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Normalizing Tobacco? The Politics of Trade, Investment, and Tobacco Control

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Policy Points:

- Tobacco industry denormalization is a key strategy for tobacco control that has been formalized in the WHO Framework Convention on Tobacco Control.
- International trade and investment laws are a potential threat to tobacco industry denormalization because they do not automatically incorporate denormalization and, in theory, treat tobacco firms like other commercial interests.
- Countries that seek to defend tobacco control policies against international trade and investment challenges need to have good governance in two senses: good governance as understood by tribunals and good-enough governance to manage the processes and requirements that enable policies to survive international challenges.

Context: Tobacco industry denormalization (TID), portraying tobacco product manufacturers as a deadly industry, is a major strategy for public health advocates. Using this strategy, activists around the world have successfully pushed for governments to enact tobacco control regulations, including the unprecedented international Framework Convention on Tobacco Control (FCTC). TID has been a distinctive legal and political strategy that has affected the place of tobacco in law and has both inspired and constrained those who would imitate the strategy in other areas of regulation, such as diet or alcohol. It is therefore a case study in the creation of a distinctive legal approach and of threats to that approach from the changing role of world trade and investment law, which creates a new set of venues that tobacco industry advocates can use to redefine

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tobacco as a normal good and to seek out "fair and equitable treatment" for their industry.

Methods: I review legal and policy documents pertaining to two major challenges to tobacco control policies in Australia and Uruguay aimed at controlling industry branding.

Findings: International trade and investment law challenges TID and raises fundamental questions about the role of the state in protecting public health. Recent trade disputes involving Uruguay and Australia illustrate this dynamic. Despite losing high-court challenges against packaging regulations in both countries, tobacco firms were still able to challenge states in a different way, through international trade and investment agreements. This article identifies the industry's strategies and the responses of those seeking to avoid renormalizing tobacco as a part of world trade. In particular, states must demonstrate that their tobacco control policies satisfy standards set by tribunals, which include standards of good governance, and they must prepare their policies in a way that reduces legal risk and requires good governance.

Conclusions: Although TID has strengthened the hand of tobacco control advocates, TID strategies alone are not sufficient to defend public regulations against extraterritorial legal challenges in an arena that resists the basic TID technique of singling out a particular industry. Public health advocates might also note the FCTC's aid in helping governments defend themselves against these challenges and consider similar international instruments for other areas.

Keywords: governance, tobacco control, trade, investment.

Tobacco control regulations are often the focus of intense and polarized political conflict. On one side of the conflict is an international community of public health researchers and advocates. Tobacco control advocates share principled beliefs about protecting and maintaining public health, professional judgment about the causal relationships between tobacco use and poor health, common notions of validating that knowledge, and a common policy enterprise. Leveraging scientific evidence and public opinion, they push for tight regulation of tobacco products and the industry that makes them.

Opposing them are tobacco firms and their allies, which are highly globalized, well resourced, and dominated by a handful of large companies. Despite commercial success and strong revenues, tobacco companies have lost a number of important political battles since the late

1990s, resulting in a sullied public reputation and, in many countries, regulatory constraints on lobbying activities. Likewise, the stakes are high for tobacco control advocates who risk losing ground unless they consistently renew their antismoking message.

In such a polarized political environment, each side has a dominant political strategy. Tobacco control advocates seek to link scientific evidence and subject matter expertise with public opinion, constructing a narrative that not only focuses on the individual and population health consequences of smoking but also targets the behavior of the tobacco industry and its contribution to the smoking epidemic. This "denormalization" narrative, encoded in the international Framework Convention on Tobacco Control, portrays tobacco companies' behavior as aberrant, an abnormal, rather than a normal, part of society and economy. Advocates point out that in addition to suffering from the consequences of addiction to a harmful product, smokers are victims of tobacco industry tactics and misrepresentation of the facts.[1]

Denormalization of tobacco industry behavior is beneficial to tobacco control advocates because it changes the culture of smoking at the population level. Public opinion research shows that a poor opinion of the tobacco industry contributes to the decision of some people to not start smoking and strengthens the intent of others to quit.[2] Through years of media campaigns, public education, litigation, and advocacy strategies that emphasize evidence of the industry's duplicity and corruption, public health activists have substantially convinced mainstream audiences that both cigarettes and cigarette manufacturers are serious health hazards.[3-6] Successful denormalization then affects politics, shaping public opinion in ways helpful to tobacco control. It also works to convince elites that tobacco companies are not normal and legitimate participants in policymaking.

Drawing evidence from two recently concluded international investment disputes that challenged domestic tobacco control regulations, this article evaluates the success of tobacco industry denormalization (TID) arguments against industry efforts to seek out "fair and equitable treatment" through trade and investment forums. To what extent do TID strategies support states in defending against investment claims?

In response to the strategy of public health advocates, the tobacco industry has sought to move debates into forums where denormalization has not taken place and where their product and business are

consequently not seen as aberrant. The global industry has taken advantage of its ability to act in coordinated ways across state borders by fighting in some countries' domestic courts but not others, by focusing its lobbying on countries with weaker governance, and by seeking favorable decisions in legal forums that go beyond domestic courts, such as international arbitration panels and multilateral dispute settlement mechanisms. These forums are often less transparent and less democratic, marginalize principles of public law, and include public policies only against a background of rules designed to promote or protect private firms. By moving to forums with more restricted access, the industry can deflect political criticism and public scrutiny of their actions, seeking to defeat the tools and advocates of denormalization by working in an area where those tools and advocates are weak or excluded. Analysis of the cases shows that even despite the denormalizing work of the Framework Convention on Tobacco Control, an international agreement that codifies TID strategies, upholding claims of industry wrongdoing requires both documentation of governance procedures and a willingness of investment tribunals to defer to states regarding the use of their regulatory authority.

It is important to ask questions about the future of TID strategies at this time in the history of public health. In the current climate, the perceived power of industry denormalization strategies is such that public health advocates are adapting them to other areas. Researchers are seeking to document activities of the alcohol and food industries and are framing tobacco industry actions as one case within a broader argument against commercial interests.[7] Influential environmentalists are constructing arguments against the producers of fossil fuels, trying to denormalize the behavior of firms like Exxon as well as projects like the US-Canada Keystone XL Pipeline.[8] It remains to be seen, though, how well TID strategies will stand up in areas where the body of evidence documenting harm by industries or their products is less comprehensive or where the political consensus behind the need for action is less well established, including in tobacco control areas such as e-cigarette regulation.

Public health advocates face a set of strategic decisions regarding how far to pursue TID. Before returning to this strategic dilemma, the following sections define TID and explain its role in the FCTC, and then analyze how TID strategies held up in investment disputes brought against Uruguay and Australia.

Tobacco Industry Denormalization: A Distinct Political and Legal Strategy

> The cigarette is the deadliest object in the history of human civilization ... cigarettes are the only legal products that are deadly when used as intended by the manufacturer.[9]

"Denormalization" portrays an action, person, or organization as aberrant, deviant, or abnormal. Once an actor or action is denormalized, normal status and protections may no longer be available. Smokers can be asked to smoke outdoors, and industry can be excluded from participating in its own regulation.

From the 1990s onward, a shift in the tobacco control discourse, sparked by the growing public awareness of the duplicity of tobacco firm representatives, led to the greater prevalence of denormalization strategies that emphasized industry practices rather than the actions of individual smokers.[10] Although tobacco control advocates began in the 1950s to systematically raise concerns about the harms of smoking, their success in achieving policy change was limited by the government treatment of tobacco firms as important commercial interests. The belated acknowledgment by some tobacco companies in the 1990s that cigarettes were addictive was a watershed because it allowed TID strategies to be built and strengthened.[11,12] This change in discourse, combined with greater access to internal industry documents as the result of successful litigation, formed a foundation for policies targeting the industry, including required health warnings, mandated imagery and plain packaging (extensive regulatory control over the packaging of tobacco products in order to minimize the effects of branding), bans on promotions and advertising, requirements to disclose certain behaviors, limitations on contacts between government officials and the industry, public inquiries, government litigation against the industry, and counter industry marketing campaigns.

At the heart of all these policies is the idea that the tobacco industry is outside the realm of ordinary regulated capitalism, that it is engaged in activities that society should consider as illegitimate. This process is tobacco industry denormalization (TID): the act of framing the actions of the tobacco industry as outside acceptable societal norms. TID as an explicit political strategy involves increasing scrutiny of industry behavior, publicizing poor behavior by the industry, building a narrative

of exceptionalism around tobacco products, and stigmatizing tobacco firms, including limiting contact between firms and political decision makers.

In Canada, where TID was adopted in 1999 as a key part of its national strategy to reduce tobacco use, TID was defined as activities designed to "reposition tobacco products and the tobacco industry consistent with the addictive and hazardous nature of tobacco products, the health, social and economic burden resulting from the use of tobacco, and the practices undertaken by the industry to promote its products and create social goodwill toward the industry."[13] Public health researchers and advocates have emphasized the links between the tobacco industry and organized crime, the industry's promotion of smoking to children and youth, its attempts to interfere with tobacco taxation and smoking-reduction programs, and its connections with the retail, hospitality, and film industries.[12,14-22]

In other words, TID approaches argue that tobacco products should be treated similarly to heroin or atomic weapons, that is, not something that firms are allowed to produce or sell on the open market.[23,24] Today, public health advocates and sympathetic policymakers do not talk about tobacco companies in the same way that they talk about BASF or Ford Motors. They may criticize nontobacco companies' public health records, but they do not argue that their industries should be shut down. By contrast, tobacco control advocates have frequent discussions about the tobacco "end game," how to rapidly decrease the number of smokers to the point that the industry becomes obsolete.[25,26]

Industry Normalization Strategies: Seeking "Fair and Equitable Treatment"

TID has been used in politics and policy to good effect, which means that tobacco firms have resisted it in every way they can. In response to TID strategies, tobacco companies have used trade and investment law to challenge states' tobacco control policies; threatening, and eventually initiating, investment disputes against Australia and Uruguay; and sponsoring disputes through the World Trade Organization (WTO). This strategy involves two actions: constructing an alternative frame that presents the tobacco industry and its products as legitimate and seeking out new forums thorough which it can promote and strengthen

this frame. Firms argue that tobacco products are "legal goods" that are traded in line with national and international rules that govern markets. They leverage their considerable resources to both "forum-shop," choosing the world's best forums in which to make their case, and to "buy in bulk," or simultaneously launching multiple challenges to tobacco control law.[27] As many jurisdictions become less friendly to the industry, firms seek venues where they are regarded as normal and appropriate participants.

Trade and investment agreements provide important opportunities for companies seeking redress for specific government actions that they consider unfair or arbitrary. Bilateral Investment Agreements (BITs), international investment agreements (such as the Energy Charter), and some international trade agreements (such as the North American Free Trade Agreement, or NAFTA) contain provisions that allow foreign investors to challenge government actions that affect their investments through ad hoc, extraterritorial legal tribunals. Investor-state dispute settlement (ISDS) mechanisms, as they are called, usually provide for a panel of three arbitrators, usually highly elite lawyers, to assess the case and award damages. The number of ISDS cases globally has been on an upward trend in recent years as more and more firms pursue arbitration to challenge domestic regulations.[28] As a result, ISDS has moved from relative obscurity to the forefront of political disputes over national sovereignty in a world of global markets, the place of public law outside national territories, and the future of socially minded regulation.

In adopting a strategy of pursuing international trade and investment arbitration, tobacco firms are relying on the fact that global trade and investment spaces will exclude or minimize public health norms and prioritize private business over the principles of public law.[27] In other words, industry forum-shopping unsurprisingly leads it to trade and investment forums focused on business interests.

Tobacco companies have been invoking trade and investment policies in their lobbying strategies since the early 1990s. In 1995, they threatened to sue Canada under the NAFTA dispute settlement mechanism and thereby blocked federal plain-packaging proposals.[29,30] In 1995, the Australian Ministry for Human Services and Health declined to move forward on plain packaging on the grounds that it would violate the Australian constitution, claiming that the policy would require Australia to purchase the trademarks owned by tobacco firms.[29-32] Although an investment dispute might cause a government to compensate a firm,

ran the argument, this would not automatically cause policy change, and there is no circumstance in which a state would have to "buy" a trademark. These examples, therefore, show the climate of uncertainty surrounding the application of trade and investment law and the ability of industry to use uncertainty to its advantage.

Since these early cases, it has become common for industry representatives to claim that tobacco control regulations violate trade, investment, and intellectual property commitments made by states in international treaties, and for industry communications to ominously declare that they would not hesitate to seek legal redress using trade forums should the measures in question be passed.[27] Investigations using publicly disclosed internal industry documents show that tobacco firms make these claims even when they have received legal advice to the contrary.[33]

But until 2010, despite a long history of litigious behavior, the tobacco industry had not specifically acted on these threats. Since that time, however, the industry has both directly participated in investor-state disputes and indirectly influenced (and financed) state-to-state disputes, with the intention of challenging national tobacco control regulations. The state-to-state disputes, via the WTO, are still to be officially decided, despite a ruling in favor of Australia by a WTO panel in June 2018. Honduras and the Dominican Republic chose to appeal the decision, and the appeal is ongoing. Accordingly, the following sections in this article focus on the two disputes that have been formally concluded.

There is no one single set of rules by which international investment disputes are managed but, rather, several competing regimes, of which the most prominent are those governed by the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID). Regardless of which system is used, the parties to the dispute have a great deal of discretion in deciding how disputes will proceed. Beyond placing private investors on a level (or, some may say, commercially biased) playing field with state governments, the conduct of investor-state arbitration has been heavily criticized on several grounds, including but not limited to a lack of transparency and access, the ad hoc nature of arbitration tribunals and lack of formal precedent, and the cost of and expertise required to defend disputes. Not all arbitration decisions are in the public domain, and even when they are, some information is redacted. Transcripts of the arguments presented are not available, with panels

deciding on an ad hoc basis which information to release. Tribunals also decide who can and cannot submit amicus curiae briefs, which can be vital sources of evidence in public interest cases.

Unlike most domestic courts, tribunal members are appointed to serve on a case-by-case basis. Although individual tribunal members are repeat players who can be appointed to future tribunals, the tribunals themselves are one-shot players. Established courts are often concerned about their long-term legitimacy and power and tailor their decisions accordingly, but ad hoc tribunals might not have the same incentives to promote the long-term legitimacy of the trading system.[34] Although tribunals frequently refer to previous decisions, there is no formal deference to precedent, the result being a lack of consensus across decisions. Tribunals continue to differ substantially over how some of the core principles of investment agreements should be interpreted. Investment agreements are not standardized either. BITs, of which there are around 3,000 globally, are worded very differently depending on when and where they were negotiated, thus allowing considerable latitude in interpretation.

Settling investment disputes is very expensive for governments, often costing millions of dollars. Although this may not be an obstacle for resource-rich states, many disputes are initiated against developing and middle-income countries that cannot afford to fight them without considerable outside help. Depending on the panel, the costs of the case and the names of the outside interests contributing to the case may not be disclosed.

The flexibility of international investment arbitration and the benefits that it confers on private interests are illustrated in the two cases discussed next, particularly with regard to the evidence submitted to the tribunal, the transparency of proceedings, and the extent to which the tribunals considered prior cases.[35] In the Uruguay case, the tribunal made ad hoc decisions about whether or not to allow and consider amicus briefs. With one eye on the public significance of the case, the tribunal granted the World Health Organization (WHO) and the Pan American Health Organization (PAHO) the ability to file amicus curiae briefs, stating that "in view of the public interest involved in this case, granting the Request would support the transparency of the proceeding and its acceptability by users at large."[36] Both briefs stressed the public health evidence base underlying the challenged policies, and they proved to be very important influences on the tribunal's reasoning. Applications

from other groups, Avaaz (an online activist network) and the Asociación Interamericana de la Propiedad Intelectual (ASIPI), were denied. The tribunal did not accept Avaaz's argument that it had a "unique membership" and considered ASIPI to have too close a relationship with the claimants to be objective.[36] This is significant in that intellectual property peak associations have been strong allies for the tobacco industry regarding lobbying activities and domestic court cases, and they have formed a particularly strong epistemic network of their own in parts of Latin America.[37]

In the Australia case, the parties disagreed over the level of secrecy to be adopted in the proceedings. From the start, Australia argued that in a case like this, engaging with the public interest should have a high level of transparency. Eventually the parties agreed that some information could be released, although the resulting documents are missing certain redacted information, largely about the business dealings of, and legal advice received by, the tobacco firms. Information about the costs of the dispute has also not been released. This negotiated transparency is important because it means that third parties have less chance than they would in a domestic court to influence, or learn from, the proceedings.

Finally, the degree to which the tribunals referred to previous cases is important, as international investment arbitration has no formal system of precedent. In both cases, the tribunals extensively referenced previous decisions in order to set the boundaries for the legal tests they would apply. While this is not unusual in international arbitration cases, despite the lack of a formal precedent requirement, the extent to which the arbitrators reference prior cases is indicative of the relative importance of these cases in investment law.

The FCTC: Tobacco Industry Denormalization in International Law

> There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests. FCTC Article 5.3, Guidelines, 2008, Principle 1.[38]

Tobacco control advocates are well aware that international trade and investment law, with its focus on defending firms, is a potentially hostile environment for regulation and TID strategies. Therefore, to preserve and extend domestic gains for TID strategies, they require an

international TID strategy. Key to that strategy is an international instrument, the Framework Convention on Tobacco Control (FCTC).

The FCTC is in many ways an unusual international agreement in that it is binding on those countries that have ratified it, committing them to implementing successively stricter tobacco control policies. The list of 180 countries (plus the European Commission) that have ratified the FCTC does not include the United States, which signed it but never ratified it, or some other states such as Indonesia and Argentina. But despite patchy implementation, it is one of the most endorsed international agreements. And it is a rare, perhaps unique, example of governments using an international agreement to bind themselves against interacting with an industry that operates freely and legally in their national economies. That it targets industry and not just the products it makes is significant.

The FCTC is built on TID arguments. The convention and its related guidelines explicitly attack the tobacco industry for its history of undesirable "interference" in democratic policymaking, and they commit government officials to maintaining distance between themselves and industry representatives. Much of what would be called ordinary lobbying in a normal context becomes problematic "industry interference" under the FCTC when the tobacco industry does it.

Although TID infuses the whole agreement, Article 5.3 of the FCTC perhaps best encapsulates the TID argument. Article 5.3 and the associated implementation guidelines commit signatory states to "act to protect [tobacco control policies] from commercial and other vested interests of the tobacco industry in accordance with national law."[38(para.3)] This includes limiting state interactions with the tobacco industry, avoiding conflicts of interest for government officials and employees, and denormalizing activities described by the industry as "socially responsible," such as philanthropic programs and sponsorship of the arts.[38(para.17,p6)] At the heart of these commitments is a key principle: that there exists a "fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests."[38(para.13)]

Article 5.3 of the FCTC states that parties to the agreement shall act to protect tobacco control policies "from commercial and other vested interests of the tobacco industry in accordance with international law."[39(art.5.3)] Not only did the WHO member states choose to include this language, but they then drew up guidelines for how transparency in tobacco control policymaking should be implemented.

Unlike the FCTC itself, the guidelines are advisory. Nevertheless, they provide tobacco control advocates and whistle-blowers with significant ammunition in that they add specificity to the FCTC's transparency commitments, enabling naming and shaming. The FCTC guidelines make explicit the "industry denormalization" strategy utilized by tobacco control advocates, stressing that there is a "fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests."[38(para.13)]

The guidelines recommend that governments raise awareness "about tobacco industry interference," such as the industry's use of front groups to conceal their involvement in lobbying.[38(para.18)] Governments should "limit interactions with the tobacco industry and ensure the transparency of those interactions that occur."[38(para.17,p.2)] Governments should reject "non-binding or non-enforceable" agreements with the industry, avoid "conflicts of interest for government officials and employees," require the industry to provide "transparent and accurate" information, "impose mandatory penalties" for providing false or misleading information, and avoid giving the industry any preferential treatment such as tax exemption or subsidies. Finally, they should 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."[38(para.17)]

It is easy to think of reasons why the FCTC might not change domestic policy in the face of interest group, party, judicial, and other politics.[40] But without looking for its independent effects on the policies of signatory states, we can see its effect on international law. There it is an instrument to bring TID into international trade and investment law and therefore a partial defense for tobacco control policies that could otherwise be challenged as infringements on investors' rights. The FCTC is both a testament to the unpopularity of the industry with governments and an instrument that extends TID into a world of international private law that was historically designed to privilege trade and firms.

In response, tobacco firms have fought hard to prevent equivalence between health and commercial principles in international law. Documents leaked from Philip Morris International to Reuters show that the firm conducted extensive lobbying around the 2014 meeting of the FCTC conference of parties, including meetings with government representatives designed to forge alliances and strengthen support for protrade positions. Company lobbyists fought against declarations that

would have put health issues before trade and declared the FCTC as an international standard, and claimed victory in both fights.[41]

TID in the Uruguay and Australia Investment Disputes

Unlike other forms of economic law such as contract law, the core concepts and principles of international investment law are fluid and contested. Because the jurisdiction, and therefore the potential volume of law under consideration by an investment tribunal, is very broad (particularly when it comes to different national laws) because panel membership is ad hoc, because there are multiple and competing frameworks for investment law, and because precedent is handled differently by different panels, the tribune's decisions vary greatly in their interpretation of key principles. This means that the tribunal has considerable discretion to frame the questions it will answer.

The two cases involved Uruguay and Australia, both of which had enacted novel tobacco control policies that were world firsts. Uruguay's unique "Single Presentation Requirement" (SPR) limited tobacco companies to sell only one variety of a brand (eg, Marlboro Red but not Marlboro Gold or Blue). Uruguay's 80/80 rule required graphic health warnings, like repellant images depicting the consequences of smoking, to cover 80% of the front and back of cigarette packs, a much larger area than required by any other state. Australia's "plain-packaging" policy built on this momentum to oblige companies to use standard packaging with an unattractive green-brown color palette and large graphic warnings and without distinctive brand logos or colors.

Despite losing domestic legal challenges in both states, tobacco firms made the decision to subject the measures in Uruguay and Australia to additional, extraterritorial legal challenges via international investment arbitration. In February 2010, Philip Morris International, the ultimate parent company of the Uruguayan tobacco firm Abal Hermanos, used its Swiss-based subsidiary Philip Morris Brands (PMB) to launch an investment dispute against Uruguay using an existing bilateral investment treaty between Switzerland and Uruguay, something the company had threatened to do many times but had never followed through.[42]

The same strategy was attempted in the Australian case. On November 21, 2011, the same day that the plain-packaging legislation received

final passage through the Australian House of Representatives, PM International decided to initiate an investment dispute under UNCITRAL rules. Through its Hong Kong–based subsidiary, PM Asia, the company launched the dispute using the Australia–Hong Kong Bilateral Investment Agreement.[43] Philip Morris Asia, headquartered in Hong Kong, wholly owns Philip Morris Australia, which wholly owns Philip Morris Limited. Hence, under the Asia–Hong Kong BIT, PMI hoped that PM Asia would be designated as a foreign investor with an interest in the Australian tobacco market. As Australian Federal Health Minister Nicola Roxon pointed out to ABC News, however, it was suspicious that PM Asia acquired a controlling interest in PM Australia one year after the government announced its plain-packaging proposals. This implies that PM Asia's acquisition was designed to facilitate the investment challenge.[44]

Ultimately, the *Australia v PM Asia* dispute lasted for four years. In December 2015, the tribunal in *Australia v PM Asia* dismissed the claims against Australia. The arbitrators unanimously determined that since PM Asia evidently acquired its interest in PM Australia after the plain-packaging proposals were announced by the Australian government, they did not have a legitimate challenge under the Australia–Hong Kong BIT. The tribunal ruled that there was no need to investigate the claims further and dismissed the case.[45] The award on costs was publicly released, but the final amount awarded was redacted from the document at the request of the parties.[46(para.108)]

Meanwhile, the *PMB et al. v Uruguay* dispute lasted for more than 6 years and cost the defendants US$28.5 million, including the costs of administering the dispute. In July 2016, the tribunal in *PMB et al. v Uruguay* dismissed the claims against Uruguay and awarded costs to the state. The tribunal decided that the claimants should pay US$7 million to Uruguay, plus all the fees and costs for the tribunal and the fees and costs incurred by ICSID.[47(para.588)]

FCTC, BITs, and TID: Debating Tobacco Control in International Investment Law

The Uruguay and Australia cases were efforts by tobacco companies to use international forums to resist domestic policies with strong

TID components, and TID was part of the states' responses in the tribunals. Translated into the issues and jargon of international investment law, the result was a focus on three issues: (1) the use of state authority to protect public health, particularly in regard to expropriation, or the taking of private property by government in order to serve a public purpose; (2) the obligation of governments to accord investors "fair and equitable treatment" (and the related question of whether or not investors should be held to the same standard); and (3) various aspects of the disputes in which the parties debated good governance.

The Use of State Authority to Protect Public Health

Is it legitimate to treat an entire, and legal, industry as different from the rest of the economy? In investment law, expropriation is the taking of private property by a government in order to serve some public purpose.[28,48] The reasons why the concept of expropriation causes controversy are already evident from this basic definition. What constitutes taking? What is considered private property? What can and cannot be considered to be an action to further a public purpose? What evidence is necessary to demonstrate a public interest? Tribunals have come to their own, often disparate, conclusions.

Beyond these questions are broader, long-standing debates in the world of investment law that inform the tribunals' reasoning. Can expropriation be indirect? In other words, is it expropriation if the private property in question is taken incrementally, over a period of time, as a result of regulatory change? For many years, firms have attempted to frame incremental regulatory change as "indirect expropriation," whereas many legal commentators have attacked the idea as an unwelcome stretching of the core concept. Looking at the question from another angle, is it expropriation if "ownership" of the property did not pass to the government but the value of the property decreased as a result of government policies? Under which circumstances, whether or not a determination of expropriation is made, should an investor be compensated for government actions? Debates over the meaning of expropriation in investment law literally consist of claims for and against public power to regulate the private sector.

Although the full case against Australia was not heard, in initiating the challenge PM Asia argued that plain-packaging legislation constituted an indirect form of expropriation, and it requested a compensation payment.[43] This is an old threat, repeated by tobacco firms in many other circumstances. In 1994, RJ Reynolds alleged that proposed plain-packaging legislation would violate Canada's obligations under NAFTA, the General Agreement on Tariffs and Trade (GATT), the TRIPS Agreement, and the Paris Convention and that it would constitute "unlawful expropriation" requiring "hundreds of millions of dollars of compensation.[49]

In the Uruguay case, this argument was fully tested for the first time. The claimants argued that a partial deprivation of the economic benefit of their investments—in other words, a loss in the value of their assets, their trademarks—would be enough to uphold a claim of indirect expropriation. They also argued that the state should have to provide adequate compensation in the event of "lawful expropriation" even when the policies in question served a public purpose.

In response, Uruguay argued that "interference with foreign property" in the course of a valid exercise of the state's police power does not constitute expropriation. The respondents stated that indirect expropriation would occur only if the measures had had such a severe impact that the claimants' business became virtually worthless, arguing that "if States were held liable for expropriation every time a regulation had an adverse impact, effective governance would be rendered impossible."

The tribunal in the Uruguay case accepted many of the state's arguments. The tribunal ruled that because the ownership of the tobacco firms' intellectual property did not change, this was a matter of indirect expropriation, but it noted that indirect expropriation under the specific BIT in question was defined more strictly than in other BITs. For there to be indirect expropriation, the tribunal reasoned, there would have to be "substantial deprivation" of the value, use, or enjoyment of the investments as a result of the government's actions. The panel pointed out that no absolute right to use a trademark exists and that consequently there must be an expectation of some regulation. The tribunal ruled that there was no evidence that the 80/80 regulation was indirect expropriation, as the brand and other elements continued to appear on the cigarette packs. Likewise, the "effects of the SPR were far from depriving Abal of the value of its business,"[47(para.284)] as Abal had become more profitable

since 2011, even though that it would have been even more profitable if the measures had not been implemented.

While stating that this was enough evidence to reject the claim, the tribunal chose to offer additional commentary about the use of the state's police powers and the definition of indirect expropriation.[47(para.287)] In effect, the tribunal asked a broad and significant question: Were the policies in question valid uses of the state's police powers to protect public health? In its response, the tribunal stated that adopting the measures "was a valid exercise of the State's police powers,"[47(para.287)] and that as "evidence of the evolution of the principles in the field, the police powers doctrine has found confirmation in recent trade and investment treaties."[47(para.300)] They noted that several modern model BITs explain that nondiscriminatory regulations with "legitimate public welfare objectives" such as public health do not constitute indirect expropriation.[47(para.300)] In choosing to provide commentary on the police powers question and in referencing multiple prior investment decisions in detail, the panel showed a clear intent to link this decision with modern thinking on key investment principles in order to promote a good image of the international trade and investment system.

"Fair and Equitable Treatment" Versus "Abuse of Rights"

TID means labeling an entire industry, rather than its products or individual companies, as abnormal and problematic. This cuts against some of the core principles of international trade law, which generally do not discriminate among industries. Many international investment agreements obligate the signatory state to accord investors "fair and equitable treatment" (FET). Yet defining FET is difficult. The texts of the BITs and tribunals themselves tend to handle this issue very differently, resulting in a very broad concept that frequently favors investors over governments. Governments have to prove that they have provided FET, but investors have no equivalent obligation to prove that they have acted fairly. Across all investor-state disputes, in order to accord FET a state would have to act "consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' 'legitimate expectations,'" something that would be hard for the best-resourced

and well-governed countries but even harder for developing or recently democratized states.[28(p.xiii)]

How badly does a state have to fall short of this ideal to violate its investment promises? Does FET include the right to a stable or even static legal environment? Like expropriation, FET gives rise to many questions but does not point to clear answers. Tribunals cannot even agree on whether FET should be defined by reference to the specific circumstances of the treaty in question or placed in the context of minimum standards in international law more broadly.

One point of consensus, however, is that BITs do not constrain firm behavior to nearly the extent to which they constrain government behavior. Both the Uruguay and Australia cases had an interesting denormalization twist regarding whether or not firms can or should also be expected to behave fairly and in good faith, with varying results.

In the Uruguay case, Uruguay's representatives argued that the claim against the FET standard should be dismissed because the claimants had a history of deception. The respondents alleged that when misleading labels were banned, the company moved to color coding to convey the same misleading message as before. Uruguay's SPR requirement and the 80/80 regulation were therefore "direct outgrowths of the Claimants' history of deceit," a response to an attempt by tobacco companies to skirt the previous regulation. On the basis of *ex dolo malo non oritur actio* ("an action at law does not rise from evil deceit") and the related "unclean hands doctrine" in common law, Uruguay argued that an investor should not be able to claim that it has not been accorded FET when it has not itself acted in good faith.[47(para.348)]

For its part, the tribunal acknowledged in its statement that decisions by the United States' District of Columbia Circuit Court and US Court of Appeals "authoritatively show that the Claimants have engaged in a history of misconduct and consumer deceit," including denying that smoking is harmful, denying that nicotine is addictive, and creating extended brand families "to promote the false belief among health-concerned consumers that some cigarettes are less harmful than others."[47(para.386)]

Despite hearing this argument, however, the tribunal ducked the issue of industry misconduct, which would have been more novel in this legal context, choosing to focus instead on areas where the government would have to bear the burden of proof: the rationale behind the policies and the ways in which they were adopted. The tribunal concluded (by

a majority) that although the SPR was not specifically the subject of detailed research, the rationale behind the policy was supported by public health evidence. In making this decision, it drew heavily on the amicus brief submitted by the WHO. Furthermore, it concluded that the measure was a reasonable one when adopted, "not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure."[47(para.420)] The tribunal confirmed that the BIT did not prevent governments from adopting novel measures, providing that they have a rational basis and are not discriminatory.[47(para.430)] Gary Born, the arbitrator for the claimants (Phillip Morris), wrote a separate dissenting opinion in which he was very cautious to state that he was not challenging the state's right to regulate to protect public health but that he nevertheless objected to arguments on fair and equitable treatment and the denial of justice claims.[50]

The tribunal relied heavily in its reasoning on precedent from recent investment tribunals. Specifically, the panel stated that investors' right not to have their "legitimate expectations" broken or their right to a legally stable environment does not mean that the state cannot exercise its sovereign authority to legislate or change its laws.[47(para.295-299)] Given the direction of international law (eg, the FCTC), in fact, the investors should have expected progressively more stringent regulation.

Likewise in the Australia case, PM Asia expected to argue that plain packaging does not constitute "fair and equitable treatment," relying on the claim that Australia had violated the "legitimate expectations" of investors.[43] Before they could do this, however, their claims were dismissed on the grounds that the claimants had abused their right to sue under the treaty.

Much of the Australian case centers around the timing of relevant events, specifically PMI's corporate restructuring. As Uruguay did in its dispute, Australia alleged that the tobacco industry's behavior was not in keeping with the intended purpose of the investment agreement. Australia's representatives argued that the claimants had abused their rights to bring a challenge under the BIT because they had acquired their controlling stake in PM Australia after the Australian government announced that it would pursue plain packaging.

The importance of timing is illustrated in the documents examined by the tribunal, which include extensively detailed timelines submitted by both parties. A large portion of the tribunal's decision is, in fact, an exhaustive process-tracing exercise. After reviewing the evidence, the

tribunal noted that the claimants had made statements to the effect that their rights would be harmed by plain packaging as early as 2009 but that they did not acquire their stake in PM Australia until much later, after the formal policy announcement had been made in 2010. Furthermore, the claimants had failed to provide internal documents or witnesses that could sufficiently establish that they had any economic motivation for the restructuring.[45(para.582)] For those reasons, the tribunal ultimately upheld Australia's claim that an "abuse of rights" had taken place.

The Importance of Good Governance

These cases seem to show that TID works only if the government doing it is perceived as "normal," competent, and not aberrant. The states in this litigation were all of these things, but the companies attempted to discredit their governance in the course of the cases. Countries need to be thought by tribunals to have good governance if they are to successfully single out a legal industry for special negative treatment. They also need good governance in the sense of a stable and predictable legislative process that can anticipate and prepare for legal challenge.

Uruguay is a high-income country with a highly functional democracy, and Australia is one of the most prosperous and stable countries in the world. In generalizing from these cases to other potential challenges, therefore, it is important to note that many other countries would find it more difficult to defend an investment decision. Yet the tribunal found problems with the governance process in both states, despite the eventual dismissal of the claims against them. This is one of the reasons that investment arbitration can be so pernicious, that even the best governance procedures, in the most stable regulatory environments, can produce mistakes, oversights, and even corruption.

In the Uruguay case, the state was forced to prove that it had followed due process in formulating, passing, and implementing the single presentation requirement (SPR) and the "80/80 regulation" requiring historically large graphic health warnings on cigarette packs. Despite its eventual dismissal of the case, the tribunal's remarks in several places are critical of Uruguay's governance. The tribunal described the 80/80 regulation as "in the nature of a bright idea" rather than a carefully deliberated policy, and it notes that the paper trail demonstrating the process of formulating and passing the policy was inadequate.[47(para.85)]

But a majority of the tribunal pointed out that "the present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco." "Substantial deference" should therefore be due to governments attempting to deal with an "acknowledged and major public health problem." Furthermore, "the fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal."[47(para.418)]

The tribunal also reviewed domestic litigation. The claimants challenged the process of judicial review covering the proposed measures, alleging a denial of justice. Because Uruguay's procedural court and its supreme court have different jurisdictions, Abal Hermanos was able to challenge the 80/80 rule twice, once in each court. The courts came to different conclusions. The claimants alleged that there was a denial of justice in this case on the grounds that the courts' decisions were divergent and that the procedural court's decision referenced British American Tobacco (BAT) several times, even though BAT participated in a separate dispute.

The majority of the tribunal considered denial of justice to be a serious allegation requiring an "elevated standard of proof," essentially an allegation against the state's entire judicial system. The tribunal noted that panels "should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving the judicial architecture of the State."[47(para.528)] The majority of arbitrators considered that the failure to deliver a separate judgment for Abal was a matter of procedural propriety and therefore not something that escalated to the level of denial of justice or, as the claimants put it, an "Orwellian display of arbitrariness."[47(para.521)] It is important to note that the arbitrator for the claimants disagreed on both the issues regarding FET and those specific to the denial of justice claim.[50]

In the Australia case, much of the deliberation revolved around competing allegations of misconduct. Australia alleged that the tobacco companies' Foreign Investment Application, which must be completed before a foreign investor can acquire an investment in Australia, was false or misleading in that the firm did not discuss its intent to initiate ISDS using the Hong Kong–Australia BIT. The firms countered that Australia accepted the application by providing a "no objections" letter and did not seek to correct this at a later date. The tribunal agreed with the claimants, noting that there appeared to have been an oversight by

the Australian officials, given their later allegations of firm misconduct. This shows how even the best-prepared and best-resourced government can take a misstep in investment arbitration proceedings.

Discussion

Taken together, the seminal cases analyzed here show that while TID arguments played an important role, they are, taken alone, not enough to win. In particular, these cases raise three important issues: the impact of codified political commitments to tobacco control, the importance of leveraging an extensive body of evidence (including evidence of industry practices), and the need for governments to demonstrate "good governance."

In the two cases, the effects of the tobacco control advocates' denormalization strategies can be clearly seen. The FCTC played a starring role in both, enabling advocates to argue that the states were acting in line with their international legal obligations. Notably, the text of the Australian act specifically states that one of the objects of the law is to "give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control [FCTC]."[51(para.3)] Despite both cases involving novel policies, the FCTC and the political and scientific consensus that advocates have built around it lessened the burden of proof for states.

The Uruguay case, for example, contains several disagreements about the public health evidence behind the proposed measures. The parties disagreed about trends in smoking prevalence and the relationship of those trends to the measures in question, as well as about whether or not the policies boosted demand for illicit tobacco products. Nevertheless, the tribunal pointed to the amicus curiae briefs submitted by the WHO, FCTC, and PAHO arguing that there was a clear evidence base for SPR and large graphic labels. Despite ducking the issue regarding whether the industry had "unclean hands," the tribunal explicitly noted that the policies were supported by the FCTC and its associated guidelines, which are "evidence-based."

But in neither case were denormalization strategies—reliance on the FCTC and presentation of evidence of individual firms' misconduct—enough to win an investment dispute. Good governance *in two senses* is another essential prerequisite. First, governments were required to

demonstrate that they formulated, decided on, and implemented the policy according to due process as understood by international economic tribunals. The key concepts in question—the "fair and equitable treatment" (FET) by states, and the "good faith" and "abuse of rights" by firms—do not receive equal attention in investment law. FET is something that governments promise to provide to investors. As a concept, it has stretched and stretched over time as tribunals have overreached their initial intended purpose and now can cover everything from the intent of the policy, the procedure by which it was passed and implemented, the evidence supporting it, and the provision of avenues of legal redress to foreign investors. Companies' obligations to show good faith and not to abuse the process (as, for example, Australia suggested that Phillip Morris did) are weaker and ill-defined and result in no sanctions, save the risk of losing a case they might bring.

In addition to having "good governance" in the eyes of international trade lawyers and tribunals, the cases show the need for good governance in a second sense, that of a highly competent bureaucracy that can pilot a policy through the shoals of trade and investment rules. Policymakers adopting tobacco control policies need to be fully aware of the industry's likely tactics and arguments, strongly committed to countering them, and fully prepared for long, contentious, and expensive legal battles. Even governments with the best resources require extensive legal and technical assistance from international experts to defend against such challenges.[52,53] In low- and middle-income countries, these needs can be more extensive. Considerable government commitment and civil society mobilization are required to overcome the industry's pressure.[54,55]

The cases also hinged on the extent to which the tribunal showed deference toward the state's right to regulate. Arbitrators are aware that they govern disputes through the mutual consent and goodwill of governments and investors, and governments have been getting cold feet about ISDS in recent years.[56] Behind this shift seems to be the realization by states that many of the older investment treaties signed in the 1980s and 1990s were hugely deferential to private investors. There is currently a push to correct this in many modern trade and investment agreements, although this will not fix many of the older, more ambiguous BITs.[57,58(annex 8-A), 47(para. 300)]

Investor-state provisions are not going away any time soon and are, in fact, contained in newer and proposed trade agreements (such as the

Comprehensive Economic and Trade Agreement between the European Union and Canada, the Trans Pacific Partnership, and the Transatlantic Trade and Investment Partnership). The number of investor-state dispute cases per year is trending upward, now a total of more than 600 globally.[59] It is an open question, however, whether the importance of "deference to states" is particularly high in this case vis-à-vis other cases of its type. Both Australia and Uruguay are high-visibility cases that garnered a relatively large amount of public attention. The consequences of a loss for either state would have been very severe and have had strong political ramifications. The tribunals seemed to have been aware of this. Whether out of self-interest as agents of the international investment arbitration system or as opportunists looking to shape the system through this case, they emphasized the potential impact of the dispute on public policy.

One solution that some tobacco control advocates have pushed for is perhaps the ultimate expression of TID strategies in law: "carving out" tobacco control measures from trade and investment agreements and thus preventing any ISDS challenge.[60,61] Many trade agreements contain general exceptions designed to allow states to take measures to protect human health, even if they restrict the flow of goods. But some tobacco control advocates and legal experts argue that these exceptions offer inadequate protection to public health measures and support more specific ways of excluding tobacco policies from trade and investment agreements. The Trans Pacific Partnership (TPP, now reformulated as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) was the first agreement to contain such a measure. Moreover, the idea of a tobacco "carve-out" may be spreading, with the recent Singapore-Australia Free Trade Agreement and the Canadian Free Trade Agreement (governing internal trade among Canadian provinces) containing similar measures.

Carve-outs are not without controversy. Tobacco firms view them as unfair and arbitrary. Business organizations have argued that carving out tobacco products sets an uncomfortable precedent for carving out more products or sectors in the future. And some trade experts have expressed concerns that the differential treatment of tobacco firms undermines the global trade and investment system. But for public health advocates, they could be a superior strategy against the risks of ISDS outlined by these cases.

Conclusions

TID is a major strategy for tobacco control advocates. Portraying the industry as abnormal matters a great deal to tobacco control advocates seeking to influence policy and the political process. Negative opinions of the industry can also improve smokers' intent to quit or prevent initiation. TID is therefore both an effective political and legal strategy and a tool for promoting public health.

As the preceding analysis shows, TID also has weaknesses in the context of legal arbitration that tobacco control advocates and policymakers need to understand. TID arguments rely on establishing unequal treatment, denormalizing a single industry, whereas arbitration is supposed to do the opposite. TID is threatened by trade and investment law because such law does not distinguish among kinds of firms, affording tobacco companies the same protections as any other investor has. Trade and investment disputes like those reviewed in this article are thus a way for firms to tip the balance back toward private industry by moving outside national regulatory frameworks.

In these cases, this meant that arguments for greater scrutiny of industry misconduct were balanced against an examination of the state's policymaking process and evidence base for action. On the one hand, these decisions were groundbreaking in that the arbitrators acknowledged the importance of the international consensus in favor of tobacco control policies as codified in the FCTC. On the other hand, arbitrators largely sidestepped questions of industry misconduct and closely examined government actions in implementing the policies in question.

Thus, governments seeking to invoke TID in international trade or investment disputes must also examine their own past behavior with an eye to justifying it before international tribunals. Many governments have passed stringent tobacco labeling laws, but not all governments are capable of defending themselves against extraterritorial arbitration, even with assistance and funding from the international tobacco control community. Governments have an incentive to invest not just in overall good governance as seen by trade tribunals (which they might find politically unfeasible or objectionable) but also in the capacity of policy to determine what kinds of challenges they might face.

Success in these cases does not guarantee success in the cases to come. That is the drawback of denormalization: the successful

denormalization of tobacco and the tobacco industry has been enabled by tight circumscription of the target ("a product like no other"). Can advocates extend TID strategies to new products from the same industry, such as e-cigarettes, or different products and industries altogether, such as sugary beverages? When it comes to e-cigarettes, the international tobacco control community is divided over whether to recommend "precautionary" approaches such as banning the sale of e-cigarettes versus "harm reduction" approaches that support the wider availability of e-cigarettes. It is not too far-fetched to imagine that future arbitration against e-cigarette regulation might be more difficult for tobacco control advocates to fight and that TID strategies could be less helpful, or even a complicating factor, in these cases.

This analysis shows the importance of codifying key TID principles in law. The legal reasoning of the tribunals gives great weight to law and distrusts government discretion, so if governments signal a commitment clearly through legislation and international legal instruments, tribunals are likely to accept the legitimacy of actions implementing that commitment. Advocates, no matter how heavily invested in TID, might consider that a broader Framework Convention on Public Health, as proposed by Lawrence Gostin, could open up space for the future regulation of (and potential denormalization of) industries like processed foods.[62] That would be ironic, given that TID explicitly separates out tobacco from other industries with which public health advocates might have conflicts.[63]

The complex, opaque international trade and investment law system, which has no record of TID, looks like favorable terrain for tobacco firms. Nonetheless, these cases show how TID can and should be extended to the international arena and how international agreements like the FCTC can change the balance of international law toward public health. If governments and tobacco control advocates invest in governance compliant with international legal expectations, evidence for their actions, and international and domestic statements of commitment to public health, they can promote public health policies even in the seemingly hostile environment of international trade and investment law.

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