

Corporate Development
Fiscal Affairs & Anti-Illicit Trade



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Committee Secretary
Joint Standing Committee on Treaties
P.O. Box 6021
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Re: Inquiry of the Joint Committee on Treaties into the *Agreement to Amend the Singapore – Australia Free Trade Agreement*

Dear Committee members,

Japan Tobacco International (JTI) takes this opportunity to provide input to the Joint Committee on Treaties in relation to its inquiry into the *Agreement to Amend the Singapore – Australia Free Trade Agreement* (SAFTA).

This submission is limited to Article 22 of Chapter 8 of the Agreement to Amend the SAFTA, which states that “[n]o claim may be brought under this Section in respect of a tobacco control measure”. It is thus proposed to exclude tobacco control measures from the Investor-State Dispute Settlement (ISDS) mechanism under the SAFTA.

Since the entry into force of the SAFTA in 2003, tobacco control measures have been included within the scope of ISDS, although the tobacco industry has never used that mechanism to challenge the policies of either party to the SAFTA. The amendments to the SAFTA were suddenly announced in October 2016, without any consultation with the tobacco industry. JTI is concerned about this lack of transparency regarding such a significant change in governmental policy. Transparency is a hallmark of regulatory excellence. Regrettably, this has not been reflected in the process leading up to the announcement of the amendments to the SAFTA.

In any event, JTI is of the view that the proposed exclusion of tobacco control measures from the ISDS mechanism is entirely unnecessary and without any benefit to public health.

1. There is no valid premise for excluding tobacco control measures from the ISDS system

Calls to exclude tobacco control measures from the ISDS system have been based on two related propositions: (i) the tobacco industry has abused the ISDS system; and (ii) tobacco

control measures must be excluded from ISDS mechanisms in order to preserve the right of governments to regulate. Both propositions are false.

Data compiled by the United Nations Convention on Trade and Development (UNCTAD)¹ indicate that, out of 767 known cases², only two have been initiated by the tobacco industry.³ Each of the two cases was initiated by the same tobacco company. On each occasion, the defending government prevailed. Industries that have been frequent users of the ISDS system have not been denied access to that system.⁴ Yet, the tobacco industry has become a target for exclusion as a result of a false claim by tobacco control advocates that the tobacco industry has abused the ISDS system. The facts simply do not support this claim.

The proposition that tobacco control measures must be excluded from ISDS mechanisms in order to safeguard the right of governments to regulate is also flawed. The inherent right of governments to regulate in pursuit of public health objectives is not in question. JTI supports appropriate and proportional regulation that “conforms to the Organization for Economic Co-operation and Development’s (OECD) principles of Better Regulation. These principles can be summarized as openness, participation, accountability, effectiveness, coherence and proportionality.”⁵

Many investment treaties and free trade agreements explicitly recognize and affirm the inherent right of governments to regulate. Indeed, 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. Given this explicit recognition of the inherent right to regulate, JTI fails to see how including tobacco control measures within the scope of the ISDS mechanism would nullify that right.

2. Excluding tobacco control measures from ISDS mechanisms leads to ineffective public health policies

In some cases, tobacco control policies adopted by governments are discriminatory; disproportionate; ineffective; unfit for purpose; unsupported by evidence; and without any benefit to public health. Substantive investment protections under international treaties, such as those contained in Chapter 8 of the SAFTA, provide a means of scrutinizing purported public health policies to ensure that they are fit for purpose and effective. Ultimately, this encourages a robust, evidence-based approach to public policy formulation. By contrast, excluding tobacco control measures from ISDS mechanisms serves only to encourage the adoption of arbitrary and ineffective policies.

It follows that excluding tobacco control measures from the scope of the ISDS mechanism under the SAFTA does not serve any public health objective. Instead, by insulating such measures from legal scrutiny, such exclusion, under the guise of tobacco control, encourages the adoption of ineffective measures that are arbitrary; unfit for purpose; and unsupported by evidence. However, including tobacco control measures within the scope of Chapter 8 of the SAFTA would ensure that an arbitration panel, i.e. an objective third party, could make a determination as to whether a tobacco control measure that has purportedly been taken on public health grounds is, in fact and law, “necessary” to protect human health.

¹ UNCTAD, Investment Dispute Settlement Navigator, <http://investmentpolicyhub.unctad.org/ISDS>

² As at 1 January 2017. This figure includes pending cases (259), concluded cases (495), and cases the status of which are currently unknown (13).

³ *Philip Morris Asia Limited v Commonwealth of Australia* (PCA Case N° 2012-12, 17 December 2015); and *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7).

⁴ For example, the telecommunications and mining industries have been responsible for initiating 41 and 130 ISDS cases respectively.

⁵ JTI’s views on product regulation are available at: <http://www.jti.com/global/tobaccocontrol/regulation>

3. Excluding tobacco control measures from ISDS mechanisms constitutes discrimination against the tobacco industry and is contrary to the rationale for ISDS mechanisms

ISDS mechanisms have been established under hundreds of international treaties in order to ensure that foreign investors have an effective means of challenging ineffective and arbitrary governmental measures that affect their investments. When an ISDS mechanism is established under an international treaty, this provides a means of access to justice for foreign investors who have relied on the terms of that treaty in making their investments. Access to justice is a basic principle of the rule of law. All legitimate foreign investors operating in legal industries should have access to the ISDS mechanism under the SAFTA.

The tobacco industry is a legitimate industry that manufactures and distributes legal products. There is no valid reason for discriminating against the tobacco industry by excluding foreign investors in that sector from access to justice under the SAFTA, while permitting investors in all other industries such access. If tobacco control measures adopted by governments are justifiable and "necessary" to protect public health, they will, if challenged, be upheld as such by an objective arbitration panel. There is thus no valid reason to exclude tobacco control measures from the ISDS mechanism under the SAFTA.

4. Exclusion of tobacco control measures sets a negative precedent

No international investment agreement currently in force has discriminated against the tobacco industry by excluding tobacco control measures from the scope of ISDS. The Trans-Pacific Partnership (TPP) to which Australia is a signatory excluded tobacco control measures from ISDS. However, the TPP has not entered into force, and the exclusion of tobacco control measures from ISDS has been identified as one of the issues that has made ratification of the TPP contentious in certain TPP countries. The TPP is thus not a valid precedent for excluding tobacco control measures from the scope of ISDS.

The exclusion of tobacco control measures in the Agreement to Amend the SAFTA sets a negative precedent that invites the exclusion of such measures from current and future international investment agreements. This negative precedent would apply not only in relation to tobacco control measures, but also in relation to all governmental measures that purport to pursue a public health objective. Thus, the exclusion of tobacco control measures from ISDS under the SAFTA could set in motion calls to exclude governmental measures concerning, for example, alcohol, sugar and fatty foods. This constitutes a negative precedent as it does not entail public health benefits. Instead, such a precedent invites poor and ineffective health regulations; constitutes arbitrary discrimination among legal industries; and encourages the protection of domestic industry to the detriment of foreign investors.

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.

Please accept the assurance of our highest consideration.

Yours Sincerely,

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