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Submission on the Korea-Australia Free Trade Agreement [KAFTA]

On 19 February 2014 I wrote to the Minister for Trade and Investment expressing my concerns in relation to the proposed intention by the Abbott government to include Investor-State Dispute Settlement clauses (ISDS) in the Korea-Australia Free Trade Agreement.

On 7 April 2014 I received a reply dated 2 April from Minister Robb's Senior Adviser, Lyall Howard, informing me that "The KAFTA is an excellent outcome for Australia…It is a modern agreement in which Australia secured Korea's agreement to a range of mechanisms to reduce the scope of possible ISDS claims against Australia….ISDS provisions have been included in Australia's investment and free trade agreements over the past three decades to provide protection for those who choose to pursue new opportunities for Australia by investing abroad. Australia has ISDS provisions in place with 28 economies."

Your Committee's remit includes a National Interest Analysis (NIA) which explains why the Government considers it appropriate to enter into the treaty, and other associated documents. An NIA includes information relating to:

- the economic, environmental, social and cultural effects of the proposed treaty;
- the obligations imposed by the treaty;
- how the treaty will be implemented domestically;
- the financial costs associated with implementing and complying with the terms of the treaty; and
- the consultation that has occurred with State and Territory Governments, industry and community groups and other interested parties.

I wish to inform you that, as a public health and environmental policy researcher, analyst and activist over many decades, I am particularly concerned to read that ISDS clauses have led to increasing numbers of cases in which foreign investors are suing governments around the world for hundreds of millions of dollars over health, environment and other public interest laws. Recent examples include:

- the Philip Morris Tobacco Company suing Australia and Uruguay over regulation of tobacco plain packaging for public health reasons
- the Eli Lilly pharmaceutical company suing the Canadian national government over a court decision to refuse a medicine patent
- the US Lone Pine mining company suing the Québec provincial government of Canada over environmental regulation of shale gas mining
- the Swedish energy company, Vattenfall, suing the German government over its decision to phase out nuclear energy.

(Gaukrodger and Gordon OECD, 2012, p. 7, Public Citizen Table of Cases, 2014).

These legal cases pose significant financial burdens on government and thus taxpayers. Both the costs of running cases (OECD estimates an average of $8 million per case, with some cases costing up to $30 million) and the compensation awarded to foreign investors (often hundreds of millions and in some cases billions of dollars) can discourage governments from proceeding with legitimate domestic legislation. The highest compensation award so far is $1.8 billion against the government of Ecuador. This is damaging for any government, but particularly damaging for developing countries, and can have a freezing effect on legitimate domestic legislation. (Gaukrodger and Gordon, OECD, 2012, p. 19, UNCTAD, 2013a, p. 3).

Last month, while looking at the information on the Permanent Court of Arbitration's Case No. 2012-12 between Philip Morris Asia [PMA]Ltd (Claimant) and the Commonwealth of Australia (Respondent), I was dismayed to see the high level legal representation our Government has had muster to respond to PMA's claim against Australia's ground breaking tobacco packaging laws, under the ISDS clauses in the Hong Kong-Australia Treaty for the Promotion and Protection of Investments, signed 15 September 1993. Under the PCA's Procedural Order 1 of 7 June 2012, Australia had to pay an initial deposit of EUR 100,000 by 21 June 12. The latest Procedural Order 7, dated 31 December 12, regarding amendments to the timetable sought by PMA, showed that "On 20 February 14, a hearing on bifurcation and the resulting timetable will be held in Singapore, possibly extended to 21 February 2014." This case is clearly going to drag on, at great cost, to our government, and consequently our government's ability to implement its public health legislation in a cost-effective manner.

There have been claims that recent changes to the wording of ISDS clauses in trade and investment agreements like KAFTA are "safeguards" which will prevent foreign investors from suing governments over health, environment or other public interest legislation. However, 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 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 have used to advantage.

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

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 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.

These same "safeguards" in recent trade agreements like the Central American Free Trade Agreement and the Peru-US Free Trade Agreement have not prevented foreign investors from launching cases against environmental legislation. For example:

- the Government of El Salvador has been sued by Pacific Rim Mining Corporation under the Central American Free Trade agreement, over a ban on mining to protect the nation's limited groundwater resources

- the US-based Renco Group is using ISDS in the Peru-US free Trade Agreement to contest a local court decision that it was responsible for pollution from its lead mine. Both cases are ongoing and may take several years. (see case studies in Public Citizen, 2010, 2013, 2014)

The fact that increasing numbers of governments are reviewing and terminating their involvement in ISDS indicates growing doubts in the international community about the value of ISDS clauses in trade and investment agreements. These include members of the European Union like France and Germany; Brazil, Argentina and eight other countries in Latin America; India and South Africa. Indonesia has recently announced it will terminate all 67 of bilateral investment treaties. (Gaukrodger and Gordon, OECD, 2012, p.7, European Parliamentary Research Service, 2014. p.2, Bland and Donnan, 2014)

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