The tobacco industry frequently argues that tobacco control measures ‘expropriate’ its intellectual or other property. However, decided case law on expropriation indicates that:

- To show an expropriation, an investor must prove that it has been substantially deprived of the value, use or enjoyment of its investment. It cannot simply point to a loss of profits.

- States have a sovereign right to regulate in the public interest. Good faith, non-discriminatory
measures taken under this right are not expropriations.

Background: what is expropriation?

Under most investment treaties, states promise not to ‘expropriate’ private property without due process and compensation.

Expropriation can take two forms:

- *Direct expropriations* involve the transfer of title.
- *Indirect expropriations* are measures that are 'tantamount to' direct expropriation, for example, those that result in the effective loss of an investor's enjoyment of or control over its property.

The relevant type of expropriation for WHO FCTC implementing measures is indirect expropriation.

According to the approach of the Tribunal in Philip Morris v Uruguay, two questions must be answered to determine whether a WHO FCTC measure is an indirect expropriation:

- Whether a measure ‘substantially deprives’ an investor of its investment
- Whether a measure is a valid exercise of a state’s sovereign right to regulate for public welfare purposes, including public health purposes.
Requirement for a substantial deprivation or interference in the value, use or enjoyment of an investment

The Tribunal in *Philip Morris v. Uruguay* found that for a regulatory measure to be an expropriation, a ‘“substantial deprivation” of the value, use or enjoyment’ of an investment must take place. If ‘sufficient value’ remains in an investment after a measure, no expropriation has taken place. A partial loss of profits does not constitute an expropriation. The Tribunal found that neither Uruguay’s 80% graphic health warnings nor its requirement to only market one variant of each brand of cigarettes met this threshold of a ‘substantial deprivation’.

Other tribunals have held that a measure must 'substantially interfere' with an investment for an expropriation to have occurred, such as by causing the investor to effectively lose control of the investment or its management, or by extinguishing the value of the investment. However, some tribunals have taken the alternative view that partial or temporary deprivation may amount to expropriation. Tribunals also consider the duration of the interference with the investment.

In relation to tax measures, some tribunals have stated that as ‘an essential prerogative of State sovereignty’, tax measures are not generally expropriations; and that non-discriminatory tax measures only substantially deprive investors of an investment if they are confiscatory, i.e. they must ‘virtually extinguish’ the investment as a whole, not merely result in the loss of profits.

Determining what the relevant investment is

To determine whether an investment has been substantially deprived of its value, use, or enjoyment, we must first look at what the investment is. It is much easier, for example, for an investor to prove that it has been substantially deprived of a single item of property than to prove that it was deprived...
of its entire business. How to decide what the investment is will depend on the facts of each individual case.

In *Philip Morris v. Uruguay*, Philip Morris argued that Uruguay's law limiting cigarette manufacturers to only one variant of each cigarette brand substantially deprived Philip Morris of each of its other brand variants. However, the Tribunal rejected this characterisation. It considered that since Uruguay’s measures applied to an investor’s business generally and did not specifically target an individual brand variant, the relevant investment was Philip Morris’ whole business, not an individual trademark or brand variant. Uruguay’s measure had to substantially deprive Philip Morris of its Uruguayan business as a whole, which Philip Morris could not show.

### States have a sovereign right to regulate in the public interest

A number of tribunals have held that good faith, non-discriminatory legislation/regulation or other government action implemented for public policy reasons will not amount to an expropriation. This is sometimes referred to as the ‘police powers’ doctrine, a customary international law concept recognising a state’s sovereign right to regulate in the public interest. Note that the term ‘police powers’ in this context does not refer to action by the police force, but to a state’s legislative or regulatory activity, including its regulatory powers to tax.

Some investment treaties explicitly state that measures taken within the sovereign right to regulate are not expropriations. However, many tribunals have recognised that the sovereign right to regulate is part of the test for expropriation even if it is not specifically mentioned in the relevant treaty text. This is because the concept of ‘expropriation’ in a treaty must be interpreted in light of any relevant rules of customary international law, including the customary international law doctrine of police powers.[tooltip hint="Philip Morris v. Uruguay, paras 290-305"][*][/tooltip]

### The customary international law doctrine of police powers

Customary international law is law that is derived from the practice of states, rather than from explicit agreements such as treaties. It has two main components: state practice, where two or more states consistently behave in a certain way; and *opinio juris*, the belief on the part of the relevant states that
they are behaving that way in order to comply with a legal rule.[*][*]

Modern international investment treaties supplement customary international law on state responsibility for the treatment of aliens. The customary international law on state responsibility for the treatment of aliens similarly contains protections against expropriation and fair and equitable treatment obligations, and is enforced via state-to-state dispute settlement mechanisms such as the International Court of Justice. The concept of expropriation under customary international law is defined in a way that does not include state action taken in the public interest (‘police powers’), including for public health. In general, customary international law obligations are narrower (and therefore more favourable to host states) than treaty obligations. Treaties, including investment treaties, must be interpreted in line with relevant rules of customary international law under article 31.3.c of the Vienna Convention on the Law of Treaties.

Demonstrating that a measure is part of the sovereign right to regulate

In assessing whether a measure is an exercise of the right to regulate, tribunals will examine whether the state is pursuing a legitimate public policy objective (such as public health), whether the measure is non-discriminatory, and the connection between the measure and the fulfilment of its objective.

In Philip Morris v Uruguay, the Tribunal found that both Uruguay’s graphic health warnings law and its single presentation requirement (a requirement that each brand family of cigarettes, e.g. Marlboro, contain only a single brand variant, e.g. Marlboro Red, so as to prevent comparative pack design within the brand family from suggesting that certain variants are ‘healthier’ than others) were valid exercises of Uruguay’s sovereign right to regulate. It found that the measures were good faith, non-discriminatory, and proportionate, and in particular that they:

- Had been adopted in fulfilment of Uruguay’s national and international legal obligations for the protection of public health, including the WHO FCTC, which provided an evidentiary basis for Uruguay’s measures.
- Were directed to decreasing the incidence of smoking and were capable of contributing to its achievement, in a context where smoking had declined overall during the time the measures were in place. There was no need for Uruguay to demonstrate the individual impact of either of its measures, given the complexities of doing so.

Other tribunals have taken a similar approach, with slight variations in the approach to determining whether a measure is proportionate. Some have taken an approach broadly similar to the Philip Morris
v Uruguay Tribunal, in that where there is a rational connection between a measure and a public policy objective, the measure will not constitute an expropriation [tooltip hint="Eg Saluka v Czech Republic paras 254-265, 275-276"][*][/tooltip]. Other tribunals have examined the reasonableness of the measure in light of its objective [tooltip hint="Feldman v Mexico paras 103-105; Gemplus v Mexico paras 4.114, 4.118-4.120, 4.146-4.161"][*][/tooltip] or have weighed the importance of achieving the objective against the degree of interference with the investment [tooltip hint="Tecmed v Mexico para 122; LG&E v Argentina para 195; Total v Argentina para 197."][*][/tooltip]. For example:

- In Chemtura v Canada, the tribunal held that a ban on the use of a toxic pesticide was not expropriatory because the measure was adopted for important public health and environmental reasons and was aligned with the practice of other states.
- In Methanex v US, the tribunal held that a ban on a gasoline additive for health and environmental reasons would not constitute an expropriation unless specific commitments had been given by the government to the prospective investor contemplating investment that the government would refrain from enacting such a measure.
- In Feldman v Mexico, the tribunal held that whether an expropriation had occurred would depend on the reasonableness of the measure, and remarked that if all regulatory changes affecting foreign investors were held to be expropriatory, governments would be prevented from regulating in the public interest.
- In Tecmed v Mexico, the tribunal undertook a proportionality test to determine whether an expropriation had occurred. It held that the impact of the state's actions in denying an operating permit for a toxic waste facility on the investor was so serious as to outweigh the government's objective of responding to community pressure in relation to the proximity of the facility to the urban environment.

In sum, non-discriminatory, good faith measures implementing the WHO FCTC should not be found to be an expropriation.

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20 default 4. Relevant case law line References

- Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, 19 Feb 2010
- Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016
- Philip Morris v. Australia, PCA Case no 2012-12, Notice of Arbitration, 21 November 2011
- Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, 3 Aug 2000.
- Unglaube v. Costa Rica, ICSID Case No. ARB/08/1, Award, 16 May 2012
- Pope and Talbot v. Canada, Interim Award, 26 June 2000
- Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002
- Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award, 28 September
2007

- **Tokios Tokeles v. Ukraine**, ICSID Case No. ARB/02/18, *Award*, 26 July 2007
- **LG&E v. Argentina**, Case No. ARB/02/1, *Decision on Liability*, 3 October 2006
- **Gemplus SA v. Mexico**, ICSID Case No. ARB(AF)/04/3, *Award*, 16 June 2010
- **SD Myers v. Canada**, *Partial Award*, 13 November 2000
- **Técnicas Medioambientales Tecmed, S.A.,** ICSID Case No. ARB (AF)/00/2, *Award*, 29 May 2003
- **Archer Daniels Midland v. Mexico**, ICSID Case No. Arb(AF)/04/05, *Award*, 21 November 2007
- **Saluka Investments BV v. Czech Republic**, *Partial Award*, 17 Mar 2006
- **Total SA v. Argentina**, ICSID Case No. ARB/04/1, *Decision on Liability*, 27 December 2010
- **Chemtura Corporation v. Canada**, *Award*, 2 August 2010
- **Methanex Corporation v. United States**, *Final Award of the Tribunal on Jurisdiction and Merits*, 3 August 2005