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Committee Secretary
Joint Standing Committee on Treaties
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Submission via:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/SingaporeFTA-Amendment

RE: Amendments to the Singapore-Australia FTA

The Asian Trade Centre, Singapore, is delighted to provide comments on the proposed updates to the Singapore-Australia Free Trade Agreement (SAFTA).

The third round of revisions in 2016 provide generally welcome improvements across the agreement, largely incorporating texts and commitments drawn from the Trans-Pacific Partnership (TPP) texts and schedules. These updates are an important way to ensure that the SAFTA, which first entered into force in 2003, remains relevant and useful for businesses in both partner markets.

Given the upheaval in the TPP in the wake of US withdrawal from the agreement, transferring TPP commitments into settings like SAFTA also makes sense. This helps ensure that the gains from these hard-fought negotiations will endure regardless of what happens in the broader agreement. The benefits to Australian and Singaporean companies and consumers should be quite important, as the SAFTA updates will allow both parties to capitalize on new market opportunities, particularly in services trade, that were not included in the original agreement.

There are, however, at least two aspects of the SAFTA update where the transfer of TPP provisions are problematic. These rules replicate bad ideas. While neither Australia nor Singapore can directly contradict TPP commitments in other agreements, they need not reinforce them in the bilateral context. Rather, these provisions should be dropped from the bilateral.

First, SAFTA should remove the financial services carve out from the e-commerce chapter (the definition of a “covered person” in Chapter 14). Since this entire chapter was copied directly from the TPP, it simply duplicates the problem found in the TPP agreement that fails to clarify the situation of payments in e-commerce. While some have argued that payments are covered under the financial services chapter in TPP (and now replicated in SAFTA), the apparent carve out in Chapter 14 for e-commerce makes this much too ambiguous. There is no reason why this situation need apply for either Australia or Singapore. E-commerce cannot work properly if financial services attached to it (and more specifically payments) are not included. This is now being addressed and should be rectified in the Regional Comprehensive Economic Partnership (RCEP) talks that include



both Australia and Singapore. The financial services carve out in Chapter 14 should be removed in SAFTA.

Second, the tobacco carve out from the investment chapter (Article 22 in Chapter 8) should be removed from SAFTA. While tobacco is a sensitive issue for both Australia and Singapore, the broader, more problematic issue is the principle of having sector-specific exceptions to the investor-state dispute settlement mechanism (ISDS). Having such a provision was a mistake in the TPP. Replicating this error in SAFTA is going to rebound for both Australia and Singapore in the future.

The problem is that Australian investors benefit from ISDS when they operate in other markets. ISDS helps Australian companies and investors protect themselves from governments that do not follow the rules and expropriate assets without providing adequate compensation for such seizures. While it is highly unlikely that either Australia or Singapore will ever do such a thing, governments elsewhere in Asia and beyond are less bound by rules. Investors are at real risk of having assets seized in foreign markets.

The tobacco carve out from SAFTA is likely to be taken up as an idea and placed into other trade agreements. The use of this tool in a bilateral FTA makes it even easier to justify using such a provision in different arrangements going forward. But it is not just going to be applied for tobacco in the future. It will easily spread and be included for other products, like wines and spirits, other types of food or beverages and so forth. It is certainly possible to imagine governments that are keen on expropriation placing wider and wider exclusions into trade agreements and investment treaties covering broader and broader swaths of products. Australian firms and investors will be badly hurt by these carve outs.

The TPP, and now SAFTA, contains the most advanced rules for ISDS. The entire edifice is designed to help bring better balance between the rights of investors and the rights of governments. It more clearly specifies the steps needed to trigger a dispute and the mechanisms to resolve the issue than earlier, weaker versions often contained in older bilateral investment treaties. The extent of the improvements to ISDS provided in SAFTA should see off frivolous lawsuits. Neither Australia nor Singapore is in the habit of expropriating foreign investor assets and ISDS in SAFTA is therefore unlikely to be used. But it still serves a vitally important purpose in reassuring investors and providing a benchmark for future trade deals.

Removing a product from SAFTA undermines the high quality nature of the agreement. It opens the door to allowing other countries to follow the lead of Australia and Singapore in carving out sectors from ISDS and other parts of trade agreements in the future. Each element that gets an exclusion, weakens the whole. Some of the benefits that should have accrued to Australian companies and consumers are lost.

Hence, while the revisions to SAFTA overall are to be welcomed and applauded, before the final document is submitted for approval, at least two minor adjustments are needed. The financial services carve out from the e-commerce chapter should be removed and the tobacco carve out from ISDS must also go. Both are unwelcome deviations from the otherwise gold standard elements of SAFTA that Australia should be proud to promote.

Sincerely,

Dr. Deborah Elms
Executive Director