



Drafting Options to Protect Health Policies in Trade & Investment Agreements

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- Andrew Mitchell and Elizabeth Sheargold, “Protecting the autonomy of states to enact tobacco control measures under trade and investment agreements” (2014) *Tobacco Control* - <http://ssrn.com/abstract=2510002>
- Andrew Mitchell & Tania Voon, Expert report on ‘International Investment Law and the WHO Framework Convention on Tobacco Control’ for UNCTAD and the Convention Secretariat of the WHO FCTC (2013).
- 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

	International Trade Law	International Investment Law
Multilateral treaty	WTO agreements	None
Bilateral/ plurilateral treaties	~300 preferential trade agreements ('PTAs')	~3000 international investment agreements ('IIAs')

Comparison

	International Trade Law	International Investment Law
Broad objectives	Trade liberalisation in order to promote national and global welfare	Protection of investors and investments in order to encourage foreign investment and thereby economic welfare
Coverage	Goods Services Trade-related intellectual property rights	Investments, including property, goods, shares, intellectual property rights, goodwill

Comparison

	International Trade Law	International Investment Law
Potential complainants re treaty breach	Complaints may be brought by WTO member against WTO member (ie state–state)	Complaints may often be brought by state party against state party (ie state–state) or by private investor against host state (ie investor–state).
Remedies	Prospective: typically reform of a measure found to be WTO-inconsistent (no financial compensation); may include temporary WTO-permitted retaliation through trade sanctions	Retrospective: financial compensation

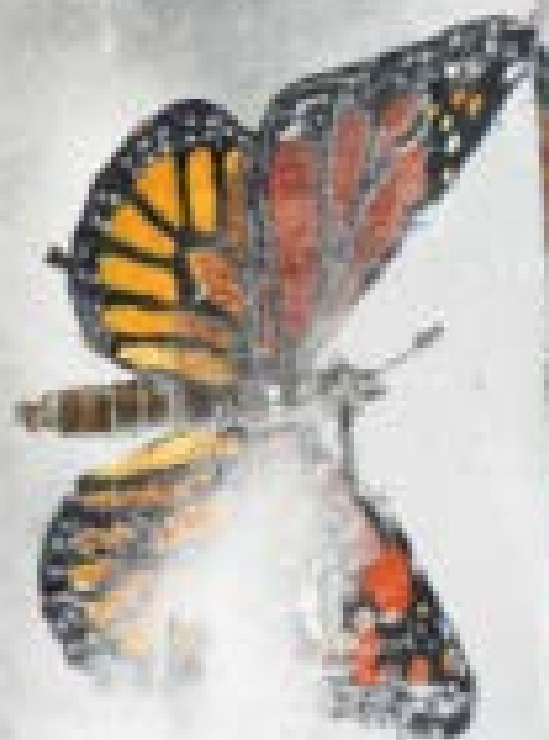
Potential Positive Impact of Trade and Investment Law on Public Health

- 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*.

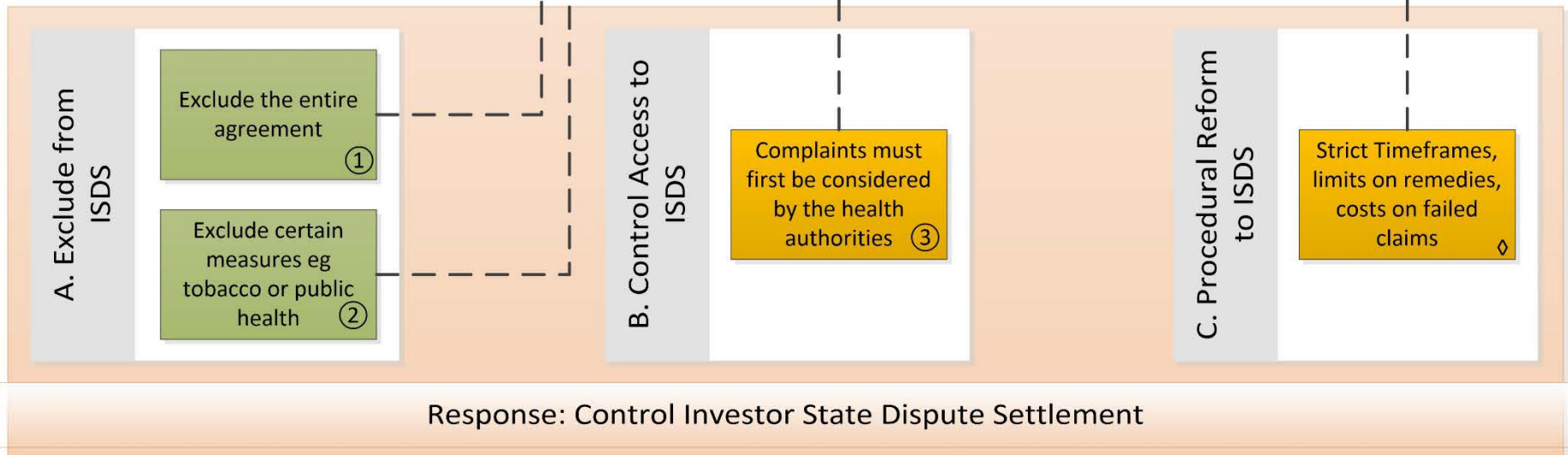
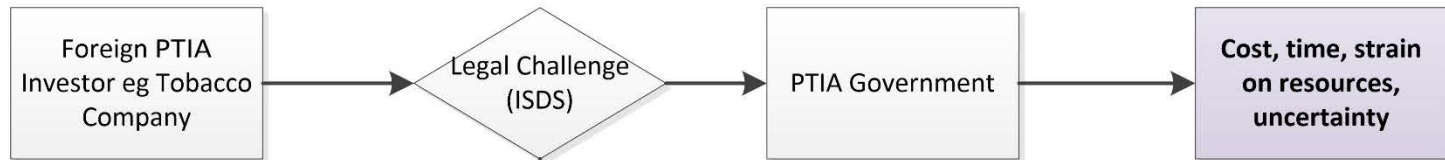
3. OPTIONS TO MINIMISE LEGAL RISKS

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*



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

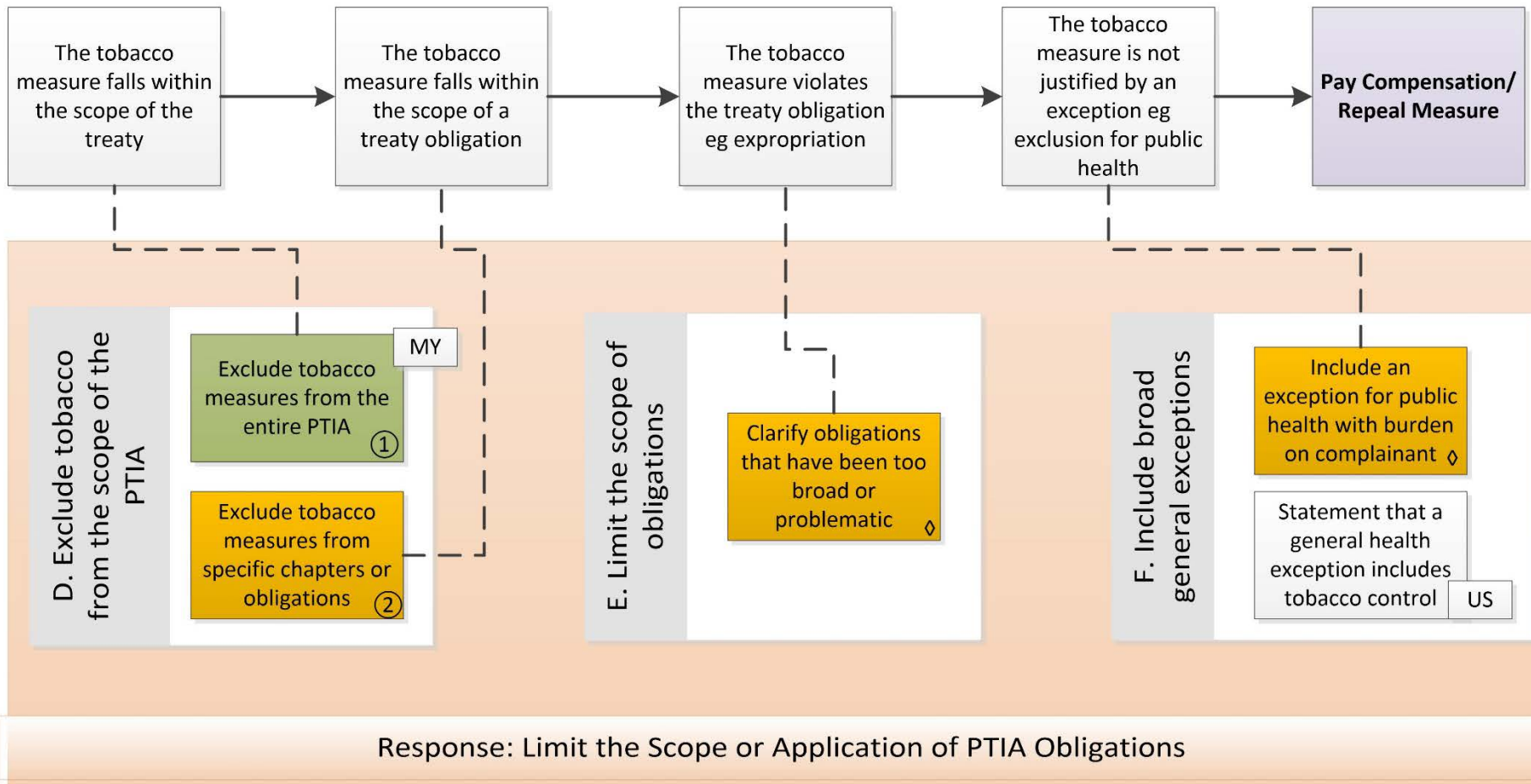
- Limit access to ISDS by requiring, for example, the complaint first be considered by the health authorities of the state parties.
- Could block unmeritorious claims by tobacco companies (specific drafting important).

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



Option D: Excluding Tobacco Control Measures

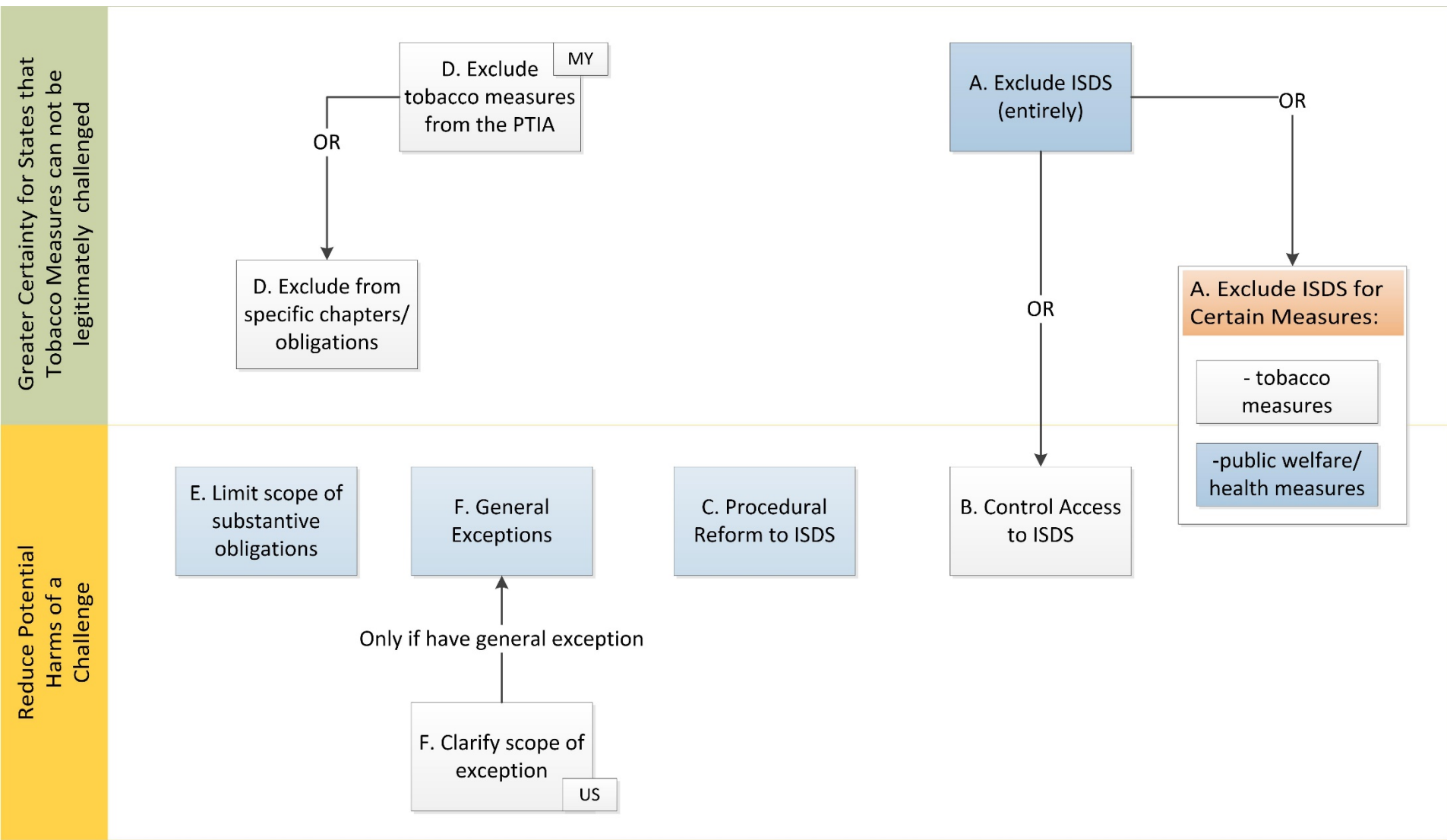
- Does the exclusion apply to all tobacco-related measures, or only to tobacco control measures (or tobacco measures that are intended to promote public health)?
- Is it self-judging?
- Could it increase the risk of other public health measures being found inconsistent with trade and investment agreements?

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'.



Key

Proposals that preserve regulatory autonomy more broadly

Proposals only relevant to tobacco measures

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.





Edited by
Tania Voon, Andrew D. Mitchell and
Jonathan Liberman with Glyn Ayres

PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES

Legal Issues



THE GLOBAL TOBACCO EPIDEMIC AND THE LAW

Tobacco use represents a critical global health challenge. The World Health Organization estimates that tobacco kills nearly 6 million people a year, with the toll expected to rise to 8 million annually over the next two decades. Written by health and legal experts from institutions around the globe, *The Global Tobacco Epidemic and the Law* examines the key areas of domestic and international law affecting the regulation of tobacco.

The book offers a wide-ranging and in-depth exploration of relevant legal questions, including a focus on the activities of the World Health Organization and the *WHO Framework Convention on Tobacco Control*, as well as an extensive evaluation of relevant developments in international trade law and international investment law. The authors' expert analysis also sheds light on broader questions relating to the capacity of governments to regulate tobacco products and the tobacco industry, as reflected in detailed case studies of tobacco control in various countries and regions around the world. The answers to these questions are of vital interest to the international community, with states' regulatory sovereignty regarding tobacco increasingly being challenged in local and international courts and tribunals.

Combining unique insight with rigorous analysis, this book will facilitate a more sophisticated understanding of the legal issues concerning tobacco control and will be of interest to lawyers, diplomats, policymakers and NGOs, as well being a valuable resource for scholars of law, public policy and health.

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Regulating Tobacco, Alcohol and Unhealthy Foods

The Legal Issues

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- 'Implications of international investment law for plain tobacco packaging: lessons from the Hong Kong–Australia BIT' in Tania Voon et al (eds), [*Public Health and Plain Packaging of Cigarettes: Legal Issues*](#) (Edward Elgar, 2012) 137–172 (ISBN 9780857939425) (with Tania Voon).
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