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Joint Standing Committee on Treaties (JSCOT)
Australian Parliament
Canberra

Dear Committee

Submission to Inquiry into Amending the Singapore-Australia FTA[1]

I support the SAFTA Amendment's attempt to retrofit key provisions from the Trans-Pacific Partnership (TPP) Agreement into this old bilateral FTA, the first signed by Australia (in 2003); and indeed to go a step further and exclude tobacco (a uniquely problematic product) from the scope of the Investor-State Dispute Settlement (ISDS) provisions. In other parliamentary inquiries related to FTAs I have urged the Australian government to similarly reassess older treaties (although especially the earlier standalone Bilateral Investment Treaties, which were drafted more loosely).[2] Doing so for this treaty sets a useful precedent for revisiting Australia's older treaties, and may also prompt other Asia-Pacific partner countries to undertake a similar stocktake.

However, I disagree with the (well-intentioned but under-researched) Submission to this Inquiry from the Public Health Association, which objects to ISDS provisions remaining at all in this Agreement. Recent econometric studies indicate positive impacts on FDI flows from ISDS-backed investment treaty provisions.[3] As for the potential downsides for host states like Australia, instead highlighted by the PHA's Submission:

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

[2] Nottage, Luke R., Investor-State Arbitration Policy and Practice in Australia (June 29, 2016). SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES, Armand de Mestral, ed, Centre for International Governance Innovation, Canada, 2017; Sydney Law School Research Paper No. 16/57. Available at SSRN: https://ssrn.com/abstract=2802450

[3] See Armstrong, Shiro Patrick and Nottage, Luke R., The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis (August 15, 2016). Sydney Law School Research Paper No. 16/74. Available at SSRN: http://ssrn.com/abstract=2824090; and http://afia.asia/2016/11/does-isds-promote-fdi-asia-pacific-insights-from-and-for-australia-and-india/.

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1. Even if the majority of ISDS claimants stem from the EU and the USA, why would this be relevant to an Agreement with Singapore? Anyway it seems more relevant to compare per capita 'litigiousness'.[4]
2. When discussing cases where 'foreign investors have used ISDS provisions to sue governments over policies and laws implemented to protect health and the environment', the first two are old cases under the North American FTA – hardly representative of tribunal rulings, which have gone distinctly more in favour of host states even under old treaties over the last decade[5] – while the third claim (by Eli Lilly) was recently rejected.[6]
3. Although noting that 'Philip Morris lost its claim in December 2015' against Australia, the PHA submits 'the case is not a clear test for the potential implications of ISDS for health policymaking, since the tribunal found that it had no jurisdiction'. I therefore attach a summary (co-authored with Dr Jarrod Hepburn, for my recent public lecture in Hong Kong) of the July 2016 decision finding against Philip Morris but on the merits, for another claim against Uruguay over other tobacco packaging regulations (these being the only two ISDS claims ever brought by tobacco companies). That demonstrates how contemporary investment treaty tribunals are able to use even older treaties, albeit supplemented by general public international law principles, to reach decisions allowing appropriate deference to host state regulatory space for genuine and proportionate public health measures.
4. The PHA notes that the proposed:

   > 'amendment to SAFTA also includes some legal safeguards similar to those in the TPP, which are intended to make it less likely that a corporation will make an ISDS claim or to increase the chances that governments will be able to defend an ISDS claim over a legitimate health or environmental policy. However, experts have cautioned that (with the one important exception) these legal safeguards are insufficient to prevent corporations from bringing ISDS claims over legitimate health and environmental policies.'

   Yet there is a big difference between being able to bring a claim, and succeeding. The procedural and substantive provisions of the TPP, reflecting a general trend in Asia-Pacific treaty drafting,[7] include numerous express provisions that should

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[4] Cf http://kluwerarbitrationblog.com/2016/11/14/are-us-investors-exceptionally-litigious-with-isds-claims/.

[5] Langford, Malcolm and Behn, Daniel, Managing Backlash: The Evolving Investment Treaty Arbitrator? (September 6, 2016). European Journal of International Law, Forthcoming ; PluriCourts Research Paper No. 16-14. Available at SSRN: https://ssrn.com/abstract=2835488

[6] See http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng

[7] Broude, Tomer and Haftel, Yoram Z. and Thompson, Alexander, The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts (April 2, 2017). Forthcoming, Journal of

make claimants less likely to prevail in inappropriate cases, as well as streamlining proceedings. Those provisions are outlined in my article published late last year,[8] as well as an article with A/Prof Amokura Kawharu[9] (whose separate work is cited in the PHA submission). As such, organisations and individuals interested in advancing public health should welcome retrofits to older treaties like SAFTA rather than complaining about them.

I hope this is useful for the Committee in setting the record straight, and in reaching an informed assessment of the merits of the proposed amendment to SAFTA.

Yours sincerely,

Luke Nottage

International Economic Law (2017); Hebrew University of Jerusalem Legal Research Paper No. 17-25; Hebrew University of Jerusalem International Law Forum Working Paper No. 02-17 . Available at SSRN: https://ssrn.com/abstract=2944846

[8] Nottage, Luke R., The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification (April 20, 2016). Melbourne Journal of International Law, Vol. 17, No. 2, pp. 1-36, 2016; Sydney Law School Research Paper No. 16/28. Available at SSRN: https://ssrn.com/abstract=2767996

[9] Kawharu, Amokura and Nottage, Luke R., Models for Investment Treaties in the Asian Region: An Underview (February 21, 2017). Arizona Journal of International and Comparative Law, 2017 Forthcoming; Sydney Law School Research Paper No. 16/87. Available at SSRN: https://ssrn.com/abstract=2845088

II. *Philip Morris v Uruguay*: A Subsequent Substantive Win for Public Health

On 8 July 2016, the award was issued on the merits finding against the Philip Morris group's parent companies in Switzerland and its local Uruguayan subsidiary,[10] in a much smaller claim commenced on 19 February 2010 under the Uruguay - Switzerland BIT.[11] That differently-constituted but also very experienced tribunal[12] held (partly by majority) that the less extensive tobacco advertising regulations did not result in a denial of justice or other violation of fair and equitable treatment (FET, prescribed in Art 2(2)). The tribunal also held unanimously that there was no indirect expropriation (Art 5(1)), recognising that bona fide public health measures are an essential manifestation of a state's 'police powers' under customary international law. These conclusions and the reasoning adopted are very important for host states concerned about possible 'regulatory chill', when legislating for the public interest. Yet this award has been hardly reported in mainstream media or even academic commentary.[13]

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[10] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) (*Philip Morris v Uruguay*).

[11] Agreement between the Swiss Confederation and the Oriental Republic of Uruguary on the Reciprocal Promotion and Protection of Investments (signed 7 October 1988, entered into force 22 April 1991).

[12] The tribunal included Professor James Crawford (appointed by the host state), a former Dean of Sydney Law School, for many years then at Cambridge University and now a Judge on the International Court of Justice. The claimants appointed Gary Born (a US lawyer and current President of the Singapore International Arbitration Centre). The agreed chair of the tribunal was Professor Piero Bernardini from Italy. See generally also Puig (n **Error! Bookmark not defined.**).

[13] For exceptions, see the succinct commentaries by Tania Voon, 'Philip Morris v Uruguay: Implications for Public Health' (2017) 18 JWIT 320 (also discussing the 2013 decision dismissing Uruguay's objections to jurisdiction) and by the Investment Arbitration Reporter: Luke Eric Peterson, 'The Philip Morris v Uruguay Award on the Merits: Part One of our Three Part Analysis, Focusing on the Expropriation Claim' (*Investment Arbitration Reporter*, 10 July 2016) <https://www.iareporter.com/articles/the-philip-morris-v-uruguay-award-on-the-merits-part-one-of-our-three-part-analysis-focusing-on-the-expropriation-claim/>; ibid, 'The Philip Morris v Uruguay Award on the Merits: Part Two of our Three Part Analysis, Focusing on the FET and Umbrella Clause Claims' (*Investment Arbitration Reporter*, 10 July 2016) <https://www.iareporter.com/articles/the-philip-morris-v-uruguay-award-on-the-merits-part-two-of-our-three-part-analysis-focusing-on-the-fet-and-umbrella-clause-claims/>; ibid, 'The Philip Morris v Uruguay Award on the Merits: Part Three of our Three Party Analysis, Focusing on the Denial of Justice Claims' (*Investment Arbitration Reporter*, 10 July 2016) <https://www.iareporter.com/articles/the-philip-morris-v-uruguay-award-on-the-merits-part-one-of-our-three-part-analysis-focusing-on-the-denial-of-justice-claims/>; and Jarrod Hepburn, 'In Dissent, Gary Born Rejects Use of "Margin of Appreciation Doctrine in BIT Cases, and Sees Two Breaches by Uruguay of Philip Morris's BIT Rights' (*Investment Arbitration Reporter*, 10 July 2016) <https://www.iareporter.com/articles/in-dissent-gary-born-rejects-use-of-margin-of-appreciation-

This case involved somewhat earlier legislation introduced by Uruguay: the 'single presentation requirement' ('SPR', mandating only one cigarette variant per brand) enacted in 2008, and the '80/80 regulation' implemented in 2009. The respondents were represented by a large US law firm (Foley Hoag), with financial support from a foundation established by former New York mayor Michael Bloomberg.[14] The tribunal awarded USD 7 million out of USD 10 million party costs incurred by the successful host state, noting also that the claimant had expended an amount (USD 16 million) greater than the base compensation sought.[15]

The tribunal proceeded on the assumption that modified but unregistered trademarks were legal under domestic law (whereas the legality of the investment was squarely raised in the PMA case, discussed above). The tribunal held that trademarks did not give the Philip Morris companies an unalienable right to use them, but rather were subject to the host state's overriding regulatory powers.[16] Indirect expropriation was not established because neither measure generated a substantial deprivation of rights or had a 'major adverse impact' on the claimants.[17] The tribunal anyway held that customary international law – as found by various investment tribunals from around 2000, and reiterated expressly in several recent North American investment treaties – provided a 'police powers' exception from compensation for expropriation when public health measures were introduced in good faith. This motivation was evidenced for example by Uruguay's accession to the World Health Organisation (WHO) Framework Convention on Tobacco Control.[18] The tribunal considered that both measures met the test of being 'taken *bona fide* for the purpose of protecting the public welfare, … non-discriminatory and proportionate'.[19] Also despite the lack of express authorisation in this old-generation BIT, the tribunal allowed amicus curiae briefs from the WTO and the Pan-American Health Organization, arguing that the measures were not arbitrary but instead could be 'effective means of protecting public health'.[20]

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doctrine-in-bit-cases-and-sees-two-breaches-by-uruguay-of-philip-morriss-bit-rights/> all accessed 23 June 2017.

[14] Eric Crosbie and Stanton Glantz, 'Philip Morris Gets Its Ash Kicked In Uruguay; Where Will It Next Blow Smoke?' (*The Conversation*, 1 August 2016) <https://theconversation.com/philip-morris-gets-its-ash-kicked-in-uruguay-where-will-it-next-blow-smoke-62933> accessed 23 June 2017.

[15] *Philip Morris v Uruguay* (n 10) paras 583, 588.

[16] ibid para 266.

[17] ibid para 192.

[18] (signed 19 June 2003, entered into force 9 September 2004) 2302 UNTS 166.

[19] *Philip Morris v Uruguay* (n 10) para 305. For a detailed recent study of the proportionality principle, both as already used by investment tribunals and as a preferred conceptual framework, see Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (CUP 2015), discussed in Nottage (n **Error! Bookmark not defined.**).

[20] *Philip Morris v Uruguay* (n 10) para 391.

Similarly, the tribunal ruled that Uruguay's enactments were not arbitrary measures contrary to FET, because they addressed serious health concerns in a proportionate manner without bad faith. It noted the usefulness of guidance and information-sharing from the multilateral Framework Convention, particularly for small states like Uruguay, and that the reasonableness of the measure could be assessed when adopted (rather than how it worked out in hindsight).[21] The majority added, following decisions by other recent tribunals, that they 'should pay great deference to government judgements in matters such as the protection of public health'.[22] The majority even went as far as referring to this as a 'margin of appreciation' in favour of host states,[23] similar to the level of deference accorded by the European Court of Human Rights when reviewing measures taken by states party to the European Human Rights Convention.[24] The dissenting arbitrator instead contrasted the wording and different institutional context of the Convention regime, compared to dispute settlement under BITs. While allowing for deference towards host state determinations, he argued that this should involve 'a sensitive and nuanced consideration of the nature of the governmental measure, the character and context of the governmental judgment, the relationship between the measure and the its stated purpose, and the measure's impact on protected investments'.[25] From this perspective, the SPR was found to be a 'hastily adopted measure … ill-suited to its articulated purpose'.[26]

The tribunal found unanimously that there was no violation of investors' substantive legitimate expectations, as another potential manifestation of FET.[27] No specific undertakings of regulatory stability were given by the host state. Indeed, given the nature of the sector and international concerns over tobacco, increasingly strict regulation could be readily expected. In discussing the 80/80 Regulation, the majority also seemed

[21] Noting the importance of such considerations, see also Henckels (n 19).
[22] *Philip Morris v Uruguay* (n 10) para 399 (referring to eg *Electrabel SA v Republic of Hungary,* ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicability and Liability (30 November 2012) para 8.35; *Glamis Gold, Ltd v United States,* UNCITRAL, Award (8 June 2009) para 805).
[23] ibid para 399.
[24] Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222. See generally also Richard H Pildes, 'Supranational Courts and The Law of Democracy: European Court of Human Rights' (2017) J Int'l Disp Settlement 1-26. Also noting and arguing for more structured use of 'deference' by investment treaty tribunals, and comparing the different institutional backdrop to the Court's 'margin of appreciation' doctrine, see Henckels (n 19).
[25] *Philip Morris v Uruguay* (n 10) para 142.
[26] ibid para 157.
[27] By contrast, for example, Australian administrative law persists in not extending protection to substantive legitimate expectations: Nottage (n **Error! Bookmark not defined.**) 389.

comfortable with a host state sometimes having to be a 'first mover' (as long as its measure displayed some rationality and was not discriminatory).[28]

With respect to a third aspect of FET, the tribunal unanimously agreed that denial of justice by host state courts was not easily established, and arose where they conducted fundamentally unfair proceedings and reached outrageously wrong final and binding decisions.[29] This was not made out, for example, where the highest administrative court had rejected the Philip Morris subsidiary's challenge to the SPR in partial reference to arguments and evidence tabled in a separate challenge by a different tobacco company. This did not mean that 'in substance, the [Court] failed to decide significant material aspects' of the subsidiary's claim, so as not to have decided the case at all.[30]

The majority also did not find a denial of justice even in inconsistent interpretations of the 80/80 Regulation by the Supreme Court (considering the background legislation constitutional, after finding it to not permit health warnings covering more than 50% of the tobacco packaging) and by the highest administrative court (holding instead that the legislation permitted more warnings, so the 80/80 Regulation was not ultra vires). By contrast, the dissenting arbitrator emphasised that this was a 'highly unusual' situation, amounting to 'Heads, I win; Tails, you lose' for the foreign investors.[31]

[28] *Philip Morris v Uruguay* (n 10) para 430. However, by 'highlighting the "unprecedented" nature of the SPR measure, [the dissenting arbitrator] seems to signal less comfort with (at least some) measures that stand apart from the global regulatory baseline': Hepburn (n 13).
[29] *Philip Morris v Uruguay* (n 10) para 498.
[30] ibid para 557.
[31] ibid para 40.