WARNING: INVESTMENT AGREEMENTS ARE DANGEROUS TO YOUR HEALTH

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ABSTRACT

Governments are currently enacting a broad menu of tobacco control measures. It is important for them to be aware of how these measures may draw legal challenges by tobacco industry investors through international investment agreements. This Article outlines the grounds upon which the tobacco industry could base a claim against host states attempting to fulfill various obligations under the World Health Organization Framework on Tobacco Control (WHO FCTC), and provides a general analysis of the relief that the public health objectives, principles, and standards outlined under the WHO FCTC can afford.

This Article notes that although most of the tobacco industry arguments are weak, the threat of a tobacco industry-initiated claim remains high. Consequently, states would be wise to begin exploring options to minimize uncertainty regarding the scope of their regulatory discretion and to take action before claims are sought. This Article proposes some options to remove the tobacco industry from the protection system of international investment agreements, with specific recommendations for the WHO FCTC parties to take collective action, as well as for the host states to consider the renegotiation of bilateral investment treaties.

I. INTRODUCTION

In the 1990s, the international community coalesced around a global solution to the tobacco epidemic.1 After six sessions of arduous negotiations on strategies to counter the ability of the tobacco industry to “influence national policies and use every international and domestic legal means to oppose strong control measures and thwart attempts to regulate its commercial practices,”2 the World Health Organization (WHO) Framework Convention

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on Tobacco Control (FCTC) was adopted by the World Health Assembly, and by 2005, it entered into force.³

The FCTC outlined the regulation of all significant aspects of tobacco trade, such as taxes,⁴ illicit trade,⁵ advertising,⁶ product regulation,⁷ and packaging,⁸ in order to assist states, particularly developing ones, to develop strong tobacco control measures.⁹ It also empowered health ministers to adopt more effective tobacco control measures and to defend them from other ministries, such as those in trade, finance, and agriculture, which had previously protected tobacco industry interests.¹⁰

Many of the 172 parties to the FCTC have succeeded in utilizing this instrument to promote comprehensive tobacco control policies. Some countries have lead by example in their respective regions. For example, Uruguay has taken the lead in the Latin American region in implementing tobacco control measures. Some of these FCTC measures include: banning smoking in all enclosed public places, requiring graphic health warning labels on cigarette packages, banning misleading terms and descriptors, and banning tobacco advertising.¹¹

Challenging these efforts to ban misleading descriptions and to require graphic health warnings, Philip Morris International (PMI), through its subsidiaries, filed an investment claim in early

³. See World Health Org., History of the WHO Framework Convention on Tobacco Control 10–26 (2009), available at whqlibdoc.who.int/publications/2009/9789241563925_eng.pdf. The World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) was adopted by the 56th World Health Assembly in 2003. Id. at 18. By the time the FCTC closed for signature in 2004, it was considered one of the most widely embraced treaties in the history of the United Nations. Id. at 26. The FCTC came into force on February 27, 2005, ninety days after the fortieth instrument of ratification or accession was deposited. Id.


⁵. Id. art. 15.

⁶. Id. art. 13.

⁷. Id. art. 10.

⁸. Id. art. 11.

⁹. Control measures include demand reduction measures (raising taxes on tobacco products, banning duty free sales, regulating packaging and labeling of tobacco products, and banning advertising and promotion), see id. arts. 6–14, supply reduction measures (combating illicit trade, prohibition on sales to minors, and promoting economically viable alternative livelihoods to tobacco), see id. arts. 15–17, and increased liability for the tobacco industry to encourage international cooperation on civil and criminal actions to hold the tobacco industry accountable, see id. art. 19.

¹⁰. See Burci, supra note 2, at 255–56.

¹¹. Eduardo Bianco et al., Implementing FCTC in Uruguay, 13th World Conf. on Tobacco and Health (July 14, 2006), http://2006.confex.com/uicc/wctoh/tech-program/P1982.HTM.
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2010\textsuperscript{12} against Uruguay, a country with a gross domestic product (GDP) that is less than half the transnational tobacco company’s total market capitalization.\textsuperscript{13} The case filed by PMI’s subsidiaries, FTR Holding, Phillip Morris Products S.A., and Abel Hermanos S.A. (collectively referred to as PMI),\textsuperscript{14} was the first in which a transnational tobacco company brought claims as a “foreign investor” under an international investment agreement (IIA).\textsuperscript{15} PMI alleged that Uruguay’s tobacco control measures constituted indirect expropriation of its intellectual property, which required just and adequate compensation.\textsuperscript{16} Observers posit that this is part of a larger strategy to bring “regulatory chill”\textsuperscript{17} to tobacco control measures.\textsuperscript{18} Others fear that a win in favor of the tobacco industry in this case could lead to a slippery slope that would question the credibility and legitimacy of the investor-state dispute system.\textsuperscript{19}


\textsuperscript{14} The plaintiffs in this case are all subsidiaries of PMI. \textit{Uruguay Investment Treaty Claim}, supra note 12.


\textsuperscript{16} \textit{Uruguay Investment Treaty Claim}, supra note 12.


In November 2010, while the WHO FCTC Conference of the Parties (COP) in its Fourth Session (COP4) was meeting in Uruguay, the Uruguay delegation sought a means to reconcile trade and tobacco issues in light of the dispute, and called on the COP to support a declaration clarifying trade and health concerns. In response, the COP4 adopted the Punta del Este Declaration, which reiterated oft-repeated trade and public health rhetoric that is found in the Doha Declaration on the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Public Health. The Punta del Este Declaration announced that parties have a right to define policies in compliance with FCTC and that measures must be consistent with the TRIPS Agreement. It urged the United Nations Ad Hoc Interagency Task Force on Tobacco Control to support “coordination for the strengthening of implementation of the WHO FCTC within the whole United Nations system,” and emphasized the need for countries not party to the FCTC to ratify it.

The relationship between investment agreements and tobacco, which instigated the call for the declaration, was left out. The danger posed by bestowing the substantive and procedural benefits of being defined as an investor under investment treaties upon the tobacco industry was not mentioned. The declaration reflected concerns regarding non-FCTC parties but failed to provide guidance on how their behavior may be influenced. The delegates, comprised mostly of representatives of health ministries from different countries, may not have appreciated the threat that tobacco industry initiated investor-state disputes pose. Alternatively, it could also reflect the failure to understand the means by which the tobacco industry may be prevented from challenging states’ tobacco control efforts through the international investment regime.


22. Id. ¶¶ 6, 8.
This Article describes the extent of the problem posed by allowing tobacco companies to be protected as “foreign investors,” and proposes some legally viable options to prevent tobacco companies from being protected as such, at the expense of public health measures. Part II briefly describes the IIA regime. Part III discusses the inherent conflict between implementing the FCTC and protecting the tobacco industry as investors, and expounds on how the evidence-based tobacco control measures outlined in the WHO FCTC and its guidelines conflict with the core provisions of IIAs. Part IV provides some recommendations to avoid tensions between the goal of protecting investments for economic development and the public health objective of addressing the tobacco epidemic.

II. Background

A. International Investment Agreements

Foreign direct investment is widely regarded as a building block for developing a host state’s economy. The international legal system is intended to address the foreign investors’ need for a stable and predictable legal framework with respect to its investments in the host state. Specifically, standards of protection and an avenue to air disputes in independent arbitration tribunals are viewed as addressing the inevitable presence of political risk stemming from engaging with a sovereign actor.

Governing a significant part of the world’s system of capital flows is an extensive network of IIAs consisting mostly of over three thousand bilateral investment treaties (BITs). Some international investment treaties are part of broader free trade agreements, such


24. R. Doak Bishop et al., Foreign Investment Disputes: Cases, Materials and Commentaries 7–8 (2005) (“Foreign investment is not a panacea for all that ails such societies, but in the absence of sufficient public funds, it can provide a way to jump start some economies, a short cut to higher wages, an improved infrastructure, and better schools and hospitals. Psychologically, it can provide economic role models, generate financial incentives and create hope. In short, it can be a motivational force. At a minimum, it can build, maintain and operate important parts of a country’s infrastructure or introduce complex technology to a country lacking it. Because of these substantial benefits, the international community today strongly encourages foreign investment.”); see also Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 12 (1995).

as investment chapters within free trade agreements like the North American Free Trade Agreement (NAFTA). These IIAs set out standard principles to protect foreign investment, imposing obligations on states with respect to their treatment of investments and investors.26

Virtually all IIAs provide a core set of uniform features aimed at protecting the investment and the investor by providing investors with: fair and equitable treatment (FET) or a minimum standard of treatment; national treatment (NT); most favored nation treatment (MFN); and just, adequate, and full compensation in cases of expropriation.27 These obligations are set out to protect both investors and investments, terms that are often broadly defined.28

One distinct feature that is found in most IIAs, particularly BITs, is the investor-state dispute settlement mechanism, where states waive their immunity from suit and allow investors access to a forum where disputes against host states may be removed from the political realm and resolved through arbitration.29 The principal international forum for investor-state dispute is the International Centre for the Settlement of Investment Disputes (ICSID Centre),30 established by the ICSID Convention, under the auspices of the World Bank, which specializes in disputes between investors and states.31 Other forums include the International Chamber of Commerce (ICC), the ICSID Additional Facility (for non-parties to

27. BISHOP ET AL., supra note 24, at 10.
29. See CAMPBELL M CLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 214 (2007); see also DOLZER & STEVENS, supra note 24, at 129; SCHREUER & DOLZER, supra note 26, at 9–10 (discussing the impact of foreign investment treaties on state sovereignty).
30. In 1965, the World Bank established ICSID as an autonomous, intergovernmental organization under the ICSID Convention for the purpose of providing facilities for the arbitration of international disputes between the contracting states and private persons, natural or juridical. See About ICSID, INT’L CENTRE FOR SETTLEMENT OF INV. DISPS., http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited Mar. 8, 2012). This facility has gained wide preference due to the assurance of enforceability, particularly against the state. See Piero Bernardini, Investment Arbitration Under the ICSID Convention and BITs, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 89, 90–91 (Gerald Aksen et al. eds., 2005).
31. BISHOP ET AL., supra note 24, at 5.
the ICSID Convention consenting to ICSID arbitration), and other forums utilizing the U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules to govern the establishment of ad-hoc tribunals.

Enforcement is another strong feature of IIAs. Sanctions for violation of IIAs/BITs consist mainly of pecuniary awards, including damages and costs of suit. Failure of a state to recognize such awards is accompanied by the reputational effect of being viewed as a state that is not “investment-friendly,” affecting its ability to attract future investments. Over 140 parties to the ICSID Convention have also committed to honor the international arbitral awards by the ICSID tribunal and to enforce them as if they were a final and executory decision of their own courts. In addition, over 140 parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) have similarly agreed to recognize arbitral awards in international commercial arbitration.

B. Scope

The scope of the application of an investment agreement depends principally on how the terms “investor” and “investment” are defined.

1. Investment

Investment is often defined in IIAs in broad terms, referring to all types of assets and rights, followed by a non-exhaustive list of goods and assets which are considered investments. Increasingly, BITs specifically include “intellectual property” or “industrial prop-


34. Bishop et al., supra note 24, at 1254.

35. See About ICSID, supra note 30.


“property” as assets in the list.\textsuperscript{38} The 2004 U.S. model BIT reflects this trend, as do the Canadian, Swiss, and Norwegian model BITs.\textsuperscript{39} Even in cases where the investment agreement is silent, tribunals may interpret a broadly defined “investment” to include industrial or intellectual property.\textsuperscript{40}

Consistent with the aim of promoting economic development in capital importing nations, ICSID tribunals attempt to emphasize the significance of “contribution of the investment to the development of the [host] state”\textsuperscript{41} in order to define an investment that allows access to ICSID arbitration system.\textsuperscript{42} Other tribunals have differing views regarding the need to comply with this requirement.\textsuperscript{43} Notably, although ICSID is considered the most popular forum for foreign investment disputes, not all such disputes are required to fall under the ICSID jurisdiction, and may be resolved under other international tribunals as chosen by the parties, thus, escaping this requirement.

2. Investor

The term “investor” includes natural and legal persons having the nationality of one of the state parties to the IIA, but foreign to the host state or the state party involved in a dispute.\textsuperscript{44} The determinations made by ICSID tribunals have economic and psychological incentive to broadly define foreign investment, as “in the absence of sufficient public funds, it can provide a way to jump start some economies, a short cut to higher wages, an improved infrastructure, and better schools and hospitals,” and “can provide economic role models, generate financial incentives and create hope”.


\textsuperscript{39} See Yannaca-Small, supra note 28, at 79–80, 82, 94, 98.

\textsuperscript{40} See generally Mahnaz Malik, Int’l Inst. for Sustainable Dev., 2nd Annual Forum of Developing Country Investment Negotiators, Nov. 3–4, 2008, Recent Developments in the Definition of Investments in International Investment Agreements, available at http://www.iisd.org/pdf/2008/dci_recent_dev.pdf; Bishop et al., supra note 24, at 7–8 (suggesting that tribunals have economic and psychological incentive to broadly define foreign investment, as “in the absence of sufficient public funds, it can provide a way to jump start some economies, a short cut to higher wages, an improved infrastructure, and better schools and hospitals,” and “can provide economic role models, generate financial incentives and create hope”).

\textsuperscript{41} Bishop et al., supra note 24, at 9 (describing the characteristics of an investment to include: a substantial commitment with expectation of profit, an undertaking of risk by the investor, and the contribution of the investment to the development of the economy).


\textsuperscript{43} Bishop et al., supra note 24, at 7–8 (concerning various cases, some of which rejected this requirement and do not require investments to contribute to the economic development).

\textsuperscript{44} ICSID Convention, supra note 42, art. 25(1) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the
mination of an investor’s “foreign” nationality is essential for the admissibility of a claim filed as a foreign investment dispute against a host state. For juridical persons, this can be determined by the place of incorporation or by “foreign control.” Determining “foreign control” is the bedrock of establishing nationality in juridical persons; it has wide-reaching implications, for instance, a local subsidiary may bring a claim against the host state if the parties to the treaty agreed that by virtue of the “foreign control,” the local entity should be considered that of another state.

“Foreign control” may be established based on factors such as control, ownership, voting rights, and management by foreign shareholders or foreign nationals. Various tribunals interpreting different treaties have allowed an investor’s foreign shareholder’s nationality to determine the investor’s nationality for purposes of conferring jurisdiction. At least one tribunal has ruled that foreign control can be established regardless of the low percentage of shares owned by the foreign shareholder, allowing minority foreign owned companies to be protected as investors in an IIA. As a consequence, tribunals have often been confronted with local companies that “disguise” themselves as a foreign national by manipulating their corporate structure to qualify themselves as “foreign investors” that have “real or effective” foreign nationality. 

dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” (emphasis added)).

45. See id.

46. Id. art. 25(2)(b) (“[A]ny juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State . . . .” (emphasis added)).


48. The tribunal sometimes declines to pierce the corporate veil in determining the nationality of the investor claimant, see, e.g., Tokios Tokelēs v. Ukr., ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 55 (Apr. 29, 2004), 11 ICSID Rep. 313 (2007), and in other cases the corporate veil was pierced, see, e.g., Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/05, Award, ¶ 147 (Dec. 19, 2008).


50. See Yannaca-Small, supra note 28, at 16–28 (citing Yaung Chi Oo Trading Pte, Ltd v. Gov’t of the Union of Myanmar, ASEAN Case No. ARB/01/1, Award (Mar. 31, 2003), reprinted in 42 I.L.M. 540 (2003)).
C. Substantive Obligations

1. Minimum Standard/Fair and Equitable Treatment (FET)

The minimum standard, or FET, is a broad term that can entail different state obligations depending on the circumstances and is the cornerstone of many IIAs. Based on various international tribunals’ interpretation, it can cover due process, transparency, abstaining from discriminatory or arbitrary treatment, and offering a stable and predictable legal framework.51 The distinction between FET and the minimum standard provided by customary international law has been the subject of much debate.52 Some have interpreted “fair and equitable treatment” as well as “full protection and security” to be the same treatment as that of the minimum standard of treatment of aliens found in customary international law.53 Most investors and capital-exporting countries would prefer a higher standard of FET that goes beyond what customary international law provides, however, and some tribunals have also taken this view.

The key to determining compliance with this standard is the “reasonable expectations of the investor.”54 To raise the FET as a ground for a claim, an investor would argue that a state imposing stringent regulatory measures has failed to respect the legitimate expectations of the investor.55

2. National Treatment/Most Favored Nation Treatment

NT and MFN are concepts that ensure the elimination of discrimination on the basis of the nationality of the investor.56 In
other words, foreign investors are to be treated no less favorably than national investors (NT), and must be afforded the same treatment as that given to investors from third states (MFN). A regulatory measure that is considered discriminatory is a violation of MFN or NT standards. MFN treatment further allows a foreign investor to enjoy more favorable treatment established in other investment treaties. Effectively, the MFN clause provides additional benefits to an investor covered by a BIT because it allows him to invoke the benefits granted to third party nationals covered by any other BIT. For example, some treaties require the expiration of a waiting period of around six to eighteen months, or the exhaustion of local remedies, before bringing a claim. Another example is a fork in the road clause, which prevents international arbitration of cases initiated through domestic proceedings.

Where treaty provisions extend MFN on “all matters” or generally to “treatment of investors/investment,” tribunal rulings reflect a predominant practice of allowing investors to extend the MFN clause, not only to substantive provisions, but also to favorable dispute settlement provisions, such as a shorter waiting period or exception to the exhaustion of local remedies requirement. Tribunals have allowed investors to import such procedural treaty benefits, and investors constantly base their claims on whichever treaty has the most favorable provisions.

The application of the MFN clause to procedural rules is a frequently debated topic. Decisions of tribunals have been inconsis-
tent, with the majority being of the opinion that MFN applies only to substantive obligations and should not apply to procedural or jurisdictional concerns. Procedural matters that effectively submit the state to the jurisdiction of the tribunal touch upon state consent to submit to that jurisdiction. Considering basic sovereignty principles, critics argue that such consent must be clearly and expressly given and not granted based on a tribunal’s ad hoc treaty interpretation.

3. Expropriation

IIAs provide investor protection by ensuring that any expropriation be based on public interest, be executed without discrimination, and include payment of full and adequate compensation. A broad definition of expropriation has evolved through the arbitral tribunals’ interpretation of various BITs. The term “taking” which is embodied in the term “expropriation” includes not only physical taking of property where there is loss of title or ownership, but any measure that interferes with administration, control, use, or value of property. This includes indirect expropriation in the form of government regulatory measures.

Indirect expropriation is one of the most controversial areas of investor-state arbitration because any regulatory measure that adversely affects investment may be viewed as a form of expropriation. Case studies based on the investment chapter of NAFTA show that a combination of broadly defined indirect expropriation

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64. See Maupin, supra note 63, at 159. None of these cases relied upon the most favored nation clause in order to avoid the basic bilateral investment treaty’s (BITs) procedural pre-requisites to arbitration. All were decided on other grounds. See cases cited supra note 63.


66. Bishop et al., supra note 24, at 10.


68. Id.
and access to international tribunals has increased the number of claims for damages against the state.69

Observers note that in recent times, arbitral tribunals have shifted away from merely looking at “sole effects” (i.e., finding expropriation based on the effect on the investor, or the adverse effect on the value of the investment and the extent to which a measure has interfered with reasonable expectations and the character of the governments actions) and have leaned toward giving deference to the state’s actions.70

4. Exceptions

Recent arbitral decisions have also indicated that the substantive provisions of IIAs/BITs must be interpreted in a manner that does not restrict a state’s “policy space.”71 Some current IIAs have already integrated investor responsibility requirements72 and adopted public policy exceptions. For example, current model BITs of the United States and Canada have provisions stating that good faith measures to protect public welfare should not be viewed as indirect expropriation.73

Due to the controversy over government regulatory measures which had been disputed as indirect expropriations under NAFTA, the 2004 U.S. model BIT has clarified that certain public welfare measures should not be deemed indirect expropriation: “Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”74 The Canadian model BIT similarly provides that measures to protect public health, safety, and the environment should not be considered indi-

71. Feldman v. United States of Mexico, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002), 7 ICSID Rep. 341 (2005) (providing that “governments must be free to act in the broader public interest” and may, through “reasonable governmental regulation,” adversely affect businesses); S.D. Myers, Inc. v. Gov’t of Can., NAFTA/UNCITRAL, Partial Award on the Merits, ¶¶ 261–63 (Nov. 13, 2000), 8 ICSID Rep. 18 (2005) (indicating that the fair and equitable standard should not be used by investors to place conceptual limitations on government decision-making).
72. See, e.g., INT’L INST. FOR SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT arts. 16–18 (2005).
73. U.S. Model BIT, supra note 37, Annex B, ¶ 4(b); Canada Model BIT, supra note 37, Annex B.13(1)(c).
rect expropriation except in rare circumstances. The new Norwegian draft model BIT also retains the right to regulate in the public interest. These provisions do not preclude, but could possibly mitigate, claims against regulatory expropriations.

5. Dispute Settlement Mechanism

Dispute settlement (DS) clauses exist to ensure states comply with their obligations. A majority of IIAs contain DS clauses that may include either recourse to domestic courts in the host state, friendly consultations, international courts, or tribunals such as the ICSID, its Additional Facility, the ICC, or other international tribunals. The primary facility for investor-state disputes is the ICSID, which provides rules for the selection of the members of the arbitral tribunal and the subsequent proceedings.

The DS mechanism is powerful because it places host states and investors on equal footing, does not allow for an appeals process, and can hold states liable for pecuniary damages based on commercial laws. Except for limited conditions outlined in the ICSID for annulment, there is no higher judicial body that can overturn decisions or evaluate the discretion exercised by the tribunals.

75. Canada Model BIT, supra note 37, Annex B.13(1)(c) (“Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.”).


78. Bishop et al., supra note 24, at 8.

79. These other international tribunals include different international arbitral bodies, claims commissions, and regional fora, such as the International Chamber of Commerce, the International Centre for Dispute Resolution of the American Arbitration Association, the London Court of International Arbitration, the Chamber of Commerce and Industry of Geneva, and the Stockholm Chamber of Commerce.


81. ICSID Convention, supra note 42, art. 52 (listing grounds for annulment, including that the tribunal was not properly constituted; that the tribunal manifestly exceeded its powers; that there was corruption on the part of a member of the tribunal; that there has been a serious departure from a fundamental rule of procedure; or that the award failed to state the reasons on which it was based).
6. General Criticisms of International Investment Agreements

The DS mechanism for investor-state disputes has been criticized, particularly for its perceived lack of coherence and transparency. Each arbitral tribunal is independent and no central permanent appeal body is accountable for the decisions of the tribunals. As such, tribunals have interpreted identical wording in different ways.82 Some tribunals take a narrow view that the IIAs’ purpose is primarily to protect investors and resolve ambiguities in treaty interpretations in favor of investors;83 others recognize the need to balance investor protection with the need to foster a host state’s development.84

Placing government regulatory measures under the scrutiny of tribunals has been compared to judicial review of commercial regulatory authority.85 Furthermore, as with all commercial arbitration, proceedings are generally private and confidential. Despite the fact that the proceeding may involve matters of public interest, the public does not have access to the proceedings or the documents.86 Publication of the decision would require the consent of both the state and the investor.87 Critics therefore view the evolving global state of law in the field of investor-state disputes, formed by the complex network of arbitral tribunals, as one that suffers from a


83. See, e.g., SGS Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) (“It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 81 (Aug. 3, 2004), 12 ICSID Rep. 174 (2007) (“The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty ‘to protect’ and ‘to promote’ investments. . . . It is to create favourable conditions for investments and to stimulate private initiative.”).


85. See Francisco Orrego Vicuña, Professor, University of Chile, Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society, Lecture at the Research Centre for International Law, Cambridge University (2008), available at www.arbitration-icca.org/media/0/12224293410150/regulatory_authority.pdf.


87. See, e.g., id. at 732 (citing the rules of ICSID arbitrations).
severe democratic deficit and lacks institutional accountability.  These observers believe this is creating a situation where the sovereign powers of a state are assessed only in view of investor protection, and evaluated without the requisite transparency, coherence, and accountability that characterize the democratic national and international systems.

Scholars observe that IIAs do not protect capital-importing countries that have failed to set out adequate considerations relating to public interests from the onset. Research has shown that the unequal bargaining power and technical knowledge between capital exporting countries and developing countries during negotiations of investment agreements such as bilateral investment treaties has lead to a situation where the less powerful state is exposed to more potential financial liabilities than to increased capital flows. Much literature has been written on the fact that many IIAs/BITs set out broad and indeterminate rights of investors, and may have significantly limited the state’s actions, especially in relation to domestic regulatory laws. Yet despite the regulatory race to the

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88. Ximena Fuentes, The Impact of International Foreign Investment Rules on Domestic Law, in GLOBAL JUSTICE AND SUSTAINABLE DEVELOPMENT 187, 204 (Duncan French ed., 2010) (“[I]n the context of investment law, the political element often appears as inherently opposed to the rules that intend to protect the expectations of the investors.”).

89. Id. at 206 (“States should make an effort to codify and progressively develop the substantive rules that will allow a balance of . . . the interests of States, as representing the political community and . . . the interests of foreign investors. Dispute settlement in the field of investment should not be equated to the system that prevails in commercial arbitration.”).


91. Fuentes, supra note 88, at 192-95.


bottom to attract foreign investors, many host states still find themselves facing lawsuits and damage claims.94

Furthermore, studies have shown that most developing countries that struggle with incoherent institutions cannot utilize foreign direct investments effectively. The lack of capacity for good economic governance leads to an exploitative relationship with foreign investors instead of one that promotes sustainable development.95 “The fallacy is that an increase in the amount of foreign investment translates directly into an increase in economic growth.”96

In addition to the failed attempt to create a multilateral investment agreement,97 there are ongoing attempts to introduce reforms to the ICSID in order to increase transparency and coherence, such as improving third party access to documents and rulings as well as an appeals mechanism.98

III. INTERNATIONAL INVESTMENT AGREEMENTS AND TOBACCO

A. Investment Agreements and the Tobacco Industry

Criticism against IIAs is magnified in the context of investor protection for the tobacco industry and the promotion of tobacco investments, because of the health and socio-economic harms caused by tobacco. Empirical evidence shows that trade openness and import penetration due to free trade policies have led to a significant increase in tobacco consumption in lower and middle-
income countries. Economists have further connected the scientific findings that long linked tobacco consumption to painful and expensive diseases, conditions, and premature deaths, to studies estimating the staggering costs of tobacco consumption, such as health costs, loss of productivity, and tobacco expenditures, and concluded that tobacco consumption contributes to increases in poverty.

The impact of increased tobacco consumption cannot be underestimated. The overwhelming health costs and productivity losses caused by the long-term diseases from tobacco generally outweigh the benefits derived by any government from foreign tobacco industry investment, with the possible exception of a few national economies which rely heavily on tobacco production.

The theory behind promotion and protection of foreign investments and foreign investors is grounded on assumptions that the foreign investment will serve as a means to promote development, not undermine it. The foreign investor is also the party assumed to require protection from possible abuses of the host state, not the party causing abuse. Considering the tobacco industry’s well-documented conduct of exhausting public resources through

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99. Prabhat Jha & Frank J. Chaloupka, World Bank, Curbing the Epidemic: Governments and the Economics of Tobacco Control 14 (1999) (“[I]n four Asian economies that opened their markets in response to U.S. trade pressure during the 1980s . . . consumption of cigarettes per person was almost 10 percent higher in 1991 than it would have been if these markets had remained closed.”); Douglas Bettcher et al., Confronting the Tobacco Epidemic in an Era of Trade Liberalization 51–53 (2001) (“Import penetration was found to positively contribute cigarette consumption in low-income and low-middle-income countries. . . . The literature review and the empirical results provide evidence in support of the link between a country’s openness to trade and investment and cigarette consumption.”); Allyn Taylor et al., The Impact of Trade Liberalization on Tobacco Consumption, in Tobacco Control in Developing Countries 343, 343 (Prabhat Jha & Frank J. Chaloupka eds., 2000); Jeff Collin et al., The Framework Convention on Tobacco Control: The Politics of Global Health Governance, 23 Third World Q. 265, 266 (2002); Anna Gilmore & Martin McKee, Exploring the Impact of Foreign Direct Investment on Tobacco Consumption in the Former Soviet Union, 14 Tobacco Control 13, 18 (2005); Frank J. Chaloupka & Adit Laixuthai, U.S. Trade Policy and Cigarette Smoking in Asia (Nat’l Bureau of Econ. Research, Working Paper No. 5543, 1996) (study on Japan, South Korea, Taiwan, and Thailand showing ten percent increase in per capita consumption of tobacco due to the entry of global tobacco companies).


101. See Jha & Chaloupka, Curbing the Epidemic, supra note 99, at 32, 34.

102. Id. at 67–70.

103. Schreuer & Dolzer, supra note 26, at 15–16.

104. See Peterson, supra note 93.
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expensive litigation, and calculated use of the IIA scheme’s protections, allowing the tobacco industry investor status is counterintuitive.

1. Potential Threat of Abuse

In the field of public health, there is a general concern that the transnational nature of corporations, and their power to persuade developing nations desperate for inward investment, “allow[ ] them to evade accountability under national health laws and regulations.” This is particularly worrisome in the case of tobacco transnationals because the disproportionate economic power and legal sophistication of multinational tobacco companies has already proven to be more than some developing states can handle. The tobacco industry is “well aware of the power of trade liberalization to open up developing-country markets to tobacco trade”; the two largest tobacco companies in the world acknowledged that free international trade and the removal of trade barriers is crucial for the “long term health of their companies.”

The limitations of national health governance in the midst of globalization, and the ability of transnational tobacco companies “to undermine the regulatory authority of national governments,” justifies the development of global instruments to address the tobacco epidemic.

Internal documents and various country reports have established that the tobacco industry has continued to employ tactics to undermine and delay adoption and implementation of national tobacco control policies including exhausting its opponents’ resources

105. Robert L. Rabin, The Third Wave of Tobacco Tort Litigation, in Regulating Tobacco 176, 181 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) (“[T]he way we won these cases was not by spending all of [our] money, but by making (the enemy) spend all his.”).

106. Taylor & Sokol, supra note 1, at 37; see also Boutros Boutros-Ghali, An Agenda for Democratization 41–42 (1996) (“Business and industry today has more power over the future of the global economy and the environment than any Government or organization of Governments. . . . Transnational or multinational corporations in particular—which are today estimated to be 40,000 in number, controlling some 250,000 foreign affiliates worth approximately $2.6 trillion in book value and accounting for some one third of world private-sector productive assets—are playing an extremely important role in economic development.”).


109. Collin et al., supra note 99, at 266.
The tobacco industry, as the *FTR Holding, et al. v. Uruguay* case demonstrated, can be expected to employ the same tactic of using investment treaties and its status as investor to challenge the good faith measures of State governments. Unfortunately, most developing countries have limited resources to defend themselves against such claims brought by the tobacco industry and may opt to settle or suspend regulations.

Many developing nations, in their desire to attract foreign direct investment, have concluded BITs with states that are home to transnational tobacco companies even before ratifying the FCTC. Consequently, should they accept investments from tobacco companies, they will potentially expose themselves to an investor-state dispute claim should they adopt stringent tobacco control measures. For instance, Philip Morris has invested in manufacturing facilities in the Philippines in exchange for various financial incentives. Based on the definition of investment and investor in the Philippines’ BITs, Philip Morris would be in a position to challenge a Filipino tobacco control regulation should its “legitimate expectations” be adversely affected, in violation of the FET standard.

Tobacco companies have numerous avenues for bringing an investor-state dispute claim based on anti-tobacco regulation.  

110. *See* Haines *v*. Liggett Grp., Inc., 814 F. Supp. 414, 421 (D.N.J. 1993) (“To paraphrase General Patton, the way we won these cases was not by spending all of [our] money, but by making that other son of a bitch spend all of his.”).

111. For example, providing evidence such as a government official or policymaker statement regarding the protectionist intent of the measure although the measure was passed primarily to protect public health would suffice to question its “good faith.” The tobacco industry’s influence in many developing nations’ governments can make the production of this type of evidence easy.

112. *See* Margolis, *supra* note 13 (“New York Mayor Michael Bloomberg . . . has donated thousands of dollars from his Bloomberg Philanthropies and legal aid to Uruguay, whose ‘leaders did the right thing.’”).

113. *See Country Lists of BITs*, U.N. Conference on Trade and Dev., http://www.unctad.org/templates/Page.asp?intItemID=2344&lang=1 (last updated June 1, 2011) (based on the mapping of BITs entered into by the country headquarters of top tobacco transnationals Philip Morris, British American Tobacco, and Imperial Tobacco (i.e., Switzerland, United Kingdom, and United States) where most BITs entered into force prior to 2003, when the FCTC entered into force); *see also* U.N. Conference on Trade & Dev., *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* 3 fig.I.1 (showing the foreign direct investment inflow registered a peak in the 1990s and tapered downwards in early 2000s).


115. The tobacco transnationals can easily find reasons to bring an investor-dispute claim, especially in developing countries. The tobacco transnationals generally have invested heavily in their brands, through the use of trademarks and licensing agreements.
The tobacco companies have raised various trade challenges elsewhere that could lead to investor-state disputes.\(^{116}\) In addition, the liberal interpretation of foreign nationality\(^{117}\) of an investor suggests that tobacco companies can readily find an investment treaty under which it can file a claim against developing nations. Various merger and acquisition arrangements permit this. For instance, in *FTR Holding, et al. v. Uruguay*, Philip Morris Products S.A. and FTR Holding S.A., both based in Switzerland, own and control the Uruguay-based tobacco manufacturer and importer, Abal Hermanos S.A., a local company that was acquired by Philip Morris to produce its brands under a license agreement.\(^{118}\)

There are several capital exporting states that can be considered home states to tobacco industry investors, including Switzerland and the United States (PMI), the United Kingdom (British American Tobacco/Imperial Tobacco), and Japan (Japan Tobacco). For example, PMI, a Swiss company, has the opportunity to file a claim against over a hundred countries that have concluded a BIT with Switzerland,\(^{119}\) including countries leading the tobacco control initiative, like Australia, Thailand, Canada, and Singapore.\(^{120}\)

**B. Inherent Conflict with the FCTC**

In addition to the general problems caused by extending investor protections to the tobacco industry, additional tensions arise when countries that are party to the FCTC are forced to extend tobacco control measures that may affect the use of such intellectual property are not only exposed to potential claims of indirect expropriation but also to national treatment arguments. Because the tobacco transnational brands often have more “value” and are more established and advertised than the local brands, any such tobacco control measure would tend to cause more economic harm to the transnationals than to local tobacco companies, thus giving them a reason to claim that the measures are discriminatory and violate the national treatment clause.


\(^{117}\) See *supra* note 48 and accompanying text.

\(^{118}\) *Uruguay Investment Treaty Claim, supra* note 12.

\(^{119}\) See Total Number of Bilateral Investment Treaties Concluded, U.N. Conference on Trade and Dev. (June 1, 2011), http://www.unctad.org/sections/dite_pcbb/docs/bits_switzerland.pdf [hereinafter List of Swiss BITs] (listing all countries that have BITs with Switzerland).

\(^{120}\) Collin et al., *supra* note 99, at 267. Switzerland and the United Kingdom have BITs with Thailand and Singapore, two of the leaders on tobacco control in Southeast Asia. See List of Swiss BITs, *supra* note 119; Total Number of Bilateral Investment Treaties Concluded, U.N. Conference on Trade and Dev. (June 1, 2011), http://www.unctad.org/sections/dite_pcbb/docs/bits_uk.pdf [hereinafter List of UK BITs] (listing treaties concluded with the United Kingdom). The United Kingdom has also concluded BITs with Philippines, Malaysia, Thailand, and Singapore. See List of UK BITs, *supra*. 
investor protection to tobacco producers. While these countries are pressured to uphold the provisions of their various IIAs, the FCTC also imposes an obligation to protect public health measures from the vested and commercial interests of the tobacco industry, to foster international cooperation to promote the implementation of the treaty, and to promote economically viable alternatives to tobacco workers, growers, and sellers.

1. Protection from Tobacco Industry Interference

According to Article 5.3 of the FCTC, parties are obligated to protect tobacco control policies from the “commercial and other vested interests of the tobacco industry.” In creating this obligation, the Guidelines for the Implementation of Article 5.3 recommend that governments not give preferential treatment to the tobacco industry, including any incentives, privileges, tax-exemption, or benefits to establish or run their businesses. In other words, the tobacco industry should not be encouraged to invest or to set up physical operations within FCTC countries.

Allowing the tobacco industry to take advantage of the key features of IIAs is incompatible with the principles behind Art 5.3. For instance, providing a minimum standard of treatment (or FET) runs afoul of the objective of not providing any privilege or benefit to the tobacco industry. Even the act of expressly consenting to subject the state to the jurisdiction of an international tribunal in favor of tobacco companies would not fit well with the notion of not granting any benefit to the tobacco industry.

The tobacco industry investor-host state relation is not only a barrier to implementing Art 5.3, it also affects a party’s commitment to promote international cooperation in the field of tobacco control. To illustrate, in the case of the Philippines, using its close investor-host state relations with the government, PMI’s affiliate, Philip Morris Philippines, encouraged the state to take up a WTO dispute against Thailand in relation to Philip Morris’s claim that

121. WHO FCTC, supra note 4, art. 5.3.
122. Id. art. 5.4 (requiring “cooperat[ion] in the formulation of proposed measures, procedures and guidelines for the implementations of the Convention”).
123. Id. arts. 17–18.
124. Id. art. 5.5.
Thailand’s valuation practices were discriminatory, notwithstanding the fact that both governments committed to “cooperate to strengthen their capacity to fulfill the obligations arising from [the] Convention.”

Another related issue is transparency. The Guidelines for the Implementation of Article 5.3 recommend that parties require the tobacco industry to be transparent and to disclose all types of information that can help in developing or implementing tobacco control measures.128 In contrast, investor-state arbitration is generally a private and confidential proceeding, having derived its model from international commercial arbitration. An arbitral tribunal applying investment agreements does not allow non-parties access to proceedings and documents, does not conduct open public hearings,129 does not publish all rulings, and bars submission of amicus curiae from interested non-parties, even in cases involving public interest.130

Finally, the FCTC text reflects the recognition that the tobacco industry is not to be treated as a partner in public health and, consequently, development.131 Instead of promoting a host state’s economy, foreign direct investments in tobacco contribute to a significant increase in tobacco consumption,132 which adversely affects a country’s economy in the long run. When a party to the FCTC establishes an investor-host state relationship with the tobacco industry, it creates a situation inconsistent with public health policy, therefore the Guidelines for the Implementation of

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127. WHO FCTC, supra note 4, art. 22.1.

128. Article 5.3 Guidelines, supra note 125, at ¶¶ 24–25.

129. One exception is when there is strong public clamor on a public interest issue, such as the environment. See, e.g., Methanex Corp. v. United States, NAFTA/UNCITRAL, Joint Motion to the Tribunal Regarding the Petitions for Amicus Curiae Status (Jan. 31, 2003), available at www.state.gov/documents/organization/17769.pdf.

130. BARBARA K. WOODWARD, GLOBAL CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND GLOBAL GOVERNANCE: THEORY AND PRACTICE 369 (2010) (“International investment and trade disputes, involve participation of States, or agencies of States adding a public interest dimension. . . . To satisfy increasing GCS [i.e., Global Civil Society] demands for transparency, public access to certain documents and third-party participation, arbitral institutions and tribunal decisions have responded in an ad hoc manner. Third party participation as a non-party or through amicus submissions and attending some hearings has provided opportunities for some GCS input.”).

131. WHO FCTC, supra note 4, pmbl.

Article 5.3 recommend that partnerships with the tobacco industry be rejected.133

2. Promotion of International Cooperation

The FCTC’s preamble emphasizes the need for international cooperation in order to effectively and comprehensively address the tobacco epidemic.134 Throughout the treaty, parties have committed to cooperate with each other to implement the substantive provisions of Articles 8–13,135 to facilitate the elimination of cross-border advertising,136 to exchange information,137 to assist one another in legal proceedings involving the criminal and civil liability of the tobacco industry,138 to strengthen capacities to fulfill the obligations of the Convention,139 and to raise funds through bilateral and multilateral funding mechanisms.140

Essentially, a party to the FCTC is expected to support another party’s efforts to implement tobacco control measures, not counter them. Allowing a foreign tobacco company investor to use a BIT to challenge another state undermines the covenant to cooperate with each other in the implementation of the treaty. Furthermore, it aggravates the divide between capital-exporting states and capital-importing states in that the tobacco industry profit is remitted to the home state at the expense of developing nations’ public health.

3. Promotion of Economically Viable Alternatives

Parties to the FCTC share the vision of reducing both the demand and supply for tobacco products.141 To reduce supply, the FCTC stipulates that parties shall promote economically viable alternatives for tobacco growers and individual sellers.142 The Convention urges parties to shift away from tobacco as a source of economic growth and development. Therefore, when capital-
importing countries attempt to attract foreign direct investment into their country in order to boost economic growth, accepting investments in the tobacco sector runs counter to the parties’ commitment to foster the development of alternative livelihoods to tobacco.

C. Tensions with Substantive Obligations

The core substantive obligations of IIAs, namely FET, MFN/NT, and full compensation for expropriations, conflict directly with the substantive requirements of the FCTC, including packaging and labeling requirements, advertising, product regulation, and tax and price measures.

1. Product Packaging and Labeling (Article 11)

A typical investment agreement such as the Uruguay-Swiss BIT provides that any expropriation is lawful only if the measure is taken under due process of law and if effective and adequate compensation is provided. PMI claims that Uruguay’s regulations requiring “single presentation” for all variants of each brand (effectively a ban on misleading descriptors), constitutes a “taking” of PMI’s intellectual property. The tobacco company also claims that the graphic health warning requirement devalues and destroys its trademarks, and that such regulatory taking by issuance of an administrative ordinance does not comply with the criteria of due process and adequate compensation.

In addition to claims of unlawful indirect expropriation, FET standards are used to challenge regulation on the basis of arbitrariness and unreasonableness. PMI claims that the graphic health warning measure is broad and sweeping, that there is no rational relationship between the objective and the measure, and that other alternative means are available to achieve the objectives; there-


146. Id.

147. Id.
fore, the regulation is contrary to “reasonable expectations” of the investor and in violation of the FET standard.148

An investment dispute over graphic health warnings would force a state to incur costs and legal fees, defeating the purpose of the cost-efficiency of such a measure.149 Worse, if such a claim succeeds, the state will be bound to pay “just and adequate compensation,” which may amount to a substantial sum of money. The host state would end up incurring double losses, the costs of litigation, and the economic costs of unabated tobacco consumption.

2. Tobacco Advertising Promotion and Sponsorship (Article 13)

Parties attempting to implement comprehensive advertising bans in accordance with Article 13 of the FCTC will invariably encounter tobacco industry resistance on the basis of indirect expropriation of intellectual property in the same manner as discussed above.

There is a wide range of measures that can be undertaken by parties to comply with Article 13 within the five years of its entry into force. A discussion of all the measures will be beyond the scope of this Article. It suffices to say that a majority of the parties have already implemented a ban on advertising in mass media and the next step would be a ban on non-traditional media, below the line marketing activities, and point of sale displays.150 For example, the Guidelines for the Implementation of FCTC Article 13 expanded the scope of advertising to include placement and display of tobacco products, brand stretching/sharing (product diversification), and all packaging and product design features.151 In particular, Article 13’s guidelines recommend the use of plain packaging as a means to ensure that packs are not used for purposes of advertising and promoting misleading descriptors.152 Any tobacco advertising regulation would invariably affect the extent to which the tobacco brand or trademark will be used, giv-

148. Id.
149. Ironically, imposing graphic health warnings on tobacco products has proven to be an effective, cost-efficient means to promote health education and information, and is particularly recommended for governments with limited resources for health education. See World Health Org., MPOWER: A Policy Package to Reverse the Tobacco Epidemic 22 (2008).
150. Id. at 24–26.
152. Id. ¶ 16.
ing rise to a potential claim by the tobacco industry that their intellectual property is being unlawfully and indirectly expropriated without just compensation. Such arguments have been used by the tobacco industry to counter Canada and Australia’s initiatives to introduce plain packaging of tobacco products. In fact, in June 2011, PMI affiliate, Philip Morris Asia Limited, launched an investment claim against the Australian government to challenge its plain packaging legislation using arguments similar to the claim against Uruguay.

Furthermore, an even-handed tobacco advertising measure may not necessarily escape a claim from the tobacco industry that it is “discriminatory” and “arbitrary” because global tobacco brands are more valuable due to past investments in mass media advertising, and would arguably be more adversely affected than the local or less-known brands.

3. Product Regulation (Articles 9 and 10)

Significant controversy surrounded the adoption of the guidelines for Articles 9 and 10 and revealed potential trade disputes that could stem from a state’s implementation of the guidelines’ recommendations. For instance, the partial guidelines recommend prohibiting flavoring in tobacco products, as these would attract the younger market. A few countries questioned this recommendation at the WTO Technical Barriers to Trade Committee.


because it effectively discriminates against a type of tobacco leaf that relies on flavoring. It is possible that when a country bans flavorings in tobacco products in accordance with the guidelines, a tobacco industry investor that manufactures mostly flavored tobacco products would argue that it is a form of indirect expropriation of corporate profits. Where the competing tobacco industry is a local industry, a foreign tobacco company could also argue that it violates the NT clause. Finally, because there are many ways to regulate tobacco product contents, any measure can be deemed to be one where numerous alternative measures exist, making the chosen measure “arbitrary” and failing to meet the reasonable expectations of the investor.

4. Tax and Price Measures (Article 6)

Taxes are deemed the single most effective measure to reduce tobacco consumption and FCTC parties are encouraged to consider national health objectives in determining tobacco taxes. Accordingly, attempts to impose significant and regular increases on tobacco taxes could pose a problem for developing countries with a market dominated by a foreign tobacco investor. The tobacco industry may argue that such a measure is effectively an expropriation of corporate profits and that the measure is arbitrary.

5. Relationship between FCTC and Investment Agreements

The breadth of tobacco control measures that a party may enact is reflected in the key substantive provisions of the FCTC. The measures indicated therein are deemed to be the floor as parties are encouraged to enact “measures beyond those required by [the] Convention.” Hence, there is significant room for potential conflict between the variety of measures authorized and recommended by the FCTC and the requirements and obligations under IIAs/BITs. Should the implementation of tobacco control measures lead to an investment dispute, neither the FCTC nor the rules on arbitration provide consistent guidance on how tribunals 157. Request for Consultations by Indonesia, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/1 (Apr. 14, 2010).
158. JHA & CHALOUPKA, CURBING THE EPIDEMIC, supra note 99, at 5; WHO FCTC, supra note 4, art. 6.
159. WHO FCTC, supra note 4, art. 6(2)(a).
160. See id. arts. 6–18.
161. Id. art. 2 (1).
should weigh a state’s obligations under the FCTC vis-à-vis its obligations under the IIA or BIT.

The FCTC is silent on the relationship between tobacco regulation and existing trade agreements. Records show that the final negotiated draft included provisions that require FCTC to be consistent with trade agreements. Due to the strong lobby of developing countries and civil society organizations against subordinating the health treaty to trade treaties, however, this provision did not find its place in the agreed treaty text. Neither did the “health over trade” language supported by many member states appear in the final text. Arguably, such silence, combined with the preambular clause “determined to give priority to their right to protect public health,” could mean that the FCTC and other trade agreements are on equal footing and, in case of conflict, the tobacco control treaty must prevail.

162. The FCTC merely provides for the conclusion of subsequent treaties in that the provisions of the Convention “shall in no way affect the right of Parties to enter into bilateral or multilateral agreements . . . on issues relevant or additional to the Convention . . . provided that such agreements are compatible with their obligations under the Convention.” Id. art. 2(2). It fails to provide guidance with respect to existing agreements, particularly its relationship to trade agreements.

163. The constraints imposed by operating within the ideological confines of neoliberalism are most dramatically evident in the clear subordination of the FCTC to trade agreements implicit in the text submitted to the penultimate round of negotiations:

Article 2(3) Nothing in this Convention and its related protocols shall be interpreted as implying in any way a change in rights and obligations of a Party under any existing international treaty

Article 4(5) While recognizing that tobacco control and trade measures can be implemented in a mutually supportive manner, Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means for arbitrary or unjustifiable discrimination in international trade.


164. Derek Yach et al., Globalization and Tobacco, in GLOBALIZATION AND HEALTH 39, 59 (Ichiro Kawachi & Sarah Wamala eds., 2007) (“Throughout the negotiations, an alliance of the majority of the developing countries and NGOs fought to secure specific language prioritizing public health and tobacco control over trade agreements.”).

165. Id.; Collin & Lee, supra note 163, at 230.

166. Collin & Lee, supra note 163, at 235 (“An optimistic assessment of the relationship between the FCTC and trade agreements highlights the language of the FCTC’s preamble, in which the parties are described as ‘determined to give priority to their right to protect public health.’ In the case of future disputes, it has been argued, this could be construed as indicating an intent to allow non-discriminatory tobacco control measures even where trade is adversely affected.”); see also Yach et al., supra note 164, at 59.

167. Yach et al., supra note 163, at 59; Joost Pauwelyn, WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for “Conflict Diamonds”, 24 MICH. J. INT’L L. 1177, 1202 (2003) (“In essence, in the event a conflict were to arise (an eventuality that is far from certain), the FCTC, being both later in time and more specific (at least to the extent
That the FCTC should prevail is further supported by the “later in time rule,” of the Vienna Convention of the Law of Treaties on the application of successive treaties relating to the same subject matter. The FCTC, being later in time, should prevail in case of conflict between treaties. Nevertheless, the use of the later in time rule may be challenged. First, it applies only where states involved are parties to both treaties. In cases where one of the parties to the BIT is not a party to the FCTC, this argument will not be available. Notably, most of the BITs involving Switzerland, the United Kingdom, and the United States were concluded in the 1990s before the FCTC entered into force in 2005. Switzerland and the United States, however, have not ratified the FCTC.

In addition, the rule applies only in the case of disputes where an arbitral tribunal is charged with the duty of interpreting the laws. Investment arbitration tribunals are generally guided by commercial arbitration rules and tend to restrict interpretations to the BIT/IIA concerned. In the absence of agreement between parties to the BIT as to which laws apply, both the UNCITRAL rules and the ICSID Convention require the tribunals to apply applicable laws. It deals with trade in a specific product, tobacco, will normally prevail over the WTO treaty; albeit, of course, only between countries that are party to both treaties.” (emphasis in original)).

168. Vienna Convention on the Law of Treaties art. 30, May 23, 1969, 1155 U.N.T.S. 331. The two treaties are arguably not “on the same subject matter,” but with respect to disputes raised by the tobacco industry investor where the tobacco industry invokes the BIT and the state invokes the FCTC, then the treaties may be considered on the same subject matter. See Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of Public International Law 65 (2003).


170. See List of Swiss BITs, supra note 119; List of UK BITs, supra note 120; Total Number of Bilateral Investment Treaties Concluded, U.N. CONFERENCE ON TRADE AND DEV. (June 1, 2011), http://www.unctad.org/sections/dite_pcbb/docs/bits_us.pdf (listing treaties concluded with the United States).


172. See generally WHO FCTC, supra note 4, arts. 35–36 (stating the requirements for ratification, acceptance, and approval in order to qualify as a Party).

173. ICSID Convention, supra note 42, art. 42(1) (requiring an ICSID arbitral tribunal, in the absence of party agreement on applicable law, to apply the law of the “State party to the dispute (including its rules on the conflict of laws”).
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ble conflict of law rules, and in the case of ICSID, applicable rules of international law. 174

Finally, even though charged with the duty to use international laws to interpret international legal obligations, the tribunals will try not to read the treaties to be in conflict, and it is easy not to read conflict into the provisions of the FCTC and other treaties because most of the FCTC provisions are broad and allow for much flexibility in interpretation.

6. Future Protocols

A new and even stronger international agreement, called the Protocol on the Illicit Trade of Tobacco Products (Protocol), has recently concluded negotiations. 175 This would create binding obligations for states to require a secure tracking and tracing system for tobacco products, licensing requirements, and reporting requirements with corresponding criminal sanctions on the tobacco industry for non-compliance. 176 Based on the draft Chair’s Text of the Protocol, international cooperation would be secured through mutual legal assistance and mutual administrative provisions similar to those found in the U.N. Convention on Transnational Organized Crime. 177 Specific obligations under such a protocol may require a host state to impose regulatory measures, possibly including suspending exports, limiting shipments to specific types of buyers, most of which were not contemplated when tobacco industry investments were made. These measures could create additional opportunities for the foreign tobacco investor to mount a challenge based on the legitimate expectations of the investor.

IV. Recommendation

Waiting for international arbitration tribunals to churn out positive interpretations is not an option in view of the broad range of


177. Id. arts. 29–30.
possibilities for tobacco control measures to fall prey to a tobacco-industry instigated investor-state dispute. States must, instead, take proactive steps to ensure that good faith, nondiscriminatory tobacco control measures will not be challenged by the tobacco industry in unnecessary and expensive foreign investment dispute proceedings.

A two-pronged approach is recommended to protect states from the tobacco industry’s attempts to utilize its privileged position as an investor. First, states must be encouraged to negotiate or renegotiate IIAs/BITs to exclude tobacco companies from the investor-state dispute settlement system or to add substantive provisions for the exclusion of tobacco products. In conjunction with this, norm-setting instruments must be developed to assist parties in dealing with tobacco and investment concerns, as well as to inform tribunals of a possible means to interpret investment agreement provisions in light of bona fide efforts to implement the FCTC.

A. **Negotiations and Consultations**

A sovereign state has the choice as to what it wants to keep out of the scope of the treaty. At least two measures exist to allow a state to prevent tobacco industry investors from interfering with its efforts to reduce tobacco consumption. One is for the states to seek consultations for the revision of the IIAs/BITs to which they are a party or to negotiate a supplement to clarify that the investment protection and privileges do not extend to the tobacco industry. Another measure is to ensure the exclusion of tobacco companies from IIAs/BITs that are currently being negotiated or will be negotiated in the future.

178. Taking drastic measures such as withdrawing from a treaty or refusal to comply in cases where the tobacco industry investor is involved may not be an appropriate solution. Non-compliance has adverse reputational effects that developing nations would want to avoid in order to continue attracting foreign direct investments, if this is being undertaken as part of a national economic strategy towards sustainable development. Most treaties provide for a fixed period during which the treaty remains in effect despite the withdrawal and does not affect existing investments. See generally Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579 (2005) (discussing when and why states abandon treaty commitments and consequences for doing so).

179. United Nations Conference on Trade & Dev., supra note 25, at 25 (explaining how many countries are currently renegotiating their investment agreements for a variety of reasons, such as adding investor-State dispute settlement clauses, clarifying treaty provisions, and balancing investor-public interests).
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The proposal to exclude tobacco\textsuperscript{180} from international trade agreements is not a new concept.\textsuperscript{181} In a debate during the World Conference on Tobacco or Health, a former U.S. trade representative who originally took the position that WTO rules provided enough leeway, eventually found merit in his opponent’s arguments and submitted that the unique nature of tobacco products justifies its exclusion in the same way that military products and fissionable materials are outside the scope of WTO agreements.\textsuperscript{182} He also agreed that certain exceptions such as surgical, diagnostic, and therapeutic methods are beyond the scope of intellectual property rules.\textsuperscript{183}


Negotiations to keep tobacco out of a BIT should entail the inclusion of one, or several, specific provisions that indicate that tobacco control measures shall not be considered a breach of the provisions of the agreement, shall not be considered indirect expropriation, and shall not be challenged as violating the FET standard under the agreement. Broad provisions can also be crafted\textsuperscript{184} to provide a self-judging clause where the host state indicates an exception in order to allow it to adopt tobacco control

\textsuperscript{180} One scholar argues that “exclusion is not a panacea for the risks posed by trade agreements,” and advocates for mechanisms that “permit sufficient regulatory freedom [rather] than . . . seek blanket exclusion.” Benn McGrady, Trade Liberalisation and Tobacco Control: Moving from a Policy of Exclusion Towards a More Comprehensive Policy, 16 Tobacco Control 280, 281 (2007). This is based on the premise that there will be overall economic gains referring to a World Trade Institute study and that exclusions in the free trade agreements creates an opening for “purely protectionist” policies. See id. A closer analysis of the Investor-State Dispute (ISD) mechanism provides a clear distinction and elucidates factors discussed here (such as potential abuse by the tobacco industry, political will of some states like Australia to avoid ISD mechanisms that will prevent them from enacting stringent tobacco control measures, and cases where discrimination between foreign and local products may be justified from a public health standpoint) that were not considered in the World Trade Institute study.

\textsuperscript{181} See generally Robert Weissman, International Trade Agreements and Tobacco Control: Threats to Public Health and the Case for Excluding Tobacco from Trade Agreements (2003), available at http://www.takingontobacco.org/trade/tobacco.trade.v02.backgrd.pdf (arguing that tobacco should be excluded from all current and future trade agreements); Cynthia Callard et al., Why Trade and Investment Liberalisation May Threaten Effective Tobacco Control Efforts, 10 Tobacco Control 68 (2001) (advocating for the exclusion and removal of tobacco and tobacco products from trade agreements).

\textsuperscript{182} See Weissman, supra note 181, at 27.

\textsuperscript{183} Id.

\textsuperscript{184} In addition, states may use reservations to exclude a sector from the protection of the investment agreement. See generally U.N. CONFERENCE ON TRADE & DEV., PRESERVING FLEXIBILITY IN IIA: THE USE OF RESERVATIONS (2006), available at wwwunctad.org/en/Docs/iteiit20058_en.pdf.
measures “as it considers necessary,” exclude the tobacco industry from access to the investor-state dispute settlement mechanisms, or exclude the tobacco industry from the application of the investment agreement.

Carefully crafted provisions can be contained in model BITs/IIAs, in order to manage the tobacco investors’ “legitimate expectations,” as well as send clear assurance to states that tobacco control measures will not be arbitrarily challenged by the tobacco industry. It will also minimize inconsistent rulings relating to tobacco control measures and discourage the filing of meritless claims by the tobacco industry, which has been known to take advantage of any legal uncertainty to delay implementation of bona fide tobacco control measures.

Finally, as a prospective measure, states should be encouraged to adopt national or administrative measures to prevent the admission of foreign direct investment from the tobacco industry, and further provide appropriate guidance to officials who may be involved in negotiating future BITs/IIAs.

B. Development of Norms

Initiatives to renegotiate existing investment treaties can take off independently among individual states depending on their political will, but this should not overshadow the value of an international instrument that spells out recommendations for possible reforms. Parties to the FCTC have an opportunity, through the COP, the subsidiary body tasked with taking decisions necessary to promote the implementation of the FCTC, to adopt guidelines as it has done in the past. Such a guideline should contain:

1. Guidance for parties negotiating/re-negotiating IIAs/BITs;
2. Guidance for tribunals in interpreting treaties in light of the FCTC;

185. This is intended to be non-justiciable in the same manner that the national security clause in the U.S. model BIT is designed.
186. These options have been proposed by Robert Stumberg as an elegant solution in the context of the Trans Pacific Partnership negotiations. Tobacco Free Kids also made comments to the Trans Pacific Partnership Agreement (TPP) to the effect that the TPP should not interfere with the United States’ efforts to implement tobacco control measures. Unpublished paper by Robert Stumberg of the Harrison Institute, Georgetown University Law Center.
187. See SOUTHEAST ASIA TOBACCO CONTROL ALLIANCE, TOBACCO INDUSTRY INTERFERENCE IN HEALTH POLICY IN ASEAN COUNTRIES 3 (2009), available at resources.seatca.org/Tobacco%20Industry%20Interference.pdf (listing ways the tobacco industry derails tobacco regulation).
188. See WHO FCTC, supra note 4, art. 23(5).
3. Guidance relating to the role of the ICSID, UNCITRAL, New York Convention, and UNCTAD.

This list is merely illustrative and an evaluation of each element is beyond the scope of this Article. Ideally, the instrument to be developed should attempt to exhaust the means by which the investment treaty regime can align with a state’s interest to implement the FCTC.

Considering the binding nature of IIAs, a counterpart binding protocol is ideal but would not necessarily provide a complete solution for non-FCTC parties.\(^{189}\) Furthermore, negotiating a binding treaty requires more financial resources and time, which are sorely lacking among developing nations.\(^{190}\) A non-binding instrument can be adopted in a shorter period of time and can serve as a platform for future plans to negotiate a protocol on this matter.\(^{191}\)

As guidance for states, a new set of guidelines could have a significant impact on state behavior.\(^{192}\) Although non-binding, the guidelines can help advance “international consensus on rules and for promoting consistent state action.”\(^{193}\) Because international law can help promote international cooperation and spur national action,\(^{194}\) the technical information in the guidelines will make it easier for parties to negotiate with other parties for the exclusion of tobacco in their BITs/investment agreements. The guidelines could also be an invaluable tool to empower and inform health ministries in their coordination with other trade-related ministries.

This instrument should also serve to encourage coherence in arriving at rulings in favor of tobacco control. Although the guidelines will not create firm obligations on the parties or “bring into play the interpretive rules of the Vienna Convention on the Laws

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189. A binding protocol among FCTC parties provides only a partial solution because this excludes some capital exporting states (e.g., United States and Switzerland) which are not parties to the FCTC.

190. Political feasibility is another critical factor. The political context is beyond the scope of this Article.

191. See A. L. Taylor, *International Law, and Public Health Policy*, in *International Encyclopedia of Public Health* 667, 672 (Kristian Heggenhougen et al. eds., 2008) (“In addition to binding international law, states produce a wide variety of nonbinding international legal instruments that can have an important impact on state behavior. Such instruments include resolutions, declarations, codes of conduct, guidelines or standards.”).

192. See id. (discussing the impact of nonbinding instruments).

193. Id. (“For example, the WTO Doha Declaration on Trade and Public Health . . . is widely considered to have advanced global understanding and perhaps, action on trade and health matters, particularly in relation to access to essential medicines, even though the legal significance of the declaratory instrument is unclear.”).

194. See id. at 677.
of Treaties,” it may provide suggestions on how to urge tribunals to recognize the role of the FCTC, instead of exclusively applying international commercial laws in disputes where the tobacco industry is involved. The guidelines should also serve as an instrument that will improve coordination with other bodies in the United Nations system. It could provide guidance on how the COP should request the cooperation of the other U.N. bodies and other intergovernmental organizations, including financial and developmental institutions, to strengthen FCTC implementation.

Guidelines should encourage parties, the WHO, and the FCTC secretariat to explore possibilities for promoting awareness and acceptance of these guidelines among the active committees and secretariats in the pertinent international bodies. Such an instrument can also promote proposed amendments to the model BITs of states or other model BITs, such as the International Institute for Sustainable Development Model International Investment Agreement.

Needless to say, collective action will be needed to speed up the process of protecting host states from the threat of tobacco industry initiated investment disputes, and the culmination of such collective action would be an instrument that can serve as clear guidance to protect FCTC parties from tobacco industry’s conceivable abuse of the investment treaty regime.

V. Conclusion

While possible conflicts with obligations under the WTO have received adequate attention during the last COP, the impending

196. The interface with other U.N. bodies cannot be overemphasized. In addition to seeking technical and financial cooperation from the pertinent U.N. bodies and intergovernmental organizations, parties must also agree to seek coherence between the FCTC and the other relevant treaty regimes, such as the ICSID and New York Convention.
197. WHO FCTC, supra note 4, arts. 23(5)(g), 25.
198. A positive effect of such a norm-setting standard is that it can change the reasonable and legitimate expectations of an investor.
199. The BITs of the International Institute for Sustainable Development (IISD) have general provisions on the protection of welfare but do not treat the tobacco industry differently. These BITs may also take into consideration the need to give a unique treatment of the tobacco industry, which, after all, promotes a unique product that kills half of its consumers when used as intended by the manufacturers. IISD has developed model BITs that are fashioned to promote sustainable development in developing countries; the IISD Model BIT has nevertheless, failed to respond to the unique characteristics of the tobacco industry. See Int’l Inst. Sustainable Dev., supra note 72, arts. 11–21 (emphasizing, among others, sustainable development objectives and investor responsibilities).
Warning: Investment Agreements Are Dangerous to Your Health

Concern of how thousands of IIAs/BITs can be used by the tobacco industry against host states that are attempting to implement the WHO FCTC remains unresolved.

As transnational companies around the world grow and the number of IIAs/BITs states enter into continues to dramatically rise, the issues surrounding tobacco investors and host states can be expected to become more complex and controversial in the future. Multinational tobacco companies’ methodical acquisition of local affiliates to dominate market shares in developing countries brings a sense of disquiet to the public health community. The potential threat this brings is clear: IIAs and BITs could cause governments to avoid adopting stringent tobacco control measures to the detriment of their constituents’ health.

The FTR Holding, et al. v. Uruguay case, as well as the more recent case of Philip Morris Asia against Australia, demonstrate how states can be exposed to investor-state disputes as a result of implementing tobacco control measures. This Article has further revealed the opportunities available to the tobacco industry to abuse the investment protection system. Consequently, taking a sui generis product out of the investment protection regime not only ensures the protection of public health but also has the potential to preserve the international investment system. States should take action, individually and collectively, through negotiations or consultations as well as by developing norms, to achieve this goal.

200. BISHOP ET AL., supra note 24, at 1.