Protecting the autonomy of states to enact tobacco control measures under trade and investment agreements

Andrew Mitchell, Elizabeth Sheargold

Melbourne Law School, University of Melbourne, Melbourne, Australia

Correspondence to
Professor Andrew Mitchell, Melbourne Law School, University of Melbourne, VIC 3010, Australia; a.mitchell@unimelb.edu.au

Received 23 June 2014
Accepted 13 October 2014
Published Online First 31 October 2014

ABSTRACT

Since the adoption of the WHO's *WHO Framework Convention on Tobacco Control*, governments have been pursuing progressively stronger and more wide-reaching tobacco control measures. In response, tobacco companies are frequently using international trade and investment agreements as tools to challenge domestic tobacco control measures. Several significant new trade and investment agreements that some fear may provide new legal avenues to the tobacco industry to challenge health measures are currently under negotiation, including the Trans-Pacific Partnership (a 12 party agreement of Asia-Pacific regional countries) and the Transatlantic Trade and Investment Partnership (an agreement between the USA and the European Union). This commentary examines different options for treaty provisions that the parties could employ in these agreements to minimise legal risks relating to tobacco control measures. It recommends that parties take a comprehensive approach, combining provisions that minimise the potential costs of litigation with provisions that increase the likelihood of a state successfully defending tobacco control measures in such litigation.

INTRODUCTION

Since the adoption of the *WHO Framework Convention on Tobacco Control* (FCTC), governments have been pursuing progressively stronger and more wide-reaching tobacco control measures. In response, tobacco companies are frequently turning to international trade and investment agreements (TIAs) as a tool to challenge tobacco control measures. Although it is not a new phenomenon,[1 2] this practice has received increased attention in recent years. Cases to date include: Indonesia's successful challenge before the World Trade Organization (WTO)[3] of the US exemption of menthol from its ban on flavoured cigarettes;[4] the pending WTO claims by Cuba, the Dominican Republic, Honduras, Indonesia and Ukraine[5–9] against Australia's 'plain' (standardised) packaging requirements for tobacco products;[10] the ongoing action brought against those requirements by Phillip Morris Asia Limited under the Hong Kong—Australia Bilateral Investment Treaty (BIT);[11 12] and the ongoing challenge led by Phillip Morris companies based in Switzerland against Uruguay's rules on health warnings and marketing restrictions for tobacco products,[13–15] brought under the Uruguay—Switzerland BIT.[16] In each of these cases, the complainant alleges that a tobacco control measure is inconsistent with a trade or investment agreement and that the regulating state must either pay compensation or alter the measure. Although the latter three disputes are yet to be resolved, the fact that the challenges have been brought risks creating 'regulatory chill', discouraging states from implementing similar tobacco control measures.[17]

As these cases are proceeding before international courts and tribunals, several major new agreements on international trade and investment are under negotiation, including the proposed Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (T-TIP). The TPP is an Asia—Pacific regional agreement involving 12 countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the USA and Vietnam.[18] Tobacco has become a contentious issue in the TPP talks, with Malaysia proposing the exclusion of all tobacco-related measures from the agreement.[19] The T-TIP is being negotiated by the USA and the European Union.[20] Discussions for the T-TIP are less advanced, but several public health advocacy groups are pushing for the inclusion of provisions to protect the parties' rights to implement tobacco control measures.[21] The tobacco industry is also actively lobbying governments in relation to these agreements, reflecting their importance for public health policymaking.[22]

This paper surveys different options available to states when negotiating trade or investment agreements, such as the TPP and T-TIP, to minimise the risk that the agreement could later be used to challenge tobacco control measures. The paper begins by examining the nature of the threat that these agreements pose for tobacco control, before moving on to suggest and analyse a range of provisions that states could choose to include in these agreements to protect regulatory autonomy.

BACKGROUND: INTERNATIONAL TIAS

International trade or investment rules could impact domestic tobacco control measures in several ways.[23–27] International trade law includes multilateral rules overseen by the WTO, as well as other preferential trade agreements (PTAs). PTAs may be bilateral (between two countries), regional or plurilateral (between more than two countries). Trade agreements typically govern international trade in goods and services, as well as related areas such as the protection of intellectual property rights. Non-discrimination is a core norm of international trade law, precluding participating states from treating imported products less favourably than 'like' domestic or foreign products or services.

To cite: Mitchell A, Sheargold E. *Tob Control* 2015;**24**:e147–e153.

The USA ban on flavoured cigarettes was found to be discriminatory, and therefore inconsistent with WTO rules, because the ban applied to clove cigarettes (primarily imported from Indonesia) but not menthol cigarettes (primarily manufactured in the USA).[3]

International investment agreements are concerned with the protection and promotion of inward and outward foreign investment. Over 3000 such agreements currently exist, most commonly in the form of bilateral investment treaties (BITs).[28] The vast majority include requirements such as the payment of adequate compensation for state expropriation of an investment, and fair and equitable treatment of foreign investors.[29] Phillip Morris alleges that Australia's plain tobacco packaging scheme unlawfully expropriates its trademarks and breaches the fair and equitable treatment standard under the Australia—Hong Kong BIT.[30]

Although international trade law and international investment law have traditionally been separate fields, they are increasingly covered together within individual treaties, primarily through the inclusion of a chapter on investment within a PTA.[31] The TPP and T-TIP are intended to be comprehensive agreements that will cover international trade and investment. The ongoing negotiations towards the TPP and T-TIP agreements provide the context for this paper, but its analysis and recommendations may also apply to the negotiation of other PTAs and investment agreements, including BITs. For ease of reference, the term TIAs will be used to refer collectively to PTAs and international investment agreements. However, these are general suggestions that should be considered in light of the context and overall design of the specific agreement under negotiation.

THE THREAT POSED BY TRADE AND INVESTMENT AGREEMENTS TO TOBACCO CONTROL MEASURES

International trade and investment lawyers often refer to the impact of TIAs on the 'autonomy' of states to adopt domestic regulatory measures. TIAs do not explicitly prevent states from pursuing domestic policies such as tobacco control. However, the possibility that a measure may be inconsistent with a state's international obligations influences domestic policymaking. In this way, TIAs may restrict state regulatory autonomy.

The potential for challenge under a TIA may undermine states' willingness to enact tobacco control policies in two distinct ways. First, significant costs may arise simply from the *use of dispute settlement* mechanisms. If a measure is challenged under a TIA, the burden of having to defend the case carries with it the potential for high legal fees, long timeframes and strain on human resources and expertise. The potential for litigation and such heavy costs may deter states from pursuing tobacco control measures, regardless of the outcome of the dispute (which may be uncertain). The tobacco industry has demonstrated its appetite for using litigation to contribute to regulatory chill in this way even where it is unlikely to succeed in the legal action in question.[32] Second, additional costs arise from an *adverse finding or outcome* in a dispute (ie, if a court or tribunal finds that the challenged measure breaches the relevant agreement). Depending on the specific rules of the agreement, the state may then be required to pay compensation to companies or repeal the measure. The following section provides a survey of different options that address these two ways in which TIAs may undermine states' willingness to enact domestic tobacco control measures.

LEGAL ANALYSIS OF OPTIONS TO PROTECT REGULATORY AUTONOMY

The threat posed by TIAs to state autonomy in tobacco control can be addressed by restricting the use of dispute settlement or by limiting the scope of treaty obligations. The diagram below provides an overview of the options available to states negotiating TIAs to preserve their autonomy in tobacco control (figure 1). It depicts a range of possible options, based on whether they address costs imposed by the use of a dispute settlement mechanism, or costs arising from a treaty breach.

Options that control the use of dispute settlement

Two kinds of dispute settlement may apply under most international investment agreements: state-to-state dispute settlement (where the complaint is made by a state) and investor-state dispute settlement (ISDS) (where a company or investor makes the complaint). The vast majority of investment disputes initiated in the past 15 years have made been through ISDS mechanisms.[33] State-to-state adjudication is the only option available in relation to trade obligations. ISDS is generally seen as a greater cause of regulatory chill than trade disputes because its outcomes are more difficult to predict and the remedies available could have a greater economic impact on the legislating state.[34] This paper focuses on ISDS, as the greatest threat to the regulatory autonomy of states. However, options similar to those outlined below could be applied in relation to state-to-state dispute settlement.

Option A: excluding ISDS from the relevant TIA

Although unlikely to occur in either the TPP or T-TIP, if the parties to an agreement were to decide not to provide any ISDS mechanism, this would significantly reduce the risk of tobacco control measures being challenged. Some international investment agreements have not included ISDS mechanisms,[35] although these are rare. A common suggestion is that the availability of ISDS promotes and protects foreign investment.[36] Even if such an approach was feasible, experience with WTO cases related to tobacco and cigarette restrictions demonstrates that challenges may still be brought by states (often at the behest of the tobacco industry).[3 5–9] Thus, this option is not an absolute safeguard against challenges to tobacco control measures.

An alternative, but related, approach would be to prevent an investor from challenging *certain kinds of measures*. We are not aware of any existing investment agreements that exclude the possibility of an investor challenging a health-related measure, but a provision of this kind could apply either specifically to tobacco measures, or to public health/welfare measures more broadly. If the latter approach is taken, the efficacy of the exclusion will depend on the language of the provision and how it is interpreted. If narrowly phrased—particularly referring by to non-discriminatory measures that are 'necessary', 'proportionate' or 'related' to achieving a specific objective—there may be uncertainty as to whether the exclusion applies in a given case, until the matter is ruled on by a tribunal. Although this assessment could be undertaken in a preliminary or jurisdictional hearing, it may still require the state to litigate a number of key issues relating to the merits of the complaint, such as whether the measure is discriminatory, the extent to which it contributes to a public purpose, and if less restrictive alternatives could have been pursued.

In contrast, a narrow exclusion based on the nature of the measure (eg, tobacco-related measures) would provide greater certainty for states, as the determination of whether a measure falls within the scope of the exclusion would be more

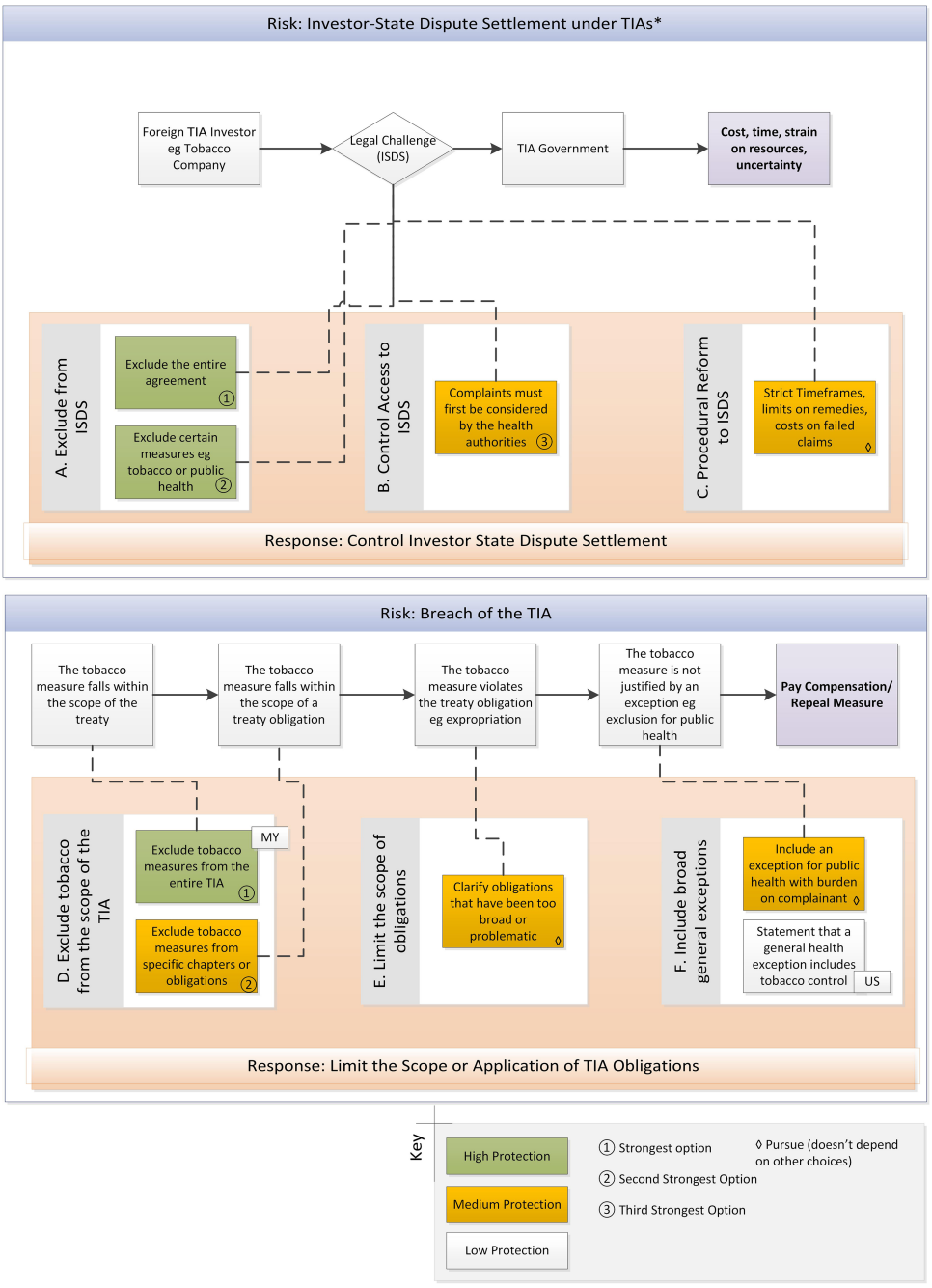

Figure 1 Options in relation to legal risks addressed. ISDS, investor-state dispute settlement; TIA, trade and investment agreements.

predictable. However, this approach would not protect regulatory autonomy for other public health measures, such as regulations affecting alcoholic beverages or high fat foods.

An exclusion of measures from ISDS under a TIA may not, however, provide the level of certainty states are seeking if previously agreed BITs or other international investment agreements between the parties provide alternative avenues for litigating investment claims, as discussed further below.

Option B: controlling access to ISDS

A TIA could limit access to ISDS in cases of tobacco or public health measures by requiring that any complaint by an investor relating to such measures be first referred, at the respondent's discretion, for preliminary consultations between the health authorities of the states parties. Some investment agreements adopt a similar procedure to this when an investor claims that a taxation measure is tantamount to an expropriation, by providing for the question to be referred to the national taxation authorities.[37] In relation to tobacco control measures, if the national authorities agreed that the measure satisfied criteria prescribed in the agreement (eg, that it is a bona fide, non-discriminatory health measure based on evidence), recourse to ISDS would not be permitted. Only if the authorities agreed that the measure failed to meet the criteria, or if they were unable to reach agreement, would the matter move to adjudication. This approach would allow states to block unmeritorious claims by tobacco companies. The strength of this kind of option would turn on the specific drafting of the relevant provision.

In the context of the TPP negotiations, the USA has proposed that before any party initiates a dispute regarding another party's tobacco measure, the health authorities of the two countries meet to discuss the measure.[38] Importantly, this proposal seems to apply only to disputes initiated by states, and not to investor-state challenges. Consequently, it would not reduce the risk of tobacco measures being challenged under ISDS mechanisms, which is one of the most significant threats to state regulatory autonomy in this area. In addition to this mechanism for consideration of a measure by health authorities, the USA proposes that the general exception clause of the TPP—a broad provision that is included in most TIAs to permit states to enact measures that are necessary for purposes such as environmental protection, public morals or health—be accompanied by a clarification that tobacco control measures fall within the scope of this general exception (the efficacy of this element of the USA proposal is discussed in greater detail below). Apart from these two provisions, the USA proposes that tobacco be treated like any other product subject to the TPP. Thus, rules requiring parties not to discriminate against products imported from another TPP party, or to subsidise their domestic industry, would apply to trade in tobacco and tobacco products.

Option C: procedural reform of ISDS

Unlike the previous approaches, this is not a single provision. A range of procedural improvements to ISDS could be undertaken to reduce the harms it poses to states and thus reduce the risk that litigation or the threat of litigation could undermine tobacco control. Procedural improvements could include strict timeframes for different stages of proceedings to prevent unreasonable delay, limits on remedies available in cases involving public interest measures such as tobacco control, and stringent rules on costs to penalise investors that bring unmeritorious challenges to public welfare measures.[33] These kinds of changes (which could be implemented in conjunction with other options) could lessen the burden of litigation for states defending tobacco control measures, and (depending on the scope of the reforms chosen) may reduce the costs associated with ISDS generally.

Options that limit the scope or application of trade and investment obligations

These options would not absolutely prevent a challenge being brought against a tobacco control measure, but they would increase the likelihood of the state successfully defending its measure. Thus, they would reduce the risk of the state having to pay compensation or repeal its measure.

Option D: excluding tobacco measures from the scope of the TIA

This option would involve a clause excluding all tobacco (or tobacco-related) measures from the scope of the relevant agreement. Malaysia has proposed that the TPP include a provision along these lines. Malaysia's proposal entails a complete exclusion of tobacco measures from the scope of the TPP. Such a 'carve out' would preclude the application of any TPP obligation to regulations or policies adopted for the purpose of tobacco control.

In drafting this form of exclusion, negotiators should consider the following questions:

- 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)? Does it include financial or taxation measures? Does the exclusion apply to the entire agreement, or only to certain chapters (eg, trade in goods or investment)? Or should the exclusion be limited to specific obligations? If the exclusion is too broad, it could inadvertently create a loophole that would permit states to implement non-health-related tobacco measures, including tobacco production subsidies and discriminatory measures that support domestic tobacco industries.
- Is it a self-judging provision (eg, excluding all measures adopted by a health ministry or measures determined by the relevant state as health-related), or would a tribunal have jurisdiction to determine whether or not a measure falls within the scope of the exclusion? If the clause is self-judging, this would provide greater certainty for states but also potentially greater scope for abuse of the exclusion. While this approach would provide the highest level of certainty for states that their tobacco control measures will not be found inconsistent with their obligations under a TIA, most states with domestic tobacco production or manufacturing sectors may be unlikely to agree to it. In particular, it seems highly doubtful that the USA will agree to Malaysia's broad proposal to exclude tobacco from the TPP.

An additional risk is that a provision that carves out tobacco control measures from the scope of a particular TIA may inadvertently increase the risk of other public health measures being found inconsistent with TIAs. One technique for interpreting treaty obligations is to draw inferences from other provisions in the agreement. A tribunal may infer from an exclusion of tobacco measures that the parties understood or intended that public health measures in general fall within the scope of the agreement (or chapter)—hence the need to specifically exclude tobacco regulations. This form of interpretation could have adverse consequences for regulatory autonomy in relation to other public health concerns, such as measures aimed at reducing the consumption of alcohol or fatty foods. For this reason, in drafting an exclusion for tobacco measures the parties should make it clear that the provision is without prejudice to states' rights to enact other public health measures.

Option E: limiting the scope of substantive obligations

Limiting provisions are commonly included in new international investment agreements, to clarify the scope of substantive obligations that have proven to be particularly broad or problematic in previous agreements. For example, many investment agreements now state that non-discriminatory measures enacted for a public purpose do not usually constitute a compensable expropriation of an investor's property.[39] Whether or not a tobacco control measure falls within the scope of the obligation, or is saved by the limiting provision, depends on how the relevant tribunal interprets the key terms in the provision—in contrast to a self-judging provision, which provides a state with greater certainty. Thus, even where a treaty includes language that limits the scope of a substantive obligation, states may find it difficult to determine in advance whether their measure complies.

Option F: general exceptions for public health or welfare measures

General exceptions, such as those contained in Article XX of the WTO's *General Agreement on Tariffs and Trade* (GATT), are one of the most common approaches used in international trade agreements to safeguard regulatory autonomy. They are also increasingly being incorporated into international investment agreements.[40] Typically, they declare that no obligations in the agreement (or a particular chapter of the agreement) 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 or consumer protection). In this way, the exception may 'save' a measure that has been found inconsistent with a substantive obligation under the agreement.

Two things differentiate these exceptions from outright exclusions for tobacco measures (Option D above): first, they apply to public health or welfare measures in general, and not just to tobacco measures; second, 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' (rather than the subject matter of the measure, eg, tobacco). This second point is particularly important for states to bear in mind. General exceptions are limited to measures that are 'necessary' for a legitimate purpose, to avoid their abuse by states who may seek to use them to defend protectionism, which would undermine the economic benefits of TIAs. But as a result of the instrumentalist nature of general exceptions, their scope is unclear, and whether or not they apply to a measure depends on how a tribunal interprets the clause and applies it to the relevant facts. Consequently, these exceptions cannot provide certainty for states regarding the treaty compliance of their tobacco control measures. Furthermore, the presence of a general exception is unlikely to deter challenges to tobacco control measures. As noted above, the tobacco industry has often demonstrated its capacity for litigation even where it is unlikely to prevail on the merits. Thus, even if it was clear that a measure would fall within an exception, it could still be challenged. Of course, this does not mean that the exception is of no utility. Having a general exceptions clause may assist a respondent state to successfully defend the measure, thus avoiding the potential costs of having to pay compensation or repeal the measure.

General exceptions are often qualified by language such as 'provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' (known as the 'chapeau' to Article XX of the WTO GATT). While a body of WTO case law has interpreted this language in the context of trade provisions, it is unclear how this language applies to investment measures. This provides another source of uncertainty for states considering whether the exception would apply to given facts.

The first element of the US proposal for the TPP builds on the inclusion of a general exception, by clarifying that the reference to measures to protect public health applies to tobacco control measures. This clarification is unlikely to have much impact on the scope of obligations under a TIA, as it would seem relatively obvious that tobacco control falls within the general scope of public health measures. Moreover, if the parties decide that the general exception applies only to chapters on goods and services trade, and not apply to investment obligations, this provision will have no impact on ISDS.

Relationship with existing agreements

Additional treaty protections secured in new TIAs will provide little comfort to states should existing TIAs continue to provide avenues for investors to bring disputes under weaker provisions. Therefore, states considering how to protect regulatory autonomy in agreements under negotiation must also consider the relationship between the new agreement and existing agreements. One option for addressing potential differences between new and existing agreements is to incorporate provisions terminating pre-existing TIAs between the negotiating parties. This practice is increasingly utilised in bilateral and regional TIAs, for example, in the PTAs between Australia and Chile,[41] Peru and South Korea,[42] Chile and South Korea,[43] and Peru and Singapore.[44] At the regional level, the Central America—Mexico Free Trade Agreement,[45 46] and the European Union's policy of replacing bilateral investment agreements between Member States and third countries with Union-level agreements,[47] suggest that this style of provision can be easily adapted to deal with multiple parties and multiple agreements. States may also consider modifying or terminating TIAs with other parties, to reduce the risk that companies will use corporate restructuring to take advantage of more favourable terms in older agreements.

An additional concern about the relationship between new and existing agreements is posed by the use of 'most-favoured nation' (MFN) provisions to import broader or more favourable provisions from one agreement into another. MFN clauses are a form of non-discrimination obligation, which requires that products, services or investors from another party receive treatment no less favourable than that accorded to their counterparts from any other country. In practice this application of MFN treatment could result in the protections discussed above being undermined by less robust provisions in another agreement. Many states have addressed this problem by including clarifying language that states that MFN treatment does not apply to dispute settlement provisions, such that ISDS from another treaty could not be invoked in a new treaty through the new treaty's MFN clause. TIAs between Chile and Colombia,[48] Canada and Peru,[49] and Japan and Switzerland provide examples of this style of provision.[50] A similar technique could also be used to clarify that an MFN provision is subject to relevant exceptions and exclusions, thereby addressing the possibility that MFN could be used to circumvent such protections.

The consequences of failing to consider the relationships between new and existing TIAs may significantly undermine a newly negotiated treaty. However, existing treaties can be relatively easily addressed through careful drafting when negotiating new agreements such as the TPP or T-TIP.

CONCLUSIONS

As set out in figure 2 (below), the strongest options for states to safeguard their autonomy to implement tobacco control measures are to exclude such measures either from the scope of the relevant TIA entirely (Option D) or from the scope of ISDS (Option A). These options would provide the greatest certainty for states in enacting legitimate tobacco control measures without being subject to a legal challenge. However, they are also the options that are least likely to be agreed to by countries where the tobacco industry is influential. They may also create a risk of abuse—that is, the exclusion from scrutiny of measures that are designed to protect the local tobacco industry against foreign competitors, for example. Broader approaches—such as limiting the scope of substantive obligations (Option E), including general exceptions (Option F), or reforming dispute settlement procedures (Option C)—do not provide a high degree of certainty for states (ie, a state cannot be sure whether its tobacco control measures will fall within the scope of the provision). Although they do not provide an absolute safeguard, these broader options mitigate some of the risks that TIAs pose for tobacco control measures and are likely to be more politically feasible.

Some of the options that provide the greatest protection to tobacco control specifically would do little to increase a state's general regulatory autonomy. In contrast, some of the less targeted options, such as general exceptions, protect the broader right of states to enact measures to promote public health and welfare. Furthermore, the legal effect of the options outlined above will be shaped by the context in which they appear.

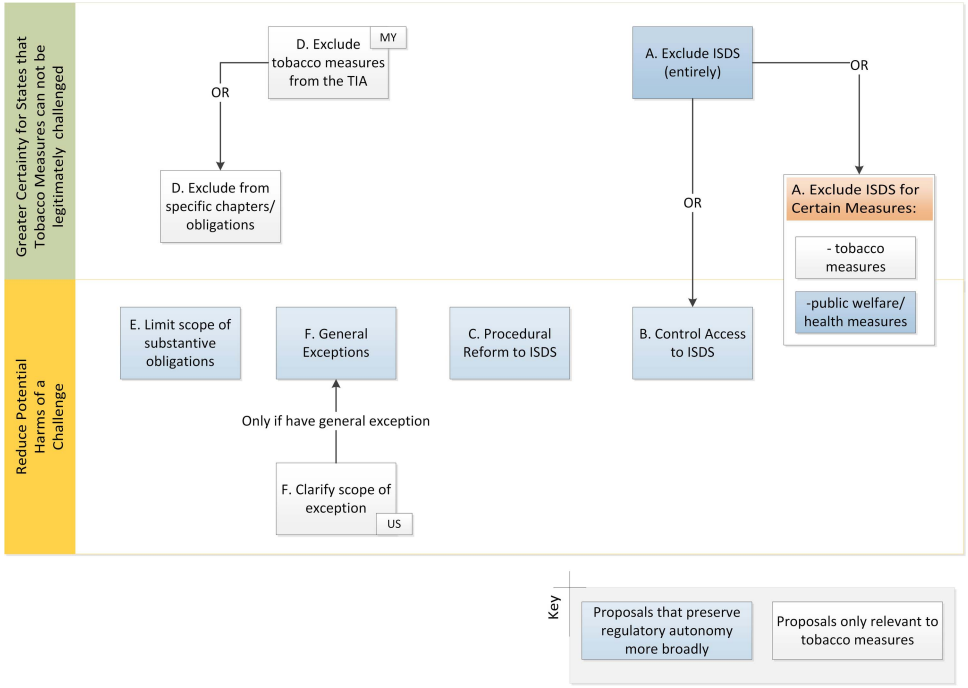

Figure 2 The relative strength of options for tobacco control measures. ISDS, investor-state dispute settlement; TIA, trade and investment agreements.

Therefore, identifying their strength or weakness will require consideration of not only the relevant treaty provision but also the treaty as a whole, as well as existing treaties. States should consider the utility of each of these options on a case by case basis, perhaps combining a number of options in a given agreement. Tailoring agreements in this way, to respond to the particular textual contexts and inter-relationships of each, will provide a more comprehensive approach to safeguarding regulatory autonomy, ensuring minimisation of both the costs of having to defend a measure, and the potential costs of an adverse outcome in a dispute.

What this paper adds

As the tobacco industry is clearly prepared to use trade and investment agreements to challenge domestic tobacco control measures, when new agreements are negotiated states need to ensure that they include clauses to protect their autonomy to regulate tobacco use. This paper provides an analysis of the strengths and weaknesses of various options for provisions that could be included in agreements such as the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership to protect the autonomy of states to adopt tobacco control measures and, for some options, public health policies generally. It may assist states and advocacy groups in seeking a comprehensive, effective approach that will minimise the risk and costs of litigation, as well as limiting the scope of trade and investment obligations, improving the chances that the state will be able to successfully defend its tobacco control measures.

Acknowledgements The authors wish to thank Jonathan Liberman and Tania Voon for their helpful comments on earlier drafts and Jessica Casben for her assistance in finalising this paper; any errors or omissions remain our own.

Contributors AM and ES jointly carried out the research and drafting of this paper.

Funding This work was supported by the Australian National Preventive Health Agency (Grant ID 203MIT2011) and the Australian Research Council (Linkage Project scheme, project number LP120200028).

Competing interests None.

Patient consent Obtained.

Provenance and peer review Not commissioned; externally peer reviewed.

REFERENCES

1 Callard C, Chitanondh H, Weisman R. Why trade and investment liberalisation may threaten effective tobacco control efforts. *Tob Control* 2001;10:68–70.
2 Shaffer ER, Brenner JE, Houston TP. International trade agreements: a threat to tobacco control policy. *Tob Control* 2005;14:19–25.
3 United States—Measures Affecting the Production and Sale of Clove Cigarettes—Report of the Appellate Body, World Trade Organisation, 4 April 2012 (WT/DS406/AB/R).
4 Federal Food Drug and Cosmetic Act (as amended by the Family Smoking Prevention and Tobacco Control Act 2009), § 907(a)(1)(A).
5 Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging—Request for Consultations by the Ukraine, World Trade Organisation, 13 March 2012 (WTO/DS434).
6 Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging—Request for Consultations by Honduras, World Trade Organisation, 4 April 2012 (WTO/DS435).
7 Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging—Request for Consultations by Dominican Republic, World Trade Organisation, 18 July 2012 (WTO/DS441).
8 Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging—Requestion for Consultations by Cuba, World Trade Organisation, 3 May 2013 (WTO/DS458).
9 Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging—Request for Consultations by Indonesia, World Trade Organisation, 20 September 2013 (WTO/DS467).
10 Tobacco Plain Packaging Act 2011 (Cth).
11 Written Notification of Claim by Philip Morris Asia Limited to the Commonwealth of Australia pursuant to Agreement between the Government of Hong Kong and the

Government of Australia for the Promotion and Protection of Investments (27 June 2011).
12 Notice of Arbitration: Australia/Hong Kong Agreement for the Promotion and Protection of Investments (21 November 2011).
13 Ordinance 514 (18 August 2008).
14 Decree 287/009 (15 June 2009).
15 Ordinance 466 (1 September 2009).
16 Request for Arbitration: FTA Holdings SA (Switzerland) v Uruguay (19 February 2010).
17 Tienhaara K. Regulatory chill and the threat of arbitration: a view from political science. In: Brown C, Miles K, eds. *Evolution in investment treaty law and arbitration*. Cambridge: Cambridge University Press, 2011:606–28.
18 Office of the United States Trade Representative, Trans-Pacific Partnership. http://www.ustr.gov/tpp (accessed Jun 2014)
19 Editorial, The Hazard of Free-Trade Tobacco. *New York Times*, 31 August 2013, http://www.nytimes.com/2013/09/01/opinion/sunday/the-hazard-of-free-trade-tobacco.html?_r=0 (accessed Jun 2014).
20 Office of the United States Trade Representative, *Transatlantic Trade and Investment Partnership*. http://www.ustr.gov/ttip (accessed Jun 2014).
21 Action on Smoking and Health (ASH), *Seven things you should know about TTIP*. http://ash.org/programs/tobacco-trade/ttip/ (accessed Jun 2014).
22 Flaherty S. Akin Gump to Lobby For Philip Morris On Trade Pacts. *Law 360*, 1 April 2014. http://www.law360.com/articles/523938/akin-gump-to-lobby-for-philip-morris-on-trade-pacts (accessed Jun 2014).
23 Voon T, Mitchell A. Face off: assessing WTO challenges to Australia's scheme for plain tobacco packing. *Public Law Rev* 2011;22:218–40.
24 Mitchell A. Australia's move to the plain packaging of cigarettes and its WTO compatiblity. *Int Health Law Policy* 2010;5:399–419.
25 Mitchell AD, Wurzberger SM. Boxed in? Australia's plain tobacco packaging initiative and international investment law. *Arbitration Int* 2011;27:623–51.
26 McGrady B. Implications of ongoing trade and investment disputes concerning tobacco: *Philip Morris v Uruguay*. In: Voon T, Mitchell A, Liberman J, *et al*, eds. *Public health and plain packaging of cigarettes: legal issues*. Cheltenham: Edward Elgar, 2012:137–172.
27 Voon T, Mitchell AD. Implications of international investment law for plain tobacco packaging: lessons from the Hong Kong–Australia BIT. In: Voon T, Mitchell A, Liberman J, *et al*, eds. *Public health and plain packaging of cigarettes: legal issues*. Cheltenham: Edward Elgar, 2012:173–199.
28 United Nations Conference on Trade and Development (UNCTAD). *World Investment Report 2013*. New York: United Nations, 2013.
29 Dolzer R, Schreuer C. *Principles of international investment law*. 2nd edn. Oxford: Oxford University Press, 2012: Chap. VII.
30 Written Notification of Claim by Philip Morris Asia Limited to the Commonwealth of Australia pursuant to Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, 27 June 2011, [10].
31 Alford RP. The Convergence of International Trade and Investment Arbitration. *Santa Clara J Int Law* 2013;12:35.
32 Crosbie E, Glantz SA. Tobacco industry argues domestic trademark laws and international treaties preclude cigarette health warning labels, despite consistent legal advice that the argument is invalid. *Tob Control* 2014;23:e7.
33 United Nations Conference on Trade and Development (UNCTAD). Reform of Investor-State Dispute Settlement: In Search of a Roadmap. IIA Issues Note, 26 June 2013. http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (accessed Jun 2014).
34 Fooks G, Gilmore AB. International Trade Law, plain packaging and tobacco industry political activity: the Trans-Pacific Partnership. *Tob Control* 2014;23e1:3.
35 Australia—United States Free Trade Agreement. Signed 18 May 2004. http://www.dfat.gov.au/fta/ausfta/final-text/Final_text_ausfta.pdf (accessed Jun 2014).
36 Nottage L. The rise and possible fall of investor-state arbitration in Asia: a skeptic's view of Australia's "Gillard Government Trade Policy Statement". *Transnational Dispute Manag* 2011;5:8–13.
37 *Canada–Peru Free Trade Agreement*, signed 29 May 2008 (entered into force 1 August 2009) Article 2203(8).
38 Office of the United States Trade Representative. Fact Sheet: New Proposal on Tobacco Regulation in the Trans-Pacific Partnership. August 2013. http://www.ustr.gov/about-us/press-office/fact-sheets/2013/august/fact-sheet-tobacco-and-tpp (accessed Jun 2014).
39 *Australia–Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) Annex10-B.
40 Newcombe A. The use of general exceptions in IIAs: increasing legitimacy or uncertainty? In: de Mestral A, Levesque C, eds. *Improving International Investment Agreements*. New York: Routledge, 2013:267–83.
41 *Australia–Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) annex10-E.
42 *Peru–South Korea Free Trade Agreement*, signed 14 November 2010 (entered into force 1 August 2011) art 9.17.
43 Free Trade Agreement between the Republic of Korea and the Republic of Chile, signed 15 February 2003 (entered into force 1 April 2004) art 21.4.
44 *Peru–Singapore Free Trade Agreement*, signed 29 May 2008 (entered into force 1 August 2009) art 10.2.
45 *The Central America–Mexico Free Trade Agreement,* signed 22 November 2011 (entered into force 1 September 2012 as between Mexico, El Salvador and Nicaragua, 30 November 2012 for Honduras, 1 July 2013 for Costa Rica, 1 September 2013 for Guatemala) standardised and consolidated the free trade agreements between Mexico and Costa Rica, Mexico and Nicaragua and Mexico, El Salvador, Guatemala and Honduras.
46 The Organization of American State's Foreign Trade Information System, 'Central America Countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua)—Mexico'. http://www.sice.oas.org/TPD/CACM_MEX/CACM_MEX_e.asp (accessed 15 Aug 2014).
47 See Regulation No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40 preambular recitals 5 and 6, art 3.
48 *Chile–Colombia Free Trade Agreement*, signed 27 November 2006 (entered into force 8 May 2009) Annex 9.3.
49 *Canada–Peru Free Trade Agreement*, signed 29 May 2008 (entered into force 1 August 2009) Annex 804.1.
50 *Japan–Switzerland Free Trade and Economic Partnership Agreement*, signed 19 February 2009 (entered into force 1 September 2009) Article 88[2].

Protecting the autonomy of states to enact tobacco control measures under trade and investment agreements

Andrew Mitchell and Elizabeth Sheargold

Tob Control 2015 24: e147-e153 originally published online October 31, 2014
doi: 10.1136/tobaccocontrol-2014-051853