

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

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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.

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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*