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**Preliminary analysis:
Why a Tobacco ‘exception’ from ISDS won’t sufficiently
protect tobacco control measures**

The total carveout of measures related to tobacco control proposed by Malaysia is the only way to ensure that policies are truly protected from challenge under the Trans-Pacific Partnership Agreement (TPPA).

It is possible that an alternative might be proposed that would provide an exception from the investor-state dispute settlement section of the investment chapter in the TPPA. There are four principal reasons why this would fail to protect a country’s strategy to combat the tobacco epidemic, although there are bound to be many further issues.

1. The exclusion could be defined minimally and subject to tight conditions

(i) How effective this exception is will depend, firstly, on its scope. There are various options. It could refer to *tobacco* (only the product), *tobacco policy* (anti-smoking policies, but only that specifically apply to tobacco), *tobacco control measures* (the legal provisions adopted for public health reasons), *measures relating tobacco control* (broader catchment), *public health measures relating to smoking or tobacco* (specifies the objective), *production, advertising, distribution, sale and marketing of tobacco products* (the more specific the wording, the more likely the industry will find loopholes).

(ii) That wording may also be subject to conditions. The most likely approach would follow the general exception provision, which will provide a problematic defence that can be argued against alleged breaches of the rules in various of the TPPA chapters. The US has currently not agreed that the general exception will cover the investment chapter. This typically requires the measure to be non-discriminatory, and subject it to a ‘necessity test’ that requires it to be evidence-based (which can be contested and the government has to prove the basis for the measure) and least trade restrictive (meaning there is not a less burdensome approach that could have been taken to achieve the policy objective).

(iii) There could also be a qualifying sentence that effectively neutralises the exception. For example, a provision in the leaked investment chapter says:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any [tobacco ...] measure *that is otherwise consistent with this chapter*.

This wording is circular. It basically means the government is allowed to take a tobacco control measure that is not in breach of the rules, and which it would therefore be allowed to take anyway.

2. Tobacco control policies would still be subject to substantive rules in other chapters

A number of other chapters will impose rules that restrict tobacco control policies. Those chapters include, at least, goods (eg tariffs or import controls), intellectual property (eg protection of brand names, colours, design etc), technical barriers to trade (eg labelling requirements), cross-border services, which includes locally established foreign firms (eg advertising, retail displays). In many chapters of the TPPA, these rules will go beyond existing WTO and FTA obligations.

These rules would be enforceable by other TPPA governments, some of which have tobacco industries, including state owned. Those cases would run parallel and additional to any brought under the World Trade Organization (WTO), with burdensome legal costs for each. Australia currently faces a prolonged dispute from Ukraine, Honduras, Dominican Republic, Indonesia and Cuba alleging breaches of the TRIPS and Technical Barriers to Trade agreements.¹ A successful defence at the WTO would not guarantee the same outcome under the TPPA, given its expected WTO+ and FTA+ rules.

Tobacco companies have a history of providing funding and other support for these cases. For example, the Australian government has complained that the tobacco companies are backing the WTO disputes by providing legal advice to Ukraine, and Honduras.²

The typical general exception from the WTO that, based on past US FTAs seems likely to be imported into the TPPA, covers measures ‘necessary to protect health’. That is inadequate as a defence for several reasons. The most important is that ‘necessary’ means that measures will be challenged as not being evidence-based, a common argument made by the tobacco industry, or one of the least restrictive options available to achieve the public health objective.

As with the WTO, a successful challenge would require the government to reverse the measure or face trade sanctions for non-compliance (rather than financial compensation, as in the case of an investor-state dispute).

3. Tobacco control policies would still be subject to procedural rules that increase tobacco company leverage

The novel chapters on Transparency and Regulatory Coherence are designed to give commercial interests more access to and influence over policy-making processes. These are supplemented by process requirements and subject-specific transparency obligations in a number of the other chapters.

Cumulatively, these rules will require greater disclosure of documentation, opportunities for the tobacco lobby to submit reports and demand explanations for why they are not adopted, opportunities for reviews of decisions they do not like, requirements to explain

¹ DS 434, 435, 441, 458, 467,

http://wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject: Tobacco

² <http://www.reuters.com/article/2012/05/22/trade-tobacco-idUSL5E8GMHBW20120522>

positions to committees of TPP governments, etc. Breaches of these obligations are breaches of the agreement.

At least some of these obligations are likely to be subject to the state-state dispute settlement process under the TPPA, and form part of a dispute that includes the substantive rules in para 2 above. There are also likely to be mechanisms for review and consultation within various chapters that allow other TPPA parties to pressure governments over tobacco-control policies.

The tobacco industry has also been very effective in using such opportunities in Australia. It has used official responses, submissions, regulatory impact analyses, official information act documents, and even ministers' speeches as evidence for its later legal challenges under the investment agreement and by governments in the WTO. There will be many more opportunities to generate and collate this information under the TPPA.

4. Governments could still bring cases alleging breach of the investment chapter, even if investors could not.

The investment chapter itself is, of course, WTO+ because there is no investment protection in the WTO.

Governments that are Parties to the TPPA can still enforce the investment chapter against a country that adopts tobacco control measures that they, or the tobacco companies, believe breach the rules, or want to use such claims to pressure the government not to proceed with planned laws. That would be an additional ground for dispute to those discussed above.

The problems with the general exception for health are even greater for the investment chapter. The US has historically refused to allow that exception to apply to investment. It is understood that some TPPA parties are suggesting it should apply, but the US has resisted. Others are suggesting it should apply to some investment rules, but not the investor protections that are most likely to be relied on in an investment dispute that involve direct and indirect expropriation and so-called 'fair and equitable treatment'. The US is reportedly considering some form of exception, but given the history of USFTAs that seems likely to be even weaker.

As with the WTO, if the challenge succeeds the government would need to reverse the measure or face trade sanctions for non-compliance, rather than financial compensation.

Parties that have a local tobacco industry are most likely to bring a dispute. That would include additional countries that signed on to a TPPA in the future.

All the points made in Paragraph 2 above apply here.