



**Submission to the Senate Foreign Affairs, Defence and
Trade Legislation Committee Inquiry into the Korea-
Australia Free Trade Agreement June 16, 2014**

Contact: Dr Patricia Randal
Convenor, Australian Fair Trade and Investment Network
128 Chalmers St, Surry Hills, NSW, 2010
Email: campaign@aftinet.org.au

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee Inquiry into the Korea Free Trade Agreement (KAFTA).

AFTINET is a network of 60 community organisations which advocates for fair trade based on human rights, labour rights and environmental sustainability.

The terms of reference of the Inquiry are:

1. That the proposed Korea-Australia Free Trade Agreement be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report, with particular reference to the impact of the agreement on Australia's economy and trade, investment, social, cultural and environmental policies.
2. That in conducting the inquiry the committee shall:
 - a. review the agreement to ensure it is in Australia's national interest, and
 - b. have regard to the report of the Joint Standing Committee on Treaties on the proposed agreement.

This submission deals with the following aspects of the KAFTA

- the impact of the inclusion of investor rights to sue governments over domestic legislation (investor state dispute settlement provisions or ISDS) and why claimed "safeguards" will not work
- copyright provisions which require changes to Australian law, including nullification of a High Court decision
- the lack of enforceable labour rights and environmental standards
- the impact of movement of people provisions
- the employment impact in Australia of tariff changes
- the claims of economic benefits from the CIE econometric study
- the limited nature of the National Interest Analysis

Summary

Investor Rights to sue Governments (ISDS)

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to sue governments for damages in an international tribunal if they can claim that domestic legislation has 'harmed' their investment. ISDS has developed as an international system of investment law based on principles which do not exist in most domestic legal systems, and are not available to domestic investors. ISDS also lacks the basic protections of domestic legal systems. There is no independent judiciary, since arbitrators can also be advocates. The proceedings are not public, and there is no system of precedents or appeals, so decisions can be inconsistent. Legal costs range between \$8 million and \$30 million per case, and damages against governments have ranged up to \$1.8 billion. There have been examples of the threat of ISDS exerting a "freezing" effect on governments, preventing them from enacting public interest legislation regulation of tobacco advertising.

Popular resistance, critical literature and resistance from governments to ISDS has grown over the last decade as transnational investors have lodged and won more cases and been awarded huge damages over health and environmental legislation. There is widespread public concern about the tobacco companies' use of ISDS to undermine national public health measures to regulate tobacco advertising. Governments in significant economies in Europe, South America, Africa, the Indian sub-continent and Asia have reviewed and/or renounced ISDS on the grounds that it undermines legitimate democratic legislation. The Howard Government did not include ISDS in the Australia-US FTA in 2004. The Productivity Commission rejected it in 2010.

Claimed "safeguard" proposals in more recent versions of ISDS and in the KAFTA have not prevented governments from being sued over environmental legislation, including regulation of mining projects. Korean companies are significant investors in the Australian coal and gas mining industries. Rural communities have successfully campaigned for improved state government environmental regulation of coal seam gas mining and more such regulation may be required in future. The inclusion of ISDS in KAFTA means that state governments may be sued, or threatened with legal action from Korean investors over future environmental regulation.

The Australian government should not include ISDS in KAFTA or any other trade or investment agreements.

Copyright Law

The National Impact Assessment shows that the KAFTA implementing legislation will require changes to the *Copyright Act 1968* which will provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement of copyright by their subscribers. This will nullify the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd*, which found that ISPs are not liable for authorising the infringements of subscribers.

The introduction of legislation to nullify a High Court decision which would have the effect of greatly strengthening copyright law in favour of copyright holders is an issue of great public interest, not only to Internet service providers as an industry sector, but also to consumers. Such a proposal should be fully debated and rigorously scrutinised by the democratic parliamentary process, not presented as a done deal in legislation to implement a trade agreement.

Labour Rights

Trade agreements should include commitments by governments to implement agreed international labour rights which should be enforced by the government-to-government disputes process of the agreement. The KAFTA labour chapter has relatively low standards and weak commitments, and they are not enforceable through the government-to-government dispute process which applies to other chapters in the agreement. It is not acceptable for preferential trade access to be given to Korean products without enforceable guarantees that there will be no unfair advantage through the violation of labour rights.

Environmental Standards

Trade agreements should include commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement. The KAFTA environment chapter has

relatively low standards and weak commitments, and they are not enforceable through the government-to-government dispute process which applies to other chapters in the agreement. It is not acceptable for preferential trade access to be given to Korean products without enforceable guarantees that there will be no unfair advantage through the violation of environmental standards.

Temporary movement of people

The Australian government has not required in KAFTA that there will be labour market testing for any categories of temporary workers from Korea in Australia.

This means that Korean temporary contractors will be able to work in Australia without local labour market testing to see if there are available local employees. This could contribute to local unemployment. In contrast, Korea's commitments on temporary movement of people retain the right for labour market testing for entry of some categories of temporary workers.

Economic modelling underestimates unemployment impacts

The CIE report uses general equilibrium models which are based on assumptions which the Productivity Commission has concluded generally overestimate the economic gains from trade liberalisation and underestimate the losses, including unemployment. The overall predicted increase in GDP after 15 years is extremely small, with an increase of \$650 million or 0.04% in 2030.

The modelling assumes away the impacts on the vehicle industry of the implementation of zero tariffs from 2015, two years before the predicted closure of the industry, which will accelerate job losses and allow less time for retaining and other transition programmes. Even with these favourable assumptions, the economic modelling predicts employment losses in textiles, clothing and footwear, wood and paper products, chemicals, rubber and plastics, metal products, motor vehicles, transport equipment, electronic equipment, and other machinery and equipment and manufacturing.

National Interest Assessment counts only estimated gains, not losses

The National Interest Assessment does not weigh the estimated very small gain of 0.04% in GDP after 15 years against any of the losses which will be experienced as a result of the agreement, either in employment losses or in other losses. These include possible regulatory risks and costs to government arising from ISDS, possible unfair competition from goods produced without enforceable labour rights for workers and without enforceable environmental standards, increased costs to business and consumers resulting from copyright changes, and losses to government revenue. Overall, these losses mean that the KAFTA is not in Australia's national interest.

1. Why ISDS should not be included in the Korea Australia free trade agreement and why claimed “safeguards” will not work

Brief history of ISDS and concerns about the growth in numbers of cases

Investment protection provisions in trade and investment agreements were originally intended to protect property and assets from nationalisation or expropriation by governments in former colonies after they achieved independence. However the development of ISDS has expanded in scope to protect the investor not only from nationalisation, but from the risk of a range of what were perceived as arbitrary actions by the host government. These included, but were not confined to, the expropriation of assets. They also included the concept of “indirect expropriation” through domestic laws or policies which “impaired” the investment. It is worth noting that the concept of “Indirect expropriation” is unique to international investment arbitration, and not recognised in most national legal systems, including Australia and the US. ISDS binds the host government to these expanded obligations, and enables the investor to seek monetary compensation through legally binding arbitration by an international tribunal, made up of experts in investment law.

The last 20 years have seen an explosion in known numbers of ISDS cases lodged each year, from less than five in 1993 to 57 in 2013. The cumulative number of known cases from 1993 to the end of 2013 is 568. The United Nations Committee on Trade and Development (UNCTAD) estimates that the total figure is probably much higher, because proceedings are not public, there are several different tribunal systems and no single system of recording of cases (UNCTAD 2014:7).

UNCTAD reports that, of the total 568 cases since 1993, ISDS actions have been initiated most frequently by investors from the United States (127 cases or 22% of all known disputes), the Netherlands (61 cases), the United Kingdom (43 cases) and Germany (39 cases). The three investment instruments most frequently used as a basis for ISDS have been the NAFTA (51 cases), the European Energy Charter Treaty (42 cases), and the Argentina-United States bilateral investment treaty (17 cases). There are a very small number of cases from investors from developing countries (12 in 2014). ISDS cases are most frequently lodged against developing country governments (57%) Another 16% were lodged against economies in transition to market economies, mostly in Eastern Europe. 27% were lodged against industrialised economies (UNCTAD 2014: 7).

UNCTAD reports that, of 244 known concluded cases, 43% were decided in favour of the state and 31% in favour of the investor, with 26% of the cases settled (UNCTAD, 2014, 10). Although the terms of settlement typically remain secret, settlement generally requires the state to offer some concession and/or payment to the investor as the complainant. For example, the Canadian Government settled a case brought by the US Ethyl Corporation over the banning of petroleum additives for health reasons by paying US\$13 million, and agreed to reverse the ban as part of the settlement (Public Citizen, 2014). Even if only half of such settlements involved a concession or payment to the investor (a conservative estimate), this would mean that at least 44% of cases involved some payment or concession to the investor, which is a greater percentage than the 43% won by the state.

The ISDS legal framework and its critics

Most ISDS disputes are concerned with “indirect” expropriation which involves “the effective loss of management, use or control or a significant depreciation of the value of the assets of a foreign investor” (UNCTAD 2000:11).

ISDS tribunals focus on the effect of the regulation on the investor, in terms of its economic impact and duration. Tribunals have also taken into account the “legitimate expectations” of the investor, whether the investor has received “fair and equitable treatment” in the development of the regulation, and whether the stated purpose of the regulation is proportional to the negative effect felt by the investor. Recently tribunals have increasingly focused not only on whether the substance of the regulation constituted indirect expropriation, but on procedural issues like the investor’s expectations about the regulatory environment, and whether the investor received fair and equitable treatment in consultation about and the process of development of the regulation (UNCTAD 2013:12-18). If these procedural issues are taken to the extreme, they can amount to an argument that any change in the regulatory environment which the investor perceives to be harmful could be compensable.

The definition of the scope of government regulatory powers and the difficulty of distinguishing regulation which could be compensable is problematic. Disputes have involved measures like health warnings on cigarette packaging, the use of dangerous chemicals, and regulation of mining projects in environmentally sensitive areas or on indigenous land. There is a growing body of academic and broader public opinion which argues that ISDS places unreasonable restrictions on the right of governments to regulate for legitimate health, environmental or other social policy objectives and thus erodes democratic process and national sovereignty (Capling and Nossal 2006, Schneidermann 2008, Tienhaara 2009, Gallagher 2010, van Harten 2012). More recently the conservative US Cato Institute has opposed the inclusion of ISDS in trade agreements (Cato Institute 2014).

Over fifty cases have been filed under NAFTA, mainly by US-based investors. There have been a series of cases involving health and environmental regulation which have been won by investors. For example, the Canadian Government settled a case brought by the US Ethyl Corporation over the banning of petroleum additives for health reasons by paying US\$13 million, and agreed to reverse the ban as part of the settlement. The US SD Myers Corporation received US\$5.6 million because of a ban on the transport and export of hazardous wastes (PCBs) harmful to the environment and human health. The US Metalclad company won US\$16.2 million in damages from a Mexican municipal government because it refused a permit for a toxic waste disposal site for environmental reasons (Public Citizen 2014:11, 22).

In ongoing cases, the US Eli Lilly pharmaceutical company has recently claimed US\$481 million damages against the Canadian Government because of a Canadian court refusal to grant a medicine patent on the grounds of lack of evidence of medical effectiveness compared with existing medicines. The US Lone Pine resources company is claiming US\$250 million damages against the Canadian Québec provincial government for a moratorium on the issue of a shale gas mining licence pending an environmental review (Public Citizen, 2014:21).

A 2009 survey of ISDS cases found 33 cases involving claims of more than US\$1 billion, the highest being a claim for US\$50 billion, and more than 100 additional cases where claims were between \$100 and \$900 million (Productivity Commission 2010:272). The largest damages claim awarded to date is US\$1.8 billion against Ecuador in 2012 (UNCTAD 2013:1-3). Damages awards of this size are harmful to the budget of any government, but have a more devastating effect on smaller developing countries where they are a sizeable proportion of government expenditure, and can be equivalent to the health or education budget. Legal and arbitration fees are additional and can amount to millions of dollars even if a government wins the case. An OECD survey found in 2012 that costs were an average of US \$8 million per case, with some cases costing up to US \$30 million. Arbitration fees are

usually split between the parties, with parties paying their own legal fees (Gaukrodger and Gordon, 2012:19).

The impact of these cases has led to an effect described as “regulatory chill”. This is a situation in which governments are made aware of the threat and costs of both protracted litigation and damages, and are discouraged from legitimate regulation because of these threats. For example, Canada withdrew a proposal for tobacco plain packaging regulation following the threat of ISDS arbitration under NAFTA (Productivity Commission 2010:271). There is no single investment institution which deals with ISDS disputes. The most commonly used tribunal systems are the ICSID tribunals of the World Bank, and the UNCITRAL tribunals of the United Nations. ISDS clauses in investment and trade agreements may specify one or another of these tribunals, or allow the parties to choose. The tribunals are made up of recognised experts in investment law, one chosen by the investor, one by the government and one mutually agreed.

Critics have identified a series of problems with ISDS processes compared with most national legal processes.

Firstly, they lack transparency and public accountability compared with national legal processes. The proceedings are not public, and even the results of proceedings can remain secret. Until the time of writing, there has been little public information about UNCITRAL disputes. Proposals for increased transparency recently agreed by UNCITRAL will only apply to ISDS arrangements agreed after April 1, 2014¹. Even aspects of these new provisions will only apply if both parties agree, and they can only apply to agreements before April 1, 2014 if both parties agree.

If it is instructive to note that a side letter to KAFTA refers to the forthcoming UNCITRAL transparency arrangements. However, the side letter states that both parties will **not** be bound by requirements for increased transparency. This may be an indicator of the extent to which not only governments, but future investor parties in disputes may be unwilling to agree to the transparency provisions (KAFTA 2014, side letter on UNCITRAL transparency rules. 1).

ICSID as part of the World Bank group has a website which lists disputes, and on which tribunal results and awards can be published, but only if the parties agree that they can be made public. This lack of transparency contrasts with most national legal proceedings, where proceedings themselves are public and records of proceedings and outcomes are publicly available (Productivity Commission: 273).

Secondly, the arbitrators lack the independence of judges in national legal systems, who cannot also be advocates. The same individual can be an ISDS advocate one month and an arbitrator the next. Empirical studies of the composition of arbitration panels show that the majority are investment law experts from Western Europe and North America, many of whom have been and remain practising advocates on behalf of investors. Both advocates and arbitrators are paid fees at the highest levels of the legal profession. A study of 450 cases found that 15 top ranking arbitrators who were also advocates handled 247 or 55% of these cases (Eberhardt and Olivet 2012:36-38).

Critics argue that arbitrators are not independent and that ISDS litigation has become a global industry with its own momentum, dominated by large specialised firms which produce their own journals and newsletters, and promote their services by approaching and advising investors of possible cases. They also actively advocate for the expansion of ISDS and argue against critics (Appleton 2007, Uribe 2013).

¹ See UNICTRAL, 2014.

Commercial third party funding of cases has also contributed to the momentum of the arbitration industry and the escalation of even larger claims. Commercial third party funding of ISDS cases is described in an OECD publication as “a new industry composed of institutional investors who invest in litigation by providing finance in return for a stake in a legal claim.” This has expanded rapidly over the last decade. The expansion of third-party funding of ISDS cases has occurred despite the fact that third party funding is controversial in many national legal jurisdictions. This is because lack of transparency about the identity of the funders can result in escalation of litigation and possible conflicts of interest if funding firms have links with parties in cases they fund. The same publication reported that, in 2008, eight out of ten top London law firms involved in arbitration were using commercial third party funders, and a number of such funding firms were listed on stock exchanges. Legal claims were considered to represent diversification of investment risk compared with cyclical trends in stock and bonds (Gaukrodger and Gordon, 2012:36-37).

Thirdly, decisions are only binding on the parties involved in the dispute. Tribunals do not have to consider decisions of previous tribunals and there is no appeal system to ensure consistency. The ICSID provides very limited grounds of annulment of awards, but only one case has been made public and this was lost (UNCTAD, 2014: 32). There have been cases where panels have reached very different conclusions based on similar facts (Productivity Commission: 273, UNCTAD 2013:26).

In summary, ISDS has developed as a supra-national legal system with its own institutions, funding, history and culture, which has been constructed under the influence of transnational investors and lacks the independence of national legal systems. ISDS has expanded the scope of disputes from compensation for expropriation of property to a range of disputes which include public interest legislation on health, environment and other matters. ISDS disputes have not only contested legislation, but also national court decisions. ISDS exposes governments to the risk of expensive litigation and huge potential damages in a secretive process without the legal safeguards of transparency, an independent judiciary, precedent setting, appeals processes and consistency of decision-making.

Juan Fernandez-Armesto, an arbitrator from Spain has observed:

“When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all. Three private individuals are entrusted with the power to review, without any restrictions or appeal procedure, all actions of the government, all decisions of the courts and all laws and regulations emanating from Parliament.” (Eberhardt and Olivet 2012:34)

Critical opposition to ISDS and the responses from national governments

The growth of critical studies of ISDS, opposition from social movements and the experience of governments in ISDS tribunals have led a number of governments to review, criticise and in some cases, renounce participation in ISDS processes. These include Brazil, Argentina and eight other Latin American countries, South Africa, India, Indonesia and Australia. France and Germany have also recently opposed the inclusion of ISDS in the Trans-Atlantic Trade and Investment Partnership between the EU and the US.

Brazil was an early critic of ISDS. Brazilian Governments signed 14 bilateral investment treaties between 1994 and 1999. However, case studies from NAFTA and the collapse of the OECD Multilateral Agreement on Investment prompted a lively civil society debate on ISDS from 1998, in the context of Brazil’s emergence from a period of military dictatorship. This debate influenced the Brazilian Parliament, which refused to ratify ISDS provisions on

the grounds that ISDS would restrain the state in its ability to pursue public policy (Filho 2007).

Other Latin American governments have been influenced by their experience of ISDS, as the number of cases and the scale of damages claimed escalated over the past decade. Argentina faced disputes when it terminated privatisation contracts with water companies which had not met the terms of contracts to supply water, and when the state took other measures to address its currency crisis after 2000 (UNCTAD 2013:4). The Philip Morris tobacco company used ISDS to sue Uruguay over legislation for health warnings on tobacco packaging (O'Malley 2010, Davison 2010). Other governments faced disputes from mining companies, which contested national court decisions which held them responsible for environmental pollution and/or damage to human health, under the ISDS provisions in the Central American Free Trade Agreement, and bilateral agreements. The US Chevron company used ISDS to counter sue for damages against Ecuador because a national court ordered Chevron to pay damages for environmental pollution and disease caused by its oil operations in the Amazon region. The US Renco company sued the Peruvian Government after a national court decision that it should remediate pollution caused by a lead mine. Canadian company Pacific Rim Cayman claimed damages of \$US200 million against El Salvador for refusing to issue a mining licence on environmental grounds (Public Citizen 2014).

These experiences prompted a Ministerial meeting of 12 countries in Ecuador in April 2013, which produced a declaration on Latin American states affected by transnational interests². This declared that:

“The recent events in various countries of Latin America, concerning disputes between states and transnational corporations, have shown that there are still cases where judgements violate international law and the sovereignty of the state, as well as legal institutions, due to the economic power of certain companies and deficiencies of the international system of dispute settlement on investment, facts that must be evaluated in depth by states in intergovernmental forums establish for this purpose.” (Declaration of the first Ministerial Meeting of Latin American States affected by transnational interests, 2013)

A further meeting in October 2013 agreed to establish a regional centre as an alternative to ICSID and UNICTRAL, with an international monitor to provide oversight of cases and ensure fair mediation (Biron 2013, Uribe 2013).

In 2009-10 South Africa conducted a review of its first-generation bilateral investment treaties signed after 1994. The review found that the treaties extended too far into the policy sphere, were skewed towards investors and did not contain the necessary safeguards to preserve flexibility in a number of critical policy areas. This allowed challenges to regulatory changes which the government considered to be in the public interest. The South African Department of Trade and Industry recommended restructuring of the treaties to ensure they were “harmonious with the country’s broader social and economic priorities”. The government decided it would refrain from entering into any new investment treaties and would review all first generation treaties as they approach their expiry date, “with a view to termination, and possible renegotiation on the basis of a new Model Bilateral Investment Treaty to be developed.” (Carim 2013)

² Bolivia, Cuba, Ecuador, Nicaragua, Dominican Republic, St Vincent & Grenadine, and Venezuela, signed the Declaration, and Argentina, Guatemala, El Salvador, Honduras, and Mexico were also present at the meeting. Argentina joined the agreement at the subsequent October meeting.

The Indian Government in January 2013 ordered a freeze of all Bilateral Investment Protection Agreements (BIPA) negotiations till a review of the model text is carried out and completed (Mehdudia, 2013).

The Indonesian Government announced in March 2014 that it would give notice to withdraw from all of its 67 bilateral investment treaties containing ISDS provisions (Bland and Donnan, 2014).

The inclusion of ISDS in negotiations for the Trans-Atlantic Trade and Investment Partnership Agreement between the US and the EU has prompted fierce public debate, resulting in a European Commission decision to pause the negotiations to allow for further public consultation about ISDS. The French Government has raised objections to ISDS. The German government has announced it will oppose to the inclusion of ISDS in the agreement, partly based on its experience of being sued by a Swedish energy company over its policy of phasing out nuclear energy (Donnan and Wagstyl, 2014, European Parliamentary Research Service, 2014)

The review and/or withdrawal of governments from ISDS agreements has prompted critical studies by a number of intergovernmental institutions including the UNCTAD, the OECD, and the European Parliament (UNCTAD 2013a and 2013b, Gaukrodger and Gordon, 2012, European Parliamentary Library Service, 2014).

The President of the World Health Organisation has also criticised the use of ISDS as a carefully planned strategy by tobacco companies to overturn democratically decided legal regulation of tobacco, passed by governments in response to the World Health Organisation Convention on Tobacco Control (Chan, 2012). The tobacco company strategy is examined as a case study in Appendix 1 to this submission.

Australian Policy: The Howard Government excluded ISDS from Australia-US FTA in 2004

The Australian Liberal-National Coalition Government negotiated a free trade agreement with the US in 2004. The US sought to change a range of Australian health and social policies based on the agenda pursued in NAFTA and in other US bilateral agreements. Targets included the wholesale price controls on medicines through the Pharmaceutical Benefits Scheme, Australian content laws for audio-visual services, labelling of genetically engineered food and the Foreign Investment Review Board. These were all seen by the US as barriers to trade (Zoellick 2002). The US also wanted an ISDS clause in the agreement. The Australia-US Free Trade Agreement prompted the biggest critical public debate held in Australia about a trade agreement (Ranald 2010, Capling 2004, Weiss et al 2004).

ISDS was a major topic in the debate. Critics used examples from NAFTA to argue that it would be a dangerous weakening of governments' ability to regulate for social and environmental goals (Australian Broadcasting Commission 2003, Henry 2003). The outcome of this debate was that ISDS was not included in the final agreement, making it the only bilateral US agreement which does not include ISDS.

Productivity Commission rejected ISDS in 2010

The debate about ISDS was re-ignited in 2010 when, at the request of the then Australian Labor Party Government, the Productivity Commission produced a report on Australia's bilateral and regional trade agreements which included a review of ISDS. The report found no evidence that ISDS resulted in greater inflows of foreign direct investment, no evidence of

market failure resulting from political risk to foreign investors, and no evidence that regulation is systematically biased against foreign investors (Productivity Commission 2010:269-70). The report concluded that “experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions” (Productivity Commission 2010:274).

The Productivity Commission review coincided with the commencement of the Trans-Pacific Partnership Agreement negotiations between the US, Australia and other Pacific Rim countries, in which the US was advocating the inclusion of ISDS. Submissions from legal experts and civil society organisations advocated against ISDS being included in the TPPA.

Australian Government Policy against ISDS 2011-13

A 2011 Government review of Australia’s trade policy rejected ISDS, stating:

“The government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses”. (Emerson 2011:20)

The Government was also influenced by the experience of the Philip Morris tobacco company using ISDS in an obscure Australia, Hong Kong investment Treaty to sue the government for compensation over its plain packaging legislation, despite the Australian High Court decision that they were not entitled to compensation under Australian law. Many commentators view this as an attempt to undermine Australia’s parliamentary and court system, and it has increased public opposition to ISDS.

See the case study of tobacco company use of ISDS against tobacco regulation contained in Appendix 1.

The ALP Government implemented its policy against ISDS in trade negotiations in 2012-13. The Malaysia-Australia Free Trade Agreement completed in 2012 did not contain ISDS. Leaked documents in the TPPA negotiation in 2012 showed that the Australian government had opposed the application of ISDS to Australia in the TPPA negotiations (Department of Foreign Affairs and Trade 2102, TPPA 2012).

Current Government Policy

This policy changed with the election of the Coalition Liberal-National Party Government in September 2013. The new government announced it would negotiate ISDS “on a case-by-case basis”. It had previously described the ALP policy as too inflexible and as having the effect of delaying completion of free trade agreements, especially in relation to the Korea-Australia Free Trade Agreement, and the TPPA (Condon 2013).

The Coalition Government is supporting the inclusion of ISDS in the Korea-Australia Free Trade Agreement, with claimed “safeguards”. It also announced that it is prepared to agree to ISDS in the TPPA in return for increased market access for Australian agricultural products to US and Japanese markets. However it has not included ISDS in the Japan-Australia FTA. (Department of Foreign Affairs and Trade, 2013, Kehoe, 2013).

Why ISDS ‘safeguards’ in KAFTA will not work

The Coalition Government has defended the inclusion of ISDS in KAFTA by claiming that more recent versions of ISDS, have clauses which aim to safeguard health, environmental and public welfare policies. It claims that these 'safeguards' have been included in the KAFTA.

The first "safeguard" sentence in the KAFTA reads: "except in rare circumstances non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations" (KAFTA, 2014: Chapter 11, annex 2B). Many legal experts have pointed out that the phrase "except in rare circumstances" leaves a very big loophole, which recent cases in other agreements with this clause have used to advantage (Public Citizen, 2010).

The second "safeguard" is a more limited definition of "fair and equitable treatment" for foreign investors (KAFTA, 2014, chapter 11, clause 11.5.2 and Annex 2A). However case studies show that tribunals have ignored these limitations and applied the previous higher standard (Public Citizen, 2012a)

These clauses are identical to those contained in the Central American Free Trade Agreement and the US-Peru Free Trade Agreement. However case studies show that clauses in these agreements have not deterred investors from suing over environmental regulation. Examples include the Pacific Rim mining company case against El Salvador environmental regulation of mining and the Renco mining company case against a Peru court decision which required the company to deal with pollution from its lead mine (Public Citizen, 2010, 2014).

A third "safeguard" is a reference to the general protections for "human, animal or plant life" in article XX of the WTO General agreement on Tariffs and Trade (KAFTA, 2014, Article 22.1). This article has only been successful in one out of 35 cases in the WTO which have attempted to use it to safeguard health and environmental legislation (Public Citizen, 2012b).

Summary on ISDS

ISDS gives special rights to foreign investors to sue government in an international tribunal if they can claim that domestic legislation has harmed their investment. ISDS has developed as an international system of investment law based on principles which do not exist in most domestic legal systems, and are not available to domestic investors. ISDS also lacks the basic protections of domestic legal systems. There is no independent judiciary, since arbitrators can also be advocates. The proceedings are not public, and there is no system of precedents or appeals, so decisions can be inconsistent. Legal costs range between \$8 million and \$30 million per case, and damages against governments range up to \$1.8 billion. There have been examples of the threat of ISDS exerting a "freezing" effect on governments, preventing them from enacting public interest legislation like tobacco advertising regulation.

Popular resistance, critical literature and resistance from governments to ISDS has grown as transnational investors have lodged and won more cases and been awarded huge damages over health and environmental legislation. There is widespread public concern about the tobacco companies' use of ISDS to undermine national public health measures to regulate tobacco advertising. Governments in significant economies in Europe, South America, Africa the Indian sub-continent and the Asia-Pacific have criticised and/or renounced ISDS on the grounds that it undermines legitimate democratic legislation. The Howard Government did not include ISDS in the Australia-US FTA in 2004. The Productivity Commission rejected it in 2010.

Claimed “safeguard” proposals in more recent versions of ISDS have not prevented governments from being sued over environmental legislation, including regulation of mining projects. Korean companies are significant investors in the Australian coal and gas mining industries. Rural communities have successfully campaigned for improved state government environmental regulation of coal seam gas mining and more such regulation may be required in future. The inclusion of ISDS in KAFTA means that state governments may be sued, or threatened with legal action from Korean investors.

The Australian government should not include ISDS in KAFTA or any other trade or investment agreements.

2. Copyright Law Changes in KAFTA to nullify High Court decision

The National Impact Assessment shows that the KAFTA implementing legislation will require changes to the *Copyright Act 1968* which will provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement of copyright by their subscribers. This will nullify the High Court’s decision in *Roadshow Films Pty Ltd v iiNet Ltd*, which found that ISPs are not liable for authorising the infringements of subscribers.

This is based on KAFTA Chapter 13, Article 9.28, requiring parties to ‘provide measures to curtail repeated copyright and related rights infringement on the Internet’. This is a more stringent requirement than the AUSFTA Chapter 17, Article 29a) requirement to provide for ‘incentives for service providers to cooperate with copyright owners in deterring unauthorised storage/transmission of copyrighted materials.’

The introduction of legislation to nullify a High Court decision which would have the effect of greatly strengthening copyright law in favour of copyright holders is an issue of great public interest, not only to Internet service providers as an industry sector, but also to consumers. Such a proposal should be fully debated and rigorously scrutinised by the democratic parliamentary process.

Instead, this proposed amendment to copyright legislation is being presented to Parliament as a done deal negotiated in a trade agreement, perhaps in the hope that it will escape public scrutiny.

We urge the Committee to reject this proposal and to ensure that any legislation to strengthen copyright law in favour of copyright holders is subjected to full public and parliamentary debate.

3. Labour Rights

AFTINET believes that trade agreements should include commitments by governments to implement agreed international labour rights, based on International Labour Organisation (ILO) conventions. These include:

- the right of workers to freedom of association and the effective right to collective bargaining (ILO conventions 87 and 98),
- the elimination of all forms of forced or compulsory labour (ILO conventions 29 and 105),
- the effective abolition of child labour (ILO conventions 138 and 182), and

- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111).

Governments should also commit to establishing and maintaining local labour laws consistent with these rights (minimum wages, hours of work, overtime, Occupational Health and Safety regulation). Governments should commit to implement, and not reduce these rights, which should be enforceable through the government-to-government dispute processes of the trade agreement, with trade penalties to apply if breaches are proven.

The KAFTA labour chapter has relatively low standards and weak commitments, and they are not enforceable through the government-to-government dispute process which applies to other chapters in the agreement.

The Chapter does not refer directly to ILO Conventions, referring only to the ILO *Declaration on Fundamental Principles and Rights at Work*. There is no commitment to adopt or maintain these, but instead a statement that parties “shall endeavour” to do so (Ch17, Article 1, 1a-d). On enforcement of national labour laws, the chapter includes a commitment to not fail to enforce labour laws (Ch17, Article 1, 3a) but it requires a sustained or recurring course of action/inaction.

On the commitment not to weaken current labour law, the text only reads ‘shall endeavour’ (Chapter 17, Article 1.4), which is not legally binding.

Even if there is a sustained breach of these commitments, there is no enforceability of any of these commitments through the government-to-government dispute process. Instead, there is consultation through contact points (Ch17, Article 4.1) and establishment of ad hoc committee if further discussion required (Ch17, Article.4. 2), but no access to the dispute settlement process.

The final clause reads:

“Neither Party shall have recourse to dispute settlement under this Agreement for any matter arising under this Chapter” (Chapter 17, Article 6).

This makes clear that there is a double standard in the agreement which gives foreign investors additional right to sue governments, but has no provisions to enforce labour rights based on ILO conventions through the government-to-government dispute process.

There have been several complaints under the OECD guidelines on multinational enterprises against Korean companies’ attempts to reduce workers’ rights (UNI Global Union, 2011).

The weak commitments and lack of enforcement mean that the KAFTA provides no incentive for companies to change this behaviour. Australia is giving preferential trade access to Korean products without enforceable guarantees that the other party will not gain an unfair advantage through the violation of labour rights.

4. Environmental Standards

AFTINET believes that that trade agreements should include commitments by governments to implement internationally agreed UN Multilateral Environment Agreements, and to maintain and not reduce local environment laws consistent with such agreements. These

commitments should be enforceable through the government-to-government dispute processes of the agreement, with trade penalties to apply if breaches are proven.

Like the labour chapter, the environment chapter has relatively weak commitments on environmental standards, and they are not enforceable through the government to government dispute processes of the agreement.

Each government is only committed to “endeavour to ensure” that “its laws, regulations and policies provide for and encourage high levels of environmental protection and shall endeavour to continue to improve its respective levels of environmental protection,” Chapter 18, Article 1.

No specific multilateral environment agreements are mentioned. Governments are only required to “seek means to enhance the mutual supportiveness of multilateral environmental agreements and international trade agreements,” (Chapter 18, Article 2).

On enforcement of national environment laws, the chapter includes a commitment to not fail to enforce environment laws (Chapter 18, Article 3.1.) but it requires a sustained or recurring course of action/inaction.

The commitment not to weaken current environment law only reads ‘shall endeavour’ (Chapter18, Article1.2)

Even if there is a sustained breach of these commitments, there is no enforceability of any of these commitments through the government-to-government dispute process. Instead, there is consultation through contact points (Chapter 18, Article 6.1) and establishment of ad hoc committee if further discussion required (Chapter18, Articles 6.2 and 7), but no access to the dispute settlement process.

As with the Labour Chapter, the final clause reads:

“Neither Party shall have recourse to dispute settlement under this Agreement for any matter arising under this Chapter” (Chapter18, Article 9),

This makes clear that there is a double standard in the agreement, which gives foreign investors additional right to sue governments, but has no provisions to enforce environmental laws based on agreed UN multilateral agreements through a government-to-government dispute process.

Australia is giving preferential trade access to Korean products without enforceable guarantees that the other party will not gain an unfair advantage through the violation of environmental standards.

5. Impact of Temporary Movement of people provisions

The Australian government has made commitments in Chapter 10, movement of natural persons, without any requirement that there will be labour market testing (economic needs test) for any categories of temporary workers from Korea in Australia. (KAFTA, Chapter 10)

This includes contractual service suppliers, many of whom come to Australia under the current visa 457 provisions (KAFTA Chapter 10, Annex 10a, Articles10-11). There has been in the past labour market testing for categories of workers under visa 457 provisions, to require employers to test if there are local workers available before bringing in temporary overseas workers.

This means Korean temporary contractors will be able to work in Australia without local labour market testing to see if there are available local employees. This could contribute to local unemployment.

The Korean government shows a marked difference from Australia in this area Korea's commitments on temporary movement of people in chapter 10 retain the right for labour market testing for professionals (KAFTA Chapter 10, Annex 10b Article 10).

6. The limitations of the CIE study of growth and employment impacts from KAFTA

The claimed economic benefits from KAFTA summarised in the National Interest Assessment rest entirely on the study entitled CIE report "Australia Korea free trade agreement: implications for Australia" which was prepared for the Department of Foreign Affairs and Trade by the Centre for International Economics (CIE), dated February 27 2014 (CIE 2014).

The report was prepared after the announcement of the conclusion of the KAFTA negotiations by the government in December 2013. It was not released publicly until March 3, 2014 after a formal request by the Senate (Cormann, 2014).

The report analyses what the KAFTA would mean for Australia's GDP, exports and employment.

The report uses general equilibrium models which are based on assumptions which generally overestimate the economic gains from trade liberalisation and underestimate the losses (Productivity Commission, 2010).

The overall predicted increase in GDP over the 15 years to 2030 is extremely small, with an increase of \$650 million or 0.04% in 2030 (CIE, 2014:13).

The KAFTA was negotiated in the context of Australia's major automobile manufacturers announcing that they would cease operations by 2017, with the loss of tens of thousands of direct and indirect jobs. Tariff reductions from 2015 could accelerate this timetable and lead to higher numbers of redundancies with shorter timeframes for retraining and transition into other employment, leading to more severe long term unemployment impacts.

However, the CIE study appears to ignore this short term impact. The modelling measures differences in GDP, exports and employment as a result of the KAFTA comparing the baseline of 2015 with projected impacts in 2030.

This means the modelling assumes that the demise of manufacturing will take place in 2015 (i.e. two years prior to the actual date) and concludes that 'reduced Australian tariffs on motor vehicles under the FTA with Korea are unlikely to have any significant incremental effect on the Australian car manufacturing sector' (CIE 2014: 8).

Even with these favourable assumptions, the economic modelling predicts employment losses by 2030 in textiles, clothing and footwear, wood and paper products, chemicals, rubber and plastics, metal products, motor vehicles, transport equipment, electronic equipment, and other machinery and equipment and manufacturing (CIE, 2014:23).

7. The limitations of the KAFTA National Interest Analysis (NIA)

The NIA study consists of a summary, the Regulation Impact Study and summaries of the KAFTA chapters. The six-page NIA summary at the beginning of the document is based on evidence from the CIE study, and only provides information about the impact of the agreement on improved market access in agriculture, goods and services (DFAT 2014 b).

The overall NIA interpretation of the CIE economic modelling is very generous, if not slightly misleading, through the use of aggregated raw figures, without comparing them to Australia's GDP. It is claimed that the KAFTA will provide \$5 billion in additional national income in the 15 years between 2015 and 2030. In fact, this is \$333 million per year, which is a tiny 0.02% of GDP, half the estimate of \$650 million or 0.04% of GDP after 2030.

This demonstrates that the overall gain for the Australian economy before and after 15 years is extremely small. This is consistent with the findings of the 2010 Productivity Commission *Inquiry into Bilateral and Regional trade agreements* which found that the economic gains for Australia predicted by similar economic modelling were "overly optimistic." It also found that the actual economic benefits were in fact "modest" and that these had not been assessed and compared with losses from extension of intellectual property rights in patents and copyright and potential risks and losses to government policy and revenue from ISDS (Productivity Commission, 2010: xxxv, xxxvi).

The main estimated gains in the NIA are in agriculture, but these are also selective and in some cases spread over long periods. For example, beef tariffs are eliminated over 15 years, and some dairy tariffs over 20 years. A number of agricultural products are excluded altogether, including rice, milk powder, honey, abalone, ginger, apples, pears and walnuts, because of potential employment impacts.

Australian tariffs are already lower on average than Korean tariffs. Many Australian tariffs will be reduced to zero from the time of implementation of the agreement, which is estimated to be late 2014.

In summary, the reductions on Korean agricultural products started at much higher levels, and will be reduced over much longer periods of time, but not to zero. Many Korean products have been exempted because possible of negative employment impacts. In contrast, Australian tariffs are reduced to zero immediately.

The Australian government approach appears to pay far less attention to employment impacts than does the Korean government.

The Regulation Impact Statement which is attached to the National Interest Assessment concedes that the KAFTA will have negative impacts in many areas of Australian manufacturing, adding to pressures from the relatively high Australian dollar and other costs:

"Australia's tariff reductions on automotive and steel products will increase competitive pressure in the domestic market "and

"Other manufacturing sectors, such as the plastics, chemicals, textiles, clothing and footwear industries, will also possibly face increased competition from Korean imports following the elimination of Australian tariffs."

(DFAT 2014b Regulation Impact statement: 13-14.)

Losses to Government revenue from tariff cuts

The NIA records that Treasury modelling has estimated that the loss of tariff revenue to the Australian Government resulting from KAFTA, based on current levels of trade, will be approximately \$100 million in 2014-15 and \$635.9 million over the four-year forward estimates period. This estimate assumes that KAFTA will enter into force in the second half of 2014. The estimates do not take into account additional lost tariff revenue if Korean imports displace imports from other countries, so revenue losses could be greater.

Given claims of a budget crisis, it is surprising that there is no concern expressed about these large and immediate revenue losses. The statement simply asserts that economic growth resulting from KAFTA could result in increased taxation revenue without any further evidence. This is in fact unlikely, since, as discussed above, the economic growth estimates are extremely low, at 0.04% of GDP after 15 years.

Summary of the NIA

In summary, the NIA does not weigh the estimated very small gains in GDP after 15 years against any of the losses which will be experienced as a result of the agreement, either in employment losses or in other losses. These include possible regulatory risks and costs to government arising from ISDS, possible unfair competition from goods produced without enforceable labour rights for workers and without enforceable environmental standards, increased costs to business and consumers resulting from copyright changes, and losses to government revenue.

Appendix 1

Case study: Tobacco company use of ISDS as a strategy to oppose the regulation of tobacco advertising

The previous Australian Government policy of opposition to ISDS was strongly influenced by the debate over regulation of tobacco advertising. This began when the Philip Morris International tobacco company lodged an ISDS dispute in the World Bank ICSID investment tribunal in February 2010 against the Government of Uruguay.

This dispute claimed damages for the regulation requiring prominent health warnings on tobacco packaging (the step before plain packaging) which was based on the recommendations of the World Health Organisation (WHO) Framework Convention on Tobacco Control. The Convention was the result of years of campaigning by public health groups which had convinced national health ministers to support it in the WHO. The campaigns and national policies were based on the overwhelming medical evidence of the deadly effects of tobacco use, evidence which had long been denied by the tobacco companies. Many governments have ratified the Convention (WHO, 2011, Chan, 2012).

However, like all UN agreements, the Convention has no external enforcement mechanism beyond naming and shaming, and can only be enforced legally through the passage of domestic legislation. This contrasts with trade and investment agreements, which have supranational government-to-government dispute processes which are enforced by trade sanctions, and in the examples discussed above, can also have legally binding ISDS dispute processes.

This discrepancy between the legal enforceability of UN Conventions and the enforceability of trade and investment agreements has been used effectively by tobacco companies to develop strategies to undermine the implementation of the Convention. They have used bilateral, regional and WTO agreements to take legal action against Uruguay, Norway, Turkey and against Australia, which is discussed further below (Voon and Mitchell *et al.*, 2012). The World Health Organisation Director General, Margaret Chan, commented on these cases in a speech to the 15th World Conference on Tobacco and Health in 2102:

“Tactics aimed at undermining anti-tobacco campaigns, and subverting the Framework Convention, are no longer covert or cloaked by an image of corporate social responsibility. They are out in the open and they are extremely aggressive.

“The high-profile legal actions targeting Uruguay, Norway, Australia, and Turkey are deliberately designed to instil fear in countries wishing to introduce similarly tough tobacco control measures”. (Chan 2012)

Philip Morris International is a US-based company, but the US did not have an investment agreement with Uruguay, to enable the use of ISDS. The company shifted some investment to Switzerland, and claimed that the measures violated the terms of the Switzerland-Uruguay bilateral investment treaty by reducing the value of its investment through impeding the display of its trademark. The case received media publicity in Australia (O’Malley 2010, Davison 2010).

The case was seen as part of the tobacco industry strategy to secure expansion of its markets into developing countries, and to counter reduced market size in industrialised countries caused by tobacco control measures taken as a result of the Convention. Uruguay, a small developing country, had a gross domestic product which was less than the net annual revenue of Philip Morris International, and was targeted as an example to discourage

other developing countries. The Uruguayan Government initially acknowledged that it lacked the resources to fight the case. It would have had to withdraw the legislation and settle the case if the charitable foundation of the departing Mayor of New York, Michael R. Bloomberg, had not assisted with funding legal costs (Tavernese, 2013).

Shortly after the Uruguay legal action, Philip Morris International made a submission to the US Trade Representative, advocating strongly for ISDS to be included in the TPPA (Philip Morris International 2010).

The ALP Government also responded to these actions specifically in its policy:

“The government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products”. (Emerson 2011:20)

In April 2011, the government announced it would introduce legislation for the mandatory plain packaging of all tobacco products. The scheme prescribed that packaging must be a plain dark colour, must contain graphic health warnings and that no trademarks, except the business or company name, could appear on the packaging. As with Uruguay, the legislation implemented Australia’s international obligations as a party to the World Health Organisation Framework Convention on Tobacco Control (WHO 2011).

The legislation was also based on Australian research that showed that tobacco control measures, including restrictions on advertising, developed in Australia over the last 30 years, had been successful in reducing numbers of smokers to 18% of the population. However, tobacco smoking continued to kill more than 15,000 Australians per year, at a social cost of \$31.5 billion per year. Research showed that most new smokers were young people, many under the age of 18. Research showed that brands and logos displayed on packaging were associated with glamorous images which attracted young people to become smokers (Parliament of the Commonwealth of Australia 2011).

The legislation was strongly supported by public health groups, all medical professional groups and consumer health organisations. As the first such legislation of its kind, it was also seen as setting a precedent that other governments could follow (Australian Health Care and Hospitals Association 2011, Cancer Council 2011a).

The tobacco industry, aware of the international impacts of such a precedent, immediately commenced a \$20 million public campaign against the legislation, which included paid television advertisements and a public relations campaign with carefully placed opinion pieces in the media. The main argument used was the threat of legal action for damages for loss of intellectual property rights in brand names and trademarks on packaging, which would cost taxpayers millions if not billions of dollars. The industry threatened a constitutional case in Australian courts, an intellectual property dispute in the WTO, and the use of ISDS through other trade agreements (ABC Radio National 2011, Institute of Public Affairs 2011).

Despite the tobacco industry campaign, public opinion polls showed majority support (59%) for the legislation (Cancer Council 2011a). After some hesitation, the Liberal-National Opposition parties, influenced by public opinion, announced that they would support the legislation in principle (Thompson 2011). Encouraged by public support, the Government proceeded with the legislation, which was passed by the Australian Parliament in December 2011. The passage of the legislation received global news coverage, and several other governments announced they would consider similar legislation (ABC, 2011).

The tobacco companies then implemented their strategy to mount national and international legal challenges to the legislation.

A group of tobacco companies led by British American Tobacco lodged a constitutional challenge in the Australian High Court, which is the highest court in the Australian legal system (High Court of Australia 2012).

Philip Morris International rearranged its assets to become a Hong Kong-based investor in Australia and lodged a dispute in a UNICITRAL tribunal, under the terms of a 1993 Hong Kong-Australia investment agreement (Voon and Mitchell 2011).

The WTO dispute system allows only government-to-government disputes. The Governments of the Ukraine and Honduras were joined by the Dominican Republic and others in lodging a dispute in the WTO that the Australian government's plain packaging legislation was a violation of the WTO Trade-Related Intellectual Property Rights Agreement, because it prevented tobacco companies from using their trade marks. The governments are receiving funding and advice for this dispute from tobacco companies, and Philip Morris International referred to its support for this dispute as part of its legal strategy (Philip Morris, 2012). This case is ongoing at the time of writing.

The tobacco companies' challenge to the legislation in the Australian High Court was argued on the grounds that the legislation violated section 51 (xxxi) of the Australian Constitution, which empowers the Parliament to make laws with respect to "the acquisition of property on just terms". The companies argued that the legislation was an acquisition of their intellectual property rights in trademarks without just compensation. The High Court announced its majority (6-1) decision on August 15, 2012, which found that the government's legislation did not violate the Constitutional provisions for the acquisition of property on just terms on various grounds, including that the legislation was a legitimate public health measure. The Court also awarded costs against the tobacco companies (High Court of Australia 2012).

On the day of the High Court decision, Philip Morris announced that it would proceed with the Hong Kong ISDS case, stating that the High Court decision had no bearing on the ISDS jurisdiction and the case was expected to take 2 to 3 years (Philip Morris Ltd 2012).

Philip Morris International described itself as a US-based company when it made a submission in 2010 to the US Trade Representative supporting an ISDS process in the TPPA. However, it claimed to be a Swiss-based company when it used an ISDS process to sue the Uruguayan Government for damages under Uruguay-Swiss investment agreement. Philip Morris also claimed to be a Hong Kong company, because Philip Morris Asia, incorporated in Hong Kong, invested in Australia by becoming the sole shareholder of Philip Morris Australia on February 23, 2011, almost a year after the Australian government announced its intention to legislate for plain packaging of tobacco products (Voon and Mitchell 2011:22).

It would therefore be difficult for the company to maintain that at the time of its investment in Australia, it had a legitimate expectation that plain packaging would not be introduced. On the contrary, it appears that the investment of Philip Morris Asia in Australia was part of a forum-shopping strategy to enable the company to take action against Australia under the Hong Kong-Australia bilateral investment treaty. The timing was clearly part of the tobacco industry attempt to delay the legislation and/or prevent its passage through the Parliament (Philip Morris, 2011, Kenny 2011).

There was a strong public reaction to the Philip Morris ISDS case from health and consumer organisations and academics who expressed outrage that the company was trying to override both domestic legislation and a High Court decision, actions many saw as a threat to

democracy and sovereignty (Heart Foundation and ASH Australia 2011, Cancer Council 2011b, Faunce and Tienhaara 2011). One legal commentator, a supporter of ISDS, lamented the fact that the case could give ISDS a bad name (Nottage 2011).

At the time of writing, the Philip Morris Uruguay case and the Hong Kong case were both ongoing. The current Australian government is still defending the Hong Kong case. Because of the arbitrary nature of the ISDS legal process, the outcomes of the cases are unpredictable.

In summary, the tobacco companies, led by Philip Morris, have practiced a consistent strategy of using ISDS to undermine the implementation of the UN Convention on Tobacco Control and prevent the development of stronger legislative controls on tobacco advertising, especially plain packaging legislation.

In the Australian case, this strategy was counterproductive, as the tobacco companies' domestic public relations campaign failed in the face of public health community group responses. Public support for the legislation shored up Government and even Opposition support. Moreover, the persistence with the ISDS dispute in defiance of the High Court decision provoked widespread outrage and opposition to ISDS.

References

- Appleton, S., (2007) "Latin American Arbitration: the story behind the headlines", International Bar Association, found at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3> [accessed November 20, 2013].
- Australian Associated Press, (2011) "Might isn't Right, Labor tells Big Tobacco", *Herald Sun* June 27. Found at <http://www.heraldsun.com.au/news/breaking-news/might-isnt-right-labor-tells-big-tobacco/story-e6frf7jx-1226082990152> [accessed June 27, 2011].
- Australian Broadcasting Corporation, (ABC) Radio National, (2003) 'Groups outline case against free trade deal', Transcript of *The World Today*, 24 November, available at: <http://www.abc.net.au/theworldtoday> [accessed December 8, 2004].
- Australian Broadcasting Corporation, 2012 "Tobacco Giants vow to fight packaging verdict," ABC website news, August 16, found at <http://www.abc.net.au/news/2012-08-15/tobacco-companies-vow-to-fight-high-court-verdict/4201004> [accessed August 16, 2012].
- ABC Radio National, (2011) "Tobacco firms threaten legal action over plain packets", Transcript of Radio National PM program, April 7, 2011, found at www.abc.net.au/pm/content/2011/s3185307.htm [accessed April 8, 2011].
- Australian Health Care and Hospitals Association, (2011) "Tobacco packaging: the answer is plain", Media Release August 28. Found at <http://ahha.asn.au/news/tobacco-packaging-answer-plain> [accessed August 28, 2011].
- Australian Labor Party, (2011) *National Platform and Constitution*, 2011, ALP Canberra,
- Bland, B., and Donnan, S., (2014) "Indonesia to terminate more than 60 bilateral investment treaties" *Financial Times*, March 27 found at <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz2xrYOWsEb> [accessed March 27, 2011]
- Biron, C., (2013) "Latin American countries put up front against corporate Lawsuits", Inter Press Service, October, found at <http://www.mintpressnews.com/latin-american-countries-put-front-corporate-lawsuits/170030/>.
- Callick, R., (2012) "Reaction to Philip Morris move may cost a packet", *The Australian*, August 23, p.28.
- Cancer Council, (2011a) "Plain tobacco packaging a winner with Australians: new poll", 29 May, found at <http://www.cancer.org.au/Newsmedia/mediareleases/mediareleases2011/29May2011.htm> [accessed May 29, 2011].
- Cancer Council, (2011b) "260 Health Professors Call for Tobacco Plain Packs," August 28, found at <http://ahha.asn.au/news/260-health-professors-call-tobacco-plain-packs> [accessed August 28, 2011].
- Capling, A., (2004) *All the Way with the USA: Australia, the US and Free Trade*, UNSW Press, Sydney.
- Capling A. and Nossal, K., (2006) "Blowback: investor-state dispute mechanisms in international trade agreements," *Governance* Vol. 19.

Carim, X., (2013) Update on the Review of Bilateral Investment Treaties in South Africa, Department of Trade and Industry, South Africa, February 15, at http://www.safpi.org/sites/default/files/publications/dti_review_of_bits_ppc_20130215.pdf [accessed November 16, 2013].

Cato Institute (2014) *A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement* found at

<http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state> [accessed April 9, 2014]

Centre for International Economics (CIE) (2014) "Australia-Korea Free Trade Agreement Implications for Australia, CIE, prepared for the Department Foreign Affairs and Trade", February 27,

Chan, M., (2012) "The Changed face of the tobacco industry: galvanizing global action towards a tobacco-free world", Keynote address at the 15th World Conference on Tobacco or Health Singapore 20 March, found at http://www.who.int/dg/speeches/2012/tobacco_20120320/en/ [accessed November 23, 2013].

Cook, I., (2005) *Australians Speak 2005: Public Opinion and Foreign Policy*, The Lowy Institute, Sydney.

Condon, J., (2013) "Expectation grows over Abbott Govt's pledge to deliver on trade access", Beef Central, October 16, <http://www.beefcentral.com/news/article/3808> [accessed November 23, 2013].

Cormann, M, " letter to the President of the Senate, March 3, 2014' , attached to the CIE report , Centre for International Economics (CIE) (2014) "Australia-Korea Free Trade Agreement Implications for Australia, CIE, prepared for the Department Foreign Affairs and Trade", February 27.

Davison, M., (2010) "Big tobacco's huff and puff is just hot air", *The Age*, 4 May, p.11.

Department of Foreign Affairs and Trade, (2012) *Text of the Malaysia-Australia Free Trade Agreement*, May 22, found at <http://dfat.gov.au/fta/mafta/> [accessed November 1, 2012].

Department of Foreign Affairs and Trade (2013a) *Fact Sheet on the Korea Australia Free Trade Agreement*, December, found at <http://dfat.gov.au/fta/akfta/fact-sheet-key-outcomes.html> [accessed December 10, 2103].

Department of Foreign Affairs and Trade (2014a) *Text of the Korea Australia Free Trade Agreement*, February found at <http://www.dfat.gov.au/fta/kafta/>

[accessed March 27, 2014]

Department of Foreign Affairs and Trade (2014b) National Interest Analysis, April 8, found at <http://www.aph.gov.au/~media/Committees/Joint/Treaties/13May2014/Korea-NIA.pdf>

[accessed June 2, 2014]

Donnan, S., and Wagstyl, S., (2014) "Transatlantic trade talks hit German snag" *Financial Times*, March 14 found at

<http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html#axzz2xCOjUOBt>

[accessed March 27, 2014]

Eberhardt, P., and Olivet, C., (2102) *Profiting from Injustice: how law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory, Brussels.

Emerson, C., (2011) *Gillard Government trade policy statement: Trading our way to more jobs and prosperity*, Department of Foreign Affairs and Trade Canberra, 12 April.

European Parliamentary Research Service, (2014) "Investor-State Dispute Settlement (ISDS): state of play and prospects for reform," European Parliamentary Research Briefing, Brussels, January found at [www.europarl.europa.eu/.../LDM_BRI\(2014\)130710_REV2_EN.pdf](http://www.europarl.europa.eu/.../LDM_BRI(2014)130710_REV2_EN.pdf) [accessed March 27, 2014]

Faunce, T., and Tienhaara, K., "Gillard must repel big tobacco's latest attack", *Canberra Times*, June 28, found at

<http://www.canberratimes.com.au/news/opinion/editorial/general/gillard-must-repel-big-tobaccos-latest-attack/2209168.aspx> [accessed June 28, 2011]

Filho, J., (2007) "The Brazilian Experience with Bilateral Investment Agreements: A Note", UNCTAD Expert Meeting On Development Implications of International Investment Rule Making, June 28-29, found at http://unctad.org/sections/wcmu/docs/c2em21p15_en.pdf [accessed November 10, 2103].

Gallagher, K., (2010) *Policy space to prevent and mitigate Financial Crises in Trade and Investment Agreements*, INCTAD G24 Discussion Paper Series, No. 58, May.

Gaukrodger, D., and Gordon, C., (2012), "Investor-state dispute settlement: a scoping paper for the investment policy community", *OECD Working Papers on International Investment*, no. 2012/3, OECD Investment Division, Paris, December found at www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf [accessed March 27, 2014]

Goodman J. and Ranald P., (1999) *Stopping the Juggernaut The Public Interest versus the Multilateral Agreement on Investment*, Pluto Press, Sydney.

Heart Foundation and ASH Australia, (2011) "Committee backs plain packs bill: now let's get on with it, say health leaders", August 22, found at <http://www.ashaust.org.au/mediareleases/110822.htm> [accessed August 30, 2011].

Hawker Britton, (2004) "US Free Trade Agreement disappoints Australia", Media Release, February 19, Hawker Britton, Sydney, available <http://www.hawkerbritton.com.au> [accessed March 11, 2004].

Henry, D., (2003) "Free trade clause would be a dangerous weakening of the law", *Sydney Morning Herald*, 23 October, p. 15.

High Court of Australia, (2012) *JT International SA versus Commonwealth of Australia, British American Tobacco Australasia Ltd and others versus Commonwealth of Australia*, decision August 15, [2012] HCA 30, at <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2012/hca30-2012-08-15.pdf> [accessed August 15, 2012]. Further documents at <http://www.hcourt.gov.au/cases/case-s389/2011>.

International Centre for Trade and Sustainable Development, (2010) *Bridges Weekly*, 10 March, <http://ictsd.org/i/news/bridgesweekly/71988/> [accessed 22 March 2010].

Institute of Public Affairs, (2011) "Plain packaging may require up to \$3.4 billion taxpayer gift

- annually to big tobacco and film companies”, March, found at <http://ipa.org.au/publications/1797/plain-packaging-may-require-up-to-3.4-billion-taxpayer-gift-annually-to-big-tobacco-and-film-companies/pg/7> [accessed August 26, 2011].
- Korea-Australia free Trade Agreement (2014) *Text*, April, found at <http://www.dfat.gov.au/fta/kafta/> [accessed April 10, 2014]
- Kehoe, J., (2013) “Robb pushes for farmers in TPP “, *Australian Financial Review*, 16 December.
- Kenny, C., (2011) “Big tobacco ignites legal war,” *The Australian*, June 26.
- Latham, M., (2004) “Joint statement by Federal Labor leader Mark Latham and Deputy Leader of the Opposition in the Senate and Shadow Minister for Trade Steven Conroy”, Media Release, 4 August, Canberra.
- Mehdudia, S., (2013) “BIPA talks put on hold” *The Hindu*, January 21, found at <http://donttradeourlivesaway.wordpress.com/2013/01/breaking-news-indian-government-puts-negotiations-on-all-bilateral-investment-treaties-bits-on-hold/> [accessed November 19, 2013].
- North American Free Trade Agreement, (NAFTA) (1994) *Text of the North American Free Trade Agreement, Washington*, found at <http://infoserve2.ita.doc.gov/tccinternetre2mac.nsf> [accessed August 15, 2012].
- Nottage, L., (2011) “Investor-State Arbitration Policy and Practice after Philip Morris v Australia” June 30, found at http://blogs.usyd.edu.au/japaneselaw/2011/06/isa_claim.html [accessed June 30, 2011].
- OECD (1962) *Draft Convention on the Protection of Foreign Property*, OECD, Paris.
- O’Malley, N., (2010) “Hard sell in a dark market”, *Sydney Morning Herald*, 24 April, Features, p. 1.
- Parliament of the Commonwealth of Australia, (2011) House of Representatives, *Tobacco plain packaging Bill 2011: Explanatory Memorandum*, 6 July.
- Philip Morris Ltd., (2011) “News release: Philip Morris Asia initiates legal action against the Australian Government over plain packaging”, June 27.
- Philip Morris Ltd., (2012) “Media Release: Philip Morris Limited Comments on Australian High Court Decision on Plain Packaging for Tobacco Products”, 15 August found at <http://www.scoop.co.nz/stories/PO1208/S00225/philip-morris-on-australian-plain-packaging-for-tobacco.htm> [accessed Sept 1, 2012].
- Productivity Commission, (2010) *Bilateral and Regional Trade Agreements Final Report*, Productivity Commission, Canberra, December.
- Public Citizen, (2010) *CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case*, Washington found at http://www.citizen.org/documents/Pacific_Rim_Backgrounder1.pdf [accessed November 1, 2013]
- Public Citizen, (2012a) *Rebutting Misleading Claims Made by Industry with Respect to RDC v. Guatemala and CAFTA Annex 10 b’s definition of Customary International Law and Minimum standard of Treatment*, Washington, found at <http://www.citizen.org/documents/rdc-v-guatemala-rebuttal.pdf>

- Public Citizen, (2012b) *Only One of 40 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded*, Washington, found at <https://www.citizen.org/documents/general-exception.pdf>
- Public Citizen, (2014) *Table of Foreign Investor-State Cases and Claims under NAFTA*, August, Washington, found at <http://www.citizen.org/documents/investor-state-chart.pdf> [accessed February 24, 2014].
- Radio Australia, (2012) "Dominican Republic joins plain packaging fight", 18 July 2012, found at <http://www.radioaustralia.net.au/international/2012-07-18/dominican-republic-joins-plain-packaging-fight/982510> [accessed September 1, 2012].
- Ranald, P., (2010) "The politics of the TPPA in Australia", in J. Kelsey (ed.) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Agreement*, Allen and Unwin, Sydney, pp. 40-61.
- Ranald, P., (2011) "The Trans-Pacific Partnership Agreement, contradictions in Australia and the Asia Pacific Region", *Economic and Labour Relations Review*, Volume 22 Issue 1, May.
- Regulation Impact Statement (2014)
- Rowbotham, J., "Fresh assault on anti-smoking laws," *Sydney Morning Herald*, January 17, 2011, p.3.
- Saulwick, J., (2010) "Nations ponder terms for Pacific free trade", *Sydney Morning Herald*, 16 March, p.6.
- Schneiderman, D., (2008) *Constitutionalizing Economic Globalisation: investment rules and democracy's promise*, Cambridge University Press, Cambridge.
- Schneiderman, D., (2013) *Resisting Economic Globalization: Critical Theory and International Investment Law*, Palgrave Macmillan Socio-Legal Studies.
- Tavernese, S., (2013) "Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws," *New York Times*, December 13, found at http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?_r=0 [accessed December 16, 2013].
- Tienhaara, K., (2009) *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press, Cambridge.
- Tienhaara, K., (2010) "Investor-state dispute settlement in the Trans-Pacific Partnership Agreement", Submission to the Department of Foreign Affairs and Trade, May 19.
- Thompson, J., (2011) "Coalition to back plain cigarette packaging", May 31, found at <http://www.abc.net.au/news/stories/2011/05/31/3231782.htm> [accessed May 31, 2011].
- Trans-Pacific Partnership Agreement (2012) *Leaked Investment Chapter*, found at: <http://tinyurl.com/tppinvestment> [accessed June 30, 2012].
- UNI Global Union, (2011) "UNI files OECD complaint over Standard Chartered performance pay plan" July 28, found at <http://www.uniglobalunion.org/news/uni-files-oecd-complaint-over-standard-chartered-performance-pay-plan>
- UNCITRAL (2014) "UNCITRAL Rules on Transparency" found at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>

[accessed February 24, 2104]

United Nations Committee on Trade and Development, (UNCTAD) (2000) "Taking of property", *Issues in International Investment Agreements*, UNCTAD, Geneva [accessed may 19, 2011].

United Nations Committee on Trade and Development, (UNCTAD) (2013) *Recent Developments in Investor-State Dispute Settlement*, IIA Issues Note, UNCTAD, May, found at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

[accessed November 15, 2013]

Uribe, M., (2013) "Investment arbitration in Latin America: Irreconcilable Differences?", Kluwer Arbitration Blog, May 13. Found at <http://kluwerarbitrationblog.com> [accessed November 19, 2013].

Van Harten, G, (2010) "Academic Experts call for reform of Investment Treaties", found at <http://triplecirsis.com/reform-of-investment-treaties/> [accessed October 15, 2012].

Voon, T., and Mitchell, A., (2011) "Time to quit? Assessing international investment claims against plain tobacco packaging in Australia", University of Melbourne, August 11.

Voon, T., Mitchell, A., Liberman, J., Ayres, G., (2012) *Public Health And Plain Packaging Of Cigarettes: Legal Issues*, Edward Elgar, London.

Weiss, L., *et al*, (2004), *How to Kill a Country: Australia's Devastating Trade Deal with the United States*, Allen and Unwin, Sydney.

World Health Organisation, (2011) *Report on the global tobacco epidemic 2011: warning about the dangers of tobacco*, Geneva.

World Trade Organisation, (1996) *Ministerial Declaration*, Singapore.

Zoellick, R., (2002) Letter to the US Senate, Washington, 13 November, available at http://www.ustr.gov/Document_Library/Letters_to_Congress/2002/USTR_Zoellick_Notifies_Congress_of_Intent_To_Initiate_Free_Trade_Negotiations_With_Australia.html [accessed 1 September 2004].