Drafting Options to Protect Health Policies in Trade & Investment Agreements

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– Advice to Government.
Overview of Presentation

1. Trade & Investment Law

2. Trade & Investment Law Litigation Against Public Health Measures

3. Options to Minimise Legal Risks
   - Options that control the use of dispute settlement
   - Options that limit the scope or application of trade and investment obligations
1. TRADE & INVESTMENT LAW
## Comparison

<table>
<thead>
<tr>
<th></th>
<th>International Trade Law</th>
<th>International Investment Law</th>
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</thead>
<tbody>
<tr>
<td><strong>Multilateral treaty</strong></td>
<td>WTO agreements</td>
<td>None</td>
</tr>
<tr>
<td><strong>Bilateral/plurilateral treaties</strong></td>
<td>~300 preferential trade agreements (‘PTAs’)</td>
<td>~3000 international investment agreements (‘IIAs’)</td>
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## Comparison

<table>
<thead>
<tr>
<th>Broad objectives</th>
<th>International Trade Law</th>
<th>International Investment Law</th>
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<tbody>
<tr>
<td></td>
<td>Trade liberalisation in order to promote national and global welfare</td>
<td>Protection of investors and investments in order to encourage foreign investment and thereby economic welfare</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Coverage</th>
<th>International Trade Law</th>
<th>International Investment Law</th>
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<tbody>
<tr>
<td></td>
<td>Goods, Services, Trade-related intellectual property rights</td>
<td>Investments, including property, goods, shares, intellectual property rights, goodwill</td>
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</tbody>
</table>
## Comparison

<table>
<thead>
<tr>
<th>Potential complainants re treaty breach</th>
<th>International Trade Law</th>
<th>International Investment Law</th>
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<tbody>
<tr>
<td>Complaints may be brought by WTO member against WTO member (ie state–state)</td>
<td>Complaints may often be brought by state party against state party (ie state–state) or by private investor against host state (ie investor–state).</td>
<td></td>
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<table>
<thead>
<tr>
<th>Remedies</th>
<th>International Trade Law</th>
<th>International Investment Law</th>
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<tbody>
<tr>
<td>Prospective: typically reform of a measure found to be WTO-inconsistent (no financial compensation); may include temporary WTO-permitted retaliation through trade sanctions</td>
<td>Retrospective: financial compensation</td>
<td></td>
</tr>
</tbody>
</table>
Potential Positive Impact of Trade and Investment Law on Public Health

- Encourage transfer of health technology and knowledge.
- Increase potential for health care spending as a result of higher economic growth.
- Increase access to a wider range of better and cheaper health products and services.
Potential Negative Impact of Trade and Investment Law on Public Health

• Tends to increase production, consumption and marketing of products related to tobacco, alcohol and unhealthy food.

• Creates legal risks for government.
2. LITIGATION AGAINST PUBLIC HEALTH MEASURES
Trade & Investment Challenges to Tobacco Control Measures

- US – Clove Cigarettes (WTO)
- Australia – Plain Packaging of Tobacco Products (WTO)
- Philip Morris v Australia (BIT)
- Philip Morris v Uruguay (BIT)
Trade & Investment Challenges to Other Public Health Measures

- Pharmaceuticals (generic drugs and their marketing and distribution) – Apotex v USA
- Health Care Services and Facilities – Melvin Howard v Canada
- Health Insurance – Achmea v Slovak Republic
- Environmental Health (pesticides) – Chemtura v Canada
The Threat to Public Health Measures

1. Costs from the *use of dispute settlement mechanisms*.

2. Costs from an *adverse finding or outcome*.
3. OPTIONS TO MINIMISE LEGAL RISKS
Options to Minimise Risks

• Question: What are some options for treaty provisions to minimise legal risks relating to public health measures?

• Recommendation: Take a comprehensive approach, combining:
  – provisions that minimise the potential costs of litigation
  – provisions that increase the likelihood of a state successfully defending tobacco control measures in such litigation.
OPTIONS THAT CONTROL THE USE OF DISPUTE SETTLEMENT
Risk: Investor-State Dispute Settlement under PTIAs*

A. Exclude from ISDS
   ① Exclude the entire agreement
   ② Exclude certain measures eg tobacco or public health

B. Control Access to ISDS
   Complaints must first be considered by the health authorities ③

C. Procedural Reform to ISDS
   Strict Timeframes, limits on remedies, costs on failed claims

Response: Control Investor State Dispute Settlement
Option A: Exclude ISDS

• Would significantly reduce the risk of tobacco control measures being challenged.
• Challenges could still be brought by states.
• Could exclude ISDS
  – completely or
  – in relation to certain kinds of measures (wording here would be important)
Option B: Control Access to ISDS

• Limit access to ISDS by requiring, for example, the complaint first be considered by the health authorities of the state parties.

• Could block unmeritorious claims by tobacco companies (specific drafting important).
Option C: Procedural Reform

- A range of procedural improvements to ISDS could be undertaken to reduce the risk of litigation or the threat of litigation that could undermine tobacco control measures:
  - Limits on remedies
  - Stringent rules on costs
OPTIONS THAT LIMIT THE SCOPE OR APPLICATION OF TRADE AND INVESTMENT OBLIGATIONS
Risk: Breach of the PTIA

1. The tobacco measure falls within the scope of the treaty
2. Pay Compensation/Repeal Measure
3. The tobacco measure falls within the scope of a treaty obligation
4. The tobacco measure violates the treaty obligation eg expropriation
5. The tobacco measure is not justified by an exception eg exclusion for public health

D. Exclude tobacco measures from the entire PTIA

E. Clarify obligations that have been too broad or problematic

F. Include broad general exceptions
   - Include an exception for public health with burden on complainant
   - Statement that a general health exception includes tobacco control

Response: Limit the Scope or Application of PTIA Obligations
Option D: Excluding Tobacco Control Measures

• Does the exclusion apply to all tobacco-related measures, or only to tobacco control measures (or tobacco measures that are intended to promote public health)?

• Is it self-judging?

• Could it increase the risk of other public health measures being found inconsistent with trade and investment agreements?
Option E: Limiting the scope of substantive obligations

• Clarify the scope of substantive obligations that have proven to be particularly broad or problematic in previous agreements.
  
  – Eg state non-discriminatory measures enacted for a public purpose do not usually constitute a compensable expropriation of an investor’s property.
Option F: General Exceptions

• State no obligations should be construed to prevent a state from taking necessary action to protect public health or meet other social welfare goals (such as environmental protection, consumer protection etc.).

• Whether or not a measure falls within the scope of the exception depends on its contribution to its purpose and whether it is deemed ‘necessary’. 


Options for Existing Treaties

• Agreed Interpretations
• Modification/Renegotiation
• Termination
• Involve lawyers early and keep them involved throughout the process.

• Take a whole-of-government approach to health policies and ensure coherence between trade and health departments.
THE GLOBAL TOBACCO EPIDEMIC AND THE LAW

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Regulating Tobacco, Alcohol and Unhealthy Foods

The Legal Issues

Edited by Tania Voon, Andrew D Mitchell and Jonathan Liberman
Further References


Further References


• ‘Face Off: Assessing WTO Challenges to Australia’s Scheme for Plain Tobacco Packaging’ (2011) 22(3) Public Law Review 218–240 (with Tania Voon).