

Tobacco Litigation in International Courts

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For years, tobacco interests have played an important role in developing international law. Recently, cooperation among nations concerned with the risks and health consequences of smoking tobacco has resulted in the adoption of international treaties, regional directives, and common administrative and regulatory practices. As a result, a wave of litigation before international courts and tribunals, including the European and Andean Courts of Justice, Investor-State Tribunals, and the World Trade Organization's dispute settlement body, has led to novel legal questions.

This Article is the first to trace, survey, and recount the history of tobacco litigation before international courts and tribunals and to assess its contribution to international law. In particular, it pays new attention to recent efforts by tobacco interests to challenge compelled speech by exporting the far-reaching Free Speech Clause of the United States into international law, especially in the context of marketing controls, mandatory graphic warnings, and "plain packaging" labels.

This Article shows that, contrary to conventional wisdom, international courts and tribunals can play a central role in advancing and enhancing complex national, regional, and global regulations rather than eroding sovereign regulatory space. Complete deference to states' policies, however, can also be risky as it may perpetuate the use of economic and political influence to distort the functioning of government. Hence, the history of international tobacco litigation reveals a more complex interrelationship between domestic institutions and international law than many scholars acknowledge.

INTRODUCTION

In 2014, Cuba surprised the world by bringing its first case as a complainant before the World Trade Organization ("WTO")—the international organization furthering trade liberalization.¹ Together with other WTO members, Cuba is using the court in an attempt to bring down Australia's regulatory framework restricting the use of trademarks on tobacco products.² Cuba argues that the law upsets the right of its domestic producers to differentiate its acclaimed *habanos* from other tobacco products.³

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1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement or WTO Agreement].

2. *Tobacco Plain Packaging Act 2011* (Austl.).

3. See Dispute Settlement, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/

Irony abounds in Cuba's invocation of trademark rights and excessive government intervention. Fewer than fifty years ago, the socialist government attempted to abolish intellectual property ("IP").⁴ Even more intriguing is the manner in which different tobacco interests across the globe are coordinating a legal strategy that includes the use of proxy governments, shell companies, third-party funding, and audacious interpretations to spark international litigation challenging public health laws designed to protect against the consequences of smoking.

This is not the first time strong economic actors have gotten creative with international law in resisting efforts to constrain some of their most controversial practices. When the nineteenth century courts for the suppression of the slave trade were first established, slave trading ships crossed the Atlantic carrying more than one national flag in the hopes of using whichever flag would help them to avoid seizure by the various naval vessels that enforced a network of bilateral treaties.⁵ This early form of nationality shopping allowed trading vessels to ensure the supply of forced labor in plantations, including tobacco plantations. Today, tobacco interests still shop for nationality, but now to bring cases before international tribunals and courts ("ICs").⁶ Whether by persuading WTO members like Ukraine with no direct interest in the Australian tobacco market to bring a complaint, by paying the legal fees of countries like the Dominican Republic to argue for deregulation in the sector, or by relying on their web of subsidiaries around the world to stimulate litigation before the World Bank's arbitration tribunals, British American Tobacco ("BAT") and Philip Morris International ("PMI") are using international law to limit antismoking regulations.⁷

The footprint of tobacco growers, manufacturers, and distributors in international law and regulation is deep and persistent. Cases deal with a range of issues, from the confiscation of property to the prohibition of flavored cigarettes; from claims resulting from the tobacco Master Settlement Agreement ("MSA") and federal subsidies in the United States to claims regarding the authority to mandate the dissemination of information. As a result, tobacco litigation has shaped, and continues to develop, our understanding of how international law and complex regulation interact. In fact, tobacco's tentacles extend so far that public health groups have lobbied suc-

DS434, WT/DS435, WT/DS441, WT/DS458, WT/DS467 (May 5, 2014), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm.

4. See Fidel Castro Ruiz, First Secretary of the Communist Party of Cuba, Pinar del Rio Cuba (April 29, 1967), <http://www.cuba.cu/gobierno/discursos/1967/esp/f290467e.html> ("And our country adopted, in fact, the decision to also abolish intellectual property.").

5. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 586 (2008).

6. See generally PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES (Tania Voon et al. eds., 2012); Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1, 6–30 (2015).

7. See Ankita Ritwik, *Tobacco Packaging Arbitration and the State's Ability to Legislate*, 54 HARV. INT'L L.J. 523 (2013) (discussing the litigation).

cessfully to bar investors from bringing tobacco-related challenges under the Trans-Pacific Partnership (“TPP”), an international commercial agreement that may regulate about one-third of global trade and investment.⁸

This Article is the first to trace and survey tobacco litigation before ICs, a domain often neglected by health law and tobacco control scholars.⁹ First, it describes, assesses, and contextualizes recent challenges to marketing controls and packaging requirements. It shows how the current use of ICs by tobacco interests differs from litigation before domestic courts in the United States.¹⁰ Through strategic litigation before American federal courts, mandatory requirements involving graphic warnings of the risks of smoking have been judicially enjoined on the grounds that they violate commercial free speech.¹¹ On the international scene, however, speech protections rarely, if ever, shield commercial actors against mandated dissemination of information. Hence, this Article describes and analyzes how tobacco companies have strategically relied on international law to defend product differentiation and the prevention of consumer confusion—two ideas at the center of trade liberalization and economic integration agreements, but in tension with recent international efforts to curtail smoking.

Second, the history of tobacco litigation illuminates the role of modern ICs in dealing with domestic, regional, and global regulatory initiatives. Critics of international law have for some time argued that the rise of economic globalization and market liberalization has resulted in “deregulation.”¹² However, as countries have engaged in new international agreements to promote global commerce, or solve common problems such as the expansion of tobacco consumption, commitments under international law have expanded. As a result of the internationalization of regulatory governance, ICs have assumed new roles, drawing the limits between different sources of competence and authority, bodies of law, and values protected.¹³

8. Since 2008, the TPP agreement has been under negotiation by Australia, Brunei, Chile, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. IAN F. FERGUSSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (2011), <http://www.fas.org/sgp/crs/row/R40502.pdf>. On the limited tobacco carve-out in the TPP, see Jackie Calmes, *Trans-Pacific Partnership Is Reached, But Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?_r=0.

9. For a notable exception, see generally THE GLOBAL TOBACCO EPIDEMIC AND THE LAW (Andrew D. Mitchell & Tania Voon eds., 2014). For a comparative perspective, see Eric A. Feldman & Ronald Bayer, *The Triumph and Tragedy of Tobacco Control: A Tale of Nine Nations*, 81 ANN. REV. L. SOC. SCI. 78 (2011).

10. See *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1213 (2012) (finding that the *Zauderer* holding is “limited to cases in which disclosure requirements are ‘reasonably related to the State’s interest in preventing deception of consumers’”) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

11. See *id.*

12. See FRIENDS OF THE EARTH, DEREGULATORY DISAPPOINTMENT: TRANSATLANTIC FREE TRADE AGREEMENT NEGOTIATIONS (2013), http://www.maine.gov/legis/opla/ISSUE_BRIEF_TAFTA_overview_3.pdf.

13. Gregory Shaffer, *How the World Trade Organization Shapes Regulatory Governance*, 9 REG. & GOVERNANCE 1 (2015).

In this context, using a single commodity to trace the role of ICs (as opposed to focusing on a particular legal issue or court) reveals the large number of institutions implicated in this modern form of governance as well as the tensions resulting when governments regulate consumer products.

Finally, the calculated efforts by economic actors to advance, frame, and spread litigation are more than just another tale of powerful commercial actors opposing government action for economic self-interest. The history of tobacco litigation before ICs reveals a more intricate interrelationship between domestic and international legal institutions than many scholars acknowledge. Instead of viewing ICs solely as a threat to the sovereignty and independence of domestic authorities as claimed by some schools of thought, the narrative presented here shows that ICs can help to transform ideas and provide coordination and legitimacy to states' policies. As I explain, these functions may strengthen efforts to constrain corporate power in limited but influential ways.

This Article proceeds as follows: Part I briefly discusses the global expansion of tobacco with a particular focus on regulatory efforts to reduce tobacco consumption and its effects. Part II surveys how tobacco interests use ICs and develops a topology to understand the role of ICs in addressing different claims. It also provides four case studies that show the use of ICs in action. Part III analyzes the role of ICs in tobacco litigation and concludes with some thoughts on the implications of this work for the understanding of international law.

I. THE EXPANSION OF TOBACCO IN CONTEXT

A. *Tobacco Regulation and Resulting Litigation in the United States*

Despite tobacco's prior use and importance in American history, smoking cigarettes is a relatively recent phenomenon.¹⁴ It gained popularity only at the beginning of the twentieth century but expanded rapidly thanks to aggressive advertising.¹⁵

Today, cigarette smoking continues to be widespread. Smoking cigarettes causes approximately 1 in 5 deaths in the United States (about 480,000 deaths each year).¹⁶ Smoking causes more deaths than HIV, alcohol use, illegal drug use, firearm-related incidents, and motor vehicle injuries com-

14. See Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, LOY. L.A. L. REV. 1721, 1722 (2008).

15. Craig P. Raysor, *From the Sword to the Pen: A History and Current Analysis of U.S. Tobacco Marketing Regulations*, 13 DRAKE J. AGRIC. L. 497, 510–12 (2008).

16. *Tobacco-related Mortality*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm. When the Surgeon General's report was released in 1964, it reported that 70 million people (38% of the population) consumed tobacco products, mostly cigarettes. See U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL ON THE PUBLIC HEALTH SERVICE (1964), <http://profiles.nlm.nih.gov/ps/access/NNBBMQ.pdf>.

bined.¹⁷ Every day more than 3200 people below the age of eighteen smoke their first cigarette.¹⁸

Public health advocates and authorities concerned with the effects of tobacco use have managed to claim some victories,¹⁹ including the adoption of antismoking regulation.²⁰ Unsurprisingly, the tobacco industry has resisted these efforts. Most recently it has targeted packaging requirements involving graphic images of the anticipated health consequences of tobacco by characterizing such requirements as a form of compelled speech.²¹ While some reject these efforts of “debiasing” consumers as paternalistic, public health advocates defend the tactic as an effective strategy to reduce underage smoking, the most salient of tobacco control goals.²²

To summarize the lessons of tobacco litigation in the United States from a regulatory perspective, Professor Robert L. Rabin suggests three different dimensions are at play: *deterrence*, *regulatory strategies*, and *information dissemination*.²³

First, deterrence constitutes the underlying foundation for claims against toxic products like tobacco. Rabin clarifies, however, that the amounts paid in litigation settlements “conform to no fine-tuned theoretical objective of internalizing [costs].”²⁴ In particular, the more than \$240 billion paid as a result of the MSA and other state claims for the industry’s misrepresentations and inadequate disclosures bears no relationship to any notion of appropriate deterrence.²⁵ These costs are minimal when compared to the productivity loss and public health costs associated with smoking, let alone

17. *Health Effects of Cigarette Smoking*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm.

18. *Fast Facts: Cigarette Smoking in the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/.

19. *Current Cigarette Smoking Among Adults in the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/ (noting that the percentage of adults in the United States who smoke cigarettes has declined from 20.9% of all U.S. adults in 2005 to 16.8% in 2014).

20. Richard J. Bonnie, *The Impending Collision Between First Amendment Protection for Commercial Speech and the Public Health: The Case of Tobacco Control*, 29 J. L. & POL. 599, 602 (2014). Experts believe that nicotine “is the most addictive substance that can be obtained without a prescription in the United States.” Matthew R. Herington, *Tobacco Regulation in the United States: New Opportunities and Challenges*, 23 HEALTH L. 13, 13 (2010).

21. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 525 (2001) (upholding constitutionality of color graphic warning label requirement); see also *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (2012) (same). But see, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (finding First Amendment protections of commercial speech where the Food and Drug Administration prohibited pharmacies from advertising or promoting the compounding of drugs); *D.C. Circuit Holds That FDA Rule Mandating Graphic Warning Images on Cigarette Packaging and Advertisements Violates First Amendment*, 126 HARV. L. REV. 818, 818 (2013) [hereinafter *D.C. Circuit Rule*]; *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (2012).

22. See generally Christine Jolls, *Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation*, 169 J. INSTITUTIONAL & THEORETICAL ECON. 53 (2013).

23. Rabin, *supra* note 14, at 1745.

24. *Id.*

25. A landmark case, *Cipollone v. Liggett Group, Inc.*, revealed a “history of lying, distorting, and covering up the truth that cigarettes are addictive and carcinogenic” and set the stage for the “corporate

other externalities (for example, exhaustion of soils by an invasive plant or contamination resulting from discarded cigarette butts).

Second, the use of courts to advance public health aims with respect to tobacco control highlights the limitations of litigation as a regulatory strategy in the United States.²⁶ Currently, there is no evidence that tort litigation necessarily contributed to reducing harm. Moreover, tobacco interests have been able to defeat an array of regulatory initiatives thanks in part to sophisticated litigation relying on doctrines such as commercial speech, cost-benefit analysis, and fairness.²⁷ Litigation also has reduced the regulatory space of the executive branch by helping to expand commercial speech protections, even as democratic consensus about the importance of control efforts has ensued.²⁸

Despite these setbacks, tobacco litigation has, notably, exposed the practices of the industry. In Rabin's view, this third factor—the documentation made available through U.S. courts—has contributed to reducing tobacco consumption by raising awareness of the consequences of smoking as well as public disapproval of the industry. This phenomenon could have helped to create a more favorable political climate that enabled political leaders to adopt more effective regulatory strategies such as the excise tax and second-hand smoke legislation.²⁹

B. *Economic Liberalization and the Expansion of Tobacco*

The progress in reducing tobacco consumption that has been made in the United States, and similar industrialized nations, has been overshadowed by the increase of smoking in emerging economies.³⁰ Today, nearly 20% of

misbehavior" narrative. Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in REGULATING TOBACCO 11, 22 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

26. Recent lawsuits have largely stalled efforts to curb smoking. For one, the industry has successfully stonewalled antismoking initiatives mandating graphic warning labels and curbing deceptive practices by invoking the commercial speech doctrine. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); see also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

27. *Herington*, *supra* note 20, at 14 (quoting *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 156, 161 (2000) (internal quotation marks omitted)).

28. See generally *Brown & Williamson*, *supra* note 27. To be sure, there is an economic aspect, too—certain small segments of the United States (estimated at 8000 farmers) still depend on tobacco cultivation. Furthermore, while consensus exists that there are more restrictions on tobacco, the adequate means to regulate tobacco remains a source of legal debate given the systemic effects on other industries. I thank Brady Cassis for this thoughtful point.

29. Rabin, *supra* note 14, at 1749–50.

30. See John R. Seffrin & Peter Baldini, *Foreword to AMERICAN CANCER SOCIETY, THE TOBACCO ATLAS 5* (5th ed. 2015) (“This focus on addicting hundreds of millions in ‘emerging markets’ has led to alarming trends in tobacco use in some countries.”); see also *The World Health Organization on the Global Tobacco Epidemic*, 34 *POPULATION AND DEV. REV.* 188, 192 (2008) (“[T]he monetary costs of the epidemic will cause severe economic harm to low and middle income countries.”).

adults in the world smoke, but more than 80% of them live in low- and middle-income countries.³¹

Tobacco's global success is partly the result of free trade deals that mandate the removal of import taxes and other commercial restrictions. Notably, U.S. trade authorities have supported the industry by leveraging the country's power and consumer base in exchange for open markets for tobacco products. Both Republican and Democratic administrations have generally espoused the industry's interest in trade deals, while simultaneously subsidizing U.S. tobacco growers to boost their exports.³² A congressional report issued at the dawn of major trade negotiations noted, to no avail, that:

[A] policy level conflict exists between U.S. trade goals and health policy objectives in regard to the export of tobacco products. On the one hand, federal resources are used to facilitate the export of U.S. cigarettes, while on the other hand, the federal government has directed a major domestic antismoking effort and is a participant in the international antismoking movement.³³

This paradox is not hard to explain. Some influential corporate interests, including PMI, BAT, Altria, Lorillard, and Imperial Tobacco ("ITG"), benefit greatly from trading tobacco globally with limited fiscal or regulatory barriers and lobby for helpful provisions in these deals.³⁴ The repatriation and taxation of the profits of these companies' subsidiaries across the world contributes to the national economy. Regions growing tobacco leaf reap handsome benefits, such as the creation of a few but much-needed jobs in farming communities. That said, on balance tobacco arguably has a negative effect on social welfare.³⁵

Until recently, officials from the Office of the U.S. Trade Representative maintained that cigarettes, like many other damaging consumer products, are sold legally in the United States and abroad and that the agency should therefore make no distinction in trade deals. This reasoning, however, fails to appreciate that the core arguments for economic liberalization—more

31. China illustrates the depth of the crisis: 300 million Chinese adults are regular smokers, including 50% of adult Chinese males. CAMPAIGN FOR TOBACCO-FREE KIDS, *The Chinese Tobacco Market and Industry Profile 3* (2012), http://global.tobaccofreekids.org/files/pdfs/en/TI_Profile_China.pdf.

32. These federal subsidies only ended (at least for now) in 2014. See Emily McCord, *Tobacco Farmers Lose Longtime Safety Net*, NPR (Oct. 24, 2014), <http://www.npr.org/2014/10/24/357947259/tobacco-farmers-lose-longtime-safety-net>.

33. U.S. GOV'T ACCOUNTABILITY OFF., TRADE AND HEALTH ISSUES: DICHOTOMY BETWEEN U.S. TOBACCO EXPORT POLICY AND ANTISMOKING INITIATIVES 5 (1990).

34. *Id.* China is unique in that the government is both owner and regulator of the industry. In 2008, Philip Morris International's Chairman and CEO stated, "China is obviously our largest opportunity . . . to capture any meaningful opportunity that may arise should state control of the industry ever be relaxed." *Remarks by Louis C. Camilleri, Chairman and CEO, PHILIP MORRIS INTERNATIONAL*, Nov. 18, 2008, http://www.pmi.com/eng/media_center/speeches_and_presentations/pages/remarks_by_louis_c_camilleri_20081118.aspx#.

35. For a discussion of the social welfare effects of tobacco, see Prabhat Jha & Richard Peto, *Global Effects of Smoking, of Quitting, and of Taxing Tobacco*, 370 *NEW ENG. J. MED.* 60 (2014).

goods become available at cheaper prices, more foreign direct investment improves production, and more sources of financing increase a country's welfare and its consumers' standard of living—do not apply so neatly to tobacco. Free trade and investment in tobacco do indeed reduce prices and increase consumption, but national welfare declines because productivity and public health deteriorate while health care costs swell. To quote from the World Health Organization (“WHO”), tobacco “is the only legally available product that kills up to one half of its regular users when consumed as recommended by its manufacturer.”³⁶

C. *The Internationalization of Regulatory Efforts*

The global expansion of tobacco has not gone unchecked. Not only have recent trade agreements enabled flexible arrangements to regulate tobacco for public health reasons, but international control efforts have also expanded.³⁷

Chief among these efforts is the Framework Convention on Tobacco Control (“FCTC”).³⁸ In sharp contrast to international trade agreements, the treaty's goal on the demand side is “to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.”³⁹ Here the Convention recommends heavy taxation and other measures to price out consumers, in addition to: (1) protections from smoke exposure; (2) regulation of the contents of tobacco products; (3) requirements for the packaging and labeling of tobacco products; (4) educational and public awareness efforts; and (5) regulation of tobacco marketing. On the supply side, the Convention addresses illicit trade in tobacco products, sales to and by minors, and alternative economic activities for tobacco growers.⁴⁰ While there are monitoring systems under the WHO, compliance with the FCTC by its current 180 members depends on each government's interest and capacity.⁴¹

36. *Tobacco Free Initiative*, WHO http://www.who.int/tobacco/industry/product_regulation/background/en/ (last visited May 16, 2016); see also J.J. Barendregt et al., *The Health Care Costs of Smoking*, 337 *NEW ENG. J. MED.* 1052, 1052–57 (1997).

37. See Tania Voon, *Flexibilities in WTO Law to Support Tobacco Control Regulation*, 39 *AM. J.L. & MED.* 199, 204 (2013).

38. See WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166 [hereinafter FCTC], <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>. The FCTC contains tobacco control measures such as implementing pictorial health warnings (50% minimum) on tobacco products' packs; adopting a total ban on tobacco advertising, promotion and sponsorship; enforcing a complete ban on tobacco use in public places; increasing tobacco prices to control access by young people; and continuing to monitor the epidemic and introduce tobacco dependence treatments. WHO & WTO, *WTO AGREEMENTS AND PUBLIC HEALTH: A JOINT STUDY BY THE WHO AND THE WTO SECRETARIAT* ¶ 135 (2002), http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf; see also WHO, *HISTORY OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL* (2009), http://whqlibdoc.who.int/publications/2009/9789241563925_eng.pdf.

39. FCTC, *supra* note 38, art. III (“The objective of this Convention and its protocols is . . . to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.”)

40. *Id.* arts. 15–17.

41. As of July 2016, the United States has signed but not yet ratified the FCTC. See *Parties to the WHO Framework Convention on Tobacco Control*, WHO (Feb. 12, 2015), <http://www.who.int/fctc/signato>

This is often a function of the strength of the tobacco industry in particular countries.⁴²

Since the treaty entered into force, a number of states such as Australia, Uruguay, and some members of the European Union (“EU”) have introduced control measures based on the FCTC.⁴³ In response, the industry has relied more and more on ICs, claiming that antismoking regulations contravene international obligations enshrined in international commercial or free trade agreements (“FTAs”). This litigation has prompted the tobacco “carve-out” in the TPP, which permits members to block corporations from using the Investor-State Dispute Settlement (“ISDS”) tribunals against tobacco control measures.⁴⁴ As explained in the following section, the path-breaking exception of the TPP is in part a response to the industry’s calculated litigation strategy to defeat control efforts.

II. GLOBALIZATION AND TOBACCO LITIGATION

A. Brief History of Tobacco Before International Courts

Tracing tobacco interests before ICs begins with the antislavery court active between 1817 and 1871. The institution operated based on bilateral treaties between Britain and several other countries (eventually including the United States) and adjudicated disputes between vessels engaged in the illegal slave trade and their captors.⁴⁵ While the link between the antislavery court and the industry is certainly much more tenuous than that found in recent arbitration cases brought directly by PMI, the court’s decisions undermined an emergent tobacco industry in a very practical way. A conservative estimate, based on the use of forced labor by industry during the

ries_parties/en/. For information on ratification, see United Nations Treaty Collection, Status of Treaties, WHO Framework Convention on Tobacco Control (Sept. 1, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en.

42. Melissa E. Crow, *Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control*, 29 YALE J. INT’L L. 209, 219 (2004).

43. The EU has been engaged in a number of tobacco regulatory initiatives since the late 1990s. See Directive 2014/40/EU, of the European Parliament and of the Council of 3 April 2014 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products and Repealing Directive 2001/37/EC, 2014 O.J. (L 127) 1 (EC), http://ec.europa.eu/health/tobacco/docs/dir_201440_en.pdf; see also Gerlinde Berger-Walliser & Robert C. Bird, *The Impact of Plain Packaging Regulation on Illicit and Non-illicit Tobacco Products in the European Union*, 38 N.C. J. INT’L L. & COM. REG. 1015, 1038 (2013); *EU Commission Adopts Revisions to Directive on Tobacco Products*, WORLD HEART FEDERATION (Dec. 20, 2012, 11:49 AM), <http://www.world-heart-federation.org/press/news/detail/article/eu-commission-adopts-revisions-to-directive-on-tobacco-products/>; *Draft EU Rules Open Door to Plain Cigarette Packs*, EURACTIV.COM (Dec. 18, 2012), <http://www.euractiv.com/health/draft-eu-rules-open-door-plain-c-news-516730>.

44. Jackie Calmes & Sabrina Tavernise, *U.S. Proposes Provision on Tobacco in Trade Pact*, N.Y. TIMES (Oct. 1, 2015), http://www.nytimes.com/2015/10/02/business/international/us-proposes-provision-on-tobacco-in-trade-pact.html?_r=0.

45. See generally Martinez, *supra* note 5.

time of the court's operation, suggests that nearly 16,000 would-be tobacco plantation slaves were freed as a result of the court's rulings.⁴⁶

Up to the late 1970s other tobacco-related cases before ICs involved almost exclusively the confiscation of property, namely tobacco-growing plantations.⁴⁷ This should not come as a surprise. For centuries, the function of ICs was to provide an independent forum to assist nations in settling disputes amicably and in many cases to compensate affected parties for takings of physical property.⁴⁸

For the last three decades or so, the scope of international legal commitments has been expanding and now covers many relevant policy areas, including health regulation, IP, and domestic taxation, relevant areas that were previously considered exclusive sovereign domains of the state. As a result, the role of ICs has also expanded.⁴⁹

One effect of such expansion is that tobacco-related cases have been brought before a number of ICs. Their authority ranges from the power to decide loss, damage, or injury in the context of armed conflicts, to the revision of national laws or regional directives on alleged supra-national constitutional-esque grounds.⁵⁰ Ten different international institutions have seen at least one tobacco case: the European Court of Justice ("ECJ"), ISDS arbitration tribunals under the International Centre for Settlement of Investment Disputes ("ICSID") and the Permanent Court of Arbitration ("PCA"), the Court of Justice of the European Free Trade Association ("EFTA"), the Eritrea-Ethiopia and the Iran-United States Claims Tribunals, the Court of Justice of the Andean Community (*Tribunal de Justicia de la Comunidad Andina*, or "TJCA") as well as the WTO, tribunals under its predecessor the General Agreement on Tariffs and Trade ("GATT"), and the Southern Common Market (*Mercado Común del Sur*, or "MERCOSUR") dispute settlement bodies.

46. See generally Paul E. Lovejoy & David Richardson, *Competing Markets for Male and Female Slaves: Slave Prices in the Interior of West Africa, 1780–1850*, 28 INT'L J. AFR. HIST. STUD. 261 (1995); Lorena S. Walsh, *Slave Life, Slave Society, and Tobacco Production in the Tidewater Chesapeake*, in CULTIVATION AND CULTURE: LABOR AND THE SHAPING OF SLAVE LIFE IN THE AMERICAS 170 (Philip D. Morgan ed., 1949).

47. See, e.g., THE SPANISH TREATY CLAIMS COMM'N, FINAL REPORT OF THE SPANISH TREATY CLAIMS COMMISSION 21 (1910). In the 1960s a complaint was raised before the General Agreement on Tariffs and Trade ("GATT") dispute settlement body by Malawi, but it was never adjudicated. See Working Party Report, United States Subsidy on Unmanufactured Tobacco (Malawi v. U.S.) (Nov. 22, 1967), <http://www.worldtradelaw.net/reports/gattpanels/ustobaccosubsidy.pdf.download#page=1>.

48. See generally Philip C. Jessup, *Responsibility of States for Injuries to Individuals*, 46 COLUM. L. REV. 903 (1946); J.L. Brierly, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 277–78 (Sir Humphrey Waldock ed., 6th ed. 1963).

49. Laurence Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INT'L ADJUDICATION 464–82 (Karen J. Alter et al. eds., 2014). For recent statistics, see KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* ch. 3 (2014); Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-based Approach*, 106 AM. J. INT'L L. 225 (2012); Dinah L. Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537 (2009).

50. For a description of the mandate and jurisdiction of different ICs, see Alter, *THE NEW TERRAIN*, *supra* note 49.

In the thirty-nine different claims surveyed (see Annex 1), ICs have adjudicated a variety of challenged government policies: import and export taxes; price, sale, export, and import controls; bans on tobacco products; marketing and advertisement restrictions; labeling requirements; and brand registration recognition. In some instances, parties have brought challenges before different ICs at the same time, and in others different actors (states, regional bodies, or corporations) have joined efforts to challenge the same policy in parallel or subsequent proceedings. Most cases, around 55%, have been brought by or on behalf of large tobacco companies, or “Big Tobacco”—PMI, BAT, Japan Tobacco International (“JTI”), and ITG—although economic actors challenging the dominance of these companies have also relied on these judicial-like institutions.⁵¹

For purposes of analysis, the claims brought in these international cases can be simplified and organized as issues over: (1) property rights; (2) authority to regulate; (3) discrimination; and (4) unnecessary obstacles to trade. The next section explains in detail how each of these sets of claims operates—a necessary step to assess the impact of ICs in tobacco regulation. Figures 1, 2, and 3 below also summarize the landscape of cases and claims.⁵²

B. *Typology of International Tobacco Claims*

In contrast to the general survey, this section uses the classification introduced above to analyze how different ICs deal with specific claims.

1. *Claims over Property Rights*

A significant number of the surveyed cases (38%) involve a claim that a governmental action has affected property rights, or the proper enjoyment of property, including IP.

Some of these claims are relatively uncontroversial from a regulatory point of view. For instance, R.J. Reynolds and PMI brought suits before the Iran-U.S. Claims Tribunal—an ongoing IC created to decide disputes between those countries after the Iranian revolution and hostage crisis—for the breach of purchase agreements by an instrumentality of the Iranian government.⁵³ Other examples include claims brought by a subsidiary of BAT for property loss before the Eritrea-Ethiopia Claims Commission—a tribunal

51. Around a third of the claims surveyed implicate PMI or a company partially or wholly owned by, or related to, this corporation.

52. The figures are based on the author’s own calculations. The sources of information used are public and include websites and databases of the list of different ICs involved and referenced in Annex 1. Additional information is also available on file with the author.

53. The tribunal found that Iran owed R.J. Reynolds \$36,294,667.66 for unpaid tobacco products. *R.J. Reynolds Tobacco Co. v. The Islamic Republic of Iran & The Iranian Tobacco Company*, 7 Iran-U.S. Cl. Trib. Rep. 181 (1986). The tribunal awarded R.J. Reynolds \$13.8 million as interest due, but rejected a claim for compound interest. *Id.*; see also Nicholas D. Kristof, *A Slow Pace for Iran Claims*, N.Y. TIMES (Nov. 14, 1984), <http://www.nytimes.com/1984/11/14/business/a-slow-pace-for-iran-claims.html>.

that heard claims as a consequence of military hostilities between the two North African nations.⁵⁴ Further, an investor-state arbitration against the Central African Republic under ICSID—an international dispute mechanism that enforces rights under investment instruments—sought compensation for a breach of contract after the government indirectly expropriated a tobacco plantation owned by a Swiss corporation.⁵⁵

Slightly more controversial, claims have been brought before investor-state arbitration, also under ICSID, by relying on the North-American Free Trade Agreement (“NAFTA”).⁵⁶ In *Feldman*, a tribunal analyzed the validity of Mexico’s attempts to halt exports by resellers that deprived the government of tax revenue (so-called “gray market exports”).⁵⁷ An American based in Mexico sued the government for denying him tax rebates under export promotion programs, apparently to protect a PMI subsidiary in Mexico. He claimed that this constituted a measure “tantamount to nationalization or expropriation” of a protected “right to export cigarettes.”⁵⁸ The tribunal found that Mexico’s actions did not result in an indirect expropriation, and international law did not require a state to permit gray market exports.⁵⁹ Hence, the tribunal found Mexico’s actions reasonable and well within its public policy powers.⁶⁰ The tribunal also recognized that some policies may make certain businesses “less profitable or even uneconomic to continue” without necessarily constituting a violation of international law.⁶¹

Also under NAFTA, *Grand River Enterprises Six Nations* dealt with a claim that resulted from the MSA in the United States. According to the Canadian

In a separate case, Iran settled with PMI for \$2 million. *Philip Morris Inc. v. The Islamic Republic of Iran & The Iranian Tobacco Company*, 1 Iran-U.S. Cl. Trib. Rep. 220 (1982).

54. See generally SEAN D. MURPHY ET AL., *LITIGATING WAR: MASS CIVIL INJURY AND THE ERITREA-ETHIOPIA CLAIMS COMMISSION* (2013). In this case, the largest employer in Eritrea’s Tokombia region brought suit against Ethiopia after its property was destroyed. The claim resulted in compensation for the looted property at the tobacco plant in the amount of \$210,000. *State of Eritrea and Federal Democratic Republic of Ethiopia (Eri. v. Eth.)*, Eritrea-Ethiopia Cl. Comm’n Partial Award, 45 I.L.M. 396, 396–429 (Dec. 19, 2005) (denying the claim for destruction due to lack of evidence, but accepting the claim for the looting after the destruction, which was documented with a detailed inventory prepared by the manager).

55. The tribunal granted compensation only for the amount of its actual investment in the form of the lost harvest. See *M. Meerapfel Söhne AG v. Cent. Afr. Republic*, ICSID Case No. ARB/07/10, Award (May 12, 2011). For a summary in English, see *M. Meerapfel Söhne AG v. Central African Republic (ICSID Case No. ARB/07/10)*, QUANTUM QUARTERLY: THE DAMAGES NEWSLETTER (King & Spalding Int’l Arb. Group), 2013, at 12, <http://www.kslaw.com/library/publication/Quantum-Quarterly-Q2-2013.pdf>.

56. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

57. *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 7 (Dec. 16, 2002) (involving Mexican excise tax on products and services that, in some circumstances, could be rebated to encourage exports).

58. *Id.* According to *Feldman*, this was to protect CIGATAM, the distributor of PMI and a firm allegedly controlled by Carlos Slim, Mexico’s wealthiest man.

59. *Id.* ¶ 136 (noting “that cigarette smuggling [was] a significant problem for Mexico”).

60. *Id.* ¶ 112. Despite this finding on expropriation claims, the tribunal found a national treatment violation because rebates were not refused to domestic exporters. The claimant was awarded 9,464,627.50 pesos plus interest in damages, or about US\$ 1.5 million. *Id.* ¶ 205.

61. *Id.* ¶ 112.

FIGURE 1: TOBACCO-RELATED DISPUTES IN ICs OVER TIME
($N=39$; $x=year$, $y=cases$)

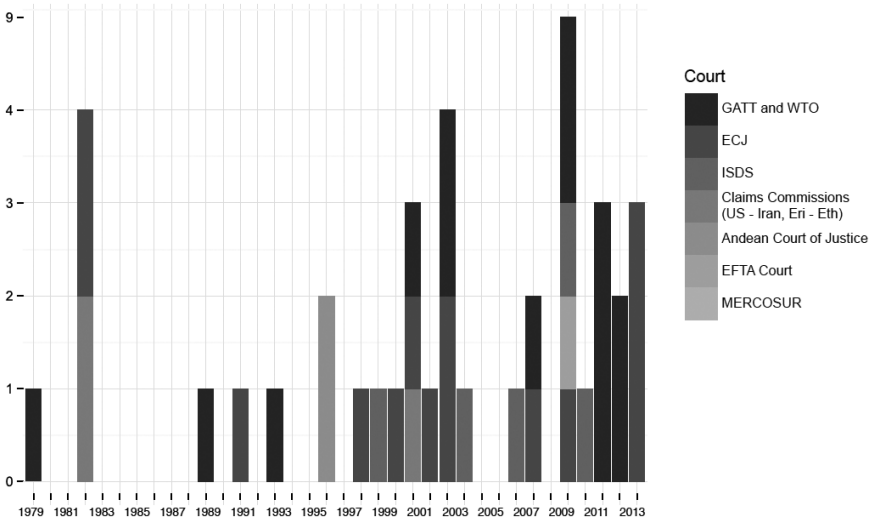
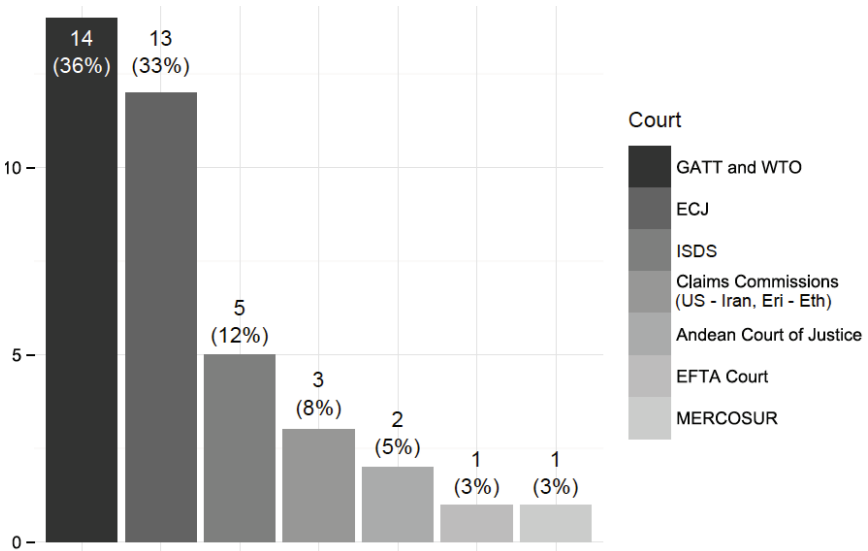


FIGURE 2: NUMBER OF TOBACCO CASES IN ICs BY VENUE
($N=39$)



claimants, some enforcement actions of the MSA affected their sales and constituted an expropriation of a substantial portion of their investments in the United States. The tribunal found little sympathy for this claim, hold-

ing that the claimants had not been deprived of ownership or control of the business of importing cigarettes and distributing them on Native American land, a jurisdiction exempted from the MSA.⁶² Rejecting the notion of a “partial” expropriation, the tribunal noted that anybody entering the tobacco business must do so with awareness of the complex regulatory environment of the sector.⁶³

More recent claims have involved IP rights (that is, the right to use brands and other symbols with respect to tobacco products). The most controversial claims have been brought in response to Australian and Uruguayan packaging and labeling regulations. In these cases, PMI’s subsidiaries argued unsuccessfully (for jurisdictional reasons in the Australian case) that the regulation of a company’s trademark destroys its IP rights because it affects its ability to differentiate its products.⁶⁴ Notably, in the Uruguayan case, the tribunal concluded that “police powers for the protection of public health” justified the regulation.⁶⁵ Hence, the regulatory framework could not constitute an expropriation.

Such arguments also have some precedent before the ECJ—a regional court in charge of interpreting and applying EU law. Likewise, that court was asked to decide if a directive on the manufacture, presentation, and sale of tobacco products infringed on property rights under the European Charter. The ECJ decided in a 2002 judgment that such right to property must be viewed in relation to its social function.⁶⁶ Hence, “restrictions on the trademark right . . . correspond to objectives of general interest [such as tobacco abuse control] . . . and do not constitute a disproportionate and intolerable interference, impairing the very substance of that right.”⁶⁷

62. *Grand River Enterprises Six Nations Ltd. v. United States*, UNCITRAL NAFTA Tribunal, 44 I.L.M. 1545, ¶ 154 (2005).

63. *Id.* ¶ 144 (concluding that an expropriation must involve the deprivation of all, or a very substantial portion, of a property interest).

64. *Philip Morris Asia v. Australia*, Notice of Arbitration, ¶ 7.15–7.17 (Nov. 21, 2011). A tribunal at the Permanent Court of Arbitration issued a decision dismissing the arbitration against Australia. Notwithstanding this dismissal, a separate claim against Australia at the WTO remains pending. See Jarrod Hepburn & Luke Eric Peterson, *Australia Prevails in Arbitration with Philip Morris over Tobacco Plain Packaging Dispute*, IAREPORTER (Dec. 17, 2015), <http://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/>.

65. *Philip Morris Brands SARL (Switz.), Philip Morris Products S.A. (Switz.), & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶¶ 235–309 (July 8, 2016), <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf> [hereinafter *Philip Morris v. Uruguay*]. Philip Morris filed a case under the Switzerland–Uruguay bilateral investment treaty (“BIT”) before ICSID in relation to legislation requiring all cigarette manufacturers to adopt a single presentation requirement and graphic warnings covering 80% of the package. *Id.*

66. *Case C-491/01, The Queen v. Sec’y of State for Health, ex parte Brit. Am. Tobacco (Investments) Ltd.*, 2002 E.C.R. I-11453.

67. *Id.* ¶ 153.

2. Claims over Authority to Regulate

A second set of claims challenges the proper exercise of regulatory authority over tobacco products or related services, including for instance the marketing of cigarettes. These claims occur only where nations have delegated power to a supra-national authority to seek deeper policy coordination, or in the context of political integration.

Before elaborating on such claims, a clarification is in order: who regulates tobacco can affect control efforts in complicated ways. It is not clear if municipal, state, federal, or supra-national bureaucracies are best suited to the task, let alone endowed with the appropriate authority, capacity, and resources to take it on. However, experts have argued that global problems often require coordinated efforts.⁶⁸ Hence, a fragmented regulatory environment may favor the tobacco industry.⁶⁹

The behavior of the industry certainly confirms this commonly held view. In 21% of the surveyed cases the ECJ decided subsidiarity principle questions (or federalism questions, in U.S. constitutional law terms). These cases address who can regulate: the central governing authority (the Commission) or the constituent political units (the European Member States).⁷⁰ For example, in *Arnold Andre*, the ECJ held that the Commission properly derived its authority to regulate tobacco products from the European Charter, which provided the community with rulemaking authority to ensure internal efficacy of the market *and* to protect public health.⁷¹

Outside of the EU context the survey showed no other claims properly challenging the authority to regulate. Notably, however, the TJCA—a regional tribunal deciding economic matters between the Andean Community (that is, Bolivia, Colombia, Ecuador, Peru, and, at points, Venezuela)—faced the question of whether Ecuadorian IP authorities could suspend cigarette exports as a result of the infringement of a trademark.⁷² While the tribunal decided the issue as a factual matter only, the decision discussed the alloca-

68. See, e.g., Joseph H. Horowitz Weiler, *Cain and Abel—Convergence and Divergence in International Trade Law*, in *THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 1–5 (Joseph H. Horowitz Weiler ed., 2001).

69. See, e.g., Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 *CORNELL L. REV.* 1387 (2014) (arguing that “both public and private international law have not adequately grappled with the problem of transnational regulation of large multinational corporations, and that part of the reason for this failure is the heavy reliance of both fields on concepts of territoriality and state-centric sovereignty”).

70. B.E. Olsen, *The Subsidiarity Principles and Its Impact on Regulation*, in *REGULATION IN THE EU* 35, 57 (B.E. Olsen & K.E. Sorensen eds., 2006). For instance, an ongoing case before the ECJ involves addressing whether the public health aspects of tobacco, which according to the industry have “a local character,” confine this issue “to be resolved at [a] national level . . . in those Member States in which there is a high level of consumption and manufacture of [tobacco] products.” Case C-358/14, *Republic of Poland v. European Parliament and Council of the EU*, 2014 O.J. (315) 69.

71. Case C-434/02, *Arnold André GmbH & Co. KG v. Landrat des Kreises Herford*, 2004 E.C.R. I-11869 (emphasis added).

72. Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutors: Understanding the Preliminary Ruling Reference Patterns in the Andean Community*, 42 *N.Y.U. J. INT’L L. & POL.* 871, 888 (2009).

tion of international trade and IP authority within the Ecuadorian national government.⁷³

Also, the cases against Australia's "plain packaging" legislation raise conflict-of-laws issues, as the domestic legislation was adopted based on the FCTC. But while the cases involve potentially overlapping international obligations, the international claims do not entail improper exercise or encroachment of regulatory authority by the government.⁷⁴

3. *Claims over Discrimination*

More prevalent are claims involving disparate effects, discriminatory intent, or violations of due process that provide an advantage to certain tobacco products or producers over others. These include claims under the umbrella of nondiscrimination provisions (for example, most-favored-nation ("MFN") status and national treatment), proportionality standards, or "fair-and-equitable treatment" clauses. Provisions of this nature are common in accords regulating economic interdependency such as free trade agreements ("FTAs"), the WTO Agreements, or bilateral investment treaties ("BITs"), but also appear in agreements dealing with political integration like the European Charter or the Andean Pact, which formed the EU and Andean Community, respectively.⁷⁵

Claims relying on these often broadly-drafted legal obligations can undermine control efforts. By their very nature, these provisions constrain regulatory power and confront different socially worthy policies.⁷⁶ While governments retain flexibility under the justificatory exceptions,⁷⁷ balancing elements—including proportionality and effectiveness—need to be asserted when governmental actions overly affect a particular class of products or producers. Not surprisingly, almost 80% of the surveyed cases deal with legal issues of this nature—some in more controversial ways than others.

Relatively uncontroversial (from a tobacco control perspective) is an ECJ case brought by the European Commission against Italy for discriminatory practices in sales of tobacco at the retail level.⁷⁸ Other cases challenging

73. See *Venez. v. Ecuador*, Judgment, 2-AI-96 (TJCA, June 20, 1997).

74. Henning Grosse Ruse-Khan, *Protecting Intellectual Property Under BITs, FTAs, and TRIPS: Conflicting Regimes or Mutual Coherence?* 17–18 (Max Planck Inst. for Intellectual Prop. & Competition L., Research Paper No. 11-02, 2011), <http://ssrn.com/abstract=1757724>.

75. See generally ROBERT Z. LAWRENCE, *Regionalism, Multilateralism and Deeper Integration: Changing Paradigms for Developing Countries*, in *TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS* 23 (Mendoza et al. eds., 1999); Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48 (2008).

76. See, e.g., Press Release, Public Citizen, Statement of Lori Wallach, If There Is a Final TPP Deal: Can It Pass Congress? (Oct. 5, 2015), <http://www.citizen.org/documents/statement-atlanta-tpp-ministerial-october-2015.pdf>.

77. See, e.g., General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (listing justificatory exceptions to adopting trade restrictive measures when, *inter alia*, they are "necessary to protect human, animal or plant life or health").

78. Case 78/82, *Comm'n of the European Cmty. v. Italy*, 1983 E.C.R. 1955.

taxation, or administrative practices that treat imported products less favorably than locally produced products, have been heard by the WTO⁷⁹ or by its precursor, the GATT.⁸⁰ In addition, a case preventing exports of Brazilian raw tobacco to Uruguay was brought before a panel under MERCOSUR, an FTA in South America.⁸¹ All of these decisions emphasize the maintenance of trade liberalization over favoring domestic products or producers, but they say little about the tensions created with other public policy goals like health, environment, or consumer protection. In fact, in none of these cases did the tribunals suggest (nor did the parties argue) that protection of these goals was a credible excuse for the adoption of the measure challenged on the grounds of discriminatory motive or impact.

More heated debate has emerged from cases challenging policies aimed at enforcing control measures but resulting in disparate effects between economic actors or their products. Again, dispute settlement bodies under the WTO and the GATT have generally addressed these claims.⁸² Most notably, in the *Clove Cigarettes* case (a dispute explored at more length in the next section), Indonesia successfully challenged a ban on the sale of clove cigarettes (and not on menthol cigarettes) on product discrimination grounds. A WTO Panel and the WTO's Appellate Body found that the measure, which was aimed at discouraging minors from smoking, was inconsistent with the nondiscrimination provisions of one of the WTO's Agreements (namely, Technical Barriers to Trade or "TBT"). The decisions emphasized that the regulation prohibited imported clove-flavored cigarettes from Indonesia but did not ban domestic menthol-flavored cigarettes from the United States

79. See, e.g., Panel Report, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/R (adopted July 15, 2011), in 4 WTO, DISPUTE SETTLEMENT REPORTS 2299 (2011) (as modified by Appellate Body Report, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/AB/R) (challenging valuation practices, excise tax, health tax, TV tax, VAT regime); Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/R (adopted May 19, 2005), in 15 WTO, DISPUTE SETTLEMENT REPORTS 7425 (2005) (as modified by Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R) (challenging the stamp and bond requirements, the transitional surcharge, the foreign exchange fee, and the selective consumption tax); Panel Report, *Peru — Taxes on Cigarettes*, WTO Doc. WT/DS227/R (adopted July 12, 2001) (challenging a tax structure that in effect imposes a higher burden on cigarettes sold in multiple countries); Panel Report, *Armenia — Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages*, WTO Doc. WT/DS411/R (adopted July 20, 2010) (challenging a "Presumptive Tax for Tobacco Products").

80. See, e.g., Panel Report, *United States — Measures Affecting the Importation, Internal Sale and Use of Tobacco*, WTO Doc. WT/DS44/R (adopted Oct. 4, 1994) (challenging a domestic content requirement and penalty provisions); Panel Report, *Japan—Restraints on Imports of Manufactured Tobacco from the United States*, L/5140 (June 11, 1981), GATT BISD (28th Supp.), at 100 (1981) (challenging a policy to discriminate treatment against imports of cigars and pipe tobacco from the United States).

81. República Oriental del Uruguay v. República Federativa del Brasil, Tribunal Arbitral *Ad Hoc* Mercosur (Aug. 5, 2005) (challenging a Brazilian tax on export products to Uruguay).

82. See Panel Report, *Thailand*, *supra* note 79 (considering Article XX(b) GATT measures "necessary for the protection of human, animal plant life or health" as the subject of interpretation). See generally Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 92–96, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012) [hereinafter *Clove Cigarettes*].

(two goods in the particular relationship known in international trade as “like products”). While the WTO Appellate Body expressed support for the tobacco control efforts more generally, it was unconvinced by U.S. arguments that the differential treatment of clove and menthol-flavored cigarettes stemmed from a legitimate regulatory distinction, implying unfair protectionism behind such aspects of the law.⁸³

Finally, a growing number of challenges to measures concerning trademarks, geographical indications, and prohibitions of advertisement are considered highly controversial. Challenges of this nature have been brought before different fora. The Uruguayan case (challenging legislation mandating single presentation, graphic images, and warnings covering 80% of packages) and the Australian case (challenging legislation mandating “generic packaging” and other measures) before ISDS involved claims that the regulations fail to provide investments fair and equitable treatment.⁸⁴ The claims were based on a company’s right to use trademarks and differentiate itself from competition, as well as the disproportional effect of this measure for well-recognized brands.⁸⁵ In the Uruguayan case, the majority of the tribunal decided that the single presentation and the warnings covering 80% of packages requirements were not a “discriminatory or a disproportionate measure, in particular given its relatively minor impact on [the PMI subsidiary’s] business.”⁸⁶

These arguments find a precedent before the ECJ and the EFTA Court—a body with intricate jurisdiction to resolve legal matters in the context of the European Economic Area involving Iceland, Liechtenstein, and Norway.⁸⁷ *Philip Morris Norway* involved a ban on tobacco advertising that included a prohibition on visual displays in retail locations (or point of sale). There, the EFTA Court concluded that the measure did not affect the tobacco products manufactured in Norway more than it affected imported tobacco products,

83. *Clove Cigarettes*, *supra* note 79, ¶¶ 92–96.

84. *See Calmes and Tavernise*, *supra* note 43.

85. Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT’L L. 1 (2015). Recently, an arbitration tribunal dismissed the investor-state arbitration against Australia on jurisdictional grounds. The tribunal did not address the question of discrimination. *See Philip Morris Asia Ltd. v. Australia*, UNCITRAL, Award on Jurisdiction and Admissibility (Dec. 17, 2015), <https://www.pccases.com/web/sendAttach/1711>.

86. *Philip Morris v. Uruguay*, *supra* note 65, ¶¶ 410, 420. However, one of the arbitrators, Gary Born, dissented on the single presentation requirement, arguing that it “is manifestly arbitrary and disproportionate and, as a consequence, constituted a denial of fair and equitable treatment under Article 3(2) of the BIT and international law.” *Philip Morris Brands SARL (Switz.), Philip Morris Products S.A. (Switz.), & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (2010), Concurring and Dissenting Opinion of Mr. Gary Born, ¶ 5 (July 8, 2016) [hereinafter *Philip Morris v. Uruguay Partial Dissent*], <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>.

87. EFTA Court, Report of the EFTA Court 1 January 1994 – 30 June 1995, 1–5, http://www.eftacourt.int/fileadmin/user_upload/Files/AnnualReports/Report-1994-01-01-1995-06-30-text.pdf; *see also* Leif Sevón, *The EEA Judicial System and the Supreme Courts of the EFTA States*, 3 EUR. J. INT’L L. 329 (1992).

and hence, no legal discrimination existed.⁸⁸ Likewise, in *Arnold Andre* a snus importer challenged the validity of the EU's tobacco directive.⁸⁹ The provision of the directive at issue prohibited the marketing of any tobacco products designed for oral use except, *inter alia*, those tobacco products designed to be chewed. Rather vaguely, the ECJ maintained that the directive satisfied the principles of proportionality and of nondiscrimination because not all oral tobacco products were in the same circumstances—namely, snus was a new product to the market.⁹⁰

In short, claims challenging discriminatory treatment are prevalent. These cases make it hard to argue that states should not be concerned about claims relying on antidiscrimination provisions. This is especially true if regulatory measures in fact strongly support the market position of a particular segment of the industry, such as domestic products. However, states retain ample leeway to adopt control measures with disparate effects as long as legitimate regulatory distinctions justify such effects.

4. *Claims over Unnecessary Obstacles to Trade*

A fourth type of claim relies on arguments that government actions aim to disturb market conditions, often problematizing regulations as unnecessary or excessive obstacles to trade.

This type of claim is also prevalent, constituting 80% of the surveyed cases, in part because of the broad drafting of the international obligations implicated. For example, in the 1980s, the EC brought a case against France challenging legislation setting a minimum retail-selling price for tobacco products, arguing that it violated fair competition provisions. The ECJ held that although it remained lawful for France to control sale prices to restrict tobacco abuse it was unlawful to do so by means of an increase in the price paid solely by imported tobacco producers.⁹¹ More recently, a case that challenged a similar regulation in Spain aimed at limiting retail sales was directed to the ECJ and met a similar fate.⁹²

In a landmark case in the 1990s, the United States challenged before a GATT panel legislation that prohibited the import and export of tobacco products except by license of Thai authorities (licenses were rarely granted

88. Philip Morris Nor. AS v. Ministry of Health and Care Serv. (Nor.), Case E-16/10, EFTA Ct. Rep. 330 (Sept. 12, 2011).

89. Snus is a powdered tobacco product that is placed between the gum and the lips and is allegedly less harmful than cigarettes or other oral tobacco products.

90. Case C-434/02, *supra* note 71; Case C-210/03, Swed. Match AB v. Sec'y of State for Health (Swed.), 2004 E.C.R. I-11901.

91. Case 90/82, *Comm'n v. France*, 1983 E.C.R. 2011.

92. The IC confirmed that a regulation that prohibited retailers from importing manufactured tobacco constituted a quantitative restriction and that state tobacco monopolies could not be used to limit importations. See Case C-456/10, *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v. Administración del Estado* (Apr. 26, 2012), <http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0456&lang1=en&type=TEXT&ance>.

and only to Thai instrumentalities).⁹³ In addition, the United States challenged taxes that the Thai government could apply at a higher rate toward imported cigarettes. Thai authorities defended the regulations as advancing public health by both diminishing the production of cigarettes (that is, reducing the area in which tobacco could be planted) and limiting harmful consumption (that is, the exposure to well-known additives contained in U.S. cigarettes). While siding with the Thai authorities on the discrimination issue, the GATT body decided that the restrictions on the importation of cigarettes violated Thailand's commitment under the global commercial agreement. The panel underscored that Thailand was permitting the sale of similar domestic cigarettes, and decided that restrictions were not justified by public policy excuses.⁹⁴ Specifically, the panel concluded that alternatives less restrictive than banning imported cigarettes were available to achieve the same objectives. The decision is considered a setback to tobacco control efforts as the GATT panel disregarded important constraints that the Thai government would necessarily face in implementing such alternatives.⁹⁵

Second, in the *Clove Cigarettes* case referred to above, Indonesia also raised the issue that the measure of prohibiting cigarettes with "characterizing flavors" had the effect of creating unnecessary obstacles to international trade in violation of the Agreement on TBT.⁹⁶ The claim hinged on distinguishing between clove and menthol-flavored cigarettes, and the United States was found in violation of the antidiscrimination provision of the agreement. Nevertheless, the decision confirmed that a government could adopt regulations even if international trade is affected, as long as unjustified discrimination is avoided.⁹⁷

Finally, a number of challenges argue that marketing restrictions or packaging requirements are excessive or limit rights created by international treaties. In two cases brought before the ECJ, German interests challenged a directive relating to the advertising and sponsorship of products. In the first case, Germany claimed that the directive created new obstacles to trade in services, entirely negating the freedoms established under EU law. The ECJ concluded that, even if the claimed effects could be proven, the directive was "justified on grounds of the protection of human health."⁹⁸ In a companion

93. See *Thailand*, *supra* note 79 (considering Article XX(b) GATT measures "necessary for the protection of human, animal plant life or health" as the subject of interpretation).

94. *Id.*

95. MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, 165 (1999).

96. See *Clove Cigarettes*, *supra* note 82.

97. In a similar case, the ECJ recently decided that regulatory discrepancies are consistent with Article 114 of the EC (harmonization of rules for the establishment and functioning of the internal market). Case C-358/14, *Republic of Poland v. European Parliament and Council of the EU*, 2015 E.C.R. ¶ 64 (Dec. 23, 2015) ("The adoption of a harmonisation measure [can be justified by] anticipated disruption of trade in the internal market . . . on condition that the general principles for the exercise of the powers of harmonisation—in particular the principles of subsidiarity and proportionality (Article 5(3) and (4) TEU) (36)—are respected.")

98. See Case C-434/02, *supra* note 71.

case addressing the prohibition of marketing tobacco products for oral use, the ECJ arrived at the same general conclusion.⁹⁹

Similarly, in a case brought by *Philip Morris Norway*, the EFTA Court was asked by a Norwegian court to review a ban on the display of tobacco products at the point of sale.¹⁰⁰ The EFTA Court decided that a visual display ban can constitute an unnecessary restriction if, in fact, the regulation affects the marketing of imported products more severely than that of domestic products. In other words, the court read a nondiscrimination element into the state's obligation to limit barriers to trade.¹⁰¹ It also decided that it was up to the courts in the territory of the referring state to assess whether public health goals could be achieved by less restrictive means. According to the EFTA Court, such inquiry requires assessing the proportionality and the effectiveness of the measure as both legal and factual matters. These are balancing questions that, very often, domestic judges are better positioned to assess than international judges given, for instance, that national judges tend to be better at evaluating the credibility of the regulator or at applying the standard of review. Hence, national courts are often required to ascertain these as factual matters.¹⁰²

As explained in more detail in the case studies below, in the cases brought against Australia before the WTO, complainants have argued that the trademark is unjustifiably “encumbered” by the packaging requirements. Some complainants have also argued that the Australian measures restrict geographical indications or signs used on products that have a specific geographical origin that connect them to some qualities or a particular reputation—for instance the word *habano* for cigars produced in Cuba. Accordingly, the argument goes, tobacco control efforts may undermine IP and mislead the public as to the true origin and quality of the products.¹⁰³

The following diagram (Figure 3) summarizes all the cases in the survey, organized by the type of claims raised by the different complainants. It also depicts the frequency with which each particular claim has been brought in combination with another.

99. See Case C-210/03, *supra* note 90 (holding that adoption of directive that directed member states to prohibit the marketing of tobacco products designed for oral use was supported by sufficient scientific evidence).

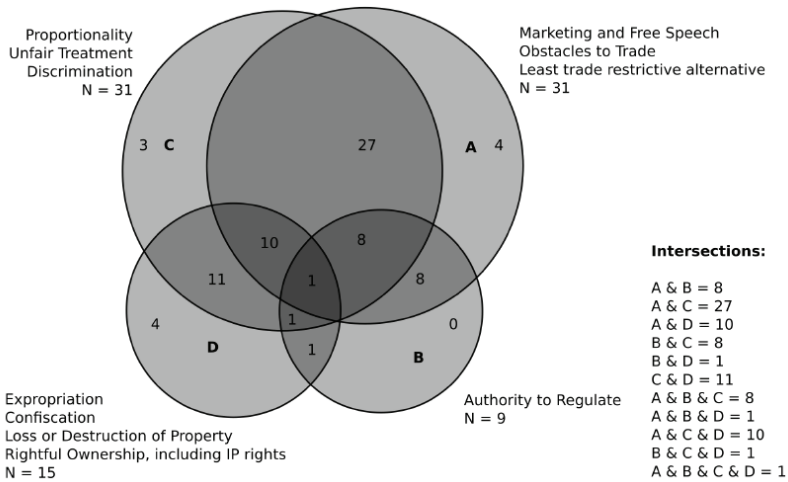
100. Case E-16/10, *Philip Morris Nor. AS & Staten*, 2011 E.F.T.A. H-E-16/10. The basis of the claim is identical to Article 34 of the Treaty on the Functioning of the EU, which establishes the free movement of goods in the internal market. See Consolidated Version of the Treaty on the Functioning of the European Union art. 34, May 9, 2008, O.J. (C 115) 47, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=lex:12012E/TXT>.

101. *Id.* ¶ 41–51.

102. *Id.* ¶ 86–88 (“[I]t is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products.”).

103. See generally *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS458 (indicating alleged violations of Articles 20, 22.2(b), and 24.3 of the TRIPS Agreement).

FIGURE 3: TYPES AND FREQUENCY OF TOBACCO CLAIMS ADVANCED IN ICS
(N=39)



C. *International Tobacco Litigation in Action*

This section expands the survey with four case studies, each illustrating the varied ways in which private interests have used different ICs in their attempts to expand markets or to influence or defeat tobacco control efforts.

1. *Trademark Protections and the TJCA*

The battle between PMI and BAT over the use of the “Belmont” cigarette trademark in South America provides a useful example of ICs arbitrating IP rights.¹⁰⁴ BAT, through its subsidiary, long held the rights to the Belmont name in Venezuela as in many other jurisdictions around the world.¹⁰⁵ The conflict between the two companies began when BAT sought to export its Venezuelan “Belmont” cigarettes into Ecuador, where PMI held the right to the trademark, but had failed to sell cigarettes.¹⁰⁶ PMI, however, had used the brand to export from Ecuador to other countries.

PMI brought a proceeding before Ecuadorian authorities arguing that the exports of Belmont cigarettes from Ecuador had been an attempt to establish trademark use. Experts maintain, however, that PMI was “primarily inter-

104. See Tribunal de Justicia, *supra* note 73.

105. See Alter, *supra* note 49, at 216; see also Jeremy, *Why T&T Trade Mark Registry Can't Magic Registration into Existence*, THE IPKAT (June 15, 2004, 11:04 AM), <http://ipkitten.blogspot.com/2004/06/why-tt-trade-mark-registry-cant-magic.html>; *Compañía Anónima Cigarrera Bigott Sucesores v. Pisani*, Case No. D2000-0448, World Intellectual Property Organization Arbitration and Mediation Center (Oct. 5, 2000).

106. See ALTER, *supra* note 49 at 216 (PMI had previously made efforts to trademark British American Tobacco brands in other countries).

ested in blocking access for rival products.”¹⁰⁷ PMI also began marketing its products within Ecuador and mobilized Ecuadorian officials to bring actions against BAT for selling counterfeit Belmont products.¹⁰⁸

Two separate actions were brought before the TJCA.¹⁰⁹ First, Venezuela sued Ecuador for “non-compliance with [Andean Community] law.”¹¹⁰ The TJCA acknowledged Ecuador’s ability to determine IP rights within its territory, but disagreed on the extent of Ecuador’s right to block legal imports from other Andean Community members *without due process* because of the failure to consider whether PMI used the trademark in the market.¹¹¹ Based on the territoriality principle, PMI’s interests prevailed.¹¹²

Colombia, having participated as a third party in the prior case, then passed a law targeting the effects of the TJCA decision.¹¹³ The law sought to protect importers from prior trademark holders who only began using the mark after a subsequent company began sales.¹¹⁴ Like in Ecuador, PMI held an unused Belmont brand in Colombia, and a second proceeding before the TJCA ensued when BAT moved the Colombian Trademark Office to cancel PMI’s Belmont trademark under the new law.¹¹⁵

The second TJCA decision set out a new framework for evaluating good-faith usage of a trademark, highlighting the need for real and effective use (as opposed to symbolic use), but left the fact-finding role to domestic courts.¹¹⁶ PMI argued that Colombia’s import restrictions prevented its use of the mark, but the Colombian court determined that the “disuse of the trademark preceded the import restriction so that the trade restriction did not itself explain the disuse of the mark.”¹¹⁷

This case illustrates how decisions at the national level can significantly affect the market and sale of tobacco internationally. It also evidences that

107. *Id.* at 217.

108. *Id.* at 218.

109. On the formation and operation of the TJCA, see Treaty Creating the Andean Tribunal of Justice, May 28, 1979, 18 I.L.M. 1203; see also Dr. Ann María Pacón, *The Andean Community Tribunal of Justice*, in STUDY ON SPECIALIZED INTELLECTUAL PROPERTY COURTS 48 (2012), <http://www.fr.com/files/Uploads/Documents/Study%20on%20Specialized%20IPR%20Courts.pdf>.

110. Tribunal de Justicia de la Comunidad Andina v. Ecuador, Judgment, 2-AI-96 (TJCA, June 20, 1997).

111. Gabriela Mancero-Bucheli, *Intellectual Property and Rules on Free Movement: A Contradiction in the Andean Community (ANCOM)*, NAFTA L. & BUS. REV. AM. 125, 128 (1998). Despite the TJCA suggesting the export exception’s limited scope, PMI prevailed because it was using the mark at the time when the complaint arose and because Ecuador chose to recognize PMI’s right to the mark.

112. *Id.* at 135 (According to Mancero-Bucheli, the decision meant that “the trader who owns a trademark in Member State A, but only uses it for exporting purposes, will still be able to stop imports from other Member States if, once the importer has launched its products in the market of Member State A, the trader commences internal use of the trademark in that Member state.”).

113. Tribunal de Justicia de la Comunidad Andina, Interpretación Prejudicial, 15-IP-99 (TJCA, Oct. 27, 1999).

114. See ALTER, *supra* note 49, at 220, n.53 (describing Colombia’s Decree Number 698 of March 14, 1997).

115. *Id.* at 220–21.

116. *Id.*

117. *Id.*

defining the boundaries of rights (and their trade-related implications) is not only a matter of domestic concern, but also often arbitrated before ICs, with important transnational policy implications.

2. *Regional Directives and the ECJ*

The decisions of ICs also affect regulatory policies adopted at regional levels that seek to harmonize regulations or to apply them extraterritorially. The EU has been engaged in a number of regulatory initiatives, culminating most recently in a revised tobacco products directive (“RTPD”). The EU was able to pass the RTPD despite intense lobbying against the RTPD and litigation targeting key provisions of the original tobacco products directive (“TPD”) adopted in 2001.¹¹⁸

The main impetus for the TPD was harmonization of domestic legislation and health protection.¹¹⁹ After companies like BAT and PMI challenged the TPD, two questions before the ECJ ensued.¹²⁰ The first involved the general validity of the measure: did the EU have the proper authority to enact the directive? The ECJ rejected arguments that because a decisive purpose of the TPD was to promote public health, which is the sole competency of member states, the EU misused its powers.¹²¹ The second question had broader implications and proved divisive among EU members: “does [the product requirement] apply only to tobacco products marketed within [Europe], or does [it] apply also to tobacco products . . . for export to third countries?”¹²² Whereas some EU members argued that the TPD should be interpreted broadly (that is, to include products exported to nonmember countries), others disagreed.¹²³ Extraterritorial application of the regulation could have enhanced control efforts. This would have required EU producers to employ, *inter alia*, the same (or stricter) health warnings for tobacco products, whatever their origin or destination. Nevertheless, the ECJ confirmed that

118. *Why Did Philip Morris Spend More than Anyone Else Lobbying the E.U.?*, TREFIS: WHAT’S DRIVING THE STOCK, Oct. 2, 2014, <http://www.trefis.com/stock/pm/articles/258388/why-did-philip-morris-spend-more-than-anyone-else-lobbying-the-e-u/2014-10-02>. For a discussion of the litigation, see Matthias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 EURO. L.J. 503, 503–33 (2006).

119. Directive 2001/37/EC, of the European Parliament and of the Council of 5 June 2001 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco Products, 2001 O.J. (L 194) 26, 29–32 (imposing requirements such as mandatory warnings, maximum limits for ingredients, mandatory reporting on ingredients, and an outright ban on tobacco for oral use).

120. Case C-491/01, *The Queen v. Sec’y of State for Health, ex parte British American Tobacco (Invs.) Ltd.*, 2002 E.C.R. I-11453 ¶ 725. Other members of the industry participated in this case.

121. *Id.* ¶ 75. The court also confirmed that the governing labeling and product descriptions did not infringe on the fundamental right to property. *See id.* ¶ 157.

122. *Id.* ¶ 25 (emphasis added).

123. *Id.* ¶ 199.

the requirements applied only within the EU¹²⁴—a position endorsed by the EU's Parliament, Council, and Commission as well as industry.¹²⁵

Another group of cases concerned a more specific issue, that is, the validity of TPD's ban of certain oral tobacco products.¹²⁶ Swedish Match, a company that sells snus, brought suit.¹²⁷ An English court referred a number of questions to the ECJ,¹²⁸ and the case was joined with *Arnold André*, a companion case dealing with a German company in the same sector.¹²⁹ The ECJ held that the TPD did not violate the principle of proportionality because no other measures would have the same preventative effect as an outright ban.¹³⁰ The court also rejected the argument that the ban violated EU prohibitions on quantitative restrictions, as it deemed permissible the EU's restrictions based "on grounds of protection of the health and life of humans."¹³¹ Finally, the ECJ held that the TPD did not violate the principle of nondiscrimination, giving full deference to the EU as an authority with the power to regulate similar risks differently even if that meant completely excluding new(er) products from the market.¹³²

Since the passage of the TPD, it remains unclear whether the measure proved effective in protecting public health.¹³³ Around 28% of adults in Europe still smoke, and Sweden, where snus is legal, has among the lowest rates of illnesses resulting from tobacco. In 2012, the European Commission therefore proposed a revision to the TPD.¹³⁴

In 2014, the RTPD entered into force and rapidly prompted litigation.¹³⁵ Poland, among others, objected to the prohibition of the marketing of men-

124. *Id.* ¶¶ 209, 217.

125. *Id.* ¶ 195.

126. Directive 2001/37/EC, *supra* note 119, arts. 2, 8 (defined as "all products for oral use, except those intended to be smoked or chewed"). The question raised was without prejudice to Article 151 of the Act of Accession of Austria, Finland, and Sweden exempting these Members of the oral tobacco ban.

127. See Case C-210/03, *supra* note 90, ¶¶ 1–2; see also, Press Release, European Court of Justice to Hear Snus Ban Case in June 2004 (Mar. 29, 2004), <https://www.swedishmatch.com/Media/Pressreleases-and-news/Press-releases/1996-2004/European-Court-of-Justice-to-Hear-Snus-Ban-Case-in-June-2004/>.

128. Case C-210/03, *supra* note 90, ¶ 21; Case C-434/02, *supra* note 71, ¶ 23.

129. Case C-434/02, *supra* note 71, ¶ 20.

130. Case C-210/03, *supra* note 90, ¶¶ 42, 58; Case C-434/02, *supra* note 71, ¶¶ 41, 42, 55.

131. Case C-210/03, *supra* note 90, ¶¶ 60, 61; Case C-434/02, *supra* note 71, ¶¶ 57, 58.

132. Case C-210/03, *supra* note 90, ¶¶ 68, 74; Case C-434/02, *supra* note 71, ¶¶ 66, 69.

133. Berger-Walliser & Bird, *supra* note 43, at 1034.

134. *Revision of the Tobacco Products Directive*, EURO. COMM'N, http://ec.europa.eu/health/tobacco/products/revision/index_en.htm (last visited Feb. 27, 2016); see also Joe Nocera, *A Tobacco Tax to Save Lives*, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/18/opinion/joe-nocera-seeing-good-in-a-tobacco-product.html?_r=0.

135. See Directive, of the European Parliament and of the Approximation of the Laws, Regulations and Administrative Provision of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products and Repealing Directive 2001/37/EC, 2014 O.J. (L 127) 1, ¶ 25 [hereinafter RTPD]. The RTPD recommends that "combined health warnings should become mandatory throughout the Union and cover significant and visible parts of the surface of unit packets." *Id.* Moreover, EU members are free to impose other, more stringent requirements. See Berger-Walliser & Bird, *supra* note 43. Some individual EU states have introduced stricter legislation. See *Philip Morris Braces for Ireland's Tobacco Plain Packaging Legislation*, FORBES (Oct. 8, 2014), <http://www.forbes.com/sites/great-speculations/2014/10/08/philip-morris-braces-for-irelands-tobacco-plain-packaging-legislation/>. For

thol cigarettes.¹³⁶ Similarly, the industry challenged the EU's authority to regulate e-cigarettes and advertising as well as the consistency of extensive standardization of packaging with "the fundamental rights of consumers to information about the products."¹³⁷ In landmark decisions, the ECJ found that the RTPD attempted to "facilitate the smooth functioning of the internal market" in Europe, while providing a high standard of protection for human health.¹³⁸ More significantly for control efforts, the court also noted that such regulation was "necessary in order to achieve the objective pursued" and consistent with Europe's international obligations under the FCTC.¹³⁹ The industry has promised to pursue litigation against other elements of the RTPD.¹⁴⁰

This case study illustrates the industry's concerns about harmonization efforts, especially when such efforts have the potential for broader, extraterritorial application. It also suggests that regulatory distinctions may result from political influence and preferences. ICs increasingly need to evaluate the effects of control efforts to establish the boundaries between different regulatory authorities and to assess the basis of regulatory distinctions when evaluating tobacco challenges.

3. *Ban on Flavored Cigarettes and the WTO*

Some recent cases before ICs involve attempts to regulate flavored tobacco products that appeal to youth, an enticing target market for the industry.¹⁴¹ In one such case, Indonesia, the world's largest producer of clove cigarettes, lodged a complaint with the WTO against the U.S. ban on flavored cigarettes that exempted menthols (mostly manufactured in the United

some, the main shortcoming of the RTPD is not harmonizing domestic sales or advertising arrangements. See EU Revised Tobacco Products Directive, 2014/40/EU, ¶ 48 (2014), http://ec.europa.eu/health/tobacco/docs/dir_201440_en.pdf.

136. Case C-358/14, *supra* note 70.

137. Press Release, Philip Morris Int'l, Philip Morris International Granted Right to Challenge EU's Tobacco Products Directive Before the Court of Justice of the European Union (Nov. 3, 2014), http://www.pmi.com/eng/media_center/press_releases/Pages/201411030908.aspx ("[T]he Directive disrupts the balance that the EU treaties establish between the Union and the Member States . . . [I]t purports to improve the internal tobacco market, yet instead . . . raise[s] serious questions under the EU Treaties about consumer choice, the free movement of goods, and competition.").

138. Case C-358/14, *supra* note 70, ¶ 21.

139. Press Release, European Court of Justice, The New EU Directive on Tobacco Products Is Valid (May 4, 2016), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-05/cp160048en.pdf> (regarding judgments in Case C-358/14 Poland v. Parliament and Council, Case C-477/14 Pillbox 38(UK) Ltd. v. Sec'y of State for Health, and Case C-547/14 Philip Morris Brands SARL v. Sec'y of State for Health).

140. See David Jolly, *European Court of Justice Upholds Strict Rules on Tobacco*, N.Y. TIMES (May 4, 2016), <http://www.nytimes.com/2016/05/05/business/eus-highest-court-upholds-strict-smoking-rules.html> (quoting Marc Firestone, PMI's senior vice president and general counsel, as saying that "[t]he court has not considered whether plain packaging is legal or is capable of reducing smoking rates").

141. *Flavored Tobacco Product Fact Sheet*, FOOD & DRUG ADMIN., <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183198.htm> (last visited Feb. 27, 2016).

States).¹⁴² At first instance the Panel found, *inter alia*, that the ban was unjustifiably discriminatory.¹⁴³ The Appellate Body agreed with the Panel but adopted different reasoning. Significantly, the Appellate Body accepted that disparate impact on imports is a necessary but not sufficient element of discrimination under the TBT Agreement.¹⁴⁴

The U.S. Trade Representative reacted to the WTO decision with disappointment.¹⁴⁵ When the United States failed to amend or repeal the discriminatory elements of the ban as required, Indonesia asked the WTO to authorize trade sanctions (that is, suspension of obligations equivalent to the prospective level of harm).¹⁴⁶ The United States objected to Indonesia's proposed level of retaliation and referred the matter to a special arbitration procedure pursuant to WTO rules. Before a final decision could be made, a settlement ensued¹⁴⁷: the parties agreed that the United States would keep the ban in place in exchange for certain benefits for Indonesia.¹⁴⁸ Nevertheless, international cases over flavored tobacco continue.¹⁴⁹

This case study shows how powerful actors employ international litigation and corporate diversification to influence regulation worldwide. Consider the following facts: at the time the ban was put in place, PMI controlled the subsidiary that was exporting clove cigarettes from Indonesia

142. See *Clove Cigarettes*, *supra* note 82. According to Indonesia, the exports totaled up to \$500 million each year in 2009; clove cigarettes made up 99% of the U.S. market for the product. According to a 2006 study by the National Institute of Drug Abuse, clove cigarettes are known as "trainer cigarettes." See Mark Drajem & Lorraine Woellert, *Clove Cigarettes May Prompt U.S., Indonesia Dispute (Update 1)*, BLOOMBERG (May 19, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a9YjoELUY1JU>; Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387g(a)(1)(A) (2009).

143. See *Clove Cigarettes*, *supra* note 82, ¶¶ 7.1–7.4. The Panel also found that Indonesia failed to show that the ban was unnecessary as clove-flavored cigarettes are used as an experimental cigarette. See *id.*

144. See *Clove Cigarettes*, *supra* note 82 (Appellate Body also disagreeing with Panel's interpretation of "like products").

145. Tom Mills & Doug Palmer, *WTO Dents U.S. Ban on Clove Cigarettes*, REUTERS (Apr. 4, 2012), <http://www.reuters.com/article/2012/04/04/us-wto-usa-indonesia-idUSBRE8330Y720120404>. The U.S. Trade Representative noted: "The ban on cigarettes with flavors is part of landmark U.S. legislation to combat the public health crisis caused by tobacco products." *Id.* Representative Henry Waxman (D-CA) criticized the WTO's decision for "interfer[ing] with our efforts to protect the American public from tobacco's devastating effects." *Id.*

146. *Indonesia Announces Deal with U.S. on Clove Cigarettes Trade Dispute*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV., 18 BRIDGES WEEKLY, Oct. 9, 2014, at 1, <http://www.ictsd.org/bridges-news/bridges/news/indonesia-announces-deal-with-us-on-clove-cigarettes-trade-dispute>.

147. See *Clove Cigarettes*, *supra* note 82.

148. Vicki Needham, *U.S., Indonesia Settle Fight over Clove Cigarettes*, THE HILL (Oct. 3, 2014), <http://thehill.com/policy/finance/219755-us-indonesia-settle-clove-cigarette-dispute>. The United States agreed not to impede market access of other Indonesian tobacco products and not to challenge Indonesia's mineral export restrictions in the WTO; pledged to reauthorize benefits under the Generalized System of Preferences; and committed to help improve IP protection in Indonesia. The dispute reportedly ended "because both sides agreed that it was creating more problems to their long-term relationship than it was worth." *Id.*

149. Case C-358/14, *supra* note 70. In this case before the ECJ, Poland argued unsuccessfully that the prohibition on the marketing of menthol cigarettes exceeded any potential advantages, suggesting that the EU's principle of proportionality demands a cost-benefit analysis of the regulation.

into the United States (1% of the total U.S. market).¹⁵⁰ Moreover, PMI (through Altria) also had the largest market share of menthols (25% of the total U.S. market) and played a key role in ensuring the exception. In fact, the former Secretary of Health and Human Services openly admitted that PMI would have withdrawn its support for the legislation if menthol cigarettes were not exempt, even though a menthol ban would save lives and reduce public health costs.¹⁵¹ Whatever the outcome of the clove cigarette case, as a result of the settlement PMI continues to control the menthol market in the United States in addition to the robust sales of clove cigarettes in Indonesia. Hence, PMI is well positioned to compete in both markets.¹⁵²

4. *Packaging Requirements and ISDS*

The final case study takes place in the context of packaging requirements and involves disputes before the WTO and, most notably, ISDS tribunals.

Invoking the FCTC's goals, Australia adopted the Tobacco Plain Packaging Act in 2011.¹⁵³ The statute imposes strict limitations on the marketing of tobacco products. Among other restrictions, brand names may continue to appear on packages, but must appear in a standard color, position, location, font, and size.¹⁵⁴ In response, the industry has brought widely publicized cases at both the domestic and international levels. The industry argues that the limitations on the use of trademarks infringe IP rights and destroy their brands given the inability of consumers to differentiate products, including illicit ones.¹⁵⁵

At the domestic level, two companies unsuccessfully challenged the control measure in a case that reached Australia's highest court.¹⁵⁶ In the inter-

150. *Clove Encounter: Philip Morris Acquires Sampoerna*, TOBACCO J. ONLINE, https://www.tobaccojournal.com/show_artikel.php?id=4344 (last visited May 17, 2016). PMI acquired Indonesian tobacco company PT HM Sampoerna. At that time, clove cigarettes represented 92% of the Indonesian cigarette market. Sampoerna had several strong clove cigarette brands, including *Dji Sam Soe* and *A Mild*.

151. Joseph A. Califano, Jr. & Louis W. Sullivan, *Why We Need a Ban on Menthol Cigarettes*, WASH. POST (Apr. 28, 2011), http://www.washingtonpost.com/opinions/why-we-need-a-ban-on-menthol-cigarettes/2011/04/27/AFNCM08E_story.html.

152. *Philip Morris Likely to Further Gains in Indonesia*, FORBES (Sept. 12, 2014), <http://www.forbes.com/sites/greatspeculations/2014/09/12/philip-morris-likely-to-further-gains-in-indonesia/> (reporting that 70% of men in Indonesia age twenty and older smoke).

153. *Tobacco Plain Packaging Act 2011* (Austl.), *supra* note 2; see also *Australia: Cigarette Package Images*, TOBACCO LABELING RESOURCE CENTRE, <http://www.tobaccolabels.ca/pack-images/country/?n=Australia> (last visited Mar. 19, 2015).

154. See *Tobacco Plain Packaging Act 2011* (Austl.), *supra* note 2.

155. Jim Armitage, *Big Tobacco Puts Countries on Trial as Concerns over TTIP Deals Mount*, THE INDEPENDENT (Oct. 21, 2014), <http://www.independent.co.uk/news/business/analysis-and-features/big-tobacco-puts-countries-on-trial-as-concerns-over-ttip-deals-mount-9807478.html>.

156. See *JT Int'l SA v. Commonwealth of Australia* [2012] HCA 43 (Austl.); *Brit. Am. Tobacco Australasia Ltd. v. Commonwealth of Australia* [2012] HCA 43 (Austl.). The plaintiffs in both cases argued that the provisions were invalid because they constituted a taking of their trademarks on "[un]just terms." The court denied their claims, finding that the Act is constitutional as it only controls the way tobacco is marketed. See Jonathan Liberman, *Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia*, 39 AM. J.L. & MED. 361 (2013).

national trade arena, Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia filed separate WTO complaints against Australia.¹⁵⁷ While each of these countries makes tobacco products,¹⁵⁸ trade flows between them and Australia have been low or nonexistent.¹⁵⁹ Moreover, the tobacco industry admits to paying the complaining States' legal fees.¹⁶⁰ In opposition, Michael Bloomberg and the Gates Foundation have formed a new legal defense fund to assist countries proposing tobacco regulations.¹⁶¹

More relevant for our purposes, Philip Morris Asia, a Hong Kong company and owner of Australian affiliate Philip Morris Australia, filed for arbitration under the Hong Kong-Australia BIT.¹⁶² Philip Morris Asia only acquired its shares in Philip Morris Australia four months prior to filing this claim, and just after Australia's announcement of a legislative proposal that later became the Tobacco Plain Packaging Act.¹⁶³ This move circumvented Australia's decision to avoid including ISDS in the 2005 Australia-United States FTA.¹⁶⁴ Australia challenged this matter as a jurisdictional issue and won on these grounds, but Australia also maintained that the law was a legitimate exercise of government regulatory authority.¹⁶⁵

157. See *supra* note 3 and sources cited therein. Ukraine has since suspended its involvement after one Ukrainian Member of Parliament expressed confusion when she learned that her country was a part of the litigation. Norman Hermant, *Ukraine Attacks Australia's Plain Packaging Laws*, AUSTL. BROAD. CORP. (Apr. 17, 2015), <http://www.abc.net.au/lateline/content/2012/s3479769.htm>.

158. *List of Exporters for Ch. 24 Tobacco and Manufactured Tobacco Substitutes, Trade Map*, INT'L TRADE CTR., http://www.trademap.org/Country_SelProduct_TS.aspx (last visited Dec. 18, 2014).

159. In fact, according to data from the International Trade Center, the Dominican Republic only exported only \$78,000 to Australia in 2011 (the year prior to the filing) and only \$23,000 to Honduras, while Ukraine, which was the first country to file the claim, does not register trade flows with Australia. *Id.*

160. Myron Levin, *Tobacco Industry Uses Trade Pacts to Try to Snuff Out Anti-smoking Laws*, NBC NEWS (Nov. 29, 2012), http://investigations.nbcnews.com/_news/2012/11/29/15519194-tobacco-industry-uses-trade-pacts-to-try-to-snuff-out-anti-smoking-laws; see also Amy Corderoy, *Mystery over Ukraine Tobacco Law Challenge*, SYDNEY MORNING HERALD (Mar. 27, 2012), <http://www.smh.com.au/opinion/political-news/mystery-over-ukraine-tobacco-law-challenge-20120326-1vunl.html>.

161. Luke Eric Peterson, *Philip Morris Disputes: Another Intervener Is OK'ed to Make Arguments in Uruguay Case*; *Bloomberg and Gates Announce Legal Defence & Support Fund*, IAREPORTER (Mar. 19, 2015), http://www.iareporter.com/articles/20150319_2; Sabrina Tavernise, *New Global Fund to Help Countries Defend Smoking Laws*, N.Y. TIMES (Mar. 18, 2015), http://www.nytimes.com/2015/03/19/health/new-global-fund-to-help-countries-defend-smoking-laws.html?_r=0.

162. Agreement for the Promotion and Protection of Investments, H.K.-Austl., Sep. 15, 1993, 1748 U.N.T.S. 385 (entered into force Oct. 15, 1993); Philip Morris Asia, *supra* note 64, ¶¶ 4.15–5.17. Prior to this claim, PMI brought a similar action against Uruguay.

163. Australian Government, Australia's Response to the Notice of Arbitration, Philip Morris Asia Ltd. v. the Commonwealth of Australia 3 (2011), <https://www.ag.gov.au/tobacoplainpackaging>.

164. Historically, Australia sought the inclusion of ISDS only in trade agreements negotiated with developing countries. As a result of this policy, the 2005 Australia-United States FTA does not include ISDS. See W. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 22–26 (2006).

165. Australian Government, *supra* note 163, at 38–39. *Award on Jurisdiction and Admissibility*, *supra* note 85, ¶¶ 585–88.

Highly visible backlash against ISDS has ensued.¹⁶⁶ Consequently, a carve-out that permits TPP members to block corporations from using the ISDS against tobacco control measures has been included, sparking opposition from business interest groups.¹⁶⁷

This case study exemplifies sophisticated, strategic, and coordinated litigation before different ICs. The use of ICs affords the industry, or at least some of its members like PMI, an opportunity to shape the interpretation of international rules to set limits on the regulation of tobacco marketing, and perhaps even chill control efforts. In fact, according to the Campaign for Tobacco Free Kids, tobacco companies have threatened international litigation against several poor African countries that are considering tobacco control legislation.¹⁶⁸ While the dismissal of PMI's investment arbitration without addressing the legal merits gave Australia a decisive victory, uncertainty remains about how precisely investment agreements restrict tobacco control efforts—in part due also to the dissenting opinion in the recent victory by Uruguay.¹⁶⁹ Hence, we may see more strategic litigation using BITs to chill antismoking regulation by the industry as well as efforts by unconvinced ISDS tribunals to deter claims with hefty awards on costs.¹⁷⁰

III. INTERNATIONAL COURTS AND TOBACCO REGULATION

In this final Part, I undertake three tasks: (a) to establish how international law is implicated in tobacco regulation; (b) to assess the role of ICs in balancing different and evolving tensions resulting from the expansion and internationalization of tobacco control initiatives; and (c) to extract general

166. Australian Government, Dep't. of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* 14 (Apr. 2011), <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>; see also Elizabeth Warren, Editorial, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

167. See Office of the United States Trade Representative, *Fact Sheet: TPP Tobacco Proposal*, <http://www.ustr.gov/about-us/press-offices/fact-sheets/2012/may/tpp-tobacco-proposal>; Michael R. Bloomberg, Editorial, *Why Is Obama Caving on Tobacco?* N.Y. TIMES, Aug. 22, 2013, at A27 (noting that tobacco industry was joined by groups fearful that “safe harbor” provisions may lead to products being singled out in trade accords); Jackie Calmes, *Trans-Pacific Partnership Is Reached, But Faces Scrutiny in Congress*, N.Y. TIMES, Oct. 6, 2015, at A1.

168. Sabrina Tavernise, *Tobacco Industry Tactics Limit Poorer Nations' Smoking Laws*, N.Y. TIMES, Dec. 13, 2013, at A1. For example, Namibia, which proposed requiring large warnings on packages, was threatened by BAT, which claimed that the law “violates its [IP] and could fuel counterfeiting.” *Id.*

169. Philip Morris v. Uruguay Partial Dissent, *supra* note 86, ¶¶ 4-5.

170. Remarkably, the tribunal ordered the reimbursement of Uruguay's costs in the amount of \$7,000,000.00 (about 67% of the total), in addition to ordering the Claimants to pay all fees and expenses of the tribunal and ICSID. Although one should not read too much into this proper use of the tribunal's discretion, the decision on cost may signal some level of discomfort with the aggressive nature of these claims among some members of the Tribunal, at least among those who arbitrated this particular case: Piero Bernardini, Gary Born, and James Crawford. See Philip Morris v. Uruguay, *supra* note 65, ¶ 588.

lessons for international law and relations from this rich history of tobacco litigation before ICs.

A. *Regulatory Boundaries in Light of International Law*

International law is relevant to tobacco control efforts in two important ways. First, international law can limit the type of actions that governments can adopt; such limits depend on factors such as the extent of treaty commitments and the variety of flexibilities, carve-outs, and exceptions secured in such instruments, especially to regulate health-related matters. Second, international law prescribes state action; human rights obligations in treaties and customary international law demand general measures to control the causes of tobacco-related illnesses as noncommunicable diseases.¹⁷¹

In this section, I use the typology of tobacco claims developed in Part II to understand how international law limits (as opposed to mandates) control efforts. This exercise dissects the tensions derived from conflicting commitments and values protected under international law, as well as frictions resulting from fragmented regulatory authorities.

1. *Traditional and Intellectual Property Protection*

Respect for property rights, and particularly protections against direct or indirect expropriation, broadly sketches the first boundary set by international law against regulatory efforts by states.¹⁷² As discussed above, the tobacco industry has attempted to push this line by building arguments often associated with commercial speech protections around international IP and takings laws.¹⁷³

These arguments are poised to fail. The majority of today's international disputes over the specific content of such obligations concern indirect expropriations, regulatory takings, and measures tantamount to expropriation.¹⁷⁴ Drawing the line between valid regulation affecting property and compensable deprivations is the subject of intense scholarly debate.¹⁷⁵ However,

171. For a discussion on the role of human rights law in tobacco control, see Harold Hongju Koh, *Global Tobacco Control as a Health and Human Rights Imperative*, 57 HARV. INT'L L.J. 433, 438 (2016) (arguing that "human rights and public health concerns can be both a shield and a sword—a valid defense against a claimed WTO violation and a valid way to challenge national action that undermines these concerns"); see also Oscar A. Cabrera & Lawrence O. Gostin, *Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems*, 7 INT'L J. L. CONTEXT 3, 285–303 (2011).

172. George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. (1994) (noting that international law almost invariably has been applied by the tribunal in its decisions on takings of property).

173. For a comparative analysis, see, for example, Micah L. Berman, *Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada*, 39 AM. J.L. & MED. 218, 225–31 (2013).

174. See generally Michael Reisman & Robert Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 119 (2003).

175. See Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 37 (2003); L. Yves Fortier & Stephen L. Drymer,

claims that marketing controls—in particular packaging requirements—breach provisions protecting property have been rejected.¹⁷⁶ Moreover, experts have responded with concern over the formulation of these IP claims under the WTO (that is, through the Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS Agreement), arguing that trademark owners only have the right to prevent third parties from using their trademarks without their consent. This is referred to as a negative right of “exclusion” of use.¹⁷⁷

Yet even if a given regulatory measure interfered with or encumbered international property rights severely enough to limit the ability of tobacco companies to distinguish products commercially, an IC should give ample and due consideration to the purpose for which it was adopted.¹⁷⁸ In particular, ICs assessing control efforts should weigh that transnational initiatives, and to some extent customary international law, prescribe effective actions to reduce smoking.¹⁷⁹ Under certain circumstances, ICs (including WTO panels or ISDS tribunals) may need to consider or even apply applicable rules of international law (or standards) arising outside of the specific treaty that establishes the tribunal’s jurisdiction.¹⁸⁰ These circumstances include, among others, the text of the specific treaty establishing dispute settlement jurisdiction and how such a treaty accommodates general background norms.

To be sure, the industry often presents the removal of regulations on property protection grounds as vital for a nation’s economic health and development. Consider the following examples: according to Danny Hakim

Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor, 13 ASIA PAC. L. REV. 79, 81 (2005).

176. See *supra* Part II.B.1.

177. See generally Andrew D. Mitchell & Tania S. Voon, *Face Off: Assessing WTO Challenges to Australia’s Scheme for Plain Tobacco Packaging*, 22 PUB. L. REV. 218 (2011); Mark Davison & Patrick Emerton, *Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco* (2014) (unpublished manuscript), <http://ssrn.com/abstract=2322043>. Recently on this issue, in an arbitration brought by a subsidiary of PMI against Uruguay, the tribunal concluded that a “better interpretation is that the *exclusive* right to use is simply the other side of the coin of the ‘right to prevent any person from performing’” *Philip Morris v. Uruguay*, *supra* note 65, ¶ 264.

178. Moreover, as recognized by the FCTC, the spread of tobacco-related illnesses results in the need to prioritize public health policy over economic rights. FCTC, *supra* note 38.

179. Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 N.Y.U. ENVTL. L.J. 198, 202 (2002) (“[T]hose charged with interpreting and applying treaties on the protection of foreign investment need to take into account the values that are reflected in norms that have arisen outside the context of the investment treaty which they are applying.”). On specific actions to address tobacco consumption, see Comm. on Econ., Soc. and Cultural Rights, CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (art. 12), ¶ 1, U.N. Doc. EC.12/2000/4 (Aug. 11, 2000).

180. See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535–578 (2001); Joost Pauwelyn, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?*, 37 J. WORLD TRADE 6, 997–1030 (2003); Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 205, 205–231 (Thomas Cottier et al. eds., 2005) (examining the different ways in which the WTO and human rights interact in trade dispute settlement); see also V. Sara Vadi, *Reconciling Public Health and Investor Rights: The Case of Tobacco*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009).

from *The New York Times*, Uruguay's president was warned that requiring graphic health warnings on packages would "have a disruptive effect on the formal economy," while El Salvador's vice president was warned they would affect "investment and economic growth."¹⁸¹ Thus by framing mandatory warnings in terms of commercial property intrusions, the industry portrays international law as hostile to regulation, IP rights as expansive, and control efforts as bad economic policy in hopes of obtaining compensation and chilling regulation.

In many cases one can sympathize with arguments that seek to protect property rights. However, as I argue below, tobacco control efforts differ from these hypotheticals, and systemic concerns over an expansive use of public health exceptions are exaggerated. It is also unclear if foreign investors would ever decide to leave any country upon the adoption of tobacco control measures.¹⁸² Finally, we should recognize that, on balance, tobacco brands negatively affect national welfare and economic development. As explained, an overwhelming counter-impact of the purported economic benefits of the industry is that national welfare suffers as people's health and productivity deteriorates and the direct and indirect costs of tobacco-related illnesses rise.

2. Fairness and Competition

A second general boundary constraining tobacco regulations results from rules that contain nondiscrimination elements. These obligations have a long pedigree in international economic agreements.¹⁸³ They protect against government interference that affects market conditions and unfairly burdens specific types of commercial actors. Particularly relevant is the principle of "national treatment," or the obligation to treat foreigners and locals equally, as the lack of evenhandedness is frequently designed or applied to benefit domestic over foreign products.¹⁸⁴ In fact, disparate treatment is an obvious consequence of the traditional political economy of international trade as domestic policymaking processes sometimes advantage rent-seeking actors (commonly national industries).¹⁸⁵

181. Danny Hakim, *US Chamber of Commerce Works Globally to Fight Anti-smoking Measures*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html>.

182. For a discussion, see Jason W. Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405 (2008).

183. See e.g., Brussels Sugar Convention, 95 Brit. & Foreign St. Papers 6 (1902) (Fr.), *abrogated* Sept. 1, 1920, 1 L.N.T.S. 400 (establishing the first-ever permanent multilateral trade institution including, among others, MFN obligations).

184. For a classic study, see Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L L. 619, 622 (1998); see also Joost Pauwelyn, *The Unbearable Lightness of Likeness* (SSRN Working Paper Series, 2006), <http://ssrn.com/abstract=2030940>.

185. Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998).

Industry and its partners challenge this second boundary line mainly through claims demanding fairness in the marketplace and leveled competition conditions. Legally, arguments against discrimination appear to get more traction against tobacco-related regulations than claims based on property rights. Challenges to domestic policies may not be completely unwarranted, as unfettered state policies also involve risks.¹⁸⁶ Segments of the industry may exploit policy autonomy and regulatory deference to obtain advantages based on unjustified or arbitrary distinctions, hence the importance of coordinated transnational actions in the public health sector.

It is hard to draw the line between protectionist regulation and good-faith attempts to reduce externalities that disfavor specific economic actors.¹⁸⁷ At a very high level of generality, the detrimental impact of the measure must be based on legitimate regulatory distinctions or reasonably relate to the value and interests protected by it.¹⁸⁸ In other words, even patently disproportional regulations may be safe from a successful challenge, if states can legally establish reasons to regulate similar risks differently.¹⁸⁹

The tobacco industry tries to rebut these types of provisions with two complementary arguments. First, general regulations that favor one economic actor over another may result in worse cumulative health outcomes. In the industry's view, tobacco control measures, especially those prohibitions that target marketing, affect the ability to differentiate reputable from low-quality or illicit products that could more negatively affect the health of their customers.¹⁹⁰ Accordingly, these efforts may disproportionately affect companies that invest heavily in establishing the quality of their products.

Second, the industry often links fairness arguments to farmers and rural jobs—indisputably the most sympathetic element of the tobacco industry supply chain. Consider this declaration of a U.S. Trade Representative spokesman: governments “can implement regulations to protect public

186. See *supra* Part II.C.3.

187. See generally William J. Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of Its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product,” in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 13* (Thomas Cottier et al. eds., 2000); Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 *YALE J. INT’L L.* 59, 70–71 (2002).

188. *Clove Cigarettes*, *supra* note 82 (providing that the legitimacy of distinctions will be judged in line with the jurisprudence of GATT Article XX introductory paragraph preventing arbitrary or unjustifiable discrimination in the application of GATT exceptions to the rules).

189. For example, in *Clove Cigarettes*, a carve-out for menthols in a general ban of flavored cigarettes could have been sustained. *Id.* ¶¶ 174–75 (“permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions”). *Swedish Match* sustained a complete ban on snus, which is less toxic than cigarettes. See Case C-210/03, *supra* note 90, ¶¶ 58–60.

190. For example, see JTI’s position at *Consequences of Cheap, Illegal Cigarettes*, JAPAN TOBACCO INTERNATIONAL, <http://www.jti.com/in-focus/consequences-cheap-illegal-cigarettes> (last visited Feb. 27, 2016); see also Notice of Arbitration (Philip Morris Asia v. Australia), *supra* note 64, ¶¶ 4.1, 7.3. When it comes to cigarettes, this argument should be taken with a grain of salt. As one decision puts it, “[t]he scientific consensus is that the only safe approach to smoking is not to smoke at all.” *Philip Morris v. Uruguay*, *supra* note 65, ¶ 405.

health [while] ensuring that our farmers are not discriminated against.”¹⁹¹ To be sure, regulators should attempt to minimize the negative effects of regulation to avoid unfair advantages. While there is no consensus on how best to reconcile these goals in the context of tobacco, the FCTC provides a good basis for addressing supply and demand without limiting policy experimentation.¹⁹² Nonetheless, tobacco producers today are large multinationals able to shape and influence policies and legislation around the world through, for instance, exceptions, permissible subsidies, or tax incentives. In this sense, antidiscrimination arguments run up against the reality that large, globally diversified tobacco companies act as power brokers in domestic, regional, and global regulatory processes.¹⁹³

3. Cost-Benefit Analysis

The third boundary limiting tobacco regulations is set by commitments limiting quantitative and other trade and investment barriers, even if these are nondiscriminatory and proportional. Some examples include: demands for transparency, empirical evidence of the effects of initiatives, and cost-benefit analysis of less restrictive alternatives prior to the adoption of anti-smoking efforts.¹⁹⁴

The tobacco industry may face some challenges in succeeding with these arguments as long as governments bring evidence of the problem that the measure intends to address.¹⁹⁵ Trade law requires limiting trade barriers to tariffs and refraining from imposing “unnecessary obstacles” or barriers “more trade restrictive than necessary.”¹⁹⁶ Without dismissing the intricacies of the topic, at the heart of the analysis often lies a comparison between the regulation at issue and a reasonably available alternative that is less restrictive but still capable of achieving the same objectives.¹⁹⁷ Given the

191. Hakim, *supra* note 181.

192. See U.N. CONF. ON TRADE & DEV., TRADE AND DEVELOPMENT REPORT (2014); see also Jörg Mayer, *Policy Space: What, for What, and Where?* (U.N. Conf. on Trade and Dev. Discussion Paper No. 191, 2009).

193. See, e.g., Califano & Sullivan, *supra* note 151 (PMI supporting reform in exchange for a menthol carve-out).

194. For a discussion on the expectations of governments to justify public health measures in the context of tobacco control efforts, see Tania Voon, *Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law*, 18 J. INT’L ECON. L., 795 (2015).

195. *Id.* at 825.

196. See Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 142, 144, WTO Doc. WT/DS381/AB/R (adopted June 30, 2012) (explaining that to determine if a measure is an “unnecessary obstacle to international trade,” the following factors are relevant: (i) the degree of contribution made by the measure to the objectives pursued, (ii) the trade-restrictiveness of the measure, and (iii) the nature of the risks at issue and the objective(s) pursued through the measure); Joost H. Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005) (explaining how nations have been progressively negotiating to eliminate any tariffs).

197. See Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, ¶ 387, WTO Doc. WT/DS384/AB/R, WT/DS386/R (June 29, 2012). See generally RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE (Tracey Epps & Michael J. Trebilcock eds., 2014).

often-speculative nature of this analysis, ICs tend to proceed cautiously (wanting to avoid evaluating possible alternatives), and instead are more comfortable finding violations under the guise of discrimination¹⁹⁸ (hence the importance of justifying any discriminatory aspects of a regulation).

When challenging regulations, industry relies on basic theories of free trade: freer trade will increase overall income and the country's welfare. In pushing this line, the industry again presents itself as an equal contributor to the economy. It often demands that governments engage in complex processes of cost-benefit analysis or justifying its necessity for furthering health objectives before taking regulatory actions, a requirement under international law in only very limited, if any, circumstances.¹⁹⁹ Consider for instance how the industry reacted to a proposal to raise cigarette taxes in the Philippines by arguing that it would open the floodgates to smugglers, limiting tax revenues that could be invested in hospitals to improve public health in the country.²⁰⁰

Regulation based on scientific evidence is certainly important in this context. However, understanding the effects of regulation on different segments of tobacco consumers requires longitudinal cohort studies and data relating to consumer behavior that is difficult to generate, access, and assess.²⁰¹ Moreover, industry has attempted to cloud the evidence by sponsoring research²⁰² or endorsing sales taxes ostensibly more effective in reducing smoking (as they can price out consumers) but that face much greater domestic political opposition. Accordingly, industry portrays international law as demanding a kind of "hard look" analysis that would entail complex studies of alternatives and hefty regulatory processes before the adoption of new regulations or taxes.²⁰³ Under this logic, industry prefers unpopular, often re-

198. See *supra* Part II.B.3.

199. See Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R (adopted Jan. 16, 1998); Panel Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/R/USA (adopted Aug. 18, 1997).

200. See, e.g., INT'L DEV. RESEARCH CTR., IMPACTS OF RESTRUCTURING TOBACCO EXCISE TAX IN PHILIPPINES, <http://www.idrc.ca/EN/Documents/Project-Profile-106832-Restructuring-tobacco-excise-tax-Philippines-ENG.pdf> (analyzing the impact of restructuring tobacco excise tax in the Philippines and concluding that "tobacco corporations have made their own forecasts of government revenue, arguing that the steep increase will result in low tax revenues because of a fall in demand"); see also WORLD HEALTH ORG., THE ECONOMIC AND HEALTH BENEFITS OF TOBACCO TAXATION, July 2015, at 3, <http://www.who.int/fctc/mediacentre/news/2015/WHOTobaccoReport.pdf> (2015) (documenting cost-benefit analysis in Philippines); Oliver Teves, *WHO Urges Philippine Senate to Defy Tobacco Lobby*, MED. PRESS (July 27, 2012), <http://medicalxpress.com/news/2012-07-urges-philippine-senate-block-tobacco.html> (stating that a tax would "encourage smuggling of cheap cigarettes and undermine the government's revenue goals").

201. See generally Benn McGrady & Alexandra Jones, *Tobacco Control and Beyond: The Broader Implications of United States — Clove Cigarettes for Non-communicable Diseases*, 39 AM. J.L. & MED. 265 (2013).

202. See Linda Rosenstock, *Attacks on Science: The Risks to Evidence-based Policy*, 92 AM. J. PUB. HEALTH 14, 15 (2002).

203. Cf. *United Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (establishing the hard-look doctrine in the United States, which, among other things, requires

gressive sales taxes.²⁰⁴ In some cases, industry has deployed this logic to its ultimate conclusion, arguing that smokers' early mortality and cigarette tax revenue outweigh the costs of health care and future lost tax revenue.²⁰⁵

4. Federalism

The limits of sovereignty and authority to regulate represent the fourth line of international law that industry uses to constrain tobacco regulations. The tobacco industry makes facial challenges to the legitimacy of any transnational control effort, very often on the basis of a lack of authority or legal competence of the adopting bodies.

Again, the industry finds itself in an uphill battle in asserting these arguments. It is only in exceptional cases that states have delegated authority to a supranational authority. When the industry has challenged supranational tobacco regulation, ICs have confirmed such transnational efforts as praiseworthy, legitimate, and necessary, rejecting the idea that principles of subsidiarity (federalism in U.S. terms) should discourage such efforts.²⁰⁶

In asserting these claims, industry often presents itself as unimpressed by transnational efforts that run against those developed at a national level. When it fits its interest, the industry subscribes to the mantra "local solutions can address local problems" and advocates for social alignment and self-regulation to minimize the effects of coordinated efforts.²⁰⁷ By advocating these principles, the industry espouses a preference for fragmented regulatory authority. Consider for instance PMI's tactic to undermine the implementation of the FCTC in Colombia. It lured customs agencies and other government entities into partnerships, claiming to be part of the public health solution and to "address [local] issues of mutual interest."²⁰⁸

agencies to consider relevant policy alternatives); see also Cass R. Sunstein, *Deregulation and the Hard-look Doctrine*, 1983 SUP. CT. REV. 177, 210.

204. See F.J. Chaloupka et al., *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 BMJ TOBACCO CONTROL i62 (2002).

205. See ARTHUR D. LITTLE INT'L, PUBLIC FINANCE BALANCE OF SMOKING IN THE CZECH REPUBLIC (2000) (report to Philip Morris Cf A.S.); Sarah Boseley & Kate Connolly, *Smoking Can Seriously Aid Your Economy*, GUARDIAN (July 16, 2001), <http://www.theguardian.com/world/2001/jul/17/smoking.sarahboseley>; *Philip Morris Issues Apology For Czech Study on Smoking*, N.Y. TIMES (July 27, 2001), <http://www.nytimes.com/2001/07/27/business/philip-morris-issues-apology-for-czech-study-on-smoking.html>.

206. See, e.g., Philip Morris Norway AS, *supra* note 88; Arnold André GmbH & Co. KG, *supra* note 71.

207. See CORPORATE ACCOUNTABILITY INT'L, PHILIP MORRIS EXPOSED: 2010 ALTERNATIVE ANNUAL REPORT 2 (2011), <https://www.stopcorporateabuse.org/sites/default/files/resources/philip-morris-international-pmi-alternative-annual-report-2011.pdf>.

208. Philip Morris International Inc. (Form 10-K) (Dec. 31, 2014). "The agreement sets up representatives from government and industry to meet periodically and confer, as well as a system of contributions from Philip Morris to the Colombian government." CORPORATE ACCOUNTABILITY INT'L, PHILIP MORRIS INTERNATIONAL ALTERNATIVE ANNUAL REPORT 17 n.54 (2010). See generally Investment and Cooperation Agreement, Colombia, Compañía Colombiana de Tabaco S.A., and Philip Morris Colombia, June 19, 2009.

Those interested in ensuring a degree of regulatory autonomy for states to take public health measures would sympathize with these arguments. But behind such rhetoric is a self-serving, self-regulating logic meant to discourage comprehensive and coordinated responses like the global FCTC or Europe's TPD.²⁰⁹

* * *

In short, the industry (or, at least a sizeable portion of it) would like to be seen as a job-creating, tax-paying, self-regulating economic actor, caring for local governance and supporting farming communities. By cultivating this appearance, industry can more readily demand that governments treat it like any other industrial sector. This approach relies on four pillars of international economic law: property rights, especially IP; nondiscrimination in taxation and regulation; limits to quantitative and trade restrictive measures; and regulatory subsidiarity. The industry shapes the precise contours of these boundaries with claims about how appropriately regulated tobacco can contribute to welfare and development; how nondiscriminatory regulation enhances the formal economy and supports farming communities; how local sales taxes are more effective regulatory alternatives; and how transnational efforts may offend or undermine domestic regulators.²¹⁰

Most instruments under international law (except the new TPP carve-out) extend equal protections to the tobacco industry. However, such entitlements should be understood in context, including by taking into account the competing rules, values, and authorities resulting from national, regional, and global efforts to eradicate the production, marketing, and consumption of a *sui generis* damaging product. Hence, any limitations on regulatory authority stemming from treaty obligations to protect property and market efficiency, should be assessed in light of public health and human rights obligations to reduce tobacco production and consumption. The next section explains the fundamental role of ICs in contextualizing tobacco litigation within these opposing international law parameters.

B. *The Roles of International Courts in Antismoking Politics*

Professor Karen Alter proposes four different roles of ICs in the international political arena: dispute settlement, enforcement, administrative review, and constitutional review.²¹¹ She explains that dispute settlement and administrative review tend to play “other-binding judicial” roles—that is,

209. See, e.g., FCTC, *supra* note 38.

210. See, for example, the reactions of the spokesman of the American Chamber of Commerce when asked why it supported the tactics of the industry: “The Chamber regularly reaches out to governments around the world to urge them to avoid measures that discriminate against particular companies or industries, undermine their trademarks or brands, or destroy their intellectual property.” Hakim, *supra* note 181.

211. ALTER, *supra* note 49, at 10.

roles used by powerful actors to bind others to follow “the law.” On the other hand, enforcement and constitutional review tend to be “self-binding judicial roles” as they check the state’s own exercise of power.²¹²

While these roles often overlap, the distinctions help us understand how ICs make different contributions in international politics. Here, I apply Alter’s framework to the case studies to explore the role of ICs in dealing with the tensions between the commitments, values, and authorities identified in the prior section.

1. *Supporting Powerful Actors*

In their dispute settlement role, ICs adjudicate legal disagreements between contracting parties, or between the contracting parties and nationals of such parties. This role tends to be less controversial, and is what scholars most commonly associate with ICs.²¹³

Tobacco disputes have been settled before many ICs that have formal jurisdiction to adjudicate a broad range of issues. In six out of ten cases, the jurisdiction covers trade-related disputes. Hence, most cases have dealt with rules relating to the free movement of tobacco products, often under the broad notion of discrimination.²¹⁴ More relevant is that in more than half of the cases, Big Tobacco is involved (directly or indirectly), and at least a third of all disputes involved PMI interests. In this sense, the tobacco industry views litigation in ICs as a critical tool in its strategy to ensure market access and push back against commercial obstacles, including antismoking regulations.

It is in this realm that ICs have affected, perhaps even weakened, tobacco control efforts.²¹⁵ To be sure, this is not necessarily the result of misapplication of rules or accretion of rights through controversial interpretations. It is, however, a consequence of the fact that trade-related and investment treaties treat tobacco no differently than any other product, even if the treaties generally recognize the ability to regulate for health-related or other reasons.²¹⁶

Two of the case studies illustrate the operation of the role of ICs in this particular domain. First, in the Belmont case, the TJCA was concerned with the significant effect on the market and sale of tobacco as a result of Ecuador’s IP restrictions. In this case, the protection of the Belmont brand was linked to its trade effects. Ultimately, the IC addressed the matter as a ques-

212. *Id.*

213. *Id.* at 12.

214. See *supra* Part II.B.3.

215. For a discussion and similar view, see JENINA JOY CHAVEZ ET AL., AM. CANCER SOC’Y, THE POLITICAL ECONOMY OF TOBACCO CONTROL IN THE PHILIPPINES (2014).

216. See *id.* For an empirical discussion, see Jeffrey Drope & Jenina Joy Chavez, *Complexities at the Intersection of Tobacco Control and Trade Liberalization: Evidence from Southeast Asia*, BMJ TOBACCO CONTROL (Feb. 5, 2014), <http://tobaccocontrol.bmj.com/content/24/e2/e128.full.pdfhtml>.

tion of fair competition, putting the interests of consumers—and consequently that of tobacco consumption—at the frontline.²¹⁷

In *Clove Cigarettes*, the WTO Appellate Body also confirmed that it would look at detrimental impact on competitive opportunities when analyzing discrimination. In other words, the Appellate Body implied that there is a policy-balancing mechanism within nondiscrimination provisions that will require tobacco control efforts to consider the effects of such regulation on international trade.²¹⁸ While this may not necessarily be controversial in the WTO, it reinforces a not insignificant challenge (evidentiary and otherwise) for regulatory efforts located in trade-related agreements. It confirms that even when addressing a health epidemic at the level of tobacco-related illnesses, the interest in maintaining a fair marketplace cannot be dismissed.

Other important matters remain to be decided before the WTO, especially in the context of claims against packaging initiatives. Such cases could serve as reference cases that will guide future practices.²¹⁹ One thing is clear, however: industry frames disputes before ICs as tensions between the rights of producers and consumers in the marketplace, and this will always threaten to undermine control efforts.

2. *Legitimizing Liberalization*

In their administrative review role, ICs act as coordinating mechanisms for remedies against government decisions across jurisdictions. According to Alter, “[w]hen ICs review State administrative acts, they [help] to generate a uniform interpretation of supranational administrative rules.”²²⁰

ICs with designated administrative review roles that have heard tobacco claims include the ECJ and TJCA, and to some extent MERCOSUR, WTO/GATT, and ISDS. Less than 25% of the cases have dealt with the interpretation or application of rules or practices by government agencies.²²¹ Yet the role of ICs in this political domain can be very important in the context of regional integration.

Within the case studies, the Belmont and EU’s TPD disputes encompass this role. First, the Belmont case serves as an example of how administrative practices could enhance coordination. Yet given the jurisdictional mandate of the Andean court to resolve economic disputes, as well as the type of actors using and accessing this body—powerful commercial actors—the regulatory coordination was used primarily to enforce IP protections and to limit trade restrictions on tobacco.²²²

217. See *supra* Part II.C.1.

218. See *supra* Part II.D.3.

219. Tania Voon & Andrew Mitchell, *Implications of International Investment Law for Plain Tobacco Packaging: Lessons from the Hong Kong–Australia BIT*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES (Tania Voon et al. eds., 2012).

220. ALTER, *supra* note 49, at 14.

221. See Annex 1.

222. See *supra* Part II.C.1.

The European case is not too different in that regard, although the ECJ oversees supra-national constitutional issues as well as economic disputes. When the TPD's application was referred to the court for interpretation, an important question involved whether the directive could be interpreted to apply to tobacco products for export to third countries. The court dismissed this approach on subsidiarity and territoriality grounds. The opposite result, however, would have been preferable for regulators, imposing important pressures on Europe's tobacco manufacturing, marketing, and distribution capacities.²²³

Both cases show how decisions are made in a larger context of well-established interpretative methodologies that determine the review function of ICs. For good or for bad, ICs cannot simply overrule larger principles of international law to nudge administrative practices in a particular direction. This is especially true if conflicts are framed in commercial terms as opposed to international human rights or other ways more favorable to sustaining regulations. Therefore, when confronting interpretive choices, ICs remain embroiled in larger economic, political, institutional, and social contexts. Such contexts include the fact that industry has been able to mobilize economic law before ICs to protect the interests of consumers, marketers, and producers of tobacco products.

3. *Contextualizing Regulation*

ICs enforce state compliance by naming violations. However, Alter also identifies compulsory enforcement jurisdiction where ICs can authorize remedies designed to aid victims when their decisions are not followed.²²⁴

In the few occasions in which ICs have taken on this type of role, ICs have failed to specify what compliance with the ruling in question would entail.²²⁵ Other ICs have explicitly recognized their limited capacity to evaluate the best way to achieve public health goals and assess evidence.²²⁶ While this type of demurral may underwhelm, it also recognizes that states have and deserve sizeable policy space in this context. This deference allows for experimentation in a context in which "regulatory distinctions can be difficult to assess and the effects of technical regulations may not be known in the short term."²²⁷

223. See *supra* Part II.C.2.

224. ALTER, *supra* note 49, ch. 1.

225. See generally Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1266 (2012) ("[A]nother approach to legal decisionmaking . . . [is] contextualizing regimes. In this approach, instead of making the decision directly, the officials charged with decisionmaking adopt the normative output of one or more specialized bodies of stakeholders.").

226. See *supra* note 82 and accompanying text. For further evidence, see also Voon, *infra* note 243, at 807–19.

227. McGrady & Jones, *supra* note 201, at 289.

Consider for instance the role of the Appellate Body in the WTO's clove cigarettes dispute, the sole case study formally reaching an enforcement stage.²²⁸ Mindful of the difficult issue at play, the Appellate Body first accepted a progressive definition of cigarettes as a product "satisfying an addiction to nicotine."²²⁹ It went further to acknowledge the defense of the United States that the burden on the health care system in caring for millions of addicted menthol cigarette smokers with withdrawal symptoms was a legitimate reason to exempt menthol from the ban on flavored cigarettes. However, at the time it was known that PMI had fought for the exception and that an advisory committee of the U.S. Food and Drug Administration had determined that the "[r]emoval of menthol cigarettes from the marketplace would benefit public health"²³⁰ Praising the regulatory efforts and the WHO, it further added:

We do not consider that the *TBT Agreement* . . . is to be interpreted as preventing Members from devising and implementing public health policies . . . through the regulation of the content of tobacco products, including the prohibition or restriction on the use of ingredients that increase the attractiveness and palatability of cigarettes for young and potential smokers [W]e are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking.²³¹

The ruling against the discriminatory elements of the ban on cigarettes containing flavors that increase the attractiveness of tobacco thus left U.S. officials enough space. As explained by Professor Tania Voon, the United States "could ban menthol cigarettes, but only after a lengthy regulatory process involving risk assessments and cost-benefit analyses . . . without assisting Indonesian exports of clove cigarettes"; alternatively, "it could repeal the current ban on cigarettes with flavoring other than menthol or tobacco," undermining tobacco control efforts.²³² The United States chose neither and settled the dispute after Indonesia set in motion compliance proceedings.²³³

228. *Clove Cigarettes*, *supra* note 82.

229. *Id.* ¶ 14.

230. U.S. FOOD & DRUG ADMIN., MENTHOL CIGARETTES AND PUBLIC HEALTH: REVIEW OF THE SCIENTIFIC EVIDENCE AND RECOMMENDATIONS 225 (2011), <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf>; see also Daniel Pruzin, *Former U.S. Health Officials Call for Ban on Menthol Cigarettes to Comply with Ruling*, 29 INT'L TRADE REP. 667 (2012) (summarizing calls to ban sale of menthol cigarettes on the U.S. market).

231. *Clove Cigarettes*, *supra* note 82, ¶¶ 235–36.

232. Tania Voon, *The WTO Appellate Body Outlaws Discrimination in U.S. Flavored Cigarette Ban*, ASIL INSIGHTS (2012), <https://www.asil.org/insights/volume/16/issue/15/wto-appellate-body-outlaws-discrimination-us-flavored-cigarette-ban>.

233. See *supra* note 148 and accompanying text.

Based on the WTO Appellate Body's understanding of its politically complex enforcement role, this case "represent[s] the WTO's ability to accommodate health regulation."²³⁴ The case shows that ICs understand the need for politically acceptable outcomes that recognize a government's regulatory needs and constraints.

4. *Balancing Values*

Finally, ICs hold international and state actors accountable to constitutional principles and rule of law expectations. This is perhaps their most controversial role, as it involves balancing tensions between competing values and rejecting policies that may have been legally and legitimately enacted.²³⁵

Tobacco companies and governments have raised multiple claims before ICs that perform a variety of constitutional review-type roles. For instance, the ECJ has jurisdiction to review the validity of supranational laws and even to invalidate national and regional measures.²³⁶ Other bodies, like the WTO, have explicit jurisdiction to review the validity of national laws, regulations, and practices.²³⁷ Most ICs do not have jurisdiction to invalidate domestic laws—for instance, ISDS tribunals—although their decisions can dramatically affect how regulatory efforts are shaped prospectively.²³⁸

In general, this balancing role is relatively newer terrain for ICs. With respect to tobacco, it involves balancing competing values like the empowerment of free enterprise and the protection of human health.²³⁹ It is in this role that ICs have the potential to support tobacco control efforts more significantly. Three cases help us assess ICs' constitutional review functions.

First, in *Clove Cigarettes*, the WTO reviewed domestic efforts in light of rule of law expectations of nondiscrimination and due process considerations.²⁴⁰ While condemning the discriminatory aspects of the regulation, the

234. Voon, *WTO Appellate Body Outlaws Discrimination*, *supra* note 232.

235. ALTER, *supra* note 49, ch 1.

236. See generally Joël BOUDANT, *LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES* 48 (Daloz, 2005).

237. See generally Steven P. Croley & John H. Jackson, *WTO Dispute Settlement Procedures, Standard of Review, and Deference to National Governments*, 90 *AM. J. INT'L L.* 193, 193 (1996).

238. In 2002, PMI considered bringing an ISDS case under NAFTA against Canada's law restricting claims made on cigarette packages. See Steven Chase, *Tobacco Firm Warns 'Mild' Cigarette Ban May Violate NAFTA*, *GLOBE & MAIL* (Mar. 16, 2002), <http://www.theglobeandmail.com/news/national/tobacco-firm-warns-mild-cigarette-ban-may-violate-nafta/article1022137/>. According to the NGO Public Citizen, a representative for Physicians for a Smoke Free Canada believes that the threat "played a role in stalling passage of this important public health policy." PUBLIC CITIZEN, *NAFTA CHAPTER 11 INVESTOR-STATE CASES: LESSONS FOR THE CENTRAL AMERICAN FREE TRADE AGREEMENT* 75 (Feb. 2005), http://www.citizen.org/documents/NAFTAReport_Final.pdf. The threat was not without merit as a prior tribunal had interpreted NAFTA expansively. See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000) 5 ICSID Rep. 209 (2000) (finding Mexico internationally responsible for failing to ensure "a transparent and predictable framework for Metalclad's business planning and investment.")

239. Koh, *supra* note 171.

240. *Clove Cigarettes*, *supra* note 82, ¶¶ 237–47.

Appellate Body supported control efforts and gave significant deference to national domestic health priorities. Similarly, the ECJ played this role when reviewing the European directive by acknowledging “that a high level of human health protection is to be ensured in the definition and implementation of all [EU] policies and activities.”²⁴¹ In both cases, the ICs confirmed and contextualized regulatory efforts by dismissing questions of authority, effectiveness, or legitimacy, and limiting their review to less controversial matters such as discrimination.²⁴² In balancing these matters, ICs have generally relied on treaty provisions that lend support to measures that potentially restrict trade, but they have done so in a manner that does not limit further regulatory policy goals.

More controversial will be the role of ICs in addressing packaging measures and other similar regulations. By availing themselves of the notion that modern international economic agreements serve a purpose along the lines of the far-reaching Free Speech Clause of the United States Constitution (a theory of limited pedigree under international law), industry is trying to set limits on a particularly effective form of regulation. In this case, industry tries to take advantage of the constitutional review function of ICs in order to export an interpretation of U.S. law favorable to their interests. With this tactic, industry hopes it can preempt other nations from adopting similar measures. Scholars have explained the limited legal merit of such claims.²⁴³ Suffice it to say here that ICs can resist these interpretations and instead support and legitimize regulatory efforts.

* * *

Rooted in enhanced free market principles, the claims the tobacco industry raises in ICs present a strong challenge to state regulatory efforts. Concerns about this from tobacco control advocates are valid. However, one thing must be recognized: ICs reviewing antismoking laws have generally supported control efforts, especially when ICs serve a “self-binding judicial role,” that is, when they engage in enforcement and constitutional review. In this role, ICs have played an important function in contextualizing decision making, deferring to national or regional authorities, and at times showing how certain elements of the industry influence governments to refrain from regulating, ostensibly in the best interests of their citizens.

At the same time, although ICs have supported tobacco control when acting in their enforcement and constitutional review roles, ICs have also facilitated the expansion of tobacco production, marketing, and consumption by playing “other-binding judicial” roles—that is, dispute settlement and administrative review. This suggests a more fundamental problem:

241. *Brit. Am. Tobacco (Investments) Ltd.*, *supra* note 66, ¶ 62; *Arnold André*, *supra* note 71, ¶ 33; *Swedish Match*, *supra* note 90, ¶ 32.

242. *See, e.g., Clove Cigarettes*, *supra* note 82, ¶¶ 235–36.

243. *See generally* the contributions in *PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES* (Tania Voon et al. eds., 2012).

when upholding the tobacco industry under traditional commercial frameworks, ICs effectively normalize the expansion of tobacco consumption as a desirable outcome by linking tobacco products and producers to the goals of international trade and investment agreements.

These observations of the roles of ICs should inform current policy debates about what to do with international economic treaties to address public health concerns in at least the following two ways: first, tobacco control advocates should not dismiss ICs as inadequate for resolving tobacco-related disputes. They can be effective, especially when acting in enforcement and constitutional review roles.

The TPP carve-out is consistent with this first observation. ISDS tribunals mainly play dispute settlement and administrative review roles. And ISDS is considered more problematic for regulatory efforts because of common broad treaty provisions and the lack of power on the part of states to filter aggressive claims.²⁴⁴ The TPP carve-out recognizes that tobacco is an especially harmful product and its industry particularly litigious.²⁴⁵ At the same time, the carve-out will not completely eliminate international tobacco litigation or the role of ICs in antismoking politics. The signatory parties to the TPP can still bring legal action on behalf of their industries before the TPP dispute settlement mechanism or the WTO if they believe other governments are regulating tobacco for trade protectionist reasons rather than the health of their citizens.²⁴⁶

Second, a policy implication resulting from this could be to find more ways to decouple the expansion of tobacco interests from international economic agreements without eliminating the role of ICs. To that end, future agreements could exempt tobacco products from tariff cuts and mandate the elimination of subsidies. Moreover, an international commodity agreement—a type of undertaking by a group of countries to stabilize trade, supplies, and prices of a particular commodity—could be considered a potential alternative to address some aspects of the internationalization of tobacco regulation without removing the useful roles played by ICs.²⁴⁷ Such an endeavor could centralize some decision making with the short-term goal of

244. See Sykes, *supra* note 185 (discussing the lack of political filtering in investment remedies compared to trade remedies); see also *Corn Products Int'l, Inc. v. Mexico*, ICSID-NAFTA Case No. ARB(AF)/04/01, Decision on Responsibility, ¶¶ 161–79 (Jan. 15, 2008).

245. See Ellen R. Shaffer & Joseph E. Brenner, *Carving Out Tobacco from Trade Agreements*, 104 AM. J. PUB. HEALTH e4 (2014). The industry has promised to tank the TPP approval process in the U.S. Congress; see also Alex Rogers, *Election Politics Might Delay Vote on Pacific Trade Accord*, NAT'L J. (Nov. 5, 2015), <https://www.nationaljournal.com/s/92097?mref=issue>. The American Chamber of Commerce representative said: “singling out tobacco” the industry argues, will “open a Pandora’s box as other governments go after their particular bêtes noires.” Hakim, *supra* note 181.

246. See generally Sergio Puig & Gregory Shaffer, *A Breakthrough with the TPP: The Tobacco Carve-Out*, 16 Y. J. HEALTH POL., L., & ETHICS (forthcoming 2016) (explaining how the carve-out applies between investors and TPP member states only for claims against tobacco control measures under ISDS).

247. For a recent argument for reinvigorating ICAs, see M. FAKHRI, SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW (2014). For a comprehensive treatment of the subject, see B.S. CHIMNI, INTERNATIONAL COMMODITY AGREEMENTS: A LEGAL STUDY (1987).

stabilizing demand and the longer-term goal of progressively reducing production and consumption over time, along with moving away from the most damaging tobacco products in a nondiscriminatory fashion. This is also an acceptable response under the WTO and other agreements without obliterating the interests of countries with much stake in the tobacco trade. Many political challenges exist, but an international commodity agreement can help start to reimagine a landscape where ICs are not forced to mediate between two diametrically opposed goals.

C. *Tobacco and International Law*

The history of tobacco before ICs is not only a story of self-interest on the part of powerful commercial actors, but also of the relationship between national and international law, with its respective institutions. Critics of international law often underestimate the extent to which ICs can be a source of influence in transforming legal ideas, in promoting coordination among governments, and in legitimizing regulatory initiatives that affect commercial interests.²⁴⁸ Because of their purview and democratic deficit, ICs are frequently seen as illegitimate sources of authority with Western views that act against indigenous regulatory efforts.²⁴⁹ However, ICs and international law can play an important role in these three domains.

First, ICs can effect positive change by challenging traditional ideas with more contemporary views of the role of international law in modern societies. In this regard, recent tobacco history provides a hopeful example: by enshrining ideas of free trade, economic integration, and product differentiation, and then reconstructing these interests as a health issue at the ECJ and the WTO (in part thanks to the FCTC) international law has shaped state interests for the better. This transformation counters a cynical view of international law that sees commercial treaties and ICs as simply enabling the tobacco industry's global success.

Second, tobacco control advocates can look optimistically at the risk of litigating control efforts before ICs. To be sure, cases before ICs risk decisions unfavorable to control advocates, especially in settings like ISDS. Yet sizeable coordination benefits also exist if such efforts are endorsed by ICs, effectively disseminated by civil society organizations, and adopted by other nations. In fact, a close look at the history of tobacco litigation arguably suggests that ICs are currently undermining, rather than helping, the long-term material position of the industry. Consider the recent cases before ISDS

248. See, e.g., Andrew T. Guzman, *A Compliance-based Theory of International Law*, 90 CAL. L. REV. 1823 (2002) (arguing that international courts are powerless institutions with no "hard" enforcement powers, so ICs' relevance are as inflictors of negative reputational costs).

249. For a sharp critique on ICs, see E.A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009). For a discussion regarding the tensions of representativeness and ICs, see Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EURO. J. INT'L L. 7 (2012).

tribunals, which are becoming focal points against the industry's litigation tactics and have raised the profile of tobacco control across nations, including the United States.

Third, ICs can positively contribute to tobacco control by acknowledging, endorsing, and legitimizing sensible regulatory efforts and by evidencing how domestic politics and interest groups can shape regulations to meet their needs. Arguing for complete, unfettered deference to government regulators and defending any regulatory initiatives at all costs can be problematic for different reasons. Chief among them is that elements of the industry would not mind total deference, as they are very capable of influencing—even capturing—regulatory efforts at every level. Hence, arguing against any role of ICs in antismoking politics may also help to perpetuate the use of economic and political power to distort the functioning of government in many countries (e.g., *Clove Cigarettes*, or the ban on *snus* that left the sales of other toxic oral tobacco products unaffected).

Beyond these generalizations, one can find in the history of litigation of a particular commodity a case study of the challenges of reconciling different values and moral ideas inherent in international law. ICs have faced the challenge of gradually reconciling free enterprise, and the separation of the state and the market, with the protection of human rights and the obligation of states to protect their citizens' health. In this complex setting, it is not at all surprising that the concept of a right to market access for differentiated products is an important line of defense for the tobacco industry, as it implies that some tobacco products are simply worse than others. This concept lies at the intersection of the type of claims made by tobacco interests and squares well with the industry's preference for lack of regulatory coordination.

Finally, as a distinct type of international institution, ICs have a complicated relationship with domestic institutions. On the one hand, the formal power that states delegate to ICs establishes, as a legal matter, their authority to rule over complex issues. Hence, ICs can be agents of change.²⁵⁰

At the same time, this role of ICs is narrow because of international law itself. As revealed by the study across ICs, the heavy reliance of these institutions on the idea of territoriality and state sovereignty often limits ICs' influence. As long as policies are implemented domestically, ICs receive a high level of deference. Efforts to use regulatory autonomy to affect foreigners or market conditions abroad are viewed with more skepticism. But corporate power is not constrained in the same ways. The modern corporate form allows industry to exploit this limitation and to push for regulatory autonomy. Big Tobacco has become masterful at influencing the regulatory turf. Yet the pending packaging cases are a rare opportunity for ICs to defer to

250. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 83 (2014).

state policies and to support a global regime designed to break this uneven advantage. Likewise, the TPP carve-out is a critical first step that existing and future trade and investment agreements should replicate.

CONCLUSION

International law is the terrain of both negotiation and conflict.²⁵¹ It is the terrain of negotiation because it reflects compromises between social actors that benefit from, or are disadvantaged by, particular institutions. It is the terrain of conflict because it empowers social actors to react against the institutions it creates. ICs are often at the center of this double function of international law, deciding the lines between change and the status quo.

Nowhere is this double role of international law more evident than in the current battles over the future of tobacco and world trade. A movement to expand the consumption, marketing, and production of this agricultural commodity faces a countermovement that views the issue as a global health problem. As the tensions of this battle emerge, ICs—particularly those whose jurisdictions cover economic issues—will continue to referee the choices of states. In other words, ICs will determine which decisions political actors should make and which should be left to the market.

In some sense, ICs are not so different from domestic courts. Prevailing values, norms, and ideas determine how the lines between governance and the market can and will be drawn. In other ways, however, ICs have been tasked with a larger order. ICs must balance the interests of states with the interests of other actors, including powerful and globally diversified economic players that may rely on the “lack of corporeal and territorial form” to oppose and escape regulation.²⁵² Hence, engaging with ICs is an important strategic tool for those individuals and states that seek to place limits on the consumption of cancerous tobacco products, and international tobacco litigation will provide a leading landscape for this battleground in the years to come.

251. GARETH DALE, KARL POLANYI: THE LIMITS OF THE MARKET 201–02 (2010).

252. Martinez, *supra* note 69, at 1414.

ANNEX 1

Andean Court of Justice (“TJCA”)

- Colombia-Venezuela
- Ecuador-Venezuela

European Court of Justice (“ECJ”)

- Comm’n v. Italy
- Comm’n v. France
- Ministero delle Finanze v. Philip Morris Belgium SA
- Federal Republic of Germany v. European Parliament (C376/98)
- The Queen v. Sec’y of State for Health
- Arnold André GmbH & Co. KG v. Landrat des Kreises Herford
- Swedish Match AB v. Sec’y of State for Health
- Federal Republic of Germany v. European Parliament (C-380/03)
- European Comm’n v. French Republic
- ANETT v. Administración del Estado Español
- Republic of Poland v. European Parliament and Council of the European Union
- “Totally Wicked” v. Sec’y of State for Health
- Philip Morris Brands SARL, Philip Morris Ltd., Brit. Am. Tobacco UK Ltd. v. Sec’y of State for Health

The Court of Justice of the European Free Trade Association (“EFTA”) States Court

- Philip Morris Norway AS v. The Norwegian State

Eritrea-Ethiopia Claims Commission

- Rothman Tobacco Plant (Claim 5—Lalaigash Sub-Zoba)

General Agreement on Tariffs and Trade (“GATT”)

- Japan — Restraints on Imports of Manufactured Tobacco from the United States
- Thailand — Restrictions on Importation of and Internal Taxes of Cigarettes
- United States — Measures Affecting the Importation, Internal Sale, and Use of Tobacco

Investor-State Dispute Settlement Tribunals: International Centre for Settlement of Investment Disputes (“ICSID”) and the Permanent Court of Arbitration (“PCA”)

- Feldman v. Mexico (ICSID)

- Grand River Enterprises Six Nations, Ltd. v. United States (ICSID)
- M. Meerapfel Sohne Ag Group v. Central African Republic (ICSID)
- Philip Morris Brands v. Uruguay (ICSID)
- Philip Morris Asia Ltd. v. Australia (PCA)

Iran—United States Claims Tribunal

- Philip Morris Inc. v. Iran
- R.J. Reynolds Tobacco Co. v. Iran

*Mercado Común del Sur (Southern Common Market,
or “MERCOSUR”) (Ad Hoc Tribunal)*

- Brazil — Controversia sobre medidas discriminatorias y restrictivas al comercio de tabaco y productos derivados del Tabaco

World Trade Organization (“WTO”)

- Peru — Taxes on Cigarettes
- Dominican Republic — Measures Affecting the Importation of Cigarettes
- Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes
- Thailand — Customs and Fiscal Measures on Cigarettes
- United States — Measures Affecting the Production and Sale of Clove Cigarettes
- Armenia — Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages
- Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging — Five cases: DS434 (Ukraine), DS435 (DR), DS441 (Honduras), DS458 (Cuba), and DS467 (Indonesia)