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Intellectual Property Rights Disputes and Public Health Policy: An Analysis of the Philip Morris v. Australia Case Based on International Law

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Abstract

This article examines the trademark and investment dispute between the multinational tobacco company Philip Morris and the Australian Government, triggered by the enactment of the Tobacco Plain Packaging Act 2011. This policy requires all tobacco products to be sold in plain packaging without logos, colours or promotional branding elements, with the aim of reducing cigarette consumption. Philip Morris responded to this policy through two main avenues of litigation: a challenge to the law's validity in the High Court of Australia under the Australian Constitution, and an international arbitration claim (Investor-State Dispute Settlement/ISDS) under the Bilateral Investment Treaty (BIT) between Australia and Hong Kong, as well as a dispute before the World Trade Organisation (WTO) under the TRIPS Agreement. Through a normative legal approach, this article analyses the conflict between the protection of Intellectual Property Rights (IPR) under trade law and a state's sovereign right to protect public health. The results of the analysis show that both national courts and international tribunals have sided with state jurisdiction to regulate public health, establishing an important precedent that plain packaging regulations do not constitute an expropriation of property in breach of international or national trade law, and underscoring the limits of trade mark protection under international law.

KEYWORDS: Investment Arbitration, International Trade Law, Philip Morris, Plain Packaging Policy, TRIPS

Introduction

The conflict between a corporation's private intellectual property rights and a state's obligation to protect public health interests has become a central topic of discourse in modern international trade law.[1] The dispute between Philip Morris and the Australian Government is one of the most significant legal precedents of the past decade, testing the limits of state sovereignty in the face of investment and trademark protection under the global trade regime.[2]

In 2011, Australia became the first country in the world to implement plain packaging regulations for tobacco products by enacting the Tobacco Plain Packaging Act 2011 (TPPA). This policy was a follow-up to Australia's commitment to the World Health Organisation's Framework Convention on Tobacco Control (WHO FCTC). The TPPA prohibits the use of logos, brand colours, promotional images and distinctive typographic designs on cigarette packaging. Instead, packaging is required to use a standard colour (dull olive brown) with graphic health warnings covering the majority of the cigarette packet's surface.[3]

The implementation of this regulation triggered a massive legal backlash from the global tobacco industry, spearheaded by Philip Morris.[4] The company argued that the ban on the use of trademarks effectively destroyed the value of their intellectual property and undermined the distinctiveness of trademarks protected by Australian domestic trade law and international agreements.[5] Lawsuits were filed across various forums, testing the resilience of domestic regulations against international trade law instruments such as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Bilateral Investment Treaties (BITs).[6]

This article aims to analyse the legal framework governing these disputes through two main lenses: Australian national trade law (specifically, the Trade

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1. Rozatul Fadilla Azza, Chairul Fahmi and Riza Afrian Mustaqim, 'LEGAL PROTECTION FOR LOCAL PRODUCTS IN ASEAN MARKET LIBERALISM: A Legal Analysis and Fiqh Muamalah Perspective' (2026) 7 Al-Mudharabah: Jurnal Ekonomi dan Keuangan Syariah 128 <https://doi.org/10.22373/AL-MUDHARABAH.V7I1.9675> accessed 17 April 2026.
2. Holger Schiele and others, 'Managing Supplier Satisfaction: Social Capital and Resource Dependence Frameworks' (2015) 23 Australasian Marketing Journal 132 <https://doi.org/10.1016/J.AUSMJ.2015.04.008>.
3. Ignacio García Bercero, Petros C. Mavroidis and André Sapir, 'How the European Union Should Respond to Trump's Tariffs' [2024] Bruegel.
4. Lorien C Abroms and others, 'Industry Marketing of Tobacco Products on Social Media: Case Study of Philip Morris International's IQOS' (2024) 33 Tobacco Control <https://doi.org/10.1136/tc-2022-057833>.
5. Vivian Daniele Rocha Gabriel and Alebe Linhares Mesquita, 'Repackaging Intellectual Property Protection in International Investment Law: Lessons from the Philip Morris V. Uruguay Case' (2019) 49 Georgetown Journal of International Law.
6. John Mehegan and others, 'Analysis of Philip Morris International's "Aspirational" Target for Its 2025 Cigarette Shipments' (2025) 34 Tobacco Control <https://doi.org/10.1136/tc-2023-058511>.

Marks Act 1995 and the Australian Constitution) and international trade law (focusing on the TRIPS Agreement and ISDS mechanisms).

Trade marks serve as a distinguishing identity between one product and another in the course of trade. At the international level, Article 15 of the TRIPS Agreement defines a trademark as any sign capable of distinguishing the goods or services of one undertaking from those of another. This protection grants the owner the exclusive right to prevent third parties from using identical or similar signs that are likely to cause confusion.[7] However, the TRIPS Agreement also recognises the right of member states to establish limited exceptions to trademark rights, provided that such exceptions take into account the legitimate interests of both the trademark owner and third parties (Article 17).[8]

The principle of state sovereignty in public international law authorises governments to enact legislation in the public interest, known as 'police powers'. In the context of international trade law, the 2001 Doha Declaration on the TRIPS Agreement and Public Health explicitly states that TRIPS must not prevent members from taking measures to protect public health.[9]

ISDS is a mechanism within international investment law that allows foreign investors to sue the host state before an international arbitration tribunal, bypassing the host state's domestic courts. Claims are typically based on breaches of provisions in a BIT, such as expropriation without fair compensation, or breaches of the standard of fair and equitable treatment.[10]

This study employs a qualitative approach using normative legal methodology (doctrinal legal research). Analysis was conducted on primary legal instruments comprising legislation (the TPPA 2011, the Trade Marks Act 1995, the Australian Constitution), international treaties (the TRIPS Agreement, the Australia–Hong Kong BIT), as well as court rulings and arbitral tribunal awards relating to the Philip Morris v. Australia (the Australian High Court judgment and the Permanent Court of Arbitration award). The case approach and the statutory approach were applied to comprehensively examine the ratio decidendi of the judges' and arbitrators' reasoning.

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7 Zachary Cahn and Lindsay Eckhaus, 'Explaining the Discontinuation of a Non-Tobacco Nicotine Project at Philip Morris: Obstacles to Innovation' (2018) 39 Journal of Public Health Policy <https://doi.org/10.1057/s41271-018-0124-1>.

8 T Ramesh and others, 'International Frameworks on Traditional Knowledge: Role of WIPO, TRIPS, and CBD' (2025) 7 International Journal For Multidisciplinary Research <https://doi.org/10.36948/ijfmr.2025.v07i05.58380>.

9 Vikas H Gandhi, 'Intellectual Property Disputes and Resolutions' (2021) 26 Journal of Intellectual Property Rights <https://doi.org/10.56042/jipr.v26i1.39447>.

10 Clayton Velicer and Stanton A Glantz, 'Hiding in the Shadows: Philip Morris and the Use of Third Parties to Oppose Ingredient Disclosure Regulations' (2015) 10 PLoS ONE <https://doi.org/10.1371/journal.pone.0142032>.

Analysis Based on Australian Commercial and Constitutional Law

The first legal battle was launched within Australia. JT International SA and Philip Morris Asia Limited challenged the validity of the Tobacco Plain Packaging Act 2011 before the High Court of Australia.[11] This action centred on Section 51(xxxi) of the Australian Constitution, which requires that any acquisition of property by the Commonwealth must be on 'just terms', meaning it must be accompanied by adequate financial compensation.[12]

Philip Morris argues that the prohibition on the use of intellectual property rights (trademarks, copyright in packaging designs, and design patents) under the TPPA constitutes a form of state expropriation without financial compensation. They contend that the commercial value of their trademarks has been taken away through regulatory action (regulatory taking).[13]

However, in August 2012, the High Court of Australia, by a 6–1 majority, dismissed the claim. The majority's ratio decidendi stated that whilst intellectual property rights constitute a form of 'property', the implementation of the TPPA did not satisfy the element of 'acquisition' as referred to in the Constitution. The Court distinguished between 'depriving' a person of the right to use their property (deprivation) and 'acquiring' or taking over that property in the public interest.[14]

Under Australian trade law, trade mark rights are negative rights—that is, the right to exclude others from using the same sign, rather than an absolute or positive right to use that sign under any circumstances. The State (the Commonwealth of Australia) does not derive any material benefit from, nor does it take over, the Philip Morris trade mark for its own use or for transfer to a third party. The State merely imposes restrictions or deprivations on the use of the trade mark to protect public health. As there is no 'takeover' of benefits by the State, the requirement for 'just terms' under Section 51(xxxi) does not apply.

[11] Gideon St Helen and others, 'IQOS: Examination of Philip Morris International's Claim of Reduced Exposure' (2018) 27 Tobacco Control <https://doi.org/10.1136/tobaccocontrol-2018-054321>.

[12] Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay' (2019) <https://doi.org/10.1017/S2044251318000139>.

[13] Adam Whitlatch and Suzaynn Schick, 'Thirdhand Smoke at Philip Morris' (2019) 21 Nicotine and Tobacco Research <https://doi.org/10.1093/ntr/nty153>.

[14] Maribeth S Metzler, 'Responding to the Legitimacy Problems of Big Tobacco: An Analysis of the "People of Philip Morris" Image Advertising Campaign' (2001) 49 Communication Quarterly <https://doi.org/10.1080/01463370109385636>.

Review under International Trade Law (the WTO TRIPS Agreement)

The failure in the domestic courts prompted the tobacco industry to bring this dispute into the realm of international trade law. Although corporations cannot bring direct claims before the World Trade Organisation (WTO), countries such as Honduras, the Dominican Republic, Cuba and Indonesia have initiated WTO dispute settlement proceedings against Australia, with support from the tobacco industry.[15]

The central argument focused on Article 20 of the TRIPS Agreement, which stipulates that the use of a trade mark must not be impeded by restrictions or 'unjustifiable encumbrances', such as the use of other marks or design restrictions. The complainants argued that plain packaging undermines the international legal framework for trade marks by removing a product's ability to distinguish itself in the market.[16]

The WTO panel ultimately delivered a landmark ruling in June 2018 (and upheld by the Appellate Body in 2020) in favour of Australia. The Panel interpreted the term "unjustifiable" in Article 20 of the TRIPS Agreement by taking into account the policy objectives of Member States. Given the international obligations under the WHO FCTC and strong scientific evidence that attractive packaging increases smoking initiation, restrictions on the use of trade marks for tobacco were deemed to be "justifiable encumbrances". The Panel reaffirmed that the TRIPS Agreement does not require affirmative protection of the right to use a trade mark, but rather the right to prevent others from using it. These rights are subject to exceptions in the public interest.[17]

International Arbitration Disputes (ISDS Mechanism via BITs)

Philip Morris's most aggressive legal escalation was pursued through the Investor-State Dispute Settlement (ISDS) mechanism. In November 2011, Hong Kong-based Philip Morris Asia Limited (PMAL) filed a notice of arbitration against Australia at the Permanent Court of Arbitration (PCA),

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[15] Hans Morten Haugen, 'A New Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge' (2025) 19 Etikk i Praksis <https://doi.org/10.5324/eip.v19i1.5917>.

[16] Wafa Ibra Syahra, Chairul Fahmi and Shabarullah Shabarullah, 'Legal Review of Dumping Practices in Indonesia: A Comparative Study of International Economic Law and Sharia Economic Law' (2026) 6 Priviet Social Sciences Journal 142 <https://doi.org/10.55942/PSSJ.V6I1.1464> accessed 17 April 2026.

[17] Chairul Fahmi and Peter Tobias Stoll, 'Measuring WTO Approaches in Resolving Palm Oil and Biofuel Trade Disputes from Indonesia' (2024) 12 BESTUUR 172 <https://doi.org/10.20961/BESTUUR.V12I2.94203> accessed 7 May 2025.

invoking the 1993 Bilateral Investment Treaty (BIT) between Australia and Hong Kong.[18]

PMAL claimed that the plain packaging policy constituted a form of indirect expropriation of its investment in Australia (namely its subsidiary, Philip Morris Limited, together with its intellectual property), and breached Australia's obligation to provide 'fair and equitable treatment'.[19]

The arbitral tribunal was faced with a crucial jurisdictional question. The Australian Government raised a preliminary objection that the tribunal lacked jurisdiction to hear the substance of the case because PMAL had engaged in treaty shopping and an abuse of rights. The facts of the proceedings revealed that the Philip Morris group of companies undertook an internal restructuring ten months after the Australian Government announced its intention to implement plain packaging. This restructuring transferred ownership of Philip Morris Australia's shares to PMAL in Hong Kong solely to obtain protection under the Australia–Hong Kong BIT, as the United States (Philip Morris's country of origin) did not, at that time, have an agreement with Australia that accommodated the ISDS mechanism.[20]

In December 2015, the PCA Tribunal issued a unanimous ruling dismissing Philip Morris's claim in its entirety on jurisdictional grounds. The Tribunal ruled that the initiation of this arbitration constituted an 'abuse of rights'—a misuse of legal process recognised under public international law. Corporate restructuring carried out when a dispute is foreseeable, with the specific aim of gaining access to an international investment tribunal, is unacceptable and negates the tribunal's jurisdiction over the subject matter of the dispute.[21]

This ruling has far-reaching implications for international investment law. It effectively sets limits on the practice of multinational corporations that engineer their business structures to intimidate sovereign states through costly arbitration proceedings (a form of regulatory chill). Essentially, the tribunal reaffirms the state's sovereignty to take domestic regulatory action (particularly in the public interest, such as public health) without the threat of its authority being usurped by corporate legal manoeuvres.[22]

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18 Christopher Berry and others, 'A Longitudinal Assessment of Corrective Advertising Mandated in United States v. Philip Morris USA, Inc.' (2021) 171 Journal of Business Ethics <https://doi.org/10.1007/s10551-020-04456-x>.

19 Michael Givel, 'Philip Morris' FDA Gambit: Good for Public Health?' (2005) 26 Journal of Public Health Policy <https://doi.org/10.1057/palgrave.jphp.3200032>.

20 Alison Slade, 'Good Faith and the Trips Agreement: Putting Flesh on the Bones of the Trips "Objectives"' (2014) 63 International and Comparative Law Quarterly <https://doi.org/10.1017/S0020589314000098>.

21 Sri Wahyuni and others, 'THE ROLE OF COURTS IN RESOLVING CASES OF BANKRUPTCY OF ISLAMIC BANK CUSTOMERS' (2023) 7 JURISTA: Jurnal Hukum dan Keadilan 1 <https://doi.org/10.1234/JURISTA.V7I1.42> accessed 18 July 2024.

22 Travis Tokar and Morgan Swink, 'Public Policy and Supply Chain Management: Using Shared Foundational Principles to Improve Formulation, Implementation, and

Conclusion

The comprehensive dispute between Philip Morris and Australia across various levels of jurisdiction has carved out a new jurisprudential foundation within the ‘ ’ discourse in national and international trade law. This case unequivocally demonstrates that the protection of intellectual property rights and foreign investment—despite being strictly safeguarded by the Trade Marks Act 1995, the Constitution, the TRIPS Agreement and bilateral investment treaties (BITs)—is not absolute and does not operate in a social vacuum.

Firstly, from the perspective of Australian commercial and constitutional law, the state has full authority to impose regulatory restrictions (regulatory deprivation) on the use of trade marks in order to address a public health crisis, without this being classified as an ‘acquisition of property’ requiring compensation. Trademark rights are reaffirmed as negative rights of exclusion, not positive rights that exempt corporations from state regulation.

Secondly, the WTO Panel’s confirmation of the plain packaging policy reinforces that drastic restrictions on the appearance of trade marks constitute a justifiable encumbrance under Article 20 of the TRIPS Agreement, provided such measures are supported by measurable public health justifications, such as the mandate of the WHO FCTC.

Thirdly, Philip Morris’s failure in the ISDS forum represents international law’s rejection of treaty shopping and the abuse of rights by transnational entities. The series of legal defeats suffered by this corporation not only validates the legal standing of plain packaging policies at the global level but also dispels fears of a ‘regulatory chill’, providing robust legal legitimacy for other sovereign states to implement measures to protect the public from the dangers of tobacco without being held hostage by the threat of intellectual property litigation and trade arbitration.

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