

THE INTERNATIONALIZATION OF TOBACCO TACTICS

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ABSTRACT

Recently, public health advocates struck a blow against tobacco companies by barring them from bringing challenges under some international trade deals. In this Article, I explain why other governments should adopt similar tobacco “carve-outs.” Specifically, I argue that it is mainly the industry’s aggressive litigation tactics—not the hazardous nature of this consumer product—that justifies treating it in an exceptional manner for the purposes of international litigation. To illustrate my point, first, I explain the nature of the carve-out in relation to a topology of legal forms used to exclude policy areas, economic sectors, and particular industries from obligations stipulated in international economic agreements. I follow with a case study of Phillip Morris International to explain how the industry, by relying on litigation before international courts and tribunals, has aimed at delaying, preempting, and weakening harmonized anti-smoking regulations. I finish by proposing modest ways to refine “Multinational Enterprise or MNE theory,” which aims at understanding the choices of extending control over subsidiaries operating abroad. In particular, I argue for increasing the recognition of international legal capacity and adjudicatory options in conceptualizing ownership, location, and internalization advantages.

ABSTRACT.....	495
INTRODUCTION	496
I.BACKGROUND	497
A. The Tobacco Carve-Out: A Breakthrough	498
B. The Carve-Out Form: An “Odd” Choice	499
II.INTERNATIONAL TOBACCO LITIGATION: THE CASE OF PHILIP MORRIS	501

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A. The Family Smoking Prevention and Tobacco Control Act	502
B. The Framework Convention on Tobacco Control.....	504
III. GLOBALIZATION, TOBACCO REGULATION AND MULTINATIONAL CORPORATIONS	510
A. Explaining the Carve-Out Choice	510
B. International Adjudicatory Aspects of Multinational Enterprise Theory	513
CONCLUSION.....	519

INTRODUCTION

The tobacco “carve-out” in the recently concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“TPP”) represents an important development in international law.¹ The carve-out permits TPP State members to block corporations from using the controversial investor-state dispute settlement (“ISDS”) mechanism to obtain damages resulting from tobacco control measures. For the first time in recent history, an international commercial treaty of this nature and magnitude treats a particular business sector exceptionally for the purpose of legal standing in international litigation. Not only that, but this mechanism seems to be spreading across treaties. Why are governments “singling out tobacco,” the industry wonders?² The short answer is simple: because governments *can* and because governments *should* do so.

In this Article, I deal mostly with the second part of the answer—why governments should follow this emerging trend and adopt tobacco carve-outs of this nature. Specifically, I argue that it is the industry’s aggressive litigation tactics—not only the hazardous nature of this consumer product—that supports this particular type of disparate treatment before a dispute settlement process. To illustrate my point, first, I explain the nature of the carve-out in relation to a topology of legal forms employed to exclude policy areas, economic sectors or particular industries from legal obligations stipulated in treaties. I follow by using the example of Phillip Morris International (“PMI”) to explain how the industry, by relying on litigation before international courts and tribunals, aims at delaying, preempting and

1. See The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 29.5, Feb. 22, 2018, Vietnam Chamber of Commerce And Industry, <http://www.trungtamwto.vn/sites/default/files/tpp/29.-exceptions-and-general-provisions.pdf>.

2. Danny Hakim, *U.S. Chamber of Commerce Works Globally to Fight Anti-Smoking Measures*, N.Y. TIMES (June 30, 2015), <https://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html>. Australia and Singapore have agreed to amend their Free Trade Agreement to include a tobacco carve-out. See Agreement to Amend the Singapore-Australia Free Trade Agreement, ch. 3, art. 22, Feb. 17, 2003 (as amended), Australian Department of Foreign Affairs and Trade, <https://dfat.gov.au/trade/agreements/safta/Documents/agreement-to-amend-the-singapore-australia-free-trade-agreement.pdf>.

weakening (in that order) anti-smoking regulations. The use of these litigation tactics is well documented in the United States where legal and constitutional provisions prohibit insulating such regulations from legal challenges before the courts.³ However, given that there are few if any legal impediments to restricting these claims internationally, there is no reason for governments to allow the exportation of such provisions to international courts. Rather, governments should adopt an approach that treats this carve-out as a practice for future commercial deals.

At a conceptual level, the case of tobacco litigation and the carve-out illustrate the paradoxical reality that international business and economic law may often result in the over-empowerment of economic actors, with resulting difficulties for governments attempting to regulate in the public interest. The case shows how ownership, location, and internalization of subsidiaries by Multinational Enterprises (“MNEs”) provide such corporations with advantages, including the utilization and deployment of legal expertise and capacity. As international governance is taking on increasingly more contentious regulatory topics, understanding the global litigation strategies of MNEs is more pressing. Such understanding may reveal more about the real power that corporations enjoy today and how international law can constrain but also enable the use of such power.

I. BACKGROUND

When it comes to tobacco consumption, the progress made in the United States has been overshadowed by the increase of smoking in low- and middle-income countries. In fact, such increase is significant enough to offset the decrease in high-income countries.⁴ This consumption growth is sustained, in part, by economic integration and trade liberalization—the reduction of tariffs and the removal of other regulatory barriers to commercial activities. Until recently, tobacco enjoyed the same benefits provided to other industries in free trade and commercial agreements (“FTAs”), including potential access to international dispute settlement. Here, I explain the significance of the tobacco carve-out and the relevance of the exceptional form of institutionalization adopted in the treaty.

3. Along with stricter textual warnings drafted by Congress, these graphic warning images were to appear on the top 50 percent of all cigarette packages and cover 20 percent of print advertisements. *See generally, D.C. Circuit Holds that FDA Rule Mandating Graphic Warning Images on Cigarette Packaging and Advertisements Violates First Amendment*, 126 HARV. L. REV. 818 (2013).

4. MICHAEL ERIKSEN ET. AL., *THE TOBACCO ATLAS*, 30–31 (John M. Daniel et. al. eds., 4th ed., 2015), www.tobaccoatlas.org/uploads/Images/PDFs/Tobacco_Atlas_2ndPrint.pdf.

A. The Tobacco Carve-Out: A Breakthrough

A few years ago, the World Health Organization (“WHO”) warned that tobacco could kill one billion people this century.⁵ For most Americans, this registered as white noise, mostly because more than eighty percent of potential victims now live in low- and middle-income countries.⁶ Nevertheless, American legal, institutional, and policy choices have substantially contributed to this problematic trend.

As has been well documented, tobacco’s global success is partly the result of FTAs that mandate the removal of import taxes and other commercial restrictions on most goods, including tobacco products.⁷ Both Republican and Democratic administrations have supported the tobacco industry in trade deals and awarded federal subsidies to tobacco growers and exporters for eight decades.⁸ These generous subsidies were only ended (at least for now) in 2014.⁹ U.S. policymakers long maintained that since cigarettes are legally sold in the United States and abroad, trade officials should treat the industry no differently in commercial agreements.¹⁰ A 1990 congressional report issued at the dawn of major trade negotiations noted the

5. *See Tobacco Could Kill a Billion People This Century, UN Health Official Warns*, UN NEWS CENTRE (Apr. 29, 2011), www.un.org/apps/news/story.asp?NewsID=38240#.Vu713xlrKV4.

6. According to the World Health Organization, member States are grouped into four income groups (low, lower-middle, upper-middle, and high) based on the World Bank’s list of analytical income classification of economies. *See Health Statistics and Information Systems: Definition of Region Groupings*, WORLD HEALTH ORG. (2016), www.who.int/healthinfo/global_burden_disease/definition_regions/en.

7. *See, e.g.*, Robert Stumberg, *Safeguards for Tobacco Control: Options for the TPPA*, 39 AM. J. OF L. & MED. 382, 382–83 (2013); *but see*, Jeffery Drope & Jenina Joy Chavez, *Complexities at the Intersection of Tobacco Control and Trade Liberalization: Evidence from Southeast Asia*, 24 TOBACCO CONTROL e128, e129 (2014) (pointing to some complex methodological issues in studying the effects of trade liberalization and the level of tobacco consumption).

8. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31; Tobacco Control Act, ch. 866, 48 Stat. 1275 (1934) (establishing price support and production adjustment for tobacco). For recent discussion on their elimination, *see* Emily McCord, *Tobacco Farmers Lose Longtime Safety Net*, NPR (Oct. 24, 2014), www.npr.org/2014/10/24/357947259/tobacco-farmers-lose-longtime-safety-net. In fact, since the 1960s countries like Malawi have complained about the effects of U.S. subsidies in global markets and on local (Malawi) production. *See* Statement by the Representative of Malawi Before the Council of Representatives for the General Agreement on Tariffs and Trade, United States Subsidy on Manufactured Tobacco (Nov. 6, 1967), https://www.wto.org/gatt_docs/English/SULPDF/90800173.pdf.

9. *See* McCord, *supra* note 8.

10. *See, e.g.*, Thomas J. Bollyky, *The Tobacco Problem in U.S. Trade*, COUNCIL ON FOREIGN REL. (Sept. 5, 2013), <http://www.cfr.org/trade/tobacco-problem-us-trade/p31346>. *But see* Stan Sesser, *Opium War Redux*, NEW YORKER (Sept. 13, 1993) <https://www.newyorker.com/magazine/1993/09/13/opium-war-redux> (quoting Dr. James Mason, Assistant Secretary for Health in the U.S. Department of Health and Human Services under President George H.W. Bush, as saying: “Our country has been known for its humanitarian and health-related projects worldwide. This is a hundred and eighty degrees opposite. We’re talking about millions of lives—and that totally outweighs and overwhelms what we’ve accomplished in the humanitarian field. It’s outrageous for the United States to allow this misery and suffering to occur.”).

“conflict . . . between U.S. trade goals and health policy objectives,” but to no avail.¹¹

The tobacco “carve-out” included in the original and reaffirmed in the recently concluded TPP represents a historic shift—a shift that is spreading.¹² The carve-out allows TPP member countries to block corporations from using the ISDS mechanism to receive compensation for commercial damages resulting from tobacco control measures.¹³ For the first time, an international commercial treaty treats tobacco companies exceptionally—recognizing that tobacco is somehow different than other commercial products. As expected, the industry argues that the TPP carve-out unfairly targets tobacco products; “singling out tobacco [will] open a Pandora’s box as other governments go after their particular *bêtes noires*,” they claim.¹⁴

B. The Carve-Out Form: An “Odd” Choice

Beyond the important breakthrough, the tobacco carve-out stands out because of the legal form to institutionalize an exception to the rule. The carve-out applies only to investor-state arbitration, a controversial form of investment dispute settlement. Under this mechanism, companies can sue governments before *ad hoc* tribunals of party-appointed arbitrators for damages that result from governmental action or omission. Because there is no formal appeals process, the decisions issued by the tribunals are subject to very little oversight.

In general, controversial topics that deserve exceptional treatment in international treaties like FTAs are formalized in one of the following three legal forms:

11. U.S. GEN. ACCOUNTABILITY OFF., GAO/NSIAD-90-190, TRADE AND HEALTH ISSUES: DICHOTOMY BETWEEN U.S. TOBACCO EXPORT POLICY AND ANTISMOKING INITIATIVES 5 (1990), <http://www.gao.gov/assets/150/149076.pdf>.

12. 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>.

13. See TPP, *supra* note 1, art. 29.5 (“A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.”).

14. Danny Hakim, *supra* note 2. The carve-out has also been criticized by “progressive” organizations on the ground that it confirms the lack of regulatory space. See, e.g., Katherine Hirono, Deborah Gleeson, & Becky Freeman, *To What Extent Does a Tobacco Carve-Out Protect Public Health in the Trans-Pacific Partnership Agreement*, 26(2) PUB. HEALTH RES. PRAC. at e2621622.

-*General exceptions* which use permissive language for the pursuit of a particular public policy, but then impose some restrictions on the design of the measure by specifying a required nexus between the measure and the permissible objective, such as “necessary to protect [objective X].”

-*Carve-outs* which exempt an entire policy area, industry or economic sector from the scope of a treaty. This form may also include internal qualifications on the scope of the obligation within the context of the clause itself, in a proximate clause, or in an interpretative annex. Carve-outs tend to identify a particular area of exclusion with language such as “do not apply to a measure designed to protect [objective Y].”

-*Treaty reservations* which allow treaty parties to unilaterally nominate a sector, industry or policy area in relation to which they reserve the right to adopt or maintain otherwise non-conforming measures. These exclusions generally rely on language such as “...nothing in this Agreement shall preclude the adoption by [country] of measures it deems necessary to [objective Z].”¹⁵

Under international law, the specific mechanism used to codify the exceptional treatment of a particular subject matter may have legal and interpretative consequences that are beyond the scope of this work.¹⁶ One should note, however, that carve-outs and reservations quarantine specific sectors, industries, or policy areas *ex ante*. Exceptions, on the other hand, preserve policy space for *ex post* exigencies. Hence, the tobacco carve-out in the TPP sits in a strange place: it enables State members to curtail the right to a private right of action or to block an existing legal claim, but only if the case concerns a particular policy area, *i.e.*, tobacco control. Nevertheless, under the treaty, companies can still internationally trade and invest in tobacco. Also, any of the signatory parties to the TPP can still bring legal claims if they believe another governmental party to the treaty is regulating tobacco products for trade-protectionist reasons rather than to protect public health.

A close look at this topology of legal forms allows us to identify what the carve-out is *not*. For one, the tobacco carve-out is not a tobacco treaty reservation. The TPP could have gone further by exempting tobacco and tobacco products from the treaty commitments more generally. This would have allowed governments to adopt tariffs and other non-tariff barriers on tobacco products as well as to block investments in local tobacco production, distribution and branding. Practically speaking, this legal form could have been more effective in dealing with the public health consequences of

15. Caroline Henckels, *The Exception Proves the Rule? The Role of Public Policy Exceptions in Trade and Investment Agreements* (on file with author).

16. For an analysis of the main substantial issues raised by reservations, see generally Alain Pellet, *The International Law Commission's Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur* 24 EUR. J. INT'L L. 1061 (2013).

tobacco, especially if coupled with consumption taxes, as the combination could potentially raise revenue and reduce demand, particularly in poor countries like Vietnam.¹⁷

The TPP carve-out is also not a general “public health exception.” Such a legal form may have served broader health purposes, including by insulating other regulatory domains. For example, it could help to constrain actors such as pharmaceutical companies or soft-drink distributors that are often empowered by FTAs and that may take actions that compromise the achievement of other public health goals.¹⁸ What then, could possibly explain the “odd” choice of the tobacco carve-out?

II. INTERNATIONAL TOBACCO LITIGATION: THE CASE OF PHILIP MORRIS

The carve-out comes in the wake of two related trends. On the one hand, tobacco companies are strategically using international dispute settlement, such as ISDS, to challenge tobacco control measures around the world, including bans of flavored cigarettes; marketing and advertising restrictions; labeling requirements of health risks; import and export taxes; price, import, and export controls; and brand registration recognition. On the other hand, in part because of international cases involving tobacco, litigation has incited growing resistance to ISDS.¹⁹

In this section, I use the case study of PMI, a company implicated in one-third of thirty-nine international cases tracked by a recent study, to explain the use of international litigation to defeat the efforts of governments to constrain the industry.²⁰ First, I discuss how PMI indirectly used litigation before the World Trade Organization (“WTO”)²¹—the cornerstone of trade governance—to challenge the Family Smoking Prevention and Tobacco

17. See Michele Goodwin, Sergio Puig & Gregory Shaffer, *Watch Out, Joe Camel is Back: Tobacco and the TPP*, HUFFINGTON POST (Apr. 30, 2015), http://www.huffingtonpost.com/michele-goodwin/watch-out-joe-camel-is-ba_b_7177592.html. There are currently fewer than 8,000 tobacco farmers in the United States. Hence, the impact on U.S. jobs would be minimal.

18. See Amy Kapczynski, *The Trans-Pacific Partnership—Is It Bad for Your Health?*, 373 NEW ENG. J. MED. 201, 202 (2015).

19. See Elizabeth Warren, *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?utm_term=.b758defdf9b6 (describing ISDS panels as “rigged pseudo-courts” that favor multinational corporations at the expense of sovereign states and their citizens).

20. See generally Puig, *supra* note 17 (based on 39 cases brought before international courts and tribunals, the author found that at least 13 cases (or 34% of the surveyed cases) directly or indirectly (through an affiliated company) involved Philip Morris International).

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

Control Act. Second, I discuss the use of multiple international litigation venues, but notably, ISDS, to challenge the goals of the Framework Convention on Tobacco Control (“FCTC”). The FCTC is a widely ratified treaty negotiated at the WHO and the most important transnational regulatory effort to reduce tobacco consumption.²²

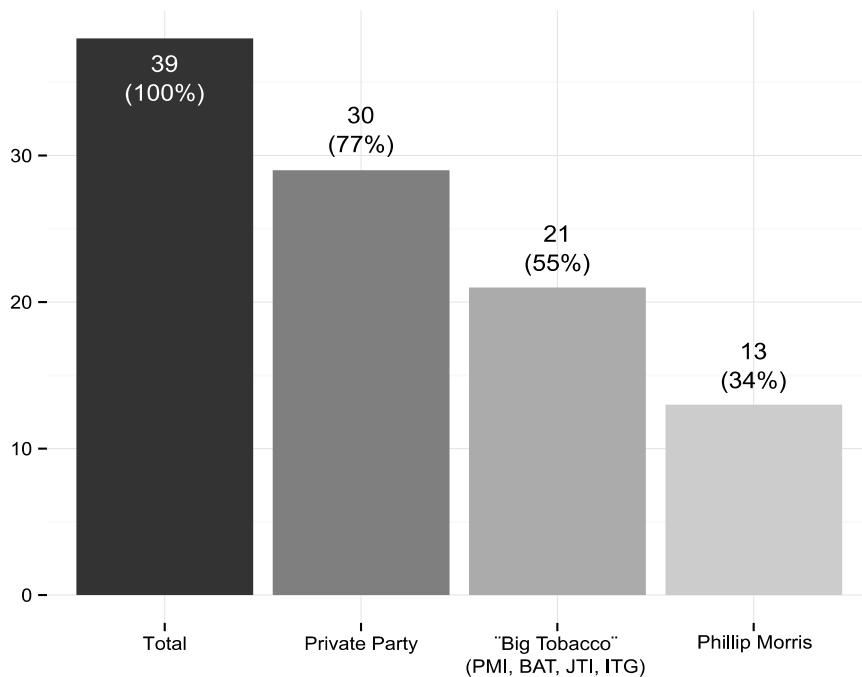


Figure 1: International tobacco cases by Party involved (n=39)

A. The Family Smoking Prevention and Tobacco Control Act

In 2009, the Family Smoking Prevention and Tobacco Control Act became law in the United States. Among other provisions, the Act banned the production and sale of clove and other flavored cigarettes as an effort to reduce youth smoking.²³ According to a 2006 study, clove cigarettes are known as “trainer cigarettes” that may serve as a gateway product for more tobacco use.²⁴ Menthol cigarettes, however, were not included in the ban,

22. See WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166 [hereinafter *FCTC*].

23. Family Smoking Prevention and Tobacco Control Act § 907, 21 U.S.C. § 387g(a)(1)(A) (2009).

24. Mark Drajem & Lorraine Woellert, *Clove Cigarettes May Prompt U.S., Indonesia Dispute (Update 1)*, SOUTHEAST ASIA TOBACCO CONTROL ALLIANCE (May 19, 2009), <https://seatca.org/?p=202>.

though they are another type of flavored cigarette that is popular among minors.²⁵

Unlike menthols, clove and other flavored cigarettes are not produced in the United States. At the time the clove cigarette ban was put into place, PMI was the sole owner of the subsidiary that exported all such products into the United States from, and shared the largest market of clove cigarettes in, Indonesia. In 2005, PMI “indigenized” in Indonesia and acquired PT HM Sampoerna, then a family business that held close to 20% of the share in the local cigarette market.

In 2010, a year after the Act was passed, Indonesia brought a lawsuit before the WTO, reportedly after heavy lobbying by PMI’s local subsidiary. In the proceedings, the WTO agreed with Indonesia that the U.S. ban on clove cigarettes was unjustifiably discriminatory because the ban exempted menthol-flavored cigarettes—a product considered “like” for international trade purposes.²⁶ The Office of the U.S. Trade Representative reacted to such decision with disappointment, stating: “The ban on cigarettes with flavors is part of landmark U.S. legislation to combat the public health crisis caused by tobacco products.”²⁷

After the United States failed to modify or repeal the discriminatory elements of the ban in response to the decision (as required by WTO rules), Indonesia requested the organization to authorize retaliation against the United States. Prior to the imposition of retaliation, however, the dispute settled—the United States and Indonesia agreed on a series of measures in exchange for keeping the ban in place as well as the exception on menthols. The value of those measures to American tax payers was around US\$55 million.²⁸

Perhaps what is most interesting about this dispute is not that an iconic American company now based in Switzerland (mostly for tax purposes) lobbied the Indonesian government (through its subsidiary) to bring the case to defend clove-flavored cigarettes’ market access, but that PMI, that same company, controlled the largest share of the menthols market in the United States. In essence, PMI’s interests were represented by both sides of the litigation in this case—by the United States that defended the exception to

25. 21 U.S.C. § 387g(a)(1)(A).

26. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 298, WT/DS406/AB/R (Apr. 4, 2012).

27. Tom Miles & Doug Palmer, *WTO Dents U.S. Ban on Clove Cigarettes*, REUTERS (Apr. 4, 2012, 12:40 PM), <https://www.reuters.com/article/us-wto-usa-indonesia/wto-dents-u-s-ban-on-clove-cigarettes-idUSBRE8330Y720120404>.

28. *Indonesia Announces Deal with U.S. on Clove Cigarettes Trade Dispute*, BRIDGES, Oct. 9, 2014, at 1.

favor menthols and by Indonesia that challenged the arbitrariness of banning some, but not all flavored cigarettes.

Ironically, the menthol-flavored exemption was heavily pushed by PMI in the legislative process. According to a 2011 report, PMI would have withdrawn its support for the Act if a blanket flavored-cigarette prohibition was adopted, even though a menthol ban would reduce public health costs and save thousands of lives, especially among African and Native American as well as Hispanic females.²⁹ PMI strongly fought for the exemption because these cigarettes are an “attractive starter product for new [female] smokers”—precisely the same reason given by the United States to ban clove-flavored cigarettes.³⁰

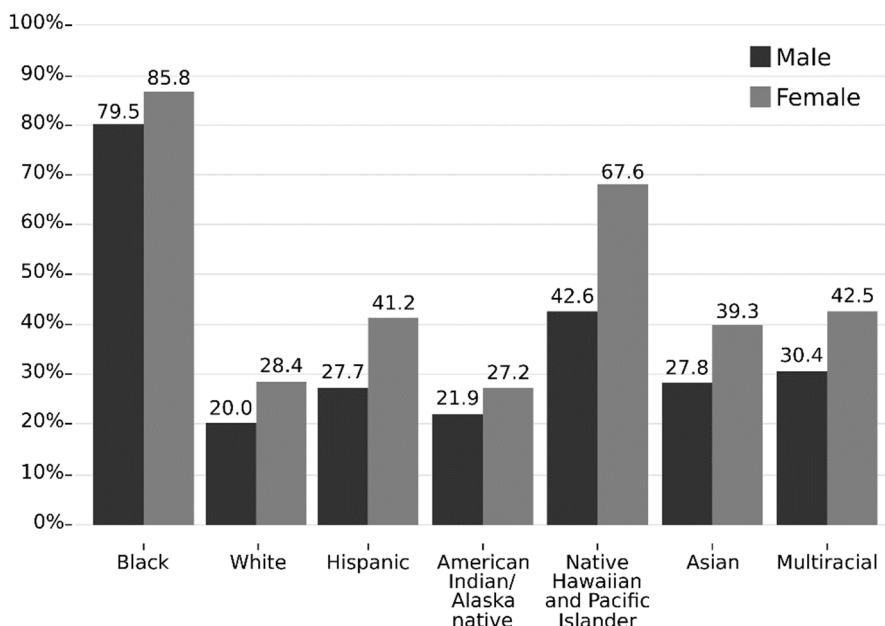


Figure 2: Menthol use among smokers by populations (2010)

(Source: Substance Abuse and Mental Health Services Administration)

B. The Framework Convention on Tobacco Control

The recent tactics employed by PMI against attempts to spread anti-smoking protections and to coordinate stronger tobacco regulations across nations seem more audacious—at least to the eyes of anti-tobacco advocates. With the global expansion of tobacco, international control efforts have also

29. U.S. Department of Health and Human Services, National Institute of Health, National Cancer Institute, 2017 Smokefree.gov. Menthol Cigarettes.

30. *Id.*

emerged. Chief among these efforts is the FCTC, which took effect in 2005 and has been ratified by 180 members (holdouts include Cuba, Haiti, and the United States).³¹

This international treaty's main goal is "to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke."³² To curb demand, it recommends measures such as: regulation of the contents of products; requirements for disclosures and for the packaging and labeling of products; promotion of educational and public awareness efforts; and regulation of advertising, sponsorship, and promotion. On the supply side, the FCTC addresses illicit trade in tobacco products, sales to and by minors, and provision of support for economically viable alternatives for farmers. Notably, the FCTC states that "nothing in [the treaty] shall prevent a Party from imposing stricter requirements that are consistent with their provisions and *are in accordance with international law*."³³

Since the treaty entered into force more than a decade ago, a number of States including Australia, Uruguay, Norway, and members of the European Union ("EU") have introduced control measures that conform to or are based on it—most notably, advertisement restrictions and "plain packaging" requirements. These requirements usually prohibit companies from printing logos, symbols, and other bright images on cigarette packets and, in some cases, mandate "generic packaging," a particular shade of drab dark brown for all tobacco products (*see*, figure 3 below). There is no "tobacco court" in charge of enforcing the FCTC's commitments or drawing the limits between potentially conflicting obligations. The Convention simply provides a number of "Guidelines for Implementation" issued by the governing body, intended to help parties implement their treaty obligations (though the legal status of the guidelines is ambiguous).³⁴

In response to the growing number of countries adopting regulations conforming to or based on the Convention, PMI (or a subsidiary or government acting on PMI's behalf) has sparked litigation before international courts and tribunals. By relying on obligations of commercial nature adopted by countries in different treaties, PMI has been able to challenge regulations internationally. In essence, these challenges attempt to frame tobacco control measures as not "in accordance with international

31. *Parties to the WHO Framework Convention on Tobacco Control*, WORLD HEALTH ORG., http://www.who.int/fctc/signatories_parties/en/.

32. FCTC, art. III.

33. *Id.* at art. II (emphasis added).

34. *See* Sam Foster Halabi, *The World Health Organization's Framework Convention on Tobacco Control: An Analysis of Guidelines Adopted by the Conference of the Parties*, 39 GA. J. INT'L & COMP. L. 121, 125–26 (2010) (comparing competing interpretations of the legal significance of the COP guidelines).

law” and therefore in conflict with the FCTC.³⁵ As I detail now, PMI’s interests have been represented in five different types of proceedings with the goal of undermining the regulations and, indirectly, the goals of the FCTC.



Figure 3: Plain Packaging as Required by Australian Act (2011)

-Investor-State Dispute Settlement: PMI has used the expensive system and expansive provisions of ISDS to challenge regulations, claim substantial money in damages, and deter countries from adopting similar measures. First, through a local subsidiary, PMI filed an unsuccessful case under the Switzerland-Uruguay bilateral investment treaty targeting Uruguay’s legislation requiring all manufacturers to adopt a single presentation and graphic warnings covering 80% of the cigarette package. PMI claimed, among other violations, that the irregular regulatory process and the resulting regulation breached the “fair-and-equitable-treatment” standard of the treaty.

That same year, PM Asia, a Hong Kong subsidiary of PMI and owner of PM Australia, filed for arbitration under the Hong Kong-Australia bilateral investment treaty against legislation mandating “generic

35. For a discussion on the relationship between the FCTC and the WTO, 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”).

packaging” and other advertisement restrictions.³⁶ To institute this second arbitration process, PM Asia acquired its shares in PM Australia four months prior to filing the case, but just after Australia’s announcement of a legislative proposal that later became the actual statute.³⁷ 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 authority.³⁸ While the dismissal of PMI’s claim 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 a dissenting opinion in the victory by Uruguay in the prior case.³⁹

-WTO-Dispute Settlement: The two ISDS cases referred to above served as a prelude to the more significant and still pending trade law dispute—which could potentially lead to the modification or repeal of the Australian plain packaging legislation (yet, this possibility is unlikely).

After testing a version of the same argument in the Uruguayan case, PM Asia argued in the ISDS case against Australia that the broad provisions of the bilateral investment treaty could be used to import Australia’s other international obligations into the claim, including those enshrined in the WTO Agreements, *i.e.*, TBT and TRIPS.⁴⁰ In the international trade arena, like in the arbitration, the complainants maintain that the Australian Act violates the very same WTO Agreements.⁴¹ Moreover, it is well documented that the Dominican Republic, and to some extent Indonesia, are both advancing interests similar to those of PMI in the dispute. In fact, the company itself admits to paying these complaining States’ legal fees.⁴² Both

36. Agreement for the Promotion and Protection of Investments, H.K.-Austl., Sep. 15, 1993, 1748 U.N.T.S. 385; Philip Morris Asia v. the Commonwealth of Australia, Notice of Arbitration, ¶¶ 4.15–5.17, 7.15–7.17 (Nov. 21, 2011). For Uruguay *see* Philip Morris Products S.A. et al. v. Uruguay, ICSID Case No. ARB/10/7 (2010), Award (Jul. 8, 2016) ¶¶ 235–309.

37. Australian Government, Australia’s Response to the Notice of Arbitration, Philip Morris Asia Ltd. v. the Commonwealth of Australia 2 (2011).

38. *Id.* ¶ 36–39; Philip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, Award on Jurisdiction and Admissibility (Dec. 17, 2015) ¶¶ 585–88.

39. Philip Morris Products S.A. et al. v. Uruguay, ICSID Case No. ARB/10/7 (2010), Concurring and Dissenting Opinion of Mr. Gary Born, ¶ 5 (July 8, 2016).

40. This argument links the WTO agreements with the BIT protections. *See* Notice of Arbitration, *supra* note 36 ¶ 7.15–7.16.

41. The current four complainants are Cuba, Indonesia, Honduras, and the Dominican Republic. *See Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WORLD TRADE ORG. (May 5, 2014), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm (concerning matters labeled DS435, DS441, DS458, and DS467).

42. 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

countries are alleging that the WTO Agreements support a claimed unrestricted right to use brands and other symbols with respect to tobacco products.

Essentially, the “rule importation” strategy affords PMI two opportunities to shape the interpretation of international trade rules as a way to set limits on the regulation of tobacco marketing. It is exposing the same tobacco control measure to oversight by two different tribunals. This aggressive testing of the “regulatory space” is used to signal resolve by a litigious actor that may seek to dissuade other nations from adopting similar measures for fear of a confrontation with a giant company. According to the Campaign for Tobacco Free Kids, tobacco companies have threatened poor African countries considering similar legislation.⁴³

-Litigation Before European Courts: Parallel to the WTO and ISDS battles, PMI has instituted extensive litigation against European regulations based on the FCTC. Three international European courts have been implicated in PMI’s legal efforts.

First, PMI attempted to invalidate the 2014 EU Tobacco Products Directive as a whole as well as various provisions within it and domestic regulations based on the directive.⁴⁴ While all the legal challenges were eventually dismissed by the European Court of Justice (“ECJ”), the picture that emerges from the litigation and resulting case law is more complex than the frequent depiction of an unqualified victory for tobacco control efforts. To see this, one needs to understand first what are the possible regulatory preferences of an actor with a dominant market position like PMI and how these preferences relate to the outcomes in international litigation.

As I have argued in the past, the tobacco industry tends to rely on specific concepts of international law, especially international economic and business law, to defend its turf. Mainly, the industry relies on four pillars: (i) property rights, especially intellectual property rights (brands); (ii) nondiscrimination in taxation and regulation; (iii) limits to quantitative and trade restrictive measures; and (iv) regulatory subsidiarity. Based on these concepts, the industry often claims—falsely in my view—that appropriately regulated tobacco can contribute to welfare and development; that nondiscriminatory regulation enhances the formal economy and

Corderoy, *Mystery over Ukraine Tobacco Law Challenge*, SYDNEY MORNING HERALD (Mar. 27, 2012), <http://www.smh.com.au/federal-politics/political-news/mystery-over-ukraine-tobacco-law-challenge-20120326-1vunl.html>.

43 Sabrina Tavernise, *Tobacco Firms’ Strategy Limits Poorer Nations’ Smoking Laws*, N.Y. TIMES (Dec. 13, 2013) at A1.

44 Case C-547/14, Philip Morris Brands SARL v. Sec’y of State for Health, 2016 E.C.R. 325. See also Case C-358/14, Republic of Poland v. European Parliament, 2016 E.C.R. 323 (Poland has a production facility owned by PMI).

supports farming communities; that local sales taxes are more effective regulatory alternatives; and that transnational efforts may contradict, undermine or conflict with domestic regulatory preferences. PMI, in particular, mirrors these preferences almost with exact precision—perhaps with the caveat of being less averse to harmonization than other members of the industry. Hence, in the context of the European challenges the company argued that Member States and not the EU are the appropriate authority to regulate tobacco. Yet, if there is a valid union-wide directive, it should preempt additional requirements that create trade impediments and aim at harmonizing State regulation.

While the decisions of the ECJ show a great deal of deference to regulations, they pose a unique quandary for the regulatory sovereignty of individual States within the EU. The ECJ confirmed that the requirements applied only within the EU⁴⁵—despite the fact that extraterritorial application of the regulation could enhance control efforts.⁴⁶ Moreover, the ECJ emphasized that tobacco regulations at the union-level are appropriate because they avoid the potential barriers to free trade posed by each EU Member State adopting its own framework. Hence, if an EU Member State were to impose some stricter requirements while other EU Member States did not, it could create the type of regulatory divergences that the ECJ suggests should be prevented. These divergences, in and of themselves, seemingly represent a species of obstacle to trade. Unless the EU devises union-wide directives, it would be somewhat problematic for the EU Member States to pass them on their own—constraining the “stricter requirements” anticipated in the FCTC.

Thus, while the ECJ is deferential to broad regulations on tobacco products in the interest of public health, such regulations must apply in a manner that is uniform, and does not involve unjustifiable discrimination, unnecessary obstacles to trade, or extraterritorial effects. As in the WTO dispute, some of the same arguments were previously tested by PMI before another international court—the Court of Justice of the European Free Trade Association States (EFTA Court).⁴⁷ There, PMI argued that Norway’s ban on the display of tobacco products for sale was akin to a quantitative restriction on the import of tobacco products prohibited under the Agreement on the European Economic Area.⁴⁸

45 Philip Morris Brand SARL v. Sec’y of State for Health, *supra* note 44, ¶ 209.

46 To be sure, a precedent existed for this position resulting from prior challenges to an earlier European tobacco regulation. *See* Case C-491/01, *The Queen v. Sec’y of State for Health*, 2002 E.C.R. I-11453 ¶¶ 209, 217. Other members of the industry participated in this case.

47 Case E-16/10, *Philip Morris Norway AS v. The Norwegian State*, 2011 E.F.T.A.C. (2011).

48 *Id.* ¶ 5.

But possibly the most extreme of PMI's tactics in Europe is what seems to be the indirect use of human rights courts to defend its interests. In *Vékony v. Hungary*, a citizen challenged a tobacco control measure that required all retailers wishing to sell tobacco to apply for a license and conform with legal requirements to limit to the utmost the access of minors to tobacco products. This challenge was brought before the European Court of Human Rights ("ECtHR") on the basis that Hungary's denial of the license unlawfully affected the peaceful enjoyment of possessions in violation of the European Convention on Human Rights.⁴⁹ Mr. Vékony's family owned a grocery store that made roughly a third of its profits on the sale of tobacco prior to the measure.⁵⁰ Vékony's family applied for a tobacco retail concession, but was denied, and therefore the applicant's family was obliged to terminate the sale of tobacco products.⁵¹ Surprisingly, the ECtHR held in favor of Vékony, stating that the measure reflected Hungary's obligations under the FCTC and that European states "enjoy a wide margin of appreciation;" nevertheless, the Court observed, that the decision was "verging on arbitrariness . . . [and imposed] excessive individual burden due to the control measure."⁵² While reasonable people may disagree on the convenience of allowing human rights-based challenges from tobacco products distributors when facing regulatory decision perceived as arbitrary, most of them would be outraged to know that a member of the Vékony family appears to be a brand management executive for PMI in Hungary.⁵³

III. GLOBALIZATION, TOBACCO REGULATION AND MULTINATIONAL CORPORATIONS

A. Explaining the Carve-Out Choice

The case study of PMI litigation helps explain the particular choice by the TPP negotiators—an exceptional insulation of "tobacco control measures" from direct legal challenges by corporations. It reveals well-founded concerns in the sophisticated use of international dispute settlement to manipulate litigation with the goal of defying attempts to constrain companies that sell—to quote from the WHO—the "only legally available

49. *Vékony v. Hungary*, App. No. 65681/13, E.C.H.R. (2016), ¶ 3.

50. *Id.* ¶ 6.

51. *Id.* ¶¶ 9–10.

52. *Id.* ¶¶ 35–37.

53. Profile of Balázs Vékony, Brand Executive, Philip Morris International, LINKEDIN, <https://www.linkedin.com/in/bal%25C3%25A1zs-v%25C3%25A9kony-65574842> (last visited Feb. 3, 2018).

product that kills up to one half of its regular users.”⁵⁴ While the litigious nature of the tobacco industry has been long-acknowledged, the internationalization of this strategy is a relatively new phenomenon.⁵⁵

PMI’s decade-long legal battle has been relatively successful—despite seemingly “losing” most individual disputes. Arguably, it has resulted in: (i) delaying or “chilling” the implementation of new laws (and, presumably the resulting profits from that delay); (ii) inserting uncertainty about how precisely international commercial (and possibly other) agreements constrain anti-smoking efforts; and, (iii) establishing some explicit limits, including restrictions to treat similar risks differently (WTO), affirming union-wide tobacco control directives over potentially stronger go-it-alone regulations (ECJ), and confirming some protections that benefit the industry under property rights regimes (possessions (ECtHR), investment (ISDS), and intellectual property (WTO)).

To a large extent, the litigation strategy has required the deployment of resources and subsidiaries by the largest tobacco multinational corporation for forum planning, forum enhancement, and facilitation of procedure—or, in less technical terms, “forum and nationality shopping.”⁵⁶ Each of these deployments of subsidiaries may have an “antidote;” a treaty provision that prevents (ab)using the legal process in undesirable ways. For instance, jurisdictional and admissibility requirements (*e.g.*, “substantial” business activities, “continuous-nationality,” “covered investments,” or “relate to” clauses) have been included in newer bilateral investment treaties and some as a result of concerns over PMI’s nationality shopping in the Australian case.⁵⁷ Other clarifications in legal text can also prevent the use of these tactics for the sole purpose of stimulating litigation to set “precedent” or collecting damages in spite of limited roots in the host State.⁵⁸ Moreover,

54. World Health Org. [WHO], TOBACCO FREE INITIATIVE (TFI): TOBACCO PRODUCT REGULATION, (2016).

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

56. BJÖRN P. EBERT, FORUM SHOPPING IN INTERNATIONAL INVESTMENT LAW: FORUM PLANNING, FORUM ENHANCEMENT, AND FACILITATION OF PROCEDURE- ASSESSMENT AND LIMITS (MOHR SIEBECK 2017).

57. See, *e.g.*, German Model Treaty art. 8 (2008), <https://www.italaw.com/sites/default/files/archive/ita1025.pdf> (clarifying scope of application); Norway Draft Model Bilateral Investment Treaty arts. 2–16 (2007), <https://www.italaw.com/sites/default/files/archive/ita1031.pdf> [hereinafter Norway Draft Model BIT] (clarifying Right to Regulate and abuse of rights under this agreement); U.S. Model Bilateral Investment Treaty arts. 1, 2, 29 (2012), <https://www.italaw.com/sites/default/files/archive/ita1028.pdf> (clarifying scope and coverage, “relating to,” consolidation, etc. as well as the annexes).

58. See, *e.g.*, Public Citizen et al., *Key Elements of Damaging U.S. Trade Agreement Investment Rules that Must Not Be Replicated in TPP*, 14–15 (Feb. 2012), <http://www.citizen.org/documents/tpp->

governments could use consolidation proceedings or the inclusion of “stay and override” proceedings to help guide the interaction of tribunals deciding similar matters, under different treaties (like the WTO rule-importation to the ISDS proceedings example).

Nevertheless, there are contexts where forum or nationality shopping may be legitimate and defensible. They can be employed to “maximize” the protection offered by international law to commercial actors—most of which do not sell cancerous consumer products. Moreover, from a practical perspective, it is impossible to catalog all the consequences of the multiplicity of international treaties and the resulting structures, overlapping jurisdictions, and parallel lawmakers. This makes it particularly difficult to preemptively sort out all the undesirable manipulations that economic agreements may generate, while allowing room for litigation strategies that are desirable and increase certainty or that can enable useful legal innovations.

Moreover, the tobacco tactics also involve the filing of claims to set advantageous precedents. International courts and tribunals, it may be thought, offer fewer benefits to litigants who file many costly suits to signal resolve or to ultimately generate legal precedent. Many international decisions—including ISDS awards or WTO decisions—do not formally create precedent. However, this peculiarity of international litigation is often overstated. As international adjudication has risen, the benefits to litigants from selecting cases and venues and signaling resolve have grown massively, in part because the cases involve issues such as food safety standards, emissions rules, taxation, and other matters that intrude deeply into national political affairs.⁵⁹ As a result, not only do most international courts have certain levels of precedent and interpretative consistency at play, but precedent is now more important. Hence, it is now more likely that economic actors decide to rely on these strategies to litigate for precedent rather than just to settle a discrete dispute.⁶⁰

Together, these reasons make it less defensible to allow challenges to tobacco regulation before ISDS—a setting where, in addition to other

investment-fixes.pdf (recommending strategies to define “substantial business activities,” so as to avoid opportunistic “nationality planning”).

59. See, e.g., Claimant’s Notice of Arbitration, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, PCA (2009) (No. 2009-23) (involving a dispute of billions of dollars over an Ecuadorian court’s decision for environmental damage compensation as a potential denial of fair and equitable treatment). For food safety, see Appellate Body Report, UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS, WTO DOC. WT/DS384/AB/R, WT/DS386/AB/R (Jun. 29, 2012) (regarding the consistency of “Country-of-Origin Labeling for Foods” with trade law).

60. Krzysztof Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547, 563 (2014).

shortcomings, claimants can select arbitrators who face limited oversight. In economic terms, the use of ISDS by tobacco interests amounts to something akin to what economists refer to as “socially excessive litigation.”⁶¹ This situation can occur when litigants use a litigation system self-interestedly, to the point that there is an extreme divergence between the private and social costs. The private costs are tolerable or insignificant, but the social costs are unbearable or massive.

In the case of tobacco, the danger of socially excessive litigation can be diminished by demanding the exercise of due care prior to bringing a claim. Under the carve-out, signatory parties to the TPP can still bring claims (either before a WTO or a TPP panel) if they believe another governmental party to the treaty is regulating tobacco products for trade-protectionist reasons rather than to protect public health. States have to make an active choice of defending tobacco interests (and with that assume some of the “political” costs), while at the same time considering multiple values and principles at stake. States tend to exercise restraint (or due care) in the initiation of proceedings and bring actions that advance the complainant’s immediate or systemic interest.⁶² Yet, tobacco companies like PMI have shown little concern for States’ regulatory interests or the negative consequences of their litigation. Therefore, the response to limit the standing to litigate tobacco control measures is not only understandable, but—in my view—also justified.

B. International Adjudicatory Aspects of Multinational Enterprise Theory

Less than a decade ago, one of the leading treatises of international economics argued that the theory of multinational organizations was “still in its infancy.”⁶³ This field, also known as MNE theory, aims at understanding the behavior of multinational enterprises, especially choices to own and control subsidiaries operating in countries other than the parent’s home country. The main focus of this strand of economics and management scholarship is to explain and predict the advantages provided by three main features of the organization of multinational firms: (1) ownership (firm-specific control); (2) location (establishment in a country other than home);

61. See Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 644 (2005). See also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 391 (2004).

62. Pelc, *supra* note 60. For States, this calculation includes a careful balance between the likely benefits, including market access or a potentially good precedent, and the costs of bringing an action, including damage to diplomatic relations.

63. PAUL KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 161 (7th Ed. Pearson Addison Wesley).

and (3) internalization (benefits of unified governance).⁶⁴ How does the case study of PMI's international legal battles and the resulting attempts to constrain the industry with "tobacco carve-outs" help to enrich MNE theory?

Whether in its "infancy" or not, the vast knowledge already encompassed in MNE theory can hardly be refuted or seriously challenged with one case. At best, PMI's case study can help introduce some concepts to refine MNE theory. In particular, authors have recognized the need to introduce "non-economic variables" and to integrate political and regulatory dimensions in the analysis. John H. Dunning—often considered a pioneer of this field—in his *eclectic paradigm* or OLI-Framework argued for referring to government intervention of various kinds when discussing sources of Ownership, Location and Internalization advantages.⁶⁵ However, he treated these as exogenous factors to which firms tended to respond or adapt; obstacles in the path to profits that needed to be overcome.

In a lucid contribution, Jean Boddewyn argued against such an exclusive focus. Boddewyn (and, since then, others) explained that as a result of the blind spot of treating "non-economic variables"—social structure, the legal and governmental system, etc.—as exogenous, many authors tend to adopt "more autonomous views of the economic system and of the organizations and individuals participating in its functioning."⁶⁶ Other forms of competition, including an active contestation for rules, which may also be at play and are distinct to traditional market advantages (*i.e.*, lower prices, superior products or better services) are left out of the analysis. In his exposition, Boddewyn specifically argued that "rules applying to international trade and foreign direct investment [are] not developed in a vacuum, but usually [are] the outcome of power plays by interested parties."⁶⁷ The rules of the economic game are—in his terms—not simply *given* but also "are often *taken*."⁶⁸ Other authors have since addressed non-

64. Jean Boddewyn, *Political Aspects of MNE Theory*, 46 J. OF INT'L. BUS. STUDIES, 341, 348 (1988). As explained by Boddewyn, "[Dunning's] paradigm explains why international production takes place, namely, that foreign direct investment (FDI) requires that a firm possess ownership (firm-specific) advantages which it finds beneficial to exploit by itself (the internalization advantage) in foreign countries offering location advantages." See generally Thomas P. Murtha & Stefanie Ann Lenway, *Country capabilities and the strategic state: How national political institutions affect multinational corporations' strategies*, 15 STRATEGIC MGMT. J. 113 (1994); T.A. POYNTER, *MULTINATIONAL ENTERPRISE AND GOVERNMENT INTERVENTION* (2012).

65. See generally THE INTERNATIONAL ALLOCATION OF ECONOMIC ACTIVITY (Per-Ove Hesselbon, Bertil Ohlin, Per Magnus, & Wijkman eds., 1977). R.D. DUNNINGS & ROBERT D. PEARCE, *THE WORLD'S LARGEST INDUSTRIAL ENTERPRISES 1962-1983* (2nd ed.1985).

66. Boddewyn *supra* note 64, at 344. Boddewyn argues that the reluctance to account for other factors reflects an ideological preference for "market" terms. See *id.* at 344–46.

67. *Id.* at 344.

68. *Id.*

market variables like regulation or government policy as constraints providing substantive contribution for the parent.⁶⁹ Overall, the literature suggests that market imperfections may result from the interaction between firms and their non-market environment; MNEs tend to facilitate such interactions in ways that other forms of business organizations may not.

The analytical move to incorporate “non-economic variables” as also endogenous factors that provide benefits has significant implications for the conceptualization of ownership, location and internalization advantages. In particular, whether market imperfections may result from interactions between firms and their non-market environment helps to conceptualize other key advantages sought by MNEs. For one, government laws and policies are the target of different activities to generate different commercial advantages, which at the same time create new government responses that force MNEs to adapt. The ability to master such recursive processes across borders in a particular regulatory domain can be a key asset. In fact, it has long been understood that seeking trade or FDI protection is a lucrative activity. Yet, underappreciated is the increasing role that adjudicatory decision-making processes (international litigation options) available in treaties that control trade and FDI rules plays in creating such advantages.⁷⁰

Based on the above discussion, I conclude with a brief exposition of some modest ways that the adjudicatory aspects of international economic treaties may help to refine MNE theory.

-Ownership Advantages: MNE theorists have noted that ownership advantages can be extended to account for knowledge or expertise that improves a company’s non-market environment, including its regulatory environment. Yet, legal expertise by MNEs is often ignored or neglected. As shown by the case study, this expertise can take the form of: (i) better understanding of the limits and opportunities created by national and, increasingly, international legal frameworks; (ii) access to legal mechanisms to challenge domestic regulations including before international court; and (iii) superior legal skills for handling expert legal advice, legal outcomes, and governmental responses to legal decisions.

The key question is why MNEs own subsidiaries to deploy knowledge/expertise instead of relying on local firms that benefit from greater familiarity with local legal and regulatory environments, or domestic partners able to appeal to economic nationalism. To crystallize our understanding of this point, future research can hypothesize that concealing

69. Murtha, *supra* note 64, at 115; *see generally* T. A. POYNTER, MULTINATIONAL ENTERPRISES AND GOVERNMENT INTERVENTION (2012).

70. Boddewyn, *supra* note 64, at 346–48.

rather than transferring legal knowledge as well as coordinating legal responses across units is a key ownership advantage, especially in heavily regulated environments like the tobacco sector. Moreover, the ability of MNE subsidiaries to access international dispute settlement and access “intermediate goods,” including support from the host government, and the advantages of multinationality that allow multiple dispute settlement options, often requires formal ownership. Whatever the increasing cost that results from ownership, it is partly overcome by the increasing options to rely on international litigation as a complementary way to deploy legal expertise and contest for the regulatory environment.

-Location Advantages: Non-market variables may be relevant in deciding the location of foreign direct investments. Particularly relevant is subsidiary location for accessing international adjudication to challenge regulation. Various international treaties demand different requirements to effectively consider a corporation as “located” in a country for international litigation purposes and, in some cases, obtain the right to access international dispute settlement. The example of PMI establishing a subsidiary in Hong Kong for the sole purpose of taking advantage of ISDS shows the potential, but also the limits and perils of this strategy. In a similar cautionary note, in the plain packaging litigation context, Ukraine temporarily brought a claim espousing British American Tobacco, despite the fact that the former Soviet Republic had no direct interest in the Australian tobacco market. In fact, at that time Ukraine registered no trade flows with Australia. 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.⁷¹ What became apparent is that in exchange for the espousal of the company’s interest in defeating plain packaging, British American Tobacco may have committed to locate a manufacturing facility in Ukraine.⁷²

Increasingly, the potential to rely on a particular treaty to challenge governmental action provides location advantages. Because some of these options are touted as necessary to attract FDI and applicable only to foreign investors, MNEs can often rely on them in ways domestic entrepreneurs cannot. In this sense, legal standing or legal representation (via espousal) may affect the attractiveness of location as both host and home to MNE activity. Future research should account for the ways in which location is both endogenous and exogenous for the purpose of legal protection; location

71 Norman Hermant, *Ukraine Attacks Australia’s Plain Packaging Laws*, AUSTL. BROAD. CORP. (Apr. 17, 2012, 11:29 PM), www.abc.net.au/lateline/content/2012/s3479769.htm.

72 Levin, *supra* note 42; *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>.

is driven by beneficial rules, but also creates beneficial rules through the ability to deploy MNEs' legal capacity.

-Internalization Advantages: Internalization refers to unified or intra-firm governance structure (as opposed to inter-firm transaction or “market”) to obtain relevant intermediate goods or services. Specific non-market advantages that result from internalization include intelligence, political access and influence, and the like.

For some time, scholars have noted that internalization, together with ownership and location advantages, affects the political risks encountered by MNEs. To some extent, internalization can be a way to limit risks by accessing protections of politically influential or similarly well-connected actors. That is, there is a market for beneficial government decisions because States must compete for foreign direct investment and resulting benefits, including by offering enticements, subsidies or specific assurances of FDI protection. In turn, MNEs often “shop” amongst States by bargaining with governments for beneficial government decisions with long-term commitments of FDI.⁷³

What the PMI case study reveals is the existence of a market for affirmative representation before international dispute settlement—think, for instance, of the two disputes brought by Indonesia and the Dominican Republic before the WTO espousing interests that closely aligned with PMI's interests.⁷⁴ In more theoretical terms, it is reasonable to assume the existence of a market for the services of nation-States in the conceptualization of internalization advantages.⁷⁵

Incorporating international adjudicatory aspects to this assumption involves recognizing that in the market for the services of nation-States, government officials control a set of intangibles, including the decision to espouse international legal claims that advance private interests. Hence, knowledge/expertise about activating relevant decision-makers as well as national allegiances creates advantages that shall be internalized because only the top managers can obtain access to and deploy such knowledge. To some extent, the advantage of representation in international litigation is a

73 To be sure, companies in industries like tobacco may have many reasons to commit FDI to improve sourcing, pricing or quality. See John M. Connor, *Determinants of Foreign Direct Investment by Food and Tobacco Manufacturers*, 65 AM. J. AGRIC. ECON. 395, 402 (1983).

74 Trade lawyers have long recognized that parties may bring a case of low economic value for different reasons, including supporting a foreign investor reflected in the EC-Bananas saga. See Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, in RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 269, 296 (Wayne Sandholtz & Christopher A. Whytock eds., 2017).

75 See generally Peter J. Buckley & Mark Casson, *THE ECONOMIC THEORY OF THE MULTINATIONAL ENTERPRISE* (1985).

way of translating private needs into national policies or interests (think of Indonesia) which require cooperation at the highest levels. Hence, only internalization can create the necessary synergies between management and governmental officials.

But the situation of a “market for espousal” before international dispute settlement is also fraught with high opportunism and arbitrariness. In contrast, ISDS is a form of effecting or curtailing such a “market for espousal.” Through ISDS, a foreign investor can access directly international litigation without the need for a government espousing a claim. By removing the need for diplomatic protection through the granting of a private right of action, a foreign investor has much more control, including the ability to influence legal regimes by bringing arguments that better fit the regulatory preferences of the MNE. In exchange for that “private right of action,” international rules may demand that MNEs exercise control over a domestic subsidiary, that is, to internalize them under unified governance. This move helps translate litigation strategies into a tactical advantage. Instead, with ISDS, governments attempting regulatory harmonization may be the target of legal claims designed to generate firm-specific advantages like delaying, preempting, and weakening regulations.

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For years, authors have argued that knowledge and experience “distinguishes the winners from the losers and mere survivors in global competition.”⁷⁶ Acknowledging international adjudicatory aspects in MNE theory helps to understand the new terrain of non-market considerations that provide competitive advantages such as legal and regulatory expertise. For litigious firms like PMI, the purpose of filing international claims is to show a willingness to bear some costs and to impose large costs on others across a whole portfolio of possible cases. In other words, as a matter of strategy, PMI files negative-value cases with the goal of signaling resolve and obtaining the most favorable legal rulings and precedents. For such MNEs, international litigation serves a complementary regulatory strategy; one that entails earning a reputation for being tough and creating favorable case law, not necessarily for winning any singular case.⁷⁷ Owning and extending control over subsidiaries operating in countries other than the parent’s home country enhances this strategy and should be considered in future research.

76 G. Richard Shell, *MAKE THE RULES OR YOUR RIVALS WILL* (2004) (“[H]e who makes the rules makes the money.”).

77 Emilie M. Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 *YALE J. INT’L L.* 279, 312 (2017).

CONCLUSION

In January of 2017, PMI issued a press release stating that the company intended to move its business away from combustible tobacco products entirely.⁷⁸ Some may welcome this move and attribute it to the series of defeats in high-profile litigations against States adopting plain-packaging regulation and advertisement requirements. That may be only partially true. Rather, PMI may have seen the change in the regulatory tide and decided to move in this direction as a viable business model. In the process, the tobacco giant did not want to fall without putting up a fight, a fight that has resulted in delaying or “chilling” the implementation of laws (and resulting profits from that delay) by adding uncertainty about how precisely commercial agreements restrict tobacco control efforts. The strategy has created some explicit limits that could benefit their future line of business (potentially less damaging tobacco products). In particular, it has succeeded in preempting other nations from adopting measures that treat similar risks differently (e-cigarettes), affirming union-wide tobacco control directives in favor of go-it-alone regulations in States that are members of the EU and the potential of protection under property rights regimes (possessions, investment, and intellectual).

For the first time, international commercial agreements are starting to treat differently a popular yet cancerous product. What justifies this disparate treatment is not its hazardous nature similar to other consumer products in the marketplace like sugary drinks, asbestos fibers or alcoholic beverages but the sophisticated use of international courts and legal knowledge by MNEs with global presence in this business. Such tactics suggest that the industry incentive to bring litigation is socially excessive and may result in the undermining of regulatory efforts that in turn exacerbates health costs. Hence, tobacco carve-outs are a welcome development in international law that should be adopted by existing and future commercial agreements.

At a theoretical level, the case study of PMI’s use of international courts and tribunals underscores the growing relevance of expertise in international business and economic law. As international law increasingly concerns the coordination of regulatory domains previously considered a national prerogative, firms and governments have radically expanded the use of international dispute settlement procedures. Understanding the choices to own and extend control over subsidiaries operating abroad with the purpose

⁷⁸ *Philip Morris International Looks Toward a Smoke-Free Future*, BUS. WIRE (Jan. 25, 2017), <https://www.businesswire.com/news/home/20170125005433/en/Philip-Morris-International-Smoke-Free-Future>.

of deploying legal capacity to effect legal rules today is understanding how corporations and international law interact.