

Trans-Pacific Partnership: Initial Analysis Tobacco ISDS carve-out

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On conclusion of the Trans-Pacific Partnership Agreement negotiations, the Parties announced that the treaty contained a carve-out to protect governments from investor-state dispute settlement (ISDS) challenges against tobacco control measures. With the release of the text, we can now examine how this carve-out works.

The tobacco ISDS carve-out is contained in the Exceptions & General Provisions Chapter. The carve-out is interesting as it operates in a different way to more traditional exceptions. Rather than excusing a potential breach of a treaty obligation, it allows a (government) Party to 'deny the benefits' of the ISDS provisions with respect to claims challenging tobacco control measures. A (government) Party can do this by electing to deny the ability of investors to challenge a tobacco control measure.

This election can be made in advance, or even after an investor has actually commenced an ISDS dispute. Importantly, the text clarifies that if a (government) Party elects to deny the benefits with respect to claims against tobacco control measures, any such claim must be dismissed.

The nature of the TPP tobacco control carve-out is unusual. However it does appear to be an effective mechanism to prevent challenges against tobacco control measures. If a government elects to deny access to ISDS for challenges against these measures it would seem futile for an investor to attempt such a challenge. The definition of "tobacco control measure" is broad and would cover a wide range of measures related to tobacco including Australia's tobacco plain packaging measures.



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