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Joint Standing Committee on Treaties
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Agreement to Amend the Singapore-Australia Free Trade Agreement (SAFTA): Chapter 8 (Investment)

Thank you for the opportunity to provide assistance to the Committee's inquiries. I am providing a submission regarding Chapter 8 of the Agreement to Amend the Singapore-Australia Free Trade Agreement (SAFTA). I am an Australian citizen and Professor of Law at The Chinese University of Hong Kong. My area of expertise is in the field of international economic law. I make this submission in my personal capacity.

My submission will focus on the addition of a new Article 22, entitled 'Tobacco Control Measures'. My submission does not discuss, review or comment on the merits or otherwise of investor-state dispute settlement (ISDS) in international investment agreements.

1. Introduction

Article 22 reads:

> No claim may be brought under this Section in respect of a tobacco control measure[19] of a Party.

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[19] "Tobacco control measure" means a measure of a Party related to tobacco products (including products made or derived from tobacco), such as for their production, consumption, distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as fiscal measures such as internal taxes and excise taxes, and enforcement measures, such as inspection, recordkeeping, and reporting requirements. "Tobacco products" means products under Chapter 24 of the [HS], including processed tobacco, or any product that contains tobacco, that is manufactured to be used for smoking, sucking, chewing or snuffing.

The addition of this provision is an obvious response to the unsuccessful investment claim brought by Philip Morris International against Australia under the Hong Kong – Australia Bilateral

Investment Treaty (BIT) regarding the plain/standardised packaging of tobacco products.[1] The provision would ensure that the SAFTA could not be used by an investor to bring a claim against any measure relating to tobacco control in either Australia or Singapore.

It is my submission that the addition a carve-out or exclusion of one or more industries from the scope of ISDS is both unwise and unnecessary.

2. Article 22 is unwise

I submit that explicitly excluding tobacco control measures from the scope of ISDS is unwise for three reasons. Each is addressed in turn.

1. The exclusion is discriminatory towards a single industry – which industry is next? How does this exclusion impact other treaties?

Simply stated, carving-out a single industry from the scope of ISDS is a misguided attempt to safeguard the public interest which undermines the basic principles embodied in investment treaties. Treaties should be designed to take account of and permit non-discriminatory public welfare measures – if this is not the case, textual drafting should be further refined so as to adequately balance the objective of promoting and protecting investment with the legitimate needs of the host state.

The carving-out of tobacco from the scope of ISDS establishes a worrying precedent for Australia, and may be one clause we will come to regret for at least three reasons. First, while Australia has an interest in safeguarding public welfare measures from tobacco claims a future treaty partner may wish to carve-out other industries, such as alcohol, pre-packaged foods or even mining. It is not beyond the realm of possibility that Indonesia, for instance, could request to carve out alcohol given its inherent interest as a Muslim majority country in reducing the consumption of alcohol. Or given the environmental track record of the mining industry, perhaps a negotiating partner may seek to exclude mining from the scope of ISDS. These requests will put Australia in a difficult position (and the government will undoubtedly will face extreme lobbying efforts from the wine/spirits and mining industry, respectively). Australia will then have to decide – is the tobacco carve-out a necessity, a red line that is non-negotiable or is it simply a point which can appear or disappear through negotiations? Can the tobacco exclusion be traded away for the negotiating partner agreeing to withdraw its request to exclude alcohol/tobacco or is this a point which this issue could potentially put an end to all negotiations? These are very real questions, and should have been carefully thought through prior to agreeing to the tobacco exclusion in the SAFTA.

Second, and as importantly, the exclusion of tobacco from ISDS sends the wrong message in regards to other public health and public welfare interests. Simply, where does the tobacco-only exclusion place pro-health advocates in regard to alcohol and other so-called 'sins' as well as to the environment – to illustrate, why would public health objectives in regards to tobacco be entirely insulated from ISDS but the government leave 'exposed' public health measures taken in regards to alcohol or public welfare measures such as environmental protection regulations. The singling out of tobacco for 'additional protection' – if it is indeed even needed – appears to prioritise that industry over all potential concerns of every other industry.

[1] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12.

Third, the addition of a tobacco exclusion clause may have an impact on other Australian treaties (future, and even past) which do not contain such an exclusion. Simply put, if a future treaty does not contain a tobacco exclusion clause does this mean that it does not provide as much safeguards against a potential claim? Stated otherwise, is the addition of such a clause evidence that Australia is not confident in the terms of the treaty to adequately safeguard its tobacco control measures and does this impact interpretation of Australian agreements without such a clause? This too is a real issue and has been discussed at length in several ISDS disputes.

Thus, while it is true that Australia does not have a tobacco industry and thus the carve-out is only a defensive measure harming no domestic tobacco industry, this is a myopic view that ignores the wider context and broader implications.

2. The exclusion removes enforcement rights

Tobacco is a legitimate industry (ie – tobacco is allowed to be imported, sold and consumed in Australia), and as long as it remains as such there is something unsettling with singling it out in such a manner. Moreover, one of the most convincing arguments in favour of ISDS is that it provides investors with security of their investment. With ISDS no longer available for the tobacco industry, it becomes the lone sector in which foreign investors will have rights under the treaty but no avenue to enforce those rights. This again, is rather curious and singling out an industry in this manner would be unacceptable in the domestic sphere. This point is worth highlighting, it would simply be unfathomable (and again, unacceptable) for domestic legislation to set apart an industry and remove all enforcement rights under Australian law. Due process is fundamental to the proper functioning of a legal system, and to deny tobacco even the right to make a claim (especially in light of point 2(3), below) is legally troubling.

In the case of the SAFTA, the issue is of greater importance as the amendment is taking away legal enforcement rights that have existed for over a decade. Arguably, the removal of existing rights under the treaty undermines the very principle of fair and equitable treatment (Chapter 8, Article 6.1) and can itself be subject to a claim.

3. The exclusion could be easily abused and facilitate cronyism and corruption

While I have no doubts that the governments of both Australia and Singapore have agreed to Article 22 in good faith and will not abuse it, I am less confident this will be the case should a tobacco exclusion be agreed with other governments.

Simply stated, once the measure is classified as relating to tobacco control, a government could (at least in theory) include a provision within the measure that discriminates against foreign tobacco in some way, or which constitutes regulatory expropriation, or is simply arbitrary in its application. It is hard to see how such a broad exemption for abusive measures makes sense as a matter of public policy. Favouring a domestic industry is of course unlikely to help with public health, and supporting powerful domestic monopolies through discriminatory regulations could actually make it harder to pass tobacco control measures, as these monopolies would have great power to fight off such regulation.

Furthermore, there will be no legal recourse when, under the guise of a tobacco control measure, a corrupt official expropriates property or a business, leaving the market open for him/herself or a friendly local contact. This is patently unfair and clearly counters the letter and spirit of the

underlying investment agreement. Such abuse should not be tolerated and the affected industry should be given the opportunity to enforce its rights under the agreement.

Simply stated, the addition of such a broad exclusionary provision to a treaty may preclude the industry from challenging even blatantly discriminating legislation.

3. Article 22 is unnecessary

1. Treaty Drafting

Article 22 is unnecessary to achieve the goal of preserving policy space and adequately safeguarding public welfare measures. It is submitted that treaty drafting, including through the use of preambular language, interpretive clauses, targeted provisions which narrow the scope of and better define obligations (such as expropriation and FET) and a general exceptions clause provide sufficient comfort to act in a non-discriminatory manner in the interests of public welfare. Such an approach has the added advantage of applying to all sectors and industries as opposed to dealing with a single industry.

Efforts to insulate tobacco control measures through use of an exclusion clause are meant to protect the right to regulate but seemingly ignore evidence and progress made in treaty drafting and discount important government attempts to preserve policy space. In recent years, governments have paid greater attention to this issue and negotiated a series of provisions aimed at further safeguarding public interest.

Treaty drafting can serve to limit, delineate and guide interpretation of treaty obligations and can be inserted into numerous parts of a treaty. For instance, Article 8.9(1) of the European Union (EU) – Canada Comprehensive Economic and Trade Agreement (CETA) states upfront that '…the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.'

Australia regularly makes use of language to narrow and delineate treaty obligations, and even does so in the SAFTA. For instance, Article 16(6), Expropriation and Nationalisation, states:

> This [Agreement's Article on expropriation] shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.

This clause is an outstanding attempt by negotiators to ensure the World Trade Organization's (WTO) flexibilities in regards to compulsory licenses to patent rights do not violate an obligation under an investment treaty.[2]

Likewise, Annex 8-A(3)(B) of the SAFTA narrows the potential for a successful claim to be made for indirect expropriation (a regulatory taking) by stating:

> Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,[22] safety, and the environment, do not constitute indirect expropriation, except in rare circumstances.

> [22] For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products**.**

Even stronger language in this regard can be seen in other agreements, such Annex 11-B(3)(b) of the Korea – United States FTA (KORUS), which reads:

> Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.[3]

These are but two of countless possible examples of provisions which limit obligations. These particular provisions significantly narrow and constrain any potential claim for expropriation and while this does not mean that a claim will never be filed, it does mean that in order to be successful the claimant will have to climb over a high barrier. In the case of the latter provision, for instance, a claimant will need to successfully argue that the measures of the host nation are discriminatory and not designed and applied to protect legitimate public welfare interests.

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[2] It should be noted, however, that I heavily criticise the direct linkage to the TRIPS Agreement, as this will require an arbitral tribunal composed under the investment treaty to interpret whether a compulsory license has been issued 'in compliance with the TRIPS Agreement'. Having an investment tribunal directly interpret what is or may be complaint with the trade regime is extremely dangerous and should be avoided in the future. See ie Bryan Mercurio, 'Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements' (2012) 15(3) Journal of International Economic Law 871, at 905.

[3] See also Annex 9-A of the EU-Singapore FTA, which reads: 'For greater certainty, except in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.'

Another provision used to narrow and constrain the potential success of claims targeting public welfare measures is a general exceptions clause. Common in international trade agreements, usage of a general exceptions clause in international investment agreements has been rapidly rising since 2012. Such provisions usually closely track the WTO provision and are modelled on either the GATT Article XX (trade in goods) or GATS Article XIV (trade in services). Common elements of all general exceptions clauses include:

- An exhaustive list of permissible policy objectives; for example, the protection of human, animal, or plant life or health, or the conservation of natural resources;

- A nexus requirement between a governmental measure and a permissible objective, such as 'necessary for,' 'relating to,' and 'designed and applied for'; and

- A prohibition of discriminatory or arbitrary application (ie chapeau).

The main rationale to include a general exception clause is to increase legal certainty for host state, to ensure policy space/flexibility for the host state and to allow for investors to factor in the risk of adverse state action into their decision-making as to whether and to what extent to make an investment. On the other hand, certain commentators criticise the usage of general exceptions clauses in international investment agreements as being unnecessary and not providing more flexible than what already exists under a properly drafted modern agreement,[4] the possibility that such a clause could limit flexibilities through rigid drafting[5] and the risk of abuse by the host state.

Those nations which appear to actively promote the inclusion of a general exception clause are diverse in a number of ways and include Canada, Colombia, Honduras, Japan, Mauritius, New Zealand, Panama, South Korea, Thailand, Turkey and Vietnam. General exceptions clauses also appear in regional agreements, such as the ASEAN Comprehensive Investment Agreement (ACIA) and the Investment Agreement for the Common Market for Eastern and Southern Africa

[4] Andrew Newcombe, 'General Exceptions in International Investment Agreements' in M-C. C. Segger, M. Gehring, & A. Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer International Law, 2011) at 355, 369–370.

[5] Celine Lévesque, 'The Inclusion of GATT XX Exceptions in IIAs: A potentially Risky Policy' in R. Echandi, & P. Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013) at 364.

(COMESA). Others, such as the EU have only agreed to a limited general exceptions clause[6] while it appears the US objects for domestic constitutional reasons.[7]

Australia too has been a proponent of general exceptions clauses, and in fact a standard general exceptions clause appears in the SAFTA, with Article 19 (Article 21 under the existing text) reading in relevant part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:
>
> (a) necessary to protect public morals or to maintain public order;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter…;
>
> (e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Given that the SAFTA contains numerous and sufficient safeguards including a general exceptions clause it is submitted that the inclusion of a tobacco carve-out is unnecessary and oddly misplaced. If its inclusion merely illustrates a new Australian policy to specifically exclude tobacco in all agreements, regardless of the need, this could have negative repercussions as set out in Section 2(1) of this submission.

This is not to say that there can be no improvement in treaty drafting. To the contrary, Australia and others should not feel obliged to slavishly conform to WTO text and could add even stronger language to protect public welfare measures. For example, changing the 'necessary' language to 'relating to' as applied to human, animal or plant life or health would make it almost impossible for a challenge to a tobacco control measure to succeed.

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[6] For instance, the CETA limits the use of the general exception clause to Sections 2 ('Establishment of Investments') and 3 ('Non-Discriminatory Treatment'), which include most-favoured nation and national treatment. Section 4, which includes the key obligations of expropriation and FET, is excluded. See CETA, Chapter 32, Article X.02 (1) and (2). It should be noted however that the CETA utilizes interpretive statements and innovative drafting to delimit the scopes of application of the expropriation and FET provisions.

[7] The fifth amendment of the US Constitution states that a person shall not 'be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' It is therefore argued, and apparently the position of the US, that it could never make use of a general exceptions clause in regards to an expropriation due to the constitutional guarantee to 'compensation'. Thus, while a treaty partner could make use of the clause the US would be without the option, and thus it elects not to include the clause in its treaties.

Another option would be to establish a flexible but comprehensive list of potential policies to be covered as public welfare measures – this could be inserted in clauses such as Annex 8-A(3)(B) of the SAFTA or elsewhere. Moreover, treaty negotiators could follow Article 2.2 of the WTO's Technical Barriers to Trade (TBT) Agreement which set out policies meant to be covered; while not an exceptions clause, it is nonetheless instructive. Article 2.2 states:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

To be clear, including a general exception clause (in any form) and other language to narrow and constrain host state obligations does not mean that investment will be curtailed. On the contrary, governments will better know what actions they can take, and investors will be informed and able to calculate potential risks before making the investment. Yet again, such an approach will preserve domestic policy space in relation to every industry. Usage of targeted language and a general exception clause to safeguard a broader range of public welfare measures, instead of targeting just one industry through an exclusion, is a more sensible approach and in the interests of Australia.

2. Regulations have not been 'chilled', and tobacco claims have not flourished

Article 22 is also unnecessary there is little to no evidence that even the mere threat of investment arbitration leads to a 'regulatory chill'. To illustrate, from the date of Philip Morris issuing its notice of intent to pursue ISDS against Australia for its plain packaging regulations until the date of the decision on jurisdictional grounds more than 30 countries tightened tobacco control laws in a host of ways, ranging from banning retail displays to plain packaging and raising the minimum legal age for smoking. Several other countries, including Ireland, New Zealand and the United Kingdom, began considering the adoption of plain packaging regulations.

Moreover, it seems odd to insert a blanket exclusion to resolve a past problem as opposed to a more general clause covering all future instances. Of the more than 750 ISDS publicly available claims, the tobacco industry has filed only two claims – both unsuccessful – this hardly demonstrates a pattern of filings, abuse or series of frivolous claims which warrant direct and targeted less favourable treatment

3. Recent IIA tribunals appear extremely sympathetic to regulations taken for public welfare

It is also worth briefly mentioning that while in the past investment tribunals have been accused (without much evidence) of having pro-investor bias recent decisions of tribunals appear extremely sympathetic to governmental regulations taken for public welfare. The addition of provisions which narrow and limit obligations has of course been beneficial, but the sympathetic approach can be seen even in older, more 'investor friendly' treaties (such as the Hong Kong – Australia BIT).

Illustrative of this point are the recent decisions in *Philip Morris v Uruguay*[8] and *Eli Lilly v Canada*.[9]

4. Conclusions

Australia has been effective in reducing smoking rates. Smoking rates among adults in Australia have been in steady decline in the last 30 years and now hover around 14.5%. This represents a reduction of more than 50% since the 1980s. Australia has also successfully defended the claim against plain packaging initiated by Philip Morris on jurisdiction.

Australia also drafts trade and investment agreements using contemporary techniques and with sufficient safeguards for public welfare measures. The investment chapter of SAFTA contains modern language which narrows and constrains host state obligations and includes a general exceptions clause. While perhaps more refinement to treaty language can be made to further ensure all non-discriminatory measures taken in the interest of public welfare are fully and completely insulated from an ISDS claim, the current treaty provides adequate comfort. Moreover, the trend among investment tribunals is to provide wide scope and sympathetic treatment when public welfare regulatory measures are at issue.

Against this backdrop, exclusion clauses which target a specific industry (or industries) seem unwise and unnecessary. While it may completely protect Australia against a further challenge from the tobacco industry, this does not come without wider risks and costs. Negotiating for a tobacco exclusion should be viewed in a wider and more holistic context. The tobacco exclusion may place Australian negotiators and decision-makers in a difficult position should others request/demand to exclude other industries from the scope of ISDS. In addition, and more systemically, the inclusion of a tobacco exclusion is may influence how investment tribunals interpret treaties with and without such clauses in the future. Finally, the tobacco exclusion send out the wrong signal to other health and public welfare advocates, who must be wondering why tobacco is different and how they do can get their (dis)favoured industries excluded from the scope of ISDS. This is dangerous, and unchartered territory, and Australia would be wise to proceed with extreme caution.

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[8] Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) v. Oriental Republic of Uruguay, ARB/10/7.

[9] Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2.

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