



THE UNIVERSITY OF
MELBOURNE

Trade in Health Products: Implications for Health in ASEAN

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Outline



Linking International Trade &
Investment Law to Public Health in
ASEAN



Litigation Against Public Health
Measures



Safeguarding Health Policy in ASEAN



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Linking International Trade & Investment Law to Public Health in ASEAN



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 Outcomes for Health in ASEAN

- 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 (including medicine and medical devices) and services.



Potential Negative Outcomes for Health in ASEAN

- Trade can increase communicable disease risks
 - eg greater cross-border flows of people and goods that are associated with such diseases such as poultry and avian influenza, cattle and bovine spongiform encephalopathy.
- Trade can increase non-communicable disease risks
 - eg changes in the patterns of food consumption brought about by changes in income, life style and the food industry through greater trade, or trade in hazardous or harmful substances
 - Tends to increase production, consumption and marketing of products related to tobacco, alcohol and unhealthy food.
- Creates legal risks for government (particularly through ISDS).



NCDs, Risk Factors & Regulatory Measures

Non-Communicable Diseases (NCDs)	Behavioural Risk Factors	Regulatory Measures
<ul style="list-style-type: none">• Cardiovascular diseases• Cancers• Chronic Respiratory Diseases• Diabetes	<ul style="list-style-type: none">• Tobacco Use• Unhealthy Diet• Physical Inactivity• Harmful Use of Alcohol	<ul style="list-style-type: none">• Taxation• Advertising Restrictions• Distribution Restrictions• Packaging and Labelling Requirements





Litigation Against Public Health Measures

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US – Clove Cigarettes (WTO)



Outcome: Indonesia successful in its challenge of the United States' exemption of menthol from its ban on flavoured cigarettes

Australia – Plain Packaging of Tobacco Products (WTO)



Outcome: Panel ruled comprehensively in favour of Australia. Cuba and Indonesia accept decision. Dominican Republic and Honduras appealing Panel decision.

Philip Morris v Uruguay (BIT)



Outcome: All of Philip Morris' claims dismissed and ordered to pay \$8.5 million

Philip Morris v Australia (BIT)



Outcome: Philip Morris' claim dismissed on jurisdictional grounds as an abuse of process and ordered to pay \$8.4 million



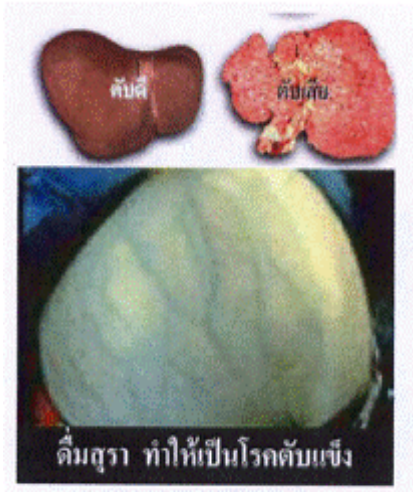
Revealed: \$39m cost of defending Australia's tobacco plain packaging laws

Exclusive: Two years after an FOI claim was lodged, the price of the six-year fight with Philip Morris has been revealed

Gareth Hutchens and Christopher Knaus

Sun 1 Jul 2018 19.00 BST

Thai Warning Labels



MILLEFOGLIE D'ITALIA MiniSnack



Con crema pasticcera

Con crema
pasticcera
alla vaniglia

5 | *MiniSnack alla crema pasticcera incartati singolarmente*
Puff pastry rolls filled with pastry cream - Rouleaux feuilletés fourrés
à la crème de pâtisserie - Blätterteiggebäck mit zarter heller Cremefüllung



Safeguarding Health Policy in ASEAN

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Assessment of Risks to Regulating States

Type of Risk	Consequences	Factors Increasing the Risk
Use of Dispute Settlement	<ul style="list-style-type: none">- High legal fees- Long timeframes- Strain on human resources and expertise	<ul style="list-style-type: none">- ISDS mechanisms- Lack of procedural controls- Poor signalling of commitment to measure, confidence in its legality, and capacity and intention to defend any challenge
Adverse Finding or Outcome	<ul style="list-style-type: none">- Payment of compensation- Repeal of the measure	<ul style="list-style-type: none">- Explicitly/implicitly discriminate- Restrict imports or foreign investments- Restrict trademarks- Lack of evidence- Improper process





Developing Evidence

Ideal evidence should be:

- Both **quantitative** and **qualitative**;
- From a **range of sources**;
- Developed over and covering a significant **time period**.

Evidence should show:

- need for **regulation**;
- **mechanism of intervention**;
- identification and evaluation of **different alternatives** to addressing the problem, while also considering the interaction of these different alternatives;
- the **impact** of the possible alternatives on different products;
- the impact of the possible alternatives on **individual consumers**;
- any **distinctions** drawn in the proposed measure.



Conclusion

- No inherent conflict between international trade and investment law, and public health.
- Maintain a principled approach to treaty drafting and avoid reacting to particular high-profile cases.
- Governments need to involve lawyers early and keep them involved throughout the process.
- Take a whole-of- government approach to public health and ensure coherence between trade and health departments.



Select Additional references

- ‘Public Health in International Investment Law and Arbitration’ in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer, 2020) (forthcoming) (with Elizabeth Sheargold).
- ‘Community Interests and the Right to Health in Trade and Investment Law’ in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018) (with Tania Voon).
- Editor, *The Global Tobacco Epidemic and the Law* (Edward Elgar, UK, 2014) (with Tania Voon)
- Editor, *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, UK, 2014) (with Tania Voon and Jonathan Liberman)
- Editor, *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, UK, 2012) (with Tania Voon, Jonathan Liberman, and Glyn Ayres)
- ‘Implications of the World Trade Organization in Combating Non-Communicable Diseases’ (2011) 125 *Public Health* 832–839 (with Tania Voon)
- ‘Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law’ (2009) 43(3) *Journal of World Trade* 571–601 (with Tania Voon).

For other publications see: <https://ssrn.com/Auth=490428>



A photograph of a courtyard at the University of Melbourne. In the foreground, there is a large, dense green bush on the left and a paved path on the right. In the background, a large stone building with arched windows and doorways is visible. A large tree with green and yellowing leaves stands to the left of the building. The text "Thank you!" is overlaid in the center of the image.

Thank you!



Professor Andrew D Mitchell

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