Other obligations found in investment treaties may also be relevant to WHO FCTC implementation, including:

- Obligations to refrain from ‘arbitrary’ or ‘unreasonable’ behaviour, which operate similarly to fair and equitable treatment obligations
- Obligations not to discriminate against foreign investors
- Umbrella clauses, which allow for the enforcement of other commitments made by states to investors, including potentially commitments in investment contracts
Some treaties may also contain explicit public health or other public policy exceptions.

Claims that a measure breaches an expropriation or fair and equitable treatment obligation may also be accompanied by claims about other obligations under investment treaties. A few of the relevant provisions are discussed on this page.

Arbitrary measures' and 'unreasonable measures' clauses
Under some investment treaties, States agree not to undertake action that is 'arbitrary or discriminatory' or 'unreasonable or discriminatory'. These provisions generally operate similarly to fair and equitable treatment obligations, and tobacco companies typically make the same arguments in relation to arbitrary/unreasonable measures clauses as they do for fair and equitable treatment. Generally, responding to such claims will therefore involve many of the same considerations as responding to fair and equitable treatment claims. [tooltip hint="See Philip Morris v. Uruguay, para 445-446"][*][/tooltip]

The obligation of non-discrimination arises in a number of areas of international investment law:

- **National treatment**: under most investment treaties, states agree to accord national treatment (treatment no less favourable than that provided to domestic investors in like circumstances). Tribunals examine whether there has been less favourable treatment of similarly situated foreign investors as compared to domestic investors, without justification.
- **Most-favoured nation treatment**: under most investment treaties, states also agree to extend many of the protections provided in investment treaties to investors of states that are party to other BITs with the respondent state, so that states do not discriminate between investors from states party to different investment treaties with the respondent state. The protections that are covered by most-favoured nation treatment depend on the relevant treaty.
- **Prohibition on discriminatory measures**: under many investment treaties, states agree not to undertake discriminatory treatment. Tribunals have held that these clauses prohibit discrimination on the basis of factors other than nationality, such as race or ethnicity.
- **Fair and equitable treatment**: the principle of non-discrimination is also regarded as an element of the fair and equitable treatment obligation.

In order to successfully make a discrimination claim, the investor must show that it has been treated less favourably than a domestic investor or an investor of another state in the same circumstances. This will be difficult to show if a measure is of general application, but may arise, if, for example, a law has a larger effect on a foreign product than a like domestic product. The analysis of discrimination under investment law is similar in a number of respects to analysis of discrimination under WTO law.
Most tribunal decisions concerning discrimination have recognized that governments are able to treat foreign and domestic investors differently where this is justified for public policy reasons.[\textsuperscript{19}][\textsuperscript{*}][\textsuperscript{tooltip} hint="Parkerings v Lithuania para 385; Pope and Talbot v Canada paras 78, 81, 87, 93; Saluka v Czech Republic paras 345-347, 460."][\textsuperscript{*}][\textsuperscript{tooltip}] However, to avoid the risk of challenge, states should make WHO FCTC measures as comprehensive as possible, and in particular ensure they apply to investors of all nationalities. States should also either apply measures even-handedly to investors in like circumstances, or ensure that there is sufficient justification for differing treatment.

20 default 3. Umbrella clause line Umbrella clause
Some treaties contain 'umbrella clauses', which typically provide that each party to an investment treaty must observe any obligation or commitment it has entered into in relation to the investments of investors of the other treaty party or parties. Investors have successfully argued in some cases that an umbrella clause requires that a state, as a matter of its treaty obligations, comply with contractual obligations entered into with investors[\textsuperscript{20}][\textsuperscript{tooltip} hint="Eg SGS v Philippines (Jurisdiction) para 119, 128; SGS v Paraguay (Jurisdiction) para 168; SGS v Paraguay (Liability) para 91."][\textsuperscript{*}][\textsuperscript{tooltip}] or comply with unilateral acts that apply specifically to investments such as observance of previously enacted legislation that specifically provides guarantees in relation to an investment, or actions of the executive towards an investor.[\textsuperscript{20}][\textsuperscript{tooltip} hint="See LG&E v Argentina para 175."][\textsuperscript{*}][\textsuperscript{tooltip}]

However, like the doctrine of legitimate expectations, umbrella clauses apply only to specific obligations and commitments and not to legislation of general application such as intellectual property laws.[\textsuperscript{20}][\textsuperscript{tooltip} hint="Philip Morris v. Uruguay, 478, 482"][\textsuperscript{*}][\textsuperscript{tooltip}]

States should avoid entering into agreements with or making specific inducements to tobacco industry investors. In the absence of such an agreement, it is unlikely that an investor will be able to prove a breach of an umbrella clause.

20 default 4. Public health and other policy exceptions line Item 2
Some investment treaties contain provisions explicitly affirming that states have the right to regulate or take other action in pursuit of a particular policy objective, such as public health, even if this would otherwise breach other provisions of the treaty.

A tribunal will examine a measure under a treaty exception only where it has already found the state to have otherwise violated its obligations. Provided that a tobacco control measure is enacted in good faith to give effect to the state's obligations under the FCTC, it would ordinarily not breach any of the provisions of the treaty, and recourse to a treaty exception would not be required. As such, the absence of a public health exception does not suggest that states cannot regulate in relation to public
health under the treaty. However, treaty exceptions would mean that even a measure that otherwise breaches the treaty would not be a violation if it satisfies the exception.

References

- **Philip Morris Brands Sarl v. Oriental Republic of Uruguay**, ICSID Case No. ARB/10/7, **Award**, 8 July 2016
- **Parkerings-Compagniet AS v. Republic of Lithuania**, ICSID Case No. ARB/05/8, **Award**, 11 September 2007
- **Pope and Talbot Inc v. The Government of Canada**, **Award on the Merits of Phase 2**, 10 April 2001
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- **SGS Société Générale de Surveillance S.A. v. Republic of the Philippines**, ICSID Case No. ARB/02/6, **Decision of the Tribunal on Objections to Jurisdiction**, 29 Jan 2004.
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