

Student Note

MAKING THE FAIR AND EQUITABLE TREATMENT HEALTHIER FOR TOBACCO CONTROL? A SYSTEMATIC VIEW ON THE POSSIBLE TENSION BETWEEN THE FCTC AND INVESTMENT REGIME

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ABSTRACT

Since the WHO Framework Convention on Tobacco Control entered into force in 2005, tobacco companies face stricter and more active tobacco control measures adopted by contracting parties. They have initiated legal challenges against the implementations of the FCTC under the WTO and investor-state arbitration. Among their claims, fair and equitable treatment is critical. FET is seen in most international investment treaties. Despite its importance and wide discussion in the literature, the way to ensure that a foreign investor's legitimate expectations can be met in the face of a host State's changing regulatory system or governmental measures is a long-term unsettled issue. This can partly be attributed to the fact that most investment treaties only

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contain general provisions on FET. The consequence is that investment tribunals are left with ample room to interpret FET clauses on their own. This increases legal uncertainty for investors and host States. Therefore, the way to deal with such conflict and tension between investors' protection under FET clauses and the host State's right to regulate under an international investment agreement is important.

In the author's point of view, tobacco control is a human right protection issue. The author believes that the value of the right to health should override tobacco property/investment rights since the former is a fundamental human right. To help clarifying the correct interpretation and application of FET clauses, this article provides a systematic approach to prevent the host State's right to protect public health from being unduly interfered with by tobacco industries. This approach is divided into two parts: The "interpretation approach" and the "legislative approach". The author argues that host States should be able to properly prioritize the public health interest so as to pursue the highest possible level of health for their people.

KEYWORDS: *FCTC, tobacco control, International Investment Agreement, BIT, fair and equitable treatment, Investor-State Arbitration*