



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

## TPP's Tobacco Carveout Could Rock Arbitration Landscape

By **Alex Lawson**

Law360, New York (February 8, 2016, 5:45 PM ET) -- The Trans-Pacific Partnership's investment chapter includes a first-of-its-kind passage barring companies from lodging challenges against tobacco control measures, a provision that some experts say could pave the way for similar product-specific exclusions in the arbitration procedures of future U.S. trade accords.

On its face, Article 29.5 of the TPP appears to firmly close the door on any company looking to use the agreement's investor-state dispute settlement, or ISDS, system to fight tobacco control measures that hamper their investments within TPP countries.

But choosing to create ISDS exceptions on a product-specific basis, rather than rely on broad exceptions preserving a government's ability to regulate in the public interest, represents a thorny new approach for the world's trade officials, according to Cato Institute trade policy analyst Simon Lester.

"We have now set a precedent that some people think there is a problem, and the anti-tobacco folks have enough influence to get the measures they don't like carved out," Lester told Law360. "I think there is a slippery slope here and that if we have carved out tobacco, then the next round of negotiations, we're going to have to have debate about what else should be carved out."

Concerns similar to Lester's were voiced repeatedly as the TPP talks **surged toward conclusion**, but with the full text of the deal available to the public, the full strength and scope of the so-called tobacco carveout are only now becoming clear.

The deal defines a tobacco control measure as any government measure "related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labeling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements."

It is that expansive definition that gives the carveout its significant power, according to Appleton & Associates managing partner Barry Appleton.

"In light of the broad scope of what constitutes a tobacco control measure, ... I do not see any 'wiggle room' here," Appleton told Law360.

Appleton added that because the TPP allows governments to "elect" to deny investment benefits to tobacco companies, the definition of a tobacco control measure may be "self-judging," meaning that the government itself has the final call on what it considers to be within the scope of the exception.

Whether the definition is self-judging is still an open question, according to Lester, who said that it may fall to an investment arbitration panel to determine what is and is not subject to the carveout — potentially adding another layer of litigation for any company brave enough to test the provision.

But even setting aside the strength of the carveout itself, Lester said that ISDS challenges from tobacco companies were already a rarity and that the provision emerged only after a fierce political fight from the anti-tobacco lobby.

Fears about the ISDS system's threat to tobacco controls have popped up only in the last few years as Philip Morris International has waged war against an Australian law that called for all tobacco products to be given plain labels stripped of all trademarks.

The company has challenged the rules through many avenues, including through the Australia-Hong Kong free trade agreement, but last month, it **came up short** on jurisdictional grounds.

"I don't like going down that road, product-by-product," said Lester, who doubted that PMI would even prevail in its fight against the Australian law before the case was decided. "I don't know that there's enough justification to say that this particular product is so evil that we need special rules for it."

Beyond the piecemeal approach to investment arbitration exceptions, Appleton flagged another prong of the tobacco carveout that could pose systemic threats to the system down the road: the ability of governments to shut down an investment challenge on a retroactive basis.

Though the provision appears focused on stopping arbitration cases before they start, Appleton pointed out that governments may also deny ISDS benefits to an investor that has already brought its claim or even secured a preliminary decision.

"You could have a situation where a claimant commences a claim for expropriation, has it heard at a hearing and the tribunal makes a draft order," he said. "The government, seeing that it is going to lose, could then invoke Article 29.5. This would retroactively deny the benefits of the TPP to the investor based entirely on the discretion of the respondent state."

Appleton went even further by expressing fear that the exception could mark a sea change in the overall trajectory of investment agreements, as the TPP has long been touted as the standard for regional trade deals.

"There were probably better and easier ways to address the tobacco control issue by ways of a general exception or a sectoral reservation," he said. "My concern is that this wording appears to erode longstanding international law values espoused by the United States in international treaties and in international fora."

--Editing by Christine Chun.

---

All Content © 2003-2016, Portfolio Media, Inc.