

# **Trade Policy Update**

**Vermont Commission on International Trade & State Sovereignty  
February 14, 2013**



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# Trade Policy Update

## 1. Introduction

- a. Trade rules that cover state law
- b. Enforcement of trade rules
- c. Agreements in effect

## 2. Recent disputes of interest

- a. Canada lost - Ontario feed-in tariff (FIT) --- GATT
- b. US lost - Clove Cigarettes --- TBT
- c. US lost - Tuna labeling --- TBT
- d. US lost - Country of origin labeling (COOL) --- TBT

## 3. Current and near-term negotiations

- a. Trans-Pacific Partnership Agreement (TPPA)
- b. International Services Agreement (ISA)
- c. Trans-Atlantic FTA
- d. US-China Bilateral Investment Treaty (BIT)

## 4. State-government interests in 2013

- a. Tobacco in the TPPA
- b. Pharmaceuticals in the TPPA
- c. Procurement

# Which agreements affect states?

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**Agreements**

**Trade Rules**

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<b>Agreements</b>	<b>Trade Rules</b>				
	<b>Goods</b>	<b>Services</b>	<b>Procurement</b>	<b>Subsidies</b>	<b>Investment</b>

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## **U.S. Trade Agreements**

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**WTO** - 157 nations

20 agreements

Trade disputes - yes

Investor disputes - no

Ongoing negotiations - yes



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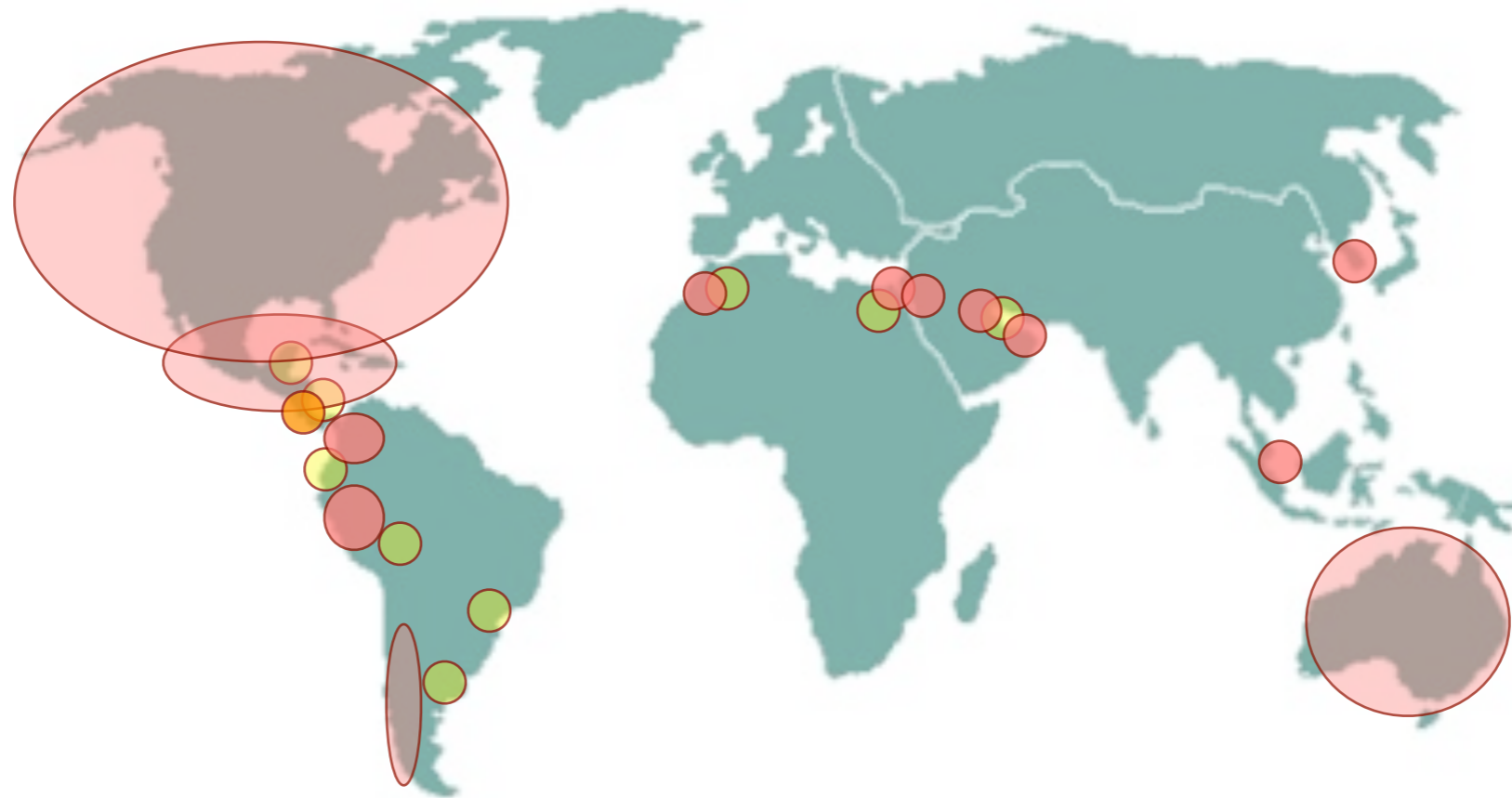
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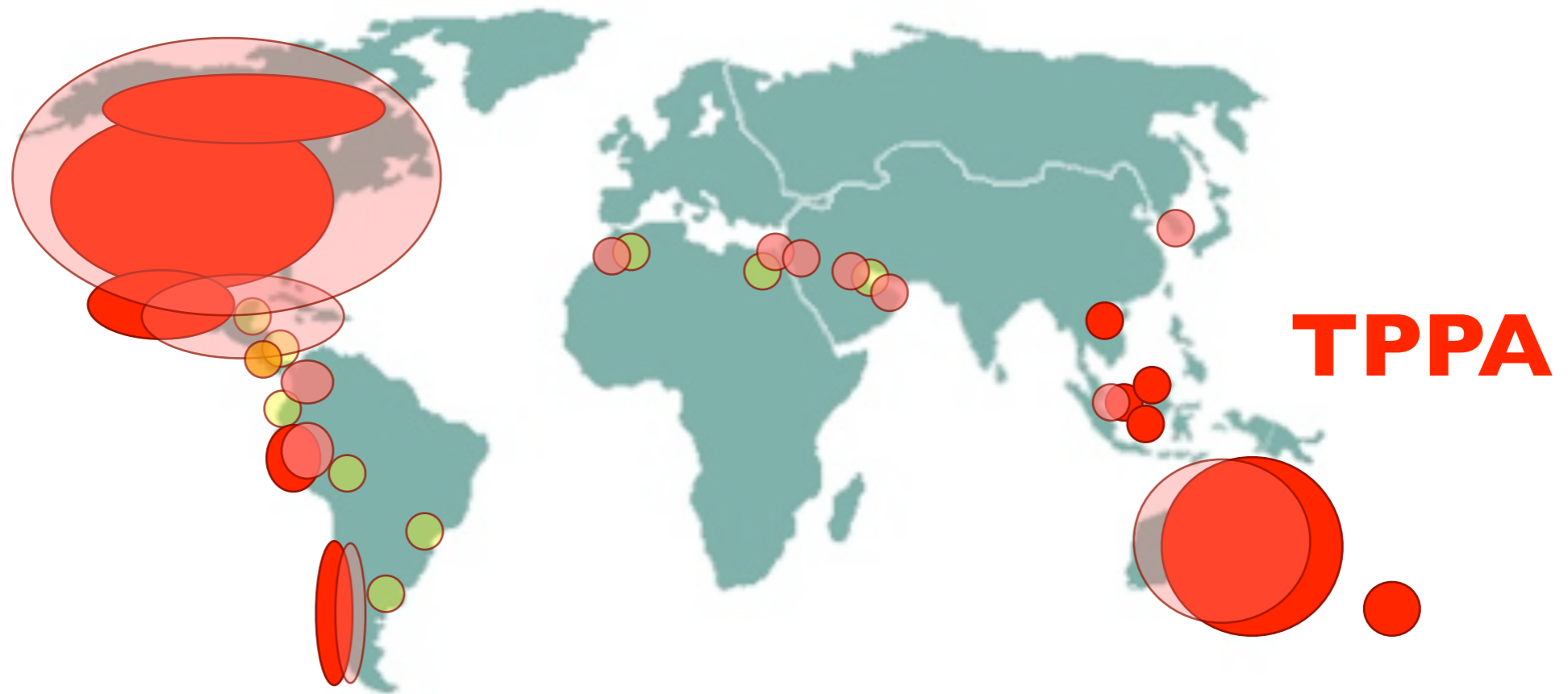
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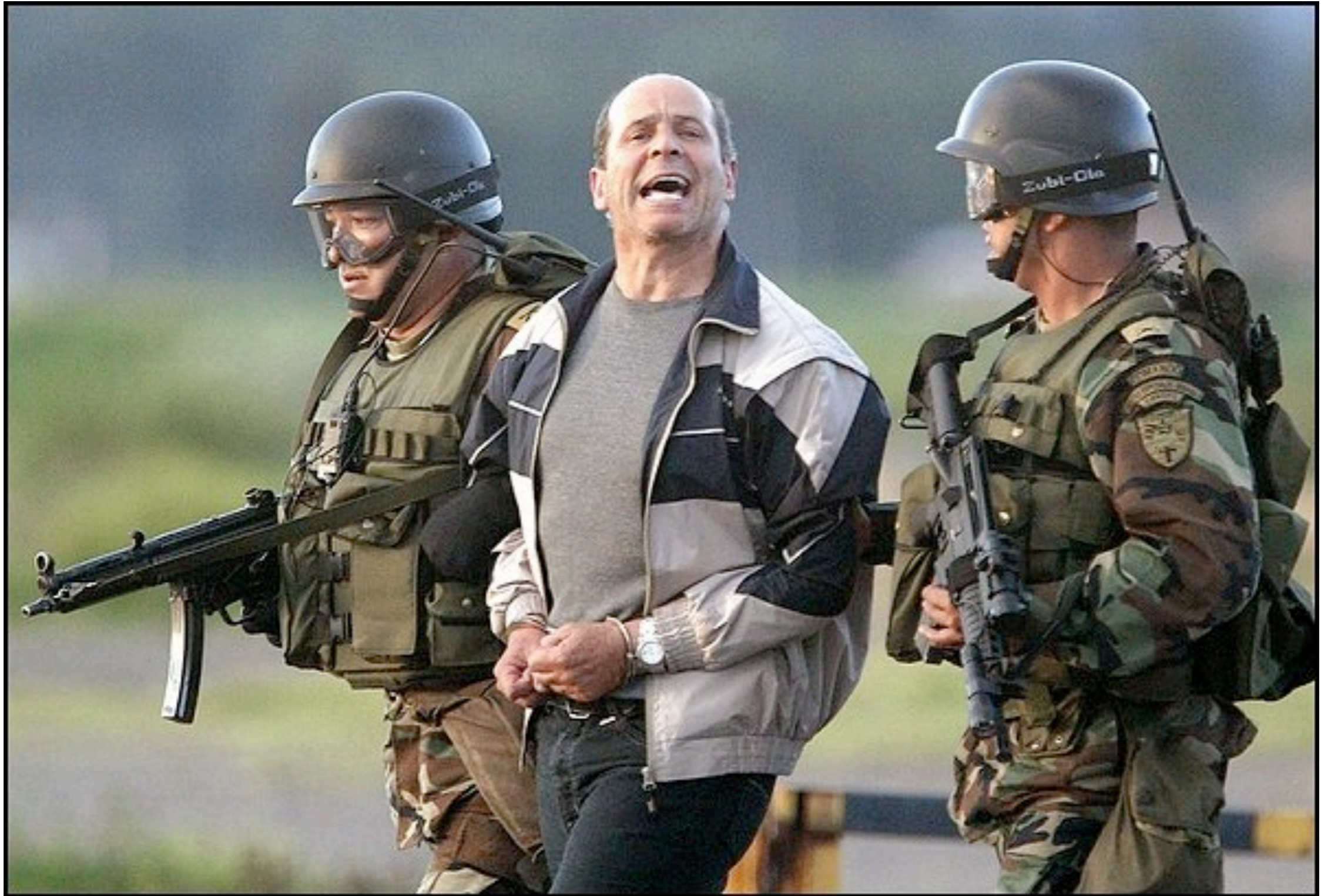
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## Enforcement of trade rules: Not this





## Enforcement of trade rules: Economic shock



**State laws that affect trade**

## Enforcement of trade rules: Economic shock

### Economic use of trade rules

- Threat of trade sanctions
- Investor compensation
- Domestic enforcement / preemption

State laws that affect trade



## Enforcement of trade rules: Economic shock

### Economic use of trade rules

- Threat of trade sanctions
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### Political use of trade rules

State laws that affect trade



# Recent Disputes

## I. **Canada lost - Ontario feed-in tariff (FIT) - GATT**

- Ontario used procurement process to support technology produced in Ontario.
- The FIT was an explicit violation of national treatment.
- GATT covers procurement when it is for goods produced for resale.
- Canada's avoidance of procurement coverage of provinces didn't matter.

# Recent Disputes

## 2. US lost - Clove Cigarettes - TBT

- Congress adopted a ban on flavorings that exempted menthol
- Indonesia failed to prove the ban was not “necessary”
- De facto violation of national treatment; no health exception
- Difficult to freeze a market or adopt incremental reform

## 3. US lost - Country of origin labeling (COOL) - TBT

- Congress adopted complex rules for meat labeling based on country of birth, raising, and slaughtering animals.
- The labeling rules created an incentive to segregate animals, which is most expensive when foreign sources are involved.
- Extensive, costly record keeping provided little information to consumers.
- De facto violation of national treatment based on practical effect of the labeling rules; no health exception.

## 4. US lost - Tuna labeling - TBT

Mexico’s fishing fleet cannot take advantage of the “Dolphin-Safe” tuna label because it sets nets on dolphins as a way to locate the tuna.

The “Dolphin-Safe” label is available to other fishing methods, even though they sometimes kill dolphins.

De facto violation of national treatment; no animal health exception.

# Current and Near-Term Negotiations

危機

## *TPPA Threat and Opportunity*

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- TPP 13 = 40%
- WTO-plus could make it a forum of choice

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*The TPPA is “A model for ...  
free-trade agreements in the future”*

Negotiations coming soon:

- International Services Agreement
- US-EU Free Trade Agreement
- US-China Bilateral Investment Agreement

# TPPA Pharmaceuticals

## **US Proposal - Reimbursements**

Market-derived prices

Recognize value of patent

Superior safety,  
efficacy, quality

Additional medical  
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Negates government's  
market power

Precludes international  
reference pricing

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No standard for setting  
value

Invites litigation

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Detached from prior  
approval based on safety  
or efficacy

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- **Medicaid?** The U.S. proposal applies to “the extent that health care authorities of a Party’s central level of government maintain procedures for listing pharmaceutical products ... for reimbursement, or for setting the amount of reimbursement for pharmaceutical products or medical devices, under health care programs operated by its central level of government.”

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- **Medicare part B:** Reimburses doctors and hospitals for pharmaceuticals used in medically necessary services

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- **Medicare part B:** Reimburses doctors and hospitals for pharmaceuticals used in medically necessary services
- **340B program:** 16,869 health facilities (2011) save states money when they purchase outpatient drugs for Medicaid participants at a discounted price.

# TPPA Pharmaceuticals

## **US Proposal - Direct Marketing**

“Each Party shall permit a pharmaceutical product manufacturer to disseminate to health professionals and consumers through the manufacturer’s Internet site ... and on other Internet sites ....”

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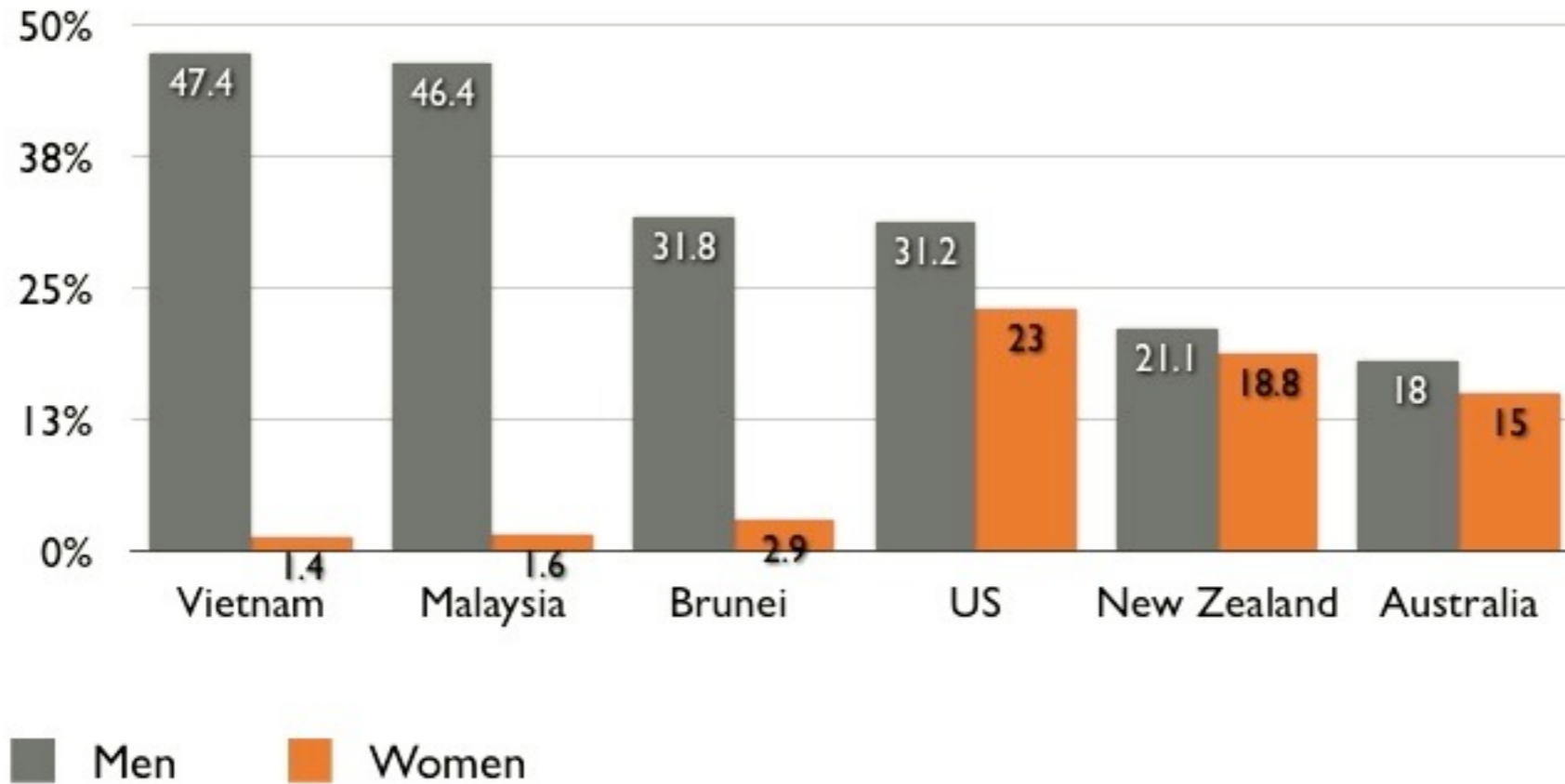
- Direct-to-consumer marketing is prohibited in some other countries.
- States are pursuing billion dollar settlements with the pharmaceutical industry for off-label marketing.
- Bills are pending in Congress that would prohibit certain kinds of direct to consumer promotion in the first three years of a drug’s time on the market.

## Oversight Questions

- **Cost to states** - Would the TPPA undermine cost-containment in Medicaid or the 340B program?
- **Are these the right pricing rules** - Cost-containment strategies are working. How does the U.S. proposal benefit the public interest?
- **Future cost-containment** - How would the U.S. proposal constrain future cost containment strategies in federal reimbursement programs?
- **Direct marketing** - Should trade policy constrain options to regulate the initial period of direct-to-consumer marketing?

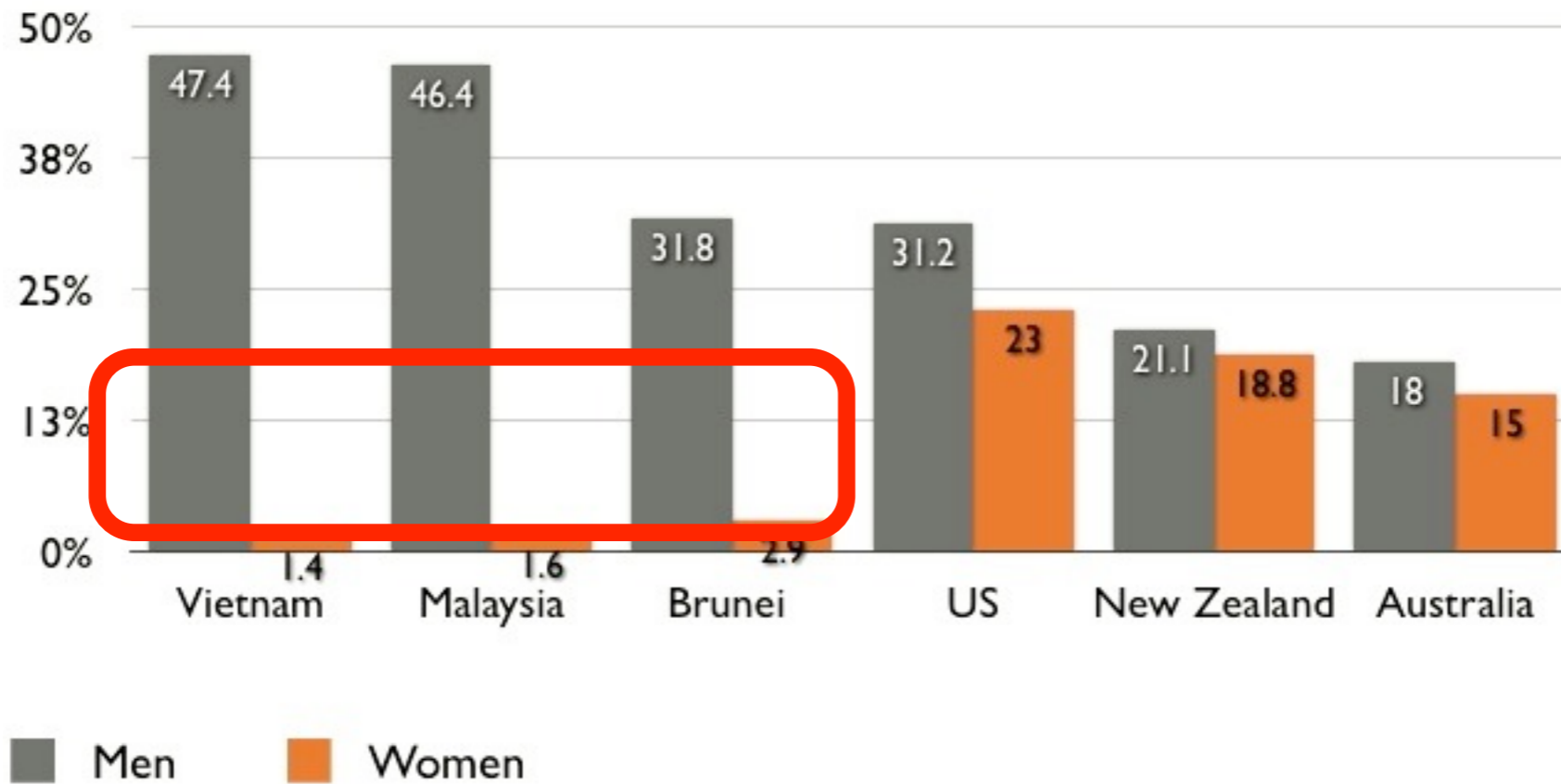
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TPPA

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FCTC measures**

**TPPA Chapters: WTO-Plus**


TPPA

# Trade promotion v. Tobacco control

## Tobacco - FCTC measures

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### Price & tax measures

6.2a. Increase consumption taxes

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**Zero tariffs**

Viet Nam has 100% applied rates

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### Regulatory coherence

Promotes industry participation in setting policy

Competing frameworks:  
Trade promotion v. Tobacco control

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**Cross-border services**

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Possible limits on domestic regulation,  
Necessity test tied to quality of service

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Competing frameworks:

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## **TPPA Chapters: WTO-Plus**

### **Investment**

#### **Investor-state dispute settlement**

#### **Foreign investor rights**

- Compensation for expropriation
- Fair & equitable treatment
- Most-favored nation treatment

# Competing frameworks: Trade promotion v. Tobacco control

## TPPA Chapters: **WTO-Plus**

### **Tobacco - FCTC measures**

	<b>Goods, tariffs, TBT</b>	<b>Intellect. property</b>	<b>Services</b>	<b>Regulatory coherence</b>	<b>Investment</b>
<b>Price &amp; tax measures</b> 6.2a. Increase consumption taxes 6.2b. Restrict duty-free sales	X			X	X
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<b>General</b> 3. Protect regulations from commercial interests				X	X



## U.S. Proposal - Treatment of Tobacco

1. Recognize tobacco as a unique product
2. Eliminate tobacco tariffs
3. Insert a tobacco exception

RON KIRK

# U.S. Proposal

... allow health authorities in TPPA governments to adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health

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| <b>1. Scope</b> | <b>2. Protection</b> | <b>3. Deference</b> | <b>4. Nexus</b> | <b>5. Additional<br/>restrictions</b> | <b>6. Objective</b> |
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**1. Scope**

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**5. Additional  
restrictions**

**6. Objective**

**Scope is not clear.**

**Existing FTA exceptions do not apply to:**

- **Investment**
- **Intellectual property**
- **New TPP chapters**

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“Health authorities” does not include:

- Customs
- Licensing (state and local)
- Taxation (state and local)
- Consumer protection (state and local)

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**“Adopt” is not the usual “adopt or enforce”**

**Appears not to cover enforcement  
of existing measures**



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**6. Objective**

**“Regulations” does not cover legislation:**

- State and local tobacco controls
- Tobacco controls in other countries
- U.S. Tobacco Control Act of 2009

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**“Origin-neutral” could be facial or de facto discrimination**

- In the clove case, the US argued for “facially” origin neutral
- Would not avoid result of cloves case

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“Science-based” is open to interpretation:

- Rational connection (“some science”)
- Preponderance of science
- What a panel finds persuasive
- Whichever ... These are more evidence than the GATT/GATS exception requires

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**1. Scope** | **2. Protection** | **3. Deference** | **4. Nexus** | **5. Additional restrictions** | **6. Objective**

**“Restrictions ...” is open to interpretation:**

- Measure that regulates a product
- Possibly not measures that regulate a service (e.g., tobacco marketing or distribution)

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TC [Not clear]	allow health authorities to adopt regulations on specific tobacco products/classes	- - -	that impose	origin-neutral, science-based restrictions	in order to safeguard public health

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<b>U.S. Proposal</b>					
[Not clear]	allow health authorities to adopt regulations on specific tobacco products/classes	- - -	that impose	origin-neutral, science-based restrictions	in order to safeguard public health
<b>Alternative elements</b>					
Nothing in this agreement	prevents a party from adopting or enforcing measures	that it considers appropriate	to	- - -	reduce tobacco use or its harms

# Exclusions





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**Full carve-out** of tobacco-control measures



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**Partial carve-out**

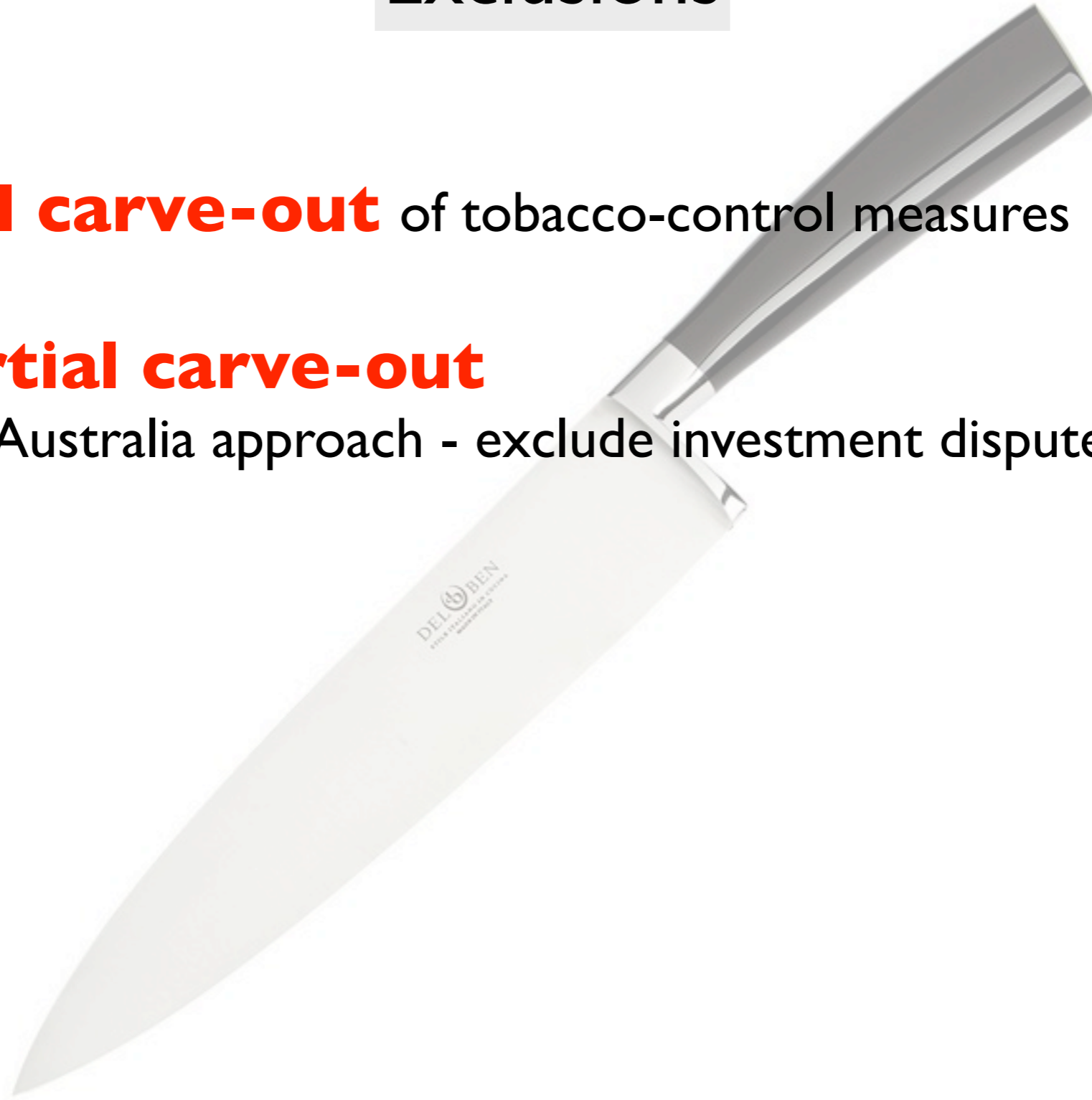


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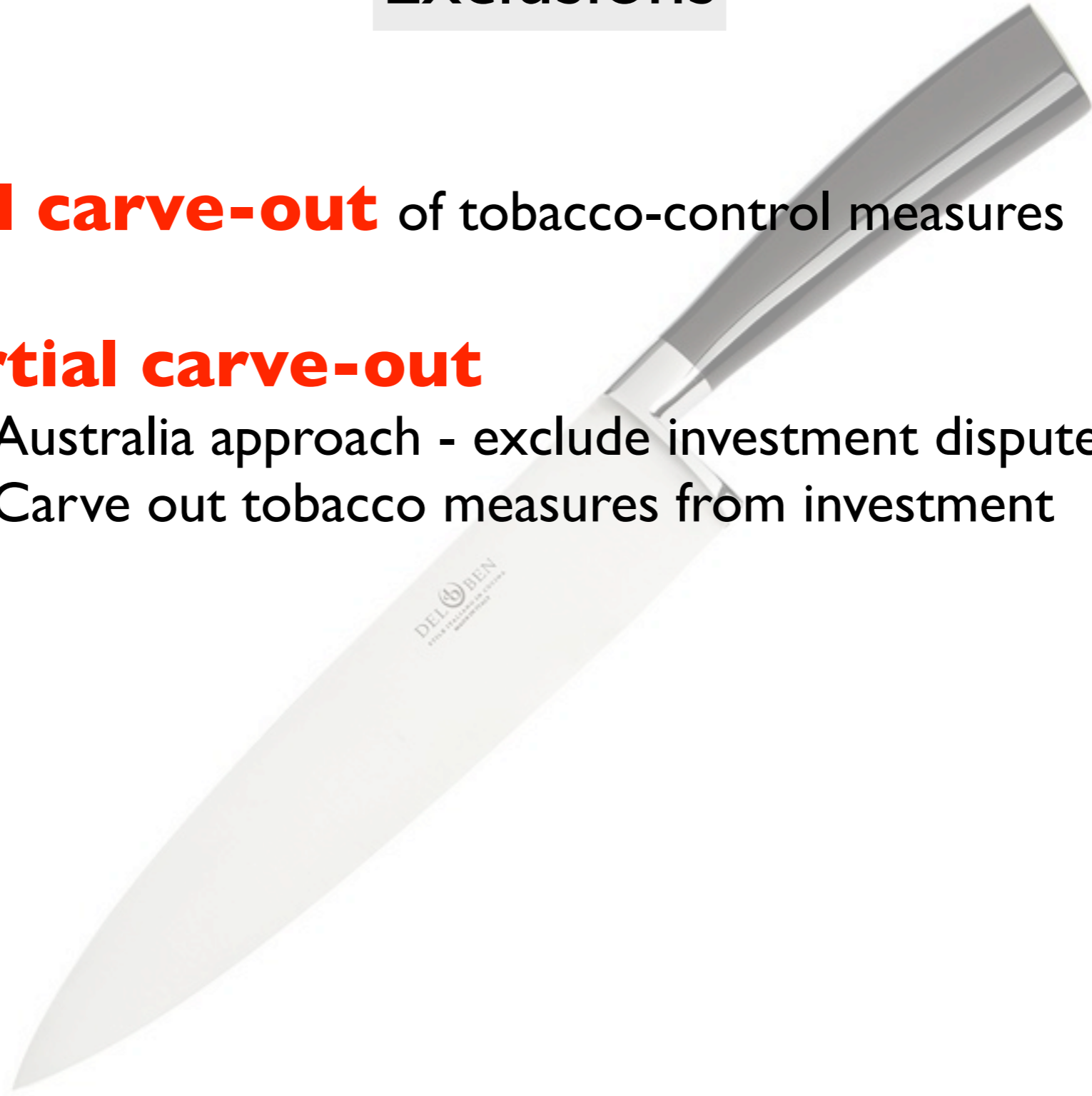


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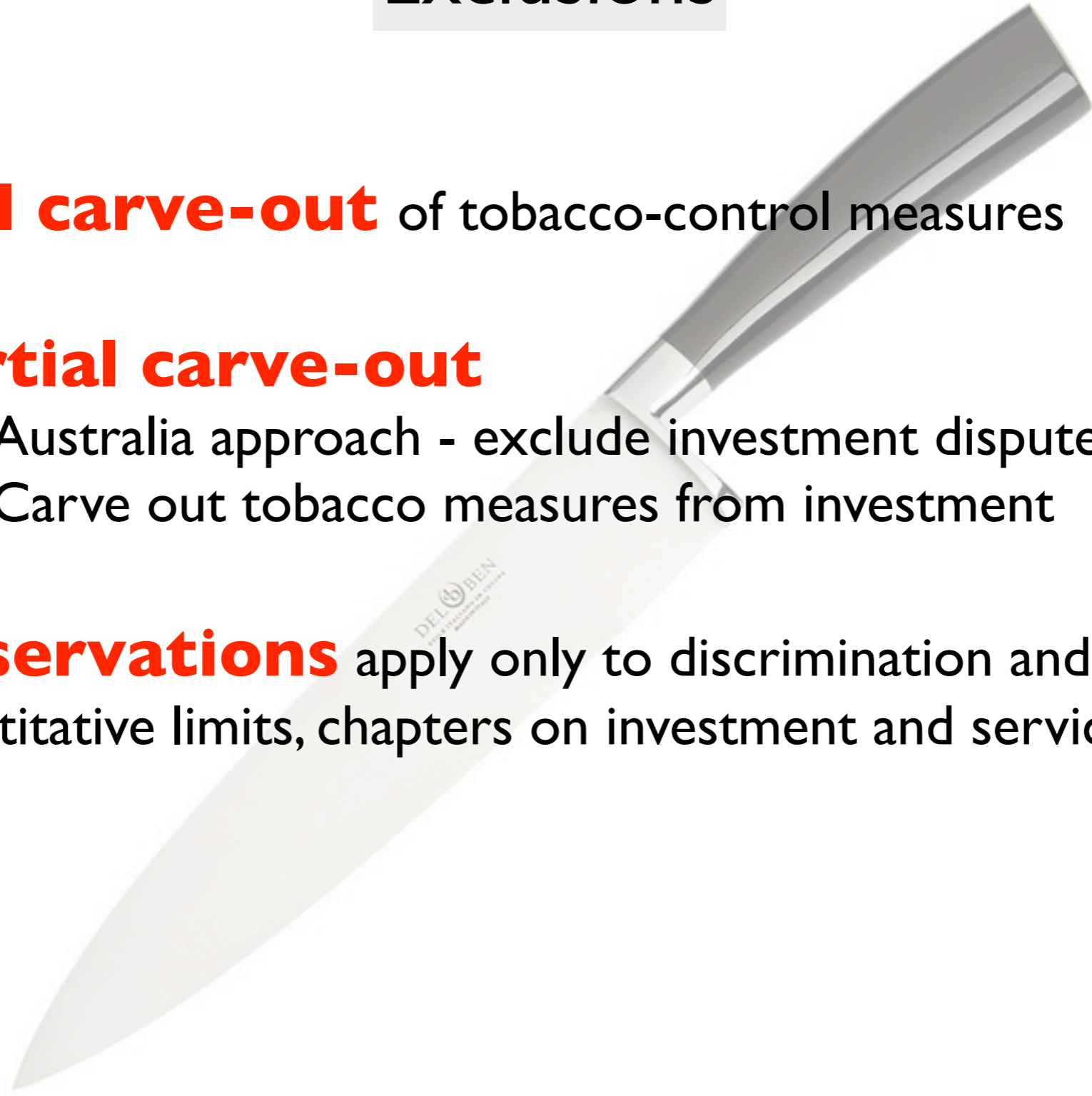
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- Tobacco advertising



## Contact information

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