

Minimizing the Risk of Claims under Investment Treaties



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Outline

1. Contemporary treaty practice
 1. Clarifying key terms
 2. Using exceptions
 3. Carving tobacco out
2. Managing risk under existing treaties



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Contemporary treaty practice



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Clarifying key terms – expropriation

- Increasingly, treaty language clarifies the meaning of expropriation.
- For example, an annex to the ASEAN – Australia – New Zealand FTA clarifies the meaning of indirect expropriation:

4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b).

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Clarifying key terms – fair & equitable treatment

- Increasingly, treaty language clarifies the meaning of fair and equitable treatment.
- The ASEAN – Australia – New Zealand FTA provides another example.

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Clarifying key terms – fair & equitable treatment

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.

2. For greater certainty:

(a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;

(b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and

(c) the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

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Clarifying key terms – MFN treatment

- To restrict the ability of investors to make arguments based upon more favorable clauses in other BITs, States clarify the scope of MFN clauses.
- For example, language might clarify that the MFN obligation does not apply to dispute settlement.

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Using exceptions

- Some investment treaties include general exceptions such as those found in Article XX of the General Agreement on Tariffs and Trade 1947.
- The investment chapter of the Australia – Singapore FTA is an example.
- There is some controversy surrounding whether these clauses protect against claims for compensation.

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Carve outs

- Many investment treaties include exemptions for sensitive products or products of specific classes.
- The prospect of a tobacco specific carve out has been discussed in the context of the Trans-Pacific Partnership negotiations.

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Managing risk under existing treaties



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Renegotiating or clarifying existing commitments

- The terms of existing agreements have been clarified along similar lines to those of new agreements.
- Examples include side letters to the Singapore – US FTA and the Free Trade Commission interpretation concerning the North American Free Trade Agreement.

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Managing an investor's expectations

- Avoid making specific commitments to foreign investors in the tobacco sector.
- Outline tobacco control as a long-term policy priority to clarify what foreign investors can expect.

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Due process

- Provide due process / natural justice rights within the bounds of domestic law and Article 5.3 of the WHO FCTC.

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Determining whether to accept foreign investment

- Where treaties leave discretion concerning the acceptance of investment, consider whether to accept or reject foreign investment in the tobacco sector.
- Avoid accepting investment that may provide a basis for future claims e.g. registering misleading trademarks.

Conclusion

- The ways to make investment treaties more sensitive to tobacco control include:
 - Clarifying the meaning of terms
 - Creating exceptions
 - Carving tobacco out of investment treaties
- Risks under existing treaties need to be managed, including:
 - Managing an investor's expectations
 - Providing due process / natural justice
 - Considering whether to reject investment (where this is permissible)



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Further information

- See *Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization*, World Health Organization, 2012



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