



THE UNIVERSITY OF  
MELBOURNE

# The CPTPP & Public Health

Focusing on Alcohol and  
Tobacco Control

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# Presenter



Professor Andrew D Mitchell is Director of the Global Economic Law Network and a member of the Indicative List of Panelists to hear WTO disputes. He has previously practised law with Allens Arthur Robinson (now Allens Linklaters) and consults for States, international organisations and the private sector.

***Australian Department of Health and Ageing:*** Member of the Expert Advisory Group for Plain Packaging of Tobacco Products, 2010–present.

***Norwegian Ministry of Health:*** Advisor on international economic law (2015, 2018).

***Alcohol Advertising Review Board:*** Member of the Review Panel, March 2012 – Present.

# Outline



## CPTPP Overview



## Link to Public Health



## Litigation against Public Health Measures



## Policy Space in the CPTPP



CPTP

MARCH 8 - 2018 | SANTO

REHENSIVE AND PROGRESSIVE AGREEMENT



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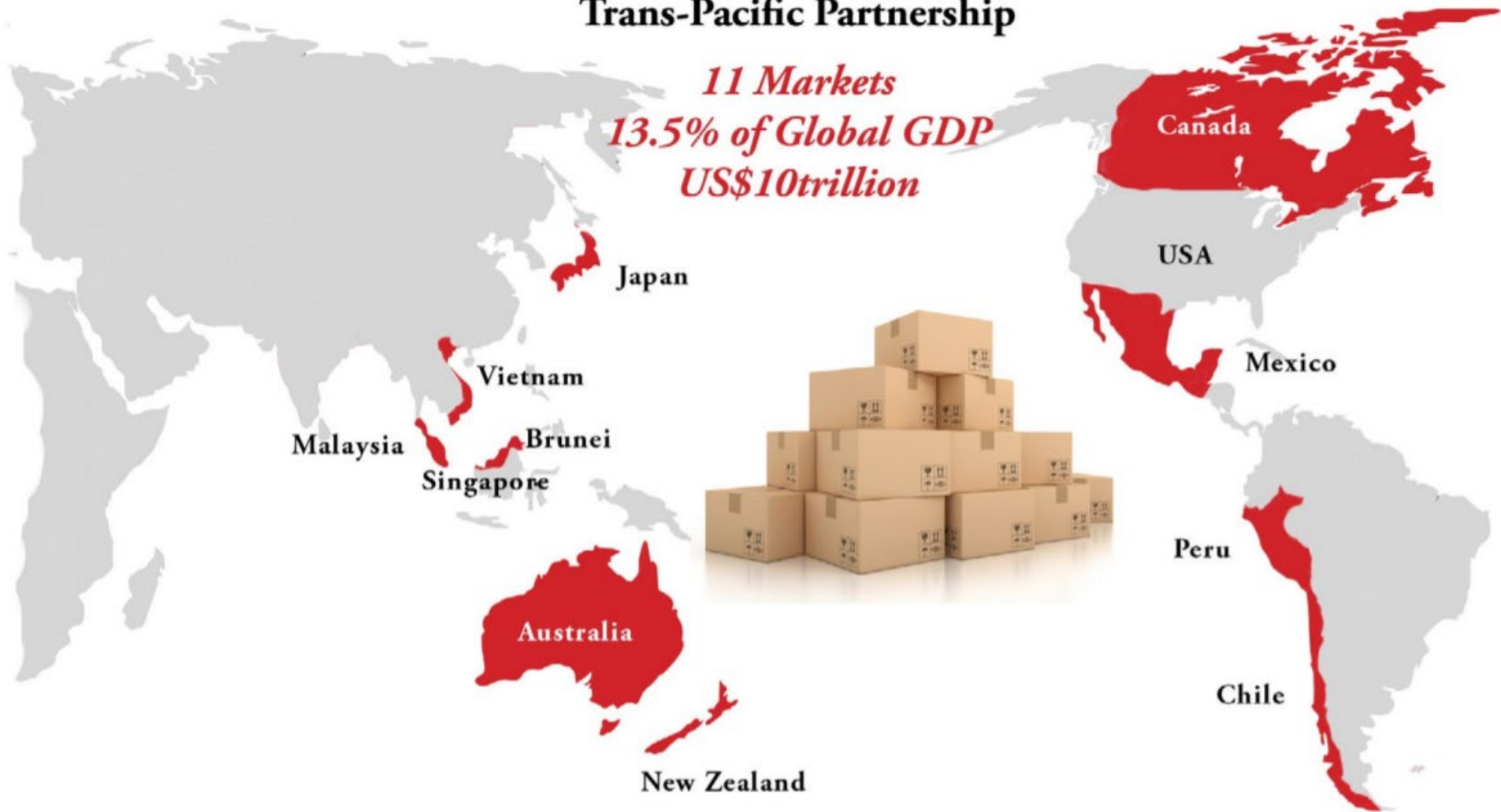
# CPTPP Overview

# What is the CPTPP?

- A free trade agreement (FTA) between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam.
- Signed on 8 March 2018 in Santiago, Chile.
- Entry into force:
  - On 30 December 2018 for Australia, Canada, Japan, Mexico, New Zealand, and Singapore; and on 14 January 2019 for Vietnam.
  - For Brunei Darussalam, Chile, Malaysia and Peru 60 days after they complete their respective ratification processes.
- It incorporates, by reference, the provisions of the Trans-Pacific Partnership (TPP) Agreement (signed but not yet in force), with the exception of a limited set of suspended provisions.

# Comprehensive & Progressive Trans-Pacific Partnership

*11 Markets*  
*13.5% of Global GDP*  
*US\$10trillion*





# CPTPP Facts

**11**  
ratifying  
member states

Covers a combined  
GDP value of  
**12.9%**  
of global GDP and  
**14.9%**  
of global trade volumes

Removes tariffs on  
an estimated  
**95%**  
of goods traded  
between  
**CPTPP**  
countries

Will provide access  
**500**  
million  
people, with a  
combined GDP  
growth of  
**US\$10**  
trillion



# CPTPP Dispute Settlement

## State-State (SSDS)

- Where complaints are brought by a state party against another state party alleging breach of the agreement by the latter
- Remedies prospective - typically reform of a measure found to be CPTPP-inconsistent (no financial compensation)

## Investor-State (ISDS)

- Where complaints are brought by an investor alleging breach of the agreement by a state party (the state hosting the relevant investment)
- Remedies retrospective - including financial compensation





# CPTPP Commission

- The CPTPP Commission is the decision-making body of the CPTPP.
- First CPTPP Commission meeting occurred in Tokyo on 19 January 2019.
- The Commission made a number of decisions at its first meeting including a decision to establish the accession process for interested economies to join the CPTPP.
- Accession Process:
  1. Request to commence accession process
  2. Accession Working Group
  3. Commission's Approval

# Potential CPTPP Members

- China, Colombia, Indonesia, the Philippines, South Korea, Taiwan, the United Kingdom and the United States have all expressed interest in joining the CPTPP.
- Thailand will apply to join (accede) to the CPTPP according Auramon Supthaweethum, director-general of the Trade Negotiations Department at the Commerce Ministry.





# Linking the CPTPP to Public Health

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# Potential Positive Outcomes for Health - General

- 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 Positive Outcomes for Health - Specific

- There is growing demand for high quality medical and aged care services in the Asia-Pacific and the CPTPP supports the expansion of health exports.
- Elimination of duties on medical instruments and devices and pharmaceuticals.
- Commitments allow suppliers from CPTPP members to bid for pharmaceutical and medical equipment government procurement contracts.
- The Technical Barriers to Trade Annexes on Pharmaceutical Products, Medical Devices and Cosmetics improves the information available to importers and exports and may reduce unnecessary delays in approvals, improving standard-setting in CPTPP countries for those industries.
- The Intellectual Property Chapter might be seen to strike an appropriate balance between promoting medical innovation and investment, and supporting timely access to affordable medicines.



# Potential Negative Outcomes for Health

- Tends to increase production, consumption and marketing of products related to tobacco, alcohol and unhealthy food.
- Creates legal risks for government.



# Litigation Against Public Health Measures

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# NCDs, Risk Factors & Regulatory Measures

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







# 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)

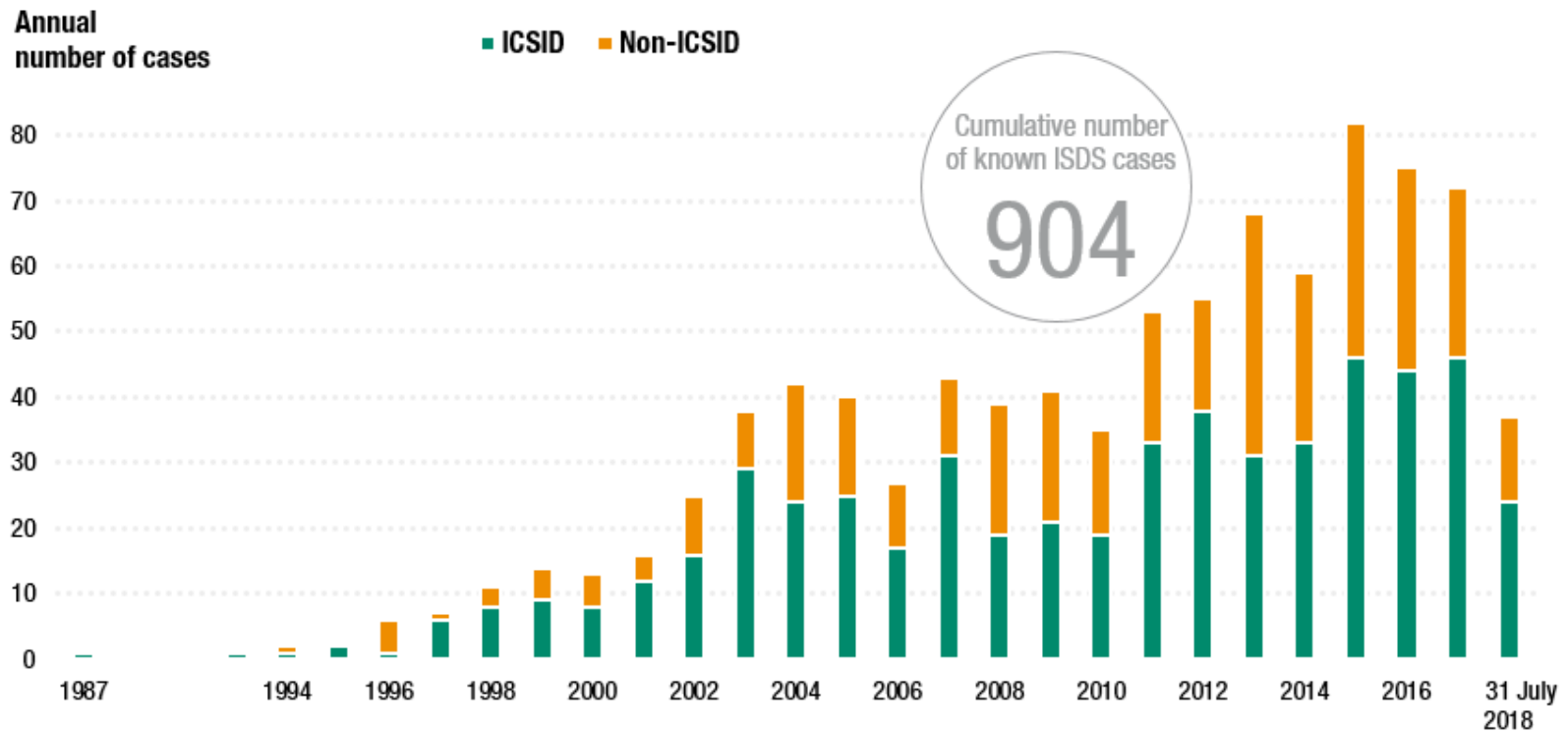


# Trade & Investment Challenges to Other Public Health Measures

- 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*

# Trends in known treaty-based ISDS cases

Figure 1. Trends in known treaty-based ISDS cases, 1987–31 July 2018



Source: UNCTAD, ISDS Navigator.

*Note:* Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification processes and may not match case numbers reported in previous years.



# Assessment of Risks to Regulating States

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



Australia World AU politics Environment World Cup 2018 Football More



## 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





# Policy Space in the CPTPP

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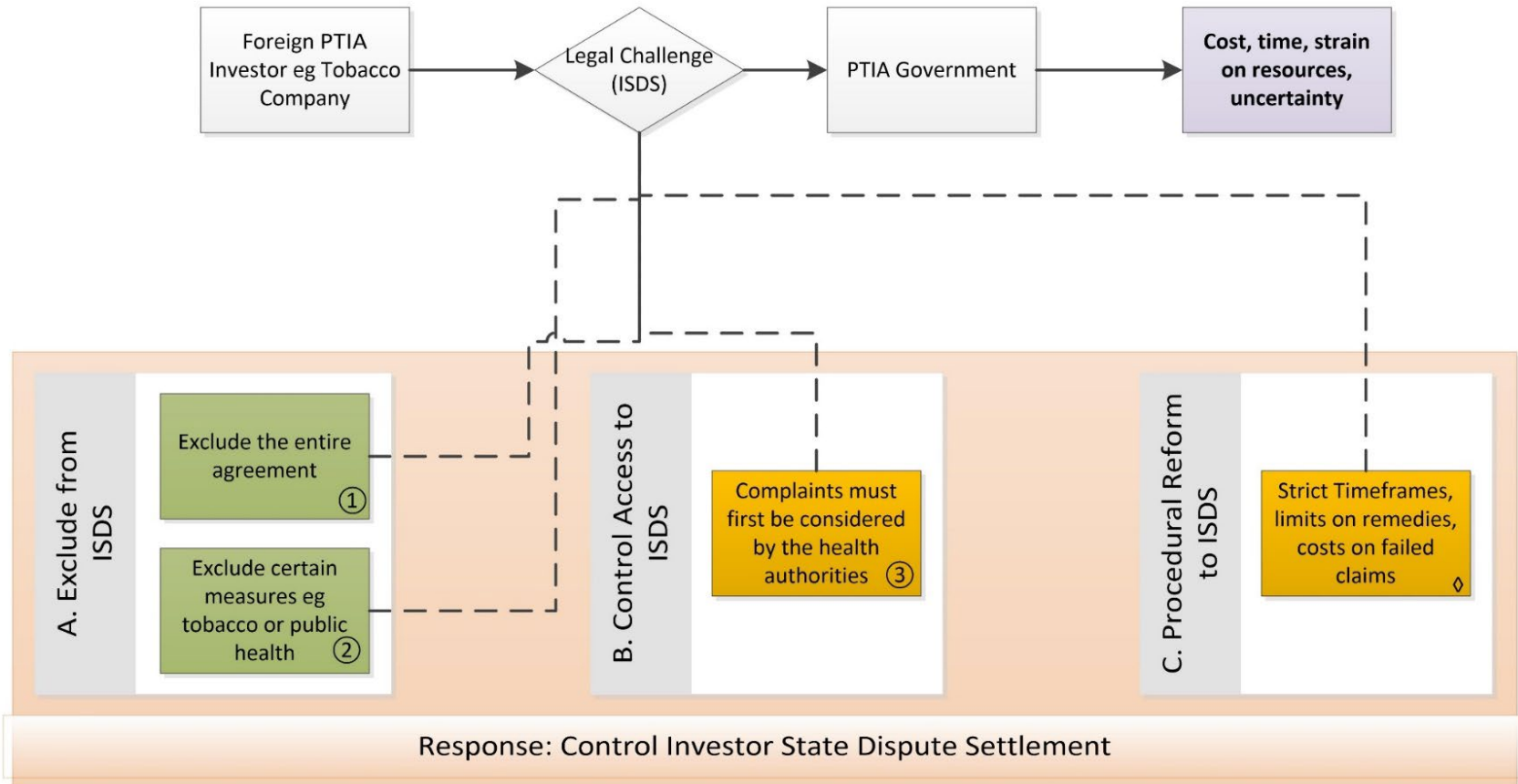


# Recommended Actions for Regulating States

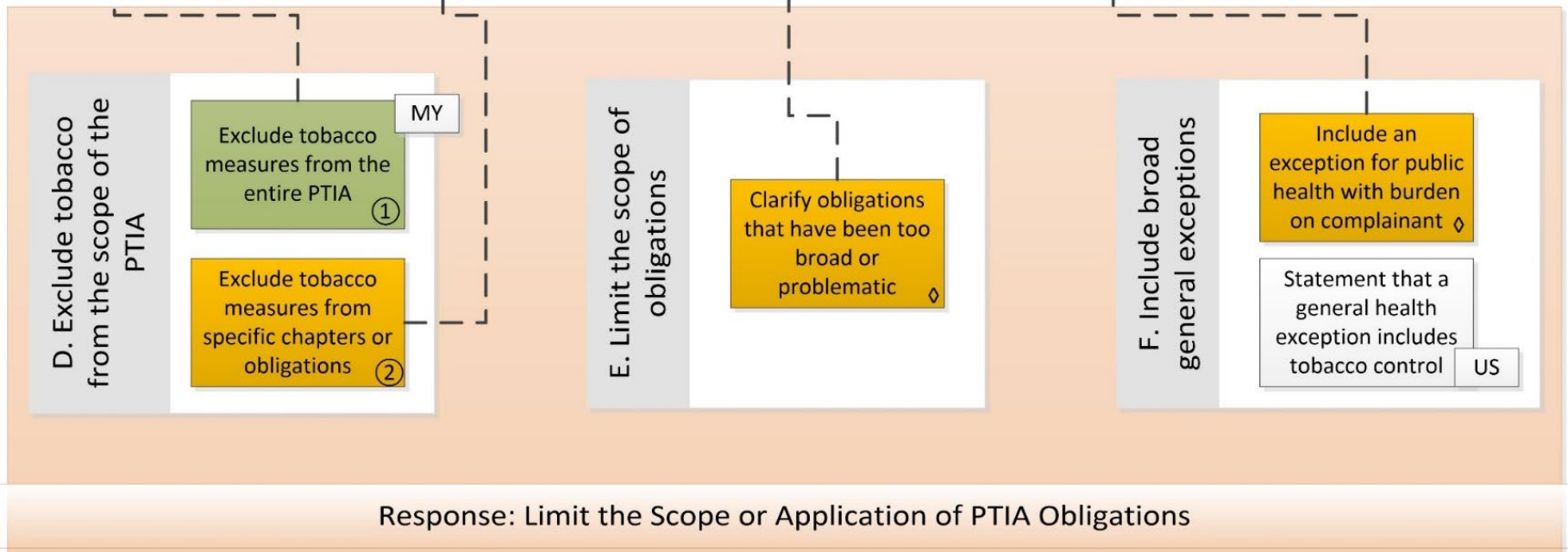
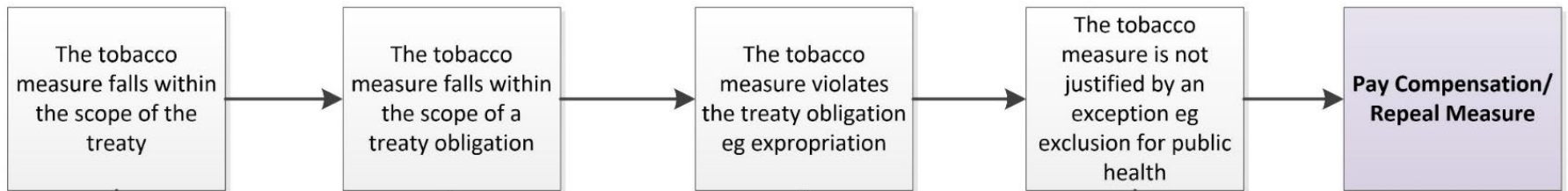
1. Review trade & investment treaties
  - sufficient regulatory autonomy, modification, termination
2. Participate in & promote the development of evidence-based regional & international standards
3. Anticipate complaints and litigation
  - counter-arguments, resources to defend
4. Follow best practice when developing domestic measures
  - process, evidence, non-discrimination
5. Manage future foreign investment
  - screening: review IIAs, domestic regulations, investment applications



## Risk: Investor-State Dispute Settlement under PTIAs\*



## Risk: Breach of the PTIA







# Article 29.5: Tobacco Control Measures

A Party *may elect to deny the benefits* of [ISDS] *with respect to claims challenging a tobacco control measure* of the Party. Such a claim shall not be submitted to [ISDS] 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 ..., 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.

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A tobacco control measure is defined as ‘a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure.’ TPP, Article 29.5, n 12.



# Issues with the Tobacco Carveout

- Addresses the problem of wasted time and resources on tobacco ISDS claims.
- However, some health advocates see this exception as too narrow because:
  - it does not cover tobacco leaf
  - it does not cover e-cigarettes without nicotine (which is rare); the exception does cover e-cigarettes including nicotine, as in practice nicotine is virtually always derived from tobacco.
  - states must make an election to exclude the claim (it is not the default position)
  - state-state claims in relation to tobacco control measures are still permitted.
- Provides no protection for other regulatory concerns such as alcohol harm and could even conceivably undermine such concerns or the more common 'general exceptions' type provisions now sometimes found in IIAs.



# Evolution of Health Carveouts

## Tobacco v health

PACER Plus signed 2017: no  
ISDS

TPP, signed  
2016:  
ISDS carveout  
for *tobacco  
control*  
measures at  
host state  
election

SAFTA  
amendments  
signed 2016:  
ISDS carveout for  
*tobacco control*  
measures

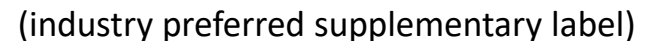
PAFTA,  
signed 2018:  
no ISDS claims  
for *public health*  
measures

IA-CEPA,  
signed 4 Mar  
2019:  
no ISDS claims  
for *public health*  
measures

A-HKFTA,  
signed 26 Mar 2019:  
ISDS carveout for  
*tobacco control*  
measures

CPTPP signed 2018

- Annex 8-A on “Wine and Distilled Spirits” requires parties to allow suppliers to use a supplementary label to comply with government-mandated labelling information.
- Also included in Singapore-Australia FTA and may be included in the Regional Comprehensive Economic Partnership (RCEP) Agreement.



See: Paula O'Brien et al, "Marginalising Health Information: Implications of the Trans-Pacific Partnership Agreement for Alcohol Labelling" (2017) 41 Melbourne University Law Review 341



# What is a supplementary label?

- Legal ambiguity in the meaning of ‘supplementary label’.
- No definition of supplementary label in TPP.
  - Definition 1: an additional label that can fit into some unused space on the container and that does not interfere with the standard labels (‘industry definition’)
  - Definition 2: a label that is affixed to the product, is additional to the standard or principal product labels, and is generally used as an alternative to removing the standard or principal labels and relabelling the container with the conforming label (‘public health definition’)
- Better view: the public health definition is the correct and preferable definition, based on text, context and purpose.
- Policy implication: legal ambiguity in the supplementary labelling rules should be eliminated.





# Deference to Regulatory Objectives

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing *any measure otherwise consistent* with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken *in a manner sensitive to* environmental, *health or other regulatory objectives*.

Article 9.16 (emphasis added)



# Clarifications to the FET standard

1. Each Party shall accord to covered investments treatment in accordance with *applicable customary international law principles*, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the *customary international law minimum standard of treatment of aliens as the standard of treatment* to be afforded to covered investments ... The obligations in paragraph 1 to provide:
  - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world

Article 9.6 (emphasis added).



# Clarifications to Indirect Expropriation

Non-discriminatory regulatory actions by a Party that are designed and applied to protect *legitimate public welfare objectives*, such as public health, safety and the environment, do not constitute indirect expropriations, *except in rare circumstances*.

Annex 9-B, Article 3(b) (emphasis added) (citations omitted).



# Select Additional References

- 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)
- 'Public Health in International Investment Law and Arbitration' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (with Elizabeth Sheargold).
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- '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).
- 'The National Interest in Trade and Investment Agreements: Protecting the Health of Australians' in John Farrar, Mary Hiscock and Vai Io Lo (eds), *Australia's Trade, Investment and Security in the Asian Century* (World Scientific, Singapore, 2015) 65–82 (with Jessica Casben).
- 'If One Thai Bottle Should Accidentally Fall: Health Information, Alcohol Labelling and International Economic Law' (with Paula O'Brien).
- 'On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Committee' (2018) 18(1) *QUT Law Review* 124-155 (with Paula O'Brien).
- 'Trade Law and Alcohol Regulation: What Role for a Global Alcohol Marketing Code?' (2016) 112 (Suppl. 1) *Addiction* 109–116



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