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Reassessing the Philip Morris v Australia Plain Packaging Dispute in International Economic Law

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Abstract

This article reassesses the legal significance of the tobacco plain packaging disputes arising from Australia's Tobacco Plain Packaging Act 2011 through the integrated lenses of international trade law, intellectual property law, investment treaty law, and constitutional property doctrine. Rather than treating Philip Morris v Australia as a simple conflict between trademark protection and public health, the article argues that the dispute is best understood as a test of the regulatory space preserved for states within an increasingly constitutionalised system of international economic law. Using doctrinal legal research, treaty interpretation under Articles 31–33 of the Vienna Convention on the Law of Treaties, comparative case analysis, and a public-law approach to investment adjudication, the article examines three interconnected proceedings: the High Court of Australia's decision in JT International SA v Commonwealth; the WTO disputes concerning Australia's tobacco plain packaging measures; and the investor–state arbitration initiated by Philip Morris Asia under the 1993 Australia–Hong Kong investment treaty. It further compares the Australian dispute with Philip Morris v Uruguay, Methanex v United States, Saluka v Czech Republic, Chemtura v Canada, and Tecmed v Mexico. The analysis demonstrates that trademark and investment protections do not create an affirmative entitlement to an unchanging regulatory environment. The High Court's distinction between deprivation and acquisition, the WTO's interpretation of

"unjustifiably" in TRIPS Article 20, and the investment tribunal's rejection of post-dispute treaty shopping collectively point toward a model of bounded economic rights: private rights remain legally protected, but their exercise is conditioned by legitimate, non-discriminatory, evidence-based regulation. The article concludes that the enduring contribution of the Australian plain packaging litigation lies not in establishing an unlimited public-health exception, but in clarifying the legal techniques through which regulatory autonomy can coexist with international economic commitments.
KEYWORDS: TRIPS; international investment law; regulatory autonomy; indirect expropriation; treaty shopping; public health; WTO; Philip Morris

Introduction

The relationship between international economic law and domestic public-interest regulation has become one of the defining questions of contemporary trade and investment governance. International trade agreements, investment treaties, and intellectual property regimes were designed to reduce arbitrary barriers, stabilise expectations, and protect cross-border economic activity. Yet those same disciplines increasingly operate in fields that were once regarded as primarily domestic: health, environmental protection, consumer safety, financial regulation, food standards, and climate policy. The resulting problem is not whether states possess a sovereign power to regulate; that proposition is largely uncontested. The more difficult question is how international law determines the boundary between legitimate regulation and compensable or otherwise unlawful interference with protected economic interests.

Australia's tobacco plain packaging regime provides an unusually rich case study because a single public-health measure generated litigation across three distinct legal orders. The Tobacco Plain Packaging Act 2011 (Cth) and its implementing regulations standardised the appearance of tobacco packaging, prohibited most brand imagery, restricted colours and logos, and required tobacco products to be marketed in a prescribed visual form alongside graphic health warnings. The legislation was adopted as part of a broader tobacco-control strategy and in the context of Australia's obligations under the World Health Organization Framework Convention on Tobacco Control (WHO FCTC). The measure immediately attracted challenges from tobacco companies and several states, producing constitutional litigation before the High Court of Australia, investor–state arbitration under the 1993 Agreement between Hong Kong and Australia for the Promotion and Protection of Investments, and WTO litigation under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT Agreement).

The original legal controversy was commonly framed as a collision between intellectual property and public health. That framing is useful but incomplete. A trademark is undoubtedly an economically valuable legal interest, and investment treaties may protect intellectual property as part of a covered investment. Nevertheless, neither trademark law nor investment law necessarily grants a positive right to exploit a mark in every commercially advantageous manner. The central doctrinal question is therefore not whether plain packaging reduces the commercial utility of trademarks—it plainly does—but whether international and constitutional law transforms that economic burden into a legal wrong. The answer depends on distinct concepts in each regime: "acquisition" under s 51(xxxi) of the Australian Constitution; "unjustifiable encumbrance" under TRIPS Article 20; indirect expropriation and fair and equitable treatment under investment law; and, at the jurisdictional level, abuse of rights and treaty shopping.

This article develops a more integrated account of the dispute. It argues that the Australian plain packaging litigation illustrates a model of bounded economic rights. Under this model, international economic law protects property, investments, market access, and legal security, but does not constitutionalise a static regulatory environment. Rights are protected against discrimination, arbitrariness, uncompensated takings where the applicable rule so requires, denial of due process, and other treaty-defined wrongs. They do not, without more, immunise investors or right-holders from generally applicable regulation adopted for legitimate public purposes. The legal task is therefore one of structured boundary drawing rather than categorical priority.

Three research questions guide the analysis. First, how did the High Court, WTO adjudicators, and the investment tribunal conceptualise the relationship between private economic rights and Australia's public-health objective? Second, what legal doctrines best explain the preservation of regulatory autonomy across these regimes? Third, what does the dispute contribute to the contemporary design and reform of international investment law, particularly in relation to police powers, treaty shopping, proportionality, and public-interest exceptions?

The article makes four contributions. First, it distinguishes carefully between the merits of public-health regulation and the jurisdictional basis on which Philip Morris Asia's claim against Australia was dismissed. This distinction is essential. The arbitration did not produce a merits ruling that Australia's plain packaging law was non-expropriatory or consistent with fair and equitable treatment; the tribunal rejected jurisdiction because the claimant's restructuring occurred when the dispute was foreseeable and amounted to an abuse of rights. Second, the article links the WTO's interpretation of TRIPS Article 20 with broader debates about regulatory autonomy and treaty interpretation. Third, it places the Australian case alongside Philip Morris v Uruguay and other investment awards to show that the police powers doctrine is significant but not conceptually uniform. Fourth, it connects the litigation to current reform debates in investor–state dispute settlement (ISDS), where states and institutions are seeking more precise rules on public-interest regulation, procedural abuse, standing mechanisms, appellate review, and consistency.

The argument proceeds in nine parts. After setting out the methodology, the article develops a theoretical framework based on regulatory autonomy, police powers, proportionality, and systemic integration. It then analyses the Australian constitutional case, the WTO proceedings, and the investment arbitration. A comparative section examines related investment jurisprudence. The final substantive sections evaluate the implications for treaty design and for the legitimacy of international economic adjudication before drawing conclusions about the future relationship between economic protection and public-interest regulation.

Methodology and Analytical Framework

This study adopts a qualitative doctrinal methodology centred on primary legal materials. The analysis draws on the Tobacco Plain Packaging Act 2011, the Trade Marks Act 1995, s 51(xxxi) of the Australian Constitution, the TRIPS Agreement, the TBT Agreement, the WHO FCTC, the 1993 Australia–Hong Kong investment agreement, the High Court judgment in JT International SA v Commonwealth, the WTO panel and

Appellate Body reports in Australia — Tobacco Plain Packaging, and the arbitral award on jurisdiction and admissibility in Philip Morris Asia Limited v Commonwealth of Australia. Comparative investment awards are used to identify doctrinal continuities and tensions in the treatment of public-interest regulation.

The legal method combines four approaches. The first is a statutory and treaty-text approach, which asks how the relevant rights and limitations are expressed in the governing instruments. The second is a case approach focused on ratio decidendi, legal characterisation, and the institutional function of each tribunal. The third is comparative doctrinal analysis, used to contrast constitutional acquisition, WTO justification analysis, and investment-law expropriation. The fourth is systemic interpretation, informed by Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), including the principle in Article 31(3)(c) that relevant rules of international law applicable between the parties may be taken into account in treaty interpretation.

This methodology deliberately avoids collapsing the three regimes into a single balancing test. Domestic constitutional law, WTO law, and investment law contain different legal thresholds, remedies, parties, and institutional purposes. A constitutional prohibition on acquisition of property is not identical to an investment treaty's expropriation clause; TRIPS Article 20 does not replicate an FET provision; and the standing requirements of an investor–state tribunal differ fundamentally from state-to-state WTO dispute settlement. Comparative analysis is valuable only if these institutional differences remain visible.

At the same time, the disputes can be analysed through a common public-law question: when does the exercise of public authority become legally excessive in relation to protected private interests? That common question permits a structured comparison of purpose, discrimination, due process, economic impact, legitimate expectations, proportionality, and the presence or absence of a proprietary transfer. It also provides a basis for evaluating whether international economic adjudication preserves adequate "regulatory space"—the practical and legal ability of a state to pursue legitimate policy objectives without incurring responsibility merely because regulation diminishes the value or profitability of an investment.

Theoretical Foundations: Regulatory Autonomy, Police Powers and Proportionality

The concept of regulatory autonomy begins from a basic proposition of public law: governments must be able to alter the legal conditions under which economic activity occurs. Markets are constituted and continuously reshaped by law. Property, corporate personality, licensing, competition rules, intellectual property, labour standards, taxation, health regulation, and environmental obligations are not external constraints on a pre-legal market; they are part of the legal infrastructure that makes markets possible. International economic law therefore faces a structural tension when it protects private expectations against state interference while simultaneously presupposing the state's continuing authority to govern.

Investment law has historically addressed this tension through the distinction between expropriation and non-compensable regulation. The police powers doctrine is central to that distinction. In broad terms, the doctrine recognises that bona fide, non-discriminatory regulation for public welfare may fall outside the concept of compensable expropriation even where it imposes serious economic costs on an investor. The tribunal in Methanex v United States articulated an influential formulation: non-discriminatory regulation for a public purpose, enacted with due process, is ordinarily not expropriatory unless the state had given specific commitments that it would refrain from such regulation. Saluka v Czech Republic similarly treated bona fide, non-discriminatory general-welfare regulation as part of the normal regulatory powers of the state. Chemtura v Canada applied comparable reasoning to a health and environmental measure concerning lindane.

The police powers doctrine should not, however, be treated as a magic formula that ends legal analysis. Its precise content remains contested. Some awards emphasise the purpose and non-discriminatory character of the measure; others focus more heavily on the severity of economic deprivation, the proportionality of the regulatory response, or the existence of specific assurances. Prabhash Ranjan has shown that Methanex, Saluka, Chemtura, and Philip Morris v Uruguay do not articulate an identical rule. This doctrinal diversity matters because a very broad police powers exception could under-protect investors against disguised or abusive regulation, while an excessively effect-based approach could require compensation for ordinary regulation whenever economic consequences are substantial.

Proportionality offers a second conceptual lens. In public law, proportionality generally asks whether a measure pursues a legitimate aim, is rationally connected to that aim, is necessary in the sense that less restrictive reasonably available alternatives are absent, and maintains an appropriate relationship between the public benefit and the burden imposed. International investment tribunals have used proportionality unevenly, and it should not automatically be imported into every treaty standard. Nevertheless, proportionality helps illuminate why the same regulatory measure can be lawful even when it significantly interferes with property: the legal inquiry is not limited to the existence of economic loss but examines the justification and structure of public action.

A third concept is legitimate expectations, often analysed within fair and equitable treatment. Legitimate expectations cannot plausibly mean that all laws relevant to an investment must remain unchanged. Modern regulatory states routinely revise health, environmental, tax, and consumer-protection rules. The stronger view is that expectations become legally significant when they are grounded in specific representations, commitments, or a sufficiently stable legal framework assessed in light of the investor's circumstances. This is particularly important in highly regulated industries. Tobacco companies operate in a sector subject to decades of escalating health regulation. In such a context, an expectation that branding rules will never become more restrictive is difficult to characterise as objectively reasonable absent a specific state commitment.

A fourth theoretical tool is "systemic integration". International economic treaties do not exist in isolation from other rules of international law. Article 31(3)(c) VCLT provides a doctrinal bridge through which adjudicators may interpret treaty language in light of relevant international rules. In public-health disputes, the WHO FCTC is especially important as evidence of the regulatory context, the legitimacy of tobacco-control objectives, and the international legal environment in which trade and investment commitments operate. Systemic integration does not automatically subordinate trade or investment treaties to health instruments; rather, it seeks interpretive coherence where treaty language permits it.

These ideas can be brought together in a model of "bounded economic rights". Trademark rights, investment protections, and market-access commitments remain genuine legal rights. But their boundaries are partly defined by the regulatory environment in which they operate. A trademark confers exclusionary powers against unauthorised use; it does not necessarily create an affirmative right to display a sign free from product regulation. An investment treaty protects against specified forms of state misconduct; it does not ordinarily guarantee regulatory immutability. A trade agreement disciplines unjustifiable restrictions; it does not eliminate members' capacity to pursue health objectives. The boundary is therefore constructed by legal tests that distinguish regulation from confiscation, justification from arbitrariness, and legitimate restructuring from procedural abuse.

Australian Constitutional Law: From Deprivation to Acquisition

The first major legal test of Australia's plain packaging regime occurred before the High Court in JT International SA v Commonwealth; British American Tobacco Australasia Ltd v Commonwealth. The plaintiffs argued that the Tobacco Plain Packaging Act effected an acquisition of their intellectual property and associated goodwill otherwise than on just terms, contrary to s 51(xxxi) of the Constitution. The case forced the Court to separate two ideas that are frequently conflated in political and commercial discourse: a restriction on the use or value of property and an "acquisition" of property for constitutional purposes.

The High Court accepted that intellectual property interests could constitute property. The decisive issue was acquisition. Australian constitutional jurisprudence does not treat every deprivation, extinguishment, or restriction as an acquisition. For s 51(xxxi) to apply, the Commonwealth or another person ordinarily must obtain an identifiable benefit or advantage of a proprietary character. The plain packaging legislation undoubtedly constrained the tobacco companies' ability to use their marks and packaging as advertising assets. Yet the Commonwealth did not acquire ownership of the trademarks, obtain a licence to exploit them commercially, or transfer them to a competitor. Regulation diminished the plaintiffs' freedom to use their property but did not produce the kind of proprietary transfer or accrual that the constitutional concept of acquisition requires.

This distinction is more than a technical feature of Australian constitutional doctrine. It reflects a general principle relevant to regulatory governance: economic loss and legal acquisition are not synonymous. A regulation may reduce the profitability of an asset without transferring the asset's value to the state. Health warnings, zoning restrictions, product standards, advertising rules, and environmental controls can all constrain the profitable use of property. If every serious regulatory burden were characterised as an acquisition, ordinary governance could become constitutionally dependent on compensation.

The tobacco companies' argument nevertheless revealed a difficult issue. Plain packaging did more than impose a small labelling requirement. It displaced a substantial portion of the communicative and advertising function of tobacco packaging. From a commercial perspective, this was severe. The majority's reasoning demonstrates that constitutional property analysis turns not merely on severity but on the juridical structure of the measure. The question is what legal interest the state obtained, not simply what economic value the owner lost. This focus insulated a wide range of non-confiscatory regulation from the just-terms requirement while preserving constitutional protection against measures that genuinely transfer proprietary benefit.

The case also exposes the distinctive character of trademark rights. Trademark law is primarily concerned with source identification and the prevention of consumer confusion. Registered owners enjoy powerful rights to exclude unauthorised use, license marks, assign them, and seek remedies for infringement. But this does not necessarily entail an unrestricted affirmative right to use a mark in all circumstances. Product safety law can regulate the way marks appear; pharmaceutical regulation can control packaging and advertising; misleading-conduct rules may prohibit particular representations; and health law can restrict promotion. The existence of the trademark therefore does not itself answer the public-law question of permissible use.

For international economic law, the High Court's reasoning supplies a useful conceptual baseline. The legal system can recognise property while simultaneously recognising regulation of that property. The crucial inquiry is whether the regulatory action crosses the threshold established by the applicable norm. Under s 51(xxxi), that threshold was acquisition. Under an investment treaty, the threshold is framed differently and may include substantial deprivation, police powers, legitimate expectations, and proportionality. Under TRIPS, the inquiry turns on the nature and justification of the encumbrance. The High Court decision thus should not be exported mechanically into international law, but its distinction between economic burden and legal taking is analytically powerful.

WTO Law and the Architecture of Justification under TRIPS

The WTO proceedings raised a different set of questions because private companies do not have direct standing to bring WTO claims. Several states, including Honduras and the Dominican Republic, challenged Australia's plain packaging measures. The litigation was exceptionally complex and addressed claims under the TRIPS Agreement, the TBT Agreement, and other WTO rules. For present purposes, the most significant issue concerns TRIPS Article 20, which provides that the use of a trademark in the course of trade shall not be "unjustifiably encumbered by special requirements".

The textual structure of Article 20 is important. It does not prohibit all encumbrances. It prohibits encumbrances that are unjustifiable. The provision therefore contains an internal justificatory standard. This makes the interpretation of "unjustifiably" central to the balance between trademark protection and regulatory autonomy. If any significant restriction on trademark use were automatically inconsistent with TRIPS, the word "unjustifiably" would have little independent work to do. Conversely, if any measure labelled "public health" were automatically justified, trademark protection would become too easily displaced. A credible interpretation must preserve both the discipline and the regulatory flexibility embedded in the text.

The WTO panel concluded that the complainants had not established a violation of Article 20, and the Appellate Body upheld the core conclusion in 2020. The adjudicators treated Australia's public-health objective and the contribution of the measures to that objective as legally relevant to justification. The WHO FCTC and its guidelines formed part of the broader regulatory context. The WTO proceedings also involved extensive evidentiary disputes over the effectiveness of plain packaging, demonstrating that regulatory autonomy in WTO law is not simply asserted; it may have to be defended through evidence, design coherence, and a reasoned relationship between means and ends.

The Appellate Body's treatment of Article 20 is especially significant because it rejects a property-absolutist understanding of trademarks. TRIPS protects trademark owners against unauthorised third-party uses and requires members to maintain specified legal protections, but it does not transform the trademark into an unconditional entitlement to use every protected sign in commerce. This distinction parallels, at a functional level, the High Court's emphasis on the nature of the right. In both settings, trademark protection remains legally meaningful even though the state can restrict modes of commercial presentation.

The WTO analysis also reveals why the Doha Declaration on the TRIPS Agreement and Public Health is conceptually relevant even though the tobacco disputes did not concern pharmaceutical patent access in the classic Doha sense. The Declaration affirms a broader interpretive proposition: TRIPS should be interpreted and implemented in a manner supportive of members' right to protect public health. That proposition does not create a free-standing exception to every TRIPS obligation. Its deeper importance lies in resisting an interpretive method that treats intellectual property protection as detached from the social objectives and regulatory responsibilities recognised within the TRIPS framework itself.

The TBT dimension reinforces this architecture of justification. The Panel and Appellate Body examined whether the measures were more trade-restrictive than necessary to fulfil a legitimate objective under TBT Article 2.2. Although the legal test differs from TRIPS Article 20, both analyses require attention to regulatory purpose, the contribution of the measure, risks of non-fulfilment, and the availability of alternatives. This type of inquiry resembles proportionality without being identical to constitutional proportionality doctrine. The state retains regulatory choice, but adjudication tests whether the restriction can be justified within treaty-defined disciplines.

A major lesson follows for international trade law. Regulatory autonomy is not best understood as an external exception to trade obligations. It is often embedded within the obligations themselves through terms such as "necessary", "unjustifiable", "arbitrary", "discriminatory", or "legitimate objective". This matters because it changes the legal narrative. Australia did not prevail because public health simply trumped trade law. Rather, Australia prevailed because the relevant trade rules, properly interpreted, contained legal space for a serious, evidence-based, non-discriminatory health measure.

The WTO dispute also demonstrates the importance of institutional restraint. WTO adjudicators are not public-health regulators. Their task is to review consistency with treaty obligations, not to select the optimal tobacco-control policy. The legitimacy of the system depends on respecting this distinction. Too deferential an approach risks making treaty disciplines ineffective; too intrusive an approach risks converting international adjudicators into appellate regulators for national policy. The plain packaging reports represent an effort—imperfect but significant—to maintain this boundary by reviewing justification and evidence without requiring Australia to prove that no conceivable alternative policy existed.

Philip Morris Asia v Australia: Jurisdiction, Treaty Shopping and Abuse of Rights

The investor–state arbitration initiated by Philip Morris Asia Limited (PMAL) is frequently described in shorthand as a case in which Australia successfully defended its plain packaging policy against an expropriation claim. That description is incomplete and, if left unqualified, legally misleading. The tribunal's decisive ruling was jurisdictional. It did not determine that the plain packaging measures complied on the merits with the treaty's expropriation or fair and equitable treatment obligations. Instead, it concluded that the claimant's corporate restructuring constituted an abuse of rights because treaty protection was invoked after the dispute had become foreseeable.

This procedural history is central to the case's significance. Philip Morris's Australian operations had originally been held through a corporate structure that did not give the group access to investor–state arbitration under the 1993 Hong Kong–Australia investment agreement. After the Australian Government had publicly committed to introducing plain packaging, the group reorganised ownership so that the Australian investment fell under a Hong Kong entity. PMAL then relied on the Hong Kong treaty to commence arbitration. Australia argued that this was an impermissible attempt to manufacture treaty jurisdiction for a pre-existing or foreseeable dispute.

International investment law generally permits investors to structure investments prospectively in order to benefit from treaty protection. Corporate nationality planning is not inherently abusive. Multinational enterprises routinely select holding companies based partly on legal protections, tax arrangements, and dispute-settlement mechanisms. The legal difficulty arises when restructuring occurs after the relevant dispute has arisen or when it is sufficiently foreseeable that the restructuring becomes an attempt to convert an existing domestic dispute into an international treaty claim.

The tribunal's abuse-of-rights analysis therefore performs an important gatekeeping function. It distinguishes legitimate nationality planning from ex post treaty shopping. The principle of good faith prevents a claimant from artificially creating jurisdiction after the essential elements of the dispute are already in view. This is not merely procedural housekeeping. Jurisdiction determines the allocation of public authority between domestic institutions and international tribunals. If post-dispute restructuring automatically generated treaty jurisdiction, virtually any multinational group with a sufficiently complex corporate network could internationalise a regulatory dispute after the fact.

The decision also has implications for the legitimacy of ISDS. One recurring criticism of investment arbitration is that multinational enterprises can reorganise corporate structures to gain access to favourable treaties in ways unavailable to domestic firms. The Philip Morris award does not eliminate that concern, but it imposes a temporal and good-faith limit. Treaty protection must attach to an investment relationship before the dispute becomes sufficiently foreseeable; it cannot simply be engineered as a litigation device once government action has crystallised.

Importantly, the jurisdictional outcome means that substantive claims concerning indirect expropriation and FET remained unresolved in the Australian arbitration. Any analysis that attributes a police-powers merits holding to Philip Morris v Australia confuses the Australian case with Philip

Morris v Uruguay. This distinction should be explicit in scholarship because it affects the precedential value of the award. Australia's policy gained substantial legal validation from the High Court and WTO proceedings, while the investor–state case stands principally for abuse of rights, foreseeability, and treaty-shopping limits.

Had the tribunal reached the merits, the expropriation claim would have required a difficult inquiry. PMAL alleged that restrictions on trademarks and packaging substantially impaired the value of protected investments. International investment law recognises that indirect expropriation may occur without formal transfer of title where state measures substantially deprive an investor of the use, value, or control of an investment. Yet the police powers doctrine, the public-health character of the measure, its general application, and the heavily regulated nature of tobacco would all have been relevant. The merits would also have raised legitimate-expectations questions: could a tobacco investor reasonably expect the branding environment to remain static despite decades of progressive tobacco regulation and Australia's international health commitments?

The stronger doctrinal lesson is therefore twofold. At the jurisdictional level, the case restricts strategic restructuring designed to create treaty standing for a foreseeable dispute. At the substantive level, it demonstrates why jurisdiction and merits must remain analytically separate. This separation improves legal accuracy and avoids overstating the degree to which investment arbitration itself validated Australia's regulatory policy.

Comparative Investment Jurisprudence: From Methanex to Philip Morris v Uruguay

The merits questions left unanswered in Philip Morris v Australia can be examined through comparative investment jurisprudence. Several cases provide a spectrum of approaches to public-interest regulation, indirect expropriation, and legitimate expectations.

Methanex v United States is a foundational reference. The dispute concerned California's ban on methyl tertiary-butyl ether (MTBE), a gasoline additive associated with groundwater contamination. The tribunal rejected the expropriation claim and articulated a strong police-powers principle for non-discriminatory public-purpose regulation enacted with due process, subject to the possibility of specific state commitments. Methanex is important because it treats legitimate regulation as conceptually distinct from compensable expropriation rather than merely as an expropriation justified by public purpose.

Saluka v Czech Republic adopted a similar but not identical approach. It recognised that states are not liable to compensate foreign investors for bona fide, non-discriminatory regulations aimed at general welfare adopted in the normal exercise of regulatory powers. The decision is frequently cited as evidence that police powers form part of customary international law. At the same time, Saluka acknowledged that the doctrine has limits and must be applied in context.

Chemtura v Canada concerned restrictions on lindane, an agricultural pesticide. The tribunal gave substantial weight to the health and environmental basis of the Canadian regulatory process, including scientific evaluation and international developments. The award is particularly relevant to tobacco control because it demonstrates that an evidence-based regulatory process can support the characterisation of a measure as a valid exercise of police powers even when the investor suffers serious commercial consequences.

Tecmed v Mexico sits at a different point in the jurisprudence. Its proportionality-oriented language has been influential in debates over indirect expropriation. Tecmed suggested that adjudicators should consider whether the burden imposed on an investor bears a reasonable relationship to the public purpose pursued. Critics have argued that aggressive proportionality review risks substituting arbitral judgment for domestic regulatory choices, especially where tribunals lack institutional competence in complex policy fields. Supporters respond that some proportionality review is necessary to prevent governments from avoiding responsibility merely by invoking a legitimate purpose.

The most directly relevant comparison is Philip Morris Brands Sàrl v Oriental Republic of Uruguay. Unlike the Australian arbitration, the Uruguay case proceeded to the merits. Philip Morris challenged tobacco-control measures including the "single presentation requirement" and large graphic health warnings. The tribunal rejected the claims and treated Uruguay's measures as a bona fide exercise of police powers directed at public health. The award drew on the state's sovereign regulatory authority, the non-discriminatory character of the measures, and the international tobacco-control framework.

Philip Morris v Uruguay demonstrates the substantive legal path that Philip Morris v Australia never reached. It supports the proposition that health regulation affecting trademarks can, in appropriate circumstances, fall outside indirect expropriation. Yet even the Uruguay award should not be converted into a categorical tobacco exception. Its significance lies in the application of general investment-law principles to a regulatory context characterised by a serious health objective, non-discrimination, evidence, and international normative support.

Together, these cases reveal three competing models of review. An effects-oriented model asks primarily whether the investor has been substantially deprived of the investment, with regulatory purpose playing a secondary role. A police-powers model treats certain bona fide public-interest regulations as non-expropriatory by their nature. A proportionality model evaluates both public purpose and the relationship between the means used and the burden imposed. Contemporary treaty practice increasingly attempts to reconcile these approaches by expressly stating that non-discriminatory measures designed and applied to protect legitimate public-welfare objectives such as health, safety, and the environment ordinarily do not constitute indirect expropriation except in rare circumstances.

For public-health regulation, the combined jurisprudence points toward a structured presumption rather than absolute immunity. Where a measure is non-discriminatory, adopted in good faith, supported by a genuine public-health rationale, enacted through due process, and not contrary to specific commitments, a tribunal should be slow to characterise it as indirect expropriation. Severe economic impact remains relevant but should not be dispositive. Otherwise, the law would convert the cost of regulation into a general compensation guarantee and distort the allocation of regulatory risk between states and investors.

Intellectual Property as Investment: Negative Rights, Commercial Value and Regulatory Risk

A central conceptual challenge in the plain packaging disputes is the dual character of intellectual property. A trademark is simultaneously a legal right and a commercial asset. Investment treaties may treat intellectual property rights as protected investments, while TRIPS establishes minimum standards of protection. Yet commercial value is not identical to the legal content of the right. This distinction is essential to understanding why restrictions on use do not automatically amount to unlawful taking.

Trademark law protects distinctiveness, source identification, and the owner's ability to prevent confusing or unauthorised uses. The right has economic value because it supports brand reputation, consumer recognition, licensing, and goodwill. Plain packaging deliberately reduces some of these commercial functions by limiting the visual expression of brands. From the perspective of marketing value, the regulatory intervention is substantial.

But international intellectual property law has never operated in a regulatory vacuum. Products bearing trademarks remain subject to safety rules, labelling obligations, advertising bans, competition law, consumer-protection standards, and sector-specific controls. The right to exclude counterfeit or confusing uses does not entail a universal right to deploy a sign in whatever manner maximises sales. This is especially clear where the product itself creates severe public-health risks and where packaging functions as a marketing medium.

The classification of trademarks as "negative rights" should nevertheless be used carefully. Trademark ownership includes affirmative legal capacities such as assignment and licensing; it is not literally devoid of positive incidents. The more precise proposition is that trademark registration does not necessarily create an affirmative public-law entitlement to use the mark free from otherwise lawful regulation. This narrower formulation avoids oversimplification while preserving the essential doctrinal distinction.

Investment law adds another layer. If intellectual property forms part of a protected investment, state interference can potentially engage treaty obligations even where domestic IP law remains formally intact. An investor might argue that a regulation has destroyed the economic value of the protected asset. This is where treaty standards—rather than the label "intellectual property"—must do the analytical work. A tribunal must ask whether the interference satisfies the applicable threshold for expropriation, FET, discrimination, or another obligation.

This analysis also requires attention to regulatory risk. Investors enter markets against a background of existing and foreseeable regulation. Tobacco has long been subject to progressively stricter controls worldwide, including advertising restrictions, health warnings, age limits, taxation, smoke-free laws, and marketing constraints. The WHO FCTC further signalled an international trajectory toward stronger tobacco-control measures. These circumstances do not give states unlimited freedom, but they weaken claims that stringent future regulation is inherently unforeseeable.

The concept of legitimate expectations should therefore be tethered to objective regulatory context and specific state conduct. A general legal framework is capable of change. Where no stabilisation clause, specific assurance, or targeted representation exists, an investor in a highly regulated sector should anticipate that rules may evolve in response to new evidence and policy commitments. This does not eliminate FET protection; it prevents that standard from becoming a de facto freeze on democratic regulation.

Regulatory Chill, Litigation Strategy and the Political Economy of ISDS

The plain packaging disputes also illuminate the phenomenon commonly described as "regulatory chill": the possibility that governments may delay, weaken, or abandon legitimate regulation because of the anticipated cost and uncertainty of international litigation. Regulatory chill is difficult to measure empirically, and it should not be assumed whenever an investor files a claim. Governments may proceed with regulation despite litigation risk, as Australia did. Yet the structural possibility is real because investment arbitration can impose substantial legal costs and expose states to large damages claims.

Tobacco disputes are especially significant in this debate because the industry has historically used litigation and legal threat as part of a broader strategy to resist regulation. The normative concern is not that corporations exercise legal rights; access to legal process is itself an aspect of the rule of law. The concern arises where procedural architecture allows claims with weak jurisdictional foundations or encourages corporate restructuring designed primarily to internationalise disputes.

Philip Morris v Australia offers a partial answer by limiting post-dispute restructuring. Abuse-of-rights doctrine protects the integrity of jurisdiction and reduces incentives to manufacture treaty access once a regulatory dispute is foreseeable. But it does not fully address regulatory chill. Even jurisdictional proceedings may be lengthy and expensive. Moreover, states confronting novel public-interest regulation may face uncertainty about how tribunals will interpret expropriation, FET, and exceptions.

Treaty design therefore matters. Modern agreements increasingly clarify that non-discriminatory public-welfare regulation ordinarily does not constitute indirect expropriation. Some treaties include general exceptions modelled on GATT Article XX or GATS Article XIV. Others refine FET through closed lists of state conduct or require stronger evidence of specific representations for legitimate-expectations claims. Tobacco carve-outs, such as those used in certain trade and investment instruments, go further by excluding tobacco-control measures from investor–state challenge.

Each technique involves trade-offs. Broad public-health exceptions enhance regulatory security but may generate disputes about necessity, discrimination, or the scope of the exception. Detailed expropriation annexes improve predictability but cannot eliminate interpretive disagreement. Sectoral carve-outs provide maximum clarity for specified fields but may imply that equally important regulation in other sectors deserves less protection. The best approach is likely cumulative: clearer substantive standards, procedural safeguards against abusive claims, mechanisms for early dismissal, transparency, and interpretive authority retained by treaty parties.

The contemporary work of UNCITRAL Working Group III reflects these legitimacy concerns at a systemic level. The reform agenda includes procedural and cross-cutting rules, codes of conduct, an advisory centre, dispute prevention, a possible standing mechanism, and appellate arrangements. As of 2026, the Working Group continues to develop draft provisions and institutional options. These reforms move the debate beyond the binary question of whether ISDS should exist and toward the design question of how investment adjudication can achieve greater consistency, independence, accessibility, and public legitimacy.

The plain packaging experience is relevant to these reforms because it demonstrates that the legitimacy of investment adjudication depends on both substance and procedure. States need sufficient policy space to address serious public problems; investors need protection from genuinely arbitrary or confiscatory conduct; and tribunals need jurisdictional rules that prevent opportunistic access. A durable system must manage all three concerns simultaneously.

Toward a Coherent Public-Law Model of International Economic Adjudication

The combined Australian proceedings suggest that international economic law is moving, unevenly, toward a public-law model of adjudication. In such a model, economic rights remain enforceable but are interpreted in light of the institutional responsibility of states to govern. The relevant question is not whether public interests override private rights as a matter of political preference. It is whether the governing legal instrument structures a balance through concepts such as acquisition, justification, non-discrimination, due process, proportionality, legitimate expectations, and abuse of rights.

This public-law model has several advantages. First, it avoids treating sovereignty as an unlimited defence. States cannot simply invoke public health to shield protectionism, discrimination, or bad faith. The WTO plain packaging litigation illustrates the importance of evidence and legal justification. Second, it avoids treating investment protection as a guarantee against regulatory change. That would create an asymmetrical system in which foreign investors enjoy stronger protection from general regulation than domestic actors and in which public-policy costs are socialised through compensation.

Third, the model encourages doctrinal differentiation. The High Court's acquisition analysis, the WTO's Article 20 analysis, and investment-law police powers are related but not interchangeable. Each responds to a different legal text. Coherence does not require uniformity. It requires that adjudicators explain how the relevant text accommodates both economic protection and legitimate governance.

Fourth, systemic integration can improve legitimacy where multiple legal regimes overlap. The WHO FCTC does not replace TRIPS or an investment treaty, but it provides important context for assessing the seriousness and international recognition of tobacco-control objectives. Similarly, human rights instruments, environmental agreements, and other specialised regimes may inform interpretation where the VCLT permits. This reduces the risk that international economic law becomes insulated from the broader international legal order.

Fifth, proportionality should be used with discipline. It can help identify disguised restrictions or excessive burdens, but tribunals should remain attentive to institutional competence. Public-health regulation often depends on scientific uncertainty, predictive judgment, and population-level risk assessment. International adjudicators should review whether the measure has a reasoned basis, is non-discriminatory, and is not manifestly disproportionate without demanding that governments prove the existence of a uniquely optimal policy.

The Australian dispute also has implications beyond tobacco. Similar tensions arise in climate regulation, digital-platform governance, pharmaceutical pricing, food safety, artificial intelligence, environmental permitting, and energy transition policies. In each field, regulation can reduce the value of investments or intellectual property. If international economic law is to remain politically sustainable, it must distinguish genuine treaty violations from the ordinary costs of lawful social regulation.

This suggests a normative principle of regulatory responsibility: states should retain authority to regulate, but that authority should be exercised transparently, non-discriminatorily, on the basis of a plausible evidentiary foundation, and consistently with specific commitments. Investors should receive protection against confiscation, targeted discrimination, denial of justice, and bad-faith frustration of legitimate assurances, but not a general insurance policy against regulatory evolution.

Implications for Treaty Design and Future Disputes

The plain packaging cases provide concrete lessons for future treaty drafting. The first is that indirect expropriation provisions should expressly address police powers. Modern treaty language increasingly states that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives, including public health and the environment, do not ordinarily constitute indirect expropriation except in rare circumstances. Such wording reduces reliance on contested customary-law formulations and gives tribunals clearer textual direction.

Second, treaties should define the role of legitimate expectations within FET. Open-ended FET clauses have contributed to inconsistent jurisprudence. A more precise rule could require that expectations arise from specific, unambiguous representations attributable to the state and reasonably relied upon by the investor. This would preserve protection against bait-and-switch conduct while avoiding a presumption of regulatory stability.

Third, treaties should address corporate restructuring and denial of benefits more explicitly. Philip Morris v Australia demonstrates that abuse-of-rights doctrine can control post-dispute treaty shopping, but treaty text can make the rule more predictable. Clear temporal requirements, substantial business-activity tests, and denial-of-benefits clauses can reduce jurisdictional manipulation while preserving legitimate corporate planning.

Fourth, public-health and general exceptions should be drafted with attention to their relationship with other treaty obligations. If an exception is intended to apply to expropriation, FET, performance requirements, or non-discrimination, the text should say so. Ambiguity merely relocates the dispute from the merits to the scope of the exception.

Fifth, institutional reform is necessary to address consistency and legitimacy. UNCITRAL Working Group III's ongoing work on a permanent tribunal, appellate mechanism, procedural rules, damages, and an advisory centre reflects recognition that substantive treaty reform alone cannot resolve all concerns. A more coherent system should also support developing states that face complex investment claims but lack equivalent litigation resources.

Finally, future disputes will increasingly involve regulatory measures adopted to manage systemic risks rather than isolated misconduct: pandemics, climate change, digital harms, biodiversity loss, and energy transition. The jurisprudence developed in tobacco cases therefore has significance far beyond tobacco. The underlying question—how to protect investment without disabling preventive regulation—will remain central to international economic law.

Conclusion

Australia's tobacco plain packaging disputes should not be reduced to the proposition that public health defeats intellectual property or investment protection. Their deeper importance lies in demonstrating how different legal regimes preserve regulatory autonomy through distinct doctrinal mechanisms.

The High Court of Australia held that severe restrictions on trademark use did not amount to an acquisition of property because no proprietary benefit accrued to the Commonwealth or another party in the constitutional sense. The WTO litigation confirmed that TRIPS Article 20 does not prohibit every encumbrance on trademark use and that the justification of a measure must be assessed in light of legitimate regulatory objectives and evidence. The investment arbitration, properly understood, did not decide the merits of expropriation or FET; it rejected jurisdiction because Philip Morris's restructuring was undertaken when the dispute was foreseeable and therefore constituted an abuse of rights.

Comparative investment jurisprudence, particularly Philip Morris v Uruguay, Methanex, Saluka, and Chemtura, supplies the substantive counterpart. These cases support a significant regulatory space for bona fide, non-discriminatory public-interest measures while leaving room to challenge confiscatory, arbitrary, or bad-faith state conduct. The most defensible synthesis is a doctrine of bounded economic rights: private economic interests are legally protected, but their exercise takes place within an evolving regulatory order.

For international trade and investment law, the normative challenge is not to choose between sovereignty and economic protection. It is to design legal standards and institutions capable of distinguishing legitimate governance from treaty breach. The Australian plain packaging litigation remains a leading example of that boundary-drawing exercise. Its enduring contribution is to show that international economic law can protect trademarks and investments without converting those protections into a veto over evidence-based public-health regulation.

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