

## Australia needs precision tools in drafting trade agreements, not a sledgehammer

Written by Bryan Mercurio, Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law, Chinese University of Hong Kong

---

When tobacco giant Philip Morris launched its legal challenge against the Australian government in 2011, it shocked the nation. It wasn't so much the subject of the lawsuit (plain packaging laws) or its eventual result (Canberra won) which caught many by surprise. It was the use of an arbitral tribunal under the obscure [Hong Kong-Australia bilateral investment treaty](#) mechanism which left many off-guard.

The pact allows foreign investors to challenge the Australian government through the [Investor-State Dispute Settlement](#) (ISDS) mechanism – introduced to attract foreign investors and allow them to effectively enforce their rights. The claim was seen by many as an attempt to exploit a legal loophole, and it might well be.

The reaction since has been to clamp down on ISDS. One such way is to deny certain investors access to ISDS. A recent example is the announcement in October (to little fanfare) of an amendment to the [Singapore-Australia Free Trade Agreement](#) excluding tobacco control measures from the scope of ISDS. This will be the first such exclusion to come into force anywhere in the world.

The change means companies will no longer have the same recourse that all other foreign investors have with regard to the authorities in Singapore and Canberra. Such a move is unnecessary and unwise when a more sustainable long-term solution is more precise drafting of treaties. The exclusion is also patently unfair.

Such arbitrary treatment of investors is unsettling and does not engender confidence – two basic ingredients required in trade and investment.

For now, few are complaining. After all, “big bad” tobacco is an easy target. But the amendment sets a dangerous precedent, introducing uncertainty into the international economic regime and an already slowing global economy.

After tobacco, other disfavoured industries could subsequently be targeted – perhaps alcohol, sugar or even mining. The Australian government would likely have a vastly different view

## Australia needs precision tools in drafting trade agreements, not a sledgehammer

Written by Bryan Mercurio, Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law, Chinese University of Hong Kong

---

should a treaty partner seek to exclude the mining industry from enforcing treaty rights.

One justification for the tobacco exclusion is the so-called “regulatory chill”. This means under threat of ISDS, governments are afraid of enacting tobacco control measures for fear of being sued.

The most frequently cited example is Philip Morris' (unsuccessful) claims against Australia, and also Uruguay, for their respective tobacco laws. This argument stands on [flimsy ground](#) . Even after the Philip Morris claims, more than 30 countries have tightened tobacco control laws in a host of ways, ranging from banning retail displays to plain packaging and raising the minimum legal age for smoking.

Instead of crudely singling out one industry, the drafting of treaties could be more nuanced so that safeguards are introduced without compromising basic fairness. With precise drafting, health advocates should rest assured that public health is protected and legitimate restrictions on tobacco usage and sales would not violate any treaty obligation. In short, Australian authorities and health advocates can have their cake and eat it too.

One simple tweak could have been to amend the existing [“general exceptions clause”](#); which allows governments to deviate from obligations on the grounds of such things as public morals and health. The clause allows governments to take action which is “necessary” to, for instance, human life or health. Simply changing the word “necessary” to a more permissive “related to” would provide wide leeway for governments to protect public health.

Alternatively, Australia could have followed [Singapore's recent agreement with the European Union](#) in significantly paring back the instances where a claimant can bring a claim under several notoriously investor-friendly clauses. These changes have significantly narrowed the chances of a claimant using the clauses to win a claim against a public health measure.

Australia is a world leader and model for the regulation of tobacco. [Smoking rates among adults have been steadily declining in the last 30 years and now hover around 14.5%](#) . This represents a

## Australia needs precision tools in drafting trade agreements, not a sledgehammer

Written by Bryan Mercurio, Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law, Chinese University of Hong Kong

---

### reduction of more than 50% since the 1980s

. Given its success, there is little need for Canberra to use a sledgehammer to combat tobacco and in the process undermine investor confidence.

The implications of Australia's move with Phillip Morris extend well beyond its shores. It's likely that other nations in the region could copy the move, given Singapore's role as a regulatory beacon in South-East Asia and Australia's as an anti-tobacco leader.

With the demise of the mega-regional [Trans-Pacific Partnership Agreement](#) following the [election of Donald Trump](#)

in the United States and the European Union's inability to forge an effective investment policy, countries like Australia and Singapore could potentially have more influence on the future direction on trade relations.

Singapore and Australia both ensure the rule of law is observed. The exclusion of a particular industry is problematic but unlikely to be egregiously abused. But if other countries in the region follow suit, it opens the way to rampant cronyism and corruption under the pretext of health promotion.

A corrupt official elsewhere could grab a foreign-owned business and booting it out of the country, leaving the market open for a friendly local contact. With a tobacco exclusion in place, there would be no legal recourse. This is not only unfair, but also makes a mockery of the underlying investment agreement. More importantly, it sets a precedent for authorities to ride roughshod over foreign investments.

The way forward is to draft trade pacts with greater precision, ensuring international economic agreements do not interfere with domestic public policy. Trade agreements should offer sufficient protection and fairness, even for industries many find distasteful.

*Bryan Mercurio is an Australian citizen that owns shares in tobacco companies through managed index funds. He does not directly own shares in any tobacco company. He has not received any direct or indirect funding for writing this article.*

## **Australia needs precision tools in drafting trade agreements, not a sledgehammer**

Written by Bryan Mercurio, Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law, Chinese University of Hong Kong

---

Authors: Bryan Mercurio, Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law, Chinese University of Hong Kong

**Read more** <http://theconversation.com/australia-needs-precision-tools-in-drafting-trade-agreements-not-a-sledgehammer-70417>