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Allens Arthur Robinson

安理國際律師事務所

15 July 2011

The Hon Robert McClelland MP
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Dear Attorney-General

Notice of Claim under the Australia / Hong Kong Agreement for the Promotion and Protection of Investments

We refer to Philip Morris Asia Limited's Notice of Claim (***Notice***) under the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (***Agreement***), which was served on you on 27 June 2011.

As set out in paragraph 2 of the Notice, and pursuant to Art. 10 of the Agreement, Philip Morris Asia Limited would like to confer with representatives of the Commonwealth of Australia with a view to negotiating an amicable settlement. Please let us know when you would like to meet for that purpose.

If an amicable settlement cannot be reached within three months of service of the Notice, the parties are, absent other agreement, bound to submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law 2010.

Yours faithfully

Allens Arthur Robinson

Allens Arthur Robinson

Our Ref: 306171502
Partners Simon McConnell Mun Yeow David Wenger
sjmm A0308360710v1 306171502 15.7.2011

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Allens Arthur Robinson

安理國際律師事務所

27 June 2011

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By Courier/By Fax

Dear Prime Minister, Attorney-General and Minister

Written Notification of Claim
Australia / Hong Kong Agreement for the Promotion and Protection of Investments

We act for Philip Morris Asia Limited.

There follows written notification of Philip Morris Asia Limited's claim pursuant to Article 10 of the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, dated 15 September 1993.

Yours faithfully

Allens Arthur Robinson

Allens Arthur Robinson

Encl

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WRITTEN NOTIFICATION OF CLAIM

by

PHILIP MORRIS ASIA LIMITED

to

THE COMMONWEALTH OF AUSTRALIA

pursuant to

AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

1. Philip Morris Asia Limited ("*PM Asia*") hereby gives notice of a claim (the "*Claim*") pursuant to Article 10 of the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments ("*Hong Kong-Australia BIT*").

2. If the Claim is not admitted, PM Asia advises, pursuant to Article 10, that it is willing to meet and confer with representatives of the Commonwealth of Australia (the "*Government*" or "*Australia*") with a view to negotiating an amicable settlement or, if an amicable settlement is not concluded, to endeavour to agree on procedures for settlement.

3. If an amicable settlement has not been achieved, nor procedures for settlement agreed, the parties are bound to submit the dispute between them to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law 2010. If the dispute is submitted to arbitration, PM Asia proposes Singapore as the seat of the arbitration and the place of hearing, since Singapore is the nearest neutral State with legal and logistical resources appropriate to support the arbitration. PM Asia further proposes that the number of arbitrators be three and proposes the Permanent Court of Arbitration at the Hague as the appointing authority. PM Asia requests Australia to advise whether it agrees with these proposals if the Claim proceeds to arbitration.

4. Service of any correspondence may be effected through PM Asia's solicitors, Allens Arthur Robinson, 10/F Jardine House, 1 Connaught Place, Central, Hong Kong, per Simon McConnell, Partner, telephone +852 2840 1202, facsimile +852 2840 0686, email simon.mcconnell@aar.com.au.

5. PM Asia's Claim is detailed below.

Introduction and summary of Claim

6. On 7 April 2011, the Government released an Exposure Draft of the Tobacco Plain Packaging Bill 2011 (*"the TPP Bill"*) together with a Consultation Paper. The Consultation Paper makes it clear that the TPP Bill, once it is formally introduced by the Government and passed by Parliament, will be used to introduce regulations prescribing every aspect of the appearance, size and shape of tobacco products and packaging, in particular, prohibiting the use of intellectual property on or in relation to tobacco products and packaging other then the product brand name and line extension on the top, front and base of the pack in standard font and size (defined more fully in paragraph 18 below, ***"plain packaging legislation"***). According to the Government, the TPP Bill is to be formally introduced in the winter session of Parliament with the legislation scheduled to be in place by 1 January 2012.[1]

7. By separate regulation, the size of graphic health warnings on the front of cigarette packs is to increase from 30% to 75% (***"GHW regulation"***). Graphic health warnings are already mandated to cover 90% of the back of cigarette packs.[2]

8. PM Asia is an investor protected by the Hong Kong-Australia BIT. PM Asia owns 100% of the available shares in Philip Morris (Australia) Limited (***"PM Australia"***), which owns 100% of the available shares in Philip Morris Limited (***"PML"***).

9. PM Asia and PM Australia, through PML (together ***"Philip Morris"***) manufacture, import, market and distribute for sale in Australia and elsewhere, tobacco products, principally cigarettes. PML has, whether as owner or licensee, rights to use registered and unregistered trade marks; copyright works; registered and unregistered designs; know-how; trade secrets; and overall get up of the product packaging (***"intellectual property"***) on and in relation to Philip Morris' tobacco products and packaging. Philip Morris has generated substantial goodwill from the use of the intellectual property on or in relation to Philip Morris' products and packaging (***"goodwill"***).

10. PM Asia's investments in Australia – PM Australia, PML, the intellectual property, and goodwill – are all investments Australia has undertaken to protect by the Hong Kong-Australia BIT. Plain packaging legislation and the GHW regulation contravene these investor protections. In particular:

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[1] Consultation Paper, p.2. The winter legislative session runs between May and July 2011.

[2] *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004 (Cth)*. Another warning will continue to be required on one of the side panels of the pack. The Consultation Paper, p.14, states that the GHW Regulation is to coincide with plain packaging legislation.

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

Plain packaging legislation will effectively prohibit Philip Morris from using the intellectual property on or in relation to its tobacco products and packaging. Without the use of the intellectual property, Philip Morris' products will not be readily distinguishable to the consumer from the products of its competitors; consequently, competition will be based primarily on price. PML will be reduced to a manufacturer of an effectively undifferentiated commodity, an entirely different enterprise and business model to that currently pursued by PML.

Direct and indirect expropriation of investments without payment of adequate compensation is contrary to Article 6 of the Hong Kong-Australia BIT.

(b) Plain packaging legislation will not be fair and equitable, as is required by the Hong Kong-Australia BIT, given the substantial impairment of PM Asia's investments, the lack of credible evidence that the measure will contribute to achievement of the legislation's stated objectives, the availability of effective alternative means of reducing smoking prevalence, and the contravention of Australia's international obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights ("***TRIPS***"), the Paris Convention for the Protection of Industrial Property ("***Paris Convention***") and the Agreement on Technical Barriers to Trade ("***TBT***").

These contraventions include a breach of Article 20 of TRIPS, as plain packaging legislation will be an unjustifiable encumbrance on the use of tobacco trade marks (many of which cannot be used at all), and a breach Article 2.2 of TBT, because it will be a technical regulation more trade restrictive than necessary.

A failure to afford fair and equitable treatment will contravene Article 2(2) of the Hong Kong-Australia BIT.

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

11. As a result of these contraventions, PM Asia will be entitled to orders from an arbitral tribunal for the cessation and discontinuance of plain packaging legislation and the GHW

regulation, and/or an award of damages, which may potentially amount to billions of dollars, and interest.

Plain packaging legislation

12. On 7 April 2011, the Government released an Exposure Draft of the TPP Bill which it intends to introduce to Federal Parliament during the 2011 winter legislative session, with the legislation to be in place by 1 January 2012.

13. The TPP Bill permits the promulgation and enforcement of regulations regarding tobacco products and packaging that:[3]

    (a) prohibit (or specify conditions of) the use of trade marks, logos, brands, business or company names, or other identifying mark on tobacco packaging or products;

    (b) prohibit (or specify conditions of) the use of any design of packaging or any design of a tobacco product;

    (c) otherwise relate to the appearance, size or shape of tobacco packaging or tobacco products;

    (d) relate to the opening and contents of tobacco packaging;

    (e) relate to the appearance of any words, signs or symbols on tobacco packaging;

    (f) relate to the content of any information (including prohibition of information of a specified kind) to be included on tobacco packaging; and

    (g) relate to the materials that may be used in or on tobacco packaging.

14. The TPP Bill defines packaging of tobacco products in a broad way which includes any container for which tobacco products are packaged for retail sale and anything inside, attached to, or forming part of the packaging of tobacco products. A "tobacco product" means processed tobacco or any product that contains tobacco.[4]

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[3] Sections 14 and 94 of the TPP Bill. Regulations may also be promulgated pursuant to section 11(2) governing the use of a trade mark in circumstances where the TPP Bill results in an acquisition of property within the meaning of section 51(xxxi) of the Constitution of the Commonwealth of Australia because it would prevent the use of a trade mark on tobacco products or packaging.

[4] These definitions are found in Section 4.

15. The Exposure Draft of the TPP Bill was accompanied by a Consultation Paper that details anticipated regulations to prescribe the appearance, size and shape of tobacco packaging and products as follows:[5]

    (a) Except as prescribed below, no trade mark, design, branding, colour, logo, or other aspect of livery or get-up is permitted on tobacco products or packaging;

    (b) The brand name, line extension and quantity of cigarettes are to appear on the top, front and base of the pack. The brand name is permitted to appear in Lucida sans 14 point font below the health warning on the front of the pack. The line extension and quantity is to appear below the brand name, in a font and size yet to be determined;

    (c) Packages (including foils on the inside of a cigarette pack) will be a prescribed shade of dark olive brown in a matt finish;

    (d) Cigarette packs will be rectangular rigid cardboard flip-top boxes of a prescribed size and shape and with an opening of a prescribed size. Cigarette packs will contain mandated numbers of cigarettes between a minimum of 20 and maximum of 50;

    (e) The manufacturer's details will appear on one side of the pack, in a font, size and position to be determined; and

    (f) Cigarette sticks are to be either all white, or white with an imitation cork filter. No branding, other colours or design features are permitted.

16. By the GHW regulation, the size of graphic health warnings on the front of cigarette packs is to increase from 30% to 75%. Graphic health warnings are already mandated to cover 90% of the back of cigarette packs. The new regulation is tantamount to plain packaging.

17. Power to make regulations pursuant to the TPP Bill (then Act) will commence on 1 January 2012. Offences for importing, packaging and manufacturing non-compliant products and packaging will come into force on 20 May 2012 and offences related to selling and purchasing non-compliant product will come into force from 1 July 2012.[6]

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[5] Consultation Paper, pages 11-15.

[6] Section 2.

18. In this Notice of Claim, the TPP Bill and any regulations promulgated pursuant to it at any time,[7] including but not limited to the anticipated regulations summarised above in paragraph 15, shall be collectively referred to as ***"plain packaging legislation"***.

The Hong Kong-Australia BIT

19. The Hong Kong-Australia BIT was executed by the respective Contracting States on 15 September 1993 and remains in force. According to its preamble, the Hong Kong-Australia BIT seeks, *inter alia*, to create favourable conditions for greater investment by investors of one Contracting State in the area of the other and promote economic cooperation by providing reciprocal protection for investments by investors from one State in the area of the other State.

20. PM Asia (a Hong Kong domicile limited liability company) and its investments in Australia are entitled to the protections of the Hong Kong-Australia BIT. These reciprocal protections include obligations on each Contracting State in respect of investors from the other State:

    (a) not to deprive investors of their investments, nor subject them to measures equivalent to deprivation (Article 6);

    (b) to accord investments and returns of investors fair and equitable treatment (Article 2(2));

    (c) to provide investments and returns of investors full protection and security (Article 2(2));

    (d) not to impair in any way the management, maintenance, use, enjoyment or disposal of investments and returns of investors by unreasonable or discriminatory measures (Article 2(2)); and

    (e) to observe any obligation it may have entered into with regard to investments of investors (Article 2(2)).

21. The benefit of these substantive provisions is available to "investors" as defined in Article 1(f) of the Hong Kong-Australia BIT. Relevantly, "investors" includes corporations incorporated under the law of Hong Kong who own or control investments in Australia. PM Asia, as it is now known, was incorporated under the Hong Kong Companies Ordinance on 8 November 1994 and since that time has marketed and distributed tobacco products in certain countries in Asia and provided management services to Philip Morris' affiliates in

[7] Whether under sections 14, 11(2) or 94 of the TPP Bill.

Asian and Australasian countries including Australia. Accordingly, it is entitled to the protection of the Hong Kong-Australia BIT in respect of any investments it owns or controls in Australia.

22. PM Asia owns 100% of the shares of PM Australia, a company incorporated in Victoria, Australia on 17 March 1954. PM Australia is a holding company that owns 100% of the shares of PML, a company incorporated in Victoria, Australia on 24 May 1967. PML is a trading company that employs approximately 740 staff in Australia engaged in the manufacture, marketing and distribution for sale of tobacco products.

23. PML is the owner or licensee of the intellectual property. The intellectual property includes trade marks that relate to a number of brand "families" - that is the core brands and line extensions within those brands. The principal core brands are *Marlboro*, *Alpine*, *Longbeach*, *Peter Jackson*, *Choice*, and *GT* (together the "***Brands***"). Philip Morris' business relies on the Brands to compete with other tobacco manufacturers. PML's use of the intellectual property for the development, improvement, manufacture and sale of tobacco products has generated substantial goodwill in PML.

24. The Hong Kong-Australia BIT encompasses a broad range of investments. Article 1(e) prescribes relevant investments to mean *"every kind of asset owned or controlled by investors"* and, more particularly, expressly includes:

    (a) shares in a company and any other form of participation in a company;

    (b) intellectual property rights including rights with respect to copyright, patents, trade marks, trade names, industrial designs, trade secrets, know how and goodwill; and

    (c) licences and other rights conferred by law or under contract including concessions to manufacture, use or sell products.

25. Accordingly, by virtue of its shareholding in PM Australia, PM Asia owns and/or controls a number of investments in Australia that qualify for protection of the substantive provisions of the Hong Kong-Australia BIT, specifically:

    (a) shares in PM Australia;

    (b) shares in PML; and

    (c) the intellectual property and goodwill (together, the "***Investments***").

26. Article 10 of the Hong Kong-Australia BIT concerns settlement of disputes between an investor of one Contracting Party (such as PM Asia) and the other Contracting Party (here, Australia). Article 10 provides:

> *A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area 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 be 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 arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.*

27. As stated above, this Notice of Claim is "*written notification*" of PM Asia's Claim pursuant to Article 10.

Contraventions of the Hong Kong-Australia BIT

28. Plain packaging legislation and the GHW regulation jointly and severally contravene the substantive protections in the Hong Kong-Australia BIT in that they expropriate the Investments, are unfair and inequitable, unreasonably impair the use of the Investments, amount to a failure to afford full protection and security for the Investments and contravene obligations Australia has entered into with regard to investments of investors, specifically international trade treaty obligations. These contraventions derive from the degree to which plain packaging legislation and the GHW regulation interfere with the Investments, the lack of credible evidence that plain packaging legislation will achieve its stated goals, and violation of international trade treaties by plain packaging legislation. These factors are addressed below, followed by an explanation of the specific contraventions of the Hong Kong-Australia BIT.

29. While PM Asia does not deny Australia its sovereign right to legislate, its treaty obligations (such as pursuant to the Hong Kong-Australia BIT) fetter its discretion; it cannot breach the Hong Kong-Australia BIT without consequences.

(a) General factors: interference with PM Asia's Investments, lack of credible evidence and violation of international law

30. Philip Morris uses the intellectual property and goodwill to manufacture, market and distribute for sale tobacco products, principally cigarettes, in Australia and elsewhere in accordance with all applicable laws and regulations.

31. The manufacture, marketing and sale of tobacco products in Australia is already subject to extensive regulation at the Commonwealth, State and Territory levels; most pertinently, the *Tobacco Advertising Prohibition Act 1992* ("*TAP Act*"). The practical effect of the TAP Act

is that tobacco packaging is the principal remaining means by which Philip Morris can utilise the intellectual property. Plain packaging legislation and the GHW regulation will, jointly and severally, effectively prohibit the use of the intellectual property on or in relation to tobacco products and packaging with the exception of the brand name in government-mandated font and type size thereby stripped of virtually all recognition. Philip Morris' business in Australia will be severely affected as a result.

32. The intellectual property plays a critical part in distinguishing Philip Morris' products from competitors' products and illicit products. Over time, the use of intellectual property on or in relation to Philip Morris' products has contributed to the generation of substantial goodwill in respect of those products. Philip Morris' business in Australia and elsewhere is built on the recognition of its brands and the consequent commercial advantage that recognition brings. PML's Brands have a history spanning more than 50 years. Some of the Brands, for example, *Marlboro* and *Peter Jackson*, have reached iconic status among consumer brands. Philip Morris and its affiliates in Australia and worldwide make every effort to protect its intellectual property and goodwill.

33. Plain packaging legislation (and, jointly and severally, the GHW regulation) manifestly deprives PML of the intellectual property and the commercial utility of its Brands: this is the central purpose of the legislation. Irrespective of whether legal title to the intellectual property is affected by plain packaging legislation, PML's brands will effectively be eliminated. The commercial value of the intellectual property and the goodwill generated by the intellectual property is substantially destroyed. This in turn affects the value of PM Australia and PML in a devastating manner.

34. Without branding, PML's products are not readily distinguishable to the consumer from the products of its competitors; consequently, competition will be based primarily on price. PML is reduced from a manufacturer of branded products to that of a manufacturer of an effectively undifferentiated commodity. This is an entirely different enterprise and business model to that currently pursued by PML; the enterprise will be significantly impaired given the expected loss in value of the business.

35. The stated purpose of plain packaging legislation is, essentially, to reduce smoking prevalence.[8] However, there is no credible evidence that plain packaging will reduce smoking prevalence. Moreover, the likely reduction of price and likely increase in availability and relative desirability of cheap illicit tobacco products mean the measure may be counter-productive. The connection between plain packaging and reduced smoking

[8] Sections 3(1) and 3(2).

prevalence is speculative at best; the Government is legislating without regard to credible evidence.

36. The Government has chosen to pursue this course regardless of the existence of other means of reducing smoking prevalence, as the Government itself highlighted in the 2009 National Preventative Health Taskforce report[9], that do not curtail the property rights of tobacco manufacturers. Coupling plain packaging to other anti-smoking initiatives does not remedy the fact that there is a lack of credible evidence that plain packaging will reduce smoking prevalence.

37. Plain packaging legislation contravenes Australia's obligations under international trade treaties, in particular TRIPS (to which Australia has been a party since 1 January 1996) which explicitly incorporates the minimum standards of protection provided for trade marks by the Paris Convention (to which Australia has been a party since 10 October 1925) and also provides further protections; and the TBT (to which Australia has been a party since 1 January 1995).

38. Most pertinently, Article 20 of TRIPS provides that:

> *"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."*

39. Plain packaging legislation encumbers PML's trade marks in an unjustifiable way in that the legislation requires use in a special form, and it is clearly detrimental – significantly so – to the capability of PML's trade marks to distinguish Philip Morris' products from the products of other tobacco manufacturers: a matter that goes to the heart of the purpose of a trade mark. There is no exception or carve out for tobacco trade marks.

40. Article 2(2) of TBT prohibits technical regulations that create obstacles to international trade that are more trade-restrictive than necessary to achieve a legitimate objective such as human health. Plain packaging legislation is a technical regulation that is not necessary to fulfill the objective of protection of human health; there is no credible evidence that it will reduce smoking prevalence, and there is evidence to suggest that it may have an adverse effect on that objective. Neither is plain packaging legislation a *"necessary"* obstacle in the sense that other, less restrictive, measures are available to Australia to achieve its public health objectives in an effective manner.

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[9] Australian Government Preventative Health Taskforce *"Australia – The Healthiest Country by 2020"* 30 June 2009.

41. Article 7 of the Paris Convention and Article 15(4) of TRIPS provide that the nature of the goods or services to which a trade mark is to be applied shall not form an obstacle to the registration of a mark. Plain packaging legislation dictates that the nature of the good forms an obstacle to the use of the mark, "use" being a notion inextricably linked to registration: there is no purpose to registration without a corresponding right to use. Similarly, Article 6 *quinquies* (B) of the Paris Convention provides that trade marks registered in any States which are Contracting Parties to the Paris Convention cannot be denied registration or invalidated except for one or more of three very narrowly defined reasons, none of which are applicable in the context of tobacco trade marks.

42. Accordingly, in all the above ways, plain packaging legislation contravenes Australia's obligations pursuant to international trade treaties. Neither the Framework Convention on Tobacco Control nor its Guidelines mandate measures that contravene these fundamental international trade treaty obligations.

43. Plain packaging legislation therefore severely adversely affects PM Asia's investments and extinguishes the practical utility of intellectual property rights in breach of international trade treaties. There is no credible evidence illustrating any link between plain packaging and reducing smoking prevalence. Yet Australia unreasonably persists with the introduction of plain packaging legislation.

(b) Specific contraventions of the Hong Kong-Australia BIT

44. The effect of plain packaging legislation, and for the same reasons the GHW regulation, is plainly equivalent to deprivation of title to the intellectual property and goodwill. Moreover, the effect of plain packaging legislation will be substantially to deprive PM Asia of the commercial value of its investments in Australia. In all these senses, plain packaging legislation breaches Article 6 of the Hong Kong-Australia BIT. Article 6 protects investments from measures by a host State that have an effect equivalent to deprivation, except under due process of law, for a public purpose related to the internal needs of the host State, on a non-discriminatory basis and against compensation. While it is not yet clear if the Government will follow due process in passing plain packaging legislation, it is clear that there is no credible evidence that plain packaging legislation will have the claimed effect of enhanced public health (indeed there is evidence to suggest that it may have the opposite effect) and no compensation has been paid. The effective extinguishment of the intellectual property by way of legislation also manifests a failure by Australia to afford full protection and security to PM Asia's investments as required by Article 2(2) of the Hong Kong-Australia BIT.

45. Neither is plain packaging legislation (and for the same reasons the GHW regulation) fair and equitable as required by Article 2(2) of the Hong Kong-Australia BIT. Plain packaging legislation will severely curtail the commercial utility of the intellectual property and goodwill and has a severe negative impact on the value of PM Asia's Investments in Australia. It contravenes Australia's international obligations under TRIPS, the Paris Convention, and the TBT. There is no credible evidence that it will reduce smoking prevalence, while other measures that do affect prevalence and do not severely curtail the intellectual property or goodwill are available to the Government. Its contribution to public health is purely speculative and there is, in fact, evidence that it will have a negative effect in this regard. Its promotion and imminent enactment appear to be motivated by political concerns rather than a genuine desire for fair and equitable regulation. In short, the benefits of the legislation (if any) are entirely disproportionate to the harm it will cause to PM Asia's Investments; accordingly, the legislation is not fair and equitable in any sense.

46. For the same reasons, plain packaging legislation and the GHW regulation each constitutes an unreasonable impairment to the management, maintenance, use, enjoyment or disposal of PM Asia's Investments in Australia in breach of Article 2(2) of the BIT. Finally, and also pursuant to Article 2(2) of the BIT, contravention of Australia's international trade treaty obligations results in a failure by Australia to observe obligations it entered into with regard to investments of investors in its territory.

47. For the avoidance of doubt, PM Asia's Claim encompasses the GHW regulation (or any other extension of current regulations concerning graphic health warnings) and the TPP Bill and any regulations promulgated and enforced under it, whether pursuant to section 14, section 11(2) or section 94 and whether in the terms advised in the Consultation Paper or otherwise. PM Asia claims that the erosion of the status quo regarding the use of its intellectual property on or in relation to tobacco products and packaging as a result of the passage of the TPP Bill including promulgation and enforcement of regulations (including the GHW regulation) will severely and adversely affect its Investments and amount to a breach of the Hong Kong-Australia BIT.

Loss and relief

48. Enactment of plain packaging legislation and the GHW regulation will cause PM Asia significant financial loss, potentially amounting to billions of dollars.

49. PM Asia requests that the Government cease and discontinue all steps toward enacting plain packaging legislation and issuing the GHW regulation. Failing this, PM Asia will have no option but to initiate arbitration under the Hong Kong-Australia BIT and seek orders from

an arbitral tribunal for the cessation and discontinuance of the plain packaging legislation and the GHW regulation and/or for an award of damages and interest.

Philip Morris Asia Limited
Date: 22/6/2011