TOBACCO CONTROL AND PROCEDURAL FAIRNESS IN THE CONTEXT OF INVESTMENT TREATY ARBITRATION

Mao-wei Lo*

ABSTRACT

The Framework Convention of Tobacco Control (hereinafter "FCTC") is the first treaty aiming to combat the tobacco epidemic under the auspices of the World Health Organization (WHO). This multilateral convention seeks to pursue the highest public health protection standards and good global health governance. However, since the beginning of the FCTC negotiations, the tobacco industry has attempted to obstruct its development and implementation. Article 5.3 of the FCTC, which mandates that parties shall limit interactions with the tobacco industry, aims to protect the formation and implementation of the international and domestic tobacco control policies, and has thus emerged as a powerful weapon of international law for excluding tobacco companies' intervention. Parties to the FCTC have also enacted relevant legislation based on Article 5.3 to regulate interactions with the tobacco industry and bar tobacco interests from influencing domestic law and policymaking. Unsurprisingly, these measures have become thorns in the side of the tobacco industry. Recently, global tobacco giants have waged several lawsuits to challenge the legality and constitutionality of states' anti-interference laws and regulations at the domestic level. Specifically, they have argued that such measures deviate from procedural fairness and due process, given that these entirely deprive them of their right to participate in the policymaking process.

* Mao-wei Lo, J.S.D. Candidate, Stanford University School of Law. The author can be reached at: mwlo@stanford.edu.

Although domestic jurisprudence offers guidance regarding how the judicial branch should consider the issues at stake, the question of whether tobacco control measures that exclude the tobacco industry constitute a violation of investors' rights protected by investment treaties, especially the procedural dimension of the fair and equitable treatment (hereinafter "FET") standard, remains unexplored. Hence, this article aims to fill this gap by examining the objective and scope of Article 5.3 of FCTC, its potential role in adjudicating investment arbitration, and how it can illuminate a more "balanced" interpretation of the FET clause in the investment disputes concerning host states' tobacco control measures. More broadly, this article aims to shed light on the relationship between the investment treaty obligations of host States and their regulatory powers in the field of public health.

KEYWORDS: *international investment law, fair and equitable treatment standard, FCTC, Article 5.3, tobacco control, procedural fairness, due process*

I. INTRODUCTION

The fact that the use of tobacco products results in serious harm to health and public welfare has been evinced by numerous studies conducted by the World Health Organization (hereinafter "WHO") and other public health experts.[1] Consequently, the consensus among the international community is that the tobacco epidemic must be fought. In 2005, the Framework Convention on Tobacco Control (hereinafter "FCTC"), the global public health treaty adopted under the auspices of the WHO, entered into force. The primary objective of the FCTC is to respond to "the globalization of the tobacco epidemic" and it is "an evidence-based treaty that reaffirms the right of all people to the highest standard of health."[2] The FCTC covers a wide range of topics aiming to reduce tobacco consumption by comprehensively regulating tobacco across its supply and demand chains.[3]

The implementation of the FCTC has had significant success in combating the tobacco epidemic. During this time, the Conference of the Parties (hereinafter "COP") of the FCTC has passed eight guidelines and one protocol to further implement the provisions under the FCTC and has enjoyed tremendous success in protecting public health from the threat of tobacco consumption.[4] Scholars have also empirically demonstrated that the decisions of the FCTC could reinforce states' tobacco control measures in their entirety and legality. Scholars have therefore argued that the FCTC has substantively contributed to courts' reasoning in tobacco control disputes and has also reinforced the legitimacy of countries' tobacco control measures.[5] Among the toolkits stipulated by the FCTC, one crucial regulatory scheme is to protect countries' tobacco control policies from being infringed by commercial and other vested interests of the tobacco industry. Article 5.3 of the FCTC calls on members to protect their health policy from industry interference, which may include limiting interactions with tobacco companies or any actors on behalf of the industry, conducting interactions transparently, and refraining from accepting financial or technical assistance

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[1] *See, e.g.*, *Tobacco*, WORLD HEALTH ORG. [hereinafter WHO] (July 26, 2021), https://www.who.int/news-room/fact-sheets/detail/tobacco. *Health Effects of Cigarette Smoking*, CTR. FOR DISEASE CONTROL AND PREVENTION (Oct. 29, 2021), https://www.cdc.gov/tobacco/datastatistics/factsheets/healtheffects/effectscigsmoking/index.htm.

[2] *WHO Framework Convention on Tobacco Control: Overview*, FCTC, http://www.who.int/fctc/cop/about/en/ (last visited Mar. 24, 2022).

[3] *See* Chang-fa Lo, *Guidelines and Protocols Under the Framework Convention*, *in* THE GLOBAL TOBACCO EPIDEMIC AND THE LAW 32, 33 (Andrew D. Mitchell & Tania Voon eds., 2014).

[4] *See The WHO Framework Convention on Tobacco Control: An Overview*, FCTC (May, 2019), https://fctc.who.int/docs/librariesprovider12/default-document-library/who-fctc-summary.pdf?sfvrsn=1e770ac729 &download=true.

[5] Suzanne Y. Zhou et al., *The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures*, 28 TOBACCO CONTROL s113, s113 (2019).

offered by the tobacco industry in setting and implementing their public health policies for tobacco control.

In response to the global trends of more stringent tobacco control measures, those tobacco giants have initiated or supported litigation targeting various tobacco control measures worldwide to obstruct, delay, or weaken their implementation. In addition to the lawsuits filed in domestic courts, the "tobacco war" has also extended to the international legal forum, especially the investor-state dispute settlement mechanism, where the issue of investment protection is the primary focus for arbitral tribunals. The investment claims brought by Philip Morris against Australia and Uruguay are both vivid examples demonstrating how tobacco companies formulate their arguments to challenge the legitimacy of tobacco control measures and claim that they are inconsistent with states' treaty obligations under bilateral investment treaties. For example, Philip Morris argued that the tobacco control measures enacted by Australia and Uruguay significantly restricted its property rights and freedom of conducting business, which disproportionately undermined the economic value of its established investment in both countries. Therefore, such measures amounted to expropriations and constituted violations of the fair and equitable treatment (hereinafter "FET") standard as well as the umbrella clause embedded in the bilateral investment treaties. The primary legal strategy for the tobacco industry was thus to generate public health regulatory chill against the FCTC members.[6]

Legal academia has widely discussed the arguments and the implications of the two Philip Morris cases. However, the potential claim that might also be raised by the tobacco industry, namely, the arguments of "due process" and "procedural fairness" which constitute the procedural dimension of the FET standard, has been less examined.[7] Given that Article 5.3 of the FCTC and its guidelines clearly state that members shall act to protect their tobacco control policies from being influenced by commercial and other vested interests of the tobacco industry, clarifying the relationship between tobacco companies' procedural fairness and due process, as well as the efforts to facilitate the formation and implementation of tobacco control policies, is of paramount significance. Although the relationship between tobacco companies' procedural rights and the constitutionality of the anti-interference measures has been adjudicated by several domestic courts of the

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[6] *See, e.g.*, Lukasz Gruszczynski, *Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect*, 5(2) EUR. J. RISK REG. 242 (2014). *See also* Penelope Milsom et al., *Do International Trade and Investment Agreements Generate Regulatory Chill in Public Health Policymaking? A Case Study of Nutrition and Alcohol Policy in South Africa*, 17 GLOBALIZATION & HEALTH 104 (2021).

[7] *See, e.g.*, TODD WEILER, PHILIP MORRIS VS. URUGUAY: AN ANALYSIS OF TOBACCO CONTROL MEASURES IN THE CONTEXT OF INTERNATIONAL INVESTMENT LAW 22-24 (2010), http://arbitrationlaw.com/files/free_pdfs/2010-07-28_-_expert_opinion.pdf.

FCTC members, this legal issue has remained largely unexplored by the investment arbitral tribunals. Consequently, this article aims to shed light on this issue to illuminate the states' regulatory power to protect public health policy from the tobacco industry's interference and assess if tobacco companies' claims of procedural fairness are valid in the context of investment arbitration.

This article is structured as follows. Section II introduces the content of FCTC Article 5.3 and its guidelines. Section III focuses on "due process" and "procedural fairness" under the FET standard in international investment law and reviews the relevant investment arbitral jurisprudence. With these legal landscapes addressed, section IV explores the role of Article 5.3 in interpreting and adjudicating an FET claim brought by the tobacco industry. This article envisages the justifiable limitations on tobacco companies' right to participate in the policymaking process to respect FCTC members' regulatory space for implementing their legal obligations under Article 5.3. Section V concludes.

II. AN OVERVIEW OF THE FCTC ARTICLE 5.3 AND ITS GUIDELINES

A. Preventing Interference by the Tobacco Industry

The tobacco industry's interference in forming and implementing public health policy on tobacco control activities is long-lasting and usually undetectable. According to the FCTC Secretariat, parties have reported that they still consider the tobacco industry's interference with public policies on tobacco control to be the most crucial barrier to treaty implementation.[8] The tobacco industry uses a variety of tactics to penetrate the formulation, implementation, administration or enforcement of tobacco control policies, such as interacting with relevant authorities in a non-transparent manner, proposing non-binding or non-enforceable agreements as an alternative to tobacco control legislation, or even advocating corporate social responsibility.[9] Of these, the most distinct approach is to establish relationships with governments and demand involvement in the legislation or policymaking process of states' tobacco control measures, which undermines the effectiveness of the legislation and policies. This interference aims to obstruct the parties' rights to enact optimal domestic policies and implement the provisions of the FCTC.[10]

[8] Conference of the Parties to the WHO Framework Convention on Tobacco Control [hereinafter Conference of WHO FCTC], *Implementation of Article 5.3 of the WHO FCTC: Evolving Issues Related to Interference by the Tobacco Industry*, at 3, FCTC/COP/6/16 (July 14, 2014).
[9] Mary Assunta & E Ulysses Dorotheo, *SEATCA Tobacco Industry Interference Index: A Tool for Measuring Implementation of WHO Framework Convention on Tobacco Control Article 5.3*, 25(3) TOBACCO CONTROL s313, s314 (2015).
[10] WHO, TOBACCO INDUSTRY INTERFERENCE WITH TOBACCO CONTROL 12-17 (2008).

To address this situation, Article 5.3 of the FCTC provides: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."

Moreover, to assist parties in meeting their legal obligations under Article 5.3, the "Guidelines for implementation of Article 5.3 of the WHO FCTC" were adopted at COP 3 in November 2008 to ensure that efforts to protect tobacco control from commercial and other vested interests of the tobacco industry are comprehensive and practical. Parties are encouraged to implement these guidelines to the extent possible per their national law. Both provisions aim to shield parties' policymaking from potential interference.

B. Key Elements of FCTC Article 5.3 and Its Guidelines

1. The Relationship Between FCTC Article 5.3 and Its Guidelines — Before discussing FCTC Article 5.3 and its Guidelines, their relationship must be explained to illuminate the entire picture of the mechanism for preventing interference under the FCTC.

The FCTC embodies the so-called "framework" approach, which includes certain substantive principles in the Convention itself to cope with many aspects of tobacco control. However, the general provisions under the Convention are not sufficiently specific to require the parties to enact their obligations; therefore, the Convention leaves room for parties to supplement the main content with additional legal instruments, namely the "guidelines" and "protocol," to enhance the FCTC's effectiveness.[11] The benefit of the "framework" approach is that by continuously being supplemented by the guidelines and protocol, the FCTC can become an effective, living treaty, which reflects the current trends of global tobacco control policies and strategies.[12]

According to Articles 5.4, 7 and 23.5, the COP is authorized to implement the guidelines or protocol to promote and enhance the main contents of the FCTC.[13] The difference between the guideline and protocol

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[11] Lo, *supra* note 3, at 32. Sam F. Halabi, *The World Health Organization's Framework Convention on Tobacco Control: An Analysis of Guidelines Adopted by the Conference of Parties*, 39 GA. J. INT'L & COMP. L. 121, 125-26 (2011).

[12] Lo, *supra* note 3.

[13] *See* WHO Framework Convention on Tobacco Control, *opened for signature* June 16, 2003, 2302 U.N.T.S. 166 [hereinafter FCTC]. FCTC art. 5.4: "The Parties shall cooperate in the formulation of proposed measures, procedures and guidelines for the implementation of the Convention and the protocols to which they are Parties." FCTC art. 7:

> The Parties recognize that comprehensive non-price measures are an effective and important means of reducing tobacco consumption. Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate,

is that the former is non-binding, whereas the latter establishes certain additional obligations beyond the FCTC itself.[14]

Although the guidelines under the FCTC are non-binding, they still play a vital role in assisting parties to address specific issues at the national or international level.[15] The guidelines provide specific strategies and guidance for parties to formulate their tobacco control policy and assist them in fulfilling their obligations under the convention. In addition, as the guidelines are adopted by unanimous consent of the parties, they could also represent a "subsequent agreement" under Article 31.3(a) of the Vienna Convention on the Law of Treaties between the parties regarding the interpretation of the treaty.[16] Therefore, parties shall interpret Article 5.3 of the FCTC in light of its guidelines regarding treaty compliance. Furthermore, in practice, the guidelines have a great influence on parties in formulating relevant tobacco control policies that restrict the tobacco industry's behavior.[17]

2. Guiding Principles and Recommendations Under the Article 5.3 Guidelines — Article 5.3 of the FCTC provides a basic framework that requires the parties to protect their public health policies from being subverted by the tobacco industry or groups with commercial interests. To fully implement this provision and assist parties in meeting their obligations under Article 5.3, its implementing guidelines further provide a set of guiding principles and recommendations that help parties map out their own anti-interference policies and legislation at the domestic level. The four guiding principles stipulated in the guidelines are listed below:

(1) There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests.
(2) Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.
(3) Parties should require the tobacco industry and those working to further

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> as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.

FCTC art. 23.5: "The Conference of the Parties shall keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation and may adopt protocols, annexes and amendments to the Convention, in accordance with Articles 28, 29 and 33."

[14] For detailed discussion for the guideline and protocol under the FCTC, see generally Lo, *supra* note 3.

[15] Chang-fa Lo, *FCTC Guidelines on Tobacco Industry Foreign Investment Would Strengthen Controls on Tobacco Supply and Close Loopholes in the Tobacco Treaty*, 19 TOBACCO CONTROL 306, 307-10 (2010).

[16] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (art. 31.3(a): "There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.").

[17] Halabi, *supra* note 11, at 128, 137.

its interests to operate and act in a manner that is accountable and transparent.

(4) Because their products are lethal, the tobacco industry should not be granted incentives to establish or run their businesses.

The guiding principles declare the main objectives of Article 5.3 and its guidelines, which firstly emphasize that "there is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests." Therefore, parties should enact their public health policies in an accountable and transparent manner, especially to avoid tobacco industries manipulating their tobacco control measures and creating the impression that parties are combating the tobacco epidemic (especially in the illicit trade of tobacco) in collaboration with the interested parties.

To provide a specific roadmap and assist parties in the implementation of their obligations under Article 5.3, the guidelines also offer eight recommendations, as follows:

(1) Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with parties' tobacco control policies.
(2) Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.
(3) Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.
(4) Avoid conflicts of interest for government officials and employees.
(5) Require that information provided by the tobacco industry be transparent and accurate.
(6) Denormalize and, to the extent possible, regulate activities described as "socially responsible" by the tobacco industry, including but not limited to activities described as "corporate social responsibility."
(7) Do not give preferential treatment to the tobacco industry.
(8) Treat state-owned tobacco industry in the same way as any other tobacco industry.

The first recommendation outlines the core content of the guidelines, repeatedly emphasizing the importance of protecting parties' tobacco control policies from being interfered with by the tobacco industry, and calling upon all branches of government and the public to raise their knowledge and awareness about past and present interference by the tobacco industry in setting and implementing public health policies with respect to tobacco control.

Second, to prevent the creation of any perception of partnership or cooperation between governments and tobacco companies, the guidelines also provide that "[p]arties should interact with the tobacco industry only when and to the extent strictly necessary to enable them to regulate the tobacco industry and tobacco products effectively." Even if such interaction

is unavoidable and necessary, it should be conducted transparently and accountably. Moreover, parties should refrain from establishing any collaborative partnerships with the tobacco industry, given that this kind of cooperation may result in a misunderstanding that the tobacco industry is a reliable ally to plan and execute tobacco control policies.

Third, parties should routinely gather information about the nature of the business activities and their operations to better understand the possible impacts of tobacco companies' strategies. Of the many aspects of activities, the initiatives identified as corporate social responsibility are the most controversial. According to the WHO, the interests between the tobacco industry and public health policy are fundamentally irreconcilable. FCTC members should be aware of the purpose behind the initiatives framed as corporate social responsibility—which is in fact the promotion of tobacco consumption by distancing tobacco products from the image of lethal nature. Hence, these brand-promoting and public relations strategies fall within the definition of advertising, promotion, and sponsorship under the FCTC, and should be prohibited accordingly.[18]

Finally, some governments encourage investment by the tobacco industry, such as providing subsidies for their management or exemption from taxes otherwise mandated by law; these would violate their commitment to tobacco control under the Convention. In addition, these guidelines should also be applied to "state-owned" tobacco industries to prevent the loophole in tobacco control policies, no matter whether parties own all or part of the shares.

C. Summary

The guidelines of Article 5.3 of the FCTC mention various tools, including regulating the tobacco industry and government behavior, to prevent the tobacco industry's interference; in doing so, they provide comprehensive guidance for parties to implement their obligations under Article 5.3.[19] As one Non-Governmental Organization (NGO) explains, "[t]he FCTC includes a critical provision—Article 5.3—that recognizes the tobacco industry's irreconcilable conflict of interest with public health. The article is the backbone of the treaty; the treaty cannot succeed if industry interference is not rooted out."[20] Notably, in accordance with the decision

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[18] FCTC, *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control*, at 10 (2013) [hereinafter Guidelines of Article 5.3].

[19] CAMPAIGN FOR TOBACCO-FREE KIDS, ESSENTIAL ELEMENTS OF FCTC ARTICLE 5.3 IMPLEMENTING MEASURES (2014), http://www.tobaccocontrollaws.org/files/Essential%20Elements%20of%20FCTC%20Article%2053FINAL.pdf.

[20] *See, e.g.*, CORP. ACCOUNTABILITY INT'L, ROADMAP TO PROTECTING HEALTH FROM BIG TOBACCO 1 (2017), https://www.corporateaccountability.org/wpcontent/uploads/2017/09/mapbooklet_en_web.pdf.

reached by the parties during COP 7, the Secretariat of the FCTC launched the knowledge hub for Article 5.3 to assist members in establishing and implementing their anti-tobacco industry interference regulatory scheme. The knowledge hub further proposed the indicators of the extent of the tobacco industry's interference, including pro-industry elements in the tobacco control policy, government behavior toward the tobacco industry, and actions of government officials in international meetings. For example, signs of interference in government procedures would be identified if states allow, support or endorse any voluntary arrangements in setting or implementing public health policies concerning tobacco control. In addition, non-transparent meetings or interactions between government officials and representatives from tobacco companies should also be prevented, unless such interactions are necessary for regulation.[21] In 2018, the knowledge hub for Article 5.3 and the Secretariat further documented best practices carried out by countries that are proven to be effective in protecting the implementation of governments' tobacco control policies from being obstructed by the tobacco industry.[22] These best practices range from a whole-of-government approach, to the measures protecting the public health-related ministry/department from interference by the tobacco industry, and to the introduction of the transparency mechanism. For instance, Gabon adopted its Tobacco Control Law in 2013 Chapter 7 of the law prohibits the tobacco industry from being associated with the drafting of public policies for tobacco control through participating in tobacco control-related meetings and activities held by Gabonese government agencies.[23] Similar legislation has also been enacted by Moldova, where its 2015 Tobacco Control Law bans any individual who is or has been involved in the management and/or promotion of tobacco companies from participating in the development and implementation of tobacco control policy.[24] Countries which are not able to directly expel tobacco enterprises from the implementation and development of tobacco control policies may take a less stringent approach, which requires the tobacco industry to disclose their activities aiming at interfering the formulation of public health legislation and policies. For instance, Part VIII of Uganda's Tobacco Control Act requires tobacco companies to submit a report that includes all their activities attempting or undertaken to influence the formulation or implementation of any policy or legislation related to

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[21] WHO, *Indicators of Tobacco Industry Interference*, at 2, WHO Doc. WHO-EM/TFI/196/E (2019).

[22] *See generally* SECRETARIAT OF THE WHO FCTC, GOOD COUNTRY PRACTICES IN THE IMPLEMENTATION OF WHO FCTC ARTICLE 5.3 AND ITS GUIDELINES (2018), https://www.seatca.org/dmdocuments/fctc-article-5-3-best-practices.pdf.

[23] Tobacco Control Law ch. 7 (Gabon), https://www.tobaccocontrollaws.org/files/live/Gabon/Gabon%20-%202013%20TC%20Law.pdf. *See also* Decree No. 0284 art. 4 (Gabon), https://www.tobaccocontrollaws.org/files/live/Gabon/Gabon%20-%20Health%20Policy%20Decree.pdf.

[24] Tobacco Control Law arts. 17.10-.13 (Moldova), https://www.tobaccocontrollaws.org/files/live/Moldova/Moldova%20-%202015%20TC%20Amdts.pdf.

tobacco control or public health. Furthermore, under this Act, the tobacco industry shall identify any lobbyists, lobbying firms, and all other persons used for the purpose of taking action to influence the formulation or implementation of tobacco control policy or legislation.[25] Instead of adopting laws or regulations, some parties of the FCTC issue the guidelines or administrative ordinances to transparentize the interactions between government officials and individuals representing tobacco companies' interests, and denormalize the tobacco industry. Such approaches can be found in Panama's Resolution 745 of 2012, which stipulates that any interactions between the civil servant and the people on behalf of the tobacco industry's interests shall be transparent and can only happen when necessary.[26] Nepal enacted a legal instrument to denormalize any tobacco-related corporate social responsibility activities by banning "any financial, technical, material, and structural assistance to educational seminary, theatre, religious discourse, preaching or health-related organizations operated by government, non-government or private sectors."[27]

While being adopted by the Parties of the FCTC at different levels and with varied policy focuses, Article 5.3 of the FCTC has been recognized to be a crucial benchmark for the FCTC parties to design their anti-inference mechanisms to protect the integrity of its tobacco control legislation and policy. As Article 5.3 and its guidelines would effectively impact the tobacco industry's economic interests if they are fully enacted by member states, the provisions and measures have become the focus of the tobacco industry's litigation threats. Recently, several tobacco companies have launched legal action against countries' anti-interference measures on the grounds that these laws and regulations deviate from the principles of "due process" "procedural fairness," and "good governance." Specifically, these tobacco companies argue that under Article 5.3 and its guidelines, the tobacco industry would be deprived of the right to participate in the policymaking process of tobacco control measures or regulations, which is an essential part of the national constitutional principle. Moreover, the tobacco industry may also seek to move the debate into forums beyond domestic courts, such as international investment arbitral tribunals, where the issue of investment protection is the primary focus, rather than the notion of tobacco control and the pursuit of public health.[28] In the following section, this article further

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[25] The Tobacco Control Act 2015 Sixth Schedule (Uganda), https://www.tobaccocontrollaws.org/files/live/Uganda/Uganda%20-%20TCA%20-%20national.pdf.

[26] Ministerio De Salud Resolución No 745 De La Comisión Nacional Para Estudiar El Tabaquismo En Panamá [Ministry of Health Resolution No. 745 on the National Commission for the Study of Tobacco], https://www.tobaccocontrollaws.org/files/live/Panama/Panama%20-%20Res.%20No.%20745%20-%20national.pdf.

[27] Tobacco Product Control and Regulatory Directive art. 22 (Nepal), https://www.tobaccocontrollaws.org/files/live/Nepal/Nepal%20-%20TP%20Regs%202014.pdf.

[28] Regarding the fair and equitable treatment arguments and analysis in the two PMI cases, see Philip

analyzes due process and procedural fairness doctrines and their evolution in investor-state arbitration practices.

III. THE CONCEPTS OF PROCEDURAL FAIRNESS AND DUE PROCESS IN THE CONTEXT OF INVESTOR-STATE ARBITRATION

Among the substantive protection standards under the investment agreements, the FET standard is the most frequently-argued claim in investor-state disputes. Such a relatively innocuous and benign standard has allowed a number of investors to prevail in cases in which claims of expropriation have failed.[29] The FET standard contains both substantive and procedural dimensions of protection, including "stability and the protection of the investor's legitimate expectation," "compliance with the contractual obligations," "due process," and "good faith principles."[30] This article concentrates on the concepts of due process and procedural fairness under international law and how these two procedural rights are embedded in the FET standard.

A. Procedural Fairness as the Element of the Fair and Equitable Treatment

The importance of maintaining the principles of due process and procedural fairness is widely recognized and emphasized because only when the procedure is exercised in a fair manner can the quality of governance be enhanced.[31] These procedural requirements are also concerned with promoting public confidence in a government's public policy by showing that laws or regulations are being drafted and discussed consistently and

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Morris Asia Ltd. v. Commonwealth of Austl., PCA Case No. 2012-12, Notice of Arbitration, ¶¶ 7.6-.8 (Nov. 21, 2011); Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 88-123 (July 8, 2016) [hereinafter PMI v. Uruguay]. *See also* Tania Voon, *Philip Morris v Uruguay: Implications for Public Health*, 18(2) J. WORLD INV. & TRADE 320, 324-26 (2016); Andrew D. Mitchell & Sebastian M. Wurzberger, *Boxed in? Australia's Plain Tobacco Packaging Initiative and International Investment Law*, 27(4) ARB. INT'L 623, 639-45 (2014); Weiler, *supra* note 7, at 20-27.

[29] Sebastián López Escarcena, *Investment Disputes* Oltre lo Stato*: On Global Administrative Law, and Fair and Equitable Treatment*, 59 B.C. L. REV. 2685, 2699 (2018); IISD, INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM 2000-2010 19 (Nathalie Bernasconi-Osterwalder & Lise Johnson eds., 2010), https://www.iisd.org/system/files/publications/int_investment_law_and_sd_key_cases_2010.pdf; J. Roman Picherak, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, 9(4) J. WORLD INV. & TRADE 255, 255-56 (2008).

[30] *See generally* Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39(1) INT'L LAW. 87 (2005); Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12(1) SANTA CLARA J. INT'L L. 7 (2014).

[31] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 142-43 (2d ed. 2008).

carefully.[32] Traditionally, the concepts of due process and procedural fairness are firmly rooted in both common law and civil law systems, and are now regarded as the embodiments of "minimum standards in the administration of justice" under international law.[33] They guarantee individuals the right to a fair trial and prohibit arbitrary and discriminatory conduct before judicial and other governmental agencies.[34] In addition, due process and procedural fairness also infer the duty of non-discrimination, whereby a country cannot accord different treatments to individuals with similar circumstances.[35] Scholars contend that the notions of due process and procedural fairness are basic fundaments of the rule of law. From the perspective of the field of Global Administrative Law (hereinafter "GAL"), maintaining the transparency of administrative procedures and ensuring stakeholders' procedural rights in public authorities' policymaking processes is of great importance in promoting legitimacy, good governance, and democracy.[36] According to Kingsbury, GAL comprises "the mechanisms, principles, practices, and supporting social understandings that promote or affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing an effective review of the rules and decisions they make."[37] Failing to meet elements of due process and procedure constitutes the internationally wrongful act of denial of justice.[38] The substantive provisions of investment treaties and the investor-state dispute settlement mechanism are the exemplary subjects of GAL's efforts to pursue good governance. As Van Harten and Loughlin conclude, the investment arbitral mechanism "must be treated as a semi-autonomous international adjudicative body that reviews and controls state conduct in the public sphere."[39]

Because investment treaties and investor-state arbitration are perceived as the component of GAL, it is unsurprising that these procedural principles that have emerged in the national administrative law system and been

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[32] Jarrod Hepburn, *The Duty to Give Reasons for Administrative Decisions in International Law*, 61(3) INT'L & COMP. L.Q. 641, 645 (2012).

[33] *See generally* Giacinto della Cananea, *Minimum Standards of Procedural Justice in Administrative Adjudication*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 39 (Stephan W. Schill ed., 2010).

[34] *Id.*

[35] IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 177-80 (2008).

[36] Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1, 16-18 (2005).

[37] *Id.* at 17.

[38] Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) INT'L & COMP. L.Q. 867, 893 (2014); Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20(3) EUR. J. INT'L L. 729, 731 (2009).

[39] Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17(1) EUR. J. INT'L L. 121, 122 (2006).

proposed by GAL are frequently reiterated by the investment arbitral tribunals when exploring the meaning of the FET standard under investment treaties. That is, the doctrines of due process and procedural fairness constitute the investment protections from the procedural dimension, which mainly reflects the procedural rights of foreign investors under the FET standard.[40] The basic idea of the procedural principle requires host states to provide a basic standard of fairness and a certain degree of transparency in their judicial, legislative, and administrative procedures.[41] In the context of governmental procedures, the doctrine of procedural fairness necessitates that the states guarantee that the investors can enjoy the opportunity to participate in the decision-making and law-making process of the proposed measure that might affect their interests, which may include, but not be limited to, the rights to "have prior notice of decision," "be heard and convey their opinions," "be provided the reason," and "ask the proceeding be held in an unbiased manner."[42] These constitutive elements are frequently intertwined with other legal protections, such as the legitimate expectations of investors, the prevention of arbitrariness, and the principle of good faith, which explains the fact that their individual or collective breach will amount to a violation of the FET clause.[43]

To enhance the clarity of the scope of the FET standard, investment treaties increasingly specify the components in their FET clause. Among these, the concepts of due process and procedural fairness have also been specifically clarified as covered by the FET standard. For example, Article 5(2)(a) of the U.S. Model BIT 2012 provides that "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[44] Article 10(2)(a), Chapter 12 of the Taiwan–New Zealand Economic Cooperation Agreement and Article 9.7, subparagraph 2(a) of the Taiwan–Singapore Economic Cooperation Agreement also provide the same provisions,[45]

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[40] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 82, 98 (2005).

[41] ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 213 (2011); MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 204-16, 250-51 (2013).

[42] U.N. CONF. ON TRADE & DEV., FAIR AND EQUITABLE TREATMENT, at 80-81, U.N. Doc. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2011), http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf; OECD, *Fair and Equitable Treatment Standard in International Investment Law* 28-36 (OECD, Working Papers on Int'l Inv. No. 2004/03, 2004).

[43] Escarcena, *supra* note 29, at 2701-02.

[44] *See* 2012 U.S. Model Bilateral Investment Treaty: Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment art. 5.2(a) (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[45] *See* Agreement Between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation, N.Z.-Taiwan, ch. 12, art. 10(2)(a), July 18, 2013, https://www.nzcio.com/assets/NZCIO-documents/ANZTEC-Final-Text-10-July-2013-NZ.pdf;

which directly emphasize that the principle of due process is covered in the FET standard. The investment treaty practices demonstrate that the concepts of due process and procedural fairness are intertwined with the FET standard.

B. Procedural Fairness in Investment Arbitral Jurisprudence

When further reviewing the arbitral jurisprudence, the tribunals have provided numerous analyses and views on the principles of due process and procedural fairness. For example, in *Alex Genin and others v. Estonia*, the tribunal stated that if the host state failed to notify the investors in advance, or deprived the investors of their right to participate in the session dealing with their interests at stake, it would be deemed to have violated the principle of due process and the FET standard.[46] However, as the authority of the host state did not violate the relevant national legislature, and such procedure defects did not amount to the level of intended discrimination or manifestly bad faith, the FET standard was not violated. Another case addressing the issue of due process is *International Thunderbird v. Mexico*, where the tribunal rejected the claimant's argument that the Mexican government failed to provide due process. The tribunal further ruled that not every procedural deficiency would be deemed as a violation of the FET standard; in fact, it would only be deemed as such when irregularities "were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment."[47] Furthermore, in *ADC Affiliated Ltd and others v. Hungary*, the tribunal emphasized that "due process of law demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken . . . . Some basic legal mechanisms, such as reasonable advance notice, a fair hearing . . . are expected to be readily available and accessible to the investor to make such legal procedure meaningful."[48] Thus, if the host state makes use of its regulatory power which may negatively infringe foreign investors' investment interests, the host state owes a duty to provide certain mechanisms for foreign investors to fully convey their opinions in order to ensure their procedural rights. Any failure to accord foreign investors opportunities to comment or express opinions, or utilize other procedural guarantees in the governmental procedures, may constitute a violation of the

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Agreement Between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership, Sing.-Taiwan, art. 9.7, ¶ 2(a), Nov. 7, 2013, https://fta.trade.gov.tw/pimage/20141210135639028.pdf.

[46] Alex Genin v. Republic of Est., ICSID Case No. ARB/99/2, Award, ¶ 364 (June 25, 2001) [hereinafter Alex Genin and others v. Estonia].

[47] Int'l Thunderbird Gaming Corp. v. United Mexican States, Arbitral Award, ¶ 200 (Jan. 26, 2006) [hereinafter International Thunderbird v. Mexico].

[48] ADC Affiliate Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award of the Tribunal, ¶ 435 (Oct. 2, 2006).

FET standard.[49]

In addition, the concept of "transparency" reveals a close connection to the principle of due process, and was elaborated by arbitral tribunals in the context of FET standard. For instance, in *Parkerings-Compagniet AS v. Lithuania*, the claimant argued that the host state's failure to disclose crucial information to the stakeholders constituted a violation of the principle of transparency and a breach of the FET standard. However, although the tribunal agreed that failure to provide relevant information to the investors before the measures or regulations were adopted is often considered as a breach of good faith and the principle of transparency, the fact in and of itself is insufficient to establish a violation of the FET standard because the complexity of the legal regime and whether the host state acted in bad faith shall all be considered.[50]

C. Summary

Both academia and case law argue the importance of due process and transparency in international investment law and the arbitral proceedings. The notion of procedural fairness has been gradually highlighted via the procedural dimension of the FET standard. Under the principle of procedural fairness, the host state is obliged to establish a mechanism that may fully protect foreign investors' procedural rights (e.g., notifying the affected investors in advance, ensuring the investors' right to participate in the decision-making and law-making process, and respecting their right to express themselves and the right to be heard).

However, despite frequently citing notions of due process, the arbitral tribunals frequently appear to adjudicate these arguments in a conservative manner; for instance, many tribunals tend to provide the host state's legal system with a certain flexibility. If a procedural deficiency is a "mere error" which could be remedied within the national legal system, it is difficult for it to be deemed a violation of the FET standard. Only when the participatory procedure is totally or absent, or a party is totally deprived of the right of participation, or the procedural irregularity combines with other forms of violations, such as the host state acting in bad faith or unjustifiable discrimination, can one attempt to persuade the arbitral tribunal that there is a breach of the FET standard.[51]

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[49] DOLZER & SCHREUER, *supra* note 31.

[50] Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 339-46 (Sept. 11, 2007).

[51] Alex Genin and others v. Estonia, *supra* note 46, ¶¶ 42-61; International Thunderbird v. Mexico, *supra* note 47, ¶¶ 197-200.

IV. THE RELATIONSHIP BETWEEN FCTC ARTICLE 5.3 V. FAIR AND EQUITABLE TREATMENT STANDARD: CONFLICT OR COMPLEMENT?

A. New Challenge from Tobacco Industry: The Policymaking Process of Tobacco Control Lacks Transparency

Recently, the tobacco industry has changed its tactics from arguing against the legitimacy of the tobacco control measures from a substantive aspect to claiming the deficiency of procedural fairness; namely, claiming that the policymaking process of tobacco control measures lacks "due process." For example, the Institute of Economic Affairs, an organization believed to be a close ally of the tobacco industry, advised the industry to appeal to "due process and fairness and less about the specifics of tobacco policy" in drawing the public's attention.[52] They even bluntly stated that:

> With regard to [Article] 5.3 and COP, the industry needs to find allies amongst groups who take an interest in transparency, openness and constitutional structures. Such groups needn't be sympathetic to the regulatory agenda of the industry; indeed they may even be antagonistic to the industry and tobacco products in general. That needn't matter—the issue here is about the manner in which policy is developed and created, not the exact content of the policy.[53]

Moreover, investment treaties and economic agreements have increasingly contained provisions on "regulatory cooperation" or "transparency," which encourage contracting parties to give interested persons, which may include companies, stakeholders, and even lobbying organizations, a voice in regulatory deliberations.[54] This regulatory change in treaty design also reinforces the legitimacy of including the tobacco industry in the decision-making and law-making process of tobacco control measures. For instance, Article 27.1 of the Comprehensive Economic and Trade Agreement between the European Union (EU) and Canada provides that the EU and Canada shall promptly respond to comments and questions on any proposed measures in their administrative proceedings.[55] To

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[52] *Tobacco Industry and Front Groups Pump up Their Propaganda for COP7*, FRAMEWORK CONVENTION ALL. (Nov. 7, 2016), https://fctc.org/tobacco-industry-and-front-groups-pump-up-their-propaganda-for-cop7/.

[53] *Id.*

[54] Conference of WHO FCTC, *Trade and Investment Issues, Including Agreements, and Legal Challenges in Relation to the Implementation of WHO FCTC*, ¶ 18, FCTC/COP/7/21 (July 29, 2016).

[55] Comprehensive Economic and Trade Agreement Between the European Union and Canada, art. 27.1, 2017 O.J. (L11) 23, 180.

facilitate stakeholders' procedural rights under Article 27.1, Article 27.3 further requires government agencies to provide reasonable notice to people whose interests might be affected by the proposed measure when the administrative proceeding is initiated. Those informed stakeholders shall have reasonable opportunities to present facts and arguments in support of or against the position of the proposed measures.[56] Likewise, domestic law in many states requires government agencies to consult interested stakeholders and requires the agencies to solicit recommendations from them. Such developments offer the tobacco industry a possible loophole to challenge the legitimacy of the FCTC. For instance, the tobacco industry claims that Article 5.3 of the FCTC, along with its guidelines and other relevant provisions, all contravene existing commitments to "better regulation" and "good governance" under the bilateral investment agreement or the investment protection chapter, or provision under the free trade agreement.[57] Facing these challenges from the tobacco industry and potentially competing international and domestic legal obligations, how should the FCTC and the public health community respond?

B. The Investment Dispute Concerning Tobacco Companies' Procedural Fairness: PMI v. Uruguay

1. The Claimant's Argument — In its claim against Uruguay, PMI argued that there was no due process during the drafting process of the new tobacco control measures at stake. In this case, the issue of due process was linked to the submission of whether the challenged tobacco control measures were arbitrary or not.[58] According to the claimant, the "Single Presentation Regulation" (hereinafter "SPR"), which prohibits tobacco manufacturers from marketing more than one variant of cigarette per brand family in order to mitigate the ongoing adverse effects of tobacco promotion, was adopted solely based on the evidence provided by public health experts without considering the opposing views shared by the general public. During the policymaking process of the SPR, the public health authority of Uruguay failed to provide any evidence showing that the government had engaged in meaningful deliberations prior to the SPR entering into force. The claimant even argued that the SPR was drafted by one individual's own initiative, without input or consultation from experts in relevant fields, not to mention the contradictory perspectives from the claimant and other stakeholders. Therefore, the claimant argued that the SPR had substantially damaged their investments in an arbitrary manner, and constituted a violation of Article 3(2)

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[56] *Id.* art. 27.3.
[57] *See generally* Katherine E. Smith et al., *Tobacco Industry Attempts to Undermine Article 5.3 and the "Good Governance" Trap*, 18(6) TOBACCO CONTROL 509 (2009).
[58] PMI v. Uruguay, *supra* note 28, ¶ 363.

(i.e., the FET standard) of the Switzerland–Uruguay BIT.[59]

2. The Tribunal's Analysis — Regarding the "arbitrary" claim raised by the claimant, the tribunal firstly analyzed the standard set forth by other cases. For instance, in the *ELSI v. U.S.* case, the International Court of Justice (ICJ) defined the term "arbitrary" as "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[60]

The tribunal applied the same standard in this case. It found that Uruguay had implemented a series of measures including the creation of groups of experts and agencies for the study and prevention of tobacco effects on human health starting in year 2000. The Ministry of Public Health in Uruguay even established the "Advisory Commission," where the challenged measure (the SPR) was fully discussed and eventually adopted under this Commission by the government official, experts in the field of law and public health, and public society. Thus, the tribunal agreed that the challenged measures were adopted with due consideration by public officials, even though the paper trail of these meetings was exiguous.[61]

In addition, the FCTC played an important role in the tribunal's reasoning on this issue. According to the tribunal, the FCTC is a reference in determining the reasonableness of the challenged measures. In other words, if the challenged measure is consistent with the FCTC, and is not made irrationally and not exercised in bad faith, the respondent state should be paid great deference in its governmental judgments of national needs in matters such as the protection of public health in the present case.[62]

In conclusion, in this case, as the challenged measure was reasonable and not arbitrary, grossly unfair, unjust, discriminatory, or lacking due process, the tribunal concluded by a majority that its adoption was not in breach of the FET clause of the Switzerland–Uruguay BIT.

3. Some Observations — Although the case did not specifically invoke Article 5.3 of the FCTC, it touched upon the issue of the right to participate in the course of policymaking as argued by the claimant; namely, the procedural rights for the tobacco industry in the policymaking process. In this case, the claimant argued that the formulating process of the SPR was biased and lacked comprehensiveness because it was adopted mainly by a group of experts within public health professions. In other words, the SPR was enacted without any input from the tobacco industry, which should be the most crucial stakeholder of the tobacco control policy.

However, the tribunal rejected the argument submitted by the PMI. After reviewing the relevant reasoning in the award, this article believes there are

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[59] *Id.* ¶¶ 327-34.
[60] Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, ¶ 128 (July 20, 1989) (cited from PMI v. Uruguay, ¶ 390).
[61] PMI v. Uruguay, *supra* note 28, ¶¶ 396-97, 407.
[62] *Id.* ¶¶ 399, 407.

two factors that prompted the arbitral tribunal to reach its conclusion: (1) the "conservative legal standard of the violation of due process under the FET standard," and (2) "deference to the host states' right to protect their public health as the SPR is based on the FCTC."

With regard to the first factor, the tribunal recalled relevant arbitral practices, finding that the FET standard would be breached by state conduct that is "arbitrary," "manifestly non-transparent," "grossly unfair," "unjust," or idiosyncratic," and is "discriminatory and exposes the claimant to sectional or racial prejudice."[63] The tribunal referred to many previous awards to establish the legal standard of the FET standard for this case (e.g., *Chemtura v. Canada*, *Genin v. Estonia*, and *Saluka v. Czech Republic*). In other words, only when the host state seriously violates or deviates from the investor's procedural rights protected under the domestic law and international minimum standard, or neglects the investor's right to participate in bad faith, does a breach of the FET standard occur. Weiler also holds this view, maintaining that: "tribunals will still accord deference to the municipal decision-making process, essentially requiring the presence of 'something more' than just a procedural defect . . . ."[64]

For the second factor, it is unanimously recognized that the protection against arbitrary measures does not empower the tribunal to "second guess" the legislative or regulatory judgments of the host state. On the contrary, it is well-settled that the judgments of national regulatory and legislative authorities are entitled, under the fair and equitable treatment standard, to a substantial measure of deference.[65] Most importantly, the tribunal emphasized that:

> [T]he text of Article 3(2) of the BIT must be interpreted according to the normal canons of treaty interpretation . . . . This includes interpretation in accordance with general international law, as stated in Article 31(3)(c) which requires that a treaty be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties." The scope and content of FET under Article 3(2) must therefore be determined by reference to the rules of international law, customary international law being part of such rules.[66]

Under the above analysis, other relevant international law, including the

[63] *Id.* ¶ 323.
[64] Weiler, *supra* note 7, at 22.
[65] MCCABE CTR. FOR L. & CANCER, THE AWARD ON THE MERITS IN PHILIP MORRIS V URUGUAY: IMPLICATIONS FOR WHO FCTC IMPLEMENTATION 18-19 (2016), http://www.mccabecentre.org/downloads/Knowledge_Hub/McCabeCentrepaperonUruguayaward.pdf.
[66] PMI v. Uruguay, *supra* note 28, ¶ 317.

FCTC, shall also be considered by the tribunal when interpreting the term "fair" and "equitable" through the treaty interpretation.[67] In addition, the tribunal frequently emphasized the importance of the FCTC in the arbitral award to justify the legality of SPR and determined that it is not arbitrary.[68] This "public health-friendly" award may offer an encouraging precedent, and encourage the parties to the FCTC to firmly implement their obligations and even adopt the non-binding recommendations provided by the guidelines or policy recommendations of the FCTC.

In summary, although the dissent of the tribunal emphasized the need to amass evidence and conduct formal domestic processes in the development of innovative measures,[69] it is undeniable that the outcome in this case enumerates the evidential values of the FCTC in investment dispute, and reaffirms states' regulatory capacity in matters of public policy, including protecting public health.[70] In other words, if the challenged tobacco control measure was based on a provision under the FCTC, it would hardly be deemed a violation of the FET standard, which absolutely includes the obligations and recommendations provided in Article 5.3 and its guidelines. This ruling sets an extremely high threshold for future tobacco giant companies seeking to challenge a non-discriminatory tobacco control measure through initiating an investment arbitration that has a legitimate objective and that has been taken in good faith.

C. Not Conflict, but Complement?

1. Precluding Tobacco Industry's Interference and the Procedural Fairness: Lessons from Domestic Jurisprudence — The FCTC Article 5.3 has been introduced by numerous members of the FCTC and has become domestic law to ensure the integrity of their tobacco control policies. The tobacco companies, especially those giant tobacco manufacturers which constantly hire influential lobbyists and lobby firms to manipulate the progress of the tobacco control-related measures, are confronted with serious

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[67] For similar points of view, see Ernst-Ulrich Petersmann, *How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes*, 10(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 27, 66-70 (2015); Tsai-yu Lin, *Inter-Mingling TRIPS Obligations with an FET Standard in Investor-State Arbitration: An Emerging Challenge for WTO Law?*, 50(1) J. WORLD TRADE 71, 80-82 (2016).

[68] PMI v. Uruguay, *supra* note 28, ¶¶ 404-10.

[69] Philip Morris Brands Sàrl (Switzerland) v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion: Mr. Gary Born, Arbitrator, ¶¶ 108-09, 116 (July 8, 2016). For further discussion of the scientific issue for the public health-related case in investment arbitration, see generally Tania Voon, *Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law*, 18(4) J. INT'L ECON. L. 795 (2015).

[70] *See generally* Margherita Melillo, *Evidentiary Issues in* Philip Morris v Uruguay*: The Role of the Framework Convention for Tobacco Control and Lessons for NCD Prevention*, 21 J. WORLD INV. & TRADE 724 (2020).

legal obstacles to exerting their influence. In response, the tobacco industry has initiated several lawsuits to challenge the constitutionality of the anti-interference regulations adopted by member states. However, tobacco companies' arguments have been mostly rejected by the courts in different jurisdictions for the following reasons.

First, in the case of *British American Tobacco Kenya, PLC v. Ministry of Health*, British American Tobacco Kenya (hereinafter "BAT Kenya") filed a petition to the Kenya Supreme Court. Kenya promulgated the Tobacco Control Regulations in 2014 to carry out the objectives of its Tobacco Control Act. Part V of the Tobacco Control Regulations addresses the issue of tobacco industry interference and regulates the interactions between tobacco countries' representatives and government officials. Specifically, Section 30(g) of the Regulations stresses that a public authority shall "restrict involvement of tobacco industry in the development of tobacco control policies and laws except in public forums where the industry is presenting its views to the public authority on relevant tobacco control laws and policies."[71] With this mandate, the Cabinet Secretary for Health and Tobacco Control Board of Kenya minimized the engagement with BAT Kenya and other tobacco industry stakeholders in the process of developing tobacco control policies.[72] Among other claims, BAT Kenya made the criticism that the Regulations caused its right to participate in the policymaking process to be limited and entirely unsatisfactory.[73] Thus, it argued that this restriction, which was enacted on the basis of Article 5.3 of the FCTC, constituted a violation of the right to public participation, discriminated against the tobacco industry, and breached its freedom of association under the Kenyan Constitution. However, the Supreme Court of Kenya upheld the decisions of the lower courts and dismissed nearly all the legal challenges petitioned by BAT Kenya. Regarding the issue of the right to participation, the Supreme Court recognized that public participation is a constitutional principle under Kenya's Constitution, and it must be real, meaningful, and not illusory.[74] However, in considering whether the public participation is meaningfully organized by the government, the potential influence from the public shall be considered. In addition, the Supreme Court further noted that public participation does not necessarily mean that the views given by the interested party must prevail. Given that there was sufficient public participation and consultation in the formulation of the regulations and the process, the Supreme Court ultimately upheld the finding reached by the lower courts that there was no violation of the right to public participation. Second, concerning the submission of the right to equality and

[71] Tobacco Control Regulations, No. 56 (2014), Kenya Gazette Supplement No. 161 § 30(g).
[72] Brit. Am. Tobacco Kenya, PLC v. Ministry of Health (2019) eK.L.R. 5 (S.C.K.) (Kenya).
[73] *Id.* at 5.
[74] *Id.* at 45.

freedom of association, the Supreme Court dismissed BAT's argument that the anti-inference provision solely targeting the tobacco industry stipulated in the Tobacco Control Regulations constitutes unconstitutional discrimination. Nevertheless, the Supreme Court again affirmed the lower court's decision. It stressed that not all discrimination was unfair; instead, the Court shall undertake the weighing and balancing test to make its determination by evaluating the nature of the rights or freedom that are limited, the restrictiveness of the limitation, the importance of the purpose of such limitation, and whether the enjoyment of rights and freedoms would conversely prejudice the rights and freedoms of others.[75] In this case, in light of the significant negative impacts of tobacco consumption on public health, and considering the nature of the limitation, which does not preclude all interactions between the tobacco industry and government officials but only requires such interactions to be accountable and transparent, together with the regulatory purpose of ensuring effective enforcement and implementation of the tobacco control laws, the Supreme Court ruled that the Tobacco Control Regulations and Article 5.3 of the FCTC do not constitute unconstitutional discrimination against BAT's freedom of association, or tobacco companies in general, because it was reasonable to treat the tobacco industry differently from other industries.[76]

Another legal challenge in terms of the legitimacy of limiting the interaction between the tobacco industry and government officials was brought by BAT against Uganda. As has been elaborated, Uganda enacted the Tobacco Control Act in 2015 which incorporates the provision of the FCTC Article 5.3 preventing tobacco companies from unduly influencing and interfering with the formulation, implementation, and administration of public health policies of tobacco control. Section 25 of the Act attempts to prevent conflicts of interest that have resulted from the engagement and involvement of the tobacco industry in the process of developing, implementing, and monitoring the tobacco control policy.[77] The legitimacy of the measure was endorsed by the lower courts of Uganda. In 2019, BAT appealed to the Constitutional Court of Uganda, claiming that the limitation violates its participatory rights in the policy and law-making process, and also amounts to discrimination against the tobacco industry and other sectors. Like the Supreme Court of Kenya, the Constitutional Court of Uganda rejected BAT's arguments on all grounds. First, it highlighted the purpose of the Tobacco Control Act, which was enacted to implement the provisions of the FCTC so as to meet Uganda's legal obligations as a contracting party and its government's duty to protect nationals' right to life. Perceiving public

[75] *Id.* at 49.
[76] *Id.* at 53-54.
[77] Brit. Am. Tobacco Ltd. v. Att'y Gen. & Ctr. for Health Hum. Rts. & Dev. (2019) 15-16 (Const. Ct.) (Uganda).

health as the priority, the Court recognized that the measure at issue did restrict BAT's freedom of practicing businesses, which may involve interactions with government officials. Nonetheless, the Court concluded that the limitations imposed by the Tobacco Control Act are justifiable in a free and democratic state. Notably, the Court perceived BAT's petition as one of many cases brought around the world to "influence policy and thwart effective legal and policy framework world-wide"[78] and undermine tobacco control legislation to "increase their profits irrespective of the adverse health risks their products pose to human population."[79] These facts, from the Court's perspective, further manifested the importance and necessity of implementing the provision of Article 5.3. To conclude, the Court upheld the constitutionality of the Act and dismissed BAT's petition in its entirety.[80]

Although this is the jurisprudence in terms of specific countries' domestic laws, for which investment arbitral tribunals bear no duty to take such judgments into account, this article contends that the reasonings and analytical approaches exercised by the domestic courts share common ground with the examination of the FET standard in investment arbitration and are therefore worth referencing. The litigation initiated by the tobacco industry illustrates how the legal provisions protecting the formation and implementation of the tobacco control policies from tobacco industry interference have been challenged; how states have articulated their defenses to justify their anti-interference measures; how courts have adjudicated the issues at stake and exercised the weighing and balancing test to assess the competing legal rights enjoyed by tobacco companies and the general public; and how Article 5.3 of the FCTC has been introduced by the courts as well as their role in strengthening the legitimacy of the measures. The courts' decisions, in this article's view, accord great deference to governments' public health policy space. In the forum of investment arbitration, in response to tobacco companies' challenge of the anti-interference measure on the grounds of undue discrimination or arbitrariness, host states may articulate their defenses by arguing that the discriminatory treatment against the tobacco industry is reasonable given the nature of its business and the harm tobacco causes. In addition, the limitation imposed on tobacco companies to restrict their interactions with government officials involved in the formation and implementation of tobacco control policies is also justifiable and does not amount to an infringement of the right to procedural fairness.[81]

2. Article 5.3 of the FCTC Manifests States' Right to Regulate the Tobacco Industry — The tobacco industry constantly criticizes the fact that

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[78] *Id.* at 50.
[79] *Id.* at 53.
[80] *Id.* at 53-54.
[81] *Challenges in Domestic Courts Relating to WHO FCTC Article 5.3*, FCTC, https://untobaccocontrol.org/kh/legal-challenges/domestic-courts/art-5-3/ (last visited Mar. 25, 2022).

the FCTC and the COP are working in a "black box" by completely excluding stakeholders from all subsidiary meetings and suppressing the tobacco industry's opinion.[82] Article 5.3 of the FCTC, which is the legal basis requiring its contracting parties to prevent their tobacco control policies and measures from being interfered with by the industry, has become the tobacco industry's fundamental obstacle to paralyzing the progress of tobacco control. In the past few years, the tobacco industry has actively brought both domestic litigation and international arbitrations to challenge the legitimacy of states' tobacco control measures, codifying the provision of Article 5.3 of the FCTC. The main strategy of these tobacco giant companies is to generate "regulatory chill" among the members of the FCTC and delay the formation and implementation of more stringent tobacco control measures.[83]

In light of the negative impact on tobacco control efforts brought by the tobacco industry, scholars have contended that tobacco companies should be entirely precluded from relevant policymaking processes, such as tobacco control regulations or even investment treaty negotiation, in order to maintain the integrity of the public health measures. Commentators holding this view refer to Article 5.3 of the FCTC, which specifies the irreconcilability between the tobacco industry's interests and public health policy interests, to support their argument.[84] In addition, they stress that as Article 2.1 of the FCTC encourages parties to implement measures beyond those required by the Convention,[85] there should be ample room for parties to go beyond the legal requirements stipulated by it. Hence, it should be legitimate for the FCTC parties to enact anti-interference provisions stricter than Article 5.3 of the FCTC, which may reasonably include the overwhelming exclusion of the tobacco industry from the policymaking process.

However, by examining the provisions of Article 5.3, its implementing guidelines, and scrutinizing the concepts of due process and procedural

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[82] Gregory F. Jacob, *Administering the Mark of Cain: Secrecy and Exclusion in the FCTC Implementation Process*, 41(3) FORDHAM INT'L L J. 669, 684 (2018).

[83] *See* Robert Stumberg, *Safeguards for Tobacco Control: Options for the TPPA*, 39 AM. J. L. & MED. 382, 395 (2013); Jonathan Liberman, *Making Effective Use of Law in the Global Governance of NCD Prevention*, *in* REGULATING TOBACCO, ALCOHOL AND UNHEALTHY FOODS: THE LEGAL ISSUES 12, 24-25 (Tania Voon et al. eds., 2014). Regarding the detailed discussion on "regulatory chill", see generally CHRISTINE CÔTÉ, A CHILLING EFFECT? THE IMPACT OF INTERNATIONAL INVESTMENT AGREEMENTS ON NATIONAL REGULATORY AUTONOMY IN THE AREAS OF HEALTH, SAFETY AND THE ENVIRONMENT (2014).

[84] *See* Tsai-yu Lin, *Preventing Tobacco Companies' Interference with Tobacco Control Through Investor-State Dispute Settlement Under the TPP*, 8(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 565, 568-70 (2013).

[85] FCTC art. 2.1: "In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.".

fairness elucidated by the investment arbitral jurisprudence, this article contends that there appears to be no legal conflict between Article 5.3 and the investment treaty obligations, especially the procedural dimension of the FET standard. First, from the perspective of the ordinary meaning of the treaty provision, members' primary legal obligations under Article 5.3 and its implementing guidelines are to act in a transparent and accountable manner when dealing with the tobacco industry, and to avoid offering any preferential treatment to tobacco companies. In other words, neither Article 5.3 nor its guidelines require the parties to completely restrict tobacco companies' procedural rights of fairness in a manner that deviates from the rule of law. This perspective can be further supported by the negotiation history of Article 5.3. During the fifth session of the intergovernmental negotiating body (INB5) of the FCTC, the precursor of Article 5.3 provided the consolidated Chair's Text as follows: "[i]n setting and implementing their public health policies, the parties shall avoid undue interference by the tobacco industry."[86] This treaty language, however, was opposed by many delegations because they considered it might impose overly strong legal obligations on sovereign states, particularly those that honor the right to participate in policymaking as the fundamental principles in their national constitutions that mandate transparent governance procedures and vest stakeholders with participation rights. Accordingly, in its final version, Article 5.3 was softened by replacing the terms "avoid," "undue," and "interference" with the preconditions of "in accordance with national law," which requires the implementation of the protective measures adopted pursuant to Article 5.3 to be in line with parties' domestic legal systems, especially the national constitutional principles.[87] Moreover, no delegation participating in the INBs suggested that Article 5.3 should be read as requiring the comprehensive exclusion of all tobacco industry participation in domestic policymaking relating to tobacco control.[88] Therefore, resorting to the *travaux préparatoires* of the FCTC, a similar conclusion can be reached for Article 5.3 whereby this provision does not suggest parties of the FCTC deprive tobacco companies of their rights to participate in the policymaking process in a manner that deviates from procedural fairness. That is to say, the tobacco industry or other stakeholders may still be allowed to participate and express their perspectives in public hearings and any other relevant policymaking process relating to tobacco control policies, provided they are prohibited from unduly delaying the discussion proceedings and

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[86] WHO, *New Chair's Text of a Framework Convention on Tobacco Control*, at 6, WHO Doc. A/FCTC/INB5/2 (June 25, 2002).

[87] FCTC art. 5.3: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry *in accordance with national law* (emphasis added).".

[88] Jacob, *supra* note 82, at 684.

provided that all the interactions between the government officials and the industry are conducted in a transparent and accountable manner.[89] A similar conclusion has also been reached in the national legal context. As elaborated in the previous section, in *BAT v. Ministry of Health, CA of Kenya*, the Supreme Court of Kenya also ruled that merely the restriction of limiting interactions between tobacco industries and government officials in line with Article 5.3 does not amount to an infringement of the right to procedural fairness. Consequently, even if they aim to realize unquestionably noble public health goals, this article is of the view that the "beyond-FCTC" measures shall still be consistent with the party's legal system and international law, which includes the principle of the rule of law and the aforementioned international legal obligations that require countries to protect and respect individuals' property rights and freedoms. This analytical framework can also be applied in investment arbitral proceedings. Specifically, if the host state enacts the legislation or adopts measures that totally deprive tobacco companies of opportunities to express their opinions and comments on the ongoing-discussed tobacco control measures, it will constitute a *prima facie* violation of the FET standard under the investment treaty given that such a measure is not supported by the treaty language of Article 5.3 of the FCTC. Most importantly, in view of the fact that tobacco manufacturers are the principal stakeholders having a vested interest in the implementation of tobacco control regulations and measures, their procedural rights of participating in relevant policymaking process, for instance, to offer them the chance to comment on the draft of the proposed tobacco regulations, shall still be granted by the host state.[90] Except in the rare circumstance where such engagements may trigger the concern of derogating international public policy (e.g., corruption, which will be discussed in the later section), unconditionally depriving a party of the right to participate may constitute a violation of procedural fairness and is difficult to justify by the host state under international law.

Although the outright exclusion of the tobacco industry might not be a feasible approach to tackling the tobacco companies' influence in the formation of public health policies, this article argues that Article 5.3 of the investment arbitral tribunal as manifesting the scope of host states' right to regulate in the context of limiting the tobacco industry's undue inference. That is, even if granting tobacco companies the right to engage in the decision-making process of tobacco control policy, certain rules of conduct should be implemented to synergize the procedural rights enjoyed by tobacco

[89] Smith et al., *supra* note 57, at 510.

[90] For similar perspectives, see INT'L UNION AGAINST TUBERCULOSIS & LUNG DISEASE, THE UNION TOOLKIT FOR WHO FCTC ARTICLE 5.3: GUIDANCE FOR GOVERNMENTS ON PREVENTING TOBACCO INDUSTRY INTERFERENCE 30 (2012), https://theunion.org/sites/default/files/2020-08/The%20Union%20Toolkit%20for%20FCTC%20Article%205.3.pdf.

companies and the integrity and implementation of tobacco control measures. For example, the government officials shall not maintain any private contact with representatives of the tobacco industry except in the public meetings or hearings. Additionally, all the necessary interactions between government agencies and tobacco companies shall be recorded and transparentized.[91] Moreover, if the lobbyists are hired by the tobacco manufacturers, the information of such lobbyists and their activities shall all be registered to ensure that contact between lobbyists and government representatives is conducted in a transparent and accountable manner.[92] In the case where the laws or regulations providing for the protection of public health policies regarding tobacco control from tobacco industry interference are challenged and reviewed by the investment arbitral tribunal, the fact that the aforementioned measures are the implementation of the FCTC provisions, an external but closely relevant international legal instrument, should be specially considered by the tribunal. The international investment treaty system is not a self-contained regime. Article 31.3(c) of the Vienna Convention on the Law of Treaties, which introduces an autonomous method of interpretation—namely systemic integration[93]—instructs the investment arbitrators to "take any relevant rules of international law applicable in the relations between the parties." To this end, in the context of an investment dispute concerning the respondent state's tobacco control measure, the interpretation and application of the investment protection clause, such as the FET standard, shall take the FCTC into account where both parties to the applicable investment treaty are also members of the FCTC. When being cited or considered by the investment arbitral tribunal, the FCTC could contribute to the defense of the host state's tobacco control measures in various ways, such as serving as a legal basis for the measure; manifesting the *bona fide* public health purpose of the measure; offering evidentiary support; demonstrating international consensus on the threat of tobacco use; and being a benchmark for determining the reasonableness, proportionality, or justifiability of the measure.[94] Therefore, the legitimacy and reasonableness of the anti-tobacco industry interference measures which are implemented on the basis of Article 5.3 of the FCTC should, to a large extent, be respected by the arbitral tribunal.[95] Furthermore, considering its

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[91] Guidelines of Article 5.3, *supra* note 18, at 4, 7 (Recommendations 2.2, 5.1).

[92] SECRETARIAT OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, *supra* note 22, at 11.

[93] Vassilis P. Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31(3) MICH. J. INT'L L. 621, 624 (2010). *See also* Int'l L. Comm'n, Final Rep. of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, at 213-14, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

[94] Zhou et al., *supra* note 5, at s114-16.

[95] VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 121-

relatively minor impact on the tobacco industry's businesses, and the widely recognized harmful impacts brought by tobacco consumption, the arbitral tribunal should exercise the weighing and balancing test and therefore grant deference to the host state's right to regulate the undue interference in the formation and implementation of tobacco control regulations.[96] In summary, the arbitral tribunal should pay greater deference to the FCTC members' pursuit of their obligations under the FCTC and the scientific evidence provided by the WHO in concluding that the measures are not arbitrary.[97]

3. Article 5.3 of the FCTC: Complementing Good Governance and Anti-Corruption in the Context of Investment Arbitration — The form of tobacco companies' interventions is manifold. According to the WHO, "tobacco companies have operated for many years with the deliberate purpose of subverting the efforts of the World Health Organization to address tobacco issues. The attempted subversion has been elaborate, well-financed, sophisticated, and usually invisible."[98] Among their interference strategies, corruption and bribery are both illegal forms of misconduct that may unduly delay and even hinder the implementation of national and even global tobacco control policy. These behaviors are not only prohibited by Article 5.3 of the FCTC but also constitute a violation of international public policy.[99] In this scenario, Article 5.3 is an anti-corruption measure that directs many legal and policy instruments to assist member states of the FCTC to tackle the bribes from the tobacco industry and accelerate the implementation of all the other areas of the FCTC.[100]

In the same vein, intervening in the policymaking process or even bribing government officials is not only prohibited under Article 5.3 and its guidelines, but such misconduct, or even illegal corruption, may have repercussions in investment arbitration.[101] To elaborate, the issue of investor corruption has gradually begun to constitute a critical factor in investment

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23 (2013). Lin, *supra* note 67, at 81.

[96] Pei-Kan Yang, *The Margin of Appreciation Debate over Novel Cigarette Packaging Regulations in Philip Morris v. Uruguay: A Step Toward a Balanced Standard of Review in Investment Disputes*, 1 BRILL OPEN L. 91, 110 (2018).

[97] Freya Baetens, *Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design*, 71 INT'L & COMPAR. L.Q. 139, 172-73 (2022).

[98] The Committee of Experts on Tobacco Industry Documents, *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization*, at 228 (July 2000), https://apps.who.int/iris/handle/10665/67429.

[99] *See* Ted Gleason, *Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives*, 21 INT'L ENV'T AGREEMENTS 427, 436-37 (2021). *See also* Carolyn B. Lamm et al., *Fraud and Corruption in International Arbitration*, *in* LIBER AMICORUM BERNARDO CREMADES 699, 707 (M.Á. Fernández-Ballesteros & David Arias eds., 2010).

[100] CORP. ACCOUNTABILITY INT'L & SEATCA, PRIMER ON GOOD GOVERNANCE AND TOBACCO CONTROL 11-12 (Aug., 2014) https://seatca.org/dmdocuments/Primer%20on%20Good%20Governance%20in%20Tobacco%20ControlFinal.pdf.

[101] ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 328 (2012).

arbitral proceedings.[102] At the jurisdictional stage, the existence of investors' corruption or other misconduct affects the jurisdiction of investment tribunals. The legal basis authorizing the arbitral tribunal to deny the jurisdiction is the "unclean hand doctrine" (*ex turpi causa non oritur actio*)—a Latin maxim which means "nobody can benefit from his own wrong."[103] For instance, the *World Duty Free v. Kenya* case is the classical case of the scenario of corruption. The facts of this case are that the investor made a "personal donation" (which was subsequently considered corruption by the arbitral tribunal) to the president of Kenya and received the project of airport facilities in return. However, the *World Duty Free v. Kenya* case was taken over by the host state's authority. In the jurisdiction stage, the tribunal firstly linked corruption with the violation of *bones mores*, which is also a breach of international public policy, and may trigger the tribunal to decline jurisdiction as nobody shall profit from his or her illicit conduct. The tribunal then made reference to several international commercial arbitration awards to reinforce its reasoning.[104] Likewise, a similar analysis also appeared in *Inceya Vallisoletana, SL v. El Salvador*, where the tribunal denied jurisdiction on two grounds: (1) the investor's criminal conduct infringed the host state's law, which led to the result that such investment was not made "in accordance with" the host state's law and would fall outside the scope of protected "investment" under the BIT, and (2) Article 42.1 of ICSID provides that the rules of international law shall be applied by the tribunal as may be applicable, also including principles of good faith, international public policy, and *nemo audiatur propriam turpitudinem allegans*, meaning "no one can be heard to invoke his own turpitude."

Aside from the discussions of international public policy and general principles of law, the past investment arbitral jurisprudence affirms that at the merit stage of investment disputes, the breach of the respondent state's laws and other investors' misconduct are relevant factors for the arbitral tribunal to determine the legitimacy of the host states' corresponding measure in the context of the FET claim.[105] For example, in *Genin v. Estonia*,

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[102] *Id*. at 313.

[103] AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 100 (2009). *See* Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, *in* BETWEEN EAST AND WEST: ESSAYS IN HONOUR OF ULF FRANKE 309, 316-19 (Kaj Hobér et al. eds., 2010).

[104] World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 138-57 (Oct. 4, 2006).

[105] Peter Muchlinski, *'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55(3) INT'L & COMPAR. L.Q. 527, 536-56 (2006). *See also* Andrew Newcombe, *Investor Misconduct*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 187, 196 (Armand de Mestral & Céline Lévesque eds., 2013); Tsai-yu Lin et al., *The Tension Between Investors' Criminal Misconduct Under Host State Law and Investment Treaty Protection: An Unsettled Challenge for Investment Arbitral Tribunals*, 14(1) CONTEMP. ASIA ARB. J. 83, 94-97 (2021).

the arbitral tribunal ruled that the claimant's failure to comply with the laws on transparency and the disclosure of investment information prevented the investor from establishing that Estonia breached the FET standard, given that the measure at issue was taken as a response to the violation of the respondent state's legal order.[106] In a similar vein, in *Southern Pacific Properties v. Egypt*, Egypt argued that its measure was justifiable in response to the investor's intermittent interactions with government officials during the period when the investment agreement was executed. Although Egypt's submission was dismissed by the arbitral tribunal due to a lack of substantial evidence, the tribunal did recognize that if unlawful conduct on the part of the foreign investor could conceivably be identified, the host state's measure that aims to restore the investor's misconduct could therefore be justified and the investor's FET claim would also be rejected.[107] Hence, applying the above arbitral jurisprudence to the issue of the legitimacy of precluding tobacco companies' interference, this article argues that if the tobacco company obstructs the formation or implementation of the tobacco control regulations or policies of the host country through bribing public health officials and legislators, or engaging in other misconduct prohibited by Article 5.3 of the FCTC, then the tobacco company's FET claim against the host state's anti-interference measures should not be validated.

In brief, the investment arbitral jurisprudence illuminates the possible role of Article 5.3 of the FCTC in investment arbitration from a different angle. That is, both Article 5.3 and its guidelines could shed light on the efforts of anti-corruption and the prevention of undue intervention from the tobacco industry as they aim to resist the tobacco industry's influence in the policymaking process and to enhance the transparency and accountability of the public health policies of tobacco control.[108] Therefore, if the tobacco company is found to be involved in corruption or other illegal activities with a view to delaying or weakening the formation or implementation of the state's tobacco control policies, the arbitral tribunal should dismiss the claim against the respondent state's anti-interference measure either at the jurisdiction or merit stages given that such misconduct is not only prohibited under the FCTC but also constitutes a breach of international public policy and the general legal principles. Moreover, the tobacco company may lose its rights or benefits under FET clauses on the basis of the violation of Article 5.3 and the host state laws that codify the FCTC.

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[106] Alex Genin v. Republic of Est., ICSID Case No. ARB/99/2, Award, ¶ 362 (June 25, 2001).

[107] S. Pac. Prop. (Middle E.) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶ 128 (May 20, 1992).

[108] Jacob, *supra* note 82, at 695.

V. CONCLUDING REMARKS

The FCTC is perceived as a success in coordinating a global tobacco control strategy. However, to obstruct the development of the FCTC, tobacco companies have deployed their remarkable capital and organizational resources to lobby or even bribe government officials to delay or even revoke the enactment of effective public health provisions. Thus, it is necessary to establish certain mechanisms to protect the implementation of the FCTC while maintaining the transparency of the decision-making process for each respective party. Article 5.3 of the FCTC serves this purpose as it requires parties to protect their tobacco control policies from interference by the tobacco industry. However, efforts to preclude tobacco companies' interference in the policymaking process have been criticized for deviating from the principle of due process and unconstitutionally depriving the tobacco industry of its due process rights and procedural fairness. The alleged infringements of tobacco companies' procedural rights further raise the question of whether the implementation of Article 5.3 constitutes a breach of the FET clause under investment treaties.

This article explored the objective and scope of Article 5.3 of the FCTC, and its potential roles in investment disputes, with a focus on the arguments of procedural dimensions of the FET standard. In general, this article contends that states' measures implemented to fulfill their obligations under Article 5.3 should be duly respected. Drawing from the domestic jurisprudence addressing tobacco companies' legal challenges against FCTC members' anti-interference measures on the grounds of infringing tobacco companies' procedural fairness and discriminating against the tobacco industry, this article advocates that Article 5.3 can reinforce the legitimacy of the host state's measures for the purpose of protecting against any interference from the tobacco industry. Consequently, when weighing and balancing the interests owned by the state and tobacco industry, special weight should be given to the host state's efforts to realize the highest public health protection level over the tobacco industry's right to procedural fairness in the policymaking process and its business interests. Moreover, this article argues that Article 5.3 could complement global efforts to promote good governance and combat corruption in the context of investment arbitration. In the case where the tobacco company's misconduct (e.g., corruption, bribery, and fraud) is involved, Article 5.3 could manifest the scope of states' rights to tackle tobacco companies' misconduct. In such a scenario, the arbitral tribunal should reject the exercise of its jurisdiction on the grounds of the violations of international public policy and the principle of *ex turpi causa non oritur actio*. In addition, at the merit stage, the arbitral tribunal should take the spirit of Article 5.3 into account and dismiss the tobacco company's FET claim because intervening in the public

health policymaking process through bribery or other prohibitive interactions with government officials is inconsistent with Article 5.3.

Recent trends show that foreign investors tend to utilize the investor-state arbitration as an alternative forum to challenge the host state's public policy, including tobacco control measures. In facing such disputes, arbitral tribunals should remember that neither international investment law nor FCTC constitute a self-contained regime; on the contrary, they are all integrated into a coherent international legal system. Therefore, as international adjudicators granted the authority to resolve treaty disputes, arbitrators should take the whole body of international law into account to reconcile the conflict interests held by both sides and find the right balance.[109]

[109] Baetens, *supra* note 97, at 178-82. VADI, *supra* note 95, at 192-93.

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