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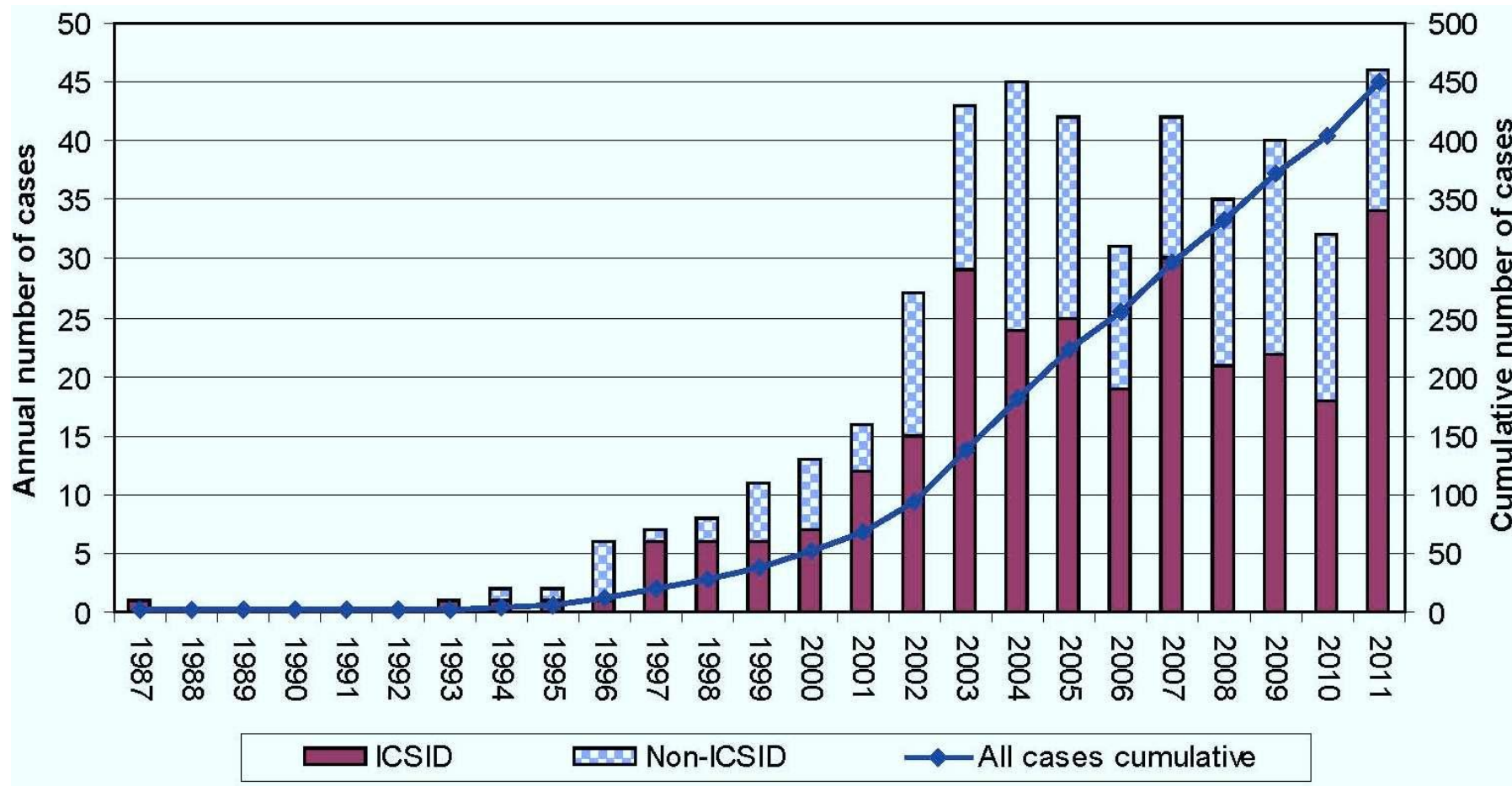
MELBOURNE LAW SCHOOL

Australia's first, Australia's global

International Investment Agreements: An Overview

Professor Andrew D Mitchell

Known investor-State disputes, 1987-2011



Source: UNCTAD

Investor-State Dispute Settlement

- Gives teeth to the substantive obligations contained in investment treaties.
- Gives foreign investors a right to bring a claim against a State for violation of the substantive investment guarantees.
- In many cases substantial awards have been made in an investor's favour.

Investment Treatment Obligations

Absolute Protections (non-contingent obligations)

Fair & Equitable Treatment

Full protection & security

Compensation for Expropriation

Relative Protections (contingent obligations)

National Treatment (NT)

Most Favoured Nation Treatment (MFN)

Expropriation

- BITs often prohibit the taking of a foreign investment by a public authority except:
 1. for a public purpose,
 2. on a non-discriminatory basis, and
 3. against compensation.

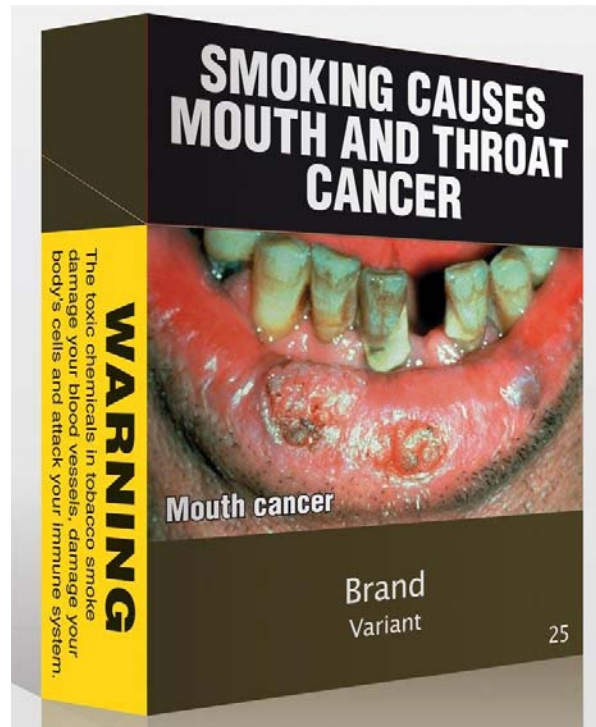
ARTICLE 6 (Hong Kong–Australia BIT)

Expropriation

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

Expropriation

- Direct/Indirect Expropriation
 - Direct - acts that transfer title and physical possession
 - Indirect - acts that lead to the loss of management, use or control, or a significant depreciation in the value, of assets
- ‘Creeping’ Expropriation
 - ‘the slow and incremental encroachment on one or more ownership rights of a foreign investor that diminishes the value of its investment.’
- Regulatory Takings



Expropriation

- Arbitral tribunals have found a number of different factors relevant in distinguishing non-compensable regulation by the State from compensable expropriation.
- Relevant considerations:
 - whether the government has acquired the investor's property rights;
 - whether the interference with those rights is proportionate to a public interest objective;
 - the degree and duration of the interference;
 - whether the measure entails an exercise of the State's sovereign *police powers*;
 - and the legitimate expectations of investors.

Fair and Equitable Treatment

- Arbitral decisions concerning the FET standard have assessed government conduct according to principles of reasonableness, consistency, non-discrimination, transparency, and due process.

Fair and Equitable Treatment

- Pursuant to Article 2(2) of the Hong Kong–Australia BIT, ‘[i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment ... in the area of the other Contracting Party’.

Fair and Equitable Treatment

- No breach of legitimate expectations:
 - Australia's legitimate regulatory interests.
 - Rational relationship between health objectives and plain packaging measure.
 - PMA cannot have reasonable expected regulatory environment would remain frozen.
 - No specific assurances made.
 - Time of PMA's investment.

The Arbitrators



**Professor Donald
McRae**
appointed by Australia



**Professor Dr Karl-Heinz
Böckstiegel**
(Presiding Arbitrator)
appointed by the
Secretary-General of
the Permanent Court
of Arbitration



**Professor Gabrielle
Kaufmann-Kohler**
appointed by Philip
Morris Asia

Conclusions

- International Investment Law is a growing area of international law – increased number of arbitral decisions and number of investment treaties.
- Improved the legal position of investors but host states have become less enthusiastic.
- Outcome of arbitration cases difficult to predict.



Edited by
**Tania Voon, Andrew D. Mitchell and
 Jonathan Liberman with Glyn Ayres**

PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES

Legal Issues

Tania Voon, Andrew D. Mitchell
 and Jonathan Liberman
 with Glyn Ayres

PUBLIC HEALTH AND PLAIN
 PACKAGING OF CIGARETTES



“Voon, Mitchell, and Liberman offer a penetrating analysis of the monumental struggle against smoking in the 21st century – the leading preventable cause of death in the world. Their book is undoubtedly the seminal scholarly examination of plain packaging of tobacco products. “Big Tobacco” is challenging plain packaging rules in trade, investment, and constitutional forums around the world. It is simply impossible to understand the law, policy, and profound social implications of tobacco control without this masterful text.”

– Lawrence O. Gostin, Georgetown University and World Health Organization Centre on Public Health Law and Human Rights, USA

“This book is a “must read” for anyone interested in tobacco regulation at the international level. Written by an impressive array of experts in a variety of fields, it deals with international rules on trade, investment, intellectual property, and public health, as well as constitutional issues in Australia – at the vanguard of plain packaging of tobacco – and other jurisdictions. It is an informative and timely guide to current debates on these important issues.”

– Lorand Bartels, University of Cambridge, UK

“This book provides a definitive account of Australia’s pioneering public health legislation on the plain packaging of tobacco products. The regime was designed to implement the World Health Organization Framework Convention on Tobacco Control and address the impacts of “the tobacco epidemic”. A number of nation states plan on emulating Australia’s exemplary regime. In a panic, the tobacco industry has sought to challenge the plain packaging of tobacco products under both Australian constitutional and administrative law, and international trade, investment, and intellectual property laws. This book provides a lucid, thoughtful, and intelligent analysis of the “mega-litigation” over the plain packaging of tobacco products, and highlights the necessity for public health measures in this area. It is a timely and prescient work.”

– Matthew Rimmer, The Australian National University College of Law and ACIPA, Australia

Tobacco use represents a critical global health challenge. The World Health Organization estimates that tobacco kills nearly 6 million people a year, with the toll expected to rise to 8 million annually over the next two decades. This detailed book, written by health and legal experts from institutions around the globe, examines legal issues arising from Australia’s world-first introduction of mandatory plain packaging of tobacco products.

The book offers an in-depth exploration of relevant domestic and international legal questions in fields such as intellectual property, constitutional law, health, trade and investment. The authors’ analysis sheds light on broader questions relating to the capacity of governments to regulate tobacco products and the tobacco industry, and to regulate in the interests of public health more generally. The answers to these questions are of vital interest not only to Australia but also to the international community, with states’ regulatory sovereignty increasingly being challenged in local and international courts and tribunals.

This timely study is designed to assist international organizations, NGOs, policymakers, and scholars in law, medicine and health-related areas. Health professionals and advisors will also find much of interest here.

Tania Voon, Andrew D. Mitchell and Glyn Ayres are at Melbourne Law School, the University of Melbourne, Australia and **Jonathan Liberman** is Director of the McCabe Centre for Law and Cancer, a joint initiative of the Cancer Council Victoria, Australia and the Union for International Cancer Control.

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