

27 April 2017

Committee Secretary
Joint Standing Committee on Treaties
P.O. Box 6021
Parliament House
Canberra ACT 2600
Australia

Re: Inquiry of the Joint Committee on Treaties into the *Agreement to Amend the Singapore – Australia Free Trade Agreement*

Dear Members of the Joint Committee,

The Tobacco Association (Singapore) notes that the Joint Committee on Treaties is inquiring into, and will report on, matters arising under the *Agreement to Amend the Singapore – Australia Free Trade Agreement* (SAFTA). We take this opportunity to present our views regarding Article 22 of Chapter 8 of the *Agreement to Amend the SAFTA*, which excludes “tobacco control measures” from the scope of the Investor-State Dispute Settlement (ISDS) mechanism established under the SAFTA.¹

The Tobacco Association (Singapore) believes that the exclusion of tobacco control measures from the scope of ISDS mechanisms does not have any public health benefit; runs contrary to the principle of access to justice and the rule of law; and serves only to prevent legitimate foreign investors from having the chance to challenge arbitrary and ineffective tobacco control measures, that may unjustifiably affect their investments, using the same legal mechanism that any other industry can use under the SAFTA.

1. Exclusion of tobacco control measures from ISDS has no public health benefit

There have been frequent calls by tobacco control activists for governments to exclude tobacco control measures from ISDS mechanisms on public health grounds. Yet, the exclusion of tobacco control measures from ISDS is counterproductive, and does not entail any public health benefits. By removing tobacco control measures from the scope of ISDS, such measures can be adopted and enforced without verifying whether they are capable of fulfilling their purported public health objective. Thus, arbitrary and ineffective tobacco control measures that affect legitimate investments – and violate substantive international obligations under the SAFTA – would go unchecked.

Under the *Agreement to Amend the SAFTA*, Singapore and Australia can justify tobacco control measures affecting foreign investments on the basis that these measures are “necessary” to protect human health.² The term “necessary”, however, implies *inter alia* that the measure is fit for purpose, effective and proportional, and that there are no reasonably available alternative measures that can be taken. The exclusion of tobacco control measures from the scope of the

¹ Article 22 of Chapter 8 of the *Agreement to Amend the SAFTA* states that “[n]o claim may be brought under this Section in respect of a tobacco control measure”.

² Article 19 of Chapter 8 of the *Agreement to Amend the SAFTA* explicitly recognizes the right of Australia and Singapore to adopt and enforce measures that are “necessary” to protect human health.

ISDS mechanism will circumvent the requirement to demonstrate the "necessity" of a tobacco control measure. Regulators will simply not have to demonstrate that tobacco control measures are evidence-based and fit for purpose. This is clearly a recipe for poor and ineffective regulation.

2. Excluding tobacco control measures from ISDS mechanisms is inconsistent with the principle of access to justice and the rule of law

ISDS mechanisms provide access to a neutral legal forum through which foreign investors can rely on international commitments made by governments in order to challenge arbitrary and ineffective regulations that *unjustifiably* affect their investments. These mechanisms thus provide treaty-based access to justice. By establishing an ISDS mechanism under the SAFTA, Australia and Singapore have clearly recognized the importance of providing access to justice to foreign investors who have relied on the commitments under the SAFTA in making their investments. It is proposed now, however, to discriminate among industries by excluding the tobacco industry from accessing justice under the SAFTA, while permitting investors in other industries such access. It should not be that some industries have access to justice, and by extension the rule of law, while others do not. All legitimate foreign investors across all legal industries should have access to the ISDS mechanism under the SAFTA. The tobacco industry is no exception as it is a legal industry that trades in legal products.

3. Exclusion of tobacco sets a negative precedent for ISDS mechanisms.

If the amendments to the SAFTA are ratified, this would be the first international agreement in force in which a legal industry will be singled out and excluded from the scope of ISDS. This could serve as a negative precedent for carving out, in current and future international investment agreements, all governmental measures that allegedly pursue a health objective for any product category. Far from being a positive development with benefits to public health, this would be inconsistent with due process, access to justice and the rule of law; and would constitute a negative precedent that encourages singling out specific legal industries and the potential adoption of poor and ineffective regulations.

In closing, we urge the Joint Committee to take the views expressed above into account in executing its mandate to inquire into and report on matters arising from the Agreement to Amend the SAFTA.

We are grateful for the opportunity to provide our input to the Joint Committee on Treaties, and we urge this Committee to consider the views expressed above in reporting on matters arising under the *Agreement to Amend the SAFTA*.

Yours Sincerely, 

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Chairman
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