

INVESTOR–STATE DISPUTE SETTLEMENT AND TOBACCO CONTROL: IMPLICATIONS FOR NON-COMMUNICABLE DISEASES PREVENTION AND CONSUMPTION-CONTROL MEASURES

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Public health advocates and policy makers have long considered how to translate the successes of tobacco control measures to address alcohol abuse and the excessive consumption of ultra-processed and nutrient-poor foods. Correspondingly, the strategies adopted by tobacco companies to prevent or delay regulation often parallel those adopted by the alcohol and food industries. Philip Morris, a leading tobacco company, has recently used investor–state dispute settlement (ISDS) mechanisms as a new strategy to hinder or prevent tobacco control measures in the form of plain packaging requirements. The cases that followed may have implications for the development of novel consumption-control measures, like plain packaging laws, aimed at preventing non-communicable diseases such as cancer and cardiovascular disease. This paper considers how the challenges to tobacco control measures through ISDS mechanisms could affect the development of consumption-control measures aimed at reducing alcohol abuse and unhealthy food consumption for non-communicable disease prevention. Using the recent ISDS challenges by Philip Morris as case studies, this paper draws out lessons and issues for the future development of consumption-control measures.

I INTRODUCTION

Investor–state dispute settlement (‘ISDS’) provisions in investment treaties allow foreign investors to use international investment dispute settlement processes against a host government in particular circumstances. Criticisms of ISDS mechanisms centre on whether these processes hinder the introduction of new, or the amendment of pre-existing, regulations necessary to promote public health, environmental protections and related human rights.¹ In fact, opposition to the Trans-Pacific Partnership and Trans-Atlantic Trade and Investment Partnership largely focused on the inclusion of ISDS clauses.²

These concerns about the potential impacts of ISDS on public measures have come to a head in recent years,³ particularly when tobacco company Philip Morris brought claims against

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¹ For the purposes of this article, ‘regulation’ refers to a broad range of regulatory mechanisms, and adopts the definition provided by Julia Black: ‘the intentional activity of attempting to control, order or influence the behaviour of others’: Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1, 1.

² Leon Trakman and Luke Nottage, ‘As Asia Embraces the Trans-Pacific Partnership, ISDS Opposition Fluctuates’, *The Conversation*, 20 November 2015 <<http://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979>>; Ian A Laird, ‘TPP and ISDS: The Challenge from Europe and the Proposed TTIP Investment Court’ (2016) 40 *Canada-United States Law Journal* 106.

³ Note that alongside the tobacco-related disputes, the other key ISDS case in the public health space is *Eli Lilly and Company v Canada* (ICSID Case No UNCT/14/2), which entailed a pharmaceutical company bringing an



Australia and Uruguay respectively. In both cases, the claims related to each country's introduction of standardised tobacco packaging requirements. These cases reveal both strengths and weaknesses in the ISDS process, and may have implications for the negotiation of future trade deals encompassing ISDS provisions. The purpose of this article, however, is to reflect upon the implications of Philip Morris's ISDS challenges to tobacco control for the adoption and development of consumption-control measures more broadly.

Tobacco use, unhealthy diets and alcohol abuse are three of the four main modifiable behaviours that increase the risk of non-communicable diseases ('NCDs'), such as cancer, diabetes and cardiovascular diseases.⁴ Collectively, NCDs have become the main cause of human deaths worldwide.⁵ The adverse impacts of NCDs on human life, as well as related flow-on costs, disproportionately affect low- and middle-income countries.⁶ The increased prevalence of NCDs is an outcome of shifts in epidemiological, demographical and nutritional trends. Specifically, trade and investment flows between countries since the 1980s, underpinned by trade and investment agreements and policies, have significantly influenced the social and physical environments that drive NCDs.⁷ International trade and investment have enabled and improved the access to, and availability and promotion of alcohol, tobacco and ultra-processed,⁸ nutrient poor foods ('risk commodities'). For instance, a significant body of work has examined how liberal trade policies, and aspects of globalisation more generally, have led to a shift within middle and low-income countries towards 'Western' diets that increase the risk of NCDs.⁹

The consumption of these risk commodities is the main behaviour that regulatory interventions can influence to reduce the impact of NCDs.¹⁰ To date, the most successful consumption-control regulations have concerned tobacco-related products. In fact, worldwide obesity has more than doubled, while the percentage of the population that smokes has globally declined.¹¹ Regulatory interventions to influence tobacco use have primarily taken the form of fiscal

action against Canada under the North American Free Trade Agreement, for the invalidation of patents for two pharmaceutical products.

⁴ Note, the fourth modifiable behaviour is physical inactivity, which is often addressed by measures to influence diets, such as informational campaigns.

⁵ World Health Organization, *Global Status Report on Noncommunicable Diseases 2014* (2014) 8 <http://apps.who.int/iris/bitstream/10665/148114/1/9789241564854_eng.pdf>.

⁶ Ibid xi. Around three quarters of NCD deaths worldwide, and the significant majority of premature deaths, occur in low- and middle-income countries.

⁷ See eg, Tikki Pang and G Emmanuel Guindon, 'Globalization and Risks to Health' (2004) 5(Suppl 1) *EMBO Reports* S11.

⁸ Ultra-processed foods are those foods that are ready-to-eat or ready-to-heat and which have comparatively more added sugar, saturated fat and sodium as well as less fibre and a much greater energy density. See eg, Carlos Augusto Monteiro et al, 'Increasing Consumption of Ultra-Processed Foods and Likely Impact on Human Health: Evidence from Brazil' (2011) 14 *Public Health Nutrition* 5.

⁹ See eg, Barry M Popkin and Penny Gordon-Larsen, 'The Nutrition Transition: Worldwide Obesity Dynamics and Their Determinants' (2004) 28(S3) *International Journal of Obesity* S2; C M Doak et al, 'The Dual Burden Household and the Nutrition Transition Paradox' (2005) 29 *International Journal of Obesity* 129; Corinna Hawkes, 'The Role of Foreign Direct Investment in the Nutrition Transition' (2005) 8 *Public Health Nutrition* 357; Sharon Friel et al, 'A New Generation of Trade Policy: Potential Risks to Diet-Related Health from the Trans Pacific Partnership Agreement' (2013) 9 *Globalization and Health* 46.

¹⁰ This is because alcohol abuse, tobacco use, unhealthy diets and inadequate physical activity are modifiable behaviours.

¹¹ World Health Organization, *Prevalence of Tobacco Smoking* (2016) Global Health Observatory (GHO) Data <<http://www.who.int/gho/tobacco/use/en/>>. Note, claims that decline in smoking rates has contributed to increases in obesity rates are unsupported: see eg, Jonathan Gruber and Michael Frakes, 'Does Falling Smoking Lead to Rising Obesity?' (2006) 25 *Journal of Health Economics* 183.

measures, prevention and education initiatives, and legislative measures.¹² These responses are facilitated and required by the World Health Organization's ('WHO') *International Framework Convention for Tobacco Control* ('FCTC'), the first, and at present the only international treaty supporting consumption-control measures for a risk commodity.

This is not to suggest that tobacco control has been a success. With over five million people dying each year from tobacco-related illnesses,¹³ tobacco control still has a long way to go. The number of smokers worldwide has increased due to population growth, and most people who smoke live in low- and middle-income countries where capacity to prevent and treat tobacco-related diseases is lower.¹⁴ However, the challenges and successes of tobacco control hold lessons for other consumption-control regulatory interventions, which for various reasons tend to be far less developed.

This article begins by exploring the approaches to and development of consumption-control measures. This discussion sets the context for exploring the tensions that exist between international investment law and these consumption-control measures. The two disputes regarding tobacco control measures brought by Philip Morris through ISDS mechanisms are then considered. Based on these case studies, this article draws out potential implications of ISDS mechanisms for the future of consumption-control policies.

II REGULATORY STRATEGIES FOR REDUCING MODIFIABLE RISK FACTORS FOR NCDs

A *Approaches to Regulatory Strategies*

It is well-established that regulation has a role in reducing the common modifiable risk behaviours for NCDs. Along with several UN General Assembly Resolutions supporting regulatory interventions to prevent NCDs,¹⁵ the WHO's Global Action Plan for Prevention and Control of NCDs encourages member states to:

Strengthen programmes for the prevention and control of noncommunicable diseases with suitable expertise, resources and responsibility for needs assessment, strategic planning, policy development, legislative action, multisectoral coordination, implementation, monitoring and evaluation.¹⁶

¹² See eg, World Health Organization, *WHO Report on the Global Tobacco Epidemic 2015: Raising Taxes on Tobacco* (2015) <http://apps.who.int/iris/bitstream/10665/178574/1/9789240694606_eng.pdf?ua=1&ua=1>.

¹³ World Health Organization, above n 11.

¹⁴ Marie Ng et al, 'Smoking Prevalence and Cigarette Consumption in 187 Countries, 1980–2012' (2014) 311 *Journal of the American Medical Association* 183. This study observed that Canada, Norway, Iceland and Mexico reduced smoking prevalence by half between 1980 and 2012.

¹⁵ *Prevention and Control of Non-Communicable Diseases*, GA Res 64/265, UN GAOR, 64th sess, Agenda Item 114, UN Doc A/RES/64/265 (20 May 2010); *Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases*, GA Res 66/2, 64th sess, Agenda Item 117, UN Doc A/Res/66/2 (24 January 2012); *Outcome Document of the High-level Meeting of the General Assembly on the Comprehensive Review and Assessment of the Progress Achieved in the Prevention and Control of Non-Communicable Diseases*, GA Res 68/300, 68th sess, Agenda Item 118, UN Doc A/Res/68/300 (17 July 2014).

¹⁶ World Health Organization, *Global Action Plan for the Prevention and Control of NCDs 2013–2020* (2013) <<http://www.who.int/nmh/publications/ncd-action-plan/en/>> 23; endorsed by: World Health Organization, *Follow-up to the Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases*, Sixty-sixth World Health Assembly, Agenda Item 13.1, Resolution WHA 66.10 (27 May 2013) <http://apps.who.int/gb/ebwha/pdf_files/WHA66/A66_R10-en.pdf>.

From an examination of legal and public health literature, this article identifies three broad models for regulating the common modifiable risk factors for NCDs.¹⁷ The first approach is largely influenced by libertarian political philosophy, with its emphasis on individual autonomy and low levels of state intervention, coupled with rational choice theory from neoclassical economics.¹⁸ From this perspective, the consumer is a rational actor optimally placed to make decisions in their own interest.¹⁹ Regulations in line with this approach centre on information disclosure such as education campaigns and mandated warnings on product labels. The reasoning behind this approach is that consumers, as rational actors, only require information, to make decisions that are in their self-interest. It is open to an individual to consider that the benefits of consuming a risk commodity — for example personal enjoyment — outweigh the health and financial costs. In addition to the provision of information, a neoclassical approach to addressing the risk factors for NCDs may support taxes on risk commodities, provided that the taxes are equivalent to the societal benefits of declines in the consumption of risk commodities such as unhealthy food choices or tobacco.²⁰

The second approach to regulatory design for reducing NCD modifiable risk factors is referred to as a ‘libertarian paternalist’ approach.²¹ Based on insights from behavioural economics and psychology, the libertarian paternalism focuses on how choices are presented to consumers, and the environmental factors that influence consumer decisions. The aim of such regulatory interventions is to gently persuade or ‘nudge’ individuals towards desired behaviours.²² The libertarian paternalist approach marks a shift away from the consumer as rational decision-maker to a new model of consumption-control policies that, in minor or significant ways, alter the environments in which consumers make choices about what to consume. Using packaging standardisation regulations for tobacco as an example, Alessandro explained, ‘The focus of the

¹⁷ While regulatory responses certainly differ across jurisdictions, regulatory strategies for tobacco control have tended to converge, as facilitated by the WHO *Framework Convention on Tobacco Control*. See eg, Donley T Studlar, ‘Tobacco Control Policy Instruments in a Shrinking World: How Much Policy Learning?’ (2006) 29 *International Journal of Public Administration* 367.

¹⁸ The influence of libertarianism and neoclassical economics has generally been discussed in public health literature. See eg, Peter D Jacobson, ‘Changing the Culture of Health: One Public Health Misstep at a Time’ (2014) 51 *Society* 221; R S Magnusson, ‘Case Studies in Nanny State Name-calling: What Can We Learn?’ (2015) 129 *Public Health* 1074; Bryan Thomas and Lawrence O Gostin, ‘Tackling the Global NCD Crisis: Innovations in Law and Governance’ (2013) 41 *The Journal of Law, Medicine & Ethics* 16. See also, Ha-Joon Chang, ‘An Institutional Perspective on the Role of the State: Towards an Institutional Political Economy’ in Leonardo Burlamaqui, Ana Célia Castro and Ha-Joon Chang (eds), *Institutions and the Role of the State* (Edward Elgar Publishing, 2000) 3, 5, where the author discusses the linkages between neoclassical economics and Austrian-libertarian philosophy.

¹⁹ For a useful overview, see Raymond Boudon, ‘Rational Choice Theory’ in Bryan S Turner (ed), *The New Blackwell Companion to Social Theory* (John Wiley & Sons, 2009) 179; Herbert A Simon, ‘Theories of Decision-making in Economics and Behavioural Science’ in *Surveys of Economic Theory* (Palgrave Macmillan UK, 1966) 1 <http://link.springer.com/chapter/10.1007/978-1-349-00210-8_1>. For a discussion of the limitations of rational actor theory in the context of tobacco, see Anna V Song, Paul Brown and Stanton A Glantz, ‘When Health Policy and Empirical Evidence Collide: The Case of Cigarette Package Warning Labels and Economic Consumer Surplus’ (2014) 104 *American Journal of Public Health* e42.

²⁰ Frank J Chaloupka, Ayda Yurekli and Geoffrey T Fong, ‘Tobacco Taxes as a Tobacco Control Strategy’ (2012) 21 *Tobacco Control* 172; Edith D Balbach and Richard B Campbell, ‘Union Women, the Tobacco Industry, and Excise Taxes’ (2009) 37 *American Journal of Preventive Medicine* S121.

²¹ Richard Thaler and Cass Sunstein are leading theorists in this framing of consumption-control interventions. See Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008).

²² For more detail, see eg Rhys Jones, Jessica Pykett and Mark Whitehead, *Changing Behaviours: On the Rise of the Psychological State* (Edward Elgar Publishing, 2013) 18, where the authors described a ‘nudge’ as acting on ‘predictable forms of irrational bias and error through forms of non-coercive suggestion’ based on behavioural psychology and cognitive design.

policy intervention is no longer on providing a set of information to enable choice, but on changing the context of choice'.²³ The libertarian paternalist does not support outright bans on particular products. However, this approach does support subtly paternalistic consumption-control measures to influence decision-making.

A third way to regulate the behavioural risk factors of NCDs is to adopt a human rights-based approach. Various human rights treaties recognise a right to a health,²⁴ which implies a duty on states to 'provide an environment which facilitates the discharge' of responsibilities associated with the right to health.²⁵ However, a rights-based approach to NCDs is less developed or evident in the literature, in international policy guidance or in regulatory interventions. For instance, NCD policy instruments developed by international institutions tend to contain broad references to human rights without constructive advice about what such an approach entails and how it could be implemented.²⁶ This is illustrated in the international *Framework Convention on Tobacco Control*,²⁷ which reaffirms the human right to health and the overarching duty of governments to protect public health in the foreword and preamble, but does not weave this statement into its suggested framework for tobacco control.

Despite being an emerging area, it is possible to make some preliminary observations about the form of a rights-based approach to regulating risk behaviours. To begin, a rights-based model is more holistic than the previous two regulatory strategies. A rights-based approach focuses on the root causes of the risk behaviours, that is, the underlying determinants to health, which tend to centre on inequalities within and between societies on social, economic and political levels.²⁸ Such an approach is compatible with NCD prevention, as NCDs tend to be more prevalent in low socio-economic groups.²⁹ Thus, a rights-based approach to regulating

²³ Alberto Alemanno, 'Unpacking Plain Packaging and Other Standardization Requirements in Light of Behavioural Sciences' in Alberto Alemanno and Enrico Bonadio (eds), *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar Publishing, 2016) 15, 40.

²⁴ See eg, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24.

²⁵ Committee on Economic, Social and Cultural Rights, 'The Right to the Highest Attainable Standard of Health (Art. 12)', General Comment No 14, UN Doc E/C.12/2000/4, 11 August 2000, 5 [42].

²⁶ Laura Ferguson et al, 'Non-Communicable Diseases and Human Rights: Global Synergies, Gaps and Opportunities' (2016) *Global Public Health* 1.

²⁷ *World Health Organization Framework Convention on Tobacco Control*, signed 21 May 2003 (entered into force 27 February 2005).

²⁸ 'Addressing the Social Determinants of Noncommunicable Diseases' (Discussion Paper, United Nations Development Program, 16 October 2013) <<http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper--addressing-the-social-determinants-of-noncommu.html>>.

²⁹ L Kilander et al, 'Education, Lifestyle Factors and Mortality from Cardiovascular Disease and Cancer: A 25-Year Follow-up of Swedish 50-Year-Old Men' (2001) 30 *International Journal of Epidemiology* 1119; Cate Burns, 'A Review of the Literature Describing the Link between Poverty, Food Insecurity and Obesity with Specific Reference to Australia' (Literature Review, VicHealth, 2004) 1 <http://secondbite.org/sites/default/files/A_review_of_the_literature_describing_the_link_between_poverty_food_insecurity_and_obesity_w.pdf>; Mark W Massing et al, 'Income, Income Inequality, and Cardiovascular Disease Mortality: Relations Among County Populations of the United States, 1985 to 1994' (2004) 97 *Southern Medical Journal* 475; Johan P Mackenbach et al, 'Socioeconomic Inequalities in Health in 22 European Countries' (2008) 358 *New England Journal of Medicine* 2468; Daniel Kim et al, 'Is Inequality at the Heart of It? Cross-Country Associations of Income Inequality with Cardiovascular Diseases and Risk Factors' (2008) 66 *Social Science & Medicine* 1719; Mariachiara Di Cesare et al, 'Inequalities in Non-communicable Diseases and Effective Responses' (2013) 381 *The Lancet* 585. However, data on the correlations between inequalities and non-communicable diseases is lacking in many low income countries, and some studies have not found a correlation: Timothy S Laux et al, 'Prevalence of Obesity, Tobacco Use, and Alcohol Consumption by Socioeconomic Status among Six Communities in Nicaragua' (2012) 32 *Pan-American Journal of Public Health (Revista panamericana*

risk behaviours for NCDs would be based on regulatory and other governance responses to facilitate the realisation of other, health-related, human rights such as the rights to education, shelter and fair wages.³⁰

A rights-based approach also emphasises the state's responsibility to protect citizens against human rights abuses by third parties, including corporate actors.³¹ In this context, an example of a human rights abuse committed by private actors may include the promotion of risk commodities known to be detrimental to health, especially for vulnerable groups.³² The *United Nations Guiding Principles on Business and Human Rights*³³ observed that states should consider 'the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication' in order to protect their citizens against human rights abuse by private actors. Arguably then, a rights-based approach is more likely to support comparatively more onerous consumption-control measures for risk commodities and the corporate actors that profit from them. These include, inter alia, restrictions on the availability of sugar-sweetened beverages, taxation measures, gradually implemented bans on particular products, significant or total reduction in marketing of risk commodities, especially those that target vulnerable groups such as children, and reformulation requirements.³⁴ To be consistent with a rights-based approach, these more onerous restrictions must be employed in conjunction with broader socio-economic interventions addressing inequities. Moreover, the right to health, and other rights protected or facilitated by consumption-control measures would need to be balanced against other human rights such as the right to liberty of the person.³⁵

B *Development of Consumption-control Measures*

The relative successes of tobacco control have led to some tobacco control measures being translated into schemes to address other NCD risk factors, namely unhealthy diets and alcohol abuse.³⁶ In reference to unhealthy dietary choices and tobacco use, Mercer et al observed: '[s]imilar psychological, social, and environmental factors as well as advertising pressures influence the usage patterns of all. These similarities suggest that there may be commonalities between factors involved in controlling obesity and tobacco'.³⁷ This section will briefly outline

de salud publica) 217.

³⁰ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 13, 11, 7.

³¹ Committee on Economic, Social and Cultural Rights, above n 25, 5 [42]; Olivier De Schutter, 'The Right to an Adequate Diet: The Agriculture–Food–Health Nexus', *Report of the Special Rapporteur on the Right to Food*, UN Doc A/HRC/16/49, (20 December 2010).

³² De Schutter, above n 31, 21 [42].

³³ United Nations Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, UNHRC Res 17/4, 17th sess, Agenda Item 3, UN Doc A/HRC/RES/17/4 (16 July 2011) 6–7.

³⁴ Allyn Taylor, Emily Parento and Laura Schmidt, 'The Increasing Weight of Regulation: Countries Combat the Global Obesity Epidemic' (2015) 90 *Indiana Law Journal* 257 <<http://www.repository.law.indiana.edu/ilj/vol90/iss1/7>>; Belinda Reeve and Lawrence Gostin, *Creating the Conditions for People to Lead Healthy, Fulfilling Lives: Law Reform to Prevent and Control NCDs* (Future Leaders, 2015) <<http://sro.library.usyd.edu.au:80/handle/10765/116351>>.

³⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI) (entered into force 23 March 1976) art 9.

³⁶ See eg, Jennifer L Pomeranz, 'Sugary Beverage Tax Policy: Lessons Learned From Tobacco' (2014) 104 *American Journal of Public Health* e13; Frank J Chaloupka and Patricia A Davidson, 'Applying Tobacco Control Lessons to Obesity: Taxes and Other Pricing Strategies to Reduce Consumption' (Law Synopsis, Tobacco Control Legal Consortium, 2010) <<http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-obesity-2010.pdf>>.

³⁷ Shawna L Mercer et al, 'Possible Lessons from the Tobacco Experience for Obesity Control' (2003) 77(4 Suppl)

the overarching trends in tobacco control, alcohol control and dietary-related regulations to show how the regulation of these risk commodities has evolved in both different and similar ways.

Tobacco use became widespread in the 20th century, as advances in technologies made the mass production of cigarettes possible and as attitudes towards women smoking became more accepting.³⁸ In response to increasing scientific certainty about the adverse effects of tobacco use, control measures began to be adopted from approximately the 1960s to the 1980s, and centred on mandated disclosure and fiscal measures.³⁹

Over time, tobacco control has expanded to encompass the context in which consumers access and use tobacco. This is illustrated by the development of standardised packaging for tobacco and the increasing number of places where smoking is banned.⁴⁰ The trend towards more interventionist control measures without prohibiting a product is aligned with a ‘libertarian paternalist’ approach. More broadly, it reflects a willingness of states to increase and expand regulatory measures relating to tobacco control.

Against the backdrop of a strong political willingness to regulate tobacco, consumption-control measures for tobacco have been subject to comparatively more global coordination and harmonisation than other risk commodities.⁴¹ This is evidenced by the FCTC, which, as already noted, remains the only international legal instrument for action to prevent a lifestyle factor that increases the risk of NCDs.⁴² This treaty provides a national and multilateral framework for tobacco control measures with the aim of substantially reducing the prevalence of tobacco use. To achieve these ends, the FCTC obligates states to strengthen or implement a range of measures to reduce the consumption of tobacco products including, for instance, a restriction or complete ban on the marketing of tobacco products.⁴³

Alcohol and tobacco are behavioural risk factors for NCDs with common elements. Both are addictive drugs that have significant commercial interests, disproportionate effects on vulnerable groups and strong scientific evidence for the link between their consumption and the risk of NCDs.⁴⁴ Yet, some significant differences exist between the two, which has led to less interventionist approaches to alcohol than tobacco. Unlike tobacco, alcohol has been produced and consumed for thousands of years longer, it is embedded within religious rituals and cultures, the adverse health impacts tend to be diverse and more long-term, and moderate drinking appears to be relatively unharmed (or, according to some studies, even reduces the

The American Journal of Clinical Nutrition 1073S.

³⁸ Allan Brandt, *The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product that Defined America* (Basic Books, 2009) 57.

³⁹ See eg, Heikki Hiilamo, Eric Crosbie and Stanton A Glantz, ‘The Evolution of Health Warning Labels on Cigarette Packs: The Role of Precedents, and Tobacco Industry Strategies to Block Diffusion’ (2014) 23 *Tobacco Control* e2.

⁴⁰ Crawford Moodie et al, ‘Plain Tobacco Packaging: A Systematic Review’ (Report, Public Health Research Consortium, 2012) <<http://eprints.ioe.ac.uk/16381/>>.

⁴¹ As illustrated, inter alia, by the WHO *Framework Convention on Tobacco Control*, above n 27.

⁴² *Ibid*.

⁴³ *Ibid* art 13(4).

⁴⁴ See eg, David Stuckler et al, ‘Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco’ (2012) 9 *PLoS Medicine* e1001235; Eric Gorovitz, James Mosher and Mark Pertschuk, ‘Preemption or Prevention? Lessons from Efforts to Control Firearms, Alcohol, and Tobacco’ (1998) 19 *Journal of Public Health Policy* 36; DP Hackbarth et al, ‘Collaborative Research and Action to Control the Geographic Placement of Outdoor Advertising of Alcohol and Tobacco Products in Chicago.’ (2001) 116 *Public Health Reports* 558.

risk of some NCDs, although this is debated).⁴⁵ Perhaps as a result of these factors, prohibitions on alcohol from Russia, Norway, Iceland, Finland and the United States have generally been considered as unsuccessful at preventing alcohol use.⁴⁶ Moreover, tobacco has been subject to decades of scientific investigation and activism, which has built strong public consensus that tobacco use is harmful, whereas with alcohol use, there is less activism and significant research gaps remain.⁴⁷

Common measures of alcohol control include: minimum drinking ages; taxation and price control; restrictions on marketing, and on locations, quality and types of alcohol that can be consumed; and limitations on where, when and how many alcohol businesses can operate.⁴⁸ Plain-packaging of alcohol products and complete bans on marketing are rare, unlike tobacco. Casswell and Thamarangsi observed: ‘Packaging and labelling restrictions have not been addressed for alcohol in the same way that they have for tobacco, but changes to labelling — at least for alcohol strength and ingredients — will probably be introduced’.⁴⁹ Consequently, alcohol control has generally become more interventionist, but the measures adopted have retained a higher freedom of choice than tobacco control measures. Alcohol control measures often seem to sit somewhere between a completely libertarian approach and more paternalist interventions.

Meanwhile, regulatory interventions aimed at influencing food and dietary choices, for instance, have traditionally adopted a libertarian approach to regulatory design.⁵⁰ National dietary guidelines tend to act as the key regulatory tool for influencing diets with almost 90 states having national dietary guidelines aimed at educating consumers.⁵¹ Social marketing campaigns are commonly used to communicate the advice contained in dietary guidelines, with the objective of influencing dietary choices by disseminating information and evidence. The

⁴⁵ David J Hanson, ‘Historical Evolution of Alcohol Consumption in Society’ in Peter Boyle et al (eds), *Alcohol: Science, Policy and Public Health* (Oxford University Press, 2013) 31; Eric B Rimm et al, ‘Review of Moderate Alcohol Consumption and Reduced Risk of Coronary Heart Disease: Is the Effect due to Beer, Wine, or Spirits?’ (1996) 312 *British Medical Journal* 731. There is debate regarding whether moderate alcohol consumption has health benefits: see Kaye Middleton Fillmore et al, ‘Moderate Alcohol Use and Reduced Mortality Risk: Systematic Error in Prospective Studies and New Hypotheses’ (2007) 17(5 Suppl) *Annals of Epidemiology* S16.

⁴⁶ See eg, Jeffrey A Miron and Jeffrey Zwiebel, ‘Alcohol Consumption During Prohibition’ (Working Paper 3675, National Bureau of Economic Research, April 1991) <<http://www.nber.org/papers/w3675>>; Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (Routledge, 2009) 70. In several countries, such as Afghanistan and Saudi Arabia, alcohol is still prohibited for religious reasons: see eg, Laurence Michalak and Karen Trocki, ‘Alcohol and Islam: An Overview’ (2006) 33 *Contemporary Drug Problems* 523.

⁴⁷ Uwe Gneiting and Hans Peter Schmitz, ‘Comparing Global Alcohol and Tobacco Control Efforts: Network Formation and Evolution in International Health Governance’ (2016) 31(suppl 1) *Health Policy and Planning* i98.

⁴⁸ Esa Osterburg, ‘The Effects of Controlling Physical Availability of Alcohol’ in Peter Boyle et al (eds), *Alcohol: Science, Policy and Public Health* (Oxford University Press, 2013) 361; Jon P Nelson and Amy D McNall, ‘Alcohol Prices, Taxes, and Alcohol-Related Harms: A Critical Review of Natural Experiments in Alcohol Policy for Nine Countries’ (2016) 120 *Health Policy* 264.

⁴⁹ Sally Casswell and Thaksaphon Thamarangsi, ‘Reducing Harm from Alcohol: Call to Action’ (2009) 373 *The Lancet* 2247, 2254.

⁵⁰ See eg, Jana Sisnowski, Elizabeth Handsley and Jackie M Street, ‘Regulatory Approaches to Obesity Prevention: A Systematic Overview of Current Laws Addressing Diet-related Risk Factors in the European Union and the United States’ (2015) 119 *Health Policy* 720; Christina A Roberto et al, ‘Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking’ (2015) 385 *The Lancet* 2400.

⁵¹ Food and Agriculture Organization of the United Nations, *Food-based Dietary Guidelines* (2017) <<http://www.fao.org/nutrition/education/food-dietary-guidelines/home/en/>>.

requirement that nutritional information be displayed on packaged foods is another, common way to inform consumers.⁵²

States have increasingly considered and introduced a range of regulatory measures that seek to influence dietary choices more significantly. In part, this trend is a response to growing evidence that the libertarian approach of only providing consumers with information to make choices in their interest has been relatively ineffective.⁵³ The measures adopted include marketing bans on ultra-processed food, taxes on particular foods (eg soft drinks) or attributes (eg sugar content), front-of-pack nutrition labelling schemes, regulating food manufacturing and product reformulation (eg prohibition on the addition of salt to particular foods) and restrictions on the availability of particular food (eg zoning limits on the number of fast food places in particular areas).⁵⁴ In addition, some states have responded to calls for sustainable dietary interventions, that is, measures that exploit the synergies between foods that have a low environmental impact and human health and nutritional requirements.⁵⁵

Unlike tobacco and alcohol, regulatory interventions that tax or that require the reformulation of a food product have only been adopted, sometimes unsuccessfully, by a small handful of states.⁵⁶ Regardless, the larger range of regulatory interventions to influence diets that have been considered or implemented over the last decade reflect a general shift towards increased regulation to influence dietary change. The overarching trend in recent years has been towards using regulatory interventions to influence consumer choices, which is mirrored and supported by the concept of libertarian paternalism. The next section considers whether international investment law poses a threat to this (admittedly gradual and general) progress on regulating for the prevention of NCDs.

II FRICTION BETWEEN INTERNATIONAL INVESTMENT LAW AND THE ADOPTION OF CONSUMPTION-CONTROL MEASURES

A *Overview of International Investment Law*

International investment law emerged from, and remains centred on, protections for foreign investors against state interference. From the post-colonial era onwards, states have increasingly developed norms to assure protections for foreign investors against arbitrary state interference. These norms have been referred to as the international minimum standard of

⁵² M Cecchini and L Warin, ‘Impact of Food Labelling Systems on Food Choices and Eating Behaviours: A Systematic Review and Meta-analysis of Randomized Studies’ (2016) 17 *Obesity Reviews* 201.

⁵³ See, eg, Walter Wymer, ‘Rethinking the Boundaries of Social Marketing: Activism or Advertising?’ (2010) 63 *Journal of Business Research* 99; VEPP Lemmens et al, ‘A Systematic Review of the Evidence Regarding Efficacy of Obesity Prevention Interventions among Adults’ (2008) 9 *Obesity Reviews* 446; M Stead, G Hastings and L McDermott, ‘The Meaning, Effectiveness and Future of Social Marketing’ (2007) 8 *Obesity Reviews* 189; Lawrence M Wallack, ‘Mass Media Campaigns: The Odds Against Finding Behavior Change’ (1981) 8 *Health Education & Behavior* 209.

⁵⁴ See eg, David M Studdert, Jordan Flanders and Michelle M Mello, ‘Searching for Public Health Law’s Sweet Spot: The Regulation of Sugar-sweetened Beverages’ (2015) 12 *PLOS Medicine* e1001848; Paolo R Vergano and Blanca Salas Ferrer, ‘Taxing and Marketing Restrictions of “Foods High in Fat, Salt or Sugar” in the EU’ (2016) 7 *European Journal of Risk Regulation* 597. Note however, the critique from Gyorgy Scrinis and Christine Parker, ‘Front-of-Pack Food Labeling and the Politics of Nutritional Nudges’ (2016) 38 *Law & Policy* 234, regarding the accuracy and effectiveness of current approaches to food labelling.

⁵⁵ See eg, Barbara Burlingame and Sandro Dernini (eds), *Sustainable Diets and Biodiversity: Directions and Solutions for Policy, Research and Action* (Food and Agriculture Organization, 2010).

⁵⁶ Sisnowski, Handsley and Street, above n 50; Malene Bødker et al, ‘The Rise and Fall of the World’s First Fat Tax’ (2015) 119 *Health Policy* 737.

treatment for aliens.⁵⁷ Yet it was not until the later part of the 20th century that international investment law started to develop rapidly.⁵⁸ As liberal economic policies became predominant in the 1980s, states began rapidly entering into increasingly detailed bilateral and multilateral investment agreements.⁵⁹ Indeed, the number of international investment agreements has grown from approximately 500 in 1988 to over 3000 in 2014.⁶⁰ Now, the primary sources of international investment law are the substantive rules of international investment agreements (bilateral investment treaties and investment provisions in free trade agreements) and the decisions, interpretations and applications of these substantive rules by investment treaty tribunals. These sources of international investment law, along with customary international investment law, create standards for the treatment of foreign investors as well as specific norms regarding expropriation and dispute resolution.

In relation to standards of treatment, an investor's right to fair and equitable treatment by the host state is one of the most common standards imposed via investment treaties.⁶¹ Yet, a shared formulation of 'fair and equitable treatment' does not exist.⁶² There is some suggestion from tribunals, other international institutions, and scholars that, depending on the context and the relevant provision, the following conduct can formulate a breach of the standard: clearly unequal treatment such as treatment that is significantly counter to rule of law principles; discriminatory treatment; or treatment that is grossly inconsistent with due process.⁶³ Regardless, the fragmented way in which international investment law develops and is implemented has led to a significant amount of ambiguity and inconsistency surrounding the interpretation of the right to fair and equitable treatment.

Specific norms relating to expropriation apply in situations where a state wishes to directly expropriate an investor's property rights. Expropriation norms were generally created to deal with situations where a state directly takes the title or possession of an investor's property.

⁵⁷ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) ch 1. Note there is debate about the extent to which principles considered to be customary international investment law principles are in fact customary. As Professor Sornarajah observed 'General principles of law are a weak source of international law. Their weakness is accentuated by the common tendency to select a proposition from a few national systems and argue that they constitute a general principle, which should be treated as international law. Thereafter, like-minded scholars seek to achieve this conversion through constant repetition. This is a phenomenon which frequently occurs in international investment law': M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010) 418.

⁵⁸ See eg, *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (Preliminary Objections) [1970] ICJ Rep 3, 48 [89] where the ICJ observed that, in relation to international investment law 'it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.'

⁵⁹ World Trade Organization, *World Trade Report 2013: Factors Shaping the Future of World Trade* (2013) 76–8 <https://www.wto.org/english/res_e/publications_e/wtr13_e.htm>. Michael Gast and Roland Herrmann, 'Determinants of Foreign Direct Investment of OECD Countries 1991–2001' (2008) 22 *International Economic Journal* 509; United Nations Conference on Trade and Development, *Investment Policy Hub* (2017) <<http://investmentpolicyhub.unctad.org/IIA>>.

⁶⁰ 'Recent Trends in IIAS and ISDS' (Issues Note No 1, United Nations Conference on Trade and Development, February 2015) 2 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf>.

⁶¹ See eg, Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press, 2013) 384.

⁶² See eg, 'Fair and Equitable Treatment' (UNCTAD/ITE/IIT/11 (Vol III), United Nations Conference on Trade and Development, 1999) <<http://unctad.org/en/Docs/psiteiid11v3.en.pdf>>.

⁶³ *Waste Management Inc v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/003/3, 30 April 2004); *Alex Genin, Eastern Credit Limited Inc and AS Baltoil (US) v Republic of Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/2, 25 July 2001) [367]; see also Kenneth J Vandeveld, 'A Unified Theory of Fair and Equitable Treatment' (2010) 106 *International Law and Politics* 43.

Since the 1960s onwards, norms regarding expropriation have generally applied to indirect forms of expropriation where a state regulates in a way that affects the investor's property to the extent that it is the equivalent of a physical taking.⁶⁴ This shift was due to a general expansion of the concept of property, and the increased precision of rights and obligations that international investment treaties provide in comparison to customary international law.⁶⁵ Regardless of whether the expropriation is direct or indirect, an expropriation must be non-discriminatory and for a public purpose.⁶⁶ In addition, the host state must provide appropriate compensation to the investor.⁶⁷

In relation to dispute resolution norms, bilateral investment treaties ('BITs') and multilateral free trade agreements have increasingly granted foreign investors the right to directly challenge a host state's policy or other regulatory intervention. Such actions involve a foreign investor claiming in an international arbitration forum that a host state directly or indirectly expropriated their property.

These aspects of international investment law, that is, the establishment of the fair and equitable treatment obligation, the expanded understandings of expropriation and the development of ISDS clauses, are not simply a restatement of customary norms relating to investor protections.⁶⁸ Rather, they represent an evolution in international investment law in a direction that has substantially increased the scope of protections for investors. These developments have fueled significant concerns that international investment law is curtailing the regulatory space required by states to adopt, inter alia, measures to protect public health.

A host state's regulatory interventions to influence consumption choices could substantially impact on the value of an investment to the extent that enacting the regulation is considered an indirect expropriation of the foreign investor's property. Alternatively, a host state may enact particularly onerous laws targeting risk commodities, in line with a libertarian-paternalist or a rights-based approach. Strict consumption-control measures could form the basis of an ISDS challenge where the investor argues that the host state breached its obligation to provide the investor with fair and equitable treatment by enacting the consumption-control measures. Even if a regulatory intervention was legitimately for and proportionate to decreasing risk behaviours linked to NCDs, it could still form the basis of an investor claim against a host state.

Moreover, a host state's perceived threat of such an action eventuating is suspected of having a chilling effect on the introduction of new measures for the prevention of NCDs.⁶⁹ Referred to

⁶⁴ *Libyan American Oil Company (LIAMCO) v The Government of the Libyan Arab Republic* (1977) Ad Hoc Tribunal, Draft Convention on Arbitral Procedure, 103–4, where the tribunal broadened the emphasis in customary law on tangible property to discuss intangible property as 'those rights that had a pecuniary or monetary value'.

⁶⁵ See eg, Rudolf Dolzer, 'Indirect Expropriations: New Developments?' (2002) 11 *New York University Environmental Law Journal* 64.

⁶⁶ These requirements are based in customary law, but have been reaffirmed in *United Nations Declaration on Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII)/17 UN GAOR Supp (No 17), UN Doc A/5217, 17th sess, 1194th plen mtg (14 December 1962). Note also, OECD's overview 'Policy Framework for Investment' (Ministerial Council Meeting, OECD, 6 April 2015) 25 <<https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/expropriationlawsandreviewprocesses.htm>>.

⁶⁷ *United Nations Declaration on Permanent Sovereignty over Natural Resources*, above n 66.

⁶⁸ Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Bloomsbury Publishing, 2016) 2.

⁶⁹ Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606; Julia G Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat'

as the regulatory chill hypothesis, the suggestion is that ISDS mechanisms cause governments to stall, amend or abandon regulatory interventions in the public interest to avoid disputes with private actors.⁷⁰ In fact, the Special Rapporteur on the Right to Health suggested that international investment law has allowed '[t]ransnational corporations to reduce States' policy space and have been instrumental in increasing the influence of transnational corporations on States' ability to institute public health policies...'.⁷¹ Similarly, Dr Margaret Chan, the Director-General of the WHO, described tobacco companies bringing of investment disputes in relation to tobacco control measures as 'deliberately designed to instill fear in countries wishing to introduce similarly tough tobacco control measures'.⁷² Chan's comment suggests that a single case concerning tobacco control measures could have broad impacts on the development of more onerous consumption-control measures worldwide. Despite these claims, it remains notoriously hard to prove or disprove whether ISDS has affected state decision-making on whether to introduce a particular measure to prevent NCDs.⁷³

More broadly, ISDS raises questions about whether international investment arbitration tribunals are the appropriate forum to deal with complex matters of public interest. The applicable rules for ISDS depend on the investment agreements between the host and home states. Generally, an agreement will adopt the body of rules developed by the UN Commission on International Trade Law ('UNCITRAL') or the International Centre for the Settlement of Investment Disputes ('ICSID'). Following the consent of parties, these rules are implemented by tribunals formed under these institutions. Thus, ISDS involve tribunals of differing compositions, potentially under different bodies of rules.

The potential for these characteristics to give rise to inconsistent decisions is aggravated by the fact that settled, uniform rules on the persuasiveness of previous cases have not been created, and ISDS mechanisms lacks appeal processes to correct legal or significant factual errors.⁷⁴ Inconsistent decisions under ISDS occur in cases with similar facts but a different application of the law, across cases concerning the same investment treaty provisions.⁷⁵ The cases of *CME v Czech Republic* and *Lauder v Czech Republic* arbitrations are a classic example of this practice and the issues that arise from it.⁷⁶ The cases concerned the same Czech Republic government interference with media licences, and were both subject to UNCITRAL rules. Despite the similarities, in 2001 the Czech Republic was successful in opposing Lauder's claims of expropriation, but in 2003 was ordered to pay a substantial compensation to CME

(2013) 3 *Western Journal of Legal Studies* [i]. See also, Arthur W Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (BRILL, 2015).

⁷⁰ Ronald Labonte and Matthew Sanger, 'Glossary on the World Trade Organization and Public Health: Part 2' (2006) 60 *Journal of Epidemiology & Community Health* 738; Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 608–9.

⁷¹ Anand Grover, 'Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health', UN Doc A/69/299 (11 August 2014) 15 [48].

⁷² Margaret Chan, 'The Changed Face of the Tobacco Industry' (Keynote address at the 15th World Conference on Tobacco or Health, Singapore, 22 March 2012)

<http://www.who.int/mediacentre/news/releases/2012/tobacco_20120322/en/>.

⁷³ Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014) 115–29.

⁷⁴ See eg, Karl P Sauvant, *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008).

⁷⁵ For a good discussion on this point, see Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004) 73 *Fordham Law Review* 1521.

⁷⁶ *CME Czech Republic BV (The Netherlands) v The Czech Republic (Final Award)* (2003) UNCITRAL; *Ronald S Lauder v The Czech Republic (Final Award)* (2001) UNCITRAL.

for expropriation. A legal regime where oppositional decisions exist together at the same time, coupled with a lack of appeal avenues to rectify errors, is contrary to the legal consistency, fairness and predictability required by rule of law and justice principles.⁷⁷ This raises serious questions about whether ISDS mechanisms are the appropriate forum for hearing complex matters that are of public interest as well as private matters.

Regardless of the rules that apply, international investment arbitration procedures are based on domestic commercial arbitration models that are confidential and customisable to parties' needs. As a result, disputes heard under UNCITRAL or ICSID have varying degrees of confidentiality and the granting of public access to decisions requires the consent of all parties.⁷⁸ This lack of public oversight, and specifically the limited access to award decisions, would be unacceptable in domestic courts that are complying with the rule of law.

Two other examples of procedural issues with ISDS raise doubts about the appropriateness of referring matters of public interest to ISDS. Firstly, arbitrators are appointed by the parties to the dispute, and commentators have generally considered the conflict of interest standards to be inadequate and minimal.⁷⁹ Secondly, substantial costs are often incurred in resolving investor-state disputes. The United Nations Conference on Trade and Development ('UNCTAD') found that the average legal fees and tribunal expenses in 2013 exceeded US\$8 million for each party per case.⁸⁰ For host countries, the overall costs include the potential of having to pay compensation and the costs involved in carrying out the arbitration (eg legal expenses and arbitration costs).⁸¹ Salacuse identifies a third cost, which is that 'a substantial award to the investor may require the host country to repeal or modify measures that were implemented for the public good'.⁸²

Non-party states may also incur opportunity costs as a result of another host state's consumption-control measures being challenged under ISDS. Where a state does not adopt a particular regulatory intervention to avoid being subject to ISDS claims, they risk incurring significantly more economic costs from NCDs (eg due to a macro-economic loss of productivity).⁸³ In other words, the opportunity to prevent NCDs by adopting more restrictive consumption-control measures may not be taken, which in turn may increase the incidence of and costs associated with NCDs.

⁷⁷ See eg, Brian Tamanaha, 'A Concise Guide to the Rule of Law' in Gianluggi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing Limited, 2008).

⁷⁸ See eg, Alexis C Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2000) 16 *American University International Law Review* 969.

⁷⁹ Allen S Weiner, 'Indirect Expropriations: The Need for a Taxonomy of Legitimate Regulatory Purposes' (2003) 5 *International Law FORUM Du Droit International* 166; Omar Chehade, 'The Evolution of the Law of Indirect Expropriation and Its Application to Oil and Gas Investments' (2016) 9 *Journal of World Energy, Law & Business* 64; James D Fry and Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' (2014) 30 *Arbitration International* 189.

⁸⁰ United Nations Conference on Trade and Development, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013) 112 <http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf>.

⁸¹ See eg, Susan D Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88 *Washington University Law Review* 769.

⁸² Jeswald Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-based, Investor-State Dispute Resolution' (2007) 31(1) *Fordham International Law Journal* 138, 146.

⁸³ See, eg, D E Bloom et al, *The Global Economic Burden of Non-communicable Diseases* (World Economic Forum, 2011) <<http://apps.who.int/medicinedocs/documents/s18806en/s18806en.pdf>>, where an argument is made for an increased investment in NCD prevention to reduce the economic burden of NCDs.

Due to their existing resource constraints, low and middle income countries are likely to be disproportionately affected and threatened by the financial costs of arbitration to the extent that they may wish to avoid contesting an arbitral claim and instead concede to investor demands.⁸⁴ However, it is hard (if not impossible) to predict and prove that ISDS could have such a great chilling effect that it would prevent the development of effective measures to reduce NCDs and thus increase the economic burden of NCDs for particular countries.

B *Limitations of Drawing Lessons for Other Risk Commodities from ISDS Cases Concerning Tobacco*

Tobacco is arguably easier to regulate than the other key risk commodities: unhealthy food products and alcohol. The consumption of ultra-processed, nutritionally-poor foods, as well as alcohol, forms part of social events, epicureanism and culture in a far more heavily entrenched way than tobacco. Because of these factors, stronger measures to influence diets or lessen alcohol abuse may have to meet a higher threshold to be considered legitimate and proportionate public health measures. The food industry, in particular, is far more diverse and multifaceted than the tobacco or alcohol industries. Brownell and Warner observed:

The food industry is more complex than tobacco, with scores more players and thousands more products. Some companies, such as fruit and vegetable sellers, promote inherently good products, while some like the candy companies do the opposite. Most companies, especially the major players such as Nestlé, Unilever, and Kraft (the world's three largest food companies), do a great deal of both.⁸⁵

The difference between food as an essential human need and drugs like alcohol and tobacco, as well as the complexity of the food industry and diversity of products, suggests that consumption-control measures related to diets will be more difficult to introduce. Furthermore, the concentration within the food sector suggests that some companies are especially well-placed to frustrate efforts to influence diets, including by referring a matter to ISDS.⁸⁶

A final point relates to 'tobacco exceptionalism', which is the notion that tobacco is uniquely toxic in nature and requires exceptional policy responses. The carveouts for tobacco in negotiated agreements beginning with the Trans-Pacific Partnership Agreement are reflective of tobacco exceptionalism. These carveouts partially or completely prevent investors from bringing claims in respect of tobacco control measures under the investment agreement's ISDS clause.⁸⁷ However, tobacco carveouts do not necessarily prevent a state challenging another state under an investment treaty in relation to tobacco control measures.

Similar carveouts for alcohol and particular food products have not been developed, which means that diet- and alcohol-control related measures can be subject to ISDS mechanisms

⁸⁴ See eg, Alfred-Maurice de Zayas (Independent Expert), 'Promotion of a Democratic and Equitable International Order' (Human Rights Council, UN Doc A/70/285, 5 August 2015) <<http://www.refworld.org/docid/55f28f2e4.html>> [41].

⁸⁵ Kelly D Brownell and Kenneth E Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?' (2009) 87 *The Milbank Quarterly* 259, 285.

⁸⁶ See eg, Sophia Murphy, 'Globalization and Corporate Concentration in the Food and Agriculture Sector' (2008) 51 *Development* 527.

⁸⁷ Robert Ireland, 'The Trans-Pacific Partnership Tobacco Carve-out Precedent' (2016) 11 *Global Trade and Customs Journal* 165. Note, Australia and Singapore amended their BIT to introduce a tobacco carveout. *Singapore-Australia Free Trade Agreement*, signed 17 February 2003 (entered into force 28 July 2003) art 22 'Tobacco Control Measures'.

under any applicable investment treaty. It seems narrow and inconsistent to apply this exceptionalism for tobacco, and not the two other key risk commodities. In regard to alcohol, Hawkins and Holden argued:

[a]lcohol is extremely harmful causing an estimated 3.3 million deaths per year (5.9% of global mortality), versus 5.4 million deaths per year (8% of global mortality) for tobacco, and is associated with a range of wider social harms. Whilst tobacco may be uniquely harmful, the differences in harm do not appear to provide sufficient rationale for such radically different policy approaches.

Meanwhile, around 16 million disability-adjusted life years,⁸⁸ and 1.7 million deaths worldwide are attributable to diets low in fruit and vegetable consumption,⁸⁹ and an estimated minimum of 2.6 million people die each year from being overweight or obese.⁹⁰ While tobacco is exceptional in that it kills up to one half of its regular users, it is clearly not the only risk commodity significantly contributing to NCDs. Additionally, studies indicate at a population level that the use of tobacco corresponds with the uptake of unhealthy diets and alcohol abuse.⁹¹ This suggests that a more systemic, and coherent approach to consumption-control is required, including general carveouts to preserve public policy space for consumption-control measures.⁹²

III *PHILIP MORRIS ASIA LTD v AUSTRALIA*: POTENTIAL IMPLICATIONS FOR TREATY SHOPPING TO CHALLENGE NCD PREVENTION MEASURES

A *Australia's Tobacco Plain Packaging Laws*

The dispute between Philip Morris Asia Ltd and Australia began when the federal government in Australia passed the *Tobacco Plain Packaging Act 2011* (Cth). The stated objectives of the Act include to 'improve public health' by discouraging tobacco use.⁹³ It seeks to achieve this goal by regulating the retail packaging and appearance of tobacco products with the aim of reducing the appeal of tobacco products to consumers, increasing the effectiveness of health warnings and reducing the ability of such marketing to mislead consumers about the harmful effects of smoking.⁹⁴

The *Tobacco Plain Packaging Act* sets out a number of requirements for how tobacco products must be packaged, including that the boxes must have a matte finish, only employ a 'drab dark brown' colour, not have any decorative ridges or other embellishments, only provide the company name once across one line, and must not display any trade mark.⁹⁵ With this legislation, Australia seemingly removed the final avenue open to tobacco companies to advertise their products to consumers.

⁸⁸ This refers to the overall productive years lost due to premature ill-health, disability or death.

⁸⁹ World Health Organization, above n 5, 20.

⁹⁰ 'Obesity and Overweight' (World Health Organization, Fact Sheet No 311, May 2014) <<http://www.who.int/mediacentre/factsheets/fs311/en/>>.

⁹¹ P Batel et al, 'Relationship between Alcohol and Tobacco Dependencies among Alcoholics Who Smoke' (1995) 90 *Addiction* 977; Mark B Reed et al, 'The Relationship between Alcohol Use and Cigarette Smoking in a Sample of Undergraduate College Students' (2007) 32 *Addictive Behaviors* 449; Mimi Nichter et al, 'Smoking and Drinking among College Students: "It's a Package Deal"' (2010) 106 *Drug and Alcohol Dependence* 16.

⁹² This point is expanded upon in Jeff Collin, 'Tobacco Control, Global Health Policy and Development: Towards Policy Coherence in Global Governance' (2012) 21 *Tobacco Control* 274.

⁹³ *Tobacco Plain Packaging Act 2011* (Cth) s 3(1).

⁹⁴ *Ibid* s 3(2).

⁹⁵ *Ibid* ss18–26.

Certainly, Australia's plain packaging laws represent more of a libertarian paternalist approach as the context in which consumers are buying and making choices about tobacco has been altered more so than, for instance, an informational campaign.⁹⁶ At the same time, the introduction of plain packaging laws is consistent with a rights-based approach; Australia is facilitating healthy environments and protecting citizens from actions of third parties that interfere with the right to health, that is, the use of marketing on packaging to promote the purchase and consumption of tobacco. Empirical evidence supports the notion that plain packaging laws contribute to the realisation of the right to health. An earlier empirical study found that those Australians smoking from plain packs perceive their cigarettes to be less satisfying; they were also more likely to have considered quitting at least once in the previous week and placed quitting as a higher priority.⁹⁷ Furthermore, the smoking cessation helpline, Quitline, has experienced a prolonged 78 per cent increase in calls following the introduction of plain packaging.⁹⁸

B Parties' Arguments

As the Australian government was working towards the *Tobacco Plain Packaging Act* in 2011, Philip Morris's Hong Kong affiliate, Philip Morris Asia Ltd ('PM Asia'), acquired the Australian Philip Morris subsidiary. On the same day as the plain packaging laws were passed, PM Asia brought an action against Australia under the *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments* ('1993 Hong Kong–Australia BIT'),⁹⁹ and commenced arbitration proceedings in the Permanent Court of Arbitration.¹⁰⁰ In addition to bringing an action under ISDS mechanisms, which is the focus of this article, Philip Morris unsuccessfully challenged the constitutionality of the plain packaging laws.¹⁰¹ Further challenges to the laws were brought by several countries under the WTO's dispute resolution mechanisms. At the time of writing, the outcome of the WTO dispute has not officially been released.

The company's ISDS claim was that the new plain packaging laws expropriated their intellectual property rights and transformed their tobacco products from a branded product to a commoditised product. The company argued that these actions amounted to an indirect

⁹⁶ Alemanno, above n 23, 40.

⁹⁷ Melanie A Wakefield et al, 'Introduction Effects of the Australian Plain Packaging Policy on Adult Smokers: A Cross-Sectional Study' (2013) 3 *BMJ Open* e003175.

⁹⁸ Jane M Young et al, 'Association between Tobacco Plain Packaging and Quitline Calls: A Population-based, Interrupted Time-Series Analysis' (2014) 200 *Medical Journal of Australia* <https://www.mja.com.au/journal/2014/200/1/association-between-tobacco-plain-packaging-and-quitline-calls-population-based?0=ip_login_no_cache%3Dbb60e035818eaa3baa6525c47f4b7dd5>.

⁹⁹ *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 No. 30 (entered into force 15 October 1993) art 10, which states 'A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three-month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules'.

¹⁰⁰ *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, No 2012–12, 17 December 2015) ('*PMA v Australia*'). Note, the Permanent Court of Arbitration is an inter-governmental organization that provides dispute resolution mechanisms for international dispute resolution.

¹⁰¹ *JT International v Commonwealth* (2012) 250 CLR 1.

expropriation by significantly devaluing PM Asia's investments in Australia. The company sought an award of damages 'of the order of billions of Australian dollars' with compound interest, or withdrawal of the plain packaging laws.¹⁰²

The Australian government defended its introduction of plain packaging laws.¹⁰³ In its response to the Notice of Arbitration in 2011, Australia stated:

The plain packaging legislation forms part of a comprehensive government strategy to reduce smoking rates in Australia. This strategy is designed to address one of the leading causes of preventable death and disease in Australia.... The implementation of these measures is a legitimate exercise of the Australian Government's regulatory powers to protect the health of its citizens.¹⁰⁴

Australia raised several jurisdictional objections, and the following will focus on the two most relevant for the scope of this article. In the first instance, Australia asserted that the dispute arose before PM Asia had a controlling interest in the Australian company, as Australia announced its intentions to introduce plain packaging legislation before PM Asia acquired the Australian firm.¹⁰⁵ Alternatively, Australia argued that PM Asia's investment in the Australian firm of Philip Morris amounted to an abuse of process because PM Asia restructured its investment with the purpose of bringing a claim against Australia.¹⁰⁶

PM Asia defended its corporate restructuring by arguing that restructuring investments to benefit from BIT protection was a common business practice, and that, as the investor, it enjoyed a presumption of good faith.¹⁰⁷ In the context of ISDS, 'treaty-shopping' generally occurs where two states, country A and country B, have a BIT that has an ISDS clause.¹⁰⁸ An investor from a third country wants to challenge a measure brought in by country B. To do this, the investor can incorporate in country A and challenge measures under the rights and guarantees provided for by the BIT between country A and country B. Thus, PM Asia is right in suggesting that their restructuring to take advantage of the BIT between Hong Kong and Australia is common practice. Treaty-shopping tends to increase the legal uncertainties present in ISDS; it may enhance a state's perceived threat of a measure being subject to a ISDS challenge; and it allows for abuse of the investment law system if committed in bad faith.¹⁰⁹ Arbitral tribunals have generally held that re-structuring to benefit from an investment agreement can be legitimate or, if the context supports it, may be an abuse of process.¹¹⁰

There was a long-running procedural dispute between Australia and Philip Morris that led to a large number of procedural decisions. In Procedural Order No 8, the Tribunal decided to divide

¹⁰² Ibid 2 [8].

¹⁰³ *Philip Morris Asia Limited Claimant and The Commonwealth of Australia Respondent*, Australia's Response to the Notice of Arbitration under the 2010 Arbitration Rules of the United Nations Commission on International Trade Law (21 December 2011)

<<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx> >.

¹⁰⁴ Ibid 1.

¹⁰⁵ *PMA v Australia* (Permanent Court of Arbitration, No 2012–12, 17 December 2015) 43–4.

¹⁰⁶ Ibid 91 [351].

¹⁰⁷ Ibid 176 [570].

¹⁰⁸ See eg, Jonathan Klett, 'National Interest vs Foreign Investment — Protecting Parties through ISDS Comments' (2016) 25 *Tulane Journal of International and Comparative Law* 213, 223–4.

¹⁰⁹ See eg, Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford University Press, 2016) ch 2.

¹¹⁰ See eg, *Pacific Rim Cayman LLC v Republic of El Salvador (Decision on the Respondent's Jurisdictional Objections)* (ICSID Arbitral Tribunal, Case No. ARB/08/12, 1 June 2012) [2.99].

the dispute into two and to begin by considering Australia's preliminary objections concerning jurisdiction separately from the other claims. Subsequently, on 18 December 2015, the arbitration tribunal issued a unanimous decision.

C *Findings and Potential Implications for Other NCD-prevention Measures*

The Tribunal rejected Australia's argument that the dispute arose when Australia announced its plans to introduce plain packaging, and therefore before PM Asia restructured to take advantage of the BIT between Hong Kong and Australia. Instead, the Tribunal agreed with PM Asia that the dispute arose on the date that the plain packaging laws were passed. Since PM Asia's investment had occurred a few months before the laws were passed, no jurisdictional issues were present when the dispute arose.¹¹¹ In other words, the Tribunal focused on the timing of the particular actions that breached the BIT (the passing of the laws), and not the broader context of the dispute, which began with Australia's announcement of an intention to introduce standardised packaging laws.

Nonetheless, the Tribunal agreed with Australia that PM Asia's claim was an abuse of process. On the basis of the evidence presented, the Tribunal was convinced PM Asia acquired the Australian subsidiary, Philip Morris (Australia) Limited, for the purpose of initiating arbitration under the Hong Kong Agreement to challenge Australia's tobacco plain packaging laws. The Tribunal agreed with previous arbitral decisions by drawing a distinction between legitimate re-structuring and re-structuring for abuse of process. This distinction is based on whether the dispute was reasonably foreseeable at the time when the investor re-structured their companies. While the Tribunal considered various tests for foreseeability used by other arbitral bodies, it interpreted a dispute as foreseeable where there is a 'reasonable prospect...that a measure which may give rise to a treaty claim will materialise'.¹¹²

In application to the dispute at hand, the Tribunal noted that the Australian government began indicating that it would consider introducing plain packaging measures in 2008. Subsequently, in 2009 Philip Morris had sought legal advice about the plain packaging, and wrote a letter to the Health Minister protesting plain packaging laws. In 2010, various public officials, including the then Prime Minister Kevin Rudd, announced Australia's intention of introducing plain packaging legislation for tobacco products. The Australian government began consultations with stakeholders in late 2010, as Philip Morris began to re-structure its companies. Although changes in government leadership occurred in the years that followed, there was no evidence that the Australian government had changed its intention to introduce plain packaging laws.¹¹³ On the basis of these facts, the Tribunal commented that the introduction of plain packaging laws was:

[f]oreseeable well before the Claimant's decision to restructure was taken (let alone implemented). On 29 April 2010, Australia's Prime Minister Kevin Rudd and Health Minister Roxon unequivocally announced the Government's intention to introduce Plain Packaging Measures.... Accordingly, from that date, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted and a dispute would arise.¹¹⁴

¹¹¹ *PMA v Australia* (Permanent Court of Arbitration, No 2012–12, 17 December 2015) 98–113.

¹¹² *Ibid* 185 [585].

¹¹³ *Ibid* 184 [586].

¹¹⁴ *Ibid* 184 [586].

On the basis of these facts, the Tribunal held that Australia's adoption of plain packaging laws for tobacco products was foreseeable to PM Asia at the time they re-structured.¹¹⁵ However, if the re-structuring were justified on other grounds, then it would be less likely to be considered an abuse of process, as the re-structuring would not be solely for the benefit of triggering an ISDS clause.¹¹⁶ In other words, a re-structuring will not be considered an abuse of process if it can be justified separately from the possibility of being eligible for ISDS.

PM Asia justified their re-structuring on the grounds that it was 'part of a broader, group-wide process', and submitted internal memoranda as evidence that the re-structuring of PM Australia was part of its re-structuring initiatives.¹¹⁷ Specifically, PM Asia claimed the re-structure was to centralise ownership to reduce costs and to minimise tax liabilities.¹¹⁸ The Australian government cast doubt on the veracity of these internal communications. It reported that any tax advantage would be negligible, and emphasised that one of the memoranda questions the commercial advantage that could be gained by re-structuring the Asian affiliates.¹¹⁹

Ultimately, the Tribunal found that PM Asia was unable to establish sufficient business reasons for re-structuring, and thus 'the main and determinative, if not sole, reason for restructuring was the intention to bring a claim under the Treaty'.¹²⁰ Therefore, the Tribunal was satisfied that the arbitration constituted an abuse of process, as PM Asia re-structured when it was reasonably foreseeable that the dispute would arise, and the re-structuring was for the main, perhaps only, purpose of gaining the rights offered under the Hong Kong–Australia BIT.

Some interpreted the outcome of the case as evidence that ISDS tribunals do not allow abuses of process by investors, and that the impact of ISDS provisions on the introduction of public health measures have been over-exaggerated by opponents.¹²¹ Others were more cautiously positive about the Tribunal's decision, and spoke of the potential for future actions against NCD prevention measures under ISDS mechanisms.¹²² As Voon and Mitchell observed: 'Australia's win on jurisdiction offered a political boost to countries implementing or considering standardized tobacco packaging, but the circumstances of Philip Morris' investment in Australia may not be mirrored elsewhere.'¹²³ In other words, the case will make it more politically viable for other states to introduce similarly stringent public health measures, because it reduces the potential for 'regulatory chill' induced by the perceived threat of a measure being subject to ISDS. But this win for NCD prevention should be tempered because tribunals do not need to follow previous decisions, and facts differ between cases. Thus, a completely different decision could be reached in another case concerning the same or other risk commodities and similar regulatory measures.

¹¹⁵ Ibid 185 [588].

¹¹⁶ Ibid 176 [570].

¹¹⁷ Ibid 177 [572].

¹¹⁸ Ibid 179 [573], [574].

¹¹⁹ Ibid 177–8 [573].

¹²⁰ Ibid 184 [584].

¹²¹ Tomas Fitzgerald, 'Australia's Plain Packaging Win Over Philip Morris Should Take the Heat off ISDS', *The Conversation*, 18 December 2015 <<http://theconversation.com/australias-plain-packaging-win-over-philip-morris-should-take-the-heat-off-isds-52541>>.

¹²² See eg, Peter Whish-Wilson, 'Plain Packaging Victory is Outstanding for Public Health but ISDS Still Hangs Like a Damocles Sword Over Australian Democracy' (Press Release, 18 December 2015) <<http://peter-whish-wilson.greensmps.org.au/content/media-releases/plain-packaging-victory-outstanding-public-health-isds-still-hangs-damocles-s>>.

¹²³ Tania Voon and Andrew Mitchell, 'Philip Morris vs Tobacco Control: Two Wins for Public Health and Uncertainty Remains' (Columbia FDI Perspectives No 182, Columbia Center on Sustainable Investment, 12 September 2016) <<http://ccsi.columbia.edu/files/2013/10/No-182-Voon-and-Mitchell-FINAL.pdf>>.

For countries wishing to introduce other measures to reduce NCD risk behaviours, this decision shows the importance of pre-empting treaty-shopping by making public announcements earlier rather than later about their intentions to introduce a particular measure to reduce NCDs. Further, it shows that governments must either be in a position to act, consistent with their announcements, or at least should internally emphasise the importance of staying consistent with their announced intention. Otherwise, it will be difficult to prove that a corporate re-structuring occurred at a time when a dispute was reasonably foreseeable.

Companies producing unhealthy food or alcohol will be able to re-structure to take advantage of a treaty's protection if they can justify the re-structuring on grounds other than that it allowed them to bring a dispute under a specific BIT. Given that food, alcohol and tobacco industries adopt similar strategies to avoid the introduction of NCD prevention and control measures,¹²⁴ it seems likely that they would be better prepared to justify a re-structure following the outcome in this case. For instance, foreign investors will be more aware of the need to create valid internal communication evidence to support its justifications for re-structuring. Provided they reflect on the Tribunal's decision in this case, those industries that produce risk commodities will be in a better position to refute abuse of process or rights claims.

From the perspective of preventing NCDs, it would have been beneficial if the Tribunal in this case found that re-structuring to take advantage of a treaty's protections would be an abuse of process regardless of whether it was only one of the reasons for re-structuring. Currently though, corporate actors are in a position where they can re-structure to challenge NCD prevention measures, which may increase the potential for ISDS to have a regulatory chilling effect on measures to reduce NCD risk factors. Indeed, it may limit moves towards more stringent NCD prevention measures based on a rights-based approach. Nevertheless, tribunals do not follow precedent, and so any decision seeking to limit or prevent the ability of corporations to treaty-shop could only be persuasive (in non-legal terms) on another tribunal.

IV *PHILIP MORRIS V URUGUAY*

A *Challenges to Uruguay's Plain Packaging Laws*

Since 1968, Uruguay has increasingly adopted measures to reduce tobacco use in order to prevent NCDs.¹²⁵ In 2009, Uruguay introduced three new measures that became the subject of the dispute with Philip Morris. The first measure required that graphic health warnings cover 80 per cent of packages.¹²⁶ The second identified the especially graphic images that would be used as health warnings.¹²⁷ The third prohibited the use of logos, colours or other such markers that would imply the tobacco product was somehow safer than or otherwise different from another.¹²⁸ The latter restriction effectively required a single presentation per brand family, as

¹²⁴ See eg, Rob Moodie et al, 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-processed Food and Drink Industries' (2013) 381 *The Lancet* 670.

¹²⁵ Presidential Decree 287/009.

¹²⁶ Ministry of Health of Uruguay, Ordinance No 466 (issued 1 September 2008, entered into force 28 February 2010).

¹²⁷ Ministry of Health of Uruguay, Ordinance No 514 (issued on 18 August 2008, entered into force 14 February 2010).

¹²⁸ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S A (Switzerland) and Abal Hermanos S A (Uruguay) v Oriental Republic of Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) ('*Philip Morris v Uruguay*'); Ministry of Public Health Decree No. 287/009 on Health Warnings (2009); Minister

opposed to multiple variations of a brand. These measures, along with others such as restrictions on places where smoking is permitted, led to significant and unprecedented decreases in tobacco use in Uruguay.¹²⁹

Similar to Australia, these standardised packaging laws represent a ‘nudging’ to tobacco, as the measures have altered and restricted how brands and packaging influence consumer choice, but they do not remove the risk commodity from sale.¹³⁰ Arguably, Uruguay’s more restrictive approach to tobacco marketing is also more aligned with human rights law; but, as discussed, a rights-based approach employs a more holistic understanding of health, so no one measure will ensure that a country is meeting its human rights obligations to protect against third party interferences with health and to pro-actively facilitate health.

Using the ISDS provisions under a BIT between Switzerland and Uruguay,¹³¹ the Swiss subsidiary of the US-based Philip Morris, and other connected firms, sought either the withdrawal of the laws or damages of at least US\$22.2 million with compound interest, as well as the fees and expenses incurred as a result of the arbitration. Among other breaches, the basis for their claim was that the packaging laws breached the company’s right to fair and equitable treatment,¹³² and Uruguay’s obligation to refrain from acts of expropriation unless for public purposes and with compensation.¹³³ This case followed two domestic court cases brought by Philip Morris against Uruguay in the Supreme Court of Justice of Uruguay and the *Tribunal de lo Contencioso Administrativo*.

B *Expropriation of Trade Marks*

Whether trade marks and the goodwill that attaches to them are investments under the relevant BIT was undisputed in this case. The BIT had defined investments broadly to include ‘every kind of assets’ including tangible and intangible, and expressly ‘rights in the field of intellectual property’.¹³⁴ States considering NCD prevention measures that may affect IP rights should, therefore, be carefully considering the definition of ‘investment’ when negotiating a BIT including whether IP rights for particular products or purposes can be removed from the definition of investment.

Philip Morris argued that Uruguay’s standardised packaging laws had expropriated their trade marks for each brand variant contrary to article 5(1) of the BIT.¹³⁵ To support this claim, Philip Morris argued that Uruguay’s tobacco control measures resulted in a considerable loss of sales combined with the loss of value of the company’s trade marks.¹³⁶ In response, Uruguay argued that trade mark law does not recognise a right to use the trade mark in commerce and that the economic impact of its plain packaging measures was not substantial enough to be considered an expropriation.¹³⁷

of Health of Uruguay, Ministerial Ordinance No 514 (2008).

¹²⁹ Winston Abascal et al, ‘Tobacco Control Campaign in Uruguay: A Population-based Trend Analysis’ (2012) 380 *The Lancet* 1575.

¹³⁰ Note though, under the introduced laws, one brand could generally not have multiple variations. In other words, the same product could not be branded in different ways to attract different consumers.

¹³¹ *Switzerland-Uruguay BIT*, signed 7 October 1998 (entered into force 22 April 1991).

¹³² *Ibid* art 3.

¹³³ *Ibid* art 5.

¹³⁴ *Ibid* art 1(2)(d).

¹³⁵ *Philip Morris v Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) 53 [193]–[195].

¹³⁶ *Ibid* 49 [184].

¹³⁷ *Ibid* 45 [168].

The majority first considered whether the trade mark conferred a positive right to use, or only a negative right to protect against use by another. In answering this question, the majority concluded that the legal title to the trade marks had not been affected by Uruguay's tobacco control measures as a different proprietary relationship exists between a trade mark holder and third parties from that between a trade mark holder and the state who issued the trade mark. In support of this finding, the majority observed: 'Nothing in any of the legal sources cited by the Claimants supports the conclusion that a trade mark amounts to an absolute, inalienable right to use that is somehow protected or guaranteed against any regulation that might limit or restrict its use'.¹³⁸ In a similar vein, the majority noted the unreasonable outcomes that would occur if registering a trade mark guaranteed the holder the right to sell the trade-marked product. In this way, intellectual property is more subject to the power of the state than physical property. Here, the majority drew out broader lessons for consumption-control policies by stating:

Particularly in an industry like tobacco, but also more generally, there must be a reasonable expectation of regulation such that no absolute right to use the trade marks can exist. Otherwise 'the mere fact of registering a trade mark would guarantee the sale of any trade-marked product, without regard to other considerations'. If a food additive is, subsequent to the grant of a trade mark, shown to cause cancer, it must be possible for the government to legislate so as to prevent or control its sale notwithstanding the trade mark.¹³⁹

This is an important finding for measures to reduce alcohol or unhealthy food consumption that alter how the products are presented to the consumers, which tend to be more aligned with nudging and rights-based approaches to influencing the risk behaviours for NCDs. It suggests that tribunals will be less likely to require compensation for an investor where a trade mark is altered for a public health purpose.

When considering whether an expropriation had occurred, the majority considered the entirety of the business in Uruguay on the grounds that the standardised packaging laws impacted upon the business activities as a whole. Nonetheless, the majority held that the effects of the standardised packaging laws were far from being the equivalent to an expropriation, as the laws had not completely or even substantially deprived Philip Morris of the value of its investment. In fact, Philip Morris admitted that its Uruguay branch 'had grown more profitable since 2011' but added that it 'would have been even more profitable' if Uruguay had not adopted the consumption-control measures.¹⁴⁰ The majority concluded:

[i]n respect of a claim based on indirect expropriation, as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation. As confirmed by investment treaty decisions, a partial loss of the profits that the investment would have yielded absent the measure does not confer an expropriatory character on the measure.¹⁴¹

This enforces a high standard for establishing indirect expropriation, which is consistent with previous arbitral decisions.¹⁴² A mere loss of profits in an investment will not equal indirect expropriation. Additionally, that the profits may have increased but for the measures being introduced was not given weight by the majority in this case. Such a finding also suggests that

¹³⁸ Ibid 75 [268].

¹³⁹ Ibid 75 [269].

¹⁴⁰ Ibid 80 [284].

¹⁴¹ Ibid 81 [286].

¹⁴² See eg, *Marvin Roy Feldman Karpa v United Mexican States* (Award) (ICSID Arbitral tribunal, Case No ARB(AF)/99/1, 16 December 2002); *Pope & Talbot Inc v The Government of Canada* (Decision and Order by the Arbitral Tribunal) (UNCITRAL, 11 March 2002).

similar measures brought in for food or alcohol will be difficult to challenge unless the profits the investment would yield are substantially decreased. Thus, measures to reduce the risk factors for NCDs would have to result in the investor no longer having sufficient value in their investment after the measures are enforced. This allows for some lee-way in implementing consumption-control measures. At the same time, measures that ban a particular product, which may be aligned with a rights-based approach to regulating risk commodities, are likely to lead to a substantial decrease in the value of an investment and could be subject to indirect expropriation challenges.

B *Defence Against Expropriation Claims: Police Powers Doctrine*

Uruguay submitted in response to Philip Morris's claims that it could adopt measures to protect public health on the basis of the police powers doctrine, and more broadly, state sovereignty.¹⁴³ The police powers doctrine is a general and potentially customary international law principle that is closely connected, conceptually and practically, to state sovereignty.¹⁴⁴ Essentially, the police powers doctrine recognises that states have, on the basis of their sovereignty, an inherent legal power to regulate even where doing so will interfere with private economic interests.¹⁴⁵

Philip Morris viewed the defence as inapplicable because a state's regulatory power has limitations imposed by private property and, in their view, the measures were disproportionate and unreasonable 'even if enacted in pursuit of public health'.¹⁴⁶ It seems then that Philip Morris views libertarian approaches to public health as reasonable and proportionate, but measures which tend to be more consistent with a libertarian-paternalist approach are unreasonable. Certainly, this position is consistent with their commercial interests.

Uruguay argued that the doctrine was implied by the BIT. Specifically, article 2(1) of the BIT acknowledges that a host state can refuse an investment 'for reasons of public security and order, public health or morality'. Article 5(1), the expropriation clause, contains the commonly used restrictions on expropriation, which is that it must be 'for the public benefit, as established by law, on a non-discriminatory basis, and under due process of law...'.¹⁴⁷

The Arbitral Tribunal in *Tecmed v Mexico* first acknowledged that the police powers doctrine,¹⁴⁸ and subsequent cases have further developed a test to determine whether the doctrine is applicable. For instance, in *LG&E Energy Corp v Argentine Republic* the test was described as follows:

It can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed.¹⁴⁹

¹⁴³ *Philip Morris v Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) 48 [181].

¹⁴⁴ See eg, Walter Wheeler Cook, 'What Is the Police Power?' (1907) 7 *Columbia Law Review* 322.

¹⁴⁵ For a useful overview of police power doctrine in international investment law, see Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Australian International Law Journal* 267, 272–8.

¹⁴⁶ *Philip Morris v Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) 53 [198].

¹⁴⁷ *Switzerland–Uruguay BIT*, signed 07 October 1998 (entered into force 22 April 1991).

¹⁴⁸ *Técnicas Medioambientales Tecmed S A v United Mexican States* (ICSID Case No. ARB(AF)/00/2, 29 May 2003) 45–6 [119].

¹⁴⁹ *LG&E Energy Corporation, LG&E Capital Corporation, and LG&E International, Inc v Argentine Republic* (ICSID Case No. ARB/02/1, 3 October 2006) 59 [195].

Further detail has been provided in *Methanex v United States*, where the Tribunal explained the doctrine as follows:

[a]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable...¹⁵⁰

These considerations were applied in *Philip Morris v Uruguay*. The majority agreed with Uruguay that the police powers doctrine was implied by the BIT.¹⁵¹ The important aspect of this finding is the basis on which this implication was established. Article 31(3)(c) of the *Vienna Convention* requires that a treaty provision be interpreted pursuant to the rules of international law applicable between the parties including customary international law.¹⁵² From this provision, the majority found that the expropriation clause in the BIT must be interpreted pursuant to the police powers doctrine, as it is a relevant rule of (customary) law that applies between the parties. Accordingly, Uruguay had not expropriated Philip Morris's property because not only did the laws not impact upon the value of the investment, but also the laws were a 'valid exercise by Uruguay of its police powers for the protection of public health'.¹⁵³ This finding, which is consistent the decision in *Saluka v Czech Republic*,¹⁵⁴ adds support to the view that the police powers doctrine can apply to indirect expropriation claims even where a BIT provision does not expressly refer to the doctrine.

The majority's acceptance of the police powers doctrine holds lessons for implementing other measures to reduce the risk factors for NCDs. In particular, states should consider mentioning the police powers doctrine expressly when negotiating the expropriation clause in an investment treaty, and civil society could advocate for such an approach. This would reduce the persuasiveness of arguments that a state cannot avoid liability under an expropriation clause by invoking the police powers doctrine under customary international law. A more politically palatable option may simply be to ensure that the investment treaty refers to the sovereignty of the contracting parties and their ability to regulate in the public interest.

To reduce the risk behaviours for NCDs, states need to be able to take measures that influence consumers' environments, and which address the underlying determinants of such risk behaviours. The protection offered by the police powers doctrine to states' regulatory space is, therefore, important. Moreover, the on-going development of the police powers doctrine as a defence in expropriation cases is a significant advance for international investment law, which has largely focused on the rights and interests of investors. The majority's decision in this case reflects a concerted attempt to elevate the importance of states exercising regulatory powers for public health purposes, even though the BIT focuses on investor rights. On the basis of the majority's findings, future tribunals could imply the police powers doctrine using article 31(3)(c) of the *Vienna Convention* in order to protect the exercise of state powers legitimately for the benefit of public health.

¹⁵⁰ *Methanex v United States* (Final Award) (North American Free Trade Agreement Chapter 11, Part IV, 3 August 2005) 4 [7].

¹⁵¹ *Switzerland–Uruguay BIT*, art 5(1).

¹⁵² *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

¹⁵³ *Philip Morris v Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) 88 [307].

¹⁵⁴ *Saluka Investments BV (The Netherlands) v The Czech Republic* (Partial Award) (UNCITRAL, 2006) 53–4 [263]–[264].

C Fair and Equitable Treatment

Philip Morris argued that the plain packaging laws were unfair and inequitable. Their grounds for this argument were twofold: firstly, that the plain-packaging requirements were arbitrary as they were adopted without scientific evidence, and secondly the requirements did not adequately serve a public purpose. Secondly, Philip Morris claimed that the plain packaging laws undermined the company's legitimate expectations to use and enjoy its investments including its brand assets. Finally, Philip Morris submitted that the plain packaging laws destroyed 'the legal stability that Uruguay pledged in the BIT'.¹⁵⁵ Uruguay contradicted these arguments on the basis that the laws were adopted in good faith, in a non-discriminatory manner and were logically connected with Uruguay's public health objectives. In siding with Uruguay, the majority did not consider the laws to be arbitrary because there was nothing in their implementation that indicated 'a willful disregard of due process' and the plain packaging laws were adequately connected with the objective of protecting public health.¹⁵⁶ In reaching this decision, the Tribunal consulted a number of sources.

Firstly, the Tribunal accepted written submissions filed by the Pan American Health Organization and the WHO, which supported the importance of tobacco control measures and the international empirical evidence illustrating that particular consumers were misled by different brands of cigarettes into thinking that one cigarette was safer than another.¹⁵⁷ Accordingly, the submissions effectively supported Uruguay's claims regarding the legitimacy of the laws for public health purposes. Notably, the Tribunal rejected the Inter-American Association of Intellectual Property's request to file a written submission due to the 'close relationship' between Philip Morris and the association, including the participation of lawyers for Philip Morris on the association's management board and thematic committees.¹⁵⁸ The approach of the Tribunal in this case illustrates a willingness to allow independent non-parties to participate in complex, investment disputes relating to public health, and reveals the important contributions such bodies can make, particularly where the host state is less technically capable. Arguably, the inclusion of such briefs can help improve the legitimacy of a particular decision by an arbitral body by increasing non-party participation.

Secondly, the majority's decision shows how public health objectives can profoundly inform the interpretation of an investment treaty including whether a state interference was fair and equitable. Due to the evidence regarding tobacco and NCDs, the Tribunal did not consider it relevant to debate whether a measure was reasonable, and considered it sufficient that the plain packaging laws were 'an attempt to address a real public health concern'.¹⁵⁹ To a certain extent, this finding may allay concerns from some commentators that 'the investor-friendly structure of investor-state dispute mechanisms can facilitate attacks on the presumption that public health regulation is necessarily for a public purpose'.¹⁶⁰

Finally, the Tribunal noted that Uruguay's plain packaging laws were in accordance with the FCTC, that Uruguay was an active participant in the implementation of the FCTC, and that this

¹⁵⁵ Ibid 88 [309]

¹⁵⁶ Ibid 112 [390].

¹⁵⁷ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S A (Switzerland) and Abal Hermanos S A (Uruguay) v Oriental Republic of Uruguay* (Procedural Order No 3) (ICSID Case No ARB/10/7, 17 February 2015); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S A (Switzerland) and Abal Hermanos S A (Uruguay) v Oriental Republic of Uruguay* (Procedural Order No 4) (ICSID Case No ARB/10/7, 24 March 2015).

¹⁵⁸ *Philip Morris v Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) 10 [55].

¹⁵⁹ Ibid 119 [409].

¹⁶⁰ Samrat Ganguly, 'The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health' (1999) 38 *Columbia Journal of Transnational Law* 113, 162.

treaty was evidence-based, so measures consistent with FCTC provisions could also be considered evidence-based.¹⁶¹ Consequently, the Tribunal did not consider it necessary for Uruguay to perform additional studies on plain packaging or to present further evidence to support its measures in order for the laws to be considered fair and equitable.

Those countries that are highly engaged at an international level in the sharing of knowledge and cooperation around measures to reduce the consumption of risk commodities may, therefore, be in a better position to implement control measures regardless of whether they have the resources to undertake the necessary scientific research. This decision illustrates the persuasiveness of a treaty based on scientific evidence, regarding control measures that reduce the consumption of particular risk behaviours. If Uruguay had not been a member of the FCTC, or had not been FCTC-compliant with its plain packaging laws, the link may not have been established between the plain packaging laws and the public health purpose. This would perhaps have led to the laws being considered as arbitrary and a breach of the fair and equitable guarantee. Given that unhealthy foods and alcohol do not have similar treaties regarding control measures, the arguments put forward by Philip Morris may be far more persuasive in cases concerning consumption-control measures for other products.

In relation to Philip Morris's legitimate expectations and the stability of Uruguay's laws, the Tribunal noted that specific undertakings by host states to investors form legitimate expectations, but a company cannot have a legitimate expectation that legislative schemes applying across a jurisdiction will remain unchanged.¹⁶² Additionally, the Tribunal did not consider that Uruguay's legal system had been made unstable or substantially modified as a result of the introduction of plain packaging laws. Notably, the Tribunal stated:

Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed, and certainly no commitments of any kind were given by Uruguay to the Claimants or (as far as the record shows) to anyone else.¹⁶³

This is a positive statement from the perspective of regulating risk commodities to prevent NCDs. Products such as alcohol and highly processed and unhealthy food products are also considered harmful by WHO and other credible bodies on the basis of scientific evidence. Arguably then, investors cannot have a legitimate expectation that regulations in relation to these products will not become more onerous over time. This finding is consistent with the trends in consumption-control measures outlined above in Part II A *Approaches to Regulatory Strategies*. In particular, it allows for a libertarian-paternalist approach to consumption-control measures. Whether it allows for interventions as potentially onerous as a rights-based approach to NCD prevention is debatable.

D *Denial of Justice*

Philip Morris claimed another breach of the fair and equitable treatment obligation based on the argument that they were denied justice. Their argument was that the two cases it brought domestically against the measures within Uruguay reached contradictory interpretations of the same statutory provision but both decisions still overturned the laws. The cases were brought

¹⁶¹ *Philip Morris v Uruguay* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) 113 [393].

¹⁶² *Ibid* 124 [426].

¹⁶³ *Ibid* 125 [429].

to the Supreme Court of Justice of Uruguay and the *Tribunal de lo Contencioso Administrativo*, which are largely equal under Uruguay's constitutional system. It is unusual that one court's decision does not override another where there is contradictory reasoning.

The parties and the majority accepted that a denial of justice is found '[i]f and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong final and binding decisions'.¹⁶⁴ The majority's decision, therefore, maintains this high standard for a denial of justice, which addresses concerns that the ISDS will significantly curb sovereign powers to the disadvantage of public interests and goals. In line with this, the majority noted that ISDS tribunals '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'.¹⁶⁵ Ultimately, the majority was not convinced that there had been an outrageously wrong decision or fundamentally unfair proceedings, as Philip Morris were able to present their case in court, to judicial authorities acting within their jurisdiction, and received a properly reasoned decision.¹⁶⁶ This decision reflects a careful consideration of the role of ISDS and the variations between legal systems.

E *Concurring and Dissenting Opinion*

Arbitrator Gary Born, who was appointed by Philip Morris, dissented from the majority in two ways. Firstly, he considered the single presentation requirements did not accord with fair and equitable treatment.¹⁶⁷ He emphasised that the FCTC contains a comprehensive range of detailed regulatory measures that should be adopted by signatories, but the FCTC does not oblige states or even recommend that states adopt laws that remove brand variants.¹⁶⁸ Because international evidence was not considered as sufficient by Born, he focused on Uruguay's domestic evidence and process for implementing the laws. Born commented 'the requirement was formulated, drafted and approved in the space of a few days'.¹⁶⁹ Born considered it arbitrary and disproportionate to remove brand variant trade marks because a blanket single presentation requirement is not proportionate to protecting consumers from being misled into thinking some variants of tobacco products were healthier than others. This is a compelling point, as surely other measures could have been used to prevent consumers from being misled. Thus, Born stated: '[n]otwithstanding the deference that is due sovereign regulatory measures and judgments, I am convinced that the requirement does not bear a rational relationship to its stated legislative objective, yet disproportionately injures important investor rights'. Born's judgement shows that states should ensure their objectives for a particular measure expressly include protecting public health, or otherwise draw a link between the measure and achieving public health objectives. Merely implying such a purpose will be less convincing for some arbitrators.

Secondly, Born considered that Philip Morris was denied access to justice, and therefore Uruguay had breached its obligation to provide fair and equitable treatment. Born commented that the two court decisions were 'rendered in closely-related proceedings, involving the same parties and interpreted the same provision of Uruguayan law to mean diametrically opposed

¹⁶⁴ Ibid 143 [498].

¹⁶⁵ Ibid 151 [528].

¹⁶⁶ Ibid 151 [527].

¹⁶⁷ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S A (Switzerland) and Abal Hermanos S A (Uruguay) v Oriental Republic of Uruguay* (Concurring and Dissenting Opinion) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016).

¹⁶⁸ Ibid 24 [99].

¹⁶⁹ Ibid 29 [116].

and contradictory things'.¹⁷⁰ This finding leaves consumption-control measures vulnerable to ISDS challenges where the host state's court system does not have a mechanism for the claimant to resolve conflicts between equal courts with finality. Thus, Born applied a lower standard than the majority in relation to denial of justice. In contrast, and as discussed, the majority did not find the decisions were at a level serious enough to constitute a denial of justice. An especially weighty factor in this regard was that both courts' decisions were constitutional.

V CONCLUSION

International investment law was designed to protect foreign investors from unfair interferences by host states. It remains an area of law focused on protecting the rights of foreign investors in order to promote economic growth. Due to this focus, as well as the deficiencies in ISDS processes, including a lack of transparency, there is a risk that an arbitral tribunal will award compensation to an investor, or require the state to overturn the challenged measure, in cases where a legitimate measure was adopted to reduce the consumption of risk commodities. This risk has heightened in recent decades as consumption-control measures have become more onerous in line with a more libertarian-paternalist approach.

Fortunately, the *Philip Morris v Uruguay* case indicates a willingness by international investment tribunals to prioritise a state's power to enact legitimate public health protections, over investors' interests. The decision further reflects how states may be able to use international evidence and the support of independent, international bodies to establish the proportionality and purpose of a particular measure to reduce alcohol or unhealthy food consumption. This is especially important for low income countries that lack the capacity to develop such evidence. Meanwhile, the *Philip Morris v Australia* case indicates how countries can try to prevent treaty-shopping, and, one hopes, provides an influential case for other tribunals when dealing with similar instances.

The outcomes of the ISDS cases concerning tobacco products should be understood as a positive development for other consumption-control measures, but it is a limited one. As the facts and provisions of each case differ, the risk of regulatory chill remains, as states can still be subject to ISDS for measures relating to tobacco products, and no case concerning other consumption-control measures need consider the Philip Morris cases. In addition, the risk of ISDS challenges to regulatory measures for reducing alcohol or unhealthy food consumption is arguably far greater than tobacco, due to the broader range of private actors and potentially relevant BITs involved. Likewise, the situation is likely to differ greatly where a case concerns alcohol products or unhealthy food products, which lack the support of an international treaty as a basis for consumption-control measures. There is also a far broader range of alcohol and food products with differing compositions, and low consumption of these products does not necessarily have harmful health impacts. For these reasons, it will generally be more difficult for host states to prove that regulatory measures to reduce alcohol abuse or unhealthy diets are proportionate and for legitimate public health purposes.

In the case of food, a state may be more likely to avoid liability under ISDS if it introduces consumption-control measures for particular substances with well-established negative health impacts (eg trans fats) and specific products (eg sugar-sweetened beverages), rather than applying control measures like restriction on marketing across a range of products, such as

¹⁷⁰ Ibid 2 [9].

unhealthy food. In relation to alcohol, the strategy may be somewhat different because, if some alcohol products are restricted and others are not, this may suggest the consumption-control measure is discriminatory and not for legitimate public health purposes. However, a rights-based approach to NCD prevention would arguably support more drastic regulatory interventions that would perhaps not meet the proportionality considerations that tribunals undertake when considering whether an expropriation was in the public interest or whether an investor was treated fairly and equitably. To support consumption-control measures, states should ensure they are consistent with WHO guidelines, and they may bolster claims that a measure is proportionate and legitimate by demonstrating a history of being pro-active in relation to reducing alcohol and unhealthy food consumption. The potential for ISDS to weaken, delay or prevent consumption-control measures should remain a key concern of public health advocates, and states should be considering ways of protecting their regulatory space to adopt consumption-control measures when negotiating investment treaties.