 January 2015, the Claimant submitted the *Gremcitel* Award, along with commentary explaining its relevance. By letter dated 25 January 2015, the Respondent submitted its response to Claimant's arguments in relation to the *Gremcitel* Award.
70. On 26 January 2015, the Parties submitted notifications of the witnesses and experts whom they wished to examine at the Hearing on Preliminary Objections. The Parties also submitted a chronological list of all exhibits and their comments on the draft procedural order that had been circulated on 16 January 2015.
71. By letter dated 26 January 2015, the Respondent, following the Tribunal's decision in Procedural Order No. 14, sought leave from the Tribunal to file a short expert report by way of rebuttal to the Callinan Report. By letter of the same date, the Tribunal acceded to the Respondent's request and pointed out that the said expert report was to be strictly responsive to the Callinan Report.
72. By letter dated 27 January 2015, the Claimant, in response to the Respondent's letter and the Tribunal's decision of 26 January 2015, noted that it regretted that it did not have the opportunity to respond to the Respondent's application in relation to a rebuttal expert report before the Tribunal issued its decision on this matter. The Claimant, therefore, reserved the right to ask the Tribunal to reconsider whether it would allow the Respondent's rebuttal expert report after having reviewed it.
73. On 29 January 2015, the Respondent filed the expert report of The Hon. Roger Gyles A.O. Q.C. focusing on questions of Australian law, by rebuttal to the Callinan Report.¹⁴
74. On 4 February 2015, the Tribunal issued Procedural Order No. 15 regarding details of the Hearing on Preliminary Objections.

¹³ ICSID Case No. ARB/11/17, Award, 9 January 2015 ("*Gremcitel* Award").

¹⁴ See **Exhibit RWS-015**.

75. By letter dated 5 February 2015, the Claimant sought leave from the Tribunal to further introduce a short statement by Justice Callinan and by letter dated 6 February 2015, the Tribunal granted this request.
76. On 9 and 10 February 2015, respectively, the Parties filed with the Tribunal an agreed timeline of relevant facts.
77. On 10 February 2015, the Parties provided the PCA with a list of attendees at the hearing, and after consultation with each other, the Parties established a detailed scheduling proposal in relation to the witnesses and experts whom they wished to cross-examine. On the same date, the Claimant submitted a short additional statement by Justice Callinan, strictly limited to replying to the issues raised by The Hon. Roger Gyles A.O. Q.C.
78. On 15 February 2015, the Respondent submitted a further statement from The Hon. Roger Gyles A.O. Q.C., strictly limited in response to the additional statement by Justice Callinan, together with additional legal authorities.
79. The Hearing on Preliminary Objections was held in Singapore from 16 to 19 February 2015. The hearing was attended by:

The Tribunal:

Prof. Karl-Heinz Böckstiegel
Prof. Gabrielle Kaufmann-Kohler
Prof. Donald M. McRae

For the PCA:

Dr. Dirk Pulkowski

For the Claimant:

Dr. Stanimir Alexandrov
Mr. James Mendenhall
Mr. Andrew Blandford
Mr. Patrick Childress
Mr. Andrew Arnold
Ms. Katherine Leong
Mr. Joe Smouha Q.C.
Mr. Chris Young
Mr. Marc Firestone
Mr. Kevin Banasik
Mr. Jonathan Horton
Mr. James Boulton
Mr. Justice Mayall
Ms. Melissa Whiting

For the Respondent:

Mr. Justin Gleeson S.C.
Mr. Tony Payne S.C.
Mr. Sam Wordsworth Q.C.
Mr. Bill Campbell Q.C.
Prof. Chester Brown
Mr. James Hutton
Mr. Simon Daley P.S.M.
Ms. Catherine Kelso
Mr. Jonathon Hutton
Ms. Celia Winnett
Mr. John Atwood
Ms. Sarah Baker-Goldsmith
Ms. Anna Garsia
Ms. Nana Frishling
Mr. Devon Whittle
Ms. Natalie Mojsoska
Mr. Andrew Callaway
Mr. Nathan Smyth
Ms. Jackie Davis
Dr. Anthony Millgate
Mr. Andrew Higgins

Fact Witnesses:

Mr. Matteo Pellegrini (for Claimant)
Mr. John Gledhill (for Claimant)
The Hon. Wayne Swan (for Respondent)

Mr. Brian Wilson (for Respondent)

Expert Witnesses:

Mr. Tony Hinton (for Claimant)
The Hon. Ian Callinan A.C. (for Claimant)
The Hon. Roger Gyles A.O. Q.C. (for Respondent)

Court Reporters:

Ms. Jade King
Ms. Bronwen Williams

80. On 23 February 2015, following consultation with the Parties at the end of the Hearing on Preliminary Objections, the Tribunal issued Procedural Order No. 16 and determined that the Parties should have an opportunity to submit post-hearing briefs, should they wish so, and that the Parties shall consult with each other in respect of any corrections to the hearing transcripts.
81. On 23 March 2015, the Respondent sought leave to submit two additional legal authorities relevant to the legal issues currently in dispute in this arbitration, namely, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*,¹⁵ and *Tidewater Investment SRL, Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*.¹⁶
82. On 26 March 2015, in response to Respondent's letter of 23 March 2015, the Claimant did not oppose the Respondent's request to submit the two legal authorities, namely, the *Apotex* Award and the *Tidewater* Award. By e-mail of the same date, the Tribunal admitted these two awards into the record.
83. On 1 April 2015, the Claimant sought leave from the Tribunal to submit an additional legal authority, namely, the Award on Jurisdiction and Admissibility in *Bilcon of Delaware v. Canada*.¹⁷
84. On 2 April 2015, the Respondent informed the Tribunal that it would not oppose the Claimant's request. On the same date, the Tribunal confirmed admission of the *Bilcon* Award into the record.
85. On 6 April 2015, both Parties' simultaneously submitted electronic copies of their First Post-Hearing Briefs on Preliminary Objections.

¹⁵ ICSID Case No. ARB (AF)/12/1, Award, 25 August 2004 ("*Apotex* Award").

¹⁶ ICSID Case No. ARB/10/5, Award, 13 March 2015 ("*Tidewater* Award").

¹⁷ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Admissibility, 17 March 2015 ("*Bilcon* Award").

86. On 4 May 2015, both Parties simultaneously submitted electronic copies of the second round of Post-Hearing Briefs on Preliminary Objections, in rebuttal to the other Party's first round Post-Hearing Brief.
87. On 20 July 2015, both Parties requested that the Tribunal give them advance notice of the date of the Award on Jurisdiction and Admissibility in order "to make any necessary internal arrangements".
88. On 15 December 2015, the Tribunal advised the Parties that the Award on Jurisdiction and Admissibility would be issued on 17 December 2015.

III. THE PARTIES' REQUESTS

A. THE CLAIMANT'S REQUEST

89. The Claimant, in its Statement of Claim, requests that the Tribunal:
 - (1) order Respondent to withdraw the [Plain Packaging] [M]easures or refrain from applying them against Claimant's investments; or in the alternative
 - (2) award damages of at least [USD] 4,160 million, plus compound interest at the Australian bank cash management account rate running from the date of breach to the date of Respondent's payment of the [A]ward; and
 - (3) award Claimant all of its fees and expenses, including attorney's fees, incurred in connection with this arbitration; and
 - (4) award such other relief as the Tribunal deems just and appropriate.¹⁸
90. In its Counter-Memorial on Preliminary Objections, its Rejoinder on Preliminary Objections, and its First Post-Hearing Brief, the Claimant, in addition or alternatively to the relief sought in the Statement of Claim, requests that the Tribunal:
 - a. dismiss each of Respondent's bifurcated preliminary objections;
 - b. enter a procedural order requiring the Parties to consult with the goal of reaching a mutually agreeable schedule for the merits phase of this arbitration; and
 - c. award Claimant its costs, including counsel fees, that have been incurred in connection with this bifurcated proceeding.¹⁹

¹⁸ Statement of Claim, para. 463.

¹⁹ Claimant's Counter-Memorial on Preliminary Objections, para. 409; Claimant's Rejoinder on Preliminary Objections, para. 380; Claimant's First Post-Hearing Brief, para. 129.

B. THE RESPONDENT'S REQUEST

91. In its Statement of Defence, the Respondent seeks the following orders from the Tribunal:
- a. that Australia's preliminary objections be heard and determined in a preliminary phase of proceedings in accordance with the **Bifurcated Timetable** set out at paragraph 294 above;

[...]
 - b. that the Tribunal dismiss each of the claims made in PM Asia's ASoC;
 - c. that the Tribunal award Australia all of the fees and expenses incurred in connection with this arbitration, including its legal costs and costs of the arbitration.²⁰
92. In its Reply on Preliminary Objections, the Respondent seeks the following orders from the Tribunal:
- a. That the Tribunal dismiss each of the claims in PM Asia's ASoC;
 - b. That the Tribunal award Australia all of the fees and expenses it has incurred in connection with this arbitration, including its legal costs and the costs of the arbitration.²¹
93. In its First Post-Hearing Brief, the Respondent further seeks the following orders:
- a. The Tribunal finds that it has no jurisdiction to determine this dispute and/or that PM Asia's claim is inadmissible;
 - b. The Tribunal dismisses each of the claims in PM Asia's ASoC; and
 - c. The Tribunal awards Australia all of the fees and expenses it has incurred in connection with this arbitration, including its legal costs and the costs of the arbitration.²²

IV. STATEMENT OF FACTS

94. The following is a short summary of relevant facts as understood by the Tribunal without prejudice to any legal conclusions by the Tribunal, which will be addressed in later sections of this Award.

A. THE PHILIP MORRIS INTERNATIONAL GROUP OF COMPANIES

95. Philip Morris International Inc. ("**PMI**") is a company incorporated and headquartered in New York, United States, which produces seven of the top fifteen cigarette brands in the world

²⁰ Statement of Defence, Vol. A, para. 296.

²¹ Respondent's Reply on Preliminary Objections, para. 516.

²² Respondent's First Post-Hearing Brief, para. 156.

including the number one selling brand of cigarettes, *Marlboro*.²³ PMI owns dozens of subsidiaries and affiliates around the world (referred to as the PMI Group) and manages its business in different regions,²⁴ including in Asia, where the Claimant has its regional headquarters.²⁵

96. The Claimant was incorporated in Hong Kong in 1994 and has been doing business in Hong Kong since that time.²⁶ On 17 March 1954, the PMI Group began operations in Australia through PM Australia.²⁷ Before restructuring, PM Australia was owned by US-based Philip Morris group companies until 1998, followed by Swiss-based Philip Morris group companies for over 12 years.²⁸ Before PML was incorporated in 1967, PM Australia carried on the PMI Group's business in Australia and had done so since PM Australia was incorporated in 1954. In May 1967, PML was incorporated as a wholly owned subsidiary of PM Australia, after which PM Australia ceased to carry out operational activities in Australia or elsewhere.²⁹ PM Australia was, and remains, the owner of PML. In turn, PML operates the PMI Group's Australian sales of tobacco products in Australia, selling mainly international brands, licensed from other Philip Morris companies located in Switzerland and the United States.³⁰
97. The Claimant alleges that it has controlled and managed all strategic, budgetary and investment decisions of the Australian subsidiaries, namely, PM Australia and PML, since 2001. Until February 2011, both PM Australia and PML were owned by Philip Morris Brands Sàrl ("**PM Brands Sàrl**"), a Swiss company forming part of the PMI Group.³¹

²³ Statement of Claim, para. 22 referring to Philip Morris International, 2011 Annual Report (5 March 2012), p. 87 (**Exhibit C-188**).

²⁴ See Philip Morris International, 2011 Annual Report (5 March 2012), p. 17 (**Exhibit C-188**); [REDACTED].

²⁵ Statement of Claim, para. 23.

²⁶ Statement of Claim, para. 25 referring to the Certificate of Incorporation for PM Asia (8 November 1994) (**Exhibit C-054**).

²⁷ Statement of Claim, para. 27 referring to the Certificate of Registration for PM Australia (17 March 1954) (**Exhibit C-050**); see also Statement of Defence, Vol. A, para. 6.

²⁸ Respondent's Reply on Preliminary Objections, para. 97.

²⁹ [REDACTED].

³⁰ Statement of Claim, para. 28 referring to the Certificate of Registration for PML (24 May 1967) (**Exhibit C-051**) and the Gledhill Statement at paras 8–9 (**Exhibit CWS-001**); see also Respondent's Reply on Preliminary Objections, para. 6.

³¹ Statement of Claim, para. 29 referring to the PMI Management Structure for Segment Reporting (**Exhibit C-223**); Claimant's Rejoinder on Preliminary Objections, para. 5; [REDACTED].

98. According to the Claimant, the PMI Group has been engaged in a group-wide restructuring process “to reduce costs and improve efficiencies by streamlining its legal entity structure, rationalizing business process, centralising activities, and developing shared services”.³² The restructuring plan also took into account the political risk that PMI was facing in several countries including Australia with the proliferation of new regulations on packaging and marketing of tobacco products.³³ Since the possible relationship of steps taken by the PMI Group to restructure its investments in Australia with the introduction of the Plain Packaging Measures forms the basis of two of the Respondent’s preliminary objections, these facts will be set out in detail below.

B. THE WORK OF THE NATIONAL PREVENTATIVE HEALTH TASKFORCE (NPHT)

99. Australia first considered plain packaging in 1995. However, Australia initially recommended further investigations to be made. The Claimant contends that Australia refrained from adopting any Plain Packaging Measures in light of its treaty obligations and lack of evidence that plain packaging would be effective in reducing tobacco consumption.³⁴

100. On 27 February 2005, the World Health Organization Framework Convention on Tobacco Control (“FCTC”) entered into force for Australia. Under the FCTC, States Parties are under an obligation to develop and implement “tobacco control measures, including measures to eliminate the propensity of tobacco packaging to mislead consumers about the health effects of smoking and comprehensive bans on tobacco advertising, promotion and sponsorship”.³⁵

101. In December 2007, shortly after being elected, the Australian Labor Party Government of Prime Minister Kevin Rudd launched the National Preventative Health Taskforce (“NPHT”).³⁶

102. On 9 April 2008, Australia’s then Minister of Health and Ageing, The Hon. Nicola Roxon MP, announced the establishment of the NPHT to “provide evidence-based advice to government

³²



³³ Statement of Claim, para. 46 referring to the Pellegrini Statement, para. 34 (**Exhibit CWS-002**).

³⁴ Statement of Claim, paras 230–233.

³⁵ Respondent’s Reply on Preliminary Objections, para. 15 referring to Articles 5.1, 11 and 13 of the FCTC.

³⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 234 referring to the NPHT Discussion Paper, p. ii (Foreword by Minister of Health and Ageing, The Hon. Nicola Roxon MP) (**Exhibit C-080**).

and health providers—both public and private—on preventative health programs and strategies, and support the development of a National Preventative Health Strategy” (“**NPHS**”).³⁷

103. On 10 October 2008, the NPHT published a discussion paper entitled “Australia: The Healthiest Country by 2020”. The paper proposed targets for the prevention of obesity, tobacco and alcohol, including in particular the reduction of the prevalence of daily smoking to 9% or less by 2020. To meet this target, the paper suggested to “[f]urther regulate the tobacco industry with measures such as ending all forms of promotion including point-of-sale display and mandating plain packaging of tobacco products”.³⁸
104. On 2 January 2009, PML participated in the NPHT consultation and stated, among other things, that “plain packaging was unnecessary, unsupported by evidence, and unlawful”. On the same day, the NPHT consultation closed.³⁹
105. In April 2009, shortly before the NPHT delivered its report to the government, Australia’s Department of Health and Ageing (“**DoHA**”) examined the feasibility of a Tobacco Control Act through which plain packaging would be introduced.⁴⁰ Accordingly, DoHA prepared a draft Regulated Impact Statement (“**RIS**”) and submitted it for review to the Office of Best Practice Regulations (“**OBPR**”) which is the independent government agency responsible for ensuring that “Australian legislation and regulations rest on solid evidentiary foundation”. This proposal together with the Tobacco Control Act, however, failed because the draft RIS lacked “proper analysis and substantiation for plain packaging”.⁴¹
106. On 30 June 2009, the NPHT issued a report on the NPHS, listing a series of important actions, including to “[e]liminate the promotion of tobacco products through design of packaging”,⁴² and “[m]andate standard plain packaging of all tobacco products to ensure that design features of the pack in no way reduce the prominence or impact of prescribed government warnings”.⁴³ The NPHT also issued a “Roadmap for Action”, which underlined that plain packaging was

³⁷ Statement of Defence, Vol. A, para. 74; Respondent’s Reply on Preliminary Objections, para. 15(a).

³⁸ Statement of Defence, Vol. A, para. 75; Respondent’s Reply on Preliminary Objections, para. 15(b).

³⁹ Statement of Defence, Vol. A, paras 76–78 referring to PML’s Submission to the NPHT Consultation, “Australia: The Healthiest Country by 2020” (2 January 2009) (**Exhibit R-212**).

⁴⁰ Statement of Claim, para. 210.

⁴¹ Statement of Claim, para. 211.

⁴² Respondent’s Reply on Preliminary Objections, para. 15(d).

⁴³ Statement of Defence, Vol. A, para. 78 referring to NPHT, *Australia: The Healthiest Country by 2020, National Preventative Health Strategy - Overview* (30 June 2009), pp. 17–18 (**Exhibit R-193**).

“justifiable, proportionate and not inconsistent with international trade agreements”,⁴⁴ and identified a series of key actions in relation to tobacco, such as the need to “[l]egislate to eliminate all remaining forms of promotion including (...) promotion through packaging (...)”.

C. RESPONSES TO THE NPHT’S WORK AND THE CHANGE IN GOVERNMENT IN AUSTRALIA

107. In August 2009, Senator Steven Fielding introduced the Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009 (the “**Fielding Bill**”) in the Australian Senate, which proposed to remove “brands, trademarks and logos from tobacco packaging”.⁴⁵
108. On 1 September 2009, Health Minister Roxon launched the NPHS, and released a technical paper on tobacco entitled “Australia: The Healthiest Country by 2020”, which proposed to “[r]equire all tobacco products to be sold in plain packaging”.⁴⁶
109. Beginning at least on 2 September 2009, the PMI Group received legal advice [REDACTED]
[REDACTED]
[REDACTED].⁴⁷
110. On 9 October 2009, in response to the Health Minister’s launch of the NPHS on 1 September 2009, Allens Arthur Robinson, wrote to Health Minister Roxon to express the PMI Group’s concern about the unconstitutionality of plain packaging and the Fielding Bill which sought to introduce a form of plain packaging.⁴⁸
111. In January 2010, the PMI Group expressed its opposition to the NPHT’s recommendation that Australia introduce Plain Packaging Measures. PMI, the parent company of the PMI Group, referred to the “lack of evidence that plain packaging will achieve its intended public health

⁴⁴ Statement of Defence, Vol. A, para. 79 referring to NPHT, *Australia: The Healthiest Country by 2020, National Preventative Health Strategy – the Roadmap for Action* (30 June 2009), pp. 180–182 (**Exhibit R-194**).

⁴⁵ Statement of Claim, para. 239; Parliamentary Digest, Tobacco Plain Packaging Bill 2011 (**Exhibit C-456**).

⁴⁶ Statement of Defence, Vol. A, para. 80; see also Respondent’s Reply on Preliminary Objections, para. 15(e) referring to NPHT Tobacco Working Group, *Technical Report 2: Tobacco Control in Australia: Making Smoking History* (2009), p. 21 (**Exhibit R-195**).

⁴⁷ Respondent’s Reply on Preliminary Objections, paras 16, 124 referring to RPL doc. 299 (Category 9 document) (**Exhibit R-1058**).

⁴⁸ Statement of Defence, Vol. A, paras 80–81; Letter from AAR to Health Minister Roxon (9 October 2009) (**Exhibit R-007**).

objectives” and described plain packaging as imposing “restrictions tantamount to expropriation”.⁴⁹

112. On 29 January 2010, PM Asia obtained legal advice [REDACTED]
[REDACTED]
[REDACTED].⁵⁰

113. In February 2010, the popularity of Prime Minister Rudd’s Government (the “**Rudd Government**”) dropped, as evidenced by several opinion polls in Australia.⁵¹

114. In March 2010, the Australian Department of Foreign Affairs and Trade stated that the Fielding Bill “did not represent government policy and that there was no government plan to introduce plain packaging legislation”.⁵²

115. In April 2010, DoHA prepared another RIS draft and submitted it to the OBPR for review. The OBPR rejected the draft because it failed to provide any credible evidence that plain packaging would be effective in reducing smoking.⁵³

116. Meanwhile, in April 2010, IP Australia, the government agency responsible for intellectual property, had raised serious concerns regarding plain packaging in the context of the Fielding Bill and the NPHT. According to the Claimant, IP Australia was unaware of Prime Minister Rudd’s decision to adopt the plain packaging law. In other words, the Claimant alleges that Prime Minister Rudd’s Government decided to pursue plain packaging without consulting, or informing, IP Australia.⁵⁴

⁴⁹ Statement of Defence, Vol. A, para. 83.

⁵⁰ Respondent’s Reply on Preliminary Objections, para. 124c referring to RPL doc. 315 (**Exhibit R-1058**).

⁵¹ Statement of Claim, para. 243 referring to the Parliament of Australia Research Paper, p. 10 (**Exhibit C-189**).

⁵² Statement of Claim, para. 241 referring to the Letter from Australian Department of Foreign Affairs and Trade to Redacted Recipient on Plain Packaging (23 February 2010) (**Exhibit C-100**).

⁵³ Statement of Claim, paras 212, 249 referring to the OBPR Letter to DoHA Regarding Draft RIS 2010 (**Exhibit C-125**) and the Milliner Report, paras 73–75 (**Exhibit CWS-010**). See also **Exhibit C-110**, **Exhibit C-115** and **Exhibit C-132**.

⁵⁴ Statement of Claim, para. 246.

117. On 19 April 2010, Health Minister Roxon stated that the Australian Government was considering additional measures in line with NPHT's recommendations including plain packaging for tobacco products to address the harmful effects of smoking.⁵⁵
118. On 23 April 2010, an IP Australia internal e-mail revealed that DoHA had just learnt of Prime Minister Rudd's intentions to publicly announce the plain packaging initiative.⁵⁶
119. On 29 April 2010, Australia's Prime Minister Kevin Rudd and Health Minister Roxon, jointly announced major tobacco control reforms to give effect to the recommendations of the NPHT including the Government's introduction of plain packaging legislation to mandate plain packaging of tobacco products by 1 July 2012.⁵⁷ In addition, the features of the Plain Packaging Measures were announced, which were similar to those subsequently expressed in the TPP Act.
120. At that time, Australia had not released a formal response to the NPHT's final report.⁵⁸ Accordingly, several opposition Senators described this announcement as "a politically driven decision".⁵⁹ The then-Opposition Leader Tony Abbot MP criticised Prime Minister Rudd's plain packaging proposal.⁶⁰ The Claimant suggests that Prime Minister Rudd's announcement was "simply a statement of intent" and that the political situation at that time in Australia made it impossible to foresee the ultimate fate of the plain packaging policy as a very high probability.⁶¹
121. On 30 April 2010, PML reiterated its opposition to plain packaging by contesting the "legality and efficacy" of plain packaging in a submission to the Senate Community Affairs Legislation Committee regarding the Fielding Bill.⁶²

⁵⁵ Statement of Defence, Vol. A, para. 84 referring to the Letter from Health Minister Roxon to L. Boissart (PML) (19 April 2010) (**Exhibit R-011**); Respondent's Reply on Preliminary Objections, para. 20.

⁵⁶ Statement of Claim, para. 247 referring to the e-mail from Leo O'Keeffe to Ian Goss, forwarded to Philip Noonan, Director General, IP Australia (23 April 2010) (**Exhibit C-113**).

⁵⁷ Statement of Defence, Vol. A, para. 85; Respondent's Reply on Preliminary Objections, para. 22 referring to Prime Minister, "Anti-Smoking Action" (Media Release, 29 April 2010) (**Exhibit C-120**); Respondent's Reply on Preliminary Objections, Annexure 1, p. 197; Respondent's First Post-Hearing Brief, para. 70.

⁵⁸ Statement of Claim, para. 251.

⁵⁹ Statement of Claim, para. 256.

⁶⁰ Transcript of Joint Press Announcement of Opposition Leader, The Hon. Tony Abbott MP, The Hon. Scott Morrison MP and The Hon. Louise Markus MP (29 April 2010) (**Exhibit C-117**).

⁶¹ Claimant's Counter-Memorial on Preliminary Objections, paras 22–23.

⁶² Statement of Defence, Vol. A, paras 88–89; Respondent's First Post-Hearing Brief, para. 70; Claimant's Second Post-Hearing Brief, para. 17.

122. By the end of April 2010, the Respondent alleged that the PMI Group had progressed with its intention and planned strategy to bring a claim under the Treaty if Australia proceeded with its decision to implement Plain Packaging Measures and to restructure the PMI Group to get a “corporate vehicle with standing” to bring the claim.⁶³ The Respondent contends that despite opposition from the PMI Group, the Australian Government adhered to its decision to introduce Plain Packaging Measures.⁶⁴
123. From April to June 2010, the Australian Government started to implement its plain packaging decision. Through DoHA, the Government had engaged a consultant to market-test the design of graphic health warnings and plain packaging.
124. On 11 May 2010, the Rudd Government published its formal response to the NPHT’s final report, detailing its commitment to the introduction of plain packaging. In particular, it stated that “[t]he Government will remove one of the last remaining vehicles for the advertising of tobacco products by developing legislation to mandate plain packaging for tobacco products from 1 January 2012 with full implementation by 1 July 2012”.⁶⁵
125. On 31 May 2010, in a media release regarding increased funding for *Quitline*, Health Minister Roxon reiterated that the Government was committed to the introduction of Plain Packaging Measures.⁶⁶
126. In early June and July 2010, PMI Group’s Australian lawyers provided legal advice [REDACTED]
[REDACTED]
[REDACTED].⁶⁷
127. On 23 June 2010, the PMI Group’s claims in opposition to plain packaging were reiterated in an address to investors by PM Asia’s President, Mr. Matteo Pellegrini. On the same day, in a

⁶³ Respondent’s Reply on Preliminary Objections, paras 24–26, 45.

⁶⁴ Respondent’s Reply on Preliminary Objections, para. 27.

⁶⁵ Statement of Claim, para. 257; Statement of Defence, Vol. A, para. 90 referring to *Taking Preventative Action – A Response to Australia: The Healthiest Country by 2020, the Report of the National Preventative Health Taskforce* and the Government Response to NPHT Discussion Paper, pp. 66–67 (**Exhibit R-196/Exhibit C-123**).

⁶⁶ Statement of Defence, Vol. A, para. 90; Respondent’s Reply on Preliminary Objections, para. 28.

⁶⁷ Respondent’s Reply on Preliminary Objections, para. 28 referring to RPL docs. 81, 324 (Category 9 document) and RPL doc. 325 (Category 9 and Category 12 documents) (**Exhibit R-1058**).

media release, Health Minister Roxon stated that the Government would legislate plain packaging.⁶⁸

128. On 24 June 2010, Prime Minister Kevin Rudd was replaced by Deputy Prime Minister Julia Gillard.⁶⁹ At her first press conference, Prime Minister Gillard indicated “a willingness to revisit the policies of the Rudd Government”.⁷⁰
129. The Respondent explained that in the weeks following the change in Government, the process of implementing Plain Packaging Measures was carried in a methodical, diligent and resolute manner without Australia wavering from its decision. The Respondent dismissed the Claimant’s allegations that PMI Group had “good reason” to think that Plain Packaging Measures would never be implemented in Australia because Prime Minister Rudd “had developed a reputation for announcing ambitious proposals and later backing down”.⁷¹ The Respondent maintained that there was, at all relevant times, every reason to expect that the Australian Government’s decision to introduce plain packaging would be brought to fruition in due course.⁷²
130. On 7 July 2010, the Australian Government published a timetable for the implementation of its decision to introduce Plain Packaging Measures. The timetable showed that plain packaging legislation would be ready for introduction before 30 June 2011, and would be fully implemented by 1 July 2012.⁷³
131. On 17 July 2010, three and a half weeks after assuming leadership, Prime Minister Gillard called for an early federal general election on 21 August 2010.⁷⁴ On 19 July 2010, the House of Representatives was dissolved.⁷⁵
132. On 26 July 2010, Franchise Partners, an investment management firm, communicated with PMI on the likelihood of the Australian Government’s decision to introduce Plain Packaging Measures. Franchise Partners expressed the view that:

⁶⁸ Statement of Defence, Vol. A, paras 91–93 referring to the Health Minister Roxon, “Launch of AIHW Australia’s Health 2010” (Media Release, 23 June 2010) (**Exhibit R-017**).

⁶⁹ Statement of Claim, para. 258.

⁷⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 47.

⁷¹ Respondent’s Reply on Preliminary Objections, paras 46–47.

⁷² Respondent’s Reply on Preliminary Objections, para. 50.

⁷³ Respondent’s Reply on Preliminary Objections, paras 30, 73.

⁷⁴ Statement of Claim, para. 258.

⁷⁵ Parliament of Australia Research Paper No. 8, 2011-12, “2010 Federal Election: a brief history” (**Exhibit C-189**).

Outcome of plain packaging is dependent on who wins the election and most experts seem to believe that a labour (sic) government under Julia Gillard is likely to go ahead with PP [plain packaging] plans and based on history most governments have got a second term in office so likelihood of Labor (sic) victory is high.⁷⁶

133. In a response e-mail of 29 July 2010, PMI noted that “there are no indications that a newly elected [Labor] Government will set aside the pursuit of plain packaging as articulated by the former Prime Minister”.⁷⁷
134. After the 2010 election, the Government continued to pursue its legislative agenda and none of the minor parties or independent Members of Parliament, save one, indicated that they opposed or even were considering opposing the Plain Packaging Measures.⁷⁸
135. In August 2010, PML cited and relied on the timetable for planning purposes in its 2011–2013 Original Budget/Long Range Plan (“OB/LRP”). The document, in the Respondent’s view, evidences that the Claimant’s planned BIT strategy was complete and approved at the highest levels of the PMI Group by August 2010.⁷⁹
136. On 11 August 2010, Health Minister Roxon complained about the Coalition’s “lack of support for the Labor Party’s plain packaging proposal”.⁸⁰
137. On 16 August 2010, the Coalitions’ Shadow Health Minister, Peter Dutton, stated that “[w]e haven’t seen any legislation from the Government. So really apart from a press release, we don’t know what it is the Government’s asking us to sign up to”.⁸¹
138. In the same period of time, PML’s senior management presented its annual OB/LRP, which set out the affiliates’ operating budget and business objectives, to PM Asia’s management including Mr. Pellegrini, for approval. The August 2010 OB/LRP stipulated that the Labor Government’s plan to pursue plain packaging would be a potential future regulatory challenge to the Australian

⁷⁶ Respondent’s Reply on Preliminary Objections, para. 57 referring to the e-mail of ██████████ (Franchise Partners) to ██████████ (Philip Morris group), “Plain Packaging issue we spoke about” (26 July 2010) (**Exhibit R-774**).

⁷⁷ Respondent’s Reply on Preliminary Objections, para. 58 referring to the e-mail of ██████████ (Philip Morris group) to ██████████ (Franchise Partners), “RE: Plain Packaging issue we spoke about” (29 July 2010) (**Exhibit R-774**).

⁷⁸ Respondent’s Reply on Preliminary Objections, paras 68–69.

⁷⁹ Respondent’s Reply on Preliminary Objections, para. 33 referring to ██████████.

⁸⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 47.

⁸¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 47 referring to the Transcript of Radio National interview with Shadow Health Minister Peter Dutton (16 August 2010), p. 9 (**Exhibit C-321**).

business. However, the sales projections and PML's plans to launch updated packaging designs on the Australian market remained unchanged.⁸²

139. On 21 August 2010, Australia held a federal election, and no party achieved an absolute majority. The Labor Party and the Opposition Coalition which had criticised plain packaging had an equal number of seats in the House of Representatives.⁸³
140. On 26 August 2010, the Parliament discontinued its consideration of the Fielding Bill.⁸⁴

D. THE PROPOSED RESTRUCTURING AND PLAN TO INTRODUCE PLAIN PACKAGING MEASURES

141. In early September 2010, PMI restructured the ownership and functions of many of its affiliates around the world thereby eliminating redundant legal entities. In particular, the restructuring placed PMI Group's operating affiliates in various jurisdictions under the administration of PM Holland.⁸⁵
142. The decision to restructure ownership of the Australian subsidiaries as part of this global process was documented in an internal memorandum dated 2 September 2010, which stated that the goal of the restructuring plan was "to further streamline PMI's corporate structure".⁸⁶ The Claimant notes that the justifications provided in the internal memorandum for the restructuring proposal (to "streamline" or "rationalise" the corporate structure) were identical to the purpose for the restructuring in the Claimant's notification to the Treasurer (the "**FATA notification**" or "**Foreign Investment Application**")⁸⁷ several months later (to "refine PMI affiliates' corporate structure in the Asian region").⁸⁸

⁸² Claimant's Counter-Memorial on Preliminary Objections, para. 49.

⁸³ Parliament of Australia Research Paper No. 8, 2011-12, "2010 Federal Election: a brief history" (**Exhibit C-189**).

⁸⁴ Australian Senate Community Affairs Legislation Committee, "Final Report, Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009 (**Exhibit C-083**).

⁸⁵ Statement of Claim, para. 44 referring to the Pellegrini Statement, para. 32 (**Exhibit CWS-002**).

⁸⁶ Claimant's Counter-Memorial on Preliminary Objections, para. 50 referring to the PMI Request for Change in Investment, p. 2 (**Exhibit C-129**). The Claimant notes that the "first steps of this plan" had been approved on 14 April 2010, two weeks before Prime Minister Rudd's policy announcement concerning Plain Packaging Measures.

⁸⁷ Under FATA, the Foreign Investment Application is given to the Treasurer. For administrative reasons, the Foreign Investment Application was addressed to the Executive Member of the Foreign Investment Review Board ("FIRB"), who is also the General Manager of the Foreign Investment and Trade Policy Division of the Treasury.

⁸⁸ Claimant's Counter-Memorial on Preliminary Objections, para. 52.

143. On 3 September 2010, PMI approved the restructuring proposal of several companies within the PMI Group and decided to transfer its wholly owned Australian subsidiaries to the Claimant.⁸⁹ Consequently, two Dutch holding companies within the PMI Group—Philip Morris International B.V. and Philip Morris Participation B.V.—were merged into another Dutch company, Park 1989 B.V., which was then transferred to PM Holland.⁹⁰ This was followed by the transfer of PM Australia from PM Brands Sàrl to PM Holland, accomplished by transferring PM Australia to the Claimant and in parallel, transferring the Claimant to PM Holland. As a result, the Claimant became the direct owner of PM Australia and the indirect owner of PML.⁹¹
144. On 13 September 2010, Health Minister Roxon acknowledged the uncertainty over whether there was political support for plain packaging in the newly elected Parliament, and stated that she hoped that the Coalition would support Plain Packaging Measures but voiced concern that the Coalition had “sort of [drawn] back” from supporting the measure.⁹²
145. On 14 September 2010, following weeks of negotiations, Prime Minister Gillard formed a Labor Party-led minority government (“**Minority Labor Government**”). However, the Minority Labor Government did not have sufficient votes to pass legislation including the proposed (but not yet drafted) plain packaging legislation.⁹³ According to a report from the Department of Parliamentary Services, “the number of votes that the Government may have on most matters before the House of Representatives [was] variable”. Similarly, a research paper published by the Social Policy Section of the Australian Parliamentary Library on 16 September 2010 noted that “it is difficult to determine the likely fate of the plain packaging proposal given that the position of the Coalition and the independent members is unknown”.⁹⁴ The Minority Labor

⁸⁹

[REDACTED]

⁹⁰

Statement of Claim, para. 45 referring to [REDACTED].

⁹¹

Statement of Claim, para. 45 referring to [REDACTED].

⁹²

Claimant’s Counter-Memorial on Preliminary Objections, para. 58 referring to the Transcript of Lateline Interview with Minister for Health Nicola Roxon (13 September 2010), p. 2 (**Exhibit C-324**).

⁹³

Statement of Claim, para. 258 referring to the Parliament of Australia Research Paper, pp. 31–32 (**Exhibit C-189**); Wanna, Australia: July to December 2010, pp. 285–87 (**Exhibit C-136**); Wiltshire, Retrospect 2010, pp. 24–25 (**Exhibit C-144**); Claimant’s Counter-Memorial on Preliminary Objections, para. 55.

⁹⁴

Claimant’s Counter-Memorial on Preliminary Objections, para. 58.

Government published schedules of legislation but these contained no references to the proposed plain packaging legislation.⁹⁵

146. On 20 September 2010, the Managing Director of PM Australia, Mr. Boissart, wrote a letter to the Assistant Treasurer which read, in part, as follows:

Former Prime Minister Rudd announced in late April that he would introduce legislation requiring cigarettes to be sold in plain packaging by mid-2012. *This decision was taken without any consultation with the industry or the retail community and no commitment to following normal regulatory impact assessment processes.* It was also taken without any recognition that Australian states and territories have moved to ban the retail display of tobacco products.⁹⁶ [...] (emphasis added)

147. On 24 September 2010, DoHA prepared minutes for Health Minister Roxon (the “**September 2010 Minutes**”), at her request, to update her on the implementation of the Plain Packaging Measures. On the same day, PMI Group received legal advice concerning Plain Packaging Measures and investment treaty protections for Philip Morris’s investments in Australia.⁹⁷
148. On 23 October 2010, a spokesperson for the Health Minister stated that the Australian Government remained committed to the introduction of Plain Packaging Measures.⁹⁸
149. On 17 November 2010, PMI’s Chairman and Chief Executive Officer, Mr. Louis Camilleri stated that “[w]hilst PMI has a proven track record of successfully operating in highly regulated environments, we will continue to use all necessary resources and extensive stakeholder engagement, and where necessary litigation, to actively challenge unreasonable regulatory proposals”.⁹⁹
150. On the same day, in a media release regarding restrictions on Internet tobacco advertising, Health Minister Roxon confirmed the Government’s decision to introduce Plain Packaging Measures.¹⁰⁰

⁹⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 59.

⁹⁶ Statement of Defence, Vol. A, para. 95.

⁹⁷ Respondent’s Reply on Preliminary Objections, para. 74 referring to DoHA, Minute to the Minister, “Progressing Plain Packaging of Tobacco Products” (24 September 2010) (**Exhibit R-703**); RPL docs. 348 (**Exhibit R-1058**) and 349 (**Exhibits R-778** and **R-780**).

⁹⁸ Statement of Defence, Vol. A, para. 96 referring to M. Metherell, “Legal obstacles raised against plain cigarette packs”, *Sydney Morning Herald* (23 October 2010) (**Exhibit R-022**).

⁹⁹ Statement of Defence, Vol. A, para. 97 referring to L. Camilleri, “Remarks by Louis C. Camilleri Chairman and Chief Executive Officer, Philip Morris International Inc., Morgan Stanley Global Consumer and Retail Conference” (17 November 2010), p. 11 (**Exhibit R-023**).

¹⁰⁰ Statement of Defence, Vol. A, paras 98–99 referring to Health Minister Roxon, “Internet tobacco advertising to face new tough restrictions” (Media Release, 17 November 2010) (**Exhibit R-024**).

151. On 23 November 2010, DoHA prepared minutes for Health Minister Roxon (the “**November 2010 Minutes**”) which stated that the purpose of the “targeted consultations on plain packaging” with the tobacco industry including the PMI Group was not to engage in a debate about the Australian Government’s decision to introduce Plain Packaging Measures but rather to give the tobacco industry an opportunity to comment on aspects of the implementation process.¹⁰¹
152. On 26 November 2010 and 14 January 2011, DoHA held individual consultations with the three major tobacco companies in Australia, including PML, during which the tobacco companies, in particular, the representative of PML, indicated their opposition to the “excessive regulation” through Plain Packaging Measures.¹⁰²
153. On 9 December 2010, DoHA briefed Health Minister Roxon again about the implementation of Plain Packaging Measures generally (the “**December 2010 Minutes**”).¹⁰³ The December 2010 Minutes to which a letter, addressed to Prime Minister Gillard, was attached, stipulated that Minister Roxon agreed to the “drafting of legislation for public exposure, prior to making a request for the measure to be included on the legislation programme for introduction during the Winter 2011 sitting period”.¹⁰⁴
154. Between 13 and 21 January 2011, in the lead-up to the restructuring, PMI Group exchanged e-mails with its solicitors referring to the application of Australian law and investment policies to “any anticipated or actual change in ownership or control of PM Australia and/or PML and concerning investment treaty protections for the Group’s operations in Australia”.¹⁰⁵
155. On 14 January 2011, DoHA met with representatives of the tobacco industry including with those of the PMI Group to provide the tobacco industry with an “update on the process and timeliness” of plain packaging, and inform the tobacco industry that the draft legislation or a detailed legislative proposal would be available for public comment in the second quarter of

¹⁰¹ Respondent’s Reply on Preliminary Objections, para. 76 referring to DoHA, Minute to the Minister, “Targeted Consultations with Tobacco and Retail Industries on Plain Packaging of Tobacco Products” (23 November 2010) (**Exhibit R-704**).

¹⁰² Statement of Defence, Vol. A, paras 100–101.

¹⁰³ Respondent’s Reply on Preliminary Objections, para. 78 referring to DoHA, Minute to the Minister, “Tobacco Plain Packaging: Legislation; Enforcement” (9 December 2010) (**Exhibit R-705**).

¹⁰⁴ Respondent’s Reply on Preliminary Objections, paras 82–83.

¹⁰⁵ Respondent’s Reply on Preliminary Objections, paras 41–42.

[2011] and that the legislation would not be introduced into the Australian Parliament before the winter 2011 sittings.¹⁰⁶

156. On 18 January 2011, three days before the PMI Group applied to the FIRB for approval of its proposed restructuring, PMI Group’s legal counsel provided it with legal advice concerning investment treaty protection for its investment in Australia.¹⁰⁷
157. On 21 January 2011, Australian legal counsel for the PMI Group, Allens Arthur Robinson, filed the Foreign Investment Application regarding the proposed change in ownership of PM Australia and PML with the Treasurer requesting approval of the restructuring under the FATA.¹⁰⁸ The Foreign Investment Application refers to the statutory notices,¹⁰⁹ and to documents that the PMI Group and in particular PM Asia had provided, including most importantly the Foreign Investment Review Board Letter (“**FIRB Letter**”) dated 21 January 2011. The Foreign Investment Application stipulated that the transfer was for the purpose of “refining PMI affiliates’ corporate structure in the Asian region”.¹¹⁰ It also stated the seller’s nationality (Swiss) and the identity and nationality of the Group’s ultimate parent company (PMI, United States).¹¹¹ The Foreign Investment Application further provided that the Claimant “[was] not aware of any reason why the [r]estructur[ing] would be contrary to the Australian national interest” because the “[r]estructur[ing] does not result in any change in ultimate control of PM Australia or PML, as both before and after the [r]estructur[ing], those entities will remain indirect, wholly owned subsidiaries of PMI”.¹¹²
158. Subsequently, in January 2011, the Foreign Investment Application was first considered by ██████████ an officer of the Foreign Investment and Trade Policy Division of the Treasury (“**FITPD**”), and no national interest concerns were raised.¹¹³
159. While the Foreign Investment Application was pending before the Treasury, Minister Roxon stated at a press conference that “plain packaging legislation [would] be available and

¹⁰⁶ Respondent’s Reply on Preliminary Objections, para. 147.

¹⁰⁷ Respondent’s Reply on Preliminary Objections, para. 42.

¹⁰⁸ Statement of Defence, Vol. A, para. 102.

¹⁰⁹ Respondent’s Reply on Preliminary Objections, para. 243 referring to statutory notices (**Exhibit C-360**).

¹¹⁰ Statement of Claim, para. 47 referring to the ██████████

¹¹¹ See ██████████.

¹¹² See ██████████.

¹¹³ Claimant’s First Post-Hearing Brief, para. 83.

introduced through the middle of [2011]” and explained that the draft legislation would first be “made available for discussion and debate” before it is introduced in Parliament. She also noted that “if it is passed by the [P]arliament”, the Plain Packaging Measures would be in force as from 1 July 2012.¹¹⁴

160. On 10 February 2011, PMI’s Chairman and Chief Executive Officer, Mr. Louis Camilleri, addressed Australia’s decision to introduce Plain Packaging Measures at a conference call with analysts. In his remarks, Mr. Camilleri recognised that Australia had a “strong intent” to implement Plain Packaging Measures and stated that “plain packaging doesn’t make any sense and we’ll fight plain packaging in every way possible”.¹¹⁵
161. On 11 February 2011, the Treasury responded to the Foreign Investment Application with a formal letter stipulating that, “there are no objections to this proposal in terms of the Government’s foreign investment policy” (“**No-objection Letter**”).¹¹⁶
162. On 17 February 2011, PMI Group indicated that it had suddenly realised that it may be exposed to substantial tax payments in Hong Kong if the restructuring occurred as described in the Foreign Investment Application. As a result, the PM Australia transaction went from one of mere “contribution” where PM Asia paid nothing to acquire PM Australia to one where it acquired it for substantial value.¹¹⁷
163. On 23 February 2011, [REDACTED] the Claimant formally acquired PM Australia and PML when PM Brands Sàrl transferred its shares from PM Australia to the Claimant.¹¹⁸ On the same day, PML wrote to Health Minister Roxon stating that PML “strongly opposes” Australia’s proposal for plain packaging.¹¹⁹ Furthermore, at a presentation given in New York by the Chief Financial Officer of PMI, Australia’s Plain Packaging Measures were raised once more and it was stated that “[w]e will vigorously oppose any such

¹¹⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 61.

¹¹⁵ Statement of Defence, Vol. A, para. 103.

¹¹⁶ Statement of Claim, para. 48; Claimant’s Counter-Memorial on Preliminary Objections, para. 62 referring to the [REDACTED].

¹¹⁷ [REDACTED]

¹¹⁸ Statement of Claim, para. 48.

¹¹⁹ Statement of Defence, Vol. A, para. 105 referring to the Letter from C. Argent (PML) to Health Minister Roxon (23 February 2011) attaching PML submission, “Generic packaging will increase illegal tobacco trade and undermine the Government’s health objectives” (**Exhibit R-027**).

proposed measures using all the tools at our disposal, including, if necessary, legal challenges”.¹²⁰

164. Less than a week after the share transfer on 23 February 2011, the Claimant, continuing its preparations for the present arbitration, made inquiries for the purposes of instructing additional counsel.

E. INTRODUCTION OF THE TOBACCO PLAIN PACKAGING BILL 2011

165. On 6 April 2011, the Tobacco Plain Packaging Bill 2011 (“**TPP Bill**”) was introduced into the Australian Parliament.¹²¹

166. On 7 April 2011, the Minority Labor Government released for public consultation an Exposure Draft of the TPP Bill 2011 (which would become the TPP Act 2011) along with a consultation paper.¹²² Meanwhile, Australia received a number of submissions from interested parties opposing plain packaging, including from the Coalition, which opposed plain cigarette packaging.¹²³ The Coalition’s Shadow Health Minister noted that “there are a lot of question marks around this”.¹²⁴

167. On 8 April 2011, the Minority Labor Government notified the draft plain packaging legislation to the World Trade Organization (“**WTO**”) at an “early appropriate stage” (when amendments and comments could still be made).¹²⁵ On the same day, Health Minister Roxon suggested that plain packaging involved “some level of experiment” and that the Plain Packaging Measures, on their own, probably would not stop addicted smokers.¹²⁶ In April 2011, the Australian Government released its trade policy statement which expressly made a link between Investor-State Dispute Settlement (“**ISDS**”) clauses and the Respondent’s plain packaging proposals.¹²⁷

¹²⁰ Statement of Defence, Vol. A, para. 106 referring to H. Waldemer, “Remarks for 2011 Consumer Analyst Group of New York (CAGNY) Conference” (23 February 2011), p. 2 (**Exhibit R-028**).

¹²¹ Respondent’s Reply on Preliminary Objections, para. 92.

¹²² Statement of Claim, para. 260 referring to the Consultation Paper on Exposure Draft of the Tobacco Plain Packaging Bill (7 April 2011) (**Exhibit C-073**). See also Respondent’s Reply on Preliminary Objections, para. 91f. Amended Statement of Defence, Vol. A, para. 113 gives the date incorrectly as 1 March 2011.

¹²³ Statement of Claim, para. 262; Claimant’s Counter-Memorial on Preliminary Objections, para. 64.

¹²⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 64.

¹²⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 65.

¹²⁶ Statement of Claim, para. 261 referring to the Transcript of Interview with The Hon. Nicola Roxon MP with Neil Mitchell, 3 AW (8 April 2011) (**Exhibit C-156**).

¹²⁷ Claimant’s First Post-Hearing Brief, para. 85 referring to the Australian Government “Trade Policy Statement: Trading our way to Jobs and Prosperity” (April 2011) (**Exhibit R-813**).

168. On 17 May 2011, Coalition leader, Mr. Tony Abbott, expressed concerns that the proposed plain packaging legislation could be “counterproductive in practice”.¹²⁸
169. On 22 May 2011, three months after the Claimant acquired the Australian subsidiaries, Health Minister Roxon criticised the Coalition for failing to support Plain Packaging Measures. The Health Minister did not respond when she was asked whether the Minority Labor Government would have sufficient votes to pass the plain packaging legislation without the Coalition’s support.¹²⁹ Rather, Health Minister Roxon admitted that the Government had a “very big fight on [its] hands” in Parliament over the plain packaging proposal.¹³⁰
170. On 24 May 2011, the Australian press reported that “there were indications that some Coalition Members of Parliament were prepared to cross the floor to vote with federal government on plain packaging”.¹³¹
171. On 26 May 2011, another article stipulated that “plain packaging would likely pass the House regardless of what Coalition Leader [Mr. Abbott] decides”, and explained that the Minority Labor Government had secured the votes it needed to pass the legislation.¹³²
172. On 22 June 2011, PMI approved the transfer of its Malaysian and Taiwanese entities to PM Asia as part of its ongoing efforts to refine PMI affiliates’ corporate structure in the Asia region.¹³³
173. On 27 June 2011, pursuant to the Treaty, the Claimant served its Notice of Claim on the Respondent, to the attention of the Prime Minister, the Attorney-General, and the Treasury. The Notice of Claim was made public on the same day.¹³⁴ The Respondent adds that the claim could have been lodged on 23 February 2011 when the dispute had already “crystallised” (or had beyond doubt become reasonably foreseeable), or earlier, but that the Treaty was not yet available at such earlier points in time.¹³⁵

¹²⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 67.

¹²⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 68.

¹³⁰ Claimant’s Second Post-Hearing Brief, para. 26 referring to the Transcript of Meet the Press interview with Minister for Health Nicola Roxon, p. 2 (22 May 2011) (**Exhibit C-388**).

¹³¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 71.

¹³² Claimant’s Counter-Memorial on Preliminary Objections, para. 71.

¹³³

¹³⁴ Claimant’s First Post-Hearing Brief, para. 86.

¹³⁵ Statement of Defence, Vol. A, paras 109, 114–115.

174. On 6 July 2011, the TPP Bill was introduced into the House of Representatives by the Health Minister, who, on the same day, also delivered the second reading speech for the Bill.¹³⁶
175. On 19 September 2011, having received the Notice of Claim, the Attorney-General's Department wrote a letter to [REDACTED] the FITPD inquiring whether the Claimant's Foreign Investment Application complied with the FATA.¹³⁷ Shortly thereafter, [REDACTED] the FITPD (the very division responsible for assessing the Foreign Investment Application) responded stating that "no objections were raised against the proposal because the proposal was not considered to be contrary to [the] national interest [of Australia]".¹³⁸
176. On 21 November 2011, nine months after the Claimant acquired the Australian subsidiaries, the TPP Bill passed both Houses of Parliament and the TPP Act was enacted. On the same day, the Claimant served the Respondent with a Notice of Arbitration under the Treaty.¹³⁹
177. On 1 December 2011, the TPP Act received Royal Assent.
178. On 7 December 2011, the TPP Regulations were promulgated. Under the terms of the Plain Packaging Measures, all tobacco packages had to be manufactured in compliance with the plain packaging requirements as of 1 October 2012 and all tobacco products sold at retail outlets had to comply with the Plain Packaging Measures as of 1 December 2012.¹⁴⁰
179. On 21 December 2011, the Respondent's response to the Notice of Arbitration was filed; it did not express any concerns about the content of the Foreign Investment Application.¹⁴¹
180. On 13 January 2012, the Respondent pointed out that the ownership of PM Asia "appears" to have been transferred from PM Brands Sàrl to PM Holland.¹⁴²

¹³⁶ Statement of Defence, Vol. A, para. 113.

¹³⁷ Claimant's First Post-Hearing Brief, para. 87 referring to the Letter from [REDACTED] (Treasury) to B. Campbell Q.C. (AGD) "Request for Documents: Philip Morris Asia Limited Acquisition of Shares in Philip Morris" (31 October 2011) (**Exhibit R-764**).

¹³⁸ Claimant's First Post-Hearing Brief, para. 88.

¹³⁹ Statement of Defence, Vol. A, para. 113; Respondent's Reply on Preliminary Objections, para. 8b; see also Claimant's Counter-Memorial on Preliminary Objections, para. 73.

¹⁴⁰ Statement of Claim, para. 50 referring to the Parliamentary Information, Tobacco Plain Packaging Bill 2011 History (**Exhibit C-212**).

¹⁴¹ Claimant's First Post-Hearing Brief, para. 89.

¹⁴² Amended Statement of Claim, para. 45 referring to PM Asia, "Directors' Report and Financial Statement for the year ended 31 December 2011" (6 July 2012), p. 3 (**Exhibit R-745**); see also Respondent's Reply on Preliminary Objections, para. 103 referring to the Pellegrini Statement, para. 33 (**Exhibit CWS-002**).

181. On 30 July 2012, at the First Procedural Meeting, the former Solicitor-General of the Commonwealth reiterated the preliminary objections of the Respondent; in this context, no submission was made in relation to the Foreign Investment Application or the No-objection Letter.¹⁴³
182. On 31 July 2012, [REDACTED] the FITPD sent a letter to the Attorney-General's Department of Australia reiterating, according to Claimant, that no objections were raised against the proposal and, therefore, the No-objection Letter was valid.¹⁴⁴

V. THE PARTIES' ARGUMENTS IN RESPECT OF THE RESPONDENT'S PRELIMINARY OBJECTIONS

183. The Claimant asserts that it has met all the jurisdictional requirements to bring its claim against Australia in this arbitration. First, the Claimant submits that, as a company incorporated under the laws of Hong Kong at all relevant times, it is a covered investor under the Treaty.¹⁴⁵ Second, the Claimant considers that it satisfies the "investment" requirement under Article 1(e) of the Treaty since it owns or controls assets in the form of direct shareholding in PM Australia and indirect shareholding in PML; PML's brands and its portfolio of brands as a whole; and PML's ownership and/or licence of intellectual property rights.¹⁴⁶ Third, the Claimant asserts that its investments have been admitted by Australia subject to its laws and investment policies, and therefore its investments are legal under the host State's law.¹⁴⁷ Fourth, the Claimant states that there is a dispute between the Claimant and the Respondent in relation to the Plain Packaging Measures, which have substantially diminished the value of the Claimant's investments in Australia, and that the Claimant has thus satisfied the dispute resolution provisions in the Treaty.¹⁴⁸
184. As noted above, the Respondent advances three preliminary objections, relating to the Tribunal's jurisdiction and to the admissibility of the Claimant's claim.¹⁴⁹ The First Objection is

in which Mr. Pellegrini asserts that the transfer of ownership of PM Asia from PM Brands Sàrl to PM Holland occurred at approximately the same time as the restructuring in February 2011.

¹⁴³ Claimant's First Post-Hearing Brief, para. 90.

¹⁴⁴ Claimant's First Post-Hearing Brief, para. 91.

¹⁴⁵ Statement of Claim, para. 272.

¹⁴⁶ Statement of Claim, paras 273–276.

¹⁴⁷ Statement of Claim, para. 275.

¹⁴⁸ Statement of Claim, paras 277–278, 298.

¹⁴⁹ Respondent's First Post-Hearing Brief, para. 3.

that the Claimant's purported "investment" has not been admitted by the Respondent in accordance with Article 1(e) of the Treaty, which provides that an investment must be admitted by Australia "subject to its law and investment policies as applicable from time to time".¹⁵⁰ The Second Objection is that the Claimant's claim falls outside the scope of Article 10 of the Treaty because it relates to a pre-existing dispute, or, alternatively, that the Claimant's claim amounts to an abuse of right because it has sought to restructure its investment to gain Treaty protection over a pre-existing or reasonably foreseeable dispute.¹⁵¹ The Third Objection is that neither the shares in PML nor PML's assets constitute investments for the purposes of the Treaty.¹⁵²

185. The Tribunal has deemed the First and Second Objections suitable for consideration in a preliminary phase. The legal arguments presented by both Parties in respect of each objection are summarised in detail in the following sections. Both bifurcated objections centre on the question whether, in the period between Australia's announcement of a decision to introduce the Plain Packaging Measures and the enactment of these measures into legislation, the Claimant properly became an investor in Australia when it acquired equity in PML in the context of a corporate restructuring in 2011.¹⁵³
186. In addition, the Claimant raises an argument that, in its view, "eliminates every objection raised by the Respondent in this preliminary phase of the arbitration"¹⁵⁴, *i.e.*, it has continuously "controlled, managed, and supervised PML's business" since 2001,¹⁵⁵ such that it should qualify as an investor in Australia since that date regardless of the 2011 restructuring. Given the nature of the Claimant's defence, the Tribunal considers it expedient to address this contention at the outset, before turning to the Parties' views on the two specific jurisdictional objections.
187. Finally, the Tribunal summarises the Parties' positions on the burden of proof in respect of the bifurcated preliminary objections.

¹⁵⁰ Statement of Defence, Vol. A, para. 12; Bifurcation Hearing Transcript, p. 12:4–8.

¹⁵¹ Bifurcation Hearing Transcript, pp. 14:1–6, 18:7–14, 52:12–26.

¹⁵² Statement of Defence, Vol. A, paras 71, 168; Bifurcation Hearing Transcript, p. 18:15–18.

¹⁵³ Respondent's First Post-Hearing Brief, para. 1.

¹⁵⁴ Claimant's Counter-Memorial on Preliminary Objections, para. 75.

¹⁵⁵ Statement of Claim, paras 38, 276; Statement of Defence, Vol. A, paras 167, 179.

A. WHETHER THE CLAIMANT HAS EXERCISED CONTROL WITHIN THE MEANING OF ARTICLE 1(e) OF THE TREATY SINCE 2001

1. The Meaning of “Controlled”

188. The Parties disagree with respect to the meaning of the term “controlled” in Article 1(e) of the Treaty. Whereas the Claimant contends that oversight and management control is sufficient, the Respondent believes that a showing of a legal and economic interest in the investment is required for the purpose of establishing control.

Article 1(e) of the Treaty reads as follows:

“investment” means every 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...

For the purposes of this Agreement, a physical person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in the company or the investment.

(a) The Meaning of the Term “Controlled” in Accordance with Article 31 VCLT

189. The Parties are in agreement that Article 1(e) of the Treaty is to be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”).¹⁵⁶ The Article provides as follows:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

¹⁵⁶ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 (entered into force on 27 January 1980).

- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The Claimant's Position

190. Applying Article 31 of the VCLT to the Treaty, the Claimant argues that the concept of “substantial interest” is not determinative of the meaning of “control” under the Treaty. According to the Claimant, “substantial interest” is one way, but not the only way, to prove “control”.¹⁵⁷ The Claimant asserts that the Treaty language “*shall be regarded as controlling a company or an investment*” does not mean that control can only be found “in the presence of, or requires a substantial interest”.¹⁵⁸ The drafters of this Treaty, in the Claimant’s view, could have chosen a different wording had they intended “substantial interest” to be the only way to prove control.¹⁵⁹
191. Furthermore, the Claimant criticises the Respondent’s attempt to “make ‘substantial interest’ the *exclusive* definition of control” on the basis that the Respondent does not provide a clear definition of substantial interest but simply implies that it means substantial ownership interest.¹⁶⁰ Substantial control does not always require ownership, the Claimant explains, because “the word ‘ownership’ does not appear in the wording of the phrase” and “control is distinct from ownership under the Treaty”.¹⁶¹ According to the Claimant, as a result of the ordinary meaning of Article 1(e) of the Treaty, in particular the word “or”, the Treaty provides that “ownership and control are two distinct and independent bases” for establishing a protected investment.¹⁶² The Claimant maintains that neither dictionary definitions of control nor the ordinary meaning of control in the corporate context link control to ownership.¹⁶³ Rather, “the ordinary meaning of ‘control’ focuses on the ability of one entity or person to direct the actions

¹⁵⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 77; Claimant’s Rejoinder on Preliminary Objections, para. 24; Claimant’s First Post-Hearing Brief, para. 51.

¹⁵⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 93.

¹⁵⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 94; Claimant’s Rejoinder on Preliminary Objections, para. 30.

¹⁶⁰ Claimant’s Rejoinder on Preliminary Objections, para. 31.

¹⁶¹ Claimant’s Rejoinder on Preliminary Objections, paras 31-32.

¹⁶² Claimant’s Counter-Memorial on Preliminary Objections, paras 77, 79, 80; Claimant’s Rejoinder on Preliminary Objections, para. 24.

¹⁶³ Claimant’s Counter-Memorial on Preliminary Objections, para. 81; Claimant’s Rejoinder on Preliminary Objections, para. 25.

of another”.¹⁶⁴ The Claimant explains that its “management control—pursuant to which it managed, directed, superintended, governed and oversaw the Australian subsidiaries—fits this definition”.¹⁶⁵ In any event, whether or not “substantial interest” is the exclusive definition of “control” under Article 1(e), the Claimant maintains that “[t]he ordinary meaning of ‘substantial interest’ includes management control” and that “if a supervising entity manages every aspect of a business” then “that supervising entity has a substantial interest in the business”.¹⁶⁶

192. For the purposes of defining Article 1(e) within a particular treaty context, the Claimant disputes the Respondent’s reliance on the meaning of “investment” as solely referring to economic contributions of a certain duration involving some element of risk. According to the Claimant, “Article 1(e) of the Treaty defines ‘investment’ to mean ‘every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party’”.¹⁶⁷ Moreover, the definition provided by the Respondent refers to the criteria set out in *Salini v. Morocco*—an ICSID case that was never intended to establish a universal definition of “investment” in investment treaties but refers, at most, to Article 25 of the ICSID Convention.¹⁶⁸
193. The Claimant refers to the Holderness Report as stating that, “in the context of multinational corporations, it is common practice for control—but not necessarily ownership—of certain subsidiaries to be delegated to another subsidiary within the same corporate family”.¹⁶⁹ The separation of ownership and control is, according to the Claimant, “one of the defining features of the corporation that distinguishes it from other organizations”.¹⁷⁰ The Claimant cites the Holderness Report as stating that, “the key feature of control is not financial interest, but rather the existence of performance measurement and evaluation, and incentive and disincentive systems that allow the controlling entity to ‘determine the management of corporate resources’”.¹⁷¹

¹⁶⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 81; Claimant’s First Post-Hearing Brief, para. 48.

¹⁶⁵ Claimant’s First Post-Hearing Brief, para. 48.

¹⁶⁶ Claimant’s First Post-Hearing Brief, para. 52.

¹⁶⁷ Claimant’s Rejoinder on Preliminary Objections, para. 19.

¹⁶⁸ Claimant’s Rejoinder on Preliminary Objections, para. 37.

¹⁶⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 82 citing the Holderness Report at paras 34, 38.

¹⁷⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 83.

¹⁷¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 83.

194. According to the Claimant, in *International Thunderbird Gaming Corporation v. Mexico*,¹⁷² the tribunal defined control in a corporate setting as “the power to effectively decide and implement the key decisions of the business activity off an enterprise...”.¹⁷³ Similarly, the tribunal in *Bilcon of Delaware v. Canada* confirmed “that ownership is not necessary to establish control of an investment”.¹⁷⁴ According to the Claimant, in *Bilcon of Delaware v. Canada*, the tribunal was concerned with the interpretation of NAFTA Article 1139 which “is analogous to Article 1(e) of the [Treaty]”.¹⁷⁵ The *Bilcon* Award involved a claimant that “did ‘not formally hold any equity in any relevant entities of the Bilcon group’”.¹⁷⁶ According to the Claimant, “[a]lthough Mr. Clayton did not exercise any formal control of the relevant entities, the tribunal decided to look at evidence of informal control—unrelated to ownership—to establish jurisdiction”.¹⁷⁷ The *Bilcon* tribunal stated that “the evidentiary record does not exclude any reasonable possibility that [the claimant] exercised indirect control in other—less formal—ways”.¹⁷⁸
195. The Claimant disagrees with the Respondent’s interpretation of *International Thunderbird Gaming Corporation v. Mexico* as establishing that control is linked to the expectation to receive an economic return. Contrary to the Respondent’s view, the Claimant emphasises that “the *Thunderbird* tribunal did not conclude that an economic return is a necessary condition to establish control”.¹⁷⁹ The Claimant emphasises that in the *Thunderbird* Award, the tribunal reasoned that “[c]ontrol can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise’ without the legal capacity to control”.¹⁸⁰ According to the Claimant, “the nature of [its] control is comparable to that exhibited by the investor in [the] *Thunderbird* [Award]” on the ground that the Claimant was responsible for the approval of PML’s major business decisions and significant investments and was directly involved in the overseeing of the implementation of PML’s business plans, the approval of significant expenditures and payment of dividends, as well as the appointment of

¹⁷² *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006 (“*Thunderbird* Award”).

¹⁷³ Claimant’s Rejoinder on Preliminary Objections, para. 25.

¹⁷⁴ Claimant’s First Post-Hearing Brief, para. 53.

¹⁷⁵ Claimant’s First Post-Hearing Brief, para. 54.

¹⁷⁶ Claimant’s First Post-Hearing Brief, para. 54.

¹⁷⁷ Claimant’s First Post-Hearing Brief, para. 54.

¹⁷⁸ Claimant’s First Post-Hearing Brief, para. 54.

¹⁷⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 103.

¹⁸⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 101; Claimant’s Rejoinder on Preliminary Objections, para. 99.

top level management in the Australian subsidiaries.¹⁸¹ These factors, viewed collectively, support the Claimant's position.¹⁸²

196. In support of its assertion that oversight and management can suffice to establish control for the purposes of enjoying treaty protections, the Claimant refers to the findings of the tribunal in *S.D. Myers v. Canada*.¹⁸³ According to the Claimant, the *S.D. Myers* tribunal confirmed that, “control can exist independently of ownership”.¹⁸⁴ In *S.D. Myers v. Canada*, the tribunal was concerned with the relationship between a claimant corporation, SDMI, and the subject of the dispute, a separate company called Myers Canada. SDMI did not own any equity in Myers Canada, but both companies were owned by the same four brothers, one of whom was, according to the Claimant, also the “CEO” or “President” of SDMI.¹⁸⁵ The Claimant asserts that the *S.D. Myers* tribunal “relied on the testimony of the President of SDMI that he controlled Myers Canada in his role as President of SDMI, even though SDMI did not own equity in Myers Canada and that there was no legal agreement ‘set[ting] out the respective responsibilities and obligations’ of the companies”.¹⁸⁶ When the respondent State sought to set aside the decision, the Federal Court of Canada “strongly endorsed the [A]ward” and made a finding that “[t]he meaning of ‘controlled directly or indirectly’ is its ordinary meaning. In this case, the tribunal found that SDMI controlled Myers Canada. “This control was not based on the legal ownership of shares, but on the fact that Mr. Dana Myers controlled every decision, every instrument, every move by Myers Canada, and Mr. Myers did so as chief executive officer of SDMI”.¹⁸⁷ The Claimant also refers to the decision in *Perenco v. Ecuador*—a case in which the claimant did not possess legal title to the shares in question on the date of consent to the arbitration. According to the Claimant, the tribunal held that jurisdiction was proper because the treaty covered investments “owned or controlled” by French nationals, and the French claimants exerted indirect control over the Ecuadorian investments at issue.¹⁸⁸ The tribunal in *Perenco v. Ecuador* stated that it would not take a “formalistic approach to the question of control”.¹⁸⁹

¹⁸¹ Claimant's Counter-Memorial on Preliminary Objections, para. 104.

¹⁸² Claimant's Rejoinder on Preliminary Objections, para. 100.

¹⁸³ Claimant's Counter-Memorial on Preliminary Objections, para. 86.

¹⁸⁴ Claimant's Counter-Memorial on Preliminary Objections, para. 86.

¹⁸⁵ Claimant's Counter-Memorial on Preliminary Objections, para. 87.

¹⁸⁶ Claimant's Counter-Memorial on Preliminary Objections, para. 88.

¹⁸⁷ Claimant's Counter-Memorial on Preliminary Objections, para. 89 referring to *Attorney General of Canada v. S.D. Myers, Inc.*, 2004 FCR 38 (2004), para. 63 (**Exhibit CLA-140**).

¹⁸⁸ Claimant's Rejoinder on Preliminary Objections, para. 88.

¹⁸⁹ Claimant's Rejoinder on Preliminary Objections, para. 89.

197. The Claimant disputes that its interpretation of “control” runs counter to the object and purpose of the Treaty.¹⁹⁰ In response to the argument that the Claimant’s interpretation of control would not require assets, funds and technology transfer, the Claimant notes that its “position *does* contemplate that the investor manages the development of investments in Australia, authorises new investments and controls decisions related to the transfer of assets, funds, expertise”.¹⁹¹ The Claimant dismisses the Respondent’s requirement of “exposure to risk” on the basis that the Treaty does not contain such a requirement.¹⁹² In any event, the Claimant disputes the Respondent’s assertion that it did not assume any risk of the investment’s failure since the Claimant “had a significant interest in the economic performance of the Australian subsidiaries”.¹⁹³ Finally, the Claimant does not find it problematic to allow multiple claims related to “controlled” investments, since, in the Claimant’s view, this resembles the situation of “possible multiple claims over ‘owned’ investments”.¹⁹⁴ In any case, the Claimant considers there to be only “three PMI entities” that “could be understood as having exercised ‘control’ of PM Australia and PML in the pre-2011 period”.¹⁹⁵ The Claimant criticises the Respondent’s position that it should not incur obligations to an unknowable class of investors, arguing that “[a] [S]tate’s unilateral offer to arbitrate disputes with *all* investors of the other contracting party, be they known or unknown, is a core element of an investment treaty”.¹⁹⁶ Australian law does not require the notification of all foreign investments.¹⁹⁷
198. According to the Claimant, the purpose of the Treaty is to “create favourable conditions for greater investment by investors of one Contracting Party in the area of the other”.¹⁹⁸ In the Claimant’s view, regardless of whether there is ownership of an investment, protecting the actors who make investment decisions and who are held accountable for those decisions, will promote investment and advance the purpose of the Treaty.¹⁹⁹ The Claimant maintains that interpreting the Treaty as covering PM Asia would recognise that the Treaty “incentivizes

¹⁹⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 78; Claimant’s Rejoinder on Preliminary Objections, para. 24.

¹⁹¹ Claimant’s Rejoinder on Preliminary Objections, para. 48.

¹⁹² Claimant’s Rejoinder on Preliminary Objections, paras 50–51.

¹⁹³ Claimant’s Rejoinder on Preliminary Objections, para. 54.

¹⁹⁴ Claimant’s Rejoinder on Preliminary Objections, paras 57–58.

¹⁹⁵ Claimant’s Rejoinder on Preliminary Objections, para. 57.

¹⁹⁶ Claimant’s Rejoinder on Preliminary Objections, para. 60.

¹⁹⁷ Claimant’s Rejoinder on Preliminary Objections, paras 59–63.

¹⁹⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 97.

¹⁹⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 97.

investment by reducing legal and political risk”.²⁰⁰ This is because “[w]hen an entity like PM Asia is held accountable for investment decisions made in Australia—even if that entity does not own the investments—legal and political risk will strongly influence its decision making”.²⁰¹

199. The Claimant relies on supplementary means of interpretation to support its definition of Article 1(e) of the Treaty as entailing “control” by oversight and management.²⁰² Thus, the Claimant cites the *travaux préparatoires* of the Treaty as recording that “officials of the Australian government [had] reported internally regarding the final version of the [Treaty] [that] ‘[w]e insisted [on] elements that were central to all of our IPAs, such as... a definition of investment that included the notion of control *as well as* ownership’”.²⁰³ According to the Claimant, the Respondent “rejected suggestions from Hong Kong that the Treaty should cover only ‘directly and indirectly’ owned investments”.²⁰⁴ The Claimant concludes that the *travaux préparatoires* show that the Respondent “wanted Article 1(e) to protect assets that were controlled, but not necessarily owned, by investors”.²⁰⁵
200. The Claimant also relies on the language in other Australian investment treaties to argue that a substantial interest is not the only way to establish control.²⁰⁶ Contrary to the Respondent’s view, the Claimant asserts that the tribunal in *Nova Scotia Power Inc. v. Venezuela* did not disregard treaty practice as such but merely mentioned that “looking at prior treaty-making practice requires caution”.²⁰⁷ The Claimant notes that the tribunals in *Churchill Mining v. Indonesia* and *Metal-Tech v. Uzbekistan* found that a contracting party’s treaty practice can be considered as a “supplementary means of interpretation”.²⁰⁸ The Claimant points to the Respondent’s investment treaties with Argentina and India as well as the Model Bilateral Investment Treaty at that time, which demonstrate a consistent approach in favour of the Claimant’s interpretation of control.²⁰⁹

²⁰⁰ Claimant’s Rejoinder on Preliminary Objections, paras 41–42.

²⁰¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 99.

²⁰² Claimant’s Rejoinder on Preliminary Objections, para. 65.

²⁰³ Claimant’s Rejoinder on Preliminary Objections, para. 66.

²⁰⁴ Claimant’s Rejoinder on Preliminary Objections, para. 67.

²⁰⁵ Claimant’s Rejoinder on Preliminary Objections, para. 71.

²⁰⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 95–96; Claimant’s Rejoinder on Preliminary Objections, para. 72.

²⁰⁷ Claimant’s Rejoinder on Preliminary Objections, paras 72–73.

²⁰⁸ Claimant’s Rejoinder on Preliminary Objections, para. 74.

²⁰⁹ Claimant’s Rejoinder on Preliminary Objections, para. 75.

The Respondent's Position

201. Referring to the ordinary meaning of the terms of Article 1(e) of the Treaty, the Respondent contends that, “Article 1(e) partly states that an investor ‘*shall be regarded* as controlling ... a company or an investment *if* the [investor] has a substantial interest in the company or the investment””.²¹⁰ As drafted, this mandatory language in Article 1(e) defines the meaning of control exclusively by reference to “substantial interest”.²¹¹ No other activity will, according to the Respondent, establish control.
202. Having a “substantial interest” means, according to the Respondent, “that the putative investor must have a right or power over an asset which is sourced in a legal arrangement, and which is capable of being exercised in some significant way that affects the economic returns from and disposition of the asset”.²¹² The meaning of substantial interest as an economic interest can, according to the Respondent, be derived from the “context of the term ‘control’” in the Treaty.²¹³ Thus, “[t]he context provided by the term ‘investment’ militates against the interpretation of ‘control’ contended for by PM Asia—namely that of management and oversight—‘[because] ‘investments’ are understood as an economic contribution of a certain duration which involves some element of risk”.²¹⁴ The Respondent refers to Articles 2(2), 3(1) and 8(1) of the Treaty which “apply to ‘investments and returns’ of investors” where the term “returns” means “the amounts yielded or derived from an investment” such as profits or dividends.²¹⁵ The Respondent also refers to Article 6(1) of the Treaty, which provides that investors should be compensated for any loss suffered.²¹⁶ According to the Respondent, in the absence of any substantial economic interest in the investment, the Claimant “could not have suffered any financial loss” and thus “would not be entitled to any compensatory damages”.²¹⁷ Therefore, in light of the context of the provisions of the Treaty, control over an investment must entail an economic relationship. The Respondent recalls that, “in the period 2001–2011,

²¹⁰ Respondent’s Reply on Preliminary Objections, para. 139.

²¹¹ Respondent’s Reply on Preliminary Objections, para. 139; Respondent’s First Post-Hearing Brief, para. 20.

²¹² Respondent’s First Post-Hearing Brief, para. 20.

²¹³ Respondent’s Reply on Preliminary Objections, para. 146.

²¹⁴ Respondent’s Reply on Preliminary objections, para. 146.

²¹⁵ Respondent’s First Post-Hearing Brief, para. 21.

²¹⁶ Respondent’s First Post-Hearing Brief, para. 21.

²¹⁷ Statement of Defence, Vol. A, para. 173.

PM Asia did not have any expectation of ‘an economic return’ from its asserted ‘control’ of PM Australia and PML”.²¹⁸

203. According to the Respondent, the determinations of other tribunals support its assertions regarding the need for an economic relationship. Thus, the tribunal in *International Thunderbird Gaming Corporation v. Mexico* “linked ‘de facto control’ with ‘the expectation to receive an economic return’”.²¹⁹ Similarly, in *Romak SA v. Uzbekistan*, the tribunal stated that, “the term ‘investments’ under the treaty has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk”.²²⁰
204. According to the Respondent, the definition of “control” suggested by the Claimant “is inconsistent with the object and purpose of the [Treaty]”.²²¹ The Respondent argues that oversight and management control would not require assets, funds or technology transfer between Hong Kong and Australia. This would frustrate the purpose of the Treaty to “promote investment, economic co-operation and mutual prosperity ‘between the Contracting Parties’”.²²² The Claimant’s contention that protecting actors who actually make investment decisions would promote investments, is, in the Respondent’s view, not supported by the text of the Treaty.²²³ Similar to its assertions with respect to the context provided by Articles 2(2), 3(1), 6(1) and 8(1) of the Treaty, the Respondent submits that the purpose of the Treaty does not allow actors who do not suffer any economic loss to bring a claim.²²⁴
205. The Claimant’s interpretation of control would, the Respondent emphasizes, “lead to a multiplication of possible claimants in respect of the same investment”, including at least FTR Holding SA, PMI and PM Asia.²²⁵ According to the Respondent, the very risk of creating uncertainty as to which entity may be considered an “investor” and what constitutes an “investment” under the treaty led the tribunal in *Aguas del Tunari v. Bolivia* to reject the test of

²¹⁸ Statement of Defence, Vol. A, para. 174.

²¹⁹ Statement of Defence, Vol. A, para. 174.

²²⁰ Respondent’s Reply on Preliminary Objections, para. 147.

²²¹ Respondent’s Reply on Preliminary Objections, para. 150; Respondent’s First Post-Hearing Brief, para. 21.

²²² Respondent’s Reply on Preliminary Objections, paras 151–153.

²²³ Respondent’s Reply on Preliminary Objections, paras 154–161.

²²⁴ Respondent’s Reply on Preliminary Objections, para. 162.

²²⁵ Respondent’s Reply on Preliminary Objections, paras 163–166.

“control” based on the exercise of management functions alone.²²⁶ Similarly, the Respondent stresses that “information about the detail of management practices within a corporate group is generally not available publicly” and that the Claimant’s interpretation of “control” as equivalent to such internal management practices would expose the Respondent to “obligations [owed] to an unknowable class of investors”.²²⁷

206. The Respondent refers to the *travaux préparatoires* as “clearly demonstrat[ing] that Australia and Hong Kong regarded the need for a ‘substantial interest’ as the sole criterion of control”.²²⁸ According to the Respondent, Hong Kong was initially unwilling to agree to the inclusion of “control” but agreed on the basis that it was defined by reference to the concept of “substantial interest”.²²⁹ The Respondent asserts that the discussion of “substantial interest” by the Treaty drafters was not, as the Claimant asserts, by reference to direct or indirect ownership, but rather in order to distinguish “full” ownership and having a “substantial interest” which nonetheless confers control.²³⁰
207. The Respondent takes issue with the Claimant’s reference to other Australian investment treaties in support of its interpretation of Article 1(e) on the grounds that the text of other treaties is irrelevant to the interpretation of this Treaty and that “prior treaty-making practice” is also irrelevant as “supplementary means of interpretation under Article 32” of the VCLT, as confirmed by the tribunal in *Nova Scotia Power Incorporated v. Venezuela*.²³¹ Furthermore, the Respondent notes that in any event the Claimant “has failed to establish a consistent [Treaty] practice” by Australia.²³²
208. The Respondent disputes the relevance of *S.D. Myers v. Canada* for establishing that “‘control’ can exist separately from ‘ownership’”.²³³ According to the Respondent, the decision in *S.D. Myers v. Canada* turned on the fact that the NAFTA defines “investment of an investor” as an “investment owned or controlled *directly or indirectly* by an investor”.²³⁴ The Respondent also

²²⁶ Respondent’s Reply on Preliminary Objections, para. 164.

²²⁷ Respondent’s Reply on Preliminary Objections, paras 164, 167.

²²⁸ Respondent’s First Post-Hearing Brief, para. 21.

²²⁹ Respondent’s Reply on Preliminary Objections, paras 170–177; Respondent’s First Post-Hearing Brief, para. 21.

²³⁰ Respondent’s First Post-Hearing Brief, para. 21.

²³¹ Respondent’s Reply on Preliminary Objections, paras 178–179.

²³² Respondent’s Reply on Preliminary Objections, para. 179.

²³³ Respondent’s Reply on Preliminary Objections, para. 140.

²³⁴ Respondent’s Reply on Preliminary Objections, para. 140.

highlights that, unlike in the Treaty, Chapter 11 of NAFTA does not contain any clarification on what is meant by the term “control”, for example by reference to “substantial interest”.²³⁵ According to the Respondent, there are also significant factual differences between *S.D. Myers v. Canada* and the present dispute.²³⁶ Specifically, unlike in *S.D. Myers v. Canada*, the Claimant here did not “direc[t] the actions of PML”, “derive a profit from PM Australia’s/PML’s business”, “contribut[e] to the capital of PML”, “provid[e] PML with any speciali[s]ed technical know-how” or “regularly work together” with PML.²³⁷

209. Similarly, the Respondent disputes the relevance of the *Bilcon* Award for three reasons. First, the *Bilcon of Delaware v. Canada* claim was brought under Chapter 11 of NAFTA “which does not contain a test for control such as that found in Art 1(e) of the [Treaty]”.²³⁸ Second, the *Bilcon* tribunal, according to the Respondent, “held that the state of the evidentiary record did not permit it to make a determination as to the issue of ‘control’”.²³⁹ In contrast, in the present dispute, the Claimant “has had ample opportunity ... to make good its assertions”.²⁴⁰ Third, although the claimant in *Bilcon of Delaware v. Canada* “had no ownership interest in Bilcon of Delaware, it seems there was evidence that he ran the business and had made a financial contribution, and it is possible that there was an agreement conferring rights of control on Mr. Clayton”.²⁴¹ The Respondent states that none of these factors are present in this case.²⁴²

(b) The Meaning of the Term “Controlled” in Light of other Arbitral Awards

The Respondent’s Position

210. Even if “significant interest” does not exclusively define the meaning of “control” under the Treaty, the Respondent refers to a number of cases where the meaning of “control” was, in its view, established to mean something more than management practices.²⁴³ For example, the Respondent refers to the findings of the arbitral tribunal in *Aguas del Tunari v. Bolivia* where

²³⁵ Respondent’s Reply on Preliminary Objections, para. 140.

²³⁶ Respondent’s Reply on Preliminary Objections, para. 143.

²³⁷ Respondent’s Reply on Preliminary Objections, paras 143–144.

²³⁸ Respondent’s Second Post-Hearing Brief, para. 74.

²³⁹ Respondent’s Second Post-Hearing Brief, para. 74.

²⁴⁰ Respondent’s Second Post-Hearing Brief, para. 74.

²⁴¹ Respondent’s Second Post-Hearing Brief, para. 74.

²⁴² Respondent’s Second Post-Hearing Brief, para. 74.

²⁴³ Respondent’s Reply on Preliminary Objections, para. 135; Respondent’s First Post-Hearing Brief, para. 52.

“control” was linked with “legal capacity to control”, and in turn defined by reference to “the percentage of shares held”.²⁴⁴ The Respondent cites the *Aguas del Tunari* tribunal as stating that “the word ‘controlled’ is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. *In this sense ‘controlled’ indicates a quality of the ownership interest*”.²⁴⁵

211. In *Vacuum Salt v. Ghana*, the ICSID tribunal determined that “a total absence of foreign shareholding would virtually preclude the existence of [foreign] control”.²⁴⁶ The Respondent acknowledges that the fact pattern in *Vacuum Salt v. Ghana* was different to the present case since, in *Vacuum Salt v. Ghana*, the tribunal was concerned with determining whether a Ghanaian company was controlled by an individual.²⁴⁷ However, the Respondent asserts that the relevance of *Vacuum Salt v. Ghana* is that “the tribunal *rejected* an assertion of control in circumstances where the supposed controller exercised a far *greater* level of influence over a corporate entity than PM Asia supposedly exercised over PM Australia or PML”.²⁴⁸ The Respondent recalls that the Claimant “held no shares in PM Australia or PML” nor any “legal rights conveyed in instruments or agreements” in the period between 2001 and 2011.²⁴⁹
212. The Respondent also refers to *International Thunderbird Gaming Corporation v. Mexico* in which the tribunal held that a number of factors, viewed collectively, justified the finding that the claimant controlled the relevant minority-owned subsidiaries. These factors, according to the Respondent, were: (i) that the claimant held more than 30% of the share capital in the subsidiaries; (ii) the claimant “expected an economic return on its investment in the subsidiaries”; (iii) the “key officers of [the claimant] and [the subsidiaries] were one and the same”; and (iv) “the initial expenditures, the knowhow of the machines, the selection of suppliers, and the expected return on the investment were provided or determined by [the claimant].”²⁵⁰ The Respondent submits that “[i]n contrast, none of these factors were present in the relationship between PM Asia and PM Australia/PML prior to February 2011”.²⁵¹

²⁴⁴ Statement of Defence, Vol. A, para. 174.

²⁴⁵ Respondent’s Reply on Preliminary Objections, para. 190.

²⁴⁶ Statement of Defence, Vol. A, para. 174.

²⁴⁷ Respondent’s Reply on Preliminary Objections, para. 192.

²⁴⁸ Respondent’s Reply on Preliminary Objections, para. 192.

²⁴⁹ Statement of Defence, Vol. A, para. 174.

²⁵⁰ Respondent’s Reply on Preliminary Objections, para. 186.

²⁵¹ Respondent’s Reply on Preliminary Objections, para. 187.

213. The Respondent accepts that “control” may be established in certain other circumstances, for example, where there is a formal agreement to this effect—as was the case in *AIG Capital Partners, Inc. v. Kazakhstan*.²⁵² The Respondent emphasises, however, that no equivalent formal agreement exists in the present case.²⁵³ Nevertheless, although *AIG Capital Partners, Inc. v. Kazakhstan* entailed a different fact pattern to that which characterises the present dispute, the Respondent maintains that the case “nonetheless provides an example of what is necessary in order to establish ‘control’ [and that t]he existence of certain management practices is not enough”.²⁵⁴

The Claimant’s Position

214. The Claimant asserts that the cases cited by the Respondent do not support its assertion that there is a generally accepted meaning of “control”. “Nothing in the decisions does or could supersede the plain text of the Treaty, the *travaux préparatoires*, and arbitral jurisprudence, all of which align on the core point: management control is an independent basis for jurisdiction, distinct from ownership, under Article 1(e) [of the Hong Kong-Australia BIT]”.²⁵⁵

215. The Claimant disputes the relevance of the decision in *Aguas del Tunari v. Bolivia* on the basis that the relevant treaty in that case did not contain “owned or” as an alternative to “controlled”.²⁵⁶ In contrast to the present case, the Claimant notes that the tribunal in *Aguas del Tunari* focused on the question of whether the actual exercise of control was a necessary element *in addition to* the legal capacity to control.²⁵⁷ In the Claimant’s view, the tribunal found only that legal capacity to control is sufficient to establish control; the tribunal therefore “did not find that actual control by itself is insufficient to meet the standard of control” as suggested by the Respondent.²⁵⁸ The Claimant emphasises that the *Aguas del Tunari v. Bolivia* case also contradicts the Respondent’s argument that the Claimant did not control the Australian subsidiaries pursuant to Article 1(e) of the Treaty because “PMI ultimately controlled the

²⁵² Statement of Defence, Vol. A, para. 174.

²⁵³ Statement of Defence, Vol. A, para. 174.

²⁵⁴ Respondent’s Reply on Preliminary Objections, para. 194.

²⁵⁵ Claimant’s Rejoinder on Preliminary Objections, para. 106.

²⁵⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 105–106; Claimant’s Rejoinder on Preliminary Objections, paras 52, 94.

²⁵⁷ Claimant’s Counter-Memorial on Preliminary Objections, paras 107–109.

²⁵⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 109.

Claimant”. According to the Claimant, the finding of the *Aguas del Tunari* tribunal found that “[t]he BIT does not limit the scope of eligible claimants to only the ‘ultimate controller’”.²⁵⁹

216. The Claimant also explains that *Vacuum Salt v. Ghana* does not help the Respondent because it addresses issues that are very different from the present case, such as the meaning of “foreign controlled” under the ICSID Convention and the involvement of “an individual’s person property, not an investment within a corporate family”.²⁶⁰ The Claimant points to the tribunal’s finding that, for the purpose of establishing control, “a tribunal... may regard any criterion based on *management*, voting rights, shareholding or any other reasonable theory as being reasonable for the purpose”.²⁶¹ The Claimant stresses that in *Vacuum Salt v. Ghana*, the claimant presented “exceedingly thin” evidence in support of its assertion of control, and the *Vacuum Salt* tribunal therefore asserted that “[i]t is significant that nowhere does there appear to be any material evidence that [the claimant] either acted or was materially influenced in a truly managerial rather than technical or supervisory vein... Nowhere in these proceedings is it suggested that [the claimant]... was in a position to steer, through either positive or negative action, the fortunes of Vacuum Salt”.²⁶² The Claimant maintains that, unlike the investor in *Vacuum Salt v. Ghana*, it “has exercised significant ‘control’ over the investment within the plain meaning of that term”, that the evidentiary record in this case is “bursting with evidence of Claimant’s control of the Australian subsidiaries” and that the relevance of *Vacuum Salt v. Ghana* should therefore be rejected.²⁶³

217. The Claimant reiterates that *International Thunderbird Gaming Corporation v. Mexico* in fact supports the Claimant’s position.²⁶⁴ In the *Thunderbird* Award, the tribunal interpreted the term control “in accordance with its ordinary meaning” and held that “[c]ontrol can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise” absent legal capacity to control.²⁶⁵ The *Thunderbird* tribunal then examined the facts and determined that the claimant exercised *de facto* control over the investment and therefore “controlled” the investment for the purposes of jurisdiction under NAFTA.²⁶⁶ The

²⁵⁹ Claimant’s Rejoinder on Preliminary Objections, para. 96.

²⁶⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 113.

²⁶¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 114.

²⁶² Claimant’s Rejoinder on Preliminary Objections, para. 103.

²⁶³ Claimant’s Counter-Memorial on Preliminary Objections, paras 115–116; Claimant’s Rejoinder on Preliminary Objections, paras 102–104.

²⁶⁴ Claimant’s Rejoinder on Preliminary Objections, para. 99.

²⁶⁵ Claimant’s Rejoinder on Preliminary Objections, para. 99.

²⁶⁶ Claimant’s Rejoinder on Preliminary Objections, para. 99.

Claimant agrees with the Respondent that there were a series of factors that led the *Thunderbird* tribunal to its conclusions.²⁶⁷ The Claimant emphasises that both Parties agreed these factors are to be “viewed collectively—*i.e.* that no individual factor is dispositive or necessary”.²⁶⁸ This is significant for the Claimant’s position in this case since, “on any ‘collective’ view of the evidence, Claimant’s exercise of control of PML is undeniable”. Thus, according to the Claimant, the evidence in the present case satisfies the *Thunderbird* tribunal’s formulation of “control”.²⁶⁹

218. As regards the *AIG Capital Partners, Inc. v. Kazakhstan* decision, the Claimant considers it “entirely irrelevant” because there is no similar legal agreement between the parties in the present case”.²⁷⁰ The *AIG Capital Partners* tribunal, the Claimant emphasises, “takes no position on whether management control can qualify as control under an investment treaty”.²⁷¹

2. Evidence of Management Oversight for the Purposes of Establishing “Control”

The Respondent’s Position

219. In the Respondent’s view, “[e]ven if PM Asia’s assertion that “oversight and management control’ qualifies as ‘control’ under Article 1(e) of the Treaty is correct (which it is not), PM Asia has failed to demonstrate that it did in fact exercise such ‘control’ over PM Australia and PML before the restructur[ing]”.²⁷² The Respondent supports this assertion on the following basis: (i) the evidence demonstrates that any control over PM Australia and PML was exercised regionally by PMI; (ii) Mr. Pellegrini’s responsibilities in respect of PM Australia and PML were limited and insufficient to amount to “control”; (iii) there was no delegation of control from PMI to PM Asia; and (iv) PM Asia’s asserted “control” is inconsistent with the PMI Group’s application to FIRB.²⁷³ These assertions are set out in more detail below.

220. With respect to whether PM Asia or PMI controlled PM Australia and PML before the restructuring, the Respondent asserts that the documentary evidence provided by the Claimant is “sparse, incomplete and inadequate” and argues that any control over PM Australia and PML

²⁶⁷ Claimant’s Rejoinder on Preliminary Objections, para. 100.

²⁶⁸ Claimant’s Rejoinder on Preliminary Objections, para. 100.

²⁶⁹ Claimant’s Rejoinder on Preliminary Objections, para. 100.

²⁷⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 117.

²⁷¹ Claimant’s Rejoinder on Preliminary Objections, para. 105.

²⁷² Respondent’s Reply on Preliminary Objections, para. 204.

²⁷³ Respondent’s Reply on Preliminary Objections, para. 204.

was in fact exercised by “the ultimate parent company, PMI”.²⁷⁴ According to the Respondent, PMI assigned specific individuals to Hong Kong to oversee decisions concerning the Australian subsidiaries who “acted in their capacity as part of a PMI structure, not in their capacity as officers of PM Asia”.²⁷⁵

221. To elaborate on its arguments, the Respondent disputes that one of the Claimant’s primary functions has been the oversight of PMI affiliates in Asia on the grounds that the PMI Annual Report for 2008 does not even mention PM Asia and that Mr. Pellegrini is described therein as the President of the “Asia Region”, consistently with his profile on the PMI website.²⁷⁶ The “only contemporaneous document” provided by the Claimant, the Respondent notes, does not suggest that PM Asia personnel has anything to do with the restructuring process.²⁷⁷ The Respondent also contests the Claimant’s alleged “various appointments of PML’s senior management”, arguing that, “the documentary evidence establishes no link between such appointments and PM Asia officeholders acting in that capacity”.²⁷⁸
222. According to the Respondent, the Claimant’s evidence only indicates that various officers at PML reported to “individuals holding positions in the PMI ‘Asia Pacific Region’, and not to PM Asia”.²⁷⁹ The Respondent emphasises that, “documentary evidence, witness testimony and [the Claimant’s] own organizational structure” establish that “what was important for the personnel at the Australian subsidiaries in their reporting lines was the ‘region’”.²⁸⁰ Thus, the Respondent points out that the Claimant “has not established that the actions undertaken by Mr. Pellegrini with respect to the Australian subsidiaries were done either in the capacity of *President of PM Asia* (which he was not), or as a *director of PM Asia* (which he was). The documentary evidence is consistent with him exercising powers as President of the *Asia Region of PMI*”.²⁸¹ While the Claimant refers to PM Asia as a “team of managers” that assisted Mr. Pellegrini, the Respondent stresses that this does not alter the fact that “those managers and directors are working either as part of the *PMI Asia Region* or within a *PMI central function*”.²⁸²

²⁷⁴ Respondent’s Reply on Preliminary Objections, paras 206–207.

²⁷⁵ Respondent’s Reply on Preliminary Objections, paras 207–208.

²⁷⁶ Respondent’s Reply on Preliminary Objections, para. 210.

²⁷⁷ Respondent’s Reply on Preliminary Objections, para. 211.

²⁷⁸ Respondent’s Reply on Preliminary Objections, paras 212–214.

²⁷⁹ Respondent’s Reply on Preliminary Objections, paras 215–219.

²⁸⁰ Respondent’s First Post-Hearing Brief, para. 55.

²⁸¹ Respondent’s First Post-Hearing Brief, para. 56.

²⁸² [REDACTED]

223. The Respondent points to further documentary evidence to support its assertion that PM Asia did not provide oversight of the Australian subsidiaries. As regards PML’s financial performance and budget, the Respondent emphasizes that the documents produced by the Claimant concern a market strategy review meeting in 2003 and only show that “PM Asia was responsible for organizing, and providing feedback from, that meeting” but not control of PML.²⁸³ The Respondent points to Mr. Pellegrini’s own admission that it is the CEO of PMI who finalises PML’s budget and concludes that, “ultimate decision-making power rested with PMI”.²⁸⁴ Addressing the approval of PML’s capital expenditures, the Respondent emphasises that, contrary to the Claimant’s assertion, Mr. Pellegrini gave his approval in his role within PMI and the expenditures were approved in accordance with a PMI policy.²⁸⁵ Furthermore, the person “who gave the ultimate approval for PML’s payment of dividends”, the Respondent notes, was “a PMI officer”.²⁸⁶
224. With respect to Mr. Pellegrini’s responsibilities, the Respondent submits that the limited responsibilities of individuals like Mr. Pellegrini “would still not amount to ‘control’ by PM Asia”.²⁸⁷ The Respondent relies on Professor Lys’s expert report to argue that, “the *final decision* was often made by [Mr. Pellegrini’s] supervisors within PMI”.²⁸⁸ The Respondent cites several examples to demonstrate Mr. Pellegrini’s limited responsibilities.²⁸⁹ Where the Claimant insists that it controlled PML’s major business initiatives and budgets through reviewing and approving PML’s OB/LRP since 2001, the Respondent asserts that Mr. Pellegrini’s evidence was in fact that “PMI ‘finalised the numbers’ on PML’s [OB/LRP] ... [and that] Mr. Pellegrini would review the budgets against a standard provided to him by PMI”.²⁹⁰ As to the Claimant’s assertion that it “directed PML’s branding and marketing strategy”, the Respondent asserts that “Mr. Pellegrini agreed that decisions concerning international brands had to be approved by PMI in Lausanne”.²⁹¹ As to the Claimant’s assertion that PML managing directors reported to and worked under the supervision of the Claimant’s President, Mr. Pellegrini, the Respondent asserts that “the evidence shows that much of the reporting was directly to ‘central function’

283 [REDACTED]

284 [REDACTED]

285 [REDACTED]

286 [REDACTED]

287 Respondent’s Reply on Preliminary Objections, para. 226.

288 Respondent’s Reply on Preliminary Objections, para. 226.

289 [REDACTED]

290 [REDACTED]

291 [REDACTED]

personnel in Lausanne, and only indirectly to Mr. Pellegrini on a ‘dotted line’ basis”.²⁹² According to the Respondent, this “in no sense... establish[es] ‘control’ of those departments of the Australian subsidiaries”.²⁹³ The Respondent states further that “PMI’s RACI tables²⁹⁴ make it clear that Mr. Pellegrini’s ability to approve [capital] expenditure was restricted, and even in those limited cases in which Mr. Pellegrini was involved in approvals, anything above USD 25 million also required approval from someone higher up in PMI”.²⁹⁵ Finally, the Respondent notes that any approval of the Australian subsidiaries’ dividend payments had to be approved by the “director Treasury PMI”.²⁹⁶

225. The Respondent refers to the facts in *S.D. Myers v. Canada* to emphasise its position that “control” cannot be established through an “intermediate company”. According to the Respondent, in *S.D. Myers v. Canada*, “the CEO of SD Myers was the ‘authoritative voice’ and ‘directing mind and controller’ of both companies, who ‘directed and controlled every decision of Myers Canada’. In the present case, there are manifest limitations on Mr. Pellegrini’s ability to make decisions in respect of the Australian subsidiaries”.²⁹⁷

226. The Respondent asserts that delegated control is not protected under any investment treaty when the delegator does not qualify as an investor, because “any control being exercised is not that of PM Asia as the delegate, but that of the delegator”.²⁹⁸ The Respondent explains that “delegated control—which is revocable at will by the company exercising actual control—cannot be sufficient to establish “control” for the purposes of Article 1(e) of the Treaty and is not protected when the delegator is not an “investor” under the [Treaty]...[since] PMI [is] an entity not protected by the [Treaty]”.²⁹⁹ The Respondent refers to the evidence of Professor Lys as stating that, “delegated control is meaningful from an economic point of view only where the delegate is more than a mere caretaker for the delegator”.³⁰⁰

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297 Respondent’s First Post-Hearing Brief, para. 58.

298 Respondent’s Reply on Preliminary Objections, para. 234.

299 Respondent’s First Post-Hearing Brief, para. 53.

300 Respondent’s First Post-Hearing Brief, para. 53.

The Claimant's Position

227. The Claimant emphasises that there is “incontrovertible evidence that the Claimant exercised management control over the Australian subsidiaries since 2001”.³⁰¹ Moreover, the Claimant asserts that its control of the Australian subsidiaries “provides a distinct, independent basis of jurisdiction under the Treaty, which renders all of the Respondent’s preliminary objections moot”.³⁰²
228. With respect to whether PM Asia or PMI controlled PM Australia and PML before the restructuring, the Claimant asserts that it has “put on the record clear, substantial evidence that it has exercised management control over PML since 2001 and has therefore controlled the Australian subsidiaries for purposes of Article 1(e)”.³⁰³ The Claimant refers to “two briefs, four witness statements and abundant documentation [that constitutes] overwhelming evidence” in its favour.³⁰⁴ In response to the Respondent’s assertion that the evidence on control put forward by the Claimant is “sparse, incomplete and inadequate”, the Claimant explains that it had “offered to produce a set of [control-related] documents from 2009” in respect of the Respondent’s document production requests but the Respondent rejected this offer.³⁰⁵
229. The Claimant maintains that, “PM Asia and the Australian subsidiaries have always been part of the same corporate family and, at least since 2001, Claimant has controlled the subsidiaries”.³⁰⁶ The Claimant emphasises its role as controlling the significant business decisions related to its Asian subsidiaries.³⁰⁷ [REDACTED]

³⁰¹ Claimant’s Rejoinder on Preliminary Objections, para. 107.

³⁰² Claimant’s First Post-Hearing Brief, para. 25.

³⁰³ Claimant’s Rejoinder on Preliminary Objections, para. 108.

³⁰⁴ Claimant’s Rejoinder on Preliminary Objections, para. 109.

³⁰⁵ Claimant’s Rejoinder on Preliminary Objections, paras 112–118.

³⁰⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 89.

³⁰⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 98.

³⁰⁸ [REDACTED]

230. The Claimant disputes the significance of Mr. Pellegrini’s “formal title” as referring to the “Asia region” rather than “PM Asia”.³⁰⁹ Referring to Mr. Pellegrini’s testimony, the Claimant asserts that he “was and remains the President of PM Asia”.³¹⁰ The Claimant explains that Mr. Pellegrini’s title refers to “Asia region” because “PM Asia is the headquarters for PMI’s Asia region” and “[o]versight and supervision of PMI affiliates in the Asia region is one of PM Asia’s primary functions”.³¹¹ The Claimant reiterates that secondments to PM Asia were arranged on the basis that PM Asia had the right to supervise and define the duties and activities of the “Expatriates”.³¹² According to the Claimant, “Respondent has been unable to refute the fact that Mr. Pellegrini *regardless of his title*, works on behalf of PM Asia (as proven by his employment letter and his position as the senior director of PM Asia) and that he had his staff at PM Asia control the Australian subsidiaries (as proven by the documentary evidence of PM Asia’s management control of the Australian subsidiaries covering many years)”.³¹³
231. The Claimant contends that it “has controlled the composition of PM Australia’s and PML’s Boards, approved PML’s budgets and strategy, authorised PM Australia’s dividend payments, overseen PML’s marketing and sales plans, approved the introduction of new brands in Australia, and evaluated and approved the evaluations of PML’s key offices”.³¹⁴ In this regard, the Claimant refers to the witness testimony of its President, Mr. Pellegrini, and that of the Managing Director of PML, Mr. John Gledhill. The Claimant also explains that it exercised control over PML since at least 2001 by overseeing its senior staff; directing its budgeting and business planning processes; requiring PML to secure the Claimant’s approval for certain expenditures, including capital investments; and requiring approval for other business decisions, including developing and launching new products, discontinuing products, changing product packaging, adjusting recommended retail prices, and developing marketing plans.³¹⁵ The Claimant has also exercised control by virtue of the fact that the Claimant’s President appoints or approves the appointment of the senior managers of PML who then become board members.³¹⁶

³⁰⁹ Claimant’s First Post-Hearing Brief, para. 27.

³¹⁰ Claimant’s First Post-Hearing Brief, para. 28.

³¹¹ Claimant’s Second Post-Hearing Brief, para. 9.

³¹² Claimant’s Second Post-Hearing Brief, para. 8.

³¹³ Claimant’s First Post-Hearing Brief, para. 29.

³¹⁴ Statement of Claim, paras 39–41, 276.

³¹⁵ Claimant’s Counter-Memorial on Preliminary Objections, paras 121–122.

³¹⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 121–122.

232. With respect to Mr. Pellegrini's responsibilities, the Claimant refers to the "employment contracts of Messrs. Gledhill and Boissart" and reiterates that PML managing directors reported to and worked under the supervision of Mr. Pellegrini.³¹⁷ According to the Claimant, Mr. Pellegrini "completed the annual performance reviews of the Managing Directors of PML", "fixed the salaries of PML employees" and "set the annual bonuses of PML staff".³¹⁸ Moreover, "[t]he employment contracts and personnel announcements for other key PML management", the Claimant argues, indicate its control over PML.³¹⁹ To further support its position, the Claimant provided what it characterises as "[i]nternal organizational and reporting line documentation from 2009".³²⁰
233. The Claimant insists that it controlled PML's major business initiatives and budgets through reviewing and approving PML's OB/LRP since 2001.³²¹ In addressing the Respondent's concern over the OB/LRP process, the Claimant refers to the agendas for the 2008, 2009 and 2010 regional OB/LRP reviews in Hong Kong and Mr. Pellegrini's account of the review process for PML's 2010 OB/LRP.³²² The Claimant also points out that "PML was also required to submit revised budget forecasts to Claimant each month".³²³
234. Various examples of PML initiatives that were approved by the Claimant in 2009 demonstrate, according to the Claimant, that it directed PML's branding and marketing strategy.³²⁴ In the context of approvals of PML's major expenditures and capital investments, the Claimant considers any distinction between approvals made by the Asia Region and those by PM Asia "meaningless".³²⁵ According to the Claimant, the Respondent's argument concerning the PMI policy for the approval of expenditures is "unhelpful" because the fact that the expenditure approval process has been standardised across the company has nothing to do with the Claimant's approval.³²⁶ Similarly, the Claimant maintains that the fact that PMI approval was required for large expenditures does not affect the Claimant's approval in this context.³²⁷ As

³¹⁷ Claimant's Rejoinder on Preliminary Objections, paras 122–124.

³¹⁸ Claimant's Rejoinder on Preliminary Objections, para. 125.

³¹⁹ Claimant's Rejoinder on Preliminary Objections, para. 126.

³²⁰ Claimant's Rejoinder on Preliminary Objections, para. 127.

³²¹ Claimant's Rejoinder on Preliminary Objections, para. 129.

³²² Claimant's Rejoinder on Preliminary Objections, paras 131–136.

³²³ Claimant's Rejoinder on Preliminary Objections, paras 138–139.

³²⁴ Claimant's Rejoinder on Preliminary Objections, para. 143.

³²⁵ Claimant's Rejoinder on Preliminary Objections, para. 145.

³²⁶ Claimant's Rejoinder on Preliminary Objections, para. 145.

³²⁷ Claimant's Rejoinder on Preliminary Objections, para. 146.

regards the approval of dividend payments, the Claimant contends that the requirement of multiple approvals does not change the “critical fact... that PML dividend payments required Claimant’s approval”.³²⁸

235. The Claimant counters the Respondent’s assertion that PM Asia’s executives acted on behalf of PMI instead of PM Asia on the grounds that the position of “President Asia Region” is a position with PM Asia, and that both employment letters [REDACTED] demonstrate that the relevant executives worked on behalf of PM Asia.³²⁹ The Claimant also points out that Mr. Pellegrini was not only seconded to PM Asia in 2003 but also appointed to PM Asia’s board of directors.³³⁰ Hence, “the fact that Mr. Pellegrini was part of PMI’s global management team”, the Claimant suggests, “is fully consistent with his role as President of PM Asia”.³³¹

236. The Claimant states that the legal arguments of the Respondent, namely “that if Claimant controlled the Australian subsidiaries, then it must have been exercising the powers of a shareholder”, turns on a “*factual* question”: “Did Claimant exercise powers held by PML shareholders?”³³² The Claimant asserts that it did not, and that the Respondent’s legal argument must therefore fall away.³³³ The Claimant’s arguments are, in summary, that the Respondent “blurs the distinction” between the activities of PML employees and members of PML’s board of directors to the effect that it appears as though Mr. Pellegrini acted with the powers of a PML shareholder.³³⁴ The Claimant rejects this mischaracterisation of the powers of PML employees. For example, the Claimant refers to Mr. Pellegrini’s First Witness Statement, wherein Mr. Pellegrini confirms that he had no power to remove directors from PML’s board of directors and could not have exercised powers equivalent to a shareholder.³³⁵ The Claimant also asserts that while “Claimant has the authority to approve the appointments of individuals to functional roles such as PML’s *Director* of Finance or *Director* of Marketing”, this does not mean that the Claimant had the power to appoint individuals to PML’s board of directors.³³⁶ As

³²⁸ Claimant’s Rejoinder on Preliminary Objections, para. 147.

³²⁹ Claimant’s Rejoinder on Preliminary Objections, paras 148–149, 152.

³³⁰ Claimant’s Rejoinder on Preliminary Objections, para. 151.

³³¹ Claimant’s Rejoinder on Preliminary Objections, para. 154.

³³² Claimant’s Rejoinder on Preliminary Objections, paras 167–168.

³³³ Claimant’s Rejoinder on Preliminary Objections, para. 168.

³³⁴ Claimant’s Rejoinder on Preliminary Objections, para. 171.

³³⁵ Claimant’s Rejoinder on Preliminary Objections, para. 169.

³³⁶ Claimant’s Rejoinder on Preliminary Objections, para. 170.

set out in Mr. Pellegrini's Second Witness Statement, "PML's board appoints individuals to PM's board of directors and fills any vacancies".³³⁷ The Claimant also states that while Mr. Pellegrini did fix salaries and bonuses of individuals in their roles as PML personnel, "[this] says nothing about Claimant's power to set remuneration for individuals in their capacities as PML board members".³³⁸ The Claimant stresses that it "did not have the latent power to, and never purported to, set compensation for directors acting in their capacities as board members before February 2011".³³⁹

237. The Claimant disputes the relevance of the Respondent's contention that delegated control is not protected under any Treaty when the delegator does not qualify as an investor because that control can be revoked at will.³⁴⁰ According to the Claimant, the Treaty "speaks only of 'control' not 'revocable' or 'irrevocable' control".³⁴¹ Furthermore, the fact that a higher level entity within the PMI Group *could have* revoked the Claimant's control over the Australian subsidiaries is irrelevant: "[t]he undisputed fact is that Claimant's control *was never* revoked".³⁴² According to the Claimant, "[i]f an investor has control when the host [S]tate takes adverse action, that is sufficient for purposes of jurisdiction. It does not matter under Article 1(e) whether that control could have been revoked by a higher entity".³⁴³

3. Notification Requirement under FATA

The Respondent's Position

238. Even assuming that the Claimant's control over PM Australia and PML from 2001 could be established, the Respondent contends that such an investment by virtue of control has not been admitted under Article 1(e) because the Claimant failed to meet the notification requirement under section 26 of the FATA.³⁴⁴ Based on sections 18(2)(a) and 11(2)(d) of the FATA, the Respondent asserts that the Claimant was exercising or controlling rights "attached to a share".³⁴⁵ As a result, the Claimant was required under section 26 of the FATA to notify the

³³⁷ Claimant's Rejoinder on Preliminary Objections, para. 170.

³³⁸ Claimant's Rejoinder on Preliminary Objections, para. 171.

³³⁹ Claimant's Rejoinder on Preliminary Objections, para. 171.

³⁴⁰ Claimant's Second Post-Hearing Brief, para. 12.

³⁴¹ Claimant's Second Post-Hearing Brief, para. 12.

³⁴² Claimant's Second Post-Hearing Brief, para. 12.

³⁴³ Claimant's Second Post-Hearing Brief, para. 42.

³⁴⁴ Statement of Defence, Vol. A, para. 179.

³⁴⁵ Statement of Defence, Vol. A, paras 180–181.

Treasurer about the “agreement by virtue of which he or she acquires a substantial shareholding in an Australian corporation” in order to “avoid a criminal offence”.³⁴⁶ In the Respondent’s view, the Claimant either did not have control over the investment or had control but failed to satisfy the notification requirement.³⁴⁷

239. The Respondent counters the Claimant’s argument that it equates the meaning of substantial interest under the Treaty and under Australian law, emphasising that its position is entirely based on sections 26(2), 5(1) and 11(2)(d) of the FATA.³⁴⁸ According to the Respondent, “[a] person exercises the ‘rights attached to a share’ if that person exercises powers that are held by the shareholder”, including the power to “dismiss a director-level employee”, the power to “appoint directors at a general meeting” and the power to “review the remuneration of directors”.³⁴⁹
240. As regards section 38 of the FATA, the Respondent notes that the effect of a failure to notify is that the agreements between the PM entities by virtue of which it is said PM Asia had control of the Australian subsidiaries are not automatically invalidated, which does not “prevent inquiry into the legal validity of acts purportedly done under the FATA”.³⁵⁰

The Claimant’s Position

241. The Claimant contests the Respondent’s position that the Claimant would have been required to file a notification under section 26 of the FATA on the ground that the Respondent’s analysis is based on the premise that a showing of substantial interest is necessary for the purpose of establishing control.³⁵¹ The Claimant contends that the Respondent also “incorrectly equates the meaning of ‘substantial interest’ under the Treaty and under Australian law”.³⁵²
242. In any event, the Claimant argues that the notification requirement does not affect the admission of its investment because section 38 of the FATA states that “[a]n act is not invalidated by the fact that it constitutes an offence against this Act”.³⁵³

³⁴⁶ Statement of Defence, Vol. A, paras 182–183.

³⁴⁷ Statement of Defence, Vol. A, paras 185–186.

³⁴⁸ Respondent’s Reply on Preliminary Objections, para. 239.

³⁴⁹ Respondent’s Reply on Preliminary Objections, para. 239.

³⁵⁰ Respondent’s Reply on Preliminary Objections, para. 240.

³⁵¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 125.

³⁵² Claimant’s Counter-Memorial on Preliminary Objections, para. 126.

³⁵³ Claimant’s Counter-Memorial on Preliminary Objections, para. 127.

243. In the Claimant’s view, it did not exercise powers held by PML shareholders as the Respondent suggests. First, the Claimant notes that Mr. Pellegrini did not and “could not remove directors from PML’s board of directors”.³⁵⁴ Secondly, “[n]either Claimant nor Mr. Pellegrini ever claimed to have appointed individuals directly to PML’s board of directors before February 2011”.³⁵⁵ Thirdly, contrary to the Respondent’s view, the Claimant only reviews the remuneration of PML employees but not directors.³⁵⁶ As far as section 38 of the FATA is concerned, the Claimant maintains that “FATA violations have no legal effect on the admission of an investment” as explained in more detail in the Claimant’s arguments regarding the Non-Admission of Investment Objection.

B. WHETHER THE CLAIMANT’S INVESTMENT HAS BEEN ADMITTED UNDER AUSTRALIAN LAW AND INVESTMENT POLICIES

244. The Parties differ in respect of the admission of PM Asia’s investment in Australia pursuant to Australian law and investment policies. The Claimant submits that the admission requirement under Article 1(e) of the Treaty is satisfied, whereas the Respondent is of the view that the Claimant’s investment—its acquisition of shares in PM Australia—has not been admitted because the PMI Group’s application to the Australian Government in January 2011 was false or misleading.³⁵⁷ Accordingly, the Respondent contends that PM Asia’s investment enjoys no protection under the Treaty.³⁵⁸

1. Meaning of “admitted by the other Contracting Party subject to its law and investment policies”

245. Article 1(e) of the Treaty provides, in relevant part, as follows:

“investment” means every 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 exclusively...

³⁵⁴ Claimant’s Rejoinder on Preliminary Objections, para. 169.

³⁵⁵ Claimant’s Rejoinder on Preliminary Objections, para. 170.

³⁵⁶ Claimant’s Rejoinder on Preliminary Objections, para. 171.

³⁵⁷ Statement of Defence, Vol. A, paras 11a, 12; Respondent’s Reply on Preliminary Objections, para. 242.

³⁵⁸ Statement of Defence, Vol. A, para. 17.

The Respondent's Position

246. The Respondent submits that Article 1(e) of the Treaty preserves the customary international law position that a State has a sovereign right to determine the terms on which it admits foreign investment. Therefore, the issue of whether a Hong Kong investment is admitted in Australia is ultimately a matter for Australian law and investment policy.³⁵⁹
247. The Respondent argues that Article 1(e) of the Treaty effects a *renvoi* to Australian law “for an assessment of the existence and consequences of the alleged contraventions of local law”. It disagrees with the Claimant that these consequences should *additionally* be assessed by reference to international law. Relying on the Tribunal’s finding in *Fraport v. Philippines*, and on the interpretation of Article 1(e) in accordance with Article 31 of the VCLT, the Respondent explains that whether the Claimant’s investment is admitted under the Treaty is a question of Australian law and investment policies, and if the *putative* investment is not admitted, the consequence, as a matter of international law, is that the Treaty does not protect it.³⁶⁰ Every technical breach of Australian law, therefore, will invalidate the admission of the investment.³⁶¹
248. Further, the Respondent emphasises that Article 1(e) of the Treaty makes admission subject to *both* the “law” of the host State and its “investment policies”. The Respondent explains that Article 1(e) is not limited to some form of illegality or legal invalidity as a matter of Australian law. Otherwise, the words “investment policies” would be redundant. Article 1(e) of the Treaty, according to the Respondent, requires the admission to be free from material non-compliance with those policies.³⁶²
249. Finally, the Respondent submits that Article 1(e) of the Treaty is concerned with establishing access to the protection of the Treaty and Article 10 of the Treaty confers jurisdiction on the Tribunal and mandates it to decide the relevant issues of Australian law and policy. Accordingly, in the Respondent’s view, it is for the domestic decision-maker to decide on admission for the purposes of Australian law and it is for a “BIT tribunal” alone to decide on admission issues falling under the Treaty.³⁶³

³⁵⁹ Statement of Defence, Vol. A, para. 13. See also Claimant’s Amended Statement of Claim, para. 275, where PM Asia accepts that the investment must be “legal” under the host State law at the time it is made (Article 1(e) of the Treaty however requires compliance with *both* law and investment policy).

³⁶⁰ Respondent’s Reply on Preliminary Objections, paras 248–252.

³⁶¹ Respondent’s Reply on Preliminary Objections, para. 252.

³⁶² Respondent’s First Post-Hearing Brief, para. 140; Respondent’s Second Post-Hearing Brief, para. 54.

³⁶³ Respondent’s First Post-Hearing Brief, para. 119b.

The Claimant's Position

250. The Claimant contends that the proper standard against which the admission of its investment in the host State must be determined is international law. The Claimant adds that domestic law of the host State also “feeds into the inquiry but does not control it”.³⁶⁴ This determination, the Claimant submits, must be made independently of the parties’ choice of law applicable to the merits of the dispute.³⁶⁵ Relying on the decision in *Fraport v. Philippines*, the Claimant construes Article 1(e) of the Treaty such that it effects a *renvoi* to local law “for an assessment of the existence and consequences of the alleged contraventions of local law, with those consequences then having to be assessed by reference to international law”.³⁶⁶
251. The Claimant, accordingly, argues that the Respondent’s objection to the admission of the Claimant’s investment must be analyzed from a public international law perspective. While Australian law should be taken into account, the Claimant notes that a technical violation of domestic law will not suffice to exclude an investment from the scope of the Treaty’s protection.³⁶⁷ Relying on decisions of the tribunals in *Quiborax v. Bolivia* and *Teinver v. Argentine Republic*, the Claimant submits that it falls to the Respondent to prove that the Treaty’s requirement has not been met.³⁶⁸

2. The Alleged False or Misleading Information in the Foreign Investment Application

(a) Information Required to Be Submitted Pursuant to the FATA

The Respondent's Position

252. The Respondent submits that, for the Claimant’s investment to be admitted in the host State, certain requirements of Australian law and investment policy must be satisfied. In accordance with section 26 of the FATA, the Foreign Investment Application must set out, in accurate and complete fashion, the matters stipulated in FATA, FATA Regulations and the policies and guidelines accompanying FATA.³⁶⁹

³⁶⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 132; Claimant’s Rejoinder on Preliminary Objections, para. 229.

³⁶⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 139.

³⁶⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 140–141.

³⁶⁷ Claimant’s Rejoinder on Preliminary Objections, para. 229.

³⁶⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 142, see fn. 199.

³⁶⁹ Respondent’s First Post-Hearing Brief, para. 22.

253. The Respondent explains that section 26 of the FATA requires prospective investors to furnish a notice to the Treasurer for certain types of transactions provided it complies with the prescribed form as set out in the FATA Regulations. The form requires basic details about the person acquiring shares, the Australian company and information about the shares being acquired.³⁷⁰
254. The Respondent adds that the required content of the notice is stipulated in its foreign investment policies. In particular, Australia’s Foreign Investment Policy, which provides policy guidance on the application of the national interest test, and the “How-to-Apply”—Business Proposals guide (“**How-to-Apply Guide**”), should be complied with. The How-to-Apply Guide particularly states that “in addition to the relevant statutory notice”, applications for acquisitions of shares “must include” information on “parties to the proposal, the type of proposal, the consideration, the *reasons* for the proposal... from viewpoints of the vendor, target and purchaser, and a brief description of the purchaser’s future *intentions* for the business...”.³⁷¹
255. The Respondent emphasises that the How-to-Apply Guide leaves no room for a prospective investor to make a self-serving judgment that information it does not want to bring to the attention of the Government can be omitted.³⁷² While rejecting the distinction made by the Claimant as to the terminology of whether the regime is *standard-based* or *disclosure-based*, the Respondent clarifies that the How-to-Apply Guide requires provision of information “whether or not the investor thinks the Government might already have, or be able to infer, that information”.³⁷³
256. The Respondent states that, pursuant to the FATA and an “Instrument of Authorization” made by the Treasurer (authorising Treasury officials holding identified positions to approve PM Asia’s investment),³⁷⁴ the Treasurer can make an order prohibiting an investment if he is satisfied that the proposed investment would be contrary to Australia’s national interest.³⁷⁵ In order for such an assessment to be made, the Claimant was in effect required to provide a statutory notice and supplementary information stating, *inter alia*, the reasons for the acquisition

³⁷⁰ Respondent’s First Post-Hearing Brief, paras 23–25.

³⁷¹ Respondent’s First Post-Hearing Brief, para. 26a.

³⁷² Respondent’s First Post-Hearing Brief, para. 34 referring to oral testimony of Mr. Callinan during the cross-examination at the hearing; see Transcript, Day 3, p. 121, line 9.

³⁷³ Respondent’s Second Post-Hearing Brief, para. 57c.

³⁷⁴ Statement of Defence, Vol. A, para. 33 referring to [REDACTED]

³⁷⁵ Statement of Defence, Vol. A, para. 22 referring to section 18(2) of the FATA.

and how the investment could impact Australia's national interest.³⁷⁶ The Respondent notes that it is a criminal offence for foreign investors to mislead the Treasurer.³⁷⁷

257. In Respondent's view, the fact that the Foreign Investment Policy and the How-to-Apply Guide are not mandated under FATA does not mean that those policies lack legal status or that non-compliance with those policies bear no consequences. The investment policies, as Mr. Callinan pointed out, impose mandatory non-legislative requirements and are vital in considering whether the Foreign Investment Application was misleading.³⁷⁸ Accordingly, the Respondent submits that misleading information can invalidate the notice even if it was not required by the legislation.³⁷⁹
258. The Respondent submits that the Foreign Investment Application contained false or misleading information because the Claimant failed to meet the requirements of the FATA.³⁸⁰ According to the Respondent, "false" must not be equated with "intentionally untrue". Relying on Australian jurisprudence, the Respondent explains that "misleading conduct" may be established when objectively conduct as a whole has a tendency to lead a person into error. For example, it may occur when a person tells a half-truth, even if its general conduct may be honest and reasonable; or when a person remains silent with respect to material information; or when the expression of an opinion carries with it a representation that the opinion is held on reasonable grounds and there are no such reasonable grounds.³⁸¹
259. Taking into account Mr. Gyles' first report, the Respondent clarifies that under Australian law, a representation or non-disclosure of information may be misleading even though the recipient (here, a junior agent of the Treasurer) might have been able to find out the truth by making further enquiries.³⁸²

³⁷⁶ Statement of Defence, Vol. A, paras 23–30.

³⁷⁷ Statement of Defence, Vol. A, para. 32 citing section 136.1 of Australia's Criminal Code.

³⁷⁸ Respondent's Second Post-Hearing Brief, para. 68.

³⁷⁹ Respondent's Second Post-Hearing Brief, para. 68 referring to *El Cheikh v. Hurstville City Council* (2002) 121 LGERA 293, para. 31 (**Exhibit RLA-267**).

³⁸⁰ Statement of Defence, Vol. A, paras 56–57; Respondent's Reply on Preliminary Objections, para. 242.

³⁸¹ Respondent's Reply on Preliminary Objections, paras 468–469; Respondent's First Post-Hearing Brief, para. 28.

³⁸² Respondent's First Post-Hearing Brief, para. 32 referring to the First Gyles Report, paras 6(c), 7 (**Exhibit RWS-015**).

260. The Respondent emphasises that its case rests on the disclosure requirements formalised in the Foreign Investment Policy and the How-to-Apply Guide,³⁸³ which were well known to the Claimant's experienced Australian foreign investment lawyers and its agent, Allens Arthur Robinson.³⁸⁴

The Claimant's Position

261. The Claimant agrees with the Respondent that the required content of the Foreign Investment Application is provided in the FATA and its corresponding regulations. However, the Claimant submits that the required content of the Foreign Investment Application rests on *only* "basic, objective facts about the identity of the purchaser, the target and the transaction" and that its form is equally basic and objective. This does not prevent the Treasurer from obliging the investor to furnish further information, but the Respondent did not exercise such power.³⁸⁵ As for the content of the "notice", the Claimant notes that section 26(2) of the FATA requests investors to provide a statement of the investor's "intention to enter into [the] agreement" by virtue of which the investor would acquire a substantial interest in an Australian corporation.³⁸⁶

262. Moreover, the Claimant asserts that the guidance provided in the Foreign Investment Application is "brief, high-level and generalized",³⁸⁷ and since the Foreign Investment Policy has no statutory effect, the "supplementary information" requirement is not mandatory. In addition, the Claimant notes that the statement in the Foreign Investment Policy is legally inaccurate because, first, the FATA does not require "applications" to be made, it merely requires that notice be given to the Treasurer, and, second, the proposals need not be detailed; an investor is only required to provide basic information.³⁸⁸

263. The Claimant disputes the Respondent's argument that the How-to-Apply Guide is a mandatory and clear document. In the Claimant's view, the How-to-Apply Guide inaccurately describes the FATA; it uses vague and high-level language, the meaning of its terms is ambiguous, it has no legal effect and it is not binding under Australian law.³⁸⁹ Accordingly, the Claimant submits that

³⁸³ Alternatively referred to as "How-to-Apply- Business Proposals Guide" as coined by the FITPD and FIRB and Australia's witnesses.

³⁸⁴ Respondent's Reply on Preliminary Objections, paras 270–272.

³⁸⁵ Claimant's First Post-Hearing Brief, para. 65 referring to section 36 of the FATA.

³⁸⁶ Claimant's First Post-Hearing Brief, para. 61.

³⁸⁷ Claimant's First Post-Hearing Brief, para. 58

³⁸⁸ Claimant's First Post-Hearing Brief, para. 65.

³⁸⁹ Claimant's First Post-Hearing Brief, para. 67.

the fact that information contained in a foreign investment application does not conform to the How-to-Apply Guide does not make the information provided by an applicant false or misleading.³⁹⁰

264. The Claimant also submits that the regime established by the FATA and Australia's foreign investment policies is a *statement-based* regime and not a *disclosure* regime. Pointing to alleged contradictions in the Respondent's position as expressed at the Hearing on Preliminary Objections, the Claimant argues that, in these circumstances, an investor that is trying to reasonably interpret what information the Respondent is seeking by its policy cannot be criticised.³⁹¹
265. Further, the Claimant argues that the Respondent has changed its argument in relation to the "false or misleading" standard imposed by section 136.1 of the Criminal Code in the course of the proceedings and now states that, "no allegation is made of a contravention of that section". The Claimant, therefore, argues that the Respondent has invoked different standards including "misleading or deceptive", "truthful and complete", and "accurate and complete", leaving it unclear which of these standards the Claimant allegedly contravened.³⁹²
266. The FATA and the Regulations mandate four conditions that the Claimant submits it has met. First, the Claimant argues that it openly disclosed that the acquirer would be a multinational tobacco company incorporated in Hong Kong and that it might avail itself of the Treaty in the event that Respondent's plain packaging legislation is passed.³⁹³ Second, the Claimant notes that its activities are perfectly legal in Australia and that PM Australia and PML's business in the field of manufacture, distribution and sale of tobacco products has continued uninterrupted for the past sixty years, generating substantial tax revenues for the Respondent.³⁹⁴ Third, the Claimant argues that its investments were made openly and it had duly notified the Respondent of its intention to acquire shares of PM Australia,³⁹⁵ with proper notice given to Australia's Foreign Investment Review Board, the government body responsible for the Respondent's investment treaties.³⁹⁶ The Claimant directs the Tribunal to Mr. Hinton's expert report, in which Mr. Hinton notes that a proposal made by a foreign investor from a country that has signed a

³⁹⁰ Claimant's First Post-Hearing Brief, para. 70.

³⁹¹ Claimant's First Post-Hearing Brief, para. 69.

³⁹² Claimant's First Post-Hearing Brief, para. 72.

³⁹³ Claimant's Counter-Memorial on Preliminary Objections, para. 146.

³⁹⁴ Claimant's Counter-Memorial on Preliminary Objections, para. 147.

³⁹⁵ Claimant's Counter-Memorial on Preliminary Objections, para. 143.

³⁹⁶ Claimant's Counter-Memorial on Preliminary Objections, para. 148.

treaty with Australia constitutes a factor in favour of the proposal and not one against it.³⁹⁷ Fourth, the Claimant points out that notice was given in a context where there was much publicity regarding the differences between Philip Morris and the Respondent relating to plain packaging.³⁹⁸

(b) Information Regarding the Prospect of a BIT Claim

The Respondent's Position

267. The Respondent submits that there were several points that the Claimant failed to state accurately in the Foreign Investment Application. As a result, the Foreign Investment Application did not accurately reflect the prospect that the restructuring might enable the Claimant to make claims under the Treaty.
268. First, the Claimant did not disclose that it intended to bring a claim against Australia under the Treaty if the Australian Government implemented the Plain Packaging Measures—a circumstance that the Respondent terms the “BIT intention”.³⁹⁹ Rather, the Claimant stated only that PM Asia “does not intend any change in the direction of the business” of the Australian subsidiaries.⁴⁰⁰
269. Second, it was not stated that the true purpose of the Claimant’s investment was to “place the PMI Group in a position where, assuming that Australia proceeded to enact the legislation implementing plain packaging, a member of the group, PM Asia, would be able to bring a claim under the Treaty seeking orders requiring Australia to repeal [P]lain [P]ackaging [Measures] and/or pay substantial damages”.⁴⁰¹ Rather, the Claimant stated that the purpose of the restructuring was “to refine PMI affiliates’ corporate structure in the Asian region”.⁴⁰² The witness statements relied upon by the Respondent evidence that the PMI Group was aware of the political risk it was facing in light of the Plain Packaging Measures and thus took account of

³⁹⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 149 referring to the Hinton Report, paras 39–40 (**Exhibit CWS-018**). See also Claimant’s Rejoinder on Preliminary Objections, para. 200.

³⁹⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 150.

³⁹⁹ Respondent’s Reply on Preliminary Objections, para. 275.

⁴⁰⁰ Respondent’s First Post-Hearing Brief, para. 111 referring to the [REDACTED].

⁴⁰¹ Statement of Defence, Vol. A, paras 48–49; Respondent’s Second Post-Hearing Brief, para. 59.

⁴⁰² Respondent’s First Post-Hearing Brief, para. 111 referring to [REDACTED].

the available Treaty protection for its Australian investments during its restructuring.⁴⁰³ This circumstance is termed the “BIT reason”.

270. Third, the Claimant did not reveal that a reason for, or a purpose of, the investment was to allow for “nationality planning” and that the BIT intention and BIT reason would be *directly relevant* to assessing whether the investment was contrary to Australia’s national interest because, if the claim were successful, it “could affect Australia’s capacity to carry out its announced public policy and/or affect its economy and community”.⁴⁰⁴ Rather, the Claimant stated that “[f]rom a national interest perspective, we note that the [r]estructur[ing] does not result in any change in ultimate control” of the Australian subsidiaries, and that “our client is not aware of any reason why the [r]estructur[ing] would be contrary to the national interest... principally because the [r]estructur[ing] is an internal restructur[ing]”.⁴⁰⁵ This circumstance is termed the “BIT impact on national interest”.
271. As a result of the failure to disclose the Claimant’s BIT intention, BIT reason and BIT impact on Australia’s national interest, the Foreign Investment Application was false or misleading as to PM Asia’s intentions and reasons.⁴⁰⁶
272. The Respondent also points out that the FIRB letter stipulated that the restructuring would not result in any change in ultimate control of PM Australia or PML, implying that the proposed investment was a “corporate restructure” or “corporate re-organization” that does not raise national interest issues.⁴⁰⁷
273. The Respondent further submits that the two Treasury officials who processed the Foreign Investment Application conducted an initial examination to identify issues bearing upon Australia’s national interest. The FIRB annual reports stated that such applications were usually decided by way of a “no-objection letter” issued by Treasury officials under a limited authority and without any personal consideration by the Treasurer—a process well known to Australian

⁴⁰³ Statement of Defence, Vol. A, paras 50–52 referring to the Pellegrini Statement, para. 34 (**Exhibit CWS-002**).

⁴⁰⁴ Statement of Defence, Vol. A, paras 53–55 referring to Mr. Pellegrini’s Witness Statement in the [REDACTED].

⁴⁰⁵ Respondent’s First Post-Hearing Brief, para. 111.

⁴⁰⁶ Respondent’s Reply on Preliminary Objections, para. 276.

⁴⁰⁷ Respondent’s Reply on Preliminary Objections, para. 277 referring to the Witness Statement of Mr. Wilson (29 November 2014), paras 73–74, 76–78, 91–92 (**Exhibit RWS-014**).

foreign investment professionals regularly acting for prospective investors on FATA applications.⁴⁰⁸

274. In the event that the application raised “special circumstances” or “uncertainty” as to the national interest test at the stage of the initial screening or *triage*, the matter would have been elevated for determination by the Treasurer’s himself (on the advice of FIRB). In such a case, the Treasurer would have prohibited the investment, or approved it subject to conditions that would have prevented the Claimant from bringing a claim under the Treaty in respect of Plain Packaging Measures.⁴⁰⁹ The fact that the application was not elevated implies that the Respondent was unaware of the misleading statements and could not have inferred their existence. In addition, the Respondent rejects the Claimant’s argument that Australia should have known for itself or that such information was public knowledge because it only came to know about the Claimant’s BIT intention and BIT reason when Mr. Pellegrini admitted them in evidence with the Amended Statement of Claim.⁴¹⁰
275. The Respondent rebuts the Claimant’s assertion that the two Treasury officials who processed the Foreign Investment Application were actually aware of the BIT intention and BIT reason and submits that the Respondent only became aware of such information in late March 2013.⁴¹¹ The Respondent adds that neither of the two Treasury officials who considered the Foreign Investment Application is available to give evidence. However, the Respondent argues that the minutes prepared by the two Treasury officials evidence that PM Asia’s reason for the proposed investment was “to simplify the administrative structure of the Asia Pacific region of Philip Morris” and that the proposal “did not appear to raise any issues which could be considered as contrary to the national interest”.⁴¹² The Treasury officials were entitled to assume that the Foreign Investment Application complied with Australia’s detailed and longstanding disclosure requirements because the application was prepared by experienced foreign investment lawyers, who presented the transaction as a “simple, straightforward corporate restructuring that did not raise national interest issues”.⁴¹³

⁴⁰⁸ Respondent’s Reply on Preliminary Objections, para. 277.

⁴⁰⁹ Respondent’s Reply on Preliminary Objections, paras 278, 281.

⁴¹⁰ Respondent’s First Post-Hearing Brief, paras 113–115.

⁴¹¹ Respondent’s First Post-Hearing Brief, para. 155d.

⁴¹² Respondent’s Reply on Preliminary Objections, para. 279 referring to the [REDACTED]

⁴¹³ Respondent’s Reply on Preliminary Objections, para. 280 referring to the Witness Statement of Mr. Wilson (29 November 2014), paras 152, 171, 186, 188 (Exhibit RWS-014).

276. The Respondent disputes the Claimant's argument that it did not need to reveal the BIT reason because the ability to bring a claim against Australia under the Treaty in respect of the announced Plain Packaging Measures was a mere "motivation" and not a "reason" for the restructuring. In response, the Respondent argues that "motivations" for a restructuring should not be treated differently from "reasons" since the two are indistinguishable. The Respondent explains that the Claimant put forward as its "reasons" the refining of its corporate structure but its "motivation" was to put it in a position to make a claim against Australia so as to defeat or neutralise plain packaging legislation once adopted by Parliament. The Respondent submits that, if this were the consequence of the Claimant's argument, then the Tribunal would be compelled to consider whether this was "a case of sharp practice". The Respondent infers that the Claimant held back the "reason" or "motivation" because, if revealed, it would risk the defeat of its strategy under the Treaty.⁴¹⁴
277. The Respondent also denies that it was unreasonable to expect the Claimant to reveal its "BIT strategy". The Respondent submits that any reasonable person would find it relevant to the national interest if a proposed investment exposes a country to a claim or seeks to defeat a legislative measure. The Respondent further submits that the Claimant cannot ask the Tribunal to find that its answers in the Foreign Investment Application were truthful when it declines to produce those persons who made the underlying decisions. The Respondent infers that the person(s) authorising the Foreign Investment Application either "did not care to turn their mind to the truth of the statements therein", or quite deliberately misled the Treasury officials into approving the Foreign Investment Application under their authorisation.⁴¹⁵
278. With regard to the Claimant's assertion that exposing Australia to a BIT claim cannot be considered to be contrary to the national interest, the Respondent submits that this contention fails to take account of the crucial role that admission plays under the Treaty. The Respondent adds that it may, lawfully, adopt the policies on admission that best suit its national interest. In the Respondent's view, it is not obliged to give an investor that opposes a measure that the Australian Government has decided to implement a new basis upon which to bring a claim against it. Non-admission in these circumstances is not illegitimately "thwarting litigation", but simply declining to assume a fresh obligation that will lead to an identifiable suit in the future.⁴¹⁶

⁴¹⁴ Respondent's Reply on Preliminary Objections, paras 287–289.

⁴¹⁵ Respondent's Reply on Preliminary Objections, para. 292.

⁴¹⁶ Respondent's Reply on Preliminary Objections, paras 293–295.

279. Finally, the Respondent argues that the evidence of Mr. Hinton should be rejected. Being a senior officer at FIRB many years before the events in question, he never worked with former Treasurer Swan and cannot therefore second-guess what the latter would have done regarding the proposal. Moreover, since he is not an Australian lawyer and cannot give an expert opinion on the application of Australian law to the Foreign Investment Application.⁴¹⁷ Instead, the Respondent adduces the testimony of Mr. Wilson, an actual member of the FIRB.
280. In short, the Respondent points out that (1) BIT issues were not routinely considered as part of the initial examination of proposed investments under the FATA; (2) the existence of a treaty was not considered a factor in favour of the proposed investment against the national interest; (3) Treasury statements contained no BIT issues; (4) although there is a unit within FITPD advising the Treasurer on general investment and trade-related policy matters, it is separate from the two review units that carry out the initial examination of foreign investment applications under FATA and therefore, Mr. Hinton's claim that FITPD has knowledge of the Treaty is true but insignificant; and (5) Treasury officials who carry out initial examinations of proposed investments cannot make their own investigations and must rely on accurate information from prospective investors.⁴¹⁸

The Claimant's Position

281. The Claimant argues that in order to assess whether its statements were misleading in respect of the prospect of a BIT claim against Australia, one must have regard to the context in which the statements were made.⁴¹⁹ In the instant case, the relevant context includes the long-standing and highly-publicised differences between Philip Morris and the Australian Government in relation to plain packaging; Philip Morris' public statement that it would defend its right to use its intellectual property if the plain packaging legislation were to be enacted; a statement from Australia's Minister for Health to the effect that the Respondent would assess the enactment of the plain packaging legislation in light of the Respondent's domestic and international obligations; and the fact that the Treasurer is responsible for both notifications of investments under the FATA and for giving advice on investment agreements.⁴²⁰

⁴¹⁷ See Evidence Act 1995 (Cth) ss. 76 and 79 (**Exhibit RLA-270**).

⁴¹⁸ Respondent's Reply on Preliminary Objections, paras 299–300.

⁴¹⁹ Claimant's Counter-Memorial on Preliminary Objections, para. 172.

⁴²⁰ Claimant's Counter-Memorial on Preliminary Objections, para. 172.

282. The Claimant also submits that its statement could not be misleading because the Treasurer had full cognisance of the relevant facts, including the existence of the Treaty and the nationality of the acquirer.⁴²¹ Importantly, in the Claimant's view, the Respondent has failed to demonstrate that the Claimant's statement have led the Treasurer to make a decision he would not otherwise have made.⁴²²
283. The Claimant rejects the Respondent's contention that it was not aware of the BIT reason at the time the Foreign Investment Application was submitted. The Claimant observes that at the Hearing on Preliminary Objections, the Respondent admitted the Treasury's knowledge that the Claimant's ownership of the Australian subsidiaries would give the Claimant "the right to access dispute resolution provisions under the BIT".⁴²³
284. Relying on the testimony of Mr. Pellegrini, the Claimant argues that the Respondent was aware of PMI's plans to oppose plain packaging, and establishes that it did not make a decision to pursue a claim under the Treaty until June 2011.⁴²⁴ The Claimant adds that the Respondent must indeed have been unaware of the BIT intention because there was no such intention.⁴²⁵ The Claimant admits that it was well aware of the possibility of a claim in the future if a contingent event would occur over which the Claimant would have no control, but the Respondent at no point in time requested the Claimant to disclose contingent possibilities. The Claimant therefore concludes that the Foreign Investment Application is valid.⁴²⁶
285. The Claimant also considers that it accurately stated its "reasons for the proposal" and that these were in line with Philip Morris' own internal view, that is, to "refine" or "streamline" the corporate structure of the group in the Asian region.⁴²⁷ The Claimant notes that the reasons stated in its Foreign Investment Application were in line with the contents and level of detail of notifications under FATA generally received by the FITPD.⁴²⁸ The Treasury approved its

⁴²¹ Claimant's Counter-Memorial on Preliminary Objections, para. 174.

⁴²² Claimant's Counter-Memorial on Preliminary Objections, para. 174(c).

⁴²³ Claimant's First Post-Hearing Brief, para. 4.

⁴²⁴ Claimant's First Post-hearing Brief, paras 6–10.

⁴²⁵ Claimant's First Post-Hearing Brief, para. 5.

⁴²⁶ Claimant's First Post-Hearing Brief, para. 78.

⁴²⁷ Claimant's Counter-Memorial on Preliminary Objections, para. 177.

⁴²⁸ Claimant's Rejoinder on Preliminary Objections, para. 194.

Foreign Investment Application without suggesting that the reasons were somehow inadequate or too general and without requesting further information from the Claimant.⁴²⁹

286. In line with the reasoning in the *Autopista Concesionada de Venezuela v. Venezuela* decision, the Claimant submits that its Foreign Investment Application clearly and accurately stated that Claimant was a tobacco company incorporated in Hong Kong, thus providing the Respondent with all the information required to assess the jurisdictional consequences of the contemplated share transfer. The Claimant also relies on the Callinan Report to argue that the Respondent's failure to take into account facts that it knew when assessing the Foreign Investment Application does not and cannot make the notification misleading.⁴³⁰
287. The Claimant submits that, contrary to the Respondent's contention, it was not required to identify all the motives for its corporate restructuring and that the reason for the proposal should instead focus solely on the transaction.⁴³¹ The Claimant refers to a Ministerial statement made in the context of the conclusion of the United States-Australia Free Trade Agreement 2004 in which Australia's Minister for Trade publicly declared that internal corporate reorganisation gives rise to no concerns under foreign investment policy and that minimising their screening would be desirable.⁴³²
288. Relying on a letter from [REDACTED] the Claimant notes that Australia's Treasury does not view intra-group restructuring as contrary to national interest as long as there is no change in the ultimate holding company. Hence, the Respondent has not shown that the Claimant's restructuring raised the kind of serious concerns that have led the Treasurer to prohibit foreign investments in the past.⁴³³ The Claimant also refers to the Hinton Report to confirm [REDACTED] position and further notes that the onus was on the Respondent to request additional information, which it did not, on the corporate restructuring.⁴³⁴
289. Relying on findings in the Hinton Report, the Claimant states that it was not incumbent upon the Claimant to make mention in its notification to the Treasury that it might engage provisions of

⁴²⁹ Claimant's Rejoinder on Preliminary Objections, paras 196, 208.

⁴³⁰ Claimant's Rejoinder on Preliminary Objections, para. 198.

⁴³¹ Claimant's Counter-Memorial on Preliminary Objections, paras 178–179.

⁴³² Claimant's Counter-Memorial on Preliminary Objections, para. 179, citing Correspondence between Australia and the United States Concerning the Australia-United States Free Trade Agreement, dated 18 May 2004 (**Exhibit C-382**).

⁴³³ Claimant's Rejoinder on Preliminary Objections, para. 199.

⁴³⁴ Claimant's Counter-Memorial on Preliminary Objections, para. 180.

the Treaty in the future.⁴³⁵ This, according to the Claimant, is not relevant to the Treasury's assessment of the national interest and was accordingly not something that needed to be included in the Foreign Investment Application.⁴³⁶

290. In fact, the Respondent could not have lawfully prohibited the Claimant's investments with a view to barring the BIT claim. Such conduct would raise serious policy and legal issues and would constitute an abuse of statutory power.⁴³⁷ The Claimant also points to the fact that there has been no divestment of Claimant's investments—an indication that there were no grounds for prohibiting the investment at the time or at present.⁴³⁸
291. Additionally, the Claimant affirms that it truthfully and genuinely stated its view in respect of Australia's national interest.⁴³⁹ The Claimant submits that it is “nonsensical” on the part of the Respondent to suggest that the Claimant was required to guess the reason why the investment might or might not be considered to be contrary to national interest.⁴⁴⁰
292. The Claimant also observes that there is no objective definition of national interest. The Claimant notes that Australia purposefully left the meaning of the phrase nebulous such that it might consider investments on a case-by-case basis.⁴⁴¹ Furthermore, the Claimant submits that the Respondent's test for national interest is an imprecise and unpredictable one. To that effect, the Claimant refers to a paper produced by the Financial Services Institute of Australasia which states that “approaches taken to the national interest test by successive Australian governments reveal that the concept has been stretched into a laundry list of unlegislated policy considerations [which] are often poorly defined [and] far removed from genuinely vital national interests”.⁴⁴²
293. The Claimant invites the Tribunal to take into account Article 4 of the Treaty (“Transparency of Laws”) in order to assess the extent to which the Respondent may seek to evade its obligations

⁴³⁵ Claimant's Counter-Memorial on Preliminary Objections, para. 182.

⁴³⁶ Claimant's Rejoinder on Preliminary Objections, para. 201.

⁴³⁷ Claimant's Counter-Memorial on Preliminary Objections, para. 183, referring to the Hinton Report paras 80–92 (**Exhibit CWS-018**) and an unreported Australian case law (*Nettheim v. Minister for Planning and Local Gov't* (S. Court of New South Wales, 21 October 1988) (**Exhibit CLA-208**).

⁴³⁸ Claimant's Counter-Memorial on Preliminary Objections, para. 184.

⁴³⁹ Claimant's Counter-Memorial on Preliminary Objections, para. 185.

⁴⁴⁰ Claimant's Counter-Memorial on Preliminary Objections, para. 186.

⁴⁴¹ Claimant's Counter-Memorial on Preliminary Objections, para. 187.

⁴⁴² Claimant's Counter-Memorial on Preliminary Objections, para. 189, citing Financial Services Institute of Australasia Paper (**Exhibit C-355**).

by referring to the Claimant's alleged incorrect statements by applying the said vague national interest test. The Claimant notes that Article 4 stipulates that the Respondent shall make laws and policies relating to investments that are publicly and readily available.⁴⁴³ Accordingly, the Claimant states that the legal validity of the admission of its investment cannot hinge on an accurate guess of what the Respondent's Treasurer might deem to be in the national interest.⁴⁴⁴

294. The Claimant argues that the "extraordinary" character of the Respondent's Non-Admission of Investment Objection is revealed when the Respondent argues that its national interest will be affected in the event that the Claimant succeeds with its treaty claim.⁴⁴⁵
295. Finally, the Claimant points to correspondence between different departments of Australia that followed the Claimant's Notice of Claim. In response to enquiries by the Attorney-General's Department, the FITPD confirmed in September 2011 that no objections had been raised against the Claimant's Foreign Investment Application. Similarly, shortly before the first procedural meeting in the present arbitration in July 2012, the FITPD expressed no different view in this regard. The Claimant argues that this correspondence rebuts the Respondent's contention that it was misled by the Foreign Investment Application.⁴⁴⁶

(c) Information Regarding the Consideration to Be Paid by PM Asia

The Respondent's Position

296. The Respondent argues that the Foreign Investment Application was also without legal effect for the purposes of sections 26 and 27 of the FATA because the Claimant ultimately implemented a different transaction than that described in the Foreign Investment Application.
297. The Respondent points out that the Claimant stated in the FIRB letter that PM Brands Sàrl would contribute all of the issued and outstanding shares of PM Australia held by it to PM Asia "for no consideration".⁴⁴⁷ The Respondent contends that this was not the proposal that the Claimant actually put into effect by PM Asia's Resolutions of 23 February 2011. Philip Morris Group internal e-mails disclosed to Australia on 1 November 2014 show that, on 17 February

⁴⁴³ Claimant's Counter-Memorial on Preliminary Objections, para. 190; Claimant's Rejoinder on Preliminary Objections, para. 223.

⁴⁴⁴ Claimant's Counter-Memorial on Preliminary Objections, para. 191.

⁴⁴⁵ Claimant's Counter-Memorial on Preliminary Objections, para. 194.

⁴⁴⁶ Claimant's First Post-Hearing Brief, paras 82–92; see Statement of Facts above.

⁴⁴⁷ Respondent's Reply on Preliminary Objections, para. 334 citing the [REDACTED].

2011 (six days after FITPD had issued the No-objection Letter), the PMI Group considered that adverse tax consequences could be avoided if the shares were transferred for value.⁴⁴⁸ However, the Claimant did not submit a fresh application or otherwise inform FIRB or FITPD of the alteration even though it knew that a statement made by it, on which Australia acted, was false.⁴⁴⁹

298. The Respondent submits that the consideration to be paid to acquire an interest in an Australian corporation forms part of the assessment of an investment proposal under the FATA.⁴⁵⁰ The Claimant's failure to update the Foreign Investment Application with this change in consideration was a "material change in terms of the transaction [that] had an obvious statutory consequence", which was that, for purposes of FATA, "no notice had been given at all".⁴⁵¹

The Claimant's Position

299. In relation to the Respondent's argument that the Claimant failed to disclose that a consideration was paid for the share transfer, the Claimant submits that the Respondent is wrong to allege that the Claimant has not implemented the transaction for which it obtained clearance.⁴⁵²
300. The Claimant explains that, on 23 February 2011, the Claimant's Australian counsel discussed the change in consideration paid for the Claimant's proposed acquisition with [REDACTED] [REDACTED] the FITPD case officer who was responsible for the Foreign Investment Application and the author of the No-objection Letter. The Claimant relies on an e-mail by counsel to show that the Respondent exaggerates and distorts information provided in the Foreign Investment Application.⁴⁵³
301. Finally, the Claimant submits that the Respondent must have known that "consideration played no role in assessments of FATA notifications of international reorganisations" and that the

⁴⁴⁸ Respondent's Reply on Preliminary Objections, para. 335.

⁴⁴⁹ Respondent's Reply on Preliminary Objections, para. 336 referring to the [REDACTED]

⁴⁵⁰ Respondent's Reply on Preliminary Objections, para. 337.

⁴⁵¹ Respondent's Reply on Preliminary Objections, para. 338.

⁴⁵² Claimant's Rejoinder on Preliminary Objections, para. 184.

⁴⁵³ Claimant's Rejoinder on Preliminary Objections, paras 187–191 referring to [REDACTED].

“Treasury and the FIRB did not take consideration into account when assessing notifications of corporate restructuring”.⁴⁵⁴

(d) Completeness of the Foreign Investment Application

The Respondent’s Position

302. The Respondent submits that the statutory notices under section 26 of the FATA were ineffective because the Claimant failed to annex to the notices “all” documents “relating to or evidencing” the agreement to restructuring, as was required under the FATA Regulations.⁴⁵⁵ This would have included PMI’s internal memorandum dated 2 September 2010, which the Claimant alleges, “documented the agreement to engage in the restructur[ing]”.⁴⁵⁶
303. In particular, the Respondent rejects the Claimant’s restrictive interpretation of “relating to or evidencing the agreement... to which the notice relates” to mean “*directly* evidencing or relating to the acquisition itself” so that only legally binding contractual documents need to be annexed. The Respondent argues that neither were such documents submitted by the Claimant nor does Mr. Callinan’s evidence support such an interpretation.⁴⁵⁷

The Claimant’s Position

304. The Claimant also submits that the Respondent’s argument that the Foreign Investment Application was invalid because it failed to attach the PMI memorandum of 2 September 2010 is wrong. In response, the Claimant submits that Regulation 6 of the FATA Regulations requires prospective investors to annex documents relating or evidencing the investment “agreement” and that this requirement can only be read as a reference to documents directly evidencing or relating to the share acquisition in respect of which a notice was given. It cannot, the Claimant submits, be read as the Respondent does, as a reference to all prior documents evidencing the decision to proceed with a restructuring.⁴⁵⁸

⁴⁵⁴ Letter from the Claimant dated 21 January 2015.

⁴⁵⁵ Respondent’s Second Post-Hearing Brief, para. 67.

⁴⁵⁶ Respondent’s Reply on Preliminary Objections, paras 328–331.

⁴⁵⁷ Respondent’s First Post-Hearing Brief, para. 143.

⁴⁵⁸ Claimant’s Rejoinder on Preliminary Objections, para. 242.

3. Domestic Law Consequences of the Alleged Violations of the FATA

305. The Respondent argues that the Claimant's non-compliance with Australia's law and investment policies has the following legal consequences under its domestic law:⁴⁵⁹

- The statutory notices provided by the Claimant are invalid pursuant to sections 26 and 27 of the FATA because it contained false or misleading information and failed to annex documents required by the FATA Regulations.⁴⁶⁰
- The Treasurer's No-objection Letter dated 11 February 2011, in which the Treasury signaled that it did not object to PMI Group's application, was affected by "jurisdictional error",⁴⁶¹ or procured in "bad faith" if PM Asia *knew* that the Foreign Investment Application contained false or misleading information; it is thus regarded in law as "no decision at all" and as having no legal effect.⁴⁶²
- The Treasurer's delegate was not in a position to consider the investment and its impact on Australia's national interest since the PMI Group's Foreign Investment Application (comprising of the statutory notices and the supplementary information required under Australia's law and investment policies) did not reflect the transaction that was actually implemented and was incomplete.⁴⁶³

306. The Respondent submits that any one of these consequences is sufficient for its Non-Admission of Investment Objection to succeed. Each of these alleged consequences will be discussed in the following paragraphs.

307. The Claimant on the other hand submits that, even if the Tribunal found that it breached Australian law, as alleged by the Respondent, this would have no legal consequence on the admission of the investments as a matter of Australian law.⁴⁶⁴

⁴⁵⁹ Respondent's Reply on Preliminary Objections, para. 316.

⁴⁶⁰ Respondent's First Post-Hearing Brief, para. 40; Respondent's Second Post-Hearing Brief, para. 62b.

⁴⁶¹ Statement of Defence, Vol. A, paras 62–23 citing *Craig v. South Australia* (1995) 184 CLR 163, p. 177 per Brennan, Deane, Gaudron, Toohey and McHugh JJ (**Exhibit RLA-013**) to explain the "jurisdictional error" concept. See also Respondent's Reply on Preliminary Objections, para. 319.

⁴⁶² Statement of Defence, Vol. A, paras 57–66; Respondent's First Post-Hearing Brief, para. 41; Respondent's Second Post-Hearing Brief, para. 62c.

⁴⁶³ Statement of Defence, Vol. A, paras 36d, 58.

⁴⁶⁴ Claimant's Counter-Memorial on Preliminary Objections, para. 197.

(a) Invalidity of the Foreign Investment Application

The Respondent's Position

308. The Respondent submits that the Foreign Investment Application is legally invalid and the No-objection Letter in response to such an application is void.⁴⁶⁵ In addition, the Respondent rejects the Claimant's submission that, even if Australian law was breached, the investment remains "admitted" pursuant to section 38 of the FATA.⁴⁶⁶ Section 38 of the FATA provides that "[a]n act is not invalidated by the fact that it constitutes an offence against this Act". The Respondent relies on various Australian court decisions to argue that the term "act" in section 38 concerns the "entry into the agreement" by which the investment is effected".⁴⁶⁷ The effect of section 38 of the FATA is to preserve contractual obligations between the parties to the transaction implementing the investment.⁴⁶⁸ As such, when a foreign person commits a criminal offence under sections 26 and 26A of the FATA by entering into a contractual agreement without furnishing the required notice, that contractual agreement is not, for that reason, void or unenforceable.⁴⁶⁹ In the present context, the Respondent explains that section 38 of the FATA "preserves the validity of the *acts* of the parties that give effect to the transaction, not the legal validity of any administrative *decision*".⁴⁷⁰ The Respondent adds that the Claimant cannot point to a single Australian case that supports its interpretation of section 38 to the effect that it preserves the legal validity of statutory notices under the FATA, or the administrative decisions made in response to them.⁴⁷¹
309. The Respondent further rejects the Claimant's related submission that criminal law penalties and divestiture are the exclusive remedies provided by the FATA with respect to false or misleading applications. It submits that the Claimant's submissions on this issue are contrary to constitutional law, principles of statutory interpretation, and case law under the FATA.⁴⁷²

⁴⁶⁵ Respondent's First Post-Hearing Brief, para. 37.

⁴⁶⁶ Respondent's Reply on Preliminary Objections, para. 302.

⁴⁶⁷ Respondent's Reply on Preliminary Objections, paras 304–306.

⁴⁶⁸ Respondent's First Post-Hearing Brief, para. 43.

⁴⁶⁹ Respondent's Reply on Preliminary Objections, para. 303 referring to *Miller v. Miller* (2011) 242 CLR 446 (High Court of Australia) (**Exhibit RLA-307**): Under Australian law, a contract that is prohibited by Statute will generally be enforceable but "[w]hether a Statute prohibits contracts is always a question of construction turning on the particular provisions, the scope and purpose of the Statute".

⁴⁷⁰ Respondent's First Post-Hearing Brief, para. 37; Respondent's Second Post-Hearing Brief, para. 65.

⁴⁷¹ Respondent's Reply on Preliminary Objections, paras 307, 309 referring to *Yates Security Services v. Keating* (1990) 98 ALR 21 (Wilcox J., Federal Court of Australia) (**Exhibit RLA-265**).

⁴⁷² Respondent's Reply on Preliminary Objections, para. 310.

310. The Respondent challenges the Claimant’s argument that the statutory notices are effective under sections 25 and 26 of the FATA and that the FIRB letter should be viewed as merely “supplementary” and not as forming part of the notices. The Respondent asserts that statutory notices and the FIRB letter constitute a single, compendious supply of all the information required under Australia’s law and investment policies. Thus, the Foreign Investment Application in its entirety constituted the “notice” required to be provided under the FATA.⁴⁷³
311. Relying on an Australian court decision, the Respondent submits that “if the notice... does attempt an explanation of what is proposed it must be accurate and complete, either particularly or generally”, and if “infected by inaccurate or incomplete information” so as to defeat the “beneficial effect”, such a notice was not saved because it complied “with the express requirements of the Act”.⁴⁷⁴
312. Applying these principles to the present case, the Respondent submits that the information in a statutory notice given in purported compliance with sections 25 and 26 of the FATA is intended to allow the Treasurer (informed by FIRB) to assess whether or not a proposal is “contrary to national interest” and to allow the Respondent to scrutinise the investment.⁴⁷⁵ The statutory notices were provided under cover of an application letter that was materially false or misleading. Having provided the FIRB letter, the Claimant did not ensure that it was “accurate and complete” or, at least, it negated “the beneficial effect” of the statutory notices and “distort, obscure or minimise” the information contained in them. By concealing the BIT intention, the BIT reason and the BIT impact on the national interest, the letter gave the impression that the Claimant’s proposal was “straightforward and raised no national interest issues”, leading to the miscarriage of the assessment process.⁴⁷⁶

The Claimant’s Position

313. In the Claimant’s view, the Respondent overlooks section 38 of the FATA, which expressly states that the alleged violations do not invalidate the admission and lawfulness of the investment. The Claimant relies on two Australian court decisions to argue that non-compliance with the FATA does not render an investment illegal, void, or invalid under Australian law, and

⁴⁷³ Respondent’s Reply on Preliminary Objections, paras 320–321.

⁴⁷⁴ Respondent’s Reply on Preliminary Objections, paras 322–323.

⁴⁷⁵ Respondent’s First Post-Hearing Brief, para. 144.

⁴⁷⁶ Respondent’s Reply on Preliminary Objections, paras 325–326.

even criminal offences committed in the course of admission of an investment do not invalidate the investment.⁴⁷⁷

314. The Claimant argues that the FATA maintains the validity and lawfulness of the investment unless and until a divestment is ordered. Prior to such an order, the Claimant submits that the investor maintains all the rights, obligations, duties and liabilities of the investment.⁴⁷⁸ In the present case, the Claimant points out that the Treasurer had the power to order divestment but has chosen not to exercise that power. Accordingly, in the absence of an order to divest and in accordance with section 38 of the FATA, the Claimant argues that its investments were at all times lawful and properly admitted in Australia for the purposes of Article 1(e) of the Treaty.⁴⁷⁹
315. Furthermore, the Claimant argues that, even assuming that the information provided was false or misleading, section 18(4) of the FATA distinguishes consequences for the investor from those for the investment. Section 38 of the FATA makes it clear that there are no consequences for the lawfulness or validity of the investment and of the admission thereof under Australian law. A criminal charge, according to the Claimant, does not affect the investment.⁴⁸⁰
316. The Claimant further submits that the offence under section 136.1 of the Criminal Code does not apply to statements made in, or in connection with, a *notice* under section 26 of FATA. Section 26 of the FATA provides *inter alia* “made in, or in connection with *an application for*” and therefore, the Claimant points out, does not apply to a notice of a proposal to invest.⁴⁸¹
317. Applying this reasoning, the Claimant challenges the Respondent’s argument that, by reason of the alleged provision of false or misleading information, no valid notice was given under section 26 of the FATA. The Claimant submits that the notice was made in accordance with the prescribed form and further clarifies that the alleged false or misleading information was not contained in the notice, but in the accompanying supplementary information. Even if that supplementary information were misleading, the Claimant asserts, that would not infect the validity of the notice itself.⁴⁸² Hence, under any assumption, section 38 of FATA would still preserve the validity of the investments.⁴⁸³

⁴⁷⁷ Claimant’s Counter-Memorial on Preliminary Objections, paras 199, 202–204.

⁴⁷⁸ Claimant’s First Post-Hearing Brief, para. 101.

⁴⁷⁹ Claimant’s Counter-Memorial on Preliminary Objections, paras 205–206.

⁴⁸⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 201.

⁴⁸¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 211.

⁴⁸² Claimant’s Counter-Memorial on Preliminary Objections, para. 213.

⁴⁸³ Claimant’s Counter-Memorial on Preliminary Objections, para. 220.

(b) Jurisdictional Error

The Respondent's Position

318. Further, the Respondent submits that the No-objection Letter is legally invalid because it was tainted with “jurisdictional error”.⁴⁸⁴ The Respondent sees two such errors:
319. First, the Respondent submits that the Treasury officials who made the decision exceeded the terms of their authority.⁴⁸⁵ The No-objection Letter was issued by two Treasury officials pursuant to a limited authorisation. The officials were induced by PM Asia’s false or misleading Foreign Investment Application to take a decision that went beyond their competence. According to the Respondent, the Foreign Investment Application involved “special circumstances” and raised “uncertainty” as to the foreign investment policy. Had the Treasury officials not been misled, the Claimant’s case would have been elevated to FIRB and the Treasurer would have been competent to determine it.⁴⁸⁶
320. Second, the Respondent, following the reasoning in *Leung v. Minister for Immigration*, submits that the No-objection Letter is invalid because it was vitiated by the Claimant’s misrepresentations. As a matter of Australian law, “even an innocent misrepresentation, provided that it is sufficiently material, will vitiate an administrative decision”.⁴⁸⁷ Moreover, the Respondent rejects the Claimant’s contention that “an Australian court would not grant relief for the jurisdictional error because Australia has challenged the validity of the No-objection Letter *collaterally* in this proceeding rather than directly in domestic judicial review proceedings, and because of Australia’s alleged delay, acquiescence and waiver”.⁴⁸⁸ In response, the Respondent submits that, under Australian law, the validity of an administrative decision can be challenged *incidentally* in the course of seeking other relief.⁴⁸⁹

⁴⁸⁴ Respondent’s Reply on Preliminary Objections, para. 340.

⁴⁸⁵ Respondent’s Reply on Preliminary Objections, para. 342–344.

⁴⁸⁶ Respondent’s Reply on Preliminary Objections, para. 345.

⁴⁸⁷ Respondent’s Reply on Preliminary Objections, paras 346–348.

⁴⁸⁸ Respondent’s Reply on Preliminary Objections, para. 347.

⁴⁸⁹ See *Aerolineas Argentinas and Ors v. Federal Airports Corporation* (1995) 63 FCR 100, 117-118 (Federal Court of Australia) (**Exhibit RLA-238**): Collateral challenges are always permissible in the case of alleged jurisdictional error and sometimes permissible in relation to non-jurisdictional errors. See also R. Douglas, “Collateral Attacks on Administrative Decisions: Anomalous but Efficient” (2006) 51 AIAL Forum 71, p. 76 (**Exhibit RLA-335**).

The Claimant's Position

321. The Claimant rebuts the Respondent's argument that the No-objection Letter was "affected by jurisdictional error, and [was] as a result... an invalid decision".⁴⁹⁰ In response, it argues that the decision-maker had the power to assess the national interest, and that is what was done.
322. Although the Respondent might now take the view that its organs made a mistake in assessing the national interest, the Claimant submits that any such mistake would be an error within jurisdiction, not a denial of jurisdiction. The Claimant states that there can be no jurisdictional error only because the Respondent now wishes its Treasurer had made a different decision.⁴⁹¹ According to the Claimant, an error must be more fundamental, in the sense that "the decision maker makes a decision outside the limits of the functions and powers conferred on him or her... By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction".⁴⁹²
323. In relation to the Respondent's assertion that the Treasury officials who reviewed the Foreign Investment Application did not have authority to issue the No-objection Letter, the Claimant submits that the officials acted as the Treasurer's agent, his *alter ego*, and as such had the power to bind the principal. Therefore, the Claimant submits that the transaction was within the agent's jurisdiction.⁴⁹³
324. In any event, the Claimant relies on *Leung*,⁴⁹⁴ which found that under Australian law, a "decision infected by jurisdictional error may have continuing effect".⁴⁹⁵
325. The Claimant also submits that even assuming that grounds existed to question the Treasurer's No-objection Letter on the basis of "jurisdictional error", the party alleging that the decision is invalid can apply to Court for an order of *certiorari* quashing the decision. The Claimant, relying on the two Australian court decisions, therefore argues that, unless such an order is sought by the Treasurer, the Tribunal can act on the faith of the decision.⁴⁹⁶

⁴⁹⁰ Claimant's Counter-Memorial on Preliminary Objections, para. 214.

⁴⁹¹ Claimant's Counter-Memorial on Preliminary Objections, para. 217.

⁴⁹² Claimant's Counter-Memorial on Preliminary Objections, para. 217.

⁴⁹³ Claimant's Rejoinder on Preliminary Objections, para. 240.

⁴⁹⁴ *Leung v. Minister for Immigration* (1997) 79 FCR 400 at 413 (**Exhibit RLA-015**).

⁴⁹⁵ Claimant's Rejoinder on Preliminary Objections, para. 241.

⁴⁹⁶ Claimant's Counter-Memorial on Preliminary Objections, paras 221–223.

326. The Claimant submits that, were the Tribunal to establish a jurisdictional error, a court might nonetheless refuse the Respondent a remedy, including a *certiorari*, due to “delay or acquiescence or waiver”. The Claimant argues that the Respondent never sought to have the Treasurer’s decision quashed before an Australian court and even if the Respondent wished to do so, it would have been refused on grounds of waiver and delay. Therefore, the Claimant points out that unless relief is granted by a court there is no obligation to treat the No-objection Letter as legally ineffective.⁴⁹⁷
327. Finally, the Claimant rejects the Respondent’s assertion that it can impugn the No-objection Letter before the Tribunal as a collateral challenge. The Claimant explains that, because the Tribunal has no jurisdiction to issue prerogative writs under Australian law, it cannot, in a confidential arbitration proceeding, decide on the validity of the No-objection Letter, as a matter of Australian law.⁴⁹⁸

(c) **“Admission in Fact”**

The Respondent’s Position

328. The Respondent rejects the Claimant’s argument that its investment must be considered “admitted in fact” since Australia has, until the present day, failed to prohibit the Claimant’s investment.⁴⁹⁹ The Treaty does not require the Parties to bring parallel domestic court proceedings before making a claim or defence, nor would a decision of a domestic court bind the Tribunal.⁵⁰⁰
329. The Respondent further submits that it was unable to resort to court proceedings since it only became aware of the basis for the Non-Admission of Investment Objection during these proceedings—the FITPD and FIRB protected the confidentiality of the Claimant’s information and did not disclose documents relating to the Foreign Investment Application until 19 August 2013.⁵⁰¹

⁴⁹⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 226.

⁴⁹⁸ Claimant’s First Post-Hearing Brief, para. 99.

⁴⁹⁹ Respondent’s Reply on Preliminary Objections, para. 257.

⁵⁰⁰ Respondent’s Reply on Preliminary Objections, paras 258–259.

⁵⁰¹ Respondent’s Reply on Preliminary Objections, paras 262–263 referring to (**Exhibit R-1081**, p. 10) and citing *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (ICSID Case No. ARB/05/22, para. 157) (**Exhibit RLA-246**).

330. In addition, the Respondent only discovered the Claimant's rationale for restructuring when that rationale was exposed by the evidence filed on 28 March 2013. Therefore, the Respondent was not "plainly on notice" of Claimant's false or misleading application from June 2011 when it was served the Notification of Claim.⁵⁰² The Respondent also notes that it was under an obligation to avoid aggravating the dispute, such that it could not bring parallel proceedings against the Claimant.
331. Further, the Respondent submits that the Claimant cannot benefit from its false or misleading conduct. Following the reasoning in the *Thunderbird* Award, the Respondent argues that an investor who, by misleading information, prevents a State from an informed consideration of the exercise of its powers at the correct time should not be heard later to say "because you admitted me in fact, the legality of the admission can never be questioned".⁵⁰³
332. In line with the findings in *Fraport v. Philippines*, the Respondent submits that it was precluded from initiating legal action against the Claimant once this arbitration had begun because of the confidentiality regime adopted in the present proceedings.⁵⁰⁴ Further, the Respondent submits that the Tribunal's jurisdiction depends on PM Asia's investment being "admitted" within the meaning of Article 1(e) of the Treaty, and neither a divestiture order (which can only operate prospectively as a matter of Australian law)⁵⁰⁵ nor a parallel criminal prosecution, nor a refusal of PM Asia's filings would per se lead to the dismissal of PM Asia's claims.⁵⁰⁶

The Claimant's Position

333. While the Claimant takes issue with the Respondent's characterisation of its position as one based on "admission in fact", the Claimant asserts that its "investments were admitted in fact and in law and that the legal admission is formal and legally binding and remains in place and in full effect".⁵⁰⁷
334. The Claimant argues that the Treasurer could have taken a number of steps, such as requesting further information in relation to the acquisition, extending the time taken to render his decision, prohibiting the investment within a 30-day period or imposing additional conditions for the

⁵⁰² Respondent's Reply on Preliminary Objections, para. 262.

⁵⁰³ Respondent's First Post-Hearing Brief, para. 119e.

⁵⁰⁴ Respondent's First Post-Hearing Brief, para. 152.

⁵⁰⁵ Respondent's First Post-Hearing Brief, para. 119d.

⁵⁰⁶ Respondent's Reply on Preliminary Objections, para. 265.

⁵⁰⁷ Respondent's Rejoinder on Preliminary Objections, para. 180.

authorisation of the transaction. However, the Treasurer took no such measures:⁵⁰⁸ the Foreign Investment Application was considered by the Respondent without any additional request for information and, in a legally binding letter dated 11 February 2011 from the FIRB,⁵⁰⁹ the Respondent officially notified the Claimant that it had no objection to the acquisition of shares.⁵¹⁰

335. Moreover, the Claimant contends that it has been and remains the “registered, overt, and legal owner” of the assets the admission of which the Respondent asserts has been “nullified”.⁵¹¹ In support of its contention, Claimant points out that PM Brands’ transfer of shares to Claimant in February 2011 was and remains valid under Australian law; [REDACTED]

[REDACTED]; and that the Claimant’s ownership of PM Australia is reflected in all of PM Australia’s filings with the Australian Securities and Investments Commission.⁵¹²

336. The Claimant also observes that the Respondent, despite having admitted the investment and having been on notice of the Claimant’s present treaty claim, at no time took any steps to annul or reverse admission of the Claimant’s investments,⁵¹³ such as by ordering divestment under its FATA legislation. The Claimant argues that, notwithstanding the validity of the statutory notice under section 26 of the FATA, the Treasurer at all times retained the power of divestment.⁵¹⁴ According to the Claimant, the Treasurer has not exercised this power because he was not satisfied that the investment is contrary to national interest.⁵¹⁵ The Claimant thus submits that the Respondent’s conduct is inconsistent with its present stance on the admission of the Claimant’s investments, three years after the Claimant’s notice of its treaty claim.⁵¹⁶

337. Similarly, the Claimant submits, the Respondent chose not to prosecute the Claimant for alleged criminal offences relating to the Claimant’s investments before the Australian courts, which are

⁵⁰⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 151.

⁵⁰⁹ See the FIRB Letter to PMI (**Exhibit C-151**).

⁵¹⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 153.

⁵¹¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 157.

⁵¹² Claimant’s Counter-Memorial on Preliminary Objections, para. 157.

⁵¹³ Claimant’s Rejoinder on Preliminary Objections, para. 211.

⁵¹⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 158.

⁵¹⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 159.

⁵¹⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 155.

the proper forum for the adjudication of “criminal guilt”.⁵¹⁷ In particular, the Claimant notes that the Respondent’s privilege log shows that it considered taking legal action against the Foreign Investment Application as early as September 2011 but chose not to do so—in the Claimant’s view because the Respondent had no basis for taking action under domestic law.⁵¹⁸

338. In relation to the Respondent’s attempt to rely on the confidentiality regime applicable in the present proceedings, the Claimant submits that this argument is misconceived because the information relevant to the admission of the Claimant’s investments was at all material times in the possession of the Respondent.⁵¹⁹ In addition, the Claimant notes that the Respondent has neither made an application to the Tribunal to vary the confidentiality regime nor suggested that the present confidentiality regime inhibited it from taking domestic legal action.⁵²⁰
339. Therefore, the Claimant submits that the Respondent’s failure to prohibit the Claimant’s investments or to exercise its power of divestment reflects the Respondent’s continuous admission of the Claimant’s investments and, correspondingly, affords the Claimant the benefits and protection conferred by the Treaty.⁵²¹

4. International Law Consequences of the Alleged Violations of the FATA

340. In addition to addressing the Respondent’s arguments under Australian law, the Claimant relies on international law to demonstrate that any violation of Australian law that may have occurred in the context of the admission of the Claimant’s investment has no legal consequences under the Treaty. The Respondent responds to these arguments in the alternative, in the event that the Tribunal finds that the concept of “non-admission” under Article 1(e) of the Treaty requires the Tribunal to consider international law, in addition to the laws of Australia.

⁵¹⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 156, relying on Australian authority in *Chu Keng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (**Exhibit CLA-244**).

⁵¹⁸ Claimant’s Rejoinder on Preliminary Objections, para. 214.

⁵¹⁹ Claimant’s Rejoinder on Preliminary Objections, para. 215.

⁵²⁰ Claimant’s First Post-Hearing Brief, para. 97.

⁵²¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 164.

(a) Whether the Respondent “Tolerated” the Claimant’s Violations of Australian Law

The Respondent’s Position

341. The Respondent rejects the Claimant’s argument that it is somehow precluded from invoking the invalidity of the Foreign Investment Application or the No-objection Letter because it did not take action against the Claimant in domestic proceedings. In *Fraport v. Philippines*, the Tribunal ruled that the Philippines was not estopped from raising the claimant’s violations of Philippine law in the arbitral proceedings on the basis that the Philippines had “knowingly overlooked” these violations because the violations were “covert”. By contrast, in the present arbitration, the Respondent argues that it did not “tolerate” the Claimant’s violations of Australian law because the Respondent became aware of deficiencies in the Foreign Investment Application and the true reasons of the restructuring only during the present proceedings.⁵²²

The Claimant’s Position

342. Referring to academic commentary, the Claimant argues that, “a host State which has for some time tolerated a legal situation is thereafter precluded from insisting later, against the investor, that the situation was unlawful from the beginning”.⁵²³ Therefore, the Claimant asserts that, where the host State has failed to take any action against a known alleged illegality, tribunals have dismissed objections based on the said alleged illegality.⁵²⁴ Similarly, following the reasoning in *Ioannis Kardassopoulos v. Georgia*, a host State cannot seek to undermine the *prima facie* valid and binding acts of its own authorities which are “cloaked with the mantle of governmental authority” on the basis that they were or might be unauthorised or otherwise invalid.⁵²⁵

(b) The Impact of “Technical” Violations of Australian Law on the Admission of the Investment

The Respondent’s Position

343. The Respondent takes issue with the Claimant’s submission that any inconsistencies in the context of the admission of the investment were “technical violations” of domestic law, and that

⁵²² Respondent’s Reply on Preliminary Objections, paras 353–356.

⁵²³ Claimant’s Counter-Memorial on Preliminary Objections, para. 244.

⁵²⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 244.

⁵²⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 245.

“minor infraction of host State law, such as missing information on an application” cannot lead to a denial of investment protection. In the Respondent’s view, the Treaty simply provides “subject to the law and investment policies” of the host State, without suggesting that only violations of norms of a higher order are relevant. In any event, the Respondent suggests that the Tribunal need not decide if there is an exception for “technical breaches” in the admission requirements of the host State because there was nothing technical about the Claimant’s violation.⁵²⁶

344. With regard to the pre-establishment provision under Article 2(1) of the Treaty, the Respondent counters the Claimant’s argument that “shall admit” in Article 2(1) confers upon the host State a mandatory obligation to admit the Claimant’s investment, and asserts that there is an express qualification in the form of the phrase: “subject to its rights to exercise powers conferred by its laws and investment policies”. Further, the Respondent argues that, if there were indeed an obligation to admit investments, this would imply that the onus is all the more on the Claimant not to give false or misleading information so that the exercise of these “all-important filtering powers is not frustrated”.⁵²⁷

The Claimant’s Position

345. The Claimant argues that any breaches of Australian law that may have occurred merely amount to “technical violations”, which are immaterial to an analysis conducted under public international law.⁵²⁸ To be relevant, a breach must be serious or concern a fundamental norm or involve a contravention of the *ordre public* of the host State.⁵²⁹ Minor infractions of host State law, such as missing information on an application, cannot in the Claimant’s view lead to a denial of investment protection. Following the reasoning in several investor-State cases, including *Tokios Tokeles v. Ukraine*, *Quiborax v. Bolivia* and *Plama v. Bulgaria*, the Claimant submits that minor errors by the investor or a failure to observe bureaucratic formalities are irrelevant. According to the Claimant, tribunals refused to admit investments in accordance with local law only when there was deliberate concealment amounting to a flagrant violation, fraud, a chain of illegal acts, egregious and conscious, intentional and covert conduct.⁵³⁰

⁵²⁶ Respondent’s Reply on Preliminary Objections, paras 359–362.

⁵²⁷ Respondent’s First Post-Hearing Brief, para. 120.

⁵²⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 233.

⁵²⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 142(c)(i).

⁵³⁰ Claimant’s Counter-Memorial on Preliminary Objections, paras 236–237.

346. The Claimant further contends that there must be a direct causal link between the alleged illegality and the admission of the investment. The Claimant submits that in the instant case there can be no such link, as Australia's own investment legislation expressly provides that allegations of the kind argued by the Respondent have no effect on the validity of the investments.⁵³¹
347. The Claimant submits that an assumption of the Respondent's argument is that its "foreign investment regime conferred upon the government an absolute and unfettered discretion to admit or refuse investments by a Hong Kong company". This, the Claimant notes, is apparent from former Treasurer Swan's statement that he "would have been more comfortable" blocking Claimant's investments than admitting them due to the "realities of Australian politics".⁵³² In other words, the Respondent's position is that it may act in an entirely arbitrary manner in deciding whether or not to admit investments from Hong Kong.⁵³³
348. According to the Claimant, the Respondent cannot alter the scope of its international obligations under the Treaty and state that Article 1(e) of the Treaty and the FATA regime gives it unfettered discretion to admit or refuse investments at its convenience. This, in the Claimant's view, contradicts Article 2(1) of the Treaty, which provides pre-establishment obligations to the Respondent.⁵³⁴ The only limitation to this pre-establishment obligation is that the investments shall be "admitted subject to [Respondent's] laws and investment policies". The Claimant, relying on the *travaux préparatoires* of the Treaty as well as on arbitral jurisprudence, explains that this requirement operates as a control mechanism to screen out illicit investments.⁵³⁵ Therefore, the Claimant submits that it had a pre-establishment right to have its investment admitted pursuant to Article 2(1) of the Treaty, subject to the Respondent's laws and investment policies (which did not give the Respondent's Treasurer unfettered power to refuse admission on the basis that he wished to insulate the Respondent from consequences of its unlawful conduct).⁵³⁶
349. The Claimant submits that its investments have been expressly admitted under Australian law and investment policies by way of the No-objection Letter, and no steps have been taken to unravel that admission. The Claimant therefore requests the Tribunal to recognise and accept the

⁵³¹ Claimant's Counter-Memorial on Preliminary Objections, para. 142(c)(ii).

⁵³² See Swan Statement, para. 47 (**Exhibit RWS-013**).

⁵³³ Claimant's Rejoinder on Preliminary Objections, para. 220.

⁵³⁴ Claimant's Rejoinder on Preliminary Objections, para. 224.

⁵³⁵ Claimant's Rejoinder on Preliminary Objections, para. 226.

⁵³⁶ Claimant's Rejoinder on Preliminary Objections, para. 227.

status quo under Australian law and investment policies and find that the investments have been accordingly admitted within the meaning of Article 1(e) of the Treaty on the basis of the Treasurer's explicit and unchallenged No-objection Letter, without the need for further enquiry.⁵³⁷ This, the Claimant asserts, is further reinforced by the principle that official acts of the State "cloaked with the mantle of governmental authority" are *prima facie* valid and binding on the State on the international plane and by the fact that Australia's investment regime provides that violations of the admission process have no impact on the validity of the admission.⁵³⁸

350. In light of all the foregoing, and applying the above principles to the facts of the present case, the Claimant submits that Australia cannot rely on its own domestic law to defeat its international obligations and therefore (1) Australia is bound by its express, official, and continuing admission of the investments; (2) the Tribunal should not make determinations *ex post facto* as to the Australian national interest, but rather accept the *status quo* and recognize the binding nature of Australia's express, official and continuing admission of the investments; (3) any violations of Australian law are immaterial in circumstances where Australian law itself expressly provides that such violations have no impact on the substantive validity of the admission of the investments; and (4) Australia is precluded from relying on the alleged violations in circumstances where it has been in possession of all the relevant information for at least three years and has continuously and bindingly manifested its admission of the investments.⁵³⁹

C. WHETHER THE CLAIMANT'S CLAIM RELATES TO A PRE-EXISTING DISPUTE THAT FALLS OUTSIDE THE TRIBUNAL'S JURISDICTION OR OTHERWISE CONSTITUTES AN ABUSE OF RIGHT

351. The parties disagree as to whether the Claimant's claim falls outside the scope of Article 10 of the Treaty because it relates to a dispute which pre-dates the making of the investment (the "*Ratione Temporis* Argument") and/or whether the Claimant's claim amounts to an abuse of right because the Claimant restructured its investment to gain Treaty protection over a pre-existing or reasonably foreseeable dispute (the "Abuse of Right Argument").

⁵³⁷ Claimant's Counter-Memorial on Preliminary Objections, para. 231; Claimant's Rejoinder on Preliminary Objections, para. 231.

⁵³⁸ Claimant's Counter-Memorial on Preliminary Objections, paras 142(a), 231(b).

⁵³⁹ Claimant's Counter-Memorial on Preliminary Objections, para. 246; Claimant's Rejoinder on Preliminary Objections, para. 219.

1. *The Ratione Temporis Argument*

(a) *The Application of Article 10 of the Treaty to Existing Disputes*

352. According to the Respondent, the Claimant's claim falls outside the scope of Article 10 of the Treaty because Australia has not consented to the submission of pre-existing disputes to an arbitral tribunal established under this Treaty.⁵⁴⁰ The Claimant, in turn, contends that the timing of the dispute is irrelevant for the Tribunal's temporal jurisdiction. According to the Claimant, there are only two elements required for temporal jurisdiction: (1) a dispute concerning an investment must have existed at the time that the Claimant initiated the arbitration, and (2) the Treaty's substantive protections apply to any conduct that occurred after these protections have become applicable to that investment.⁵⁴¹

353. The Parties' differing views on the Tribunal's jurisdiction reflect their respective interpretations of Article 10 of the Treaty, which provides in relevant part as follows:

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

The Respondent's Position

354. The Respondent interprets Article 10 as requiring a series of qualifications in order to establish the Tribunal's jurisdiction: "the existence of a 'dispute' concerning an 'investment' or 'an investor of one Contracting Party' which is made 'in the territory of another Contracting Party'".⁵⁴² The Respondent considers that under Article 10, the "other Contracting Party" does not consent to the "submission of claims to arbitration where the dispute that is invoked *pre-dates* the making of the investment".⁵⁴³

355. In the Respondent's view, this interpretation of Article 10 of the Treaty derives from the application of Article 31(1) of the VCLT.⁵⁴⁴ Accordingly, the ordinary meaning of the phrase

⁵⁴⁰ Statement of Defence, Vol. A, paras 116–119.

⁵⁴¹ Claimant's Counter-Memorial on Preliminary Objections, paras 258–259.

⁵⁴² Statement of Defence, Vol. A, para. 117.

⁵⁴³ Statement of Defence, Vol. A, para. 117.

⁵⁴⁴ Statement of Defence, Vol. A, para. 120.

“dispute... concerning an investment” in Article 10 suggests that “there must first be an ‘investment’ before there can be a ‘dispute’”.⁵⁴⁵ Put another way, the plain meaning of Article 10 is, according to the Respondent that the Tribunal’s jurisdiction does not extend to disputes that pre-date the making of an investment. Similarly, the object and purpose of the Treaty as stated in the preamble, including the creation of favourable conditions for greater investment and the promotion of economic relations, do not support an interpretation of Article 10 as allowing an international company first to engage in a pre-existing dispute involving a subsidiary in one of the Contracting Parties, and then to arbitrate this dispute once ownership of such subsidiary is transferred to a company incorporated in the other Contracting Party.⁵⁴⁶

356. The Respondent considers Articles 6(1) and 2(1) of the Treaty as illustrative of the context of the Treaty, which in turn informs the interpretation of Article 10.⁵⁴⁷ Article 6(1) concerning the prohibition of expropriation provides that compensation for deprivation “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”.⁵⁴⁸ Phrased in this fashion, the Respondent suggests, Article 6(1) clearly indicates that Article 10 does not permit the arbitration of a dispute where the investment post-dates the alleged deprivation by many months.⁵⁴⁹ Turning to Article 2(1), the Respondent argues that the Treaty does not envisage that the host State is to be placed under a positive BIT obligation “to ‘encourage and create favourable conditions’ for putative Hong Kong investors to make investments in Australia in relation to pre-existing disputes”.⁵⁵⁰

357. The Respondent also refers to case law to support its interpretation of Article 10 of the Treaty. Relying on the tribunal’s finding in *Amco v. Indonesia*, the Respondent argues that pre-existing disputes can only be submitted to arbitration if the parties to the Treaty are “considered as having reasonably and legitimately envisaged” this result, which is not the case in the present dispute.⁵⁵¹ The Respondent also points to *Lao Holdings v. Laos* in which a company restructuring was alleged to have taken place after the given dispute had occurred.⁵⁵² The *Lao*

⁵⁴⁵ Statement of Defence, Vol. A, para. 121; Respondent’s Reply on Preliminary Objections, para. 379.

⁵⁴⁶ Statement of Defence, Vol. A, paras 122–123.

⁵⁴⁷ Respondent’s Reply on Preliminary Objections, paras 380, 381.

⁵⁴⁸ Statement of Defence, Vol. A, para. 124.

⁵⁴⁹ Statement of Defence, Vol. A, para. 125.

⁵⁵⁰ Statement of Defence, Vol. A, para. 126.

⁵⁵¹ Statement of Defence, Vol. A, paras 128–129.

⁵⁵² Respondent’s Reply on Preliminary Objections, para. 383.

Holdings tribunal referred to Article 28 of the VCLT which provides that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that part”.⁵⁵³ The *Lao Holdings* tribunal concluded that the silence of the treaty with respect to its temporal limit ought not to be interpreted as contemplating that “investors could change their nationalities at will by artful corporate restructurings to ‘forum shop’ after a legal dispute has arisen with the same investor on the same issue and had therefore become... a discrete event in the course of relations [between the Parties] that predated the Treaty”.⁵⁵⁴ In the Respondent’s view, the *Lao Holdings* tribunal’s conclusion that the relevant treaty is not to be viewed “as intending to provide legal weapons to investors for the purpose of re-engaging in a pre-existing legal dispute with the Lao Government” should apply to the present case.⁵⁵⁵

358. The Respondent does not consider there to be “a presumption, let alone an absolute rule, that in cases of doubt[,] jurisdiction in an international agreement embraces *all* disputes, including those disputes that arose before a given treaty entered into force”.⁵⁵⁶ What matters in any given case is the interpretation of the specific wording of the treaty in light of “well established principles reflected in Articles 28 and 31 of the VCLT”.⁵⁵⁷ Turning to the specific cases relied upon by the Claimant, the Respondent considers that *Georgia v. Russia* is not relevant to the present dispute since the International Court of Justice (“**ICJ**”) was not addressing the question of jurisdiction over disputes that pre-date a treaty’s coming into force, or a treaty’s application more generally to pre-existing disputes.⁵⁵⁸ The Respondent also distinguishes the decision of the Permanent Court of International Justice (“**PCIJ**”) in *Mavrommatis Palestine Concessions*. In that case, the PCIJ considered whether explicit limitations were required to limit the jurisdictional scope of a treaty as otherwise applying to *all* disputes, including those that arise out of events occurring before the conclusion of the treaty. In the Respondent’s view, the PCIJ was concerned with a particular treaty whose essential characteristic was to establish rights in

⁵⁵³ Respondent’s Reply on Preliminary Objections, para. 383.

⁵⁵⁴ Respondent’s Reply on Preliminary Objections, para. 383.

⁵⁵⁵ Respondent’s Reply on Preliminary Objections, paras 383–384.

⁵⁵⁶ Respondent’s Reply on Preliminary Objections, para. 389.

⁵⁵⁷ Respondent’s Reply on Preliminary Objections, para. 383.

⁵⁵⁸ Respondent’s Reply on Preliminary Objections, para. 387.

relation to the period prior to its entry into force.⁵⁵⁹ Consequently, no general rule was established.⁵⁶⁰

359. The Respondent further distinguishes the decisions in *Vivendi v. Argentina (II)* and *Chevron v. Ecuador (I)*, both relied on by the Claimant, on the basis that neither case considered the issue of pre-existing disputes in an analogous factual context. The *Vivendi II* tribunal did not consider the issue of pre-existing disputes at all, and the case is therefore irrelevant to the issue at hand.⁵⁶¹ *Chevron v. Ecuador (I)* concerned a long-standing investor that was already in dispute with the State prior to the entry into force of a new BIT;⁵⁶² by way of contrast, the present dispute concerns “a pre-existing dispute, then a corporate restructuring, and then an attempt to establish a pre-conceived BIT jurisdiction over the pre-existing dispute”.⁵⁶³
360. The Respondent discounts the relevance of the International Law Commission’s (“**ILC**”) 1966 *Draft Articles on the Law of Treaties with Commentaries*, cited by the Claimant to suggest that the term “disputes”, without qualification, covers all disputes existing after entry into force of the agreement. According to the Respondent, the Commentary clearly distinguishes between treaties establishing dispute resolution fora whose jurisdiction extends to all disputes existing after the entry into force of the agreement, and treaties containing a jurisdictional clause that is attached to substantive treaty provisions and to which “the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause”.⁵⁶⁴ In the Respondent’s view, the Claimant mischaracterises the Australia-Hong Kong BIT as falling into the former category, whereas in fact the second category is more apposite.⁵⁶⁵

The Claimant’s Position

361. According to the Claimant, it is not necessary to examine whether Article 10 extends the Tribunal’s jurisdiction to considering pre-existing disputes. First, in the Claimant’s view, both Parties agree that the dispute existed when the Claimant initiated the arbitration on

⁵⁵⁹ Respondent’s Reply on Preliminary Objections, para. 389.

⁵⁶⁰ Respondent’s Reply on Preliminary Objections, para. 389.

⁵⁶¹ Respondent’s Reply on Preliminary Objections, para. 385.

⁵⁶² Respondent’s Reply on Preliminary Objections, para. 391; Respondent’s Post-Hearing Brief on Preliminary Objections, para. 131.

⁵⁶³ Respondent’s Reply on Preliminary Objections, para. 391.

⁵⁶⁴ Respondent’s Reply on Preliminary Objections, para. 392.

⁵⁶⁵ Respondent’s Reply on Preliminary Objections, paras 392–393.

21 November 2011, after the entry into force of the Treaty.⁵⁶⁶ There is therefore no need to consider any disagreement between the Parties before this date. Second, the jurisdiction of the Tribunal *ratione temporis* is limited by the date on which the dispute ended, rather than the date on which it commenced. *Continuing* disputes, insofar as they continue to exist at the time of a Notice of Arbitration, are contemplated under Article 10.⁵⁶⁷ To this end, the Claimant refers to the *travaux préparatoires* of the VCLT, which states that “an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provision of the treaty”.⁵⁶⁸ Moreover, the *travaux préparatoires* state that “[b]y using the word ‘disputes’ without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes *existing* after the entry into force of the agreement”.⁵⁶⁹

362. In the event that the Tribunal considers it necessary to determine whether Article 10 applies to disputes that pre-date the entry into force of the Treaty, the Claimant contends that nothing in Article 10 or other provisions of the Treaty excludes pre-existing disputes from the scope of dispute settlement.⁵⁷⁰ According to the Claimant, “[a]bsent treaty language, there is no basis to assert that the Treaty excludes any dispute that began (but did not end) before the entry into force of the Treaty or before the making of the relevant investment”.⁵⁷¹ Consequently, the current Treaty does not exclude pre-existing disputes, whether arising before the entry into force of the Treaty or before a change in the investor’s nationality.⁵⁷² Furthermore, neither Article 2 nor Article 6 of the Treaty implies any limit on the temporal scope of Article 10. According to the Claimant, Article 2 on the encouragement and creation of favorable conditions is a substantive obligation unrelated to the temporal scope of Article 10. Article 6 concerning expropriation might hypothetically be relevant to damages but not to jurisdiction.⁵⁷³
363. According to the Claimant, the Respondent’s reliance on the analysis of legal principles in *Lao Holdings v. Laos* is misleading because, unlike in the present dispute, the relevant BIT in *Lao Holdings v. Laos* imposed an explicit temporal limitation on the jurisdictional scope of the

⁵⁶⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 259, 267.

⁵⁶⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 266.

⁵⁶⁸ Claimant’s Rejoinder on Preliminary Objections, para. 294.

⁵⁶⁹ Claimant’s Rejoinder on Preliminary Objections, para. 294.

⁵⁷⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 262.

⁵⁷¹ Claimant’s Rejoinder on Preliminary Objections, para. 278.

⁵⁷² Claimant’s Counter-Memorial on Preliminary Objections, para. 266.

⁵⁷³ Claimant’s Counter-Memorial on Preliminary Objections, paras 262–264.

treaty such that “any claim... which arose before [the BIT’s] entry into force” was excluded.⁵⁷⁴ Similarly, the Claimant maintains that the relevant BIT in *Lucchetti v. Peru* expressly defined the scope of disputes so as to exclude “differences or disputes that arose prior to its entry into force”.⁵⁷⁵

364. According to the Claimant, the PCIJ in *Mavrommatis Palestine Concessions* established a presumption that absent a specific provision to the contrary, a dispute settlement clause extends to all qualifying disputes *existing* at the time the claimant invokes the clause, regardless of when the dispute arose.⁵⁷⁶ The Claimant dismisses the Respondent’s concern that the finding in *Mavrommatis Palestine Concessions* “was limited to arbitration treaties”; according to the Claimant, the Court gave no such indication and in any case the treaty was also concerned with establishing recourse to arbitration.⁵⁷⁷ The Claimant cites academic commentators in support of the proposition that the decision in *Mavrommatis Palestine Concessions* establishes that a tribunal has jurisdiction over disputes that exist when the arbitration commences.⁵⁷⁸ This principle is, according to the Claimant, further supported by the findings of the ICJ in *Georgia v. Russia*.⁵⁷⁹ In that case Georgia conceded that a dispute between the parties had existed prior to the entry into force of the relevant treaty. The ICJ did not consider whether by virtue of this ‘pre-existing’ dispute, it lacked jurisdiction *ratione temporis*. Rather, the ICJ concluded that a “dispute must in principle *exist* at the time the Application is submitted to the Court”.⁵⁸⁰
365. The findings in *Chevron v. Ecuador (I)*, in the Claimant’s view, also confirm the broad interpretation of the term “disputes”.⁵⁸¹ In *Chevron v. Ecuador (I)*, the tribunal found that in the absence of a temporal limitation in the treaty’s dispute settlement provision, “the word ‘disputes’ must simply be given its ordinary meaning’- *i.e.* it must cover all existing disputes”.⁵⁸² Given that the existence of a dispute is an element of jurisdiction, the dispute must exist on the date the arbitration commences; therefore, according to the Claimant, it does not

⁵⁷⁴ Claimant’s Rejoinder on Preliminary Objections, para. 279.

⁵⁷⁵ Claimant’s Rejoinder on Preliminary Objections, para. 280.

⁵⁷⁶ Claimant’s Rejoinder on Preliminary Objections, para. 283.

⁵⁷⁷ Claimant’s Rejoinder on Preliminary Objections, para. 284.

⁵⁷⁸ Claimant’s Rejoinder on Preliminary Objections, paras 284–285.

⁵⁷⁹ Claimant’s Rejoinder on Preliminary Objections, para. 286.

⁵⁸⁰ Claimant’s Rejoinder on Preliminary Objections, para. 286.

⁵⁸¹ Claimant’s Rejoinder on Preliminary Objections, paras 281, 283.

⁵⁸² Claimant’s Rejoinder on Preliminary Objections, para. 283.

matter when the dispute began.⁵⁸³ The Claimant cites as further authority the observations of the tribunal in *Vivendi v. Argentina (II)* that “the determination of whether a party has standing *in an international judicial forum*... is made by reference to the date on which such proceedings are deemed to have been instituted”.⁵⁸⁴

366. Absent specific language to the contrary, the Claimant argues, an agreement that refers “disputes” to arbitration covers any disputes that exist when the arbitration clause is invoked, including those disputes that exist after the Treaty becomes applicable through a change in the nationality of the investor.⁵⁸⁵ To support this position, the Claimant refers to the ILC’s 1966 *Draft Articles on the Law of Treaties with Commentaries*, which the Claimant cites as stating that “by using the word ‘disputes’ without any qualification, the parties [to a treaty] are to be understood to be accepting jurisdiction with respect to all disputes *existing* after entry into force of the agreement”.⁵⁸⁶
367. Finally, the Claimant clarifies that it “is not seeking retroactive application of the Treaty” as none of the alleged claims arose from “any actions that preceded the [Treaty’s] entry into force”.⁵⁸⁷

(b) Legal Test for Establishing the Existence of a “Dispute”

The Respondent’s Position

368. The legal test for establishing whether a dispute has arisen is, according to the Respondent, “a disagreement on a point of law or fact; a conflict of legal views or of interests between two persons”.⁵⁸⁸ This test has, in the Respondent’s view, been established by the PCIJ in *Mavrommatis Palestine Concessions*⁵⁸⁹ and was subsequently affirmed by the ICJ in *Georgia v. Russia*.⁵⁹⁰ In *Georgia v. Russia*, the ICJ stated further that the existence of a dispute in a given case is a matter for objective determination and that “[i]t must be shown that the claim of one

⁵⁸³ Claimant’s Rejoinder on Preliminary Objections, para. 281.

⁵⁸⁴ Claimant’s Rejoinder on Preliminary Objections, paras 281–282.

⁵⁸⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 265.

⁵⁸⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 265.

⁵⁸⁷ Claimant’s Rejoinder on Preliminary Objections, paras 289–291.

⁵⁸⁸ Statement of Defence, Vol. A, para. 130.

⁵⁸⁹ Respondent’s First Post-Hearing Brief, para. 123.

⁵⁹⁰ Statement of Defence, Vol. A, para. 130.

party is positively opposed by the other”.⁵⁹¹ The Respondent also refers to *Murphy v. Ecuador* and *Teinver v. Argentina* in which the tribunals reiterated the *Georgia v. Russia* standard.⁵⁹² In *Murphy v. Ecuador*, the tribunal noted that “[i]t is generally admitted that the mere presence of a legal conflict of interests is sufficient to originate a difference of a dispute”.⁵⁹³

369. In light of the *Mavrommatis* test, the Respondent disagrees with the Claimant’s contention that, in order for there to be a dispute, the challenged measure must have passed into law.⁵⁹⁴ In the Respondent’s view, “[t]he threat to engage in conduct which, it is asserted, would breach an international obligation, can ground a dispute”.⁵⁹⁵ With respect to the case law cited by the Claimant, the Respondent argues that the decisions in *Mobil Corporation v. Venezuela* and *Lao Holdings v. Laos* do not “seek to establish a general rule” that a measure must become part of the domestic law before a dispute can be deemed to arise.⁵⁹⁶ According to *Mobil Corporation v. Venezuela*, the Respondent notes, “a decision by a government can indeed give rise to a dispute before it passes into law”.⁵⁹⁷ The Respondent asserts the proposition established by the tribunal in *Mobil Corporation v. Venezuela* that “an announced decision by a government to introduce a measure by legislation, to be considered and enacted by a legislature, can found a dispute” if that decision has been “sufficiently clearly opposed and protested by an investor”.⁵⁹⁸ In the view of the Respondent, the possibility that a government may withdraw the measure before the legislature enacts it, or that the legislature might reject it, are alternative means by which the dispute might be resolved, and not grounds to deny the existence of the dispute in the first place.⁵⁹⁹ That the *Lao Holdings* tribunal did not find a dispute in that case can be explained by the fact that the parties in *Lao Holdings v. Laos*, in contrast to the facts relevant to the present dispute, “were still in discussions” after the restructuring and “the final position of the... Government was not certain”, which led to the conclusion that “it could not be said that they were in dispute”.⁶⁰⁰

⁵⁹¹ Statement of Defence, Vol. A, para. 131.

⁵⁹² Statement of Defence, Vol. A, para. 132.

⁵⁹³ Statement of Defence, Vol. A, para. 132.

⁵⁹⁴ Respondent’s Reply on Preliminary Objections, para. 400.

⁵⁹⁵ Respondent’s Reply on Preliminary Objections, para. 401.

⁵⁹⁶ Respondent’s Reply on Preliminary Objections, para. 406.

⁵⁹⁷ Respondent’s Reply on Preliminary Objections, para. 407.

⁵⁹⁸ Respondent’s Reply on Preliminary Objections, paras 407–408.

⁵⁹⁹ Respondent’s Reply on Preliminary Objections, para. 408.

⁶⁰⁰ Respondent’s Reply on Preliminary Objections, paras 429–430.

370. The Respondent also challenges the Claimant’s reliance on *Teinver v. Argentina*, arguing that the tribunal found that “[t]o instigate a dispute, therefore, refers to the time at which the *disagreement* was formed, which can only occur once there has been at least some exchange of views by the parties. [The instigation of a dispute] does not refer to the commission of the act that caused the parties to disagree, for the very simple reason [that] a breach or violation does not become a ‘dispute’ until the injured party identifies the breach or violation and objects to it”.⁶⁰¹ This finding is, in the Respondent’s view, “entirely consistent with Australia’s position”.⁶⁰² As regards the Claimant’s reliance on the *RosInvestCo v. Russian Federation* case, the Respondent asserts that the case is irrelevant because none of Russia’s jurisdictional arguments raised “the same issue as in the current case” and RosInvestCo “was not even arguably in dispute with Russia prior to the making of its investment”.⁶⁰³ The Respondent distinguishes *RDC v. Guatemala* on the ground that, unlike in the present dispute, “jurisdiction under [the Treaty] is established by reference to the existence of ‘measures adopted or maintained by a Party’”.⁶⁰⁴ Moreover, given that “the government process leading to the [measure in question] was largely an internal one”, “there was no opposition of views prior to [its] publication”.⁶⁰⁵ The Respondent further criticises the Claimant’s interpretation of the *Gremcitel* Award. According to the Respondent, “the facts of *Gremcitel* are materially different” from the facts here because “the Peruvian Government had not previously made any public announcement concerning its intentions” to adopt the measure in question.⁶⁰⁶ Moreover, in determining the date when the dispute arose, the Respondent notes, “the *Gremcitel* tribunal applied the *Mavrommatis* test”.⁶⁰⁷

371. The Respondent dismisses the relevance of *Rights of Passage Over Indian Territory* on the ground that the cited proposition in that case—that a dispute cannot “arise until all its constituent elements ha[ve] come into existence”—only concerned that particular dispute and cannot serve as a general rule.⁶⁰⁸ According to the Respondent’s interpretation, this decision “suggests that disagreement over the existence of Portugal’s claimed right of passage could

⁶⁰¹ Respondent’s Reply on Preliminary Objections, para. 404.

⁶⁰² Respondent’s Reply on Preliminary Objections, para. 405.

⁶⁰³ Respondent’s Reply on Preliminary Objections, para. 431.

⁶⁰⁴ Respondent’s Reply on Preliminary Objections, paras 424–426.

⁶⁰⁵ Respondent’s Reply on Preliminary Objections, para. 427.

⁶⁰⁶ Respondent’s Letter to the Tribunal dated 25 January 2015, p. 2.

⁶⁰⁷ Respondent’s Letter to the Tribunal dated 25 January 2015, p. 2; Respondent’s First Post-Hearing Brief, para. 124.

⁶⁰⁸ Respondent’s Reply on Preliminary Objections, para. 402.

amount to a dispute in the absence of any allegation of a violation of an international obligation”.⁶⁰⁹

372. The Respondent disagrees with the Claimant that the actions taken by both parties in the period prior to the enactment of the plain packaging legislation were solely preparatory acts and conduct that cannot give rise to a legal dispute. Firstly, the Respondent reiterates that the test in *Mavrommatis Palestine Concessions* for the establishment of a dispute does not make a distinction between disagreements over decisions to enact a law and the actual enactment of that law.⁶¹⁰ Secondly, the Respondent disputes the relevance of the Claimant’s reliance on *Gabcikovo-Nagymaros Project* on the basis that in that case the Parties were deemed to be in dispute over the proposal by Czechoslovakia to commence damming works in its territory that would have impacts downstream on Hungary’s territory. According to the Respondent, these damming works could have been abandoned at a time when the ICJ deemed the parties to be in dispute.⁶¹¹ Finally, the Respondent disagrees with the Claimant’s assertion that the present dispute is necessarily contingent on the actual enactment of plain packaging legislation such that anything prior to enactment must properly be considered “preparatory”. According to the Respondent “the 2011 enactment of the plain packaging legislation cannot meaningfully be divorced from the Australian Government’s decision of April 2010 to introduce that very legislation”.⁶¹²

373. While the Claimant refers to the ILC’s *Draft Articles on Responsibility of States for International Wrongful Acts*—that a State does not breach its international obligations merely because certain government actors threaten or make preparations for an act that might cause such a violation if enacted—the Respondent asserts that this conflates the existence of a dispute with findings of international responsibility. In this regard, the Respondent points to the decision in *Achmea v. the Slovak Republic (II)* in which the tribunal found that “[i]t does not follow from the fact that international responsibility can arise only after an internationally wrongful act has occurred, that an internationally wrongful act is required for a legal dispute to

⁶⁰⁹ Respondent’s Reply on Preliminary Objections, para. 402.

⁶¹⁰ Respondent’s Reply on Preliminary Objections, para. 419.

⁶¹¹ Respondent’s Reply on Preliminary Objections, para. 420.

⁶¹² Respondent’s Reply on Preliminary Objections, paras 421–422.

exist”.⁶¹³ Rather, “the allegation of a breach is... a requirement for liability to arise” and not a “constitutive element of the notion of legal dispute”.⁶¹⁴

374. The Respondent also refers to *Achmea v. the Slovak Republik (II)*, which concerned a measure that had been threatened by the respondent government, but not yet enacted.⁶¹⁵ The Respondent quotes the tribunal as having found that a dispute existed when “the two Parties h[e]ld radically opposing views” on the proper interpretation of a particular treaty provision.⁶¹⁶ The Respondent also disagrees with the Claimant that *Pac Rim v. El Salvador* establishes a “general principle” that a dispute must concern a matter that has developed into a concrete legal claim.⁶¹⁷ In *Pac Rim v. El Salvador*, the critical factor, according to the Respondent, was that “the respondent continued to give indications that the mining permits at issue might yet be granted, and the parties remained in negotiation, after the date of the claimant’s acquisition of US nationality”.⁶¹⁸
375. The Respondent disputes purported limitations introduced by the Claimant into the concept of “dispute” as enunciated in *Mavrommatis Palestine Concessions*.⁶¹⁹ In particular, the manner in which the Claimant formulates its claims (*i.e.* that the claims arise only from the enactment and enforcement of the Plain Packaging Measures) is not, in the view of the Respondent, decisive.⁶²⁰ This position conflates the formulation of a claim with the question of whether a dispute exists.⁶²¹ The identification of the existence of a dispute remains a “matter for objective determination by the given court or tribunal... not a matter to be irrevocably determined by a claimant in its litigation strategy”.⁶²²
376. According to the Respondent, the conclusions of the tribunal in *Urbaser v. Argentina*—that it was for the claimant to state what it considered to be the dispute between the parties—does not suggest otherwise, since the issue of the formulation of a claim “arose in the discrete context of the difference between a shareholder’s claim and a claim on behalf of a company in its own

⁶¹³ Respondent’s Reply on Preliminary Objections, para. 417.

⁶¹⁴ Respondent’s Reply on Preliminary Objections, para. 417; Respondent’s First Post-Hearing Brief, para. 124.

⁶¹⁵ Respondent’s Reply on Preliminary Objections, para. 409.

⁶¹⁶ Respondent’s Reply on Preliminary Objections, paras 409–410.

⁶¹⁷ Respondent’s Reply on Preliminary Objections, para. 411.

⁶¹⁸ Respondent’s Reply on Preliminary Objections, para. 411.

⁶¹⁹ Respondent’s Reply on Preliminary Objections, para. 394.

⁶²⁰ Respondent’s Reply on Preliminary Objections, para. 396.

⁶²¹ Respondent’s Reply on Preliminary Objections, para. 398.

⁶²² Respondent’s Reply on preliminary Objections, para. 398.

right”.⁶²³ The correct test was, in the Respondent’s view, set out by the ICJ in the *Fisheries Jurisdiction Case*: namely that it is for this Tribunal to “determine the real dispute that has been submitted to it”.⁶²⁴ The Respondent therefore reiterates that “[a]n exercise of objective determination” is required, and for that purpose “the way that PM Asia has chosen to formulate its current BIT claim is relevant but not decisive”.⁶²⁵

377. According to the Respondent, it is critical that the Tribunal focuses on “the substance of the dispute as it developed... [and] to determine whether the facts or considerations that gave rise to the earlier dispute continue to be central to the current claim”.⁶²⁶ In reaching an objective determination of the dispute, the Tribunal ought not, in the Respondent’s view, be concerned with whether precisely the same BIT claim could have been made prior to the restructuring of February 2011.

378. In further support of its assertion that the dispute prior to the enactment of the plain packaging legislation is the same as the dispute presently before this Tribunal, the Respondent invites the Tribunal to adopt the finding in *Lucchetti v. Peru* that “the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter” and this Tribunal will “have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute”.⁶²⁷ The Respondent reiterates that “the fact that the original dispute did not involve, and necessarily could not have involved, any allegation of breach of the BIT did not, in itself, mean that the claim presented under the BIT constituted a distinct dispute”.⁶²⁸

The Claimant’s Position

379. The Claimant disagrees with the Respondent’s position that the PCIJ in *Mavrommatis Palestine Concessions* endorsed the general principle that “a mere conflict of views between two parties gives rise to a dispute, even if that conflict of views pertains to a measure that has not been adopted, might never be adopted, and the specific contours of which remain uncertain”.⁶²⁹ The Claimant distinguishes *Mavrommatis Palestine Concessions* on the basis that in that case the

⁶²³ Respondent’s Reply on Preliminary Objections, para. 398.

⁶²⁴ Respondent’s Reply on Preliminary Objections, para. 398.

⁶²⁵ Respondent’s Reply on Preliminary Objections, para. 399.

⁶²⁶ Respondent’s Reply on Preliminary Objections, para. 399.

⁶²⁷ Respondent’s Reply on Preliminary Objections, paras 413, 476.

⁶²⁸ Respondent’s Reply on Preliminary Objections, para. 414.

⁶²⁹ Claimant’s Rejoinder on Preliminary Objections, para. 254.

PCIJ did not decide, and was not asked to decide, this principle: the PCIJ, in the view of the Claimant, held only that a dispute existed in that case because Greece had asserted that Britain had taken an action in breach of international law.⁶³⁰ According to the Claimant, the question before the present tribunal—which is one not touched upon by the PCIJ in *Mavrommatis Palestine Concessions*—is “whether preparatory activity gives rise to a dispute”.⁶³¹ In the Claimant’s view, the correct interpretation of *Georgia v. Russia* is that the ICJ’s analysis focused on the question of whether a dispute about a claim had achieved the “specific crystallisation” necessary to invoke the ICJ’s jurisdiction over contentious cases and that such crystallisation occurred only subsequent to the allegedly wrongful State conduct.⁶³²

380. The Claimant further distinguishes *Murphy v. Ecuador* on the basis that the position relied upon by the Respondent—that “the mere presence of a legal conflict of interest is sufficient to originate a difference or dispute”—is the position of the dissenting arbitrator in that case.⁶³³ In any event, according to the Claimant, the conclusion of the relevant dissenting opinion in *Murphy v. Ecuador* was that the dispute arose *after* the measure that the claimant alleged breached the treaty.⁶³⁴ Similarly, in *Teinver v. Argentina*, the tribunal found that a dispute can arise only after “the injured party identifies the breach or violations and objects to it”.⁶³⁵
381. In the Claimant’s view, the question that is before this Tribunal—namely, whether a preparatory act gives rise to a dispute—has been conclusively decided in international law.⁶³⁶ In the view of the tribunals in *Mobil Corporation v. Venezuela* and *Lao Holdings v. Laos*, the Claimant notes, “the dispute over [specific] measures can only be deemed to have arisen after the measures were taken”.⁶³⁷ The Claimant distinguishes *Mobil Corporation v. Venezuela* from the present case on the ground that it does not challenge “an announced but unimplemented government policy” under the Treaty.⁶³⁸ With regard to *Lao Holdings v. Laos*, the Claimant asserts that the facts of that case are analogous to the matters presently in dispute. In *Lao Holdings v. Laos*, the tribunal was concerned with the compatibility with the applicable treaty of imposing a new tax code on

⁶³⁰ Claimant’s Rejoinder on Preliminary Objections, para. 254.

⁶³¹ Claimant’s Rejoinder on Preliminary Objections, para. 255.

⁶³² Claimant’s Counter-Memorial on Preliminary Objections, para. 282.

⁶³³ Claimant’s Counter-Memorial on Preliminary Objections, para. 280.

⁶³⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 280.

⁶³⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 281.

⁶³⁶ Claimant’s Rejoinder on Preliminary Objections, para. 255.

⁶³⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 277; Claimant’s Rejoinder on Preliminary Objections, para. 255.

⁶³⁸ Claimant’s Rejoinder on Preliminary Objections, para. 270.

the investor. The tax code was enacted a month before the restructuring of the original Macau company that resulted in the claimant becoming an investor under the applicable treaty.⁶³⁹ The respondent State challenged the tribunal's jurisdiction *ratione temporis* on the grounds that the dispute actually arose more than a month before the business restructuring.⁶⁴⁰ The *Lao Holdings* tribunal reasoned that Laos carried the burden of proving that the dispute arose earlier than the claimant had alleged.⁶⁴¹ This in turn required the proof that (1) it was objectively unreasonable for the investor to have believed that the issue was still live; (2) the government's consideration of the matter had come to an end; and (3) that the government's decision was "completely finalized".⁶⁴² The tribunal held that Laos failed to meet this burden of proof, and the dispute arose only "when the final decision [on the tax code]... was adopted at the highest level" of the government.⁶⁴³ The Claimant emphasises that the tribunal still "found no pre-existing dispute" even though the tax law had already been amended and the investor's application had been rejected by the Minister of Finance "at the time the investment was made".⁶⁴⁴

382. The Claimant also refers to *Teinver v. Argentina* and *RosInvestCo v. Russian Federation* to further support its position that a measure must pass into law before it can form the subject of a legal dispute. Accordingly, the tribunal's finding in *Teinver v. Argentina* were that "a breach or violation does not become a 'dispute' until the injured party identifies the breach or violation and objects to it".⁶⁴⁵ In *RosInvestCo v. Russian Federation*, the tribunal put emphasis on the timing of the specific acts that allegedly breached the BIT, rather than the origin of any broader disagreements. In the view of the tribunal, although Russia's earlier conduct was "inextricably linked" to the subsequent acts, the "major alleged acts of Respondent breaching the [BIT]... all occurred after Claimant was an investor under the [BIT]".⁶⁴⁶ In addressing the Respondent's attempts to distinguish *RosInvestCo v. Russian Federation*, the Claimant emphasizes that "[t]he tribunal was focused on when the acts giving rise to the dispute occurred, not whether *RosInvestCo* as opposed to *Yukos* was involved in an earlier dispute".⁶⁴⁷ According to the

⁶³⁹ Claimant's Counter-Memorial on Preliminary Objections, paras 297–299.

⁶⁴⁰ Claimant's Counter-Memorial on Preliminary Objections, para. 301.

⁶⁴¹ Claimant's Counter-Memorial on Preliminary Objections, para. 302.

⁶⁴² Claimant's Counter-Memorial on Preliminary Objections, para. 302.

⁶⁴³ Claimant's Counter-Memorial on Preliminary Objections, paras 302–303.

⁶⁴⁴ Claimant's Counter-Memorial on Preliminary Objections, paras 266–268.

⁶⁴⁵ Claimant's Counter-Memorial on Preliminary Objections, para. 277.

⁶⁴⁶ Claimant's Counter-Memorial on Preliminary Objections, para. 307; Claimant's Rejoinder on Preliminary Objections, para. 256.

⁶⁴⁷ Claimant's Rejoinder on Preliminary Objections, para. 257.

Claimant, a similar fact pattern arises in *RDC v. Guatemala*, wherein the tribunal determined that the relevant dispute “crystalliz[ed]” only subsequent to the entry into force of the relevant *lesivo* resolution said to have violated the applicable BIT.⁶⁴⁸ Furthermore, the Claimant puts emphasis on the *Gremcitel* Award in which the tribunal considered the critical date of the relevant dispute as the date “on which the State adopts the disputed measure, even where the measure represents the culmination of a process or sequence of events which may have started years earlier”.⁶⁴⁹ Lastly, the Claimant points to the decision of the arbitral tribunal in *Cervin v. Costa Rica* in which it was found that even where “there has existed pre-existing litigation”, such pre-existing litigation “cannot in itself deprive the Tribunal of jurisdiction”.⁶⁵⁰

383. According to the Claimant, in *Rights of Passage Over Indian Territory*, the ICJ explained that, “while ‘[c]ertain incidents occurred [before 1954]... they did not lead the Parties to adopt clearly-defined positions as against each other. The ‘conflict of legal views’ between the Parties which the [PCIJ] in [*Mavrommatis Palestine Concessions*] includes in its definition of a dispute had not yet arisen”.⁶⁵¹ This case, the Claimant maintains, establishes that a dispute cannot “arise until all its constituent elements ha[ve] come into existence”, including an act or omission allegedly in breach of the respondent State’s international obligations.⁶⁵² Similarly, in *Electricity Company of Sofia and Bulgaria*, the Claimant adds, the PCIJ rejected Bulgaria’s assertions that the Court lacked jurisdiction *ratione temporis* on the basis that the dispute had arisen “from ‘situations or facts’ that took place prior to the date of Belgium’s acceptance of the Court’s compulsory jurisdiction”. According to the Claimant, the Court considered that “the ‘situations or facts’ that Bulgaria alleged had given rise to the dispute were not the dispute’s ‘real cause’”. Rather, the real cause of the dispute was reflected in the “concrete actions that allegedly breached Bulgaria’s international obligations and that were taken by the Bulgarian government after the critical date”.⁶⁵³ In further support of this proposition, the Claimant cites the PCIJ in *Phosphates in Morocco* wherein the PCIJ held that “a dispute could only arise after the enactment of the challenged measures that were the ‘real cause’ of the dispute”.⁶⁵⁴

⁶⁴⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 294.

⁶⁴⁹ Claimant’s Letter to the Tribunal dated 22 January 2015, p. 3.

⁶⁵⁰ Claimant’s Rejoinder on Preliminary Objections, para. 287.

⁶⁵¹ Claimant’s Rejoinder on Preliminary Objections, para. 260.

⁶⁵² Claimant’s Counter-Memorial on Preliminary Objections, para. 277.

⁶⁵³ Claimant’s Rejoinder on Preliminary Objections, para. 261.

⁶⁵⁴ Claimant’s Rejoinder on Preliminary Objections, para. 262.

384. Announcements of decisions to introduce specific legislation are, in the Claimant’s view, better characterised as preparatory acts that, absent a positive obligation to the contrary, do not amount to a breach of international law.⁶⁵⁵ This is because such statements, in the words of the ICJ in *Gabcikovo-Nagymaros Project*, do not “‘predetermine the final decision to be taken’ on the issue”.⁶⁵⁶ To support its argument, the Claimant quotes ILC’s *Draft Articles on Responsibility of States for International Wrongful Acts*, which makes, in the view of the Claimant, a distinction between “when a breach of international law occurs” as opposed to “being merely apprehended or imminent”.⁶⁵⁷ The Claimant also points out that, to determine whether a dispute has arisen, the tribunal in *CMS Gas Transmission Company v. Argentina* reasoned that, “what counts is whether the rights of the investor have been affected”. Similarly, the *Pac Rim* tribunal in *Pac Rim v. El Salvador* put emphasis on “at least one specific and identifiable governmental measure that allegedly terminated the rights of the claimants”.⁶⁵⁸
385. The Claimant further maintains that *Achmea v. the Slovak Republik (II)* supports its position. In *Achmea v. the Slovak Republik (II)*, the respondent State had announced its intent to pursue a unified health insurance system, but it had not yet implemented that measure when the claimant initiated arbitration. The tribunal “declined jurisdiction because... there could be no legal dispute under the BIT until such time as the [respondent] adopted the measure in question”.⁶⁵⁹ The Claimant quotes the *Achmea II* tribunal’s findings that the host State’s “consent only extends to disputes dealing with alleged breaches of the BIT that have already occurred at the time of the institution of arbitral proceedings” and that there could be no “disputes concerning an investment” under the BIT unless “on the basis of [the claimant’s] claims of fact there could occur a [treaty] violation”. According to the Claimant, the *Achmea II* tribunal noted further that, “preparatory work... is in any circumstances not unlawful”.⁶⁶⁰
386. Even if the Tribunal were to find that a dispute can arise on the basis of a threat to enact law that will violate an applicable BIT, the Claimant submits that in order to identify the subject of the dispute, the Tribunal “must examine Claimant’s pleadings to determine which acts or omissions Claimant asserts breached the BIT and form the basis for its claims”.⁶⁶¹ The Claimant refers to

⁶⁵⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 285.

⁶⁵⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 287–288.

⁶⁵⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 285.

⁶⁵⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 286.

⁶⁵⁹ Claimant’s Rejoinder on Preliminary Objections, para. 263.

⁶⁶⁰ Claimant’s Rejoinder on Preliminary Objections, para. 264.

⁶⁶¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 271.

Urbaser v. Argentina in which the tribunal explained that “it is for Claimants to state the claims they are submitting to this arbitral jurisdiction. It is for them to say what they consider to be the ‘dispute arising between them and the [respondent State]’”.⁶⁶² In the present case, the Claimant made it clear that its “claims arise from the enactment and enforcement of the TPP Act and its effect on investments in Australia owned or controlled by PM Asia”.⁶⁶³

387. Finally, the Claimant disagrees with the Respondent’s argument that its claim can be interpreted as referring to a pre-existing dispute concerning the threat of passing plain packaging legislation. Insofar as there was a dispute between PMI and the Respondent prior to the enactment of the plain packaging legislation, the Claimant asserts that this dispute cannot be considered the same as that which is currently before the Tribunal. In this regard, the Claimant disagrees with the Respondent’s test for ascertaining whether two disputes are the same. In order to determine whether two disputes are the same, the Claimant contends, investor-State tribunals “have applied a ‘triple-identity’ test that requires an examination of the cause of action, object, and parties to the two disputes”.⁶⁶⁴ In the Claimant’s view, an application of this test reveals that, “the dispute that Respondent posits and the dispute that is actually at issue in this arbitration are entirely distinct”.⁶⁶⁵

388. Applying the *Lucchetti v. Peru* standard as suggested by the Respondent, the Claimant argues, “leads to the same outcome as the triple-identity test”.⁶⁶⁶ In *Lucchetti v. Peru*, the tribunal was required to determine whether a dispute that predated the entry into force of the applicable BIT was the same as the dispute that was at that time before the tribunal. Each dispute referred to different decrees, issued by the same Peruvian municipality denying the investor certain construction and operating licenses. The *Lucchetti* tribunal decided that the two disputes were the same, identifying as determinative of the issue the consideration of “whether and to what extent the subject matter or facts that were the *real cause* of the disputes differ from or are identical to the other”. The fact pattern in *Lucchetti v. Peru*, the Claimant asserts, is distinct from that of the present dispute, since the present dispute concerns only one piece of legislation “without any predecessor action of equivalent (or any) legal effect on the Claimants investments”.⁶⁶⁷

⁶⁶² Claimant’s Counter-Memorial on Preliminary Objections, para. 271.

⁶⁶³ Claimant’s Counter-Memorial on Preliminary Objections, para. 273.

⁶⁶⁴ Claimant’s Rejoinder on Preliminary Objections, para. 271.

⁶⁶⁵ Claimant’s Rejoinder on Preliminary Objections, para. 272.

⁶⁶⁶ Claimant’s Rejoinder on Preliminary Objections, para. 273.

⁶⁶⁷ Claimant’s Rejoinder on Preliminary Objections, para. 274.

(c) *Evidence Concerning the Time When the Parties' Dispute Arose*

The Respondent's Position

389. In the Respondent's view, "public statements and exchanges" indicate that Australia's announcement of April 2010 gave rise to "a disagreement and/or conflict" between the Parties as required by the *Mavrommatis* test.⁶⁶⁸ The Respondent points out that in January 2009 the PMI Group (via PML) opposed plain packaging in the NPHT consultation, taking substantially the same position as in this case:⁶⁶⁹ (a) that the public health benefit of plain packaging is not supported by the evidence; (b) that plain packaging is likely to increase illicit tobacco trade; (c) that mandating plain packaging would require the Australian Government to compensate trademark owners for expropriating some of the world's most valuable brands; and (d) that eliminating trademarks would violate international treaty obligations.⁶⁷⁰ The Respondent quotes the 2009 PML submission in the NPHT consultation as stating that "[m]andating plain packaging or dedicating the entire package to government warnings is extreme and disproportionate, unsupported by the evidence, and would constitute an expropriation for which compensation is due".⁶⁷¹ The Respondent points out that PML reiterated these concerns in 2009 following the announcement by NPHT of a series of "key action areas" in relation to tobacco packaging.⁶⁷² In September 2009, PMI Group (via the solicitors of PML and the Managing Director of PM Australia) contacted the Health Minister and the Trade Minister to make its claim.⁶⁷³

390. In April 2010, the Government announced its decision to introduce plain packaging, which, according to the Respondent, signaled the Government's commitment at the highest level to introduce the measures.⁶⁷⁴ One day after this announcement, PML's Director of Corporate Affairs reiterated PML's opposition to plain packaging in the *Australian Financial Review*, stating that the Plain Packaging Measures were "an unconstitutional expropriation of our valuable intellectual property and violate[d] a variety of Australian international trade obligations".⁶⁷⁵ On the same day, PML provided a submission to the Senate Community Affairs

⁶⁶⁸ Respondent's Reply on Preliminary Objections, para. 419.

⁶⁶⁹ Statement of Defence, Vol A, para. 76.

⁶⁷⁰ Statement of Defence, Vol. A, para. 76.

⁶⁷¹ Statement of Defence, Vol. A, para. 77.

⁶⁷² Statement of Defence, Vol. A, para. 79.

⁶⁷³ Statement of Defence, Vol. A, para. 134.

⁶⁷⁴ Respondent's First Post-Hearing Brief, para. 70.

⁶⁷⁵ Statement of Defence, Vol. A, paras 88, 134.

Committee in which it opposed the Plain Tobacco packaging (Removing Branding from Cigarette Packs) Bill 2009.⁶⁷⁶ Following the Government’s publication of its response to the NPHT Report in May 2010, Mr. Pellegrini—the President of PM Asia at the time—stated that “[w]e oppose plain packaging, which is not supported by evidence of a public health benefit and which will increase illicit trade, harm competition and violate Australian and international trade law”.⁶⁷⁷

391. These events, in the Respondent’s view, “manifested, and provide objective evidence of, the conflict of views between the disputants”⁶⁷⁸ regarding the legality of the *implementation* of the plain packaging legislation.⁶⁷⁹ Accordingly, by this point, a dispute had crystallized between Philip Morris and the Australian Government. By this time, PMI and the Australian Government were able to take opposing views on a point of law or fact because the Plain Packaging Measures were sufficiently definite and precise in their formulation, and sufficiently clear in their likely effect on the Philip Morris group, to enable the group to dispute the likely “*legality and efficacy* of a measure that requires tobacco products to be sold in plain packaging”.⁶⁸⁰
392. According to the Respondent, the substance of the dispute that crystallised in April 2010 contained three legal strands: “Australia’s obligations under the Australian Constitution, intellectual property or like treaties (such as the WTO TRIPS Agreement) and international investment treaties (*i.e.* BITs or FTAs)”.⁶⁸¹ Moreover, “the same basic claim underpinned all three strands”, which was that the implementation of the plain packaging legislation would expropriate or take away the ability to use trademarks and could not be justified as a legitimate public health measure.⁶⁸² The dispute remained in substance the same up to the Claimant’s initiation of these proceedings and, according to the Respondent, “continues to underpin PM Asia’s claim under the BIT”.⁶⁸³

⁶⁷⁶ Statement of Defence, Vol. A, para. 89.

⁶⁷⁷ Statement of Defence, Vol. A, para. 91.

⁶⁷⁸ Respondent’s First Post-Hearing Brief, para. 71.

⁶⁷⁹ Respondent’s First Post-Hearing Brief, para. 71.

⁶⁸⁰ Respondent’s Reply on Preliminary Objections, para. 377; Respondent’s First Post-Hearing Brief, para. 69.

⁶⁸¹ Respondent’s First Post-Hearing Brief, para. 69.

⁶⁸² Respondent’s First Post-Hearing Brief, para. 69.

⁶⁸³ Respondent’s Reply on Preliminary Objections, para. 377; Respondent’s First Post-Hearing Brief, paras 69, 127.

393. It is, in the Respondent's view, therefore "plainly incorrect to characterise the announcement of a government decision to introduce legislation as merely a plan" or a "statement of intent".⁶⁸⁴ Nor, in the Respondent's view, can the factual record prior to April 2010, be properly described as "policy debate about a potential act".⁶⁸⁵ The Respondent asserts, it was "patently clear" that the introduction of plain packaging was a "significant likelihood" by September 2010 and "highly probable" by January or February 2011, during which time the PMI Group took no different view.⁶⁸⁶ In particular, the Respondent points to the fact that from April 2008 the NPHT had considered, and from September 2009 had recommended the adoption of plain packaging, and from April 2010 the Australian Government had decided to introduce plain packaging.⁶⁸⁷ In July of the same year, the Australian Government published a timetable for the implementation of its decision, and "both the Government and the Philip Morris group subsequently worked on the basis of that timetable".⁶⁸⁸ According to the Respondent, therefore, PMI's public statements and internal documents evidence, in the view of the Respondent, its understanding that the government was "determined to introduce these measures".⁶⁸⁹
394. The Respondent contends that the assertion by the Claimant that there was no pre-existing dispute is contradicted by the Claimant's Written Notice of Claim in which the Claimant defines its complaint as pertaining to "the Bill (un-enacted)" and envisages "commencement of proceedings prior to enactment".⁶⁹⁰ The Claimant's contention that its Written Notification of Claim "was intended merely to prevent a dispute from arising", the Respondent argues, "is entirely artificial" because the Written Notification did not predicate the existence of a dispute "on the enactment of the plain packaging legislation" as the Claimant suggests.⁶⁹¹ The Respondent refers to the introductory passage in the Written Notification, which states that "[i]f the Claim is not admitted, PM Asia advises, pursuant to Article 10, that it is willing to meet and confer with representatives of [Australia]".⁶⁹² The Written Notification, the Respondent notes, employs the term "the Bill" rather than "the particular Bill once enacted" and seeks a remedy

⁶⁸⁴ Respondent's Reply on Preliminary Objections, para. 419.

⁶⁸⁵ Respondent's First Post-Hearing Brief, para. 72.

⁶⁸⁶ Respondent's Reply on Preliminary objections, para. 411; Respondent's First Post-Hearing Brief, para. 88.

⁶⁸⁷ Respondent's Reply on Preliminary Objections, para. 371.

⁶⁸⁸ Respondent's Reply on Preliminary Objections, para. 371.

⁶⁸⁹ Respondent's First Post-Hearing Brief, para. 89.

⁶⁹⁰ Respondent's Reply on Preliminary Objections, para. 435.

⁶⁹¹ Respondent's Reply on Preliminary Objections, paras 432-434.

⁶⁹² Respondent's Reply on Preliminary Objections, para. 434.

even “prior to enactment” by requesting Australia to “cease and discontinue all steps towards enacting plain packaging legislation”.⁶⁹³ The Respondent challenges the Claimant’s position that the Written Notification “was clearly conditioned on an uncertain event” on the basis that “the terms ‘once’ and ‘will’, not ‘if’ and ‘would’” were used therein.⁶⁹⁴

The Claimant’s Position

395. In the present case, the Claimant contends that the measure that gave rise to the present dispute is the enactment of the TPP Act by the Parliament and the Respondent’s attempt to “subvert the BIT by redefining the ‘dispute’” to include preparatory acts and conduct should be rejected by the Tribunal.⁶⁹⁵ According to the Claimant, there is no basis for the Respondent’s argument that the dispute concerns the legality of its decision to introduce plain packaging and the ensuing policy and political debate, because the Claimant has never claimed that these events breached the Treaty.⁶⁹⁶ In the Claimant’s view, prior to the adoption of the TPP Act, the Claimant’s legal rights regarding its brands and trademarks were not affected and certainly not terminated.⁶⁹⁷ There was therefore no basis to develop a concrete legal claim.⁶⁹⁸ The events preceding the enactment of the TPP Act, including Prime Minister Rudd’s announcement in April 2010, the Claimant maintains, are merely facts leading to the dispute, and not acts giving rise to the dispute. This is because “[a] legal dispute cannot arise simply because someone expressed a view about the ‘legality and efficacy’ of plain packaging”.⁶⁹⁹

396. In the Claimant’s view, “‘plain packaging’ is not a legal measure giving rise to a legal dispute. It is a regulatory concept that has been debated in Australia at least since the 1990s and on which the PMI Group (or its corporate predecessors) have expressed views for decades”.⁷⁰⁰ In fact, Prime Minister Rudd had no power to adopt the TPP Act or to ensure the passage of the TPP Act by Parliament⁷⁰¹ and, accordingly, “if the TPP A[ct] never materialized, none of those

⁶⁹³ Respondent’s Reply on Preliminary Objections, para. 435.

⁶⁹⁴ Respondent’s Reply on Preliminary Objections, para. 437.

⁶⁹⁵ Claimant’s Counter-Memorial on Preliminary Objections, paras 288, 290.

⁶⁹⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 284; Claimant’s Rejoinder on Preliminary Objections, paras 252–253, 269.

⁶⁹⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 286.

⁶⁹⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 276.

⁶⁹⁹ Claimant’s Second Post-Hearing Brief, para. 18.

⁷⁰⁰ Claimant’s Second Post-Hearing Brief, para. 18.

⁷⁰¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 287.

statements could have given rise to a cognizable investment dispute under the [Treaty]”.⁷⁰² Any disagreement arising before that time was a political or policy debate⁷⁰³ and better characterised as preparatory acts that, absent a positive obligation to the contrary, do not amount to a breach of international law.⁷⁰⁴ In the Claimant’s view, the Respondent conflates two events that are legally distinct: “the inchoate policy debate that the Prime Minister’s announcement spurred in April 2010 and the legal dispute that crystallized when Parliament enacted plain packaging legislation in 2011 and Claimant initiated the arbitration”.⁷⁰⁵

397. The Claimant strongly disputes the contention that the enactment of the TPP Act was highly probable. According to the Claimant, “[i]rrefutable evidence confirms that, even in the view of the Australian government, the prospects for plain packaging legislation were highly uncertain during and beyond the fall of 2010”.⁷⁰⁶ The Claimant points to a Parliamentary briefing book that stated in September 2010 that, “[i]t is difficult to determine the likely fate of the plain packaging proposal given that the position of the [Opposition] Coalition and the independent members is unknown”.⁷⁰⁷ The Claimant also points out that in the same month, the Australian Government’s Health Minister stated that, “she had not yet even discussed the plain packaging proposal with independent members of Parliament”.⁷⁰⁸ Similar uncertainty is, according to the Claimant, reflected in PMI’s 2010 Annual Report.⁷⁰⁹ The Claimant asserts that it was only in late May 2011 that it came to believe that there was “a serious threat that the legislation would pass” and that accordingly, in June 2011, “the decision was taken... to send a notice [of claim]”.⁷¹⁰
398. According to the Claimant, “even if the dispute ‘pre-existed’ the investments (it did not), the Tribunal would still have jurisdiction *ratione temporis* over the dispute as long as the dispute continued to exist on the date of the Notice of Arbitration”.⁷¹¹ The Claimant reiterates that both Parties agree that the dispute existed when the Claimant submitted its Notice of Arbitration on

⁷⁰² Claimant’s Counter-Memorial on Preliminary Objections, para. 289.

⁷⁰³ Claimant’s Counter-Memorial on Preliminary Objections, para. 276.

⁷⁰⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 285; Claimant’s Second Post-Hearing Brief, para. 17.

⁷⁰⁵ Claimant’s Second Post-Hearing Brief, para. 19.

⁷⁰⁶ Claimant’s Second Post-Hearing Brief, para. 25.

⁷⁰⁷ Claimant’s Second Post-Hearing Brief, para. 25.

⁷⁰⁸ Claimants Second Post-Hearing Brief, para. 25.

⁷⁰⁹ Claimant’s Second Post-Hearing Brief, para. 26.

⁷¹⁰ Claimant’s Second Post-Hearing Brief, para. 27.

⁷¹¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 266.

21 November 2011 since the Respondent has not argued that the dispute ceased to exist before this point.⁷¹²

399. Finally, the Claimant counters the Respondent's argument that the dispute arose before the enactment of the TPP Act in November 2011 because the Claimant filed a Written Notification of Claim in June 2011. According to the Claimant, the purpose of the Written Notification was to warn the Respondent that a dispute would arise if the plain packaging legislation were to be enacted, not to acknowledge that a dispute already existed.⁷¹³ The Written Notification is conditioned on a future and uncertain event (the passage of the plain packaging legislation), as demonstrated by the use of the word "will" throughout the text.⁷¹⁴ All potential claims identified in the Written Notification depend on this future and uncertain event.⁷¹⁵ The Claimant further maintains that the Written Notification is not an indication of the existence of a dispute, because the Notification itself explains the substantial change of the political context and prospects for the legislation between the time when it was introduced to Parliament and the time when the Coalition withdrew its opposition.⁷¹⁶

2. The Abuse of Right Argument

(a) Content of the Abuse of Right Doctrine

The Respondent's Position

400. The Respondent argues that even if the claimed investment falls under Article 10 of the Treaty, the doctrine of abuse of rights forbids the Claimant from exercising the right in Article 10.⁷¹⁷ Citing academic authority, the Respondent gives the following explanation for the doctrine:

⁷¹² Claimant's Counter-Memorial on Preliminary Objections, para. 267.

⁷¹³ Claimant's Counter-Memorial on Preliminary Objections, para. 309.

⁷¹⁴ Claimant's Counter-Memorial on Preliminary Objections, para. 310.

⁷¹⁵ Claimant's Counter-Memorial on Preliminary Objections, para. 311.

⁷¹⁶ Claimant's Counter-Memorial on Preliminary Objections, para. 312.

⁷¹⁷ Statement of Defence, Vol. A, para. 137.

A reasonable and bona fide exercise of a right... is one which is appropriate and necessary for the purpose of the right i.e. in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty.⁷¹⁸

401. The Respondent argues that the doctrine has been widely applied in national legal systems, in the legal order of the European Union, as well as by international courts and tribunals,⁷¹⁹ including investment tribunals.⁷²⁰ By way of example, the Respondent refers to the decision of the Appellate Body of the World Trade Organization in *United States—Standards for Reformulated and Conventional Gasoline* wherein the tribunal described the chapeau of Article XX of the *General Agreement on Tariffs and Trade 1994* as “animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the [GATT]”.⁷²¹
402. According to the Respondent, the abuse of rights doctrine is neither exceptionally applied, nor applied with a particularly high standard.⁷²² The doctrine “merely restricts the application of a given treaty to what the treaty parties intended” thereby bringing the jurisdiction of the arbitral tribunal within the boundaries of the Parties’ consent.⁷²³ The Respondent points to a “body of investment treaty cases where tribunals have considered and applied the doctrine of abuse of rights... precisely in the context of a corporate restructur[ing] intended in whole or in substantial part to achieve treaty protection”. From this body of case law, it is, according to the Respondent, possible to establish a number of factors that are to be taken into consideration in determining whether there is an abuse of right.⁷²⁴ The two key factors are:

⁷¹⁸ Statement of Defence, Vol. A, para. 138.

⁷¹⁹ Statement of Defence, Vol. A, para. 138.

⁷²⁰ Statement of Defence, Vol. A, para. 141.

⁷²¹ Statement of Defence, Vol. A, para. 139.

⁷²² Respondent’s Reply on Preliminary Objections, para. 443, 454.

⁷²³ Respondent’s Reply on Preliminary Objections, paras 443, 448.

⁷²⁴ Respondent’s Reply on Preliminary Objections, para. 455.

- a. “[K]nowledge of the existing or foreseeable dispute”⁷²⁵ and in particular where “the relevant party can see an actual dispute or can foresee a specific dispute as a high probability and not merely as a general future controversy”;⁷²⁶ and
- b. “[C]orporate restructur[ing] of an investment such that BIT protection is then obtained with a view to bringing a preconceived BIT claim in respect of that actual or specific future dispute” (*i.e.* “[t]he timing of the corporate restructur[ing]” and “[t]he purpose of or motivation for the corporate restructur[ing]”).⁷²⁷

403. Other relevant factors are the timing of the claim, the transparency of the corporate restructuring (for example, where an investment is made without revealing to the host State the true motives behind such an investment⁷²⁸), and whether the corporate restructuring was followed by subsequent economic activity in the host State.⁷²⁹

404. The Respondent submits that the doctrine of abuse of rights is based on the principle of good faith, citing the tribunal in *Phoenix Action v. Czech Republic* to the effect that “[t]he principle of good faith governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused”.⁷³⁰ This does not, however, mean that there is a presumption that PM Asia has acted in good faith.⁷³¹ Referring by way of example to the decisions in *Pac Rim v. El Salvador* and *Mobil Corporation v. Venezuela*, the Respondent asserts that whether a claim brought subsequent to a corporate restructuring amounts to an abuse of right “depends on the facts and circumstances of the case” and not any presumption in the claimant’s favour.⁷³² The Respondent further asserts that the decisions in *Phoenix Action v. Czech Republic*, *Pac Rim v. El Salvador*, *Tidewater v. Venezuela* and *ConocoPhillips v. Venezuela*, all of which deal with corporate restructuring, make “no mention at all... of any [such] presumption”.⁷³³ In the Respondent’s view, the decision in *Chevron v. Ecuador (I)*, relied upon by the Claimant as establishing a

⁷²⁵ Statement of Defence, Vol. A, para. 164; Respondent’s Reply on Preliminary Objections, para. 508.

⁷²⁶ Respondent’s Reply on Preliminary Objections, para. 466.

⁷²⁷ Respondent’s Reply on Preliminary Objections, paras 455, 508.

⁷²⁸ Respondent’s Reply on Preliminary Objections, para. 466.

⁷²⁹ Respondent’s Reply on Preliminary Objections, para. 455, 508.

⁷³⁰ Statement of Defence, Vol. A, paras 137, 143.

⁷³¹ Respondent’s Reply on Preliminary Objections, para. 450.

⁷³² Respondent’s Reply on Preliminary Objections, para. 448.

⁷³³ Respondent’s Reply on Preliminary Objections, paras 447–448.

presumption in favour of a claimant's right to bring a claim, was issued in "a quite different context".⁷³⁴

405. According to the Respondent, the foreseeability of the dispute and the motivation of the restructuring establish bad faith and an abuse of right where they result in "a manipulation of the international system of investment arbitration" such that rights are exercised in a way that is calculated to procure for the investor an "unfair advantage in light of the obligation assumed".⁷³⁵ By way of example, the Respondent refers to *Phoenix Action v. Czech Republic* wherein the tribunal determined that "if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment".⁷³⁶ The *Phoenix Action* tribunal was concerned to ensure that "the ICSID mechanism does not protect investments that it was not designed for [sic] to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism".⁷³⁷
406. The Respondent maintains that the "dozens" of cases to which the Claimant refers concern allegations of abuse in different circumstances and are therefore irrelevant to the present dispute.⁷³⁸ The Respondent further asserts that there is no case law that supports the Claimant's argument that there is a need to establish "an additional requirement [of] conduct of some unspecified but egregious level, such as fraud".⁷³⁹ For example, the Respondent argues that the tribunal in *Cementownia v. Turkey* "did consider an allegation of abusive treaty shopping" and that it "found that a corporate restructur[ing] at a time when the companies were on notice of the potential termination of a concession contract, but prior to the actual termination, would have fallen 'within the category of an artifice'".⁷⁴⁰ The Respondent argues that *Cementownia* supports its position that "a corporate restructur[ing] for the purpose of making a preconceived BIT claim will ordinarily be abusive".⁷⁴¹

⁷³⁴ Respondent's Reply on Preliminary Objections, para. 449.

⁷³⁵ Respondent's Reply on Preliminary Objections, para. 466.

⁷³⁶ Statement of Defence, Vol. A, para. 142.

⁷³⁷ Statement of Defence, Vol. A, para. 144.

⁷³⁸ Respondent's Reply on Preliminary Objections, para. 459.

⁷³⁹ Respondent's Reply on Preliminary Objections, paras 456, 460–476.

⁷⁴⁰ Respondent's Reply on Preliminary Objections, para. 461.

⁷⁴¹ Respondent's Reply on Preliminary Objections, para. 42.

407. Similarly, the *Phoenix Action* tribunal did not place emphasis on what the Claimant calls “egregious conduct”, but rather focused on the “international principle of good faith”.⁷⁴² According to the Respondent, the tribunal looked at “the timing of the investment, the timing of the initial request to the tribunal, the timing of the claim, the substance of the transaction, and the true nature of the investment, including whether the claimant participated in economic activities”. It was, in the Respondent’s words, these factors that lead the tribunal to conclude that the investment was not *bona fide*.⁷⁴³ In the Respondent’s view, the Claimant cannot differentiate itself from the claimant in *Phoenix Action v. Czech Republic* on the basis of long-standing control over the investment, because whether the Claimant controlled PML before 2011 is being disputed in the present case.⁷⁴⁴ Nor, in the Respondent’s view, can the Claimant distinguish *Phoenix Action v. Czech Republic* on the basis that the company in *Phoenix Action* was nothing more than a “shell” company, with no pre-existing relationship or role with respect to the investment, since, according to the Respondent, while the claimant in *Phoenix Action v. Czech Republic* had to create a shell company to buy the shares of its Czech affiliates, the Claimant in the present case has “an almost unlimited array of ready-made entities that could buy the shares of the Australian affiliates”.⁷⁴⁵
408. The *ST-AD v. Bulgaria* case, the Respondent notes, did not turn on findings of egregious conduct or fraud, but on “the timing of the investment and the claim”.⁷⁴⁶ For the same reasons as in *Phoenix Action v. Czech Republic*, the Respondent rejects the Claimant’s attempts to distinguish *ST-AD v. Bulgaria* by reference to the fact that a shell company had been employed in *ST-AD v. Bulgaria* and because of the absence of a relationship of long-standing control.⁷⁴⁷ The Respondent further rejects the Claimant’s assertions that *ST-AD v. Bulgaria* establishes that a dispute over abuse of rights must be “internationalised” such that a domestic dispute is transformed into an international one. The Respondent asserts that there is no relevant distinction between cases where the investment is “internationalised” and cases, such as the present one, where the investment is “renationalised”.⁷⁴⁸

⁷⁴² Respondent’s Reply on Preliminary Objections, para. 463.

⁷⁴³ Respondent’s Reply on Preliminary Objections, para. 463.

⁷⁴⁴ Respondent’s Reply on Preliminary Objections, para. 463.

⁷⁴⁵ Respondent’s Reply on Preliminary Objections, para. 463.

⁷⁴⁶ Respondent’s Reply on Preliminary Objections, para. 464.

⁷⁴⁷ Respondent’s Reply on Preliminary Objections, para. 464.

⁷⁴⁸ Respondent’s Reply on Preliminary Objections, paras 464, 480.

409. The Respondent further disputes the relevance of the decision in *Mobil Corporation v. Venezuela* in this context since, according to the Respondent, the *Mobil Corporation* tribunal “does not use the term bad faith in its reasoning, and does not suggest that some heightened standard akin to fraud must be met”.⁷⁴⁹
410. In sum, investment disputes that deal with allegations of abuse of right in the context of corporate restructuring turn, according to the Respondent, on their facts, and not on any general rule that the host State must establish “compelling evidence of [the investor’s] bad faith... involving egregious conduct”.⁷⁵⁰

The Claimant’s Position

411. The Claimant considers that the scope and content of the abuse of rights doctrine is uncertain⁷⁵¹ and exceptionally applied. The Claimant observes that Australia itself acknowledged such uncertainty in its arguments in the *Case Concerning Certain Phosphate Lands in Nauru* before the ICJ, wherein Australia stated that, “[t]he status and content of the doctrine of abuse of right is uncertain at international law and there has been little agreement amongst writers or arbitral and judicial tribunals concerning it”.⁷⁵²
412. The Claimant asserts that the doctrine is based on the concept that a party has abused an otherwise lawful right such that “the objection only comes into play in the present case if the Tribunal has already determined that it has jurisdiction over the dispute and Claimant has a right to arbitrate”.⁷⁵³ Depriving a party of that right on the grounds that the exercise of that right was abusive is, in the view of the Claimant, a serious and exceptional step to take⁷⁵⁴ and was described by the tribunal in *Chevron v. Ecuador (I)* as an “extraordinary remedy”.⁷⁵⁵ The Claimant refers to the decision of the tribunal in *Rompetrol v. Romania* which stated that abuse of rights “is evidently a proposition of a very-far reaching character; it would entail an ICSID tribunal, after having determined conclusively (or at least *prima facie*) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear their dispute, deciding

⁷⁴⁹ Respondent’s Reply on Preliminary Objections, para. 465.

⁷⁵⁰ Respondent’s Reply on Preliminary Objections, para. 458.

⁷⁵¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 317.

⁷⁵² Claimant’s Counter-Memorial on Preliminary Objections, para. 317.

⁷⁵³ Claimant’s Counter-Memorial on Preliminary Objections, para. 323.

⁷⁵⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 323.

⁷⁵⁵ Claimant’s Rejoinder on Preliminary Objections, para. 307.

nevertheless not to entertain the application to hear the dispute”.⁷⁵⁶ Similarly in *ConocoPhillips v. Venezuela*, the tribunal approached allegations of an abuse of rights “bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached”.⁷⁵⁷

413. In the Claimant’s view, a presumption exists in favour of the right to bring a BIT claim: the Respondent must prove that the Claimant lacks a legitimate interest in instituting proceedings and acts in a “legally reprehensible” way.⁷⁵⁸ In support of its position, the Claimant refers to the *Chevron v. Ecuador (I)* decision wherein the tribunal explained that “[a]ny right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim”. Thus, there is a “presumption in favour of [Claimant’s] right to bring [its] claim under the BIT”.⁷⁵⁹ When analysing Ecuador’s abuse of rights argument, the *Chevron (I)* tribunal found that “[t]he nature of these defenses as exceptions to a general rule that leads to the reversal of the burden of proof stem from, among other factors, the presumption of good faith. A claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse as a defense”.⁷⁶⁰
414. The Claimant concludes that, “to uphold an abuse of rights objection, this Tribunal must find that the Respondent has proven bad faith. Prior tribunals have found that standard met only in exceedingly rare circumstances involving egregious conduct akin to fraud”.⁷⁶¹ The Claimant submits further that in order to rebut the presumption of good faith, the Respondent must come forward with compelling evidence and meet “a very high evidentiary burden”.⁷⁶² Thus, the Claimant asserts, in *ConocoPhillips v. Venezuela*, the tribunal stated that it must “bear[] in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one”.⁷⁶³ The Claimant refers in particular to the decision in *Chevron v. Ecuador (I)*, which it cites as “the leading investor-[S]tate case on the presumption of good faith in the abuse of rights context and [which] is fully in accord with the Claimant’s position”.⁷⁶⁴

⁷⁵⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 323.

⁷⁵⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 325.

⁷⁵⁸ Claimant’s Counter-Memorial on Preliminary Objections, paras 319–320.

⁷⁵⁹ Claimant’s Rejoinder on Preliminary Objections, para. 324.

⁷⁶⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 321.

⁷⁶¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 336.

⁷⁶² Claimant’s Counter-Memorial on Preliminary Objections, para. 321.

⁷⁶³ Claimant’s Rejoinder on Preliminary Objections, para. 325.

⁷⁶⁴ Claimant’s Rejoinder on Preliminary Objections, para. 324.

The Claimant cites the *Chevron (I)* tribunal as stating that “in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold”.⁷⁶⁵ This high threshold “results from the seriousness of a charge of bad faith amounting to abuse of process”.⁷⁶⁶ Furthermore, “[t]he threshold must be particularly high in the context of a *prima facie* examination where the Claimant’s submissions are to be presumed true”.⁷⁶⁷ The Claimant also cites the conclusions of the ICJ in its advisory opinion in *Tacna-Arica Question* that “[a] finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion”.⁷⁶⁸

415. In the Claimant’s view, the “critical point” in establishing an abuse of rights is the evidence of bad faith.⁷⁶⁹ According to the Claimant, the case law of tribunals that have examined allegations of abusive treaty shopping provides “an indication of the types of conduct that might constitute bad faith”.⁷⁷⁰ These include cases where:

- a. The claimant lacked any pre-existing connection with the investment or lacked the capability to manage or develop the business post-investment;
- b. The claimant company was a mere “shell” company that lacked any substantial ties to the jurisdiction in which it was incorporated;
- c. The claimant did not provide notice to or obtain consent from the host State for the transfer of ownership to a new company with a different nationality;
- d. Where the restructuring resulted in the “internationalisation” of a dispute involving purely domestic business interests of concerns.⁷⁷¹

416. The Claimant asserts that the purpose of, or motivation for, a corporate restructuring does not amount to bad faith even if a claimant could reasonably foresee a potential future dispute with the host State at the time.⁷⁷² According to the Claimant, “any effort to secure BIT protection will be driven, at least to a certain degree, by the fact that an investor can foresee that a host State

⁷⁶⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 322.

⁷⁶⁶ Claimant’s Rejoinder on Preliminary Objections, para. 324.

⁷⁶⁷ Claimant’s Rejoinder on Preliminary Objections, para. 324.

⁷⁶⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 322.

⁷⁶⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 345.

⁷⁷⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 347.

⁷⁷¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 348.

⁷⁷² Claimant’s Counter-Memorial on Preliminary Objections, para. 337.

might engage in future conduct that would unreasonably impair or harm the foreign investment and wishes to guard against the risk that it will”.⁷⁷³

417. While the abuse of rights objections have been considered in a number of cases, the Claimant argues, these objections have been rejected in all but four cases that involved egregious facts giving rise to bad faith.⁷⁷⁴ Thus, the tribunals in *Cementownia v. Turkey* and *Europe Cement v. Turkey* issued a finding of bad faith and fraud because the respective investors used forged and fraudulent documents as evidence of their purported ownership of the relevant investments.⁷⁷⁵ In *Phoenix Action v. Czech Republic* and *ST-AD v. Bulgaria*, the tribunals were concerned with host country nationals that tried to initiate international arbitration against their own governments long after their domestic disputes had arisen. According to the Claimant, the cases involved shell companies without any longstanding, legitimate business relationships with the investments. Consequently, neither case involved facts similar to those that are now before the Tribunal.⁷⁷⁶
418. The Claimant asserts a further distinction between *Phoenix Action v. Czech Republic*, *ST-AD v. Bulgaria* and the present dispute: in *Phoenix Action v. Czech Republic* and *ST-AD v. Bulgaria*, both tribunals found an abuse of rights because “domestic investors had sought to ‘internationalise’ claims for damages that had already accrued and were subject to litigation before the host States’ courts” and “the claimants had established wholly artificial structures that served no purpose other than to create jurisdiction over existing domestic disputes”.⁷⁷⁷ Contrary to the Respondent’s view, the Claimant considers that, “whether the dispute was ‘internationalised’ or ‘renationalised’” makes a difference for the Tribunal’s analysis and emphasises that the tribunal in *ST-AD v. Bulgaria* found attempts to internationalise a domestic dispute “particularly troubling”.⁷⁷⁸ According to the Claimant, “the [*ST-AD*] tribunal stated that the “system of international investment protection” was not designed for “domestic investments disguised as international investments or domestic investments repackaged as international disputes”.⁷⁷⁹ Referring in particular to *Mobil Corporation v. Venezuela*, *Pac Rim v. El Salvador*, and *Tidewater v. Venezuela*, the Claimant asserts that “[i]n every other case that Respondent

⁷⁷³ Claimant’s Counter-Memorial on Preliminary Objections, para. 337.

⁷⁷⁴ Claimant’s Counter-Memorial on Preliminary Objections, paras 326–327.

⁷⁷⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 328.

⁷⁷⁶ Claimant’s Rejoinder on Preliminary Objections, para. 312.

⁷⁷⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 332.

⁷⁷⁸ Claimant’s Rejoinder on Preliminary Objections, para. 319.

⁷⁷⁹ Claimant’s Rejoinder on Preliminary Objections, para. 319.

cites... the tribunal refused to apply the abuse of rights doctrine to create... ‘an impediment or disentitlement’ to otherwise well-founded jurisdiction under an investment treaty”.⁷⁸⁰

419. Finally, the Claimant challenges the Respondent’s reliance on *ConocoPhillips v. Venezuela* to invoke a presumption in favour of the host State on the ground that the passage cited by the Respondent does not come from the tribunal’s discussion on abuse of rights but from the tribunal’s discussion of whether Venezuela consented to arbitration in its domestic investment law.⁷⁸¹ This, according to the Claimant “was unrelated to whether the claimant acted in bad faith and thus engaged in an abuse of rights”.⁷⁸²

(b) The “Foreseeability” Criterion

The Respondent’s Position

420. The Respondent asserts that “[t]he abuse (*i.e.* the failure to act in good faith/acting in bad faith) resides in the manipulation of corporate nationality at a time when the dispute is in existence or is foreseeable to a sufficient degree”.⁷⁸³
421. In respect of establishing an *existing* dispute, the Respondent maintains its position that a dispute is established when there is “a disagreement on a point of law or fact” and that this may arise after a measure is announced, threatened or decided upon and before its final and definitive implementation.⁷⁸⁴ What is important, in the view of the Respondent, is that the Tribunal identifies whether prior to the restructuring, the Parties were already in a dispute concerning the same subject matter (per *Tidewater v. Venezuela* and *Lucchetti v. Peru*).⁷⁸⁵ The Respondent emphasises the need to “focus... on the prospective claimant’s appreciation of the actual dispute [since] [w]hat matters is whether the prospective claimant restructures at a time when it can see a dispute that, in substance, then becomes the BIT dispute”.⁷⁸⁶

⁷⁸⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 333.

⁷⁸¹ Claimant’s Rejoinder on Preliminary Objections, para. 326.

⁷⁸² Claimant’s Rejoinder on Preliminary Objections, para. 326.

⁷⁸³ Respondent’s First Post-Hearing Brief, para. 137.

⁷⁸⁴ Respondent’s Reply on Preliminary Objections, para. 474.

⁷⁸⁵ Respondent’s Reply on Preliminary Objections, paras 475, 476.

⁷⁸⁶ Respondent’s Reply on Preliminary Objections, para. 476.

422. In respect of establishing a *foreseeable* dispute, the Respondent emphasises the distinction between the risk of a *specific* future dispute as opposed to a general risk of a future dispute.⁷⁸⁷ The Respondent submits that in determining whether there is abuse in the current context by reference to a foreseeability test, “it is appropriate to look at (i) the viewpoint of the putative claimant, albeit (ii) with an element of objectivity, such that the question comes down to what was within the reasonable contemplation of the putative claimant”.⁷⁸⁸
423. The Respondent asserts that the abuse of right objection has been discussed in cases in which the tribunals expressly applied a foreseeability approach.⁷⁸⁹ In *Pac Rim v. El Salvador*, the tribunal ruled that, “if a corporate restructur[ing] affecting a claimant’s nationality was made in good faith before the occurrence of any event or measure giving rise to a later dispute, that restructuring should not be considered as an abuse of process”.⁷⁹⁰ However, the tribunal found that “*the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy*”.⁷⁹¹ Hence, the tribunal agreed with El Salvador that an abuse of process exists when an investor manipulates the nationality of a shell company “at a time when the investor is aware that events have occurred *that negatively affect its investment and may lead to arbitration*”.⁷⁹²
424. In *Tidewater v. Venezuela*, the tribunal found it legitimate for “an investor to seek to protect itself from the general risk of future disputes with a host State” by restructuring its investment but emphasised that “the same is not the case in relation to pre-existing disputes between the specific investor and the State”.⁷⁹³ The Respondent stresses that what was important in *Tidewater v. Venezuela* was the extent to which the dispute was “existing” or “foreseeable” at the time of the corporate restructuring.⁷⁹⁴
425. Similarly, the Respondent refers to the tribunal’s finding in *ConocoPhillips v. Venezuela* that no claim “was in prospect at the times of the restructurings”.⁷⁹⁵ The Respondent disputes the

⁷⁸⁷ Respondent’s Reply on Preliminary Objections, para. 488; Respondent’s Second Post-Hearing Brief, para. 48.

⁷⁸⁸ Respondent’s Reply on Preliminary Objections, para. 493.

⁷⁸⁹ Respondent’s Reply on Preliminary Objections, paras 487–488.

⁷⁹⁰ Statement of Defence, Vol. A, para. 151.

⁷⁹¹ Statement of Defence, Vol. A, para. 151; Respondent’s Reply on Preliminary Objections, para. 488.

⁷⁹² Statement of Defence, Vol. A, para. 152.

⁷⁹³ Statement of Defence, Vol. A, para. 155; Respondent’s Reply on Preliminary Objections, para. 442.

⁷⁹⁴ Statement of Defence, Vol. A, para. 155; Respondent’s Reply on Preliminary Objections, para. 488.

⁷⁹⁵ Statement of Defence, Vol. A, para. 157; Respondent’s Reply on Preliminary Objections, para. 488.

Claimant's assertions that the *ConocoPhillips* tribunal focused on the date when the claim or cause of action accrued and not when it became foreseeable. The Respondent explains that the facts in *ConocoPhillips v. Venezuela* explain the tribunal's approach: "(i) at the time of the corporate restructur[ing], no claims had been made and, save for limited exceptions, none were in prospect; and (ii) subsequent to the investment, the claimant had invested massively, which was regarded as a major factor indicating that BIT proceedings were not in prospect at the time of the corporate restructur[ing]".⁷⁹⁶ According to the Respondent, it was for these reasons that the *ConocoPhillips* tribunal rejected the abuse of rights claim.⁷⁹⁷ The Respondent also cites *Aguas del Tunari v. Bolivia*, in which the tribunal considered whether the events giving rise to the dispute were "foreseeable" at the time of restructuring.⁷⁹⁸

426. The Respondent rejects the Claimant's assertion that there must be foreseeability to a very high standard of probability: according to the Respondent, the test applied in *Pac Rim v. El Salvador* is not to be portrayed as if it were much more stringent than that in *Tidewater v. Venezuela* or *ConocoPhillips v. Venezuela*.⁷⁹⁹ Citing the *Gremcitel* Award as authority, the Respondent asserts that all of these tests for foreseeability are analogous⁸⁰⁰ and that they establish a foreseeability standard that requires that a dispute must be "in reasonable contemplation of the investor, or whether a claim is in prospect".⁸⁰¹ The rationale for this position is that all of these tribunals "are seeking to preserve the integrity of the given treaty whilst at the same time identifying and distinguishing the cases where corporate restructuring is aimed—quite permissibly—at possible future disputes".⁸⁰²
427. The Respondent further rejects the assertion by the Claimant that the investor "must have known that a dispute was near-immediate".⁸⁰³ According to the Respondent, none of the applicable case law has established such a test with regard to foreseeability.⁸⁰⁴ Insofar as the Claimant is referring to a need for proximity between the restructuring and the adoption of the measure, the Respondent asserts that this is inconsistent with the foreseeability test established

⁷⁹⁶ Respondent's Reply on Preliminary Objections, para. 484.

⁷⁹⁷ Respondent's Reply on Preliminary Objections, para. 485.

⁷⁹⁸ Respondent's Reply on Preliminary Objections, para. 488.

⁷⁹⁹ Respondent's First Post-Hearing Brief, para. 137.

⁸⁰⁰ Respondent's Reply on Preliminary Objections, para. 499; Respondent's First Post-Hearing Brief, para. 137; Respondent's Second Post-Hearing Brief, para. 51.

⁸⁰¹ Respondent's First Post-Hearing Brief, para. 137.

⁸⁰² Respondent's First Post-Hearing Brief, para. 137.

⁸⁰³ Respondent's Second Post-Hearing Brief, para. 52.

⁸⁰⁴ Respondent's Second Post-Hearing Brief, para. 52.

by the relevant case law. The Respondent cites the decision in *Mobil Corporation v. Venezuela* in which the tribunal found there to be an abuse of right notwithstanding the significant time lag between the restructuring and the making of a claim.⁸⁰⁵

428. The Respondent dismisses the relevance of *Autopista Concesionada de Venezuela v. Venezuela* and *RosInvestCo v. Russian Federation*.⁸⁰⁶ In *Autopista Concesionada de Venezuela v. Venezuela*, the contract at issue had, according to the Respondent, expressly envisioned a change to foreign ownership and access to ICSID arbitration. As a result, foreseeability was neither argued, nor rejected.⁸⁰⁷ The Respondent also argues that there was no argument on, or rejection of, a foreseeability analysis in *RosInvestCo v. Russian Federation*. That case, according to the Respondent, did not concern a corporate restructuring motivated in some way by the wish to obtain treaty protection for an existing investment: it was argued that there was no *bona fide* investment, and not that there was an abuse of rights under the offer to arbitrate.⁸⁰⁸
429. The Respondent asserts that the critical date with respect to foreseeability is the date on which the restructuring occurred. In support of this argument, the Respondent refers to the tribunal decisions in *Pac Rim v. El Salvador* and *ConocoPhillips v. Venezuela* both of which “based their assessment of what was foreseen/in prospect on the date of the corporate restructur[ing]”.⁸⁰⁹ The decision in *Tidewater v. Venezuela* does not, in the Respondent’s view, suggest otherwise. In that case “it was unarguably the date of the restructuring that was taken as the critical date”.⁸¹⁰ The Respondent therefore rejects the Claimant’s contention that “foreseeability should be assessed as at the time of a non-binding decision to restructure, with the Tribunal to shut its eyes to any evidence between such decision and the implementation of it”.⁸¹¹
430. Finally, the Respondent asserts that Australian law is not inconsistent with the application of a foreseeability-based standard in abuse of rights cases. While the Claimant places emphasis on the decision in *Esso v. Federal Commissioner of Taxation* as stating that the passage of a tax amendment Bill then under discussion was not “inevitable”, the Respondent contends that this

⁸⁰⁵ Respondent’s Second Post-Hearing Brief, para. 52.

⁸⁰⁶ Respondent’s Reply on Preliminary Objections, paras 499–501.

⁸⁰⁷ Respondent’s Reply on Preliminary Objections, para. 500.

⁸⁰⁸ Respondent’s Reply on Preliminary Objections, para. 501.

⁸⁰⁹ Respondent’s Reply on Preliminary Objections, para. 504.

⁸¹⁰ Respondent’s Reply on Preliminary Objections, para. 502.

⁸¹¹ Respondent’s Reply on Preliminary Objections, para. 502.

observation “is irrelevant in the current context”.⁸¹² According to the Respondent, the decision in *Esso v. Federal Commissioner of Taxation* turned on the authority of a different case, *Meggitt Overseas Ltd. v. Grdovic*⁸¹³ which stated that Australian courts are bound to apply the substantive law as it stands and that an Australian court “cannot deny [a claimant] that right [to invoke the court’s jurisdiction] because of a reasonable expectation that at some future date the law will be changed and that [the claimant’s rights] according to law will be changed”.⁸¹⁴ Moreover, the Respondent emphasises that the discussion in these cases “says nothing about whether an international tribunal has jurisdiction over a pre-existing dispute or a specific future dispute that was specifically foreseen by the claimant at the time of a corporate restructur[ing] intended to manufacture jurisdiction over such disputes”.⁸¹⁵

The Claimant’s Position

431. The Claimant disputes the Respondent’s contention that abuse of rights can be established on the basis of “knowledge of the existing or foreseeable dispute” at the time the restructuring took place.⁸¹⁶ The Claimant asserts that by focusing on the timing of the dispute, the Respondent misses the “critical point” in establishing an abuse of rights: namely the key factor of evidencing bad faith.⁸¹⁷ To do otherwise would, in the terms used by the Claimant, “[omit] the suggestion of excess inherent in the term ‘abuse’”.⁸¹⁸ The Claimant points out that the tribunal in *Pac Rim v. El Salvador* also “cautioned that this temporal test was not a ‘thin red line’ that was decisive of the question of abuse”.⁸¹⁹ The *Pac Rim* tribunal noted the necessity to consider other circumstances, such as “whether particular facts and circumstances of the corporate restructuring provide evidence of ‘unacceptable manipulations’ or acts ‘in bad faith’”.⁸²⁰
432. The Claimant disputes that the “foreseeability” test is appropriate as a protection against the use of BIT protections in order to obtain an “unfair advantage” against the host State “even in cases such as this where the respondent is given advance notice that the claimant intends to initiate

⁸¹² Respondent’s Reply on Preliminary Objections, para. 506.

⁸¹³ (1998) 43 NSWLR 527.

⁸¹⁴ Respondent’s Reply on Preliminary Objections, para. 506.

⁸¹⁵ Respondent’s Reply on Preliminary Objections, para. 507.

⁸¹⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 327, 345.

⁸¹⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 345.

⁸¹⁸ Claimant’s Counter-Memorial on Preliminary Objections, paras 345.

⁸¹⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 346.

⁸²⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 346.

arbitration in the event the respondent adopts a particular measure”.⁸²¹ According to the Claimant, “Respondent does not explain ‘this inequality of position’ or identify the ‘unfair advantage’ to which it refers”.⁸²²

433. The Claimant asserts that the Respondent has failed to take a firm and clear position on what it means by “foreseeable” and instead “offers a parade of inconsistent and disconnected concepts”.⁸²³ The standards adopted by the Respondent range from “very high probability” to “imminent”.⁸²⁴ The Claimant takes issue with the Respondent’s assertion that the Claimant would have abused its right to gain BIT protection “where the dispute had crystallized, or was reasonably foreseeable, as at the date of the investment”, arguing that “crystallized” and “reasonably foreseeable” are two very different standards and only the former would imply that there is a ripe legal claim.⁸²⁵
434. The Claimant suggests that the reason for the inconsistency in the Respondent’s approach is that “there is no coherent—much less settled—principle of international law underlying Respondent’s objection”.⁸²⁶ The Claimant restates its contention that “no tribunal has dismissed a claim based on foreseeability, and no consistent doctrine of foreseeability has emerged from the case law, as each case has articulated a different standard”.⁸²⁷ The Claimant asserts that there cannot be a doctrine of abuse of rights based on the restructuring of an investment at a time when a dispute is “foreseeable” since such a test would be “highly subjective and difficult to administer”, leading to the result that host States would “scour the historical and administrative record for any State conduct... for evidence that could conceivably be viewed as telegraphing an intention to adopt the subsequent measure”.⁸²⁸ In any event, according to the Claimant, it is difficult to ascertain “how foreseeable a dispute must be”.⁸²⁹ The Claimant concludes that “the

⁸²¹ Claimant’s Rejoinder on Preliminary Objections, paras 346, 347.

⁸²² Claimant’s Rejoinder on Preliminary Objections, para. 347.

⁸²³ Claimant’s Counter-Memorial on Preliminary Objections, paras 353, 354.

⁸²⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 354.

⁸²⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 354.

⁸²⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 355.

⁸²⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 355.

⁸²⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 356.

⁸²⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 356.

entire concept of foreseeability as a standard of abuse is ultimately unworkable”⁸³⁰ and in any event does not justify the finding of *bad faith*.⁸³¹

435. In order to come close to establishing bad faith, the standard of the foreseeability criterion, if applied at all, must be set at “a very high probability and not merely contemplated at the time the restructuring in question took place”.⁸³² The Claimant disputes the Respondent’s assertion that the standard of foreseeability is “nothing more than that a dispute must be ‘in reasonable contemplation of the investor, or whether a claim is in prospect’”.⁸³³ According to the Claimant, the Respondent derives this standard from a misinterpretation of the *Gremcitel* Award.⁸³⁴ The Claimant submits that the correct interpretation of *Gremcitel v. Peru* is that the tribunal “found that the *Pac Rim v. El Salvador* standard was analogous to a standard that assessed whether there was a ‘reasonable prospect’ that the challenged measure was ‘imminent’ or to a standard that assessed whether a dispute was ‘highly probable’”.⁸³⁵ The Claimant insists that the *Gremcitel* tribunal did not state that the *Pac Rim v. El Salvador* standard is met when a dispute is “merely in prospect”.⁸³⁶
436. The Claimant submits that in light of the difficulties with the foreseeability standard, some tribunals have “simply refused to engage in a discussion of whether a dispute was foreseeable at the time a restructuring occurred”⁸³⁷ citing, in support of this assertion, the findings in *Autopista Concesionada de Venezuela v. Venezuela* and *ConocoPhillips v. Venezuela*.⁸³⁸
437. In the Claimant’s view, in none of the cases heavily relied upon by the Respondent did the tribunal employ a “reasonable foreseeability” test, as the Respondent advocates in the present arbitration.⁸³⁹ In *Phoenix Action v. Czech Republic* and *ST-AD v. Bulgaria*, the tribunals found that “the claimants had established artificial structures that served no purpose other than to create jurisdiction over existing domestic disputes for damages that had already been

⁸³⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 356.

⁸³¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 357.

⁸³² Claimant’s Rejoinder on Preliminary Objections, para. 352.

⁸³³ Claimant’s Second Post-Hearing Brief, para. 54.

⁸³⁴ Claimant’s Second Post-Hearing Brief, para. 54.

⁸³⁵ Claimant’s Second Post-Hearing Brief, para. 54.

⁸³⁶ Claimant’s Second Post-Hearing Brief, para. 54.

⁸³⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 359.

⁸³⁸ Claimant’s Counter-Memorial on Preliminary Objections, paras 360–362.

⁸³⁹ Claimant’s Counter-Memorial on Preliminary Objections, paras 365–366.

incurred”.⁸⁴⁰ Rather than applying a foreseeability test, the *Phoenix Action* tribunal instead applied the principle that assigning pre-existing claims to a foreign entity cannot lead to BIT protection for a domestic entity that is not entitled to such protection.⁸⁴¹ The tribunal found an abuse of the investment treaty system on the ground that “what was really at stake were indeed the pre-investment violations and damages”.⁸⁴²

438. The tribunals in both *Mobil Corporation v. Venezuela* and *ConocoPhillips v. Venezuela*, the Claimant emphasises, focused on determining “whether the claimant was improperly seeking to assert legal claims based on conduct that occurred or situations that ceased to exist before the restructuring was complete”.⁸⁴³ In *Mobil Corporation v. Venezuela*, the Claimant notes, the tribunal focused on “the date on which that process culminated in Venezuela’s adoption of the nationalisation measures that forced such migration and stripped Mobil of the value of its investments”.⁸⁴⁴ The Claimant therefore stresses that the *Mobil Corporation* tribunal did not adopt a foreseeability test at all.⁸⁴⁵ As regards *ConocoPhillips v. Venezuela*, the Claimant submits that the tribunal followed the *Mobil Corporation v. Venezuela* approach and stressed “the date on which the claim or cause of action accrued, not when it became ‘foreseeable’”.⁸⁴⁶ To the extent that the tribunal in *ConocoPhillips v. Venezuela* did consider foreseeability, it applied a very high standard. According to the Claimant “[t]he *ConocoPhillips* tribunal found that a dispute under the Netherlands-Venezuela BIT was not foreseeable, even though one of the Dutch claimants (the shell company) was inserted into the chain of ownership *after* the enactment of two challenged tax measures (but before one of those measures took effect)”.⁸⁴⁷ The Claimant stresses that “[c]learly, those measures were entirely foreseeable when the claimants inserted [ConocoPhillips] into the ownership structure, [b]ut the *ConocoPhillips* tribunal did not consider that fact to be relevant”.⁸⁴⁸
439. According to the Claimant, the tribunals in both *Pac Rim v. El Salvador* and *Tidewater v. Venezuela* found no abuse of rights even with “substantial evidence that the particular dispute at

⁸⁴⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 332.

⁸⁴¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 369.

⁸⁴² Claimant’s Counter-Memorial on Preliminary Objections, para. 368.

⁸⁴³ Claimant’s Counter-Memorial on Preliminary Objections, para. 388.

⁸⁴⁴ Claimant’s Counter-Memorial on Preliminary Objections, para. 375.

⁸⁴⁵ Claimant’s Rejoinder on Preliminary Objections, para. 359.

⁸⁴⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 382.

⁸⁴⁷ Claimant’s Rejoinder on Preliminary Objections, para. 355.

⁸⁴⁸ Claimant’s Rejoinder on Preliminary Objections, para. 356.

issue was (or should have been) within the reasonable contemplation of the investor prior to the restructuring”.⁸⁴⁹ To the extent that the *Pac Rim* and *Tidewater* tribunals did consider foreseeability, the Claimant asserts that both tribunals asserted a very high standard of foreseeability. The Claimant cites the *Pac Rim* tribunal as stating that “because even at th[e] time [of restructuring] there still seemed to be a reasonable possibility, as understood by the Claimant” to stop the challenged measure, the dispute was not foreseeable to “a very high probability” and the claimant did not “act[] in bad faith”.⁸⁵⁰ According to the Claimant, the *Tidewater* tribunal “found that a dispute under the Barbados-Venezuela BIT was not foreseeable even though Venezuela issued a threat to the claimants’ industry just *two days before* they inserted a Barbados shell company into their chain of ownership, and Venezuela expropriated the claimant’s investment two months later”.⁸⁵¹

440. The Claimant maintains the relevance of the tribunal’s decision in *RosInvestCo v. Russian Federation*. According to the Claimant, in *RosInvestCo v. Russian Federation*, the host State objected that “a [t]ransaction[] undertaken for litigation purposes without economic activity [was] an abuse of the investment treaty system”.⁸⁵² The claimant in *RosInvestCo v. Russian Federation* asserted that Russia had “not demonstrated that making an investment in order to bring a treaty claim... would be illegitimate or in violation of the principle of good faith”.⁸⁵³ According to the Claimant, the *RosInvestCo* tribunal “quickly dismissed this objection without finding any need to delve into questions of foreseeability”.⁸⁵⁴ The Claimant disputes the Respondents contention that *RosInvestCo v. Russian Federation* is not relevant on the basis that the tribunal was concerned only with identifying whether there was a *bona fide* investment and not with whether there was abuse of rights.⁸⁵⁵ According to the Claimant, since the abuse of rights doctrine is based on the principle of good faith, “the core question for an abuse of rights objections is always whether there was a ‘*bona fide*’ investment”.⁸⁵⁶ Consequently, *RosInvestCo v. Russian Federation* cannot be distinguished on this basis.

⁸⁴⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 335.

⁸⁵⁰ Claimant’s Rejoinder on Preliminary Objections, para. 355.

⁸⁵¹ Claimant’s Rejoinder on Preliminary Objections, para. 355.

⁸⁵² Claimant’s Rejoinder on Preliminary Objections, para. 357.

⁸⁵³ Claimant’s Rejoinder on Preliminary Objections, para. 357.

⁸⁵⁴ Claimant’s Rejoinder on Preliminary Objections, para. 357.

⁸⁵⁵ Claimant’s Rejoinder on Preliminary Objections, para. 357.

⁸⁵⁶ Claimant’s Rejoinder on Preliminary Objections, para. 357.

(c) *The “Motivation” Criterion*

The Respondent’s Position

441. The Respondent “accepts that it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host [S]tate”.⁸⁵⁷ The Respondent insists, however, that where the motivation for a corporate restructuring is to bring a specific preconceived BIT claim, this will be an abuse of right.⁸⁵⁸
442. In support of this assertion, the Respondent refers to the decision in *Pac Rim v. El Salvador* where the tribunal referred to the foreseeability of a “specific future dispute”.⁸⁵⁹ Likewise, the tribunal in *Tidewater v. Venezuela* referred to the foreseeability of “the present dispute”.⁸⁶⁰ In *Mobil Corporation v. Venezuela* wherein the tribunal found that “[w]ith respect to pre-existing disputes,... the tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix Action* tribunal, ‘an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs’”.⁸⁶¹ The Respondent distinguishes the case of *ConocoPhillips v. Venezuela* in this regard since, in that case, the tribunal found that the restructuring took place before any claims were in prospect. This finding was supported by the significant value of the investment that was made—a factor that the tribunal considered to be inconsistent with the proposition that the claimant foresaw or was motivated by an imminent nationalisation of its investment.⁸⁶²
443. The Respondent explains that “where there is a corporate restructur[ing] in the knowledge of an actual or specific future dispute, and a preconceived BIT claim is then brought, there is no longer an equality of position between the investor and the host State, and the investor benefits from an unfair advantage [since] the investor invests knowing that it is about to/ready to bring a claim [whilst] [t]he host State admits the investment, in ignorance of the investor’s intent”.⁸⁶³

⁸⁵⁷ Respondent’s Reply on Preliminary Objections, para. 468.

⁸⁵⁸ Respondent’s Reply on Preliminary Objections, paras 455, 508.

⁸⁵⁹ Respondent’s Reply on Preliminary Objections, para. 488.

⁸⁶⁰ Respondent’s Reply on Preliminary Objections, para. 488.

⁸⁶¹ Statement of Defence, Vol. A, para. 148; Reply on Preliminary Objections, para. 470.

⁸⁶² Respondent’s Reply on Preliminary Objections, para. 473; Respondent’s Second Post-Hearing Brief, para. 50.

⁸⁶³ Respondent’s Reply on Preliminary Objections, para. 491.

The Respondent cites the tribunal in *ConocoPhillips v. Venezuela* which stated that “[t]here is jurisdiction only if the parties to the dispute have each consented and throughout the process each is treated on an equal footing, as indeed the principles of due process and natural justice require”.⁸⁶⁴ The Respondent therefore stresses that “it is not the corporate restructur[ing] *per se* that is abusive” but rather that where there is a specific pre-determined dispute in mind, the abuse will arise “where the claimant has benefited from this inequality of position”.⁸⁶⁵

The Claimant’s Position

444. The Claimant asserts that restructuring to secure BIT protection does not amount to bad faith, even if the claimant could reasonably foresee a potential future dispute with the host State at the time.⁸⁶⁶ The Claimant cites the tribunal in *Tidewater v. Venezuela* as stating that, “it is a perfectly legitimate goal, and no abuse of an investment protection regime, for an investor to seek to protect itself from the general risk of future disputes with a host [S]tate”.⁸⁶⁷ Similarly, the tribunal in *Aguas del Tunari v. Bolivia* observed that, “it is not uncommon in practice, and—absent a particular limitation—not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment”.⁸⁶⁸ The Claimant refers to the Respondent’s submissions during the Hearing on Bifurcation that, “it is legitimate for a corporate group in good faith to make its investment into a country or restructuring an existing investment in a country in order to provide for BIT protection for that investment as regards future disputes”.⁸⁶⁹

445. The Claimant submits further that the findings of the tribunals in *Mobil Corporation v. Venezuela* and *ConocoPhillips v. Venezuela*, support its position: in both cases the tribunals found that even if the sole or predominant motivation for the restructuring is to gain access to investor-State arbitration that does not constitute an abuse of right.⁸⁷⁰ In *Mobil Corporation v. Venezuela* the tribunal found that it had jurisdiction notwithstanding the observation that the “main, if not the sole purpose of the restructuring [at issue in that case] was to protect” Mobil’s pre-existing investment in Venezuela in light of potential adverse actions by the Venezuelan

⁸⁶⁴ Respondent’s Reply on Preliminary Objections, para. 491.

⁸⁶⁵ Respondent’s Reply on Preliminary Objections, para. 492.

⁸⁶⁶ Claimant’s Counter-Memorial on Preliminary Objections, para. 337; Claimant’s Second Post-Hearing Brief, para. 54.

⁸⁶⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 340.

⁸⁶⁸ Claimant’s Counter-Memorial on Preliminary Objections, para. 340.

⁸⁶⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 341.

⁸⁷⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 342.

government before the restructuring occurred.⁸⁷¹ In *ConocoPhillips v. Venezuela*, the tribunal “flatly rejected Venezuela’s argument of treaty abuse despite the fact that... ‘the only business purpose of the restructuring... was to be able to have access to ICSID proceedings’”.⁸⁷² The Claimant thus concludes that “restructuring an investment to preserve or augment BIT protection is legitimate, prudent, and fulfils a primary objective of the BIT”.⁸⁷³

(d) Evidence of Foreseeability of a Dispute and of the Claimant’s Intention to Bring a Claim

The Respondent’s Position

446. According to the Respondent, by the end of April 2010, a dispute had crystallised between the PMI Group and Australia, and that dispute is in substance the same dispute underpinning this arbitration.⁸⁷⁴ The “three legal strands” of the dispute—according to the Respondent, Australia’s obligations under the Australian Constitution, intellectual property or like treaties, and international investment treaties—were “foreshadowed by the PM[I] [G]roup in its responses to the various NPHT reports and consistently articulated after the Government’s announcement of the measure”.⁸⁷⁵
447. According to the Respondent, there were three events that were critical to the formation of the dispute: the first was the 29 April 2010 announcement of the Government’s decision to introduce plain packaging “which signalled the Government’s commitment at the highest level to introduce the measure”; the second and third were PML’s statements to the press and Senate Committee submission of 30 April 2010 “in which the PM[I] [G]roup publicly reiterated its opposition to plain packaging on the basis of the tree legal strands”.⁸⁷⁶
448. The Respondent reiterates that “[t]he dispute was never about the legality of the Government’s *announcement* or *proposal* as such. It was about the legality of the *implementation* of plain packaging pursuant to the Government’s announced decision”.⁸⁷⁷ The Respondent also stresses

⁸⁷¹ Claimant’s Counter-Memorial on Preliminary Objections, para. 342.

⁸⁷² Claimant’s Counter-Memorial on Preliminary Objections, para. 342.

⁸⁷³ Claimant’s Counter-Memorial on Preliminary Objections, para. 344.

⁸⁷⁴ Respondent’s First Post-Hearing Brief, para. 59.

⁸⁷⁵ Respondent’s First Post-Hearing Brief, para. 69.

⁸⁷⁶ Respondent’s First Post-Hearing Brief, para. 70.

⁸⁷⁷ Respondent’s First Post-Hearing Brief, para. 71.

that “[t]he Parties’ conflicting positions were unwavering” such that they cannot be described as merely a “policy debate about a potential act”.⁸⁷⁸

449. By 3 September 2010, and no later than January-February 2011, “the PM[I] [G]roup had a crystallised intention to bring a claim against Australia under the BIT in respect of plain packaging if and when the Government’s decision to introduce the measure was implemented”.⁸⁷⁹ The Respondent strongly disputes the Claimant’s assertion that it did not decide to bring a claim until June 2011 when it “came to believe that the enactment of the plain packaging legislation became likely”.⁸⁸⁰ The Respondent emphasises various pieces of evidence to support its position:

- a. According to the Respondent, the Revised Privilege Log (“RPL”) entries leading up to early September 2010 “record extensive preparations for BIT litigation that cannot credibly be explained away as simply a ‘prudent’ review of ‘various legal scenarios’”.⁸⁸¹
- b. The Respondent also points to “38 communications” circulated by the end of April 2010 by the PMI Group and its lawyers that “involved *consideration of investment treaty protections for the Australian subsidiaries...* [REDACTED]
[REDACTED]
[REDACTED] ■ The Respondent then points to “68 communications” that were circulated between 1 May 2010 to 2 September 2010 of which “8 were communications between the PM[I] [G]roup and its external legal advisers with [REDACTED] and [REDACTED] [REDACTED] in the subject line; 12 were entitled [REDACTED] ...; and 1 was entitled [REDACTED]. 2 September 2010 saw 15 emails concerning the engagement of, or receipt of advice from, [REDACTED]
[REDACTED]
[REDACTED],⁸⁸³
- c. The Respondent points to other e-mails in the same period that establish that by 3 July 2010 the PMI Group had instructed lawyers to act for it in an investment treaty

⁸⁷⁸ Respondent’s First Post-Hearing Brief, para. 72.

⁸⁷⁹ Respondent’s First Post-Hearing Brief, para. 46.

⁸⁸⁰ Respondent’s First Post-Hearing Brief, para. 74.

⁸⁸¹ Respondent’s First Post-Hearing Brief, para. 79.

⁸⁸² [REDACTED]

⁸⁸³ Respondent’s First Post-Hearing Brief, para. 79.

arbitration concerning plain packaging in Australia.⁸⁸⁴ In one particular e-mail dated 29 July 2010 from PMI to an investor relations firm, the Respondent points out that a PMI representative stated that “[w]e... believe that a plain packaging measure would violate... international trade agreements” and “we are ready to take *all steps we deem necessary* to obtain the protection and relief to which the company is entitled”. The Respondent also points out that the same PMI representative stated that the Plain Packaging Act would cause Australia to violate its obligations under “certain international trade treaties and other various investment treaties... [giving] rise to actions both by States and private investors in Australia”.⁸⁸⁵

- d. The Respondent refers to PML’s August 2010 OB/LRP, which sets out, as part of a “Plain Packaging Strategy”, the following components: “*Litigate if the Bill is enacted*” and “*Litigation readiness*”. The Respondent asserts that litigation must have referred to investment arbitration when viewed in the context of PML public statements and internal documents before August 2010.⁸⁸⁶

450. The Respondent asserts that in any event the evidence establishes “beyond doubt” that the PMI Group had the intention to bring a claim “as at the date of the Foreign Investment Application on 21 January 2011 and subsequent execution of the restructur[ing] on 23 February 2011” based on the “BIT-related correspondence within the PMI Group and between the PMI Group and its external lawyers”.⁸⁸⁷ This correspondence, according to the Respondent, refers to [REDACTED].⁸⁸⁸ The Respondent also refers to the RPL’s entries and e-mails “during this period, including an email dated 10 December 2010 entitled [REDACTED]”.⁸⁸⁹

451. The Respondent disputes the Claimant’s assertion that the enactment of plain packaging was “unlikely” before June 2011. According to the Respondent “a crystallised intention to sue *if and when* plain packaging was introduced, and a belief as to the precise prospects that plain packaging *would be* introduced, are entirely separate mindsets”.⁸⁹⁰ In any event, the Respondent insists that the introduction of plain packaging was of “significant likelihood” by September

⁸⁸⁴ Respondent’s First Post-Hearing Brief, para. 79.

⁸⁸⁵ [REDACTED]

⁸⁸⁶ Respondent’s First Post-Hearing Brief, para. 82.

⁸⁸⁷ Respondent’s First Post-Hearing Brief, para. 83.

⁸⁸⁸ Respondent’s First Post-Hearing Brief, para. 82.

⁸⁸⁹ Respondent’s First Post-Hearing Brief, paras 84–85.

⁸⁹⁰ Respondent’s First Post-Hearing Brief, para. 88.

2010 and “highly probable” by January or February 2011, “and the PM[I] [G]roup took no different view”.⁸⁹¹ The Respondent refers to the PMI Group’s public statements and internal documents as evidence of its understanding that the Government was determined to introduce the measure.⁸⁹²

452. The Respondent acknowledges that PMI’s Annual Report for 2010, dated March 2011, states that “it is impossible to predict the outcome of... the legislation slated for introduction in 2011”. However, this passage, according to the Respondent, “does not say anything about PMI’s *already crystallised intention to sue in the event that the legislation passed*”.⁸⁹³ The Respondent insists that Mr. Pellegrini has conceded that the PMI Group had a crystallised intention to sue Australia under the Treaty as at 23 February 2011, citing Mr. Pellegrini’s oral testimony wherein he agreed that he approved the acquisition on 23 February 2011 for the purpose, amongst others, of placing PM Asia “in a position where it could sue Australia *and would sue Australia* if the legislation passed”.⁸⁹⁴
453. The Respondent asserts that, even if the Tribunal were to consider that the relevant intention to bring a claim had not crystallised by early September 2010, the evidence provided by the Respondent “in any event establish[es] the requisite degree of foreseeability which is all that Australia needs to ground its abuse of right claim”.⁸⁹⁵

The Claimant’s Position

454. The Claimant insists that the Respondent has been unable to demonstrate that the Claimant had the intention to sue the Respondent under the BIT “either in September 2010 or January 2011”.⁸⁹⁶ According to the Claimant, “[t]he earliest time when it can be said that a dispute was foreseeable as a very high probability is late May/June 2011 [when] Claimant came seriously to believe that the legislation might pass, prompting consideration of whether to bring a claim in that eventuality”.⁸⁹⁷ The Claimant insists that the Respondent’s logic is flawed: “according to Respondent’s logic, a dispute would have existed even if Prime Minister Rudd had *never* made an announcement, because a dispute existed as soon as PML expressed opposition to the

⁸⁹¹ Respondent’s First Post-Hearing Brief, para. 88.

⁸⁹² Respondent’s First Post-Hearing Brief, para. 89.

⁸⁹³ Respondent’s First Post-Hearing Brief, para. 85.

⁸⁹⁴ Respondent’s First Post-Hearing Brief, para. 86.

⁸⁹⁵ Respondent’s First Post-Hearing Brief, para. 73.

⁸⁹⁶ Claimant’s First Post-Hearing Brief, para. 121.

⁸⁹⁷ Claimant’s Second Post-Hearing Brief, para. 16.

Fielding Bill, which according to the Government did not even represent Government Policy”.⁸⁹⁸ The Claimant emphasises that a legal dispute cannot arise simply because someone expressed a view about the “legality and efficacy” of plain packaging, and that “plain packaging” itself is not a legal measure that can give rise to a legal dispute.⁸⁹⁹

455. The Claimant asserts that the Respondent has failed to describe in “any consistent way the dispute that allegedly crystallized in April 2010”.⁹⁰⁰ According to the Claimant, the Respondent’s briefs “conflate two events that are legally distinct: the inchoate policy debate that the Prime Minister’s announcement spurred in April 2010 and the legal dispute that crystallized when Parliament enacted plain packaging legislation in 2011 and Claimant initiated the arbitration”.⁹⁰¹
456. The Claimant disputes the Respondent’s interpretation of the communications it had with lawyers. According to the Claimant, “what the RPL shows is simply that PMI lawyers reviewed legal options, as they had been doing for years before the announcement”.⁹⁰² According to the Claimant, “since BIT considerations played a role in the transfer decision... it is only natural that PMI’s lawyers looked at the BIT in that context”.⁹⁰³ The Claimant notes that, “more than 80% of the documents on the RPL are e-mails that do not represent a large number of separate conversations”.⁹⁰⁴ Moreover, the Respondent distorts the figures that it asserts: many of the communications that the Respondent lists are in fact communications that belong to a longer e-mail chain.⁹⁰⁵ The Claimant submits that no conclusions can be drawn simply from numbers of e-mails sent at the time.⁹⁰⁶
457. The Claimant points to the testimony of Mr. Pellegrini who disagreed that, by August 2010, the necessary “BIT intention” had been formed.⁹⁰⁷ According to the Claimant, Mr. Pellegrini “was not even aware of the BIT in August 2010, so Claimant could not have had a BIT intention at

⁸⁹⁸ Claimant’s Second Post-Hearing Brief, para. 16.

⁸⁹⁹ Claimant’s Second Post-Hearing Brief, para. 18.

⁹⁰⁰ Claimant’s Second Post-Hearing Brief, para. 19.

⁹⁰¹ Claimant’s Second Post-Hearing Brief, para. 19.

⁹⁰² Claimant’s Second Post-Hearing Brief, para. 20.

⁹⁰³ Claimant’s Second Post-Hearing Brief, para. 34.

⁹⁰⁴ Claimant’s Second Post-Hearing Brief, para. 19.

⁹⁰⁵ Claimant’s Second Post-Hearing Brief, para. 34.

⁹⁰⁶ Claimant’s Second Post-Hearing Brief, para. 34.

⁹⁰⁷ Claimant’s First Post-Hearing Brief, para. 121.

that time”.⁹⁰⁸ The Claimant strongly disputes the Respondent’s assertion that the August 2010 OB/LRP was that “the plain packaging legislation would be defeated” and that this evidences an intention to defeat the legislation through investment treaty arbitration.⁹⁰⁹ The correct understanding of the OB/LRP was made clear in Mr. Pellegrini’s oral testimony, wherein he stated that “PML assumed in August 2010 that the plain packaging legislation would not pass Parliament, in part because merely highlighting the threat of litigation domestically and in [the] WTO would convince part of the Parliament that it was not worthwhile to proceed with the measure”.⁹¹⁰ The Claimant highlights Mr. Pellegrini’s statement that “at the time, I was honestly convinced that plain packaging wouldn’t happen”.⁹¹¹

458. The Claimant also disputes the assertion made by the Respondent that the reference in the August 2010/LRP to “litigation readiness” must have meant that the Claimant had already decided to initiate arbitration. Referring to Mr. Pellegrini’s testimony, the Claimant notes that, “what we were discussing here was the *domestic litigation*”.⁹¹² The Claimant submits that the Respondent is asking the Tribunal to find that the August 2010 OB/LRP establishes the Claimant’s intention that “the plain packaging legislation would be defeated *in arbitration under the BIT* rather than through the Parliamentary process”.⁹¹³ In any event, the Claimant points out, the OB/LRP establishes PML’s three-year business plan, and “nothing in the 2010 OB/LRP’s financial projections or brand plans reflected the need to change the packaging or marketing of PML’s products because of plain packaging”.⁹¹⁴

459. The Claimant asserts that the dispute was not foreseeable at the time of restructuring in June 2011. According to the Claimant, “numerous documents on the record show that neither Claimant nor Respondent had determined that the enactment of plain packaging was even likely, much less a very high probability, until months after the restructuring”.⁹¹⁵ The Claimant refers in this regard [REDACTED] and the Transcript of Meet the Press interview with Minister for Health Nicola Roxon.⁹¹⁶ The Claimant also points to a Parliamentary briefing book

⁹⁰⁸ Claimant’s First Post-Hearing Brief, para. 121.

⁹⁰⁹ Claimant’s First Post-Hearing Brief, para. 121.

⁹¹⁰ Claimant’s First Post-Hearing Brief, para. 121.

⁹¹¹ Claimant’s First Post-Hearing Brief, para. 121.

⁹¹² Claimant’s First Post-Hearing Brief, para. 122.

⁹¹³ Claimant’s First Post-Hearing Brief, para. 124.

⁹¹⁴ Claimant’s First Post-Hearing Brief, para. 124.

⁹¹⁵ Claimant’s First Post-Hearing Brief, para. 40.

⁹¹⁶ Claimant’s Second Post-Hearing Brief, para. 26, referring to **Exhibit C-338**.

that stated that “[i]t is difficult to determine the likely fate of the plain packaging proposal given that the position of the [Opposition] Coalition and the independent members is unknown”.⁹¹⁷ Moreover, PMI’s 2010 Annual Report, released in March 2011 noted that “[i]t is not possible to predict the outcome of the [plain packaging] Bill or the legislation slated for introduction in 2011”.⁹¹⁸ According to the Claimant, “[t]o accept Respondent’s assertion that the plain packaging legislation was foreseeable as a very high probability, the Tribunal would have to disregard both Mr. Pellegrini’s testimony and the Government’s admission that there was still a “big fight” over the plain packaging well into 2011, after restructuring took place”. In sum, the Claimant asserts that until June 2011, “neither enactment of the legislation nor the dispute was foreseeable as a very high probability” and “the dispute did not crystallize until the legislation was passed and Claimant commenced this arbitration”.⁹¹⁹

(e) Evidence of the Claimant’s Motivation for Restructuring

The Respondent’s Position

460. According to the Respondent, “[g]iving the [PMI] [G]roup a vehicle to carry out the [BIT claim], where none otherwise existed, was a, or the, true reason for the restructur[ing]”.⁹²⁰ The Respondent refers to Mr. Pellegrini’s oral testimony in which he agreed that he approved the restructur[ing] for reasons including that the transaction would grant “BIT protection to enable [PM Asia] to sue Australia if the measure passed into law”.⁹²¹ The Respondent asserts that this was the “driving motivation” behind the restructuring⁹²² as evidenced by the nature and volume of RPL entries from May 2010 onwards.⁹²³ Further evidence can, according to the Respondent, be found in the “pattern of e-mails linking consideration of the restructur[ing]... with *plain packaging* and/or *investment treaty protection*”.⁹²⁴ The Respondent also considers the “absence of communications about *any other reason* for the restructur[ing]” to be indicative of the motivation behind the restructuring.⁹²⁵

⁹¹⁷ Claimant’s Second Post-Hearing Brief, para. 25.

⁹¹⁸ Claimant’s Second Post-Hearing Brief, para. 26.

⁹¹⁹ Claimant’s Second Post-Hearing Brief, para. 27.

⁹²⁰ Respondent’s First Post-Hearing Brief, para. 47.

⁹²¹ Respondent’s First Post-Hearing Brief, para. 93.

⁹²² Respondent’s First Post-Hearing Brief, para. 94.

⁹²³ Respondent’s First Post-Hearing Brief, para. 95.

⁹²⁴ Respondent’s First Post-Hearing Brief, para. 96.

⁹²⁵ Respondent’s First Post-Hearing Brief, para. 97.

461. The Respondent highlights that “PM Asia no longer seriously contests that obtaining BIT protection for the Australian subsidiaries in respect of future plain packaging legislation *was* a reason for the restructur[ing]”,⁹²⁶ but points out that the Claimant “significantly understated the importance [of] the PM[I] [G]roup’s decision to restructure [in order to gain] BIT protection in respect of plain packaging”.⁹²⁷
462. The Respondent insists that the foreseeability of a claim, the intention to bring that claim and the need for a “vehicle” to achieve that claim are the “*only*” explanations for “the interposition of *PM Asia* between the Australian subsidiaries and PM Brands Sàrl, or later PM Holland”.⁹²⁸ According to the Respondent, “[e]ach of the purported business rationales for the restructur[ing], other than the BIT strategy, is inconsistent with (i) the contemporaneous documents (such as they are), (ii) the detailed and uncontradicted economic analysis of Professor Lys, and (iii) the oral testimony of Mr. Pellegrini”.⁹²⁹ The Respondent purports to rebut each of the explanations given by the Claimant for the restructuring:
- a. The Respondent disputes that the restructur[ing] was undertaken solely in order to “streamline” entities into two chains.⁹³⁰ The Respondent refers to Mr. Pellegrini’s testimony that the restructuring had “no relationship with that ‘streamlining’ rationale”.⁹³¹ The Respondent also refers to Professor Lys’s analysis which found that “the explanation of the restructur[ing] lacked coherent purpose in light of the various logical and factual deficiencies that he identified”.⁹³²
 - b. With respect to the Claimant’s “tax rationale”, the Respondent asserts that this is “not corroborated anywhere in the evidence, and establishes no reason for interposing PM Asia between PM Holland Holdings and PM Australia”.⁹³³ The Respondent asserts that complex tax matters need to be proven by calling “persons from PMI who supposedly designed the restructur[ing] with this aim”.⁹³⁴

⁹²⁶ Respondent’s Second Post-Hearing Brief, para. 33.

⁹²⁷ Respondent’s Second Post-Hearing Brief, para. 33.

⁹²⁸ Respondent’s First Post-Hearing Brief, para. 48; Respondent’s Second Post-Hearing Brief, paras 35–36.

⁹²⁹ Respondent’s First Post-Hearing Brief, para. 50.

⁹³⁰ Respondent’s First Post-Hearing Brief, para. 100; Respondent’s Second Post-Hearing Brief, paras 35–37.

⁹³¹ Respondent’s First Post-Hearing Brief, para. 100.

⁹³² Respondent’s First Post-Hearing Brief, para. 100.

⁹³³ Respondent’s Second Post-Hearing Brief, para. 42.

⁹³⁴ Respondent’s Second Post-Hearing Brief, para. 42.

- c. The Respondent disputes that the restructur[ing] was undertaken for “revenue” or “cash flow” purposes.⁹³⁵ This, according to Professor Lys, is “a nonsensical and unpersuasive justification” and would more easily have been achieved through an alternative restructuring that placed “PM Australia directly under PM Holland”.⁹³⁶ The Respondent asserts that Mr. Pellegrini “knew nothing about this alleged revenue purpose”.⁹³⁷ As further evidence against the “revenue” purpose, the Respondent points to the “substantial delays between the purported decision to restructure and the various steps to implement [the restructuring]”.⁹³⁸ Finally, the Respondent contends that, if the motivation for restructuring was truly one of revenue, “there were other more obvious targets amongst the top earning Asian affiliates” but that none of these affiliates were considered for the restructur[ing] and that “none [had] the nationality to bring the present claim”.⁹³⁹
- d. The Claimant’s contention that the restructur[ing] was part of a broader regional strategy to “align management control of affiliates with legal ownership” is inconsistent with Mr. Pellegrini’s oral testimony and is unsupported by any documentary evidence other than documents prepared when this arbitration was in contemplation or ongoing.⁹⁴⁰ The Respondent points to Professor Lys’s second report as stating that this “alignment had no business justification whatsoever”.⁹⁴¹ The Respondent concludes that the Claimant has failed to explain “why ownership of the Asia affiliates remains to this day ‘spread all over the place’... and why ‘alignment’ was necessary or beneficial when there was a regional structure and business relationship with the Australian affiliates that Mr. Pellegrini agreed was ‘functioning perfectly well’”.⁹⁴² The Respondent further disputes the Claimant’s assertion that the Claimant was the “most logical” candidate for the restructuring since this is, according to the Respondent, not borne out by the evidence.⁹⁴³

⁹³⁵ Respondent’s Second Post-Hearing Brief, paras 40–41.

⁹³⁶ Respondent’s First Post-Hearing Brief, para. 101.

⁹³⁷ Respondent’s First Post-Hearing Brief, para. 101.

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⁹⁴⁰ Respondent’s First Post-Hearing Brief, para. 104; Respondent’s Second Post-Hearing Brief, paras 38–39.

⁹⁴¹ Respondent’s First Post-Hearing Brief, para. 104.

⁹⁴² Respondent’s First Post-Hearing Brief, para. 107.

⁹⁴³ Respondent’s Second Post-Hearing Brief, para. 43.

- e. Finally, the Respondent disputes any other asserted rationales for the restructur[ing]. Thus, the assertion that the restructur[ing] enabled PM Australia's dividends to fund the everyday operations of PM Asia is, according to the Respondent, "a fiction". This is because PM Asia passed on the entirety of the Australian dividends to PM Holland Holdings.⁹⁴⁴ Similarly, the assertion that the restructuring was part of a decade-long group-wide restructuring of legal entities is "nonsense". The Respondent points to a lack of evidence to support this assertion.⁹⁴⁵

463. The Respondent argues that "[n]either of the factual witnesses called by PM Asia in this proceeding can speak directly to the PM[I] [G]roup's (i) decision to conduct the restructur[ing]; (ii) development of the BIT intention; or (iii) issuing of instructions to lodge the Foreign Investment Application".⁹⁴⁶ This, according to the Respondent, includes Mr. Pellegrini, who could "recall almost nothing surrounding the lodgement of PM Asia's NoC".⁹⁴⁷ The Respondent asserts that "[t]he failure to call the actual decision-makers leads to adverse inferences against PM Asia concerning the purpose of the restructur[ing]".⁹⁴⁸

464. The Respondent notes that there are evidentiary gaps in the Claimant's case: "where were the five individuals who purportedly approved the restructur[ing] decision; [w]here were the 'senior management' in PMI above Mr. Pellegrini who were clearly the real decision-makers regarding litigation against Australia under the BIT; [w]here were the people who instructed the lawyers charged with undertaking the extensive legal work documented in the RPL; [w]here were the people who gave instructions to lodge the Foreign Investment Application?"⁹⁴⁹ The Respondent further asserts that the Claimant has failed to produce adequate documents that could rebut the core elements of the Respondent's factual case, pointing to one non-privileged document concerning the decision to restructure; no documents concerning the decision to seek FIRB approval and proceed with the restructur[ing]; and one document contemporaneous with the restructuring.⁹⁵⁰ The Respondent contends that, if all of the documents relating to the Claimant's case are subject to legal professional privilege, "the inference arising from the RPL... is

944

945 Respondent's First Post-Hearing Brief, para. 109.

946 Respondent's First Post-Hearing Brief, para. 62.

947 Respondent's First Post-Hearing Brief, para. 63.

948 Respondent's First Post-Hearing Brief, para. 75.

949 Respondent's First Post-Hearing Brief, para. 64.

950 Respondent's First Post-Hearing Brief, para. 67.

overwhelming: there was *no commercial reason for the restructur[ing] separate from litigation strategy*”.⁹⁵¹

465. The Respondent emphasises that the Tribunal “cannot safely rely on Mr. Pellegrini’s evidence to draw the conclusions that PM Asia seeks” on the basis that Mr. Pellegrini “was *not* a witness who could speak to any of the relevant issues in anything but vague terms based on second or third-hand conversations”.⁹⁵² Moreover, “there are inconsistencies in Mr. Pellegrini’s testimony... which has driven PM Asia to use it very selectively in its [Post-Hearing Brief]”.⁹⁵³ The Respondent asserts that, at best, Mr. Pellegrini’s testimony establishes that “a decision *to initiate proceedings* was not made until June 2011”.⁹⁵⁴ According to the Respondent, this says nothing about “whether the *PM[I] [G]roup* had formed an intention at the time of the decision to restructure or the Foreign Investment Application to bring a claim *if and when the plain packaging measure was enacted*”.⁹⁵⁵

The Claimant’s Position

466. The Claimant submits that “the primary motivation underlying the restructuring of the Australian subsidiaries was unrelated to the BIT”.⁹⁵⁶ According to the Claimant “[t]he transfer of the Australian subsidiaries to Claimant took place in the context of a restructuring of the PMI Group that has been in progress since 2005”.⁹⁵⁷ The restructuring was driven by many factors, “the most important of which was the broad, company-wide reorganization”,⁹⁵⁸ the purpose of which was to “‘refine’, ‘rationalise’ and ‘streamline’ PMI’s corporate structure”.⁹⁵⁹ According to the Claimant, placing the Australian subsidiaries under PM Asia “provided added benefits, including aligning ownership with Claimant’s pre-existing management control of the subsidiaries and optimizing Claimant’s cash flow”.⁹⁶⁰ Moreover, the Claimant was “the most

⁹⁵¹ Respondent’s First Post-Hearing Brief, para. 67.

⁹⁵² Respondent’s Second Post-Hearing Brief, paras 23–24.

⁹⁵³ Respondent’s Second Post-Hearing Brief, para. 26.

⁹⁵⁴ Respondent’s Second Post-Hearing Brief, para. 30.

⁹⁵⁵ Respondent’s Second Post-Hearing Brief, para. 31.

⁹⁵⁶ Claimant’s First Post-Hearing Brief, para. 19.

⁹⁵⁷ Claimant’s First Post-Hearing Brief, para. 103.

⁹⁵⁸ Claimant’s First Post-Hearing Brief, para. 19.

⁹⁵⁹ Claimant’s Rejoinder on Preliminary Objections, paras 334–40; Claimant’s First Post-Hearing Brief, para. 103.

⁹⁶⁰ Claimant’s First Post-Hearing Brief, para. 19.

logical candidate to serve as the immediate parent company for the Australian subsidiaries within the ownership chain under PM Holland”.⁹⁶¹

467. According to the Claimant, the “overall objectives of PMI’s restructuring were to minimize tax liability, align ownership with control, and optimize cash flows”.⁹⁶² There were also “additional benefits”, such as alignment of the ownership of the Australian subsidiaries with Claimant’s pre-existing management control of the subsidiaries, optimization of the Claimant’s cash flow, as well as “additional BIT protection[s]”.⁹⁶³ These are discussed in further detail in the following:

- a. A key motivation behind the restructuring was, according to the Claimant, that “restructuring aligned the ownership and management control of many PMI affiliates”. The Claimant refers to documents from 2004 that evidence that “centralized ownership will facilitate [its] overall objectives”.⁹⁶⁴ According to Mr. Pellegrini, “there was an advantage in clarity” and “a better, leaner, clearer structure” that would be achieved through the restructuring.⁹⁶⁵ This, in the view of the Claimant, was “an entirely legitimate objective that was unrelated to the BIT and this arbitration”.⁹⁶⁶
- b. Another motivation behind the restructuring was, according to the Claimant, that “PMI sought to minimize its tax liability”.⁹⁶⁷ Thus in 2010, PMI decided to transfer the Australian subsidiaries to the ownership chain under PM Holland to secure a tax advantage relating to the payment of intercompany debt.⁹⁶⁸
- c. The Claimant also asserts that the “group-wide restructuring has optimized the cash flows of many PMI affiliates” and refers to Mr. Pellegrini’s testimony wherein he stated that the restructuring would be advantageous for PMI’s regional headquarters to receive “substantial, consistent cashflow... to fund everyday operations as well as less

⁹⁶¹ Claimant’s First Post-Hearing Brief, para. 110.

⁹⁶² Claimant’s First Post-Hearing Brief, para. 106.

⁹⁶³ Claimant’s First Post-Hearing Brief, para. 110.

⁹⁶⁴ Claimant’s First Post-Hearing Brief, para. 108.

⁹⁶⁵ Claimant’s First Post-Hearing Brief, para. 112.

⁹⁶⁶ Claimant’s First Post-Hearing Brief, para. 112.

⁹⁶⁷ Claimant’s First Post-Hearing Brief, para. 106.

⁹⁶⁸ Claimant’s Rejoinder on Preliminary Objections, para. 341; Claimant’s First Post-Hearing Brief, para. 107.

common expenses like strategic acquisitions”.⁹⁶⁹ According to the Claimant, the cash flow could be used “for example, to fund potential strategic acquisitions” and would have provided “greater financial flexibility in the event an acquisition opportunity arose”.⁹⁷⁰ The Claimant reiterates Mr. Pellegrini’s comment in oral testimony that “you have to look at it prospectively” because “how Claimant used the dividends ‘would depend on the amounts’ of dividends as well as the future needs of the company”.⁹⁷¹

- d. The Claimant acknowledges that an “additional” reason behind the restructuring was “to gain an additional layer of protection under the BIT”.⁹⁷² This, however, does not mean that the restructuring decision was made in order to sue the Respondent under the Treaty.⁹⁷³ The Claimant reiterates that “it was not until June 2011 that the PMI Group decided to initiate arbitration if the plain packaging legislation were enacted”.⁹⁷⁴

468. According to the Claimant, Mr. Pellegrini “is uniquely positioned to give evidence on why PM Asia added ownership to its longstanding control of the Australian subsidiaries [since] his approval was necessary for the transfer to proceed, and, therefore his understanding of the various objectives he described in his testimony is highly probative of the internal decision-making process”.⁹⁷⁵ The Claimant disputes the Respondent’s “inflammatory” assertions that it lacks sufficient evidence. The Claimant points out that the Respondent’s document requests did not cover the period leading up to the Written Notification of Claim, which indicates a deliberate attempt to avoid evidence that would be contrary to the Respondent’s attempt to undermine the FATA notification.⁹⁷⁶ In sum, “[since], as Mr. Pellegrini explained, the intention to bring a claim and the decision to litigate were formed well after February 2011, the RPL does not refer to documents relating to that decision”.⁹⁷⁷ As Mr. Pellegrini testified, he “did not come

⁹⁶⁹ Claimant’s First Post-Hearing Brief, para. 109.

⁹⁷⁰ Claimant’s First Post-Hearing Brief, para. 115.

⁹⁷¹ Claimant’s First Post-Hearing Brief, para. 116.

⁹⁷² Claimant’s First Post-Hearing Brief, para. 3.

⁹⁷³ Claimant’s First Post-Hearing Brief, para. 105.

⁹⁷⁴ Claimant’s First Post-Hearing Brief, paras 106, 118.

⁹⁷⁵ Claimant’s Second Post-Hearing Brief, para. 23.

⁹⁷⁶ Claimant’s Second Post-Hearing Brief, para. 36.

⁹⁷⁷ Claimant’s Second Post-Hearing Brief, para. 36.

to believe plain packaging would pass until after the Opposition announced its support of the Bill in May 2011”.⁹⁷⁸

D. WHETHER THE PARTIES HAVE ESTABLISHED THEIR BURDEN OF PROOF WITH RESPECT TO THE PRELIMINARY OBJECTIONS

469. The Parties disagree as to whether each of them has discharged the burden of proof with respect to the preliminary objections under consideration.

470. The Respondent explains that each Party carries the burden of proving the facts relied on to support its claim or defence. Relying on the decisions of international tribunals, the Respondent argues that once a party has adduced sufficient or *prima facie* evidence in support of its assertion, the evidential burden shifts to the other party to adduce sufficient evidence to rebut it.⁹⁷⁹ In this regard, the Respondent distinguishes legal burden of proof (which never shifts) from evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence).⁹⁸⁰

471. The Respondent submits that the Claimant not only failed to rebut Respondent’s *prima facie* case in respect of its preliminary objections but also failed to acknowledge that the burden shifts when Australia adduces sufficient *prima facie* evidence in support of its preliminary objections.⁹⁸¹ The Respondent rejects the Claimant’s proposition that Respondent’s case is characterised by “hypothetical scenarios based on counterfactuals”.⁹⁸²

472. Following the reasoning in *Rumeli Telekom v. Kazakhstan*, the Respondent observes that when a party is unable to provide direct proof due to the evidence being in the primary control of the other party, the tribunal may draw inferences from a failure of the other party to adduce the evidence.⁹⁸³ The Respondent rejects the relevance of *Ambiente v. Argentina*, explaining that it is not in a similar position as Argentina in that case because the preliminary objections raised by

⁹⁷⁸ Claimant’s First Post-Hearing Brief, para. 8.

⁹⁷⁹ Respondent’s First Post-Hearing Brief, para. 13 referring to *Methanex Corporation v. United States of America*, NAFTA Arbitration, Award, 3 August 2005, para. 55 (**Exhibit RLA-116**).

⁹⁸⁰ Respondent’s First Post-Hearing Brief, para. 15 referring to *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Award, 25 August 2014 (**Exhibit RLA-368**).

⁹⁸¹ Respondent’s Second Post-Hearing Brief, para. 18.

⁹⁸² Respondent’s Second Post-Hearing Brief, para. 14.

⁹⁸³ Respondent’s First Post-Hearing Brief, para. 13 referring to *Rumeli Telekom v. Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, para. 444 (**Exhibit CLA-060**).

Australia involve factual matters for which Australia has adduced *prima facie* evidence in spite of the Claimant having primary control over the evidence.⁹⁸⁴

473. The Claimant, on the other hand, submits that it has met its burden of proving all the facts that establish the Tribunal’s jurisdiction: that the Claimant is a Hong Kong investor under Article 1(f) of the Treaty; that it owns or controls investments in Australia under Article 1(e) of the Treaty; and that a dispute existed between the Claimant and the Respondent when the Claimant submitted its claim to arbitration.⁹⁸⁵
474. Relying on the tribunal’s reasoning in *Pac Rim v. El Salvador*, the Claimant submits that the Respondent bears the burden to prove its jurisdictional objections.⁹⁸⁶ However, the Claimant argues that the Respondent has failed, or has not even attempted, to do so. Comparing the Respondent in the present dispute to that in *Ambiente v. Argentina*, the Claimant asserts that the Respondent must provide evidence to prove its jurisdictional objections and it cannot prevail merely by questioning the evidence the Claimant has presented. In this regard, the Claimant states that the Respondent “only raises questions about the Claimant’s evidence and poses hypothetical scenarios based on counterfactuals, but fails to prove its objections with evidence”.⁹⁸⁷
475. The Parties present specific arguments in respect of each preliminary objection.

1. Burden to Prove the Non-admission of Investment Objection

The Respondent’s Position

476. While the Respondent points out that the Claimant has not adduced sufficient evidence to rebut the Respondent’s arguments, the latter argues that it has discharged its burden of proving the facts to support that the Foreign Investment Application was false or misleading in relation to the Non-admission of Investment Objection. The Respondent emphasizes that, when having regard to Australian law, the Tribunal should apply a “balance of probabilities” standard of

⁹⁸⁴ Respondent’s Second Post-Hearing Brief, para. 17.

⁹⁸⁵ Claimant’s First Post-Hearing Brief, para. 43.

⁹⁸⁶ Claimant’s First Post-Hearing Brief, para. 33 referring to *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012 (“*Pac Rim Decision on the Respondent’s Jurisdictional Objections*”), para. 2.13 (**Exhibit RLA-059**).

⁹⁸⁷ Claimant’s First Post-Hearing Brief, para. 34.

proof because this arbitration is similar to civil judicial review proceedings, and not to criminal proceedings.⁹⁸⁸

477. In this context, the Respondent denies the Claimant's suggestion that, in order to succeed on the Non-Admission of Investment Objection, Australia must establish that the Claimant has committed criminal offences under section 26(2) of the FATA and section 136.1 of Australia's Criminal Code. The Respondent explains that it has referred to the Criminal Code only to emphasise the existence of an obligation on investors to deal with the host State in a manner which is not false or misleading.⁹⁸⁹

The Claimant's Position

478. The Claimant submits that the Respondent has not proven its objection to the Claimant's admission of its investments under Article 1(e) of the Treaty and cautions the Tribunal not to discharge the Respondent's burden of proof based on a series of hypotheses which the Respondent puts before the Tribunal.⁹⁹⁰

479. The Claimant characterises as hypothetical the following questions raised in the Respondent's pleadings: (1) what the Claimant should have disclosed to the Treasury had it already decided to sue Respondent under the Treaty at the time of the Foreign Investment Application, even though the Claimant had made no such decision at the time; (2) what the Treasury might have done if the Foreign Investment Application stated that transferring ownership of the Australian subsidiaries to the Claimant would provide an additional basis of jurisdiction under the Treaty; (3) whether the Foreign Investment Application was false or misleading under Section 136.1 of the Criminal Code, even though the Respondent now asserts that it is not alleging that the Claimant violated the Criminal Code;⁹⁹¹ (4) whether the Treasury would have invalidated its No-objection Letter if it had been given the opportunity to revisit the matter; and (5) whether the investment was not properly admitted despite the provision of section 38 of the FATA.⁹⁹²

⁹⁸⁸ Respondent's Reply on Preliminary Objections, paras 253–256; Respondent's Second Post-Hearing Brief, para. 22.

⁹⁸⁹ Respondent's Second Post-Hearing Brief, para. 64.

⁹⁹⁰ Claimant's First Post-Hearing Brief, para. 36.

⁹⁹¹ See Amended Transcript of the Hearing, Day 2, p. 100:15–21, whereby the Respondent stated at the hearing that it had not "alleged that an offence has been committed under section 136.1 of the Criminal Code".

⁹⁹² Claimant's First Post-Hearing Brief, para. 35.

480. Furthermore, the Claimant submits that the standard of proof is a matter of public international law and not Australian law. The Respondent bears the burden of proof when it accuses the Claimant of illegalities in the making of an investment. The Claimant explains that, although the present proceeding is not a criminal one, the Respondent should prove its case *beyond reasonable doubt*, as it is relying on breaches of Australia's Criminal Code.⁹⁹³

2. Burden to Prove the *Ratione Temporis* Objection and an Abuse of Right

The Respondent's Position

481. The Respondent submits that it has discharged its burden of proving, on a balance of probabilities, the facts supporting its *ratione temporis* objection and its abuse of rights argument, while the Claimant has adduced insufficient evidence to rebut the Respondent's evidence.

482. Supporting its abuse of right argument with reference to Mr. Pellegrini's evidence, documents recorded in the RPL and internal documents of the PMI Group, the Respondent submits that it has established that the restructuring was *prima facie* abusive. In particular, the Respondent points out that the evidence of Professor Lys, which shows that there was no reason to believe that the restructuring was undertaken for a business purpose or economic rationale,⁹⁹⁴ has not been challenged by the Claimant. The evidential burden therefore shifts to the Claimant, which has failed to justify the restructuring of its subsidiaries: the Claimant's witnesses were not directly involved in the restructuring; and Mr. Pellegrini, who was "at the margins of key decisions", has stated that the decision to restructure was "not particularly meaningful".⁹⁹⁵

483. In relation to the standard of proof, the Respondent submits that the Claimant, referring to the ruling in *Chevron v. Ecuador (I)*, seeks to set an unduly high standard for an abuse of right. The Respondent argues that it does not need to prove bad faith, or presume good faith. Following the reasoning in *Pac Rim v. El Salvador*, the Respondent points out that to impose any higher evidentiary threshold in the context of a corporate restructuring would fail to take account of the fact that the party that controls the corporate structure is also in control of the evidence that is

⁹⁹³ Claimant's Counter-Memorial on Preliminary Objections, para. 166; Claimant's Rejoinder on Preliminary Objections, para. 233.

⁹⁹⁴ Respondent's Second Post-Hearing Brief, para. 4b referring to the Second Expert Report of professor Lys (26 November 2014), para. 238 (**Exhibit RWS-012**).

⁹⁹⁵ Respondent's First Post Hearing Brief, paras 18–19; Respondent's Second Post-Hearing Brief, para. 20.

required to substantiate the abuse of right claim. This would impose an unduly high evidential threshold on the Respondent.⁹⁹⁶

The Claimant's Position

484. The Claimant contends that the present dispute came into existence when the arbitration began and therefore the Tribunal has jurisdiction *ratione temporis*. The Claimant states that the Respondent has failed to adduce persuasive evidence to prove the contrary. Instead, the Claimant argues that the Respondent asks the Tribunal to make assumptions—that the Claimant intended in April 2010 to challenge Prime Minister Rudd's announcement, and that the Claimant knew, at that time, that the Respondent would adopt Plain Packaging Measures.⁹⁹⁷

485. With regard to the abuse of rights argument, the Claimant submits that the Respondent has failed to meet the required "high threshold", which encompasses a showing of bad faith, and cautions the Tribunal not to compare it to claimants in other cases put forth by the Respondent. Unlike in those cases, the Claimant argues that, in the present arbitration proceeding, there are no indicia of bad faith because the Claimant invested transparently in the host State; had exercised management control of the Australian subsidiaries for a decade before the transfer took place; did not engage in fraud; and did not "internationalise" a domestic dispute as stated by the Respondent.⁹⁹⁸

486. In response to the Respondent's allegation that its abuse of right argument focuses on the timing of the restructuring, the Claimant submits that timing only is insufficient to prove an abuse of right. The Claimant further argues that the Respondent has failed to prove that the dispute was foreseeable at a "very high probability" and was not "merely a possibility" when the restructuring decision was made. It is not sufficient for the Respondent to create a reasonable doubt regarding the reasons for the restructuring, as (in the Claimant's view) Counsel for the Respondent attempted to do at the Hearing on Preliminary Objections.⁹⁹⁹

⁹⁹⁶ Claimant's Second Post-Hearing Brief, para. 21.

⁹⁹⁷ Claimant's First Post-Hearing Brief, para. 37.

⁹⁹⁸ Claimant's First Post-Hearing Brief, para. 39.

⁹⁹⁹ Claimant's First Post-Hearing Brief, paras 40–41.

487. The Claimant therefore submits that the Respondent failed to meet the “high threshold” to rebut the presumption of good faith to which the Claimant is entitled, and the evidentiary burden consequently does not shift to the Claimant.¹⁰⁰⁰

3. Burden to Prove the Control Argument

The Respondent’s Position

488. The Respondent points out that the Claimant has failed to adduce sufficient evidence that it exercised control over its Australian subsidiaries since 2001.

489. According to the Respondent, the Claimant’s assertion of control is a “distracting fiction” and should be rejected by the Tribunal because it is inconsistent with the Notice of Arbitration and the Foreign Investment Application, in which the Claimant stated “nil” where it was required to specify shares or interests in shares in which it already held an interest.¹⁰⁰¹ In distinguishing the ruling in *SD Myers v. Canada* from the present arbitration proceeding, the Respondent further explains that the Claimant has not exercised “control” because it has not “provided a single dollar for the operation of the Australian subsidiaries”.¹⁰⁰²

490. The Respondent also rebuts the Claimant’s argument of “delegated control” and explains that this criterion is not sufficient to establish control for the purposes of Article 1(e) of the Treaty. A company exercising delegated control is not protected when the delegator is not itself an “investor” under the Treaty.¹⁰⁰³

491. Furthermore, the Respondent casts doubt on Mr. Pellegrini’s testimony and submits that the Claimant’s factual record does not support its assertion of control. For example, the Respondent explains that what really matters in the control of the Australian subsidiaries’ business, as pointed out by Mr. Gledhill, is the “region” and the role played by PMI’s regional structure, which Claimant has failed to disclose.¹⁰⁰⁴

¹⁰⁰⁰ Claimant’s First Post-Hearing Brief, para. 42.

¹⁰⁰¹ Respondent’s First Post-Hearing Brief, para. 51.

¹⁰⁰² Respondent’s First Post-Hearing Brief, para. 58.

¹⁰⁰³ Respondent’s First Post-Hearing Brief, para. 53.

¹⁰⁰⁴ Respondent’s First Post-Hearing Brief, para. 55.

The Claimant's Position

492. The Claimant maintains that it has established an independent basis for jurisdiction based on its control of the Australian subsidiaries since 2001. By claiming that managerial control is sufficient, the Claimant argues that it has discharged its burden to prove the factual elements of its control argument through extensive witness testimony and copious documentary evidence.¹⁰⁰⁵ The Claimant further submits that by adducing such evidence, it has proved that it had controlled the subsidiaries before the ownership transfer and before the time the Respondent alleges the dispute began.
493. Since the Respondent has, in the Claimant's view, failed to rebut the Claimant's evidence, the Claimant argues that the Respondent's preliminary objections must fail.¹⁰⁰⁶ More specifically, the Claimant argues that the Respondent has not refuted the fact that Mr. Pellegrini, regardless of his title, works on behalf of the Claimant and that he and his staff at PM Asia control the Australian subsidiaries.¹⁰⁰⁷

VI. THE TRIBUNAL'S ANALYSIS

494. The Tribunal shall now examine the Parties' arguments. The Tribunal has carefully reviewed the extensive factual and legal arguments presented by the Parties in their written and oral submissions. While the Tribunal considers that it is in the interest of clarity briefly to repeat certain aspects of each Party's case, the Tribunal's reasoning shall only address what the Tribunal regards as determinative for deciding the disputed issues of jurisdiction and admissibility. In the following, the Tribunal shall set out its findings of fact alongside its legal determinations, as the latter provide critical context for the former.

A. BURDEN OF PROOF

495. The Tribunal finds that there is no general disagreement between the Parties as to the principles governing burden of proof, although the application of these principles to certain preliminary objections requires further discussion. Specifically, it is for the Claimant to allege and prove facts establishing the conditions for jurisdiction under the Treaty; for the Respondent to allege and prove the facts on which its objections are based; and, to the extent that the Respondent has

¹⁰⁰⁵ Claimant's First Post-Hearing Brief, para. 44, referring to **Exhibits CWS-001, CWS-002, CWS-015, CWS-016, CWS-019 and CWS-020**.

¹⁰⁰⁶ Claimant's First Post-Hearing Brief, paras 32, 45.

¹⁰⁰⁷ Claimant's First Post-Hearing Brief, para. 29.

established a *prima facie* case, for the Claimant to rebut this evidence. Where relevant, the Tribunal will address the application of the burden of proof when discussing the various objections below.

B. WHETHER THE CLAIMANT HAD CONTROLLED PML'S BUSINESS PRIOR TO THE RESTRUCTURING

496. As noted above, the Claimant contends that Australia's preliminary objections relating to the manner in which it obtained ownership of the PMI Group's Australian subsidiaries fail because it had already exercised management control over these entities since 2001. To succeed with its argument, the Claimant would need to convince the Tribunal that:

- as a matter of Treaty interpretation, mere management control satisfies the test of "controlled" under the Treaty; and
- as a matter of fact, it actually exercised such management control.

1. Interpretation of "Controlled"

497. The Tribunal recalls Subsection (e) of Article 1 of the Treaty regarding Definitions:

"investment" means every 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 [...].

For the purposes of this Agreement, a physical person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in the company or the investment. Any question arising out of this Agreement concerning the control of a company or an investment shall be resolved to the satisfaction of the Contracting Parties.

498. Thus, the Treaty defines control through the concept of "substantial interest". Since the first paragraph mentions "owned or controlled" as alternative possibilities, it is evident that the drafters intended substantial interest to require something other than full ownership. However, it is less clear what the concept refers to. The *travaux préparatoires* of the Treaty—as recorded in Exhibit R-752¹⁰⁰⁸—do not provide a conclusive answer. Paragraphs 26, 137 and 167 were discussed by the Parties and considered more closely by the Tribunal:

[REDACTED]

1008

[REDACTED]



499. A possible reading of paragraph 137 appears to be that Australia considered that “substantial interest” would serve to extend protection to a minority owner. On the other hand, it might be argued that, irrespective of control, minority ownership would in any event have been protected by the Treaty under the notion of “owned” in the first sentence of the provision, as the scope of “asset” is broad and includes shares, and as the word “owned” is not limited by any qualification such as “full”.
500. The Tribunal notes the Claimant’s reference to findings of the tribunal in *S.D. Myers v. Canada* in support of its assertion that oversight and management can suffice to establish control for the purposes of enjoying Treaty protection. According to the Claimant, the *S.D. Myers* tribunal considered similar language to that set out under Article 1(e) of the Treaty and confirmed that, “control can exist independently of ownership”.¹⁰⁰⁹ The present Tribunal is not persuaded by that comparison. First, in *S.D. Myers v. Canada*, the issue was whether the investment was controlled directly or indirectly, while in the present case the BIT expressly defines control by reference to “substantial interest”. Second, as the Claimant itself mentions, the *S.D. Myers*

¹⁰⁰⁹ Claimant’s Counter-Memorial on Preliminary Objections, para. 86.

tribunal “relied on the testimony of the President of SDMI that he controlled Myers Canada in his role as President of SDMI, even though SDMI did not own equity in Myers Canada and that there was no legal agreement ‘set[ting] out the respective responsibilities and obligations’ of the companies”.¹⁰¹⁰ In the present case, as will be noted below, when discussing the evidence, Mr. Pellegrini has not been found to exercise such control at the relevant time.

501. For similar reasons, the decisions of other tribunals regarding the interpretation of “control” referred to by the Parties cannot be relied on for present purposes, because none of those other treaties defines “control” by reference to “substantial interest” or any similar wording. Therefore, “control” in this BIT must be interpreted independently.
502. In the view of the Tribunal, the most plausible reading of “substantial interest” may be the Respondent’s suggestion “that the putative investor must have a right or power over an asset which is sourced in a legal arrangement, and which is capable of being exercised in some significant way that affects the economic returns from and disposition of the asset”.¹⁰¹¹ As noted above, the Respondent contends that the essentially economic meaning of that phrase follows from the “context of the term ‘control’” in the Treaty;¹⁰¹² under the Treaty, “‘investments’ are understood as an economic contribution of a certain duration which involves some element of risk”.¹⁰¹³ Specifically, the Respondent brings Articles 2(2), 3(1) and 8(1) of the Treaty to the Tribunal’s attention, noting that these provisions “apply to ‘investments and returns’ of investors”.¹⁰¹⁴ In addition, the Respondent refers to Article 6(1) of the Treaty, which provides that investors should be compensated for any loss suffered¹⁰¹⁵— a provision that would not make any sense in the absence of any economic interest in the investment.¹⁰¹⁶ This interpretation would have the consequence that PM Asia would not have had a “substantial interest” in the Australian Philip Morris subsidiaries before 2011 since, as the Respondent recalls, “in the period 2001-2011, PM Asia did not have any expectation of ‘an economic return’ from its asserted ‘[management] control’ of PM Australia and PML”.¹⁰¹⁷

¹⁰¹⁰ Claimant’s Counter-Memorial on Preliminary Objections, para. 88.

¹⁰¹¹ Respondent’s First Post-Hearing Brief, para. 20.

¹⁰¹² Respondent’s Reply on Preliminary Objections, para. 146.

¹⁰¹³ Respondent’s Reply on Preliminary Objections, para. 146.

¹⁰¹⁴ Respondent’s First Post-Hearing Brief, para. 21.

¹⁰¹⁵ Respondent’s First Post-Hearing Brief, para. 21.

¹⁰¹⁶ Statement of Defence, Vol. A, para. 173.

¹⁰¹⁷ Statement of Defence, Vol. A, para. 174.

503. Whatever the precise intention of the negotiators as summarised in paragraph 137 of the *travaux préparatoires* may have been, the Tribunal considers that it cannot draw the kind of far-reaching conclusions from this paragraph that the Claimant suggests.¹⁰¹⁸
504. To better understand the notion of management control, one could attempt to invoke the fact that two or more entities could “co-control” an investment in Australia, such that they would all be considered protected investors under the Treaty, a result that the Treaty would arguably not allow. However, such reasoning would be inconclusive at best. Indeed, the exact same result may occur in a situation where several investors own the investment, as all of them would be considered protected investors under the Treaty.
505. Be that as it may, considering the lack of clarity in the preparatory works on the Treaty, some doubt remains as to whether the Tribunal should dismiss the Claimant’s control argument on the ground that the criterion of “controlled” in the Treaty could not be satisfied by mere management control. As explained below, the Tribunal does not need to rely on this argument. Furthermore, the Tribunal observes that, in view of the very last sentence in Article 1(e) of the Treaty, Australia had originally argued—albeit in a different context—that the interpretation of the notion of control under the Treaty fell outside the jurisdiction of the Parties and had to be considered and resolved to the satisfaction of the Treaty Parties through consultations. However, the argument was not raised again in respect of the meaning of “controlled” in the context of the Claimant’s control argument.

2. Evidence regarding Control

506. For the reasons just mentioned, *i.e.* because the documentation provided does not allow the Tribunal to reach any conclusive interpretation and because some uncertainty remains as to the Tribunal’s role in interpreting the notion of control in view of the last sentence of subsection (e) quoted above, the Tribunal is inclined to leave open the precise meaning of the term “controlled”. Instead, the Tribunal considers that, even if substantial interest could be defined through management control, it must be concluded that the Claimant has not proven that PM Asia exercised management control of any significance in respect of the Australian subsidiaries.
507. The following documentary evidence referred to by the Respondent in this context is relevant. With regard to PML’s financial performance and budget, the documents produced by the Claimant do not show that PM Asia controlled PML.¹⁰¹⁹ As mentioned earlier, Mr. Pellegrini

¹⁰¹⁸ Claimant’s Rejoinder on Preliminary Objections, paras 70–71.

¹⁰¹⁹ Respondent’s Reply on Preliminary Objections, para. 220.

admitted that the CEO of PMI finalises PML’s budget and that PMI is entrusted with the final decision-making power.¹⁰²⁰ In his role within PMI, Mr. Pellegrini approved PML’s capital expenditures in accordance with PMI policy,¹⁰²¹ but his role was limited. For example, for expenditures above USD 25 million, the approval from an officer further up in the hierarchy of PMI was required.¹⁰²² Similarly, it was a PMI officer “who gave the ultimate approval for PML’s payment of dividends”.¹⁰²³ Regarding PML’s major business initiatives and budgets, PMI finalised the numbers on PML’s OB/LRP and Mr. Pellegrini would review the budgets according to PMI standards.¹⁰²⁴ For the branding and marketing strategy, the decisions concerning international brands had to be approved by PMI in Lausanne.¹⁰²⁵ While, to some extent, PML’s managing directors reported to and worked under the supervision of the Claimant’s President, Mr. Pellegrini, the evidence shows that much of the reporting was made directly to the PMI personnel in Lausanne, and only indirectly to Mr. Pellegrini.¹⁰²⁶

3. Conclusion

508. In conclusion, the Tribunal finds that, while some (limited) management activity was exercised by PM Asia from Hong Kong prior to the 2011 restructuring, Mr. Pellegrini acted in most relevant circumstances as a manager of PMI, rather than PM Asia, and that all significant strategic and budgetary decisions were either taken by or at least had to be approved by PMI.

509. Therefore, the Tribunal concludes that the Claimant, who bears the burden of proof on this issue, has failed to show that, prior to the 2011 restructuring, it had “control” with a “substantial interest” over the Australian investments in the sense of the definition in Article 1(e) of the BIT.

C. WHETHER THE CLAIMANT’S INVESTMENT HAS BEEN ADMITTED UNDER AUSTRALIAN LAW AND INVESTMENT POLICIES

510. The Parties’ arguments concerning the (non-) admission issue are summarised in considerable detail in Section V.B. above, to which the Tribunal refers. In essence, the Respondent contends that the Claimant’s investment was never admitted under the Treaty, because the Foreign

1020 [REDACTED]
1021 [REDACTED]
1022 [REDACTED]
1023 [REDACTED]
1024 [REDACTED]
1025 [REDACTED]
1026 [REDACTED]

Investment Application was false or misleading, and that consequently, the investment cannot be afforded Treaty protection. By contrast, the Claimant submits that the admission requirement under Article 1(e) of the Treaty was satisfied, because (i) the Respondent admitted the investments following an open and factually accurate FATA notification and expressly stated that it had no objection to these investments; (ii) the No-Objection Letter is and was at all times a formal legally binding document; and (iii) the Respondent took no steps to invalidate its own regulatory action.

1. The Admission Test under the Treaty

511. Article 1(1)(e) of the Treaty provides that protected investments must have been admitted in the host country in the following terms:

“investment” means every 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 [...].

2. *Prima facie* Admission of the Investment

512. The starting point for the Tribunal’s analysis as to whether the Claimant’s investment was “admitted” in Australia is the No-objection Letter, *i.e.*, the Respondent’s notification to the Claimant of 11 February 2011 whereby the Treasury stated that it had no objection to the proposed restructuring. The No-objection Letter reads as follows:

Dear Mr Scarf,
I refer to correspondence received on 21 January 2011 concerning the proposal for Philipp Morris Asia Limited to acquire Philip Morris (Australia) Limited as a result of a company reorganisation.
There are no objections to this proposal in terms of the Government’s foreign investment policy.
Yours sincerely,
[REDACTED]
Foreign Investment Review Board Secretariat

513. In the view of the Tribunal, the No-objection Letter, which contains no reservations, constitutes *prima facie* evidence that the investment was (and remains) validly admitted.

514. Therefore, the burden of proving that the investment was *not* admitted shifts to the Respondent. Based on the evidence before it and for the reasons explained further below, the Tribunal finds that the Respondent has not provided sufficient evidence in support of its non-admission objection to rebut the No-objection Letter.

3. Lack of Evidence that the Investment Was Not Admitted

515. Having established that the investment was (initially) admitted through the No-objection Letter, the Tribunal must now review whether the No-objection Letter was nonetheless ineffective because the information provided by the Claimant was incomplete and thus misleading. The Tribunal finds that this was not the case in particular for the following reasons.
516. First, the Tribunal is not persuaded by the Respondent's reliance on the alleged requirements with respect to the content of the FATA notification as set forth in the How-to-Apply Guide¹⁰²⁷ and in Australia's Foreign Investment Policy.¹⁰²⁸ According to the Respondent, two elements were missing from the Claimant's FATA notification: first, a statement of its future intentions (immediate and ongoing) and, second, a description on how the proposed investment may impact on the national interest.
517. However, the Respondent has not demonstrated that these requirements were mandatory. Hence, the Tribunal cannot conclude that non-compliance with some aspects of the Guide or the Policy, which is neither contained nor referred to in the FATA, resulted in a misleading application which could invalidate the admission. In other words, while it may be argued that the Claimant omitted a key reason for the restructuring, the Tribunal is not convinced that it was mandatory for the Claimant to mention any such reason in the context of its FATA notification.
518. Second and more specifically with respect to national interest, one cannot see why the applicant would have considered that the restructuring raised a concern of national interest, a term for which no precision had been provided. As to the applicant's intention, it is true that the latter did not disclose that it was seeking BIT protection, but this would have been known at least in some quarters of the Treasury. Indeed, the Government, including at least the Treasurer, was aware of (i) Australia's BIT programme; and (ii) the Claimant's intention to challenge Plain Packaging Measures. Thus, the Respondent's claim that, had it known of the BIT intention, the matter would have been elevated to the Treasurer, seems to be rather an admission of a defect in its own internal procedures, where a matter of potentially important public policy was missed. Nor is the Tribunal persuaded by the Respondent's assertion that the Treasury officials who reviewed the Foreign Investment Application lacked authority to issue the No-objection Letter. Instead, the Tribunal is more inclined to accept the Claimant's argument that the officials acted

¹⁰²⁷ See **Exhibit R-001**.

¹⁰²⁸ See **Exhibit R-002**.

as the Treasurer's agents, his *alter egos*, and as such had the power to bind the principal.¹⁰²⁹ This is confirmed by the practice of FIRB in other cases.

519. In particular, the Tribunal has reviewed excerpts of FATA notifications in previous cases.¹⁰³⁰ It has also reviewed internal minutes of the Treasury, as produced by the Respondent and submitted in excerpts to the Tribunal by the Claimant, which show how applicants in the past described the purpose of their proposed restructuring. These descriptions (*e.g.*, "aligning a group's legal structure with its operational structure") are similar in style and detail as that in the description contained in the PMI Group's Foreign Investment Application.¹⁰³¹ These minutes confirm that internal corporate restructuring did not normally raise serious national interest concerns.¹⁰³²
520. Third, and more specifically with respect to the attribution of knowledge to the Treasurer, there is simply no evidence on the record of the state of knowledge of the lower-ranking officials deciding on the No-objection Letter. Thus, there is no basis for engaging in a discussion about attribution of knowledge within the Treasury for which the Respondent would have the burden of proof.
521. Fourth, the Tribunal observes that none of the other FATA applications on the record concern a scenario that is comparable with an intention to bring a BIT claim. Indeed, what the other applications suggest is that the Treasury's primary focus is on changes that result in foreign ownership of strategic industries. This finding further supports the Tribunal's view that the Claimant was not required to disclose what the Respondent has called its "BIT intention", namely, the intention to bring a Treaty claim against Australia if the Plain Packaging Measures were implemented, in the Foreign Investment Application.
522. Finally, as to the Respondent's argument that the No-objection Letter was "affected by jurisdictional error, and [was] as a result... an invalid decision," the Tribunal notes that the

¹⁰²⁹ Claimant's Rejoinder on Preliminary Objections, para. 240; Claimant's First Post-Hearing Brief, para. 84 referring to the [REDACTED]

¹⁰³⁰ Annex B to the Claimant's Rejoinder on Preliminary Objections.

¹⁰³¹ Annex A to the Claimant's Rejoinder on Preliminary Objections, [REDACTED]

¹⁰³² [REDACTED]

letter has never been formally revoked by the Government and that no procedure was initiated to have it declared invalid by any administrative authority or courts. In other words, the Tribunal finds that the Respondent has failed to challenge successfully the undisputed facts that the No-objection Letter was issued and no administrative or judicial authority has found the No-objection Letter to be invalid. The Respondent itself has never taken any action to divest the Claimant of its investment. Moreover, the fact that the No-objection Letter had been sent was later confirmed by officials of the Treasury—on 31 October 2011¹⁰³³ and on 31 July 2012¹⁰³⁴—to the effect that the investment was admitted, without there being any suggestion of invalidity.

4. Conclusion

523. In light of these reasons, the Tribunal concludes that the Claimant’s investment was admitted as required in subsection (e) of Article 1 of the BIT and that the Respondent’s non-admission objection must thus fail.

D. WHETHER THE CLAIMANT’S CLAIM FALLS OUTSIDE THE TEMPORAL SCOPE OF ARTICLE 10 OF THE TREATY

524. Having found that the investment was “admitted”, the Tribunal shall now consider whether the Claimant’s claim in the present arbitration falls outside the temporal scope of the Parties’ consent to arbitration embodied in Article 10 of the BIT, such that the Tribunal has no jurisdiction.

525. The Respondent emphasises that the existence of a dispute is a question of substance, not form, and that, based on the facts of this case, a dispute pertaining to the legality and efficacy of plain packaging in Australia had arisen prior to the restructuring of PMI through which it obtained the protection of the Treaty. The Respondent considers that a relevant “disagreement and/or conflict” between the Parties existed as early as in April 2010, when the plan to enact plain packaging legislation was announced. The dispute that arose then is the same as the one presently before the Arbitral Tribunal, notwithstanding the fact that the parties are different and that the dispute now pertains to a specific breach of the Treaty. Article 10 does not envisage that the Treaty will apply to disputes that existed before the Treaty took effect vis-à-vis a particular investor. Absent specific provisions to the contrary, the jurisdiction *ratione temporis* under an

¹⁰³³ Letter from [REDACTED] (Treasury) to B. Campbell Q.C. (AGD) “Request for Documents: Philip Morris Asia Limited Acquisition of Shares in Philip Morris” (31 October 2011) (**Exhibit R-764**).

¹⁰³⁴ Claimant’s First-Post Hearing Brief, paras 90–91 referring to a Letter from [REDACTED] (Treasury) to B. Campbell Q.C. (AGD), “Request for Documents: Philip Morris Asia Limited Acquisition of Shares in Philip Morris (Australia) Limited” (31 July 2012) (**Exhibit R-765**).

investment treaty must be deemed to be limited to prospective disputes. To find otherwise would be contrary to the ordinary meaning of the dispute resolution clause, as well as the object and purpose of the Treaty.

526. The Claimant argues that a dispute regarding a breach of an international obligation cannot exist on the basis of mere threats or proposals of a measure. Any disagreement between the Parties prior to the enactment of wrongful legislation has the character of a policy debate in preparation for the positions to be taken in a dispute in the event of enactment. Until June 2011, neither the enactment of the legislation nor the dispute was foreseeable as a very high probability, and the dispute did not crystallise until the legislation was passed. There was therefore no relevant “pre-existing” dispute, and the present dispute falls within the jurisdiction *ratione temporis* of the tribunal in accordance with Article 10 of the Treaty. Alternatively, even if a dispute did exist prior to the enactment of the legislation, nothing in Article 10 of the Treaty precludes the extension of the scope of the tribunal’s jurisdiction *ratione temporis* to pre-existing disputes.
527. In view of the arguments submitted by the Parties, the starting point for the Tribunal is to distinguish between the *ratione temporis* objection and the abuse of rights objection. This is now clear from the jurisprudence¹⁰³⁵ and is also largely consistent with the manner in which the Parties structured their pleadings. As the tribunal reasoned in *Gremcitel*:

182. As a further threshold matter, the Tribunal considers that an abuse of process objection must be distinguished from a *ratione temporis* objection. If a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process. Here, the Tribunal has established that Ms. Levy acquired her investment prior to the challenged measure, even if it was just slightly before. In such a situation, a tribunal has jurisdiction *ratione temporis* but may be precluded from exercising its jurisdiction if the acquisition is abusive.¹⁰³⁶

528. The Claimant distinguishes between jurisdiction *ratione temporis* (which it submits must be assessed at the time of filing the request for arbitration) and the *temporal application of the substantive standards* (in relation to which it accepts that the substantive standards could only apply after a claimant has made its protected investment under the BIT). While correct in

¹⁰³⁵ See *Pac Rim Decision on the Respondent’s Jurisdictional Objections*, paras 2.101, 2.107 (distinguishing between a *ratione temporis* objection and an abuse of process objection); *Lao Holdings NV. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, para. 76 (“if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process, but for an objection based on *ratione temporis* to be upheld, the dispute has to have actually arisen before the critical date to conform to the general principle of non-retroactivity in the interpretation and application of international treaties”) (emphasis in bold omitted).

¹⁰³⁶ *Gremcitel Award*, para. 182 (footnote omitted).

theory, the Tribunal is of the view that the distinction is unnecessary when the cause of action is founded upon a treaty breach.¹⁰³⁷ As the tribunal in *Gremcitel v. Peru* explained:

146. [...] it is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host [S]tate and a national or company which has acquired its protected investment before the alleged breach occurred. In other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.

147. This conclusion follows from the principle of non-retroactivity of treaties, which entails that the substantive protections of the BIT apply to the [S]tate conduct that occurred after these protections became applicable to the eligible investment. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.

148. [...] [A claimant] must therefore prove that [it] had already acquired [its] investment at the time of the impugned conduct.¹⁰³⁸ (Emphasis added)

529. The Tribunal agrees with this approach and considers that, whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred. Investor-State jurisprudence is in accord with this approach.¹⁰³⁹ In this respect, the identification of the critical date is essential for the assessment of the scope of the Tribunal's *ratione temporis* jurisdiction.

¹⁰³⁷ Furthermore, in view of the Tribunal's conclusion below that the critical date is the date of enactment of the TPP Act, this discussion would become moot, as the Notice of Arbitration was filed on the same date of such enactment.

¹⁰³⁸ *Gremcitel* Award, paras 146–148 (footnotes omitted).

¹⁰³⁹ *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 17 September 2009, paras 112–114 ("It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, *i.e.*, at the moment when the events on which its claim is based occurred"); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, paras. 121–128 ("It is common ground between the Parties that the Tribunal's jurisdiction over the merits depends on whether Libananco owned ÇEAŞ and Kepez shares at the time of the alleged expropriation ... In order to establish jurisdiction, the Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent"); *Vito G. Gallo v. The Government of Canada*, NAFTA/UNCITRAL, Award, 15 September 2011, para. 328 ("Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."); *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paras 106–107 ("...the Treaty was designed to protect only the nationals and companies of the Contracting Parties, in this case France. The investment of AES, a company incorporated in the United States, is not protected by the terms of this Treaty. Thus, the investment could not be protected by this Treaty until both this Treaty entered into force and Claimant, as a French company, acquired the investment and it became a French investment. Accordingly, the Tribunal lacks jurisdiction over acts and events that took place before the

530. To identify the critical date, the *Gremcitel* tribunal took the following view:

149. [...] the critical date is the one on which the State adopts the disputed measure, even when the measure represents the culmination of a process or sequence of events which may have started years earlier. It is not uncommon that divergences or disagreements develop over a period of time before they finally “crystallize” in an actual measure affecting the investor’s treaty rights.¹⁰⁴⁰

531. The *Gremcitel* tribunal accepted that this was the situation in that case because it was only when the measure (a 2007 Resolution by the Peruvian *Instituto Nacional de Cultura* (INC)) was “adopted and published” that the rights of the claimants were allegedly affected. Prior to that moment, “there was still a possibility that the INC would decide not to adopt the Resolution. The [c]laimants would then have had no act to complain about”.¹⁰⁴¹

532. The Tribunal shares this view. It should be mentioned in this context that the date of the *dispute* is not necessarily identical to that of the alleged breach. Rather, at least as far as one-time acts are concerned, the dispute normally follows the alleged breach (it arises when an aggrieved investor “positively opposes” the measures adopted or any claim of the other party that derives from them).¹⁰⁴²

533. In conclusion, for purposes of the *ratione temporis* objection the critical date is the date when the State adopts the disputed measure, which in this case is the date of *enactment* of the TPP Act, as before that moment the Claimant’s right could not be affected. In other words, the

Claimant acquired the investment, that is on 12 November 2004, at which time both the Treaty had entered into force and the investor had become a qualifying French national.”); *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 170 (“The Tribunal agrees with Ukraine that in order for the Tribunal to hear the Claimant’s claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed.”); *ST-AD GmbH v. Bulgaria*, Award on Jurisdiction, 18 July 2013, para. 300 (“It is an uncontested principle that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country. [...] According to the well-known principle of non-retroactivity of treaties in international law, a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT”). See also Zachary Douglas, *The International Law of Investment Claims* (Cambridge, 2009), para. 330 (“The act of making a qualified investment is also controlling for the scope of the arbitral tribunal’s adjudicative power in several respects. [...] the timing of the investor’s acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal’s adjudicative power over claims based upon an investment treaty obligation.”).

¹⁰⁴⁰ *Gremcitel* Award, para. 149.

¹⁰⁴¹ *Gremcitel* Award, para. 150.

¹⁰⁴² *Gremcitel* Award, para. 149 (“In theory, the moment when the challenged acts occurred is not necessarily the same as the one when the dispute arose [...]. It has rightly been noted that ‘[t]he time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute’. In the Tribunal’s view, a breach or violation does not become a “dispute” until the injured party identifies the breach or violation and objects to it.”).

Claimant was to have acquired its investment by the date of enactment of the TPP Act, *i.e.* by 21 November 2011. The Tribunal observes that, whether the Tribunal refers to the date when the restructuring was decided (3 September 2010) or when it was completed (23 February 2011), both events occurred before the date of the enactment of the TPP Act.

534. Therefore, and without prejudice to its later finding on abuse of rights, the Tribunal concludes that the requirements for the Tribunal's jurisdiction *ratione temporis* are met.

E. WHETHER THE CLAIMANT'S INVOCATION OF THE TREATY CONSTITUTES AN ABUSE OF RIGHTS

535. Finally, the Tribunal must address whether the invocation of the Treaty by the Claimant constitutes an abuse of rights under the present circumstances.

536. The essence of the Respondent's position is as follows. The doctrine of abuse of rights delimits the tribunal's jurisdiction as defined by the consent of the Parties to the Treaty.¹⁰⁴³ While the Respondent accepts that it must meet the burden establishing an abuse, it does not accept that there is a presumption that the Claimant acted in good faith in bringing its claim, in undergoing a corporate restructuring and subsequently relying on Treaty protections.¹⁰⁴⁴ According to the Respondent, there is no case law to support this contention.¹⁰⁴⁵ Rather, cases hold that the entitlement of the Claimant to bring a claim under the Treaty is circumscribed by the scope of the consent of the parties to the Treaty, and such consent and its scope cannot be presumed, but instead must be positively established.¹⁰⁴⁶ In discharging the burden of proof, the Respondent does not need to meet an exceptionally high evidentiary standard,¹⁰⁴⁷ such as a standard of "egregious conduct".¹⁰⁴⁸ The case law indicates that an abuse of right can be found where a corporate restructuring is *motivated* wholly or partly by a desire to gain access to treaty protection in order to bring a claim in respect of a specific dispute¹⁰⁴⁹ that, at the time of the restructuring, *exists* or is *foreseeable*.¹⁰⁵⁰ In these circumstances, the restructuring is intended to

¹⁰⁴³ Respondent's Reply on Preliminary Objections, para. 443.

¹⁰⁴⁴ Respondent's Reply on Preliminary Objections, para. 450.

¹⁰⁴⁵ Respondent's Reply on Preliminary Objections, paras 447–448.

¹⁰⁴⁶ Respondent's Reply on Preliminary Objections, para. 448.

¹⁰⁴⁷ Respondent's Reply on Preliminary Objections, para. 458.

¹⁰⁴⁸ Respondent's Reply on Preliminary Objections, para. 458.

¹⁰⁴⁹ Respondent's Reply on Preliminary Objections, paras 455, 508.

¹⁰⁵⁰ Respondent's Reply on Preliminary Objections, para. 466.

create an unfair advantage for the foreign investor because the investor has no intention of performing any economic activity in the host State.¹⁰⁵¹

537. The Claimant argues that the application of the doctrine of abuse of rights results in depriving a claimant of rights that otherwise fall squarely within the jurisdiction of the tribunal.¹⁰⁵² Such a deprivation is to be made only in exceptional circumstances.¹⁰⁵³ To meet the burden of proof, the Respondent must overcome a presumption in favour of the Claimant that it has brought its claim in good faith.¹⁰⁵⁴ The threshold for establishing an abuse of rights is that of compelling evidence of egregious bad faith akin to fraud.¹⁰⁵⁵ “Foreseeability” is not relevant to establishing abuse of rights—the critical test is bad faith.¹⁰⁵⁶ To the extent that foreseeability is relevant, it must be to a very high standard of probability. The “motivation” of an investor is indeed a criterion of abuse of rights. However, bad faith does not exist by virtue of a mere corporate restructuring with a view to taking advantage of Treaty protections. Such normal business practice meets neither the standard of “egregious” conduct nor that of bad faith.¹⁰⁵⁷

1. Arbitral Case Law Regarding “Abuse of Rights”

538. The present case is by no means the first investment arbitration in which it is disputed whether a BIT claim brought shortly after restructuring is admissible. Therefore, the Tribunal considers that it is appropriate to review the relevant case law on this point.

539. As a preliminary matter, it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute. Although it is sometimes said that an abuse of right might also exist in the case of restructuring in respect of an existing dispute, if the dispute already exists, then a tribunal would normally lack jurisdiction *ratione temporis*.

¹⁰⁵¹ Respondent’s Reply on Preliminary Objections, para. 491.

¹⁰⁵² Claimant’s Counter-Memorial on Preliminary Objections, para. 323.

¹⁰⁵³ Claimant’s Counter-Memorial on Preliminary Objections, para. 323.

¹⁰⁵⁴ Claimant’s Rejoinder on Preliminary Objections, para. 324.

¹⁰⁵⁵ Claimant’s Counter-Memorial on Preliminary Objections, para. 336.

¹⁰⁵⁶ Claimant’s Counter-Memorial on Preliminary Objections, paras 345.

¹⁰⁵⁷ Claimant’s Counter-Memorial on Preliminary Objections, para. 337.

540. A detailed examination of the relevant cases reveals the following considerations in connection with the legal test for an abuse of right. Among these, it is first and foremost uncontroversial that the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate.

541. In *Tidewater v. Venezuela*, the tribunal said:

184. [I]t is a perfectly legitimate goal and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host [S]tate in this way.¹⁰⁵⁸

542. In *Mobil Corporation v. Venezuela*, the tribunal said:

204. The aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.¹⁰⁵⁹

543. In a similar vein, the tribunal in *Gremcitel v. Peru* said:

184. In the Tribunal's view, it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate *per se*, including where this is done with a view to shielding the investment from possible future disputes with the host [S]tate.¹⁰⁶⁰

544. In *Aguas del Tunari SA v. Bolivia*, the tribunal observed:

... [T]o the extent that Bolivia argues that the December 1999 transfer of ownership was a fraudulent or abusive device to assert jurisdiction under the BIT, that... (d) it is not uncommon in practice and—absent a particular limitation—not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.¹⁰⁶¹

545. At the same time, it may amount to an abuse of process to restructure an investment to obtain BIT benefits in respect of a foreseeable dispute. After commenting that it is legitimate for an investor to seek to protect itself from the general risk of future disputes, the tribunal in *Tidewater v. Venezuela* went on to say:

¹⁰⁵⁸ *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 (“*Tidewater* Decision on Jurisdiction”), para. 184.

¹⁰⁵⁹ *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (“*Mobil Corporation* Decision on Jurisdiction”), para. 204.

¹⁰⁶⁰ *Gremcitel* Award, para. 184.

¹⁰⁶¹ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 330.

At the heart, therefore, of this issue is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen... If the Claimants' contentions are found to be correct as a matter of fact, then, in the view of the Tribunal, no question of abuse of treaty can arise. On the other hand, if the Respondent's submissions on the course of events are correct, then there may be a real question of abuse of treaty.

[...]

But the same is not the case in relation to pre-existing disputes between the specific investor and the [S]tate. Thus, the critical issue remains one of fact: was there such a pre-existing dispute?¹⁰⁶²

546. The point was reiterated in *Mobil Corporation v. Venezuela*:

205. With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix* Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs".¹⁰⁶³

547. The tribunal in *Pac Rim v. El Salvador* elaborated on this point, setting out a test for distinguishing between a general risk of future disputes and a specific dispute, stating:

2.99. [...] In the Tribunal's view, the dividing-line [between legitimate restructure and an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.¹⁰⁶⁴

548. The *Gremcitel* tribunal posited a simpler test stating:

185. However, a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.¹⁰⁶⁵

549. The principle that a restructuring undertaken to gain treaty protection in light of a specific dispute can constitute an abuse was reiterated in *Lao Holdings v. Laos* in the following terms:

70. The Tribunal considers that it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the "legal dispute," as submitted by the Respondent.¹⁰⁶⁶

550. While they admit that, under certain circumstances, a restructuring may constitute an abuse, investor-State tribunals have set a high threshold for finding an abuse of process, requiring proof of the foreseeability of the claim and depending on the particular circumstances of each case. The *Tidewater* tribunal said:

¹⁰⁶² *Tidewater* Decision on Jurisdiction, paras 145–146 and 184.

¹⁰⁶³ *Mobil Corporation* Decision on Jurisdiction, para. 205.

¹⁰⁶⁴ *Pac Rim* Decision on the Respondent's Jurisdictional Objections, para. 2.99.

¹⁰⁶⁵ *Gremcitel* Award, para. 185.

¹⁰⁶⁶ *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, para. 70.

147. [u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case...¹⁰⁶⁷

551. That statement was reiterated in *Mobil Corporation v. Venezuela*.¹⁰⁶⁸

552. The requirement of a high threshold was articulated by the *Chevron (I)* tribunal in the following terms:

143. ... [I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is “a general agreement that the graver the charge the more confidence must there be in the evidence relied on.”¹⁰⁶⁹

553. A similar approach was taken by the tribunal in *Gremcitel* when it said:

186. As for any abuse of right, the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only “in very exceptional circumstances”. Furthermore, as the Tribunal in *Mobil v. Venezuela* stated, “[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.”¹⁰⁷⁰

554. Despite the variations in the formulations used in the decisions just quoted, this Tribunal considers that case law has articulated legal tests on abuse of right that are broadly analogous, revolving around the concept of foreseeability.¹⁰⁷¹ In the Tribunal’s view, foreseeability rests between the two extremes posited by the tribunal in *Pac Rim v. El Salvador*—“a very high probability and not merely a possible controversy”. On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise. The Tribunal will now apply this test to the facts of the case.

2. The Restructuring in the Context of Political Developments

555. Both Parties have presented long timelines of events, which need to be taken into account. In the following paragraphs, the Tribunal will juxtapose developments occurring at the corporate

¹⁰⁶⁷ *Tidewater* Decision on Jurisdiction, para. 147.

¹⁰⁶⁸ *Mobil Corporation* Decision on Jurisdiction, para. 177.

¹⁰⁶⁹ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143.

¹⁰⁷⁰ *Gremcitel* Award, para. 186.

¹⁰⁷¹ See also *Gremcitel* Award, fn. 219.

level within the PMI Group of companies and events arising at the political level within the Australian Government. Doing so, it will focus on occurrences which the Tribunal considers particularly relevant to place the Claimant's restructuring into temporal perspective.

556. The PMI Group has been restructured in various ways at least since 2005,¹⁰⁷² although it is not entirely clear to the Tribunal to what extent these changes in the corporate structure were part of a single restructuring plan rather than a series of *ad hoc* improvements. The Respondent began considering tobacco Plain Packaging Measures as early as 2008 with the introduction of the Fielding Bill in August 2009.¹⁰⁷³ The Tribunal notes that on 2 September 2009 the PMI Group received a memorandum containing legal advice [REDACTED],¹⁰⁷⁴ and, a month later, PML's solicitors wrote to the Health Minister, Nicola Roxon, expressing concerns about the effect of the plain packaging legislation on Philip Morris's property rights.¹⁰⁷⁵

557. In February 2010, while several opinion polls in Australia indicated that the popularity of Prime Minister Rudd's Government dropped,¹⁰⁷⁶ Australia's Department of Foreign Affairs and Trade stated that the Fielding Bill "did not represent government policy and that there was no government plan to introduce plain packaging legislation".¹⁰⁷⁷ On 14 April 2010, the PMI Group approved its first plan to further streamline its corporate structure,¹⁰⁷⁸ and in the ensuing months of the same year, correspondence was exchanged within the PMI Group concerning legal advice regarding corporate restructuring and investment treaty protections for the Group's investments in Australia in the context of plain packaging.¹⁰⁷⁹ On 29 April 2010, the Australian Government, under the leadership of Prime Minister Rudd, announced major tobacco control

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[REDACTED]

1073 Memorandum from Australian Department of Foreign Affairs and Trade Union to Unknown Recipient Regarding Plain Packaging (**Exhibit C-221**); Parliamentary Digest, Tobacco Plain Packaging Bill 2011 (**Exhibit C-456**).

1074 PM Asia, Claimant's Revised Privilege Log – October 31, 2014 (RPL doc. 299) (**Exhibit R-1058**).

1075 Letter from AAR (solicitors for PML) to Health Minister Roxon (9 October 2009) (**Exhibit R-007**).

1076 Parliament of Australia Research Paper, p. 10 (**Exhibit C-189**).

1077 Letter from Australian Department of Foreign Affairs and Trade to Redacted Recipient on Plain Packaging (23 February 2010) (**Exhibit C-100**); Memorandum from Australian Department of Foreign Affairs and Trade Union to Unknown Recipient Regarding Plain Packaging (**Exhibit C-221**).

1078 Claimant's Counter-Memorial on Preliminary Objections, para. 50; [REDACTED].

1079 Email from Leo O'Keeffe to Ian Goss forwarded to Philip Noonan, Director General IP Australia (23 April 2010) (**Exhibit C-113**); RPL doc. 249 (**Exhibit R-1058**); RPL doc. 81 (**Exhibit R-1058**).

reforms, including the intention to introduce legislation to mandate plain packaging of tobacco products.¹⁰⁸⁰ On 24 June 2010, then-Deputy Prime Minister Julia Gillard replaced Prime Minister Rudd, and at her first press conference, she indicated “a willingness to revise the policies of the Rudd Government”.¹⁰⁸¹ There was however no specific reference to the fate of plain packaging legislation. On 7 July 2010, the Australian Government published a timetable which showed that the plain packaging legislation would be ready for introduction before 30 June 2011 and would be fully implemented by 1 July 2012.¹⁰⁸² The House of Representatives was dissolved on 19 July 2010.¹⁰⁸³

558. E-mail exchanges dated 26–29 July 2010 between the PMI Group and the Claimant’s solicitors reveal that PMI was advised [REDACTED]. In addition, the Tribunal observes that the Claimant was aware that the Gillard Government would pursue the plain packaging policy and that there were no indications that a newly elected Labor Government would discard plain packaging plans as articulated by the former Prime Minister.¹⁰⁸⁴

559. On 4 August 2010, at the height of the federal election campaign, the Hon. Tony Abbott MP, then leader of the Liberal Party and the Leader of Opposition, said that “if we are returned on the 21st August, we will certainly consider going ahead with the Government’s plain packaging for cigarettes”.¹⁰⁸⁵ At the same time, when the PMI Group requested legal advice [REDACTED], on 16 August 2010, the Coalition Shadow Health Minister, Peter Dutton, reiterated his opposition to the plain packaging legislation and stated “we haven’t seen any legislation from the

¹⁰⁸⁰ Prime Minister, “Anti-Smoking Action” (Media Press Release, 29 April 2010) (**Exhibit C-120**); Transcript of Joint Press Announcement of Opposition Leader The Hon. Tony Abbott MP, The Hon. Scott Morrison MP and The Hon. Louise Markus MP (29 April 2010) (**Exhibit C-117**).

¹⁰⁸¹ Wanna John, Political Chronicles – Commonwealth of Australia: July to December 2010, *Australian Journal of Politics and History*, Vol. 57, No. 2 (2010) (**Exhibit C-136**).

¹⁰⁸² Australian Government, “A National Health and Hospitals Network for Australia’s Future: Delivering the Reforms” (7 July 2010), p. 45 (**Exhibit R-672**).

¹⁰⁸³ Parliament of Australia Research Paper No. 8, 2011-12, “2010 Federal Election: a brief history” (**Exhibit C-189**).

¹⁰⁸⁴ Respondent’s Reply on Preliminary Objections, para. 58; Email [REDACTED] (Franchise Partners) to [REDACTED] (PM Group), “Plain packaging issue we spoke about” (26 July 2010) (**Exhibit R-774**).

¹⁰⁸⁵ Respondent’s Reply on Preliminary Objections, para. 60; S. Benson, “Abbott smoke signal – Australia Decides 2010”, *The Daily Telegraph* (5 August 2010) (**Exhibit R-695**).

Government. So really apart from a press release, we don't know what it is the Government's asking us to sign up to".¹⁰⁸⁶

560. On 21 August 2010, no political party achieved an absolute majority in the federal election and the Labor Party and the Opposition Coalition, which had criticised plain packaging, now had an equal number of seats in the House of Representatives.¹⁰⁸⁷ On 26 August 2010, the Parliament discontinued its consideration of the Fielding Bill, and the next day, the PMI Group circulated an internal e-mail titled "urgent ownership transfer" which contained advice regarding corporate restructuring.¹⁰⁸⁸ On 3 September 2010, as part of its ongoing restructuring, PMI approved, *inter alia*, the restructuring proposal of several companies within its Group and the transfer of its wholly owned Australian subsidiaries to the Claimant.¹⁰⁸⁹
561. Following weeks of negotiations, on 14 September 2010, Prime Minister Gillard formed a Labor Party-led minority government which did not have sufficient votes to pass legislation including the (not yet drafted) plain packaging legislation.¹⁰⁹⁰ Although a Parliamentary briefing book stated that, "[i]t is difficult to determine the likely fate of the plain packaging proposal given that the position of the Coalition and the independent members is unknown",¹⁰⁹¹ on 17 November 2010, in a media press release, Health Minister Roxon confirmed the Government's decision to mandate plain packaging.¹⁰⁹²
562. From November to December 2010, while PMI Group engaged in extensive communication to transfer shares among its companies including the Claimant, DoHA conducted targeted

¹⁰⁸⁶ Transcript of the Election 2010 – Health Debate at the National Press Club, *ABC News* (11 August 2010) (**Exhibit C-320**); Transcript of Radio National interview with Shadow Health Minister Peter Dutton (16 August 2010) (**Exhibit C-321**).

¹⁰⁸⁷ Parliament of Australia Research Paper No. 8, 2011-12, "2010 Federal Election: a brief history" (**Exhibit C-189**); Wiltshire Kenneth, "Political Overview – Retrospect 2010" CEDA, *Economic and Political Overview 2011* (**Exhibit C-144**).

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¹⁰⁹⁰ Parliament of Australia Research Paper No. 8, 2011-12, "2010 Federal Election: a brief history", pp. 31–32 (**Exhibit C-189**).

¹⁰⁹¹ Dr. Matthew Thomas, *Plain Packaging of Tobacco Products*, Parliamentary Library Briefing Book: Key Issues for the 43rd Parliament, Social Policy Section, (16 September 2010) (**Exhibit C-325**).

¹⁰⁹² Health Minister Roxon, "Internet tobacco advertising to face new tough restrictions" (Media Release, 17 November 2010) (**Exhibit R-024**).

consultations with the tobacco industry including PML about potential anti-counterfeiting measures to be included in the design of the Plain Packaging Measures,¹⁰⁹³ and Health Minister Roxon wrote to Prime Minister Gillard seeking her agreement for the drafting of the plain packaging legislation.¹⁰⁹⁴

563. After receiving legal advice [REDACTED] the PMI Group filed the Foreign Investment Application with the FIRB on 21 January 2011 and the Claimant's solicitors notified the Treasurer under the FATA of the proposed transfer of ownership of the Australian subsidiaries to PM Asia.¹⁰⁹⁶ While the PMI Group continued receiving legal advice [REDACTED], on 11 February 2011, a Treasury Official from the FIRB sent the Claimant's solicitor the No-objection Letter stating that the Government had no objection to PM Asia's proposed acquisition of PM Australia. On 23 February 2011, the Claimant formally acquired its shareholding in PM Australia and PML, its first acquisition of a PM subsidiary in the Asia region.¹⁰⁹⁷
564. On 6 April 2011, the TPP Bill 2011 was introduced into the Australian Parliament.¹⁰⁹⁸ On 22 May 2011, Health Minister Roxon stated that the Government had a "very big fight on [its] hands" to pass plain packaging legislation and stated that they were "finding resistance not just from big tobacco, but also unfortunately, from Mr. Abbott and the Liberal Party". When asked whether the Government would have the votes to pass plain packaging legislation without support from the Coalition, Health Minister Roxon did not commit to an answer.¹⁰⁹⁹ Shortly thereafter, on 26 May 2011, the Australian press reported that Parliament would likely pass the

¹⁰⁹³ Statement of Defence, Vol. A, para. 100; Respondent's Reply on Preliminary Objections, para. 77; DoHA, Info/Advice Brief, "Tobacco Plain Packaging: Consultations with Tobacco Industry" (30 November 2010) (**Exhibit R-008**).

¹⁰⁹⁴ Letter from Health Minister Roxon to Prime Minister (20 December 2010) (**Exhibit R-706**); Letter from Health Minister Roxon to the Treasurer (20 December 2010) (**Exhibit R-707**).

¹⁰⁹⁵ [REDACTED]

¹⁰⁹⁶ Statement of Defence, Vol A., para. 102; [REDACTED].

¹⁰⁹⁷ Statement of Claim, para. 48; [REDACTED].

¹⁰⁹⁸ Respondent's Reply on Preliminary Objections, para. 92.

¹⁰⁹⁹ Transcript of Meet the Press interview with Minister for Health Nicola Roxon (22 May 2011) (**Exhibit C-338**).

plain packaging legislation because the Labor Party had secured the four extra votes that it needed to pass the legislation.¹¹⁰⁰

565. On 22 June 2011, a memorandum from Mr. Pellegrini indicates that PMI sought approval to refine its affiliates' corporate structure in the Asia region.¹¹⁰¹ The Claimant then served the Respondent with the Notice of Claim under the BIT on 27 June 2011. On 6 July 2011, the TPP Bill was introduced into the House of Representatives.¹¹⁰² On 13 July 2011, the Claimant acquired Philip Morris (Malaysia) Sdn Bhd and Philip Morris Taiwan SA from PM Brands Sàrl.¹¹⁰³ Finally, on 21 November 2011, the TPP Bill passed both Houses of Parliament and the TPP Act was enacted. On the same date, the Claimant served the Respondent with a Notice of Arbitration under the BIT.¹¹⁰⁴
566. For the Tribunal, the key question is whether a dispute about plain packaging was reasonably foreseeable before the restructuring. In line with jurisprudence, the Tribunal considers that a dispute in the legal sense is a disagreement about rights, not merely about policy. It is clear that the dispute contemplated here was a dispute about rights. The record shows that PMI stated clearly even before the Rudd announcement that plain packaging would deprive it of its legal rights. As early as 2009, it had informed the Australian Government that plain packaging would interfere with its property rights, and its internal memoranda made it clear that it was considering the matter in legal terms. On 29 April 2010, Australia's Prime Minister Rudd and Health Minister Roxon unequivocally announced the Government's intention to introduce Plain Packaging Measures. In the Tribunal's view, there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted, which would trigger a dispute. The Tribunal is not convinced that political developments after 29 April 2010 were such that the Claimant could reasonably conclude that the enactment of Plain Packaging Measures and the ensuing dispute were no longer foreseeable.

¹¹⁰⁰ Phillip Coorey, "Tobacco plain packaging to pass despite Opposition," *The Sydney Morning Herald* (26 May 2011) (**Exhibit C-341**).

¹¹⁰¹ [REDACTED]

¹¹⁰² Statement of Defence, Vol. A., para. 113; Commonwealth, *Parliamentary Debates*, House of Representatives (6 July 2011), pp. 7708, 7711 (Ms. Roxon, Minister of Health) (**Exhibit R-291**).

¹¹⁰³ PM Asia, "Directors' Report and Financial Statements for the year ended 31 December 2011" (6 July 2012), p. 24 (**Exhibit R-745**).

¹¹⁰⁴ Tobacco Plain Packaging Act 2011 (**Exhibit C-176**).

567. The Tribunal wishes to make two further general but at the same time case-specific considerations. First, in this case a period of 19 months passed between the announcement of the intention to legislate and the passage of the actual legislation. However, the length of time it takes to legislate is not a decisive factor in determining whether the legislation is foreseeable. The Tribunal notes that democratic States often have long legislative processes involving consultations with a variety of stakeholders. In this case, the process, which led to the approval of the TPP Act, was transparent, involving preliminary reports and consultations and discussions with all stakeholders, including the tobacco companies. However, this does not make the outcome any less foreseeable than in the case of a State that does not have the same sort of democratic oversight of the legislative process and might enact legislation almost overnight.
568. Second, in April 2010, long before the restructuring, the Australian Government announced that it would introduce Plain Packaging Measures and never withdrew from that position even though political leaders changed and the Government became a minority government. What became uncertain was not whether the Government intended to introduce plain packaging, but whether the Government could maintain a majority or would be replaced. But that is a difficulty which any minority government faces, and if it were treated as a basis for saying that there was no reasonable prospect of a dispute, then there would be one rule for majority governments and another for minority governments, which would create particular difficulty for States whose electoral processes can result in minority governments.
569. The Tribunal thus concludes that, at the time of the restructuring, the dispute that materialised subsequently was foreseeable to the Claimant. Indeed, at least after the 29 April 2010 announcement, it was reasonably foreseeable that legislation equivalent to the Plain Packaging Measures would eventually be enacted and, consequently, a dispute would arise.

3. The Cogency of PM Asia's Alleged Other Reasons for Restructuring

570. Having held that the dispute was foreseeable prior to the restructuring, the Tribunal now turns to the Claimant's reasons for restructuring. In this context, the Parties have discussed whether the restructuring was solely motivated by the desire to obtain treaty protection or whether such protection was merely an ancillary consequence of the restructuring. The Tribunal considers that the mere fact that a company prepared for "the worst case" by seeking legal advice about a BIT claim at an early stage would not be unusual; such conduct might simply be normal and prudent business behaviour. In the view of the Tribunal, it would not normally be an abuse of right to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently of the possibility of bringing such a claim. The Tribunal acknowledges the reality

that corporate groups—and particularly multinationals—are routinely restructured for a variety of reasons.

571. The Parties have addressed the cogency or persuasiveness of PM Asia’s alleged other reasons for restructuring extensively both by arguments and by the submission of evidence. A summary of these submissions follows:

572. The Claimant alleges that the restructuring was part of a broader, group-wide process that had been ongoing since 2005.¹¹⁰⁵ In support, the Claimant relies on internal memoranda that refer to proposals for restructuring PMI’s European affiliates in 2004, and PMI’s Latin American and Canadian affiliates in 2008.¹¹⁰⁶ The Claimant also submits one internal memorandum dated 3 September 2010 as evidence of a proposal to restructure affiliates in the African and Asian regions at that time,¹¹⁰⁷ and one internal memorandum dated 22 June 2011 as evidence of a proposal to restructure certain Asian affiliates under PM Asia Limited “as part of ongoing efforts to refine PMI affiliates’ corporate structure in the Asia region.”¹¹⁰⁸ In addition, the Claimant presents a Board decision as evidence of ongoing restructuring of other PMI affiliates.¹¹⁰⁹ To reinforce this documentary evidence, the Claimant relies on the witness statements and oral testimony of Mr. Pellegrini in support of its assertion that the transfer of ownership of PM Australia to the Claimant was consistent with the objectives of these other restructuring initiatives.¹¹¹⁰

573. The Respondent, on the other hand, relies on the witness statement of Professor Lys, who notes that the only contemporaneous piece of evidence provided by the Claimant that directly relates to a broader project to restructure PMI Asia is the internal memorandum dated 3 September 2010 and that this memorandum raises a number of questions about whether this restructuring

¹¹⁰⁵ Statement of Claim, para. 44; Claimant’s Rejoinder on Preliminary Objections, paras 334–343; Claimant’s First Post-Hearing Brief, paras 103, 106; Claimant’s Second Post-Hearing Brief, paras 22–23; Amended Transcript of the Hearing, Day 1, pp. 102–105; Amended Transcript of the Hearing, Day 3, p. 12:1–2.

¹¹⁰⁶ [REDACTED]

¹¹⁰⁷ [REDACTED]

¹¹⁰⁸ [REDACTED]

¹¹⁰⁹ [REDACTED]

¹¹¹⁰ Pellegrini Statement, paras 30–37 (**Exhibit CWS-002**); Second Pellegrini Statement at para. 18 (**Exhibit CWS-016**); Amended Transcript of the Hearing, Day 2, p. 189:11–12, pp. 204:25–205:25. See also Claimant’s Second Post-Hearing Brief, para. 23.

made real business sense.¹¹¹¹ The Respondent also questions the veracity of that memorandum, citing to excerpts from company registers, Annual Reports of the affected affiliates, as well as previous internal PMI memoranda that appear to contradict the 3 September 2010 memorandum.¹¹¹² The Respondent criticises the Claimant’s reliance on documentary evidence on the basis that it was prepared in contemplation of this arbitration, that it contradicts the Claimant’s purported restructuring strategy, and that certain documents are too remote to be of relevance.¹¹¹³ Finally, the Respondent argues that [REDACTED] oral testimony directly contradicts the Claimant’s position, since “[h]e agreed that [the restructuring] had no ‘commercial advantage’”¹¹¹⁴ and “conceded he was not really a part of [the restructuring] and said it had no meaningful impact on this region”.¹¹¹⁵

574. The Claimant also argues that one relevant and compelling reason motivating the restructuring was the need to align ownership with the Claimant’s pre-existing management control of its subsidiaries, thereby creating a “better, leaner, clearer structure”.¹¹¹⁶ The Claimant points to internal PM Asia memoranda in support of the contention that a more centralised ownership structure would facilitate PMI’s overall objectives.¹¹¹⁷ The Claimant relies on the oral testimony of Mr. Pellegrini who stated that one of the objectives of PMI’s group-wide restructuring was to align the ownership and management control of its various affiliates.¹¹¹⁸ Mr. Pellegrini also

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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Claimant’s Counter-Memorial on Preliminary Objections, para. 52; Claimant’s Rejoinder on Preliminary Objections, paras 330, 338–340; Claimant’s First Post-Hearing Brief, paras 111–14; Amended Transcript of the Hearing, Day 1, p. 193:6–19; Amended Transcript of the Hearing, Day 2, p. 226:3–12; Amended Transcript of the Hearing, Day 3, p. 12:1–2, p. 40:13–19, p. 10:17–19.

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[REDACTED]

See also Pellegrini Statement, para. 33 (**Exhibit CWS-002**); Second Pellegrini Statement, para. 18 (**Exhibit CWS-016**); Amended Transcript of the Hearing, Day 2, p. 215:17–19.

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Amended Transcript of the Hearing, Day 2, p. 193:9–16.

explained why certain PMI affiliates in the Asia region had not been acquired by PM Asia, and that this did not contradict the streamlining objectives of the restructuring.¹¹¹⁹

575. The Respondent disputes that the restructuring was motivated by the need to align PMI affiliates in the Asia region, pointing to a Table of PMI Affiliates in the Asia region over which PM Asia asserts oversight and control and which, according to the Respondent, establishes that the restructuring has not followed a regional pattern.¹¹²⁰ Pointing to a PMI internal Memorandum dated 22 June 2011, the Respondent asserts that the decision to transfer certain PMI Asian affiliates to PM Asia was made on the same day that Mr. Pellegrini signed the Notice of Claim.¹¹²¹ The Respondent relies on the report of Professor Lys, who stated that the previous structure was functioning “perfectly well” before the restructuring and that the net impact of the restructuring was to complicate, rather than simplify the ownership structure.¹¹²²
576. Furthermore, the Claimant contends that the restructuring helped to minimise the Claimant’s tax liabilities. By way of example, the Claimant refers to an internal PMI memorandum dated [REDACTED], which indicates that certain tax benefits under the Dutch tax system were associated with shifting certain functions and responsibilities from PM Holland to PMI.¹¹²³ The Claimant also submits internal memoranda dated [REDACTED], [REDACTED] and [REDACTED] that purportedly evidence PMI’s efforts to streamline its activities, thereby liquidating redundant entities and creating consequential tax advantages.¹¹²⁴ These tax advantages, in turn, allowed the Claimant to finance an inter-company debt, as evidenced by a Loan Note between PM Holland and PM International Management S.A.¹¹²⁵ The Claimant finally relies on

¹¹¹⁹ Amended Transcript of the Hearing, Day 2, pp. 219:20–220:19, pp. 220:20–222:8; Amended Transcript of the Hearing, Day 3, pp. 9:1–10:23.

¹¹²⁰ Respondent’s Reply on Preliminary Objections, para. 112; [REDACTED]

¹¹²¹ [REDACTED]

¹¹²² Respondent’s Reply on Preliminary Objections, para. 113–115; Respondent’s First Post-Hearing Brief, paras 104–107; Respondent’s Second Post-Hearing Brief, para. 39; Amended Transcript of the Hearing, Day 2, pp. 215:20–216:10, p. 263:17–22; p. 227:11–13; Amended Transcript of the Hearing, Day 3, p. 11:21–25; pp. 42:25–43:5. See also Second Expert Report of Professor Lys (26 November 2014), paras 194, 197 (**Exhibit RWS-012**).

¹¹²³ Claimant’s Rejoinder on Preliminary Objections, paras 341; Claimant’s First Post-Hearing Brief, para. 107; Philip Morris International, Internal Memorandum, October 22, 2004, p. 2 (**Exhibit C-436**).

¹¹²⁴ Claimant’s Rejoinder on Preliminary Objections, paras 341; [REDACTED]

¹¹²⁵ [REDACTED]

Mr. Pellegrini's oral testimony wherein he recalled that the restructuring presented "an advantage from a tax point of view" to finance intercompany debt.¹¹²⁶

577. The Respondent replies that the restructuring was hurried through and that valuation and tax considerations were only an afterthought. It points in particular to a series of e-mails in this regard.¹¹²⁷ It adds that the Tribunal has been kept away from any "tax experts" who could speak of the supposed revenue rationale for the restructuring. Similarly, the Respondent observes that there are only few privileged documents listed in the RPL that support the purported tax benefits of the restructuring at the time when it was being approved by the PMI Group.¹¹²⁸ It refers to the report of Professor Lys which explains that any tax advantage from the restructuring would have been "small and inconsequential" in the context of other sources of income, and that these advantages were "not needed to service its interest obligations under the 'loan-note'".¹¹²⁹
578. Furthermore, in reliance on Mr. Pellegrini's written and oral evidence, the Claimant alleges that the restructuring also helped to optimise cash flow, which was useful for everyday operations as well as strategic acquisitions.¹¹³⁰ It notes that these cash flow benefits provided greater financial flexibility in the event that an acquisition opportunity would arise.¹¹³¹ The Claimant relies on internal correspondence and compares PM Asia's financial statements before and after the restructuring as evidence of the cash benefits of the restructuring.¹¹³²

¹¹²⁶ Amended Transcript of the Hearing, Day 1, p. 206:18–21.

¹¹²⁷ Respondent's First Post-Hearing Brief, para. 103; E-mail from [REDACTED] to [REDACTED] (29 January 2010) (RPL Doc #315); E-mail from [REDACTED] to [REDACTED] (23 August 2010) (RPL Doc #335); E-mail from [REDACTED] to [REDACTED] (Exhibit R-766).

¹¹²⁸ [REDACTED]

¹¹²⁹ Respondent's Reply on Preliminary Objections, paras 113–115; Respondent's First Post-Hearing Brief, para. 103; First Expert Report of Professor Lys (13 October 2013), Section XI (Exhibit RWS-001); Second Expert Report of Professor Lys (26 November 2014), Section III (Exhibit RWS-012).

¹¹³⁰ Second Pellegrini Statement, para. 19 (Exhibit CWS-016); Amended Transcript of the Hearing, Day 3, pp. 19:8–21:1; p. 19:11–13, 18.

¹¹³¹ Claimant's Rejoinder on Preliminary Objections, paras 334–343; Claimant's First Post-Hearing Brief, paras 19, 106, 108, 109, 115–116; Amended Transcript of the Hearing, Day 3, p. 20:5–7.

¹¹³² [REDACTED]

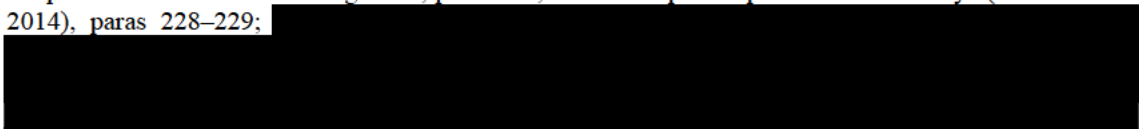
579. The Respondent objects that this alleged reason is “nonsensical and un-persuasive”. It refers in particular to the evidence of Professor Lys, who states that the restructuring did not have any of the anticipated financial benefits.¹¹³³ The Respondent also points to PM Asia’s financial statements for 2001 and 2010 to show that PM Asia made a profit in those years without the receipt of dividend income from the restructuring.¹¹³⁴ The Respondent also recalls Professor Lys’s report, and PM Asia’s financial statements for 2011, 2012 and 2013, in order to demonstrate that any dividend income arising from the restructuring was not used to fund PM Asia’s operations or to make strategic acquisitions, in contradiction of the Claimant’s purported rationale for the restructuring.¹¹³⁵ The Respondent relies on internal PMI documents, including various “country reports” and financial statements, as well as public comments made by PMI representatives, as evidence that PMI’s growth in the Asia region was the result of non-Asian PMI affiliates making strategic acquisitions in the region, as opposed to the growth of PM Asia.¹¹³⁶
580. Finally, the Claimant does not dispute that the restructuring was done partly in order to obtain protection under the BIT, but stresses that this was not the sole motive because the enactment of

¹¹³³ Respondent’s Reply on Preliminary Objections, paras 113–115; First Expert Report on Professor Lys (13 October 2013), paras 423, 424 (**Exhibit RWS-001**); Second Expert Report of Professor Lys (26 November 2014), para. 39 (**Exhibit RWS-012**).

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¹¹³⁵ Respondent’s First Post-Hearing Brief, para. 108; Second Expert Report of Professor Lys (26 November 2014), paras 228–229;



PM Holland, “Annual report for the year ended December 31st, 2012” (filed in the Dutch Registry on 24 July 2013), pp. 14, 18 (**Exhibit R-909**). See also Amended Transcript of the Hearing, Day 3, p. 3:25, p. 20:11–19.

¹¹³⁶ Respondent’s Reply on Preliminary Objections, paras 113–122; Respondent’s Second Post-Hearing Brief, paras 40–41; M. Pellegrini, “Remarks by Matteo Pellegrini, President, Asia [r]egion, Philip Morris International Inc, Investor Day, Lausanne”, 23 June 2010, pp. 4, 11 (**Exhibit R-016**); L. Camilleri, “Remarks by Louis C. Camilleri Chairman and Chief Executive Officer, Philip Morris International Inc., Morgan Stanley Global Consumer and Retail Conference”, 16 November 2011, p. 8 (**Exhibit R-032**); PMI, “India: Country Overview” 11 November 2014 (**Exhibit R-788**); PMI, “Annual Report 2013”, 7 March 2014, p. 23 (**Exhibit R-948**); PMI, “Annual Report 2013”, 7 March 2014, p. 48 (**Exhibit R-948**); PMI, “Annual Report 2013”, 7 March 2014, p. 50 (**Exhibit R-948**); PMI, “Annual Report 2013”, 7 March 2014, p. 74 (**Exhibit R-948**); J. Olczak (PMI), “Remarks for 2013 CAGNY Conference”, 20 February 2013, p. 4 (**Exhibit R-1106**); PMI, “Philip Morris International Inc. (PMI) Announces New Business Transaction in the Philippines”, 25 February 2010 (**Exhibit R-1095**); PMI, “China: Country Overview”, 27 November 2014 (**Exhibit R-1166**); PMI, “Indonesia: Country Overview”, 27 November 2014 (**Exhibit R-1167**); PMI, “Philippines: Country Overview”, 27 November 2014 (**Exhibit R-1172**); PMI, “Vietnam: Country Overview”, 27 November 2014 (**Exhibit R-1176**).

the TPP Act was not foreseeable at the time that it decided to restructure.¹¹³⁷ The Claimant relies to a significant extent on Mr. Pellegrini's testimony that the primary motivations for restructuring were unrelated to the Treaty.¹¹³⁸ In addition, the Claimant refers to internal PMI documents and statements by the Government of Australia, which in its view, indicate that at the time of the restructuring it was reasonable to assume that the TPP Act was unlikely to be enacted.¹¹³⁹

581. By contrast, the Respondent asserts that giving the PMI Group a “corporate vehicle with standing” to bring a treaty claim was the primary motivation and the true reason for the restructuring.¹¹⁴⁰ The Respondent relies in part on the cross-examination of Mr. Pellegrini, where he stated that litigation formed part of the “armory of tools we were planning to deploy” to defeat the TPP Act.¹¹⁴¹ It also notes “the sheer number of communications recorded in the RPL which concerned the consideration of investment treaty protections for the Australian subsidiaries and approaches to lawyers for a potential claim in relation to [P]lain [P]ackaging Measures under the BIT.”¹¹⁴² These e-mails purport to indicate that by 3 July 2010, the PMI

¹¹³⁷ Claimant's Rejoinder on Preliminary Objections, paras 344, 364–367, 371–373, 377.

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¹¹⁴⁰ Statement of Defence, Vol. A, paras 159–162; Respondent's Reply on Preliminary Objections, paras 94–96, 287–289; Respondent's First Post-Hearing Brief, paras 47–50, 63, 79, 83–98; Respondent's Second Post-Hearing Brief, para. 9–13, 20, 30, 33–34.

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¹¹⁴² Respondent's Second Post-Hearing Brief, para. 20. See also E-mail from [redacted] to [redacted] (23 August 2010) (RPL Doc #335); E-mail from [redacted] to [redacted] (21 September 2010) (RPL Doc #343); E-mail from [redacted] to [redacted] (28 November 2010) (RPL Doc #366); E-mail from [redacted] to [redacted] (28 November 2010) (RPL Doc #368); E-mail from [redacted] to [redacted] (30 November 2010) (RPL Doc #322); E-mail from [redacted] to [redacted] (10 December 2010) (RPL Doc #355); E-mail from [redacted] to [redacted] (11 December 2010) (RPL Doc #266); E-mail from [redacted] to [redacted] (11 December 2010) (RPL Doc #283); E-mail from [redacted] to [redacted] (RPL Doc #282); E-mail from [redacted] to [redacted]

Group had instructed lawyers and retained counsel to act for it in an investment arbitration.¹¹⁴³ Several e-mails include the subject line “Australia-HK BIT”, “HK BIT”, and “Philip Morris—Plain Packaging Australia—*Arbitration under the HK BIT*”.¹¹⁴⁴ One among these documents refers to the adoption of litigation as part of PMI’s “Plain Packaging Strategy”,¹¹⁴⁵ and the PMI Annual Report for 2010 stipulates an intention to sue in the event that the TPP Act passes.¹¹⁴⁶ Finally, the Respondent observes “the absence of communications about *any other reason* for the restructur[ing]” (emphasis original).¹¹⁴⁷

582. After a close examination of the evidence, the Tribunal is not persuaded that tax or other business reasons were determinative factors for the Claimant’s restructuring. In particular, the Tribunal notes that no witness who was familiar with the rationale of the restructuring was presented by the Claimant in the proceedings. Indeed, the persons most closely involved in the

[REDACTED] (12 December 2010) (RPL Doc #323); E-mail from [REDACTED] to [REDACTED] (12 December 2010) (RPL Doc #372); E-mail from [REDACTED] to [REDACTED] (25 January 2011) (RPL Doc #297); E-mail from [REDACTED] to [REDACTED] (9 September 2010) (RPL Doc #48); E-mail from [REDACTED] to [REDACTED] (28 January 2011) (RPL Doc #281); E-mail from [REDACTED] to [REDACTED] (25 February 2011) (RPL Doc #160).

¹¹⁴³ MCDS, “National Drug Strategy 2010-2015”, 2011 (Exhibit R-64); E-mail from [REDACTED] to [REDACTED], 30 June 2010 (Exhibit R-673); E-mail from [REDACTED] to [REDACTED], 4 August 2010 (Exhibit R-675); E-mail from [REDACTED] to [REDACTED], 12 August 2010 (Exhibit R-685).

¹¹⁴⁴ See e.g. E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #23); E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #24); E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #31); E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #44); E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #86); E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #89); E-mail from [REDACTED] to [REDACTED] (30 November 2010) (RPL Doc #322); E-mail from [REDACTED] to [REDACTED] (22 September 2010) (RPL Doc #344); E-mail from [REDACTED] to [REDACTED] (10 December 2010) (RPL Doc #352); E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #357); E-mail from [REDACTED] to [REDACTED] (18 January 2011) (RPL Doc #358).

¹¹⁴⁵ [REDACTED] See also PML, Submission to the Senate Community Affairs Legislation Committee, “Inquiry into *Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009*”, 30 April 2010 (Exhibit R-013); [REDACTED]

¹¹⁴⁶ PMI, “Annual Report 2010”, 1 March 2011 (Exhibit R-986).

¹¹⁴⁷ Respondent’s First Post-Hearing Brief, para. 97.

restructuring decision were not offered as witnesses by the Claimant. Nor was the Tribunal presented with contemporaneous corporate memoranda or other internal correspondence sufficiently explaining the business case for the restructuring in detail.

583. In this context, the Tribunal is inclined to place limited weight on Mr. Pellegrini's testimony as it became apparent during the hearing that Mr. Pellegrini was not familiar with details of legal or corporate strategy. Against this background, the expert report of Professor Lys does carry weight, especially as it remains unrebutted by other expert evidence, and Professor Lys was not called for cross-examination.
584. Therefore, the Tribunal finds that the Claimant has not been able to prove that tax or other business reasons were determinative for the restructuring. From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong.

4. Conclusion

585. In view of the above considerations, the Tribunal concludes that the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable. A dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.
586. In the present case, the Tribunal has found that the adoption of the Plain Packaging Measures was foreseeable well before the Claimant's decision to restructure was taken (let alone implemented). On 29 April 2010, Australia's Prime Minister Kevin Rudd and Health Minister Roxon unequivocally announced the Government's intention to introduce Plain Packaging Measures. In the Tribunal's view, there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, from that date, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted and a dispute would arise. Political developments after 29 April 2010 did not involve any change in the intention of the Government to introduce Plain Packaging Measures and, thus, were not such as to change the foreseeability assessment.
587. The Tribunal's conclusion is reinforced by a review of the evidence regarding the Claimant's professed alternative reasons for the restructuring. The record indeed shows that the principal, if not sole, purpose of the restructuring was to gain protection under the Treaty in respect of the very measures that form the subject matter of the present arbitration. For the Tribunal, the

adoption of the Plain Packaging Measures was not only foreseeable but actually foreseen by the Claimant when it chose to change its corporate structure.

588. In light of the foregoing discussion, the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.

F. COSTS OF ARBITRATION

589. As this Interim Award (final save as to costs) comes to the conclusion that this Tribunal cannot exercise its jurisdiction, it brings the present proceedings to an end, but for a decision on the costs of arbitration.

590. The Tribunal will provide the Parties with an opportunity to make submissions regarding the amounts and the allocation of the costs of the proceedings, and the Tribunal will then fix and allocate the costs of arbitration in a final award on costs.

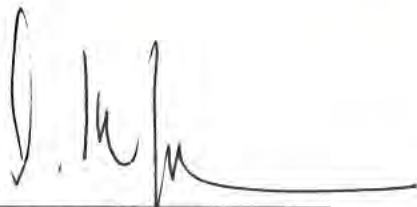
VII. DECISIONS

For the reasons set out above in this Award, the Tribunal unanimously decides, declares, and awards as follows:

- I. **The claims raised in this arbitration are inadmissible;**
- II. **Therefore, the Tribunal is precluded from exercising jurisdiction over this dispute;**
- III. **Costs are reserved for a final award limited to costs.**

Place of Arbitration: Singapore.

Date of Award: *17 December 2015*



Professor Gabrielle Kaufmann-Kohler
Co-arbitrator



Professor Donald McRae
Co-arbitrator



Professor Karl-Heinz Böckstiegel
Presiding Arbitrator