

*PHAA submission on the amendments to the Singapore-Australia Free Trade
Agreement*



Public Health Association
AUSTRALIA

Public Health Association of Australia

**Submission to the Joint Standing Committee on
Treaties Inquiry on the amendments to the
Singapore-Australia Free Trade Agreement**

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Introduction

The Public Health Association of Australia welcomes the opportunity to provide this submission on the amendments to the Singapore-Australia Free Trade Agreement (SAFTA) to the Joint Standing Committee on Treaties. We are concerned to see that the amendments include some provisions similar to those in the (now collapsed) Trans Pacific Partnership Agreement. In particular, we raise concerns about the proposed annex on labelling of wine and distilled spirits (Annex 5-C: Sectoral Annex on Wine and Distilled Spirits), and inadequate safeguards to protect public health in the investment chapter (Chapter 8) of SAFTA.

PHAA

The Public Health Association of Australia Incorporated (PHAA) is recognised as the principal non-government organisation for public health in Australia and works to promote the health and well-being of all Australians. The Association seeks better population health outcomes based on prevention, the social determinants of health and equity principles. The PHAA has a vision for a healthy region, a healthy nation and healthy people living in a healthy society and a sustaining environment while improving and promoting health for all.

PHAA has a policy on trade agreements and health which states that:

1. Trade agreements should not limit or override a nation's ability to foster and maintain systems and infrastructure that contribute to the health and well-being of its citizens by detracting from a nation's ability to legislate and regulate in the national interest;
2. Policy space needs to be preserved in trade agreements for national governments to regulate to protect public health; and
3. PHAA advocates a fairer regime of trade regulation which addresses sustainability issues as well as economic development and which prioritises equity within and between countries as a necessary condition for global population health improvement.

The policy also commits the association to 'advocate at the national and international levels to promote and protect public health within international trade agreements and limit adverse impacts of trade agreements on health and well-being, both within Australia and in other countries.'¹

Sectoral Annex on Wine and Distilled Spirits (Annex 5-C)

We are concerned to find that the Trans Pacific Partnership Agreement's annex on wine and distilled spirits (Annex 8-A) has been included in its entirety in the Amended Singapore-Australia Free Trade Agreement in Chapter 5 (Technical Regulations and Sanitary and Phytosanitary Measures) as Annex 5-C (Sectoral Annex on Wine and Distilled Spirits).

The evidence on health warning labels indicates that health warnings are most likely to be effective if they are mandatory, large, placed on the front of a container and including both graphic and text elements.² While TPP Annex 8-A and its counterpart in the amendments to the Singapore-Australia FTA does not expressly prevent Australia or other TPP countries from introducing health warning

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labels for alcoholic beverages, it does include provisions that may be used to frustrate efforts to introduce such evidence-based health warnings.³

The provisions in these annexes require countries to allow suppliers of wine and distilled spirits to provide information required by the importing country (such as health information) on a supplementary label. While there is no definition of a supplementary label, it is generally understood to be a label that is added to the container in addition to the standard labelling.

A TPP country introducing a requirement that warning labels be displayed on the main label(s) on an alcohol container or that large health warnings be displayed on the front of a container may face an argument that it has breached the obligations of the TPP. Such an argument might be made by another TPP party (using the state-state dispute settlement process) or an alcohol industry corporation (using the ISDS mechanism). Exceptions and legal safeguards incorporated into the TPP would assist in defending such a claim. However, such a claim might still be made in the hope of deterring governments from proceeding with health-related labelling measures.³

Recommendation: The Sectoral Annex on Wine and Distilled Spirits (Annex 5-C) should not be included in amendments to the Singapore-Australia Free Trade Agreement – particularly in the absence of comprehensive public health safeguards that prevent disputes over health information on alcohol containers.

Insufficient public health safeguards in the investment chapter

Investor-state dispute settlement (ISDS) is a legal mechanism that enables foreign investors to sue governments for monetary compensation over the introduction of policies and laws that they perceive as harmful to their investments. Policies and laws introduced by Federal, State and Territory or local governments can be subject to disputes. Over the last decade there has been a large increase in investment arbitration cases; from fewer than 10 in 1998 to a total of 568 known cases at the end of 2013⁴. While developing countries have usually been the target for ISDS claims, 2013 marked an increasing share of ISDS cases against developed states. Three quarters of claimants in all known ISDS cases are from the EU and the United States⁵.

Foreign investors have used ISDS provisions to sue governments over policies and laws implemented to protect health and the environment. For example, in the late 1990s the US firm Ethyl Corporation launched an ISDS case against the Canadian government over its decision to ban a petroleum additive toxic to human health. The Canadian government paid \$13 million to settle with Ethyl Corporation and as part of the settlement was required to reverse its ban⁶. Mexico was required to pay \$16.2 million dollars to US waste-management company Metalclad which sued the government for refusing to grant the firm a construction permit for a toxic waste facility, citing environmental reasons⁷. In 2013, the multinational pharmaceutical company Eli Lilly took the Canadian government to ISDS arbitration, claiming \$481 million in compensation over the Canadian court's decision to revoke its patents on two medicines that were found to not deliver the promised health benefits. Eli Lilly is not only seeking compensation but is challenging Canada's domestic intellectual property law, particular its criteria for determining patent validity⁸.

Philip Morris's ISDS case against Australia over tobacco plain packaging is another example. In 2011 Philip Morris initiated a dispute with Australia through ISDS provisions in the Hong Kong-Australia

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Bilateral Investment Treaty. After four years of proceedings, Philip Morris lost its claim in December 2015. While the decision was praised as a win for public health, 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 to hear Philip Morris' claim⁹. This was based on the fact that Philip Morris had re-arranged its corporate structure to facilitate its Hong Kong subsidiary interests in the Australian tobacco market after Australia had announced its plain packaging policy¹⁰. It remains unclear what the outcome would have been had the case not been dismissed on jurisdictional grounds.

Safeguards do not rule out ISDS claims over health and environmental policies

We are pleased to see that SAFTA specifically excludes or carves out ISDS cases against tobacco regulation, cases related to the PBS, Medicare, the Office of the Gene Technology Regulator, and legislation on foreign investment (SAFTA amendments text, Chapter 8, Article 22, footnotes 18 and 19 and Annex 8-B). However, new public health policies for alcohol, food labelling, and other measures to protect health and the environment are still potentially open to challenge using the ISDS process.

We note that the 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.¹¹¹² Examples of the flaws in the safeguards are shown in the box below.

The amendments also do not address the procedural problems associated with ISDS, such as the lack of an independent judiciary, no precedents and the absence of an appeals process.

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Box 1: Examples of flawed legal safeguards in the SAFTA amendments

SAFTA amendments text, Chapter 8, Article 20

“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.” [emphasis added]

- The phrase “otherwise consistent with this chapter” undermines the safeguard and means that its interpretation can be a matter for dispute in a tribunal.

SAFTA amendments text, Chapter 8, Annex 8-A

“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, *except in rare circumstances*.” [emphasis added]

- The phrase ‘except in rare circumstances’ leaves a loophole for corporations to argue that their circumstances are rare. This argument has been made in a case against Costa Rica over a ban on development in a national park, to protect the nesting grounds of the giant leatherback sea turtle.¹³

Recommendation: Stronger public health safeguards should be negotiated for the SAFTA amendments which prevent ISDS claims over regulatory actions to protect public health and the environment.

Conclusion

PHAA is concerned to see that the TPP annex on labelling of wine and distilled spirits has been integrated into the SAFTA amendments, and that both this annex and the investment chapter do not include sufficient public health safeguards to prevent disputes in key areas of public health policy. We believe health should receive greater priority in trade agreements and that they should be subject to independent health impact assessments before they are signed.

Please do not hesitate to contact me should you require additional information or have any queries in relation to this submission.

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References

- ¹ Public Health Association of Australia. Trade Agreements and Health Policy. [cited 20 May 2015]. Available: http://www.phaa.net.au/documents/120130_Trade%20Agreements%20&%20Health%20Policy%20F%20INAL-with%20cover%20sheet.pdf
- ² AER Foundation. Alcohol Product Labelling: Health Warning Labels and Consumer Information. <http://www.fare.org.au/wp-content/uploads/research/AER-Foundation-Policy-Position-Paper-Alcohol-Health-Warning-Labels.pdf>
- ³ O'Brien, P and Gleeson, D. (2015) Trans-Pacific Partnership Agreement (TPP): Alcoholic Beverages and Health Information/Warning Labels.
- ⁴ UNCTAD (2014). Recent developments in investor-state dispute settlement. ISDS IIA Issues Note. April. www.unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf
- ⁵ See Note 4
- ⁶ Public Citizen (2014). Table of Foreign Investor-State Cases and Claims under NAFTA, Washington. <http://www.citizen.org/documents/investor-state-chart.pdf>
- ⁷ See note 3 pages 10-11, 22. Australian Fair Trade and Investment Network (2014). Submission to the Joint Standing Committee on Treaties Inquiry into the Korea-Australia Free Trade Agreement June 13, 2014. <http://aftinet.org.au/cms/submissions/aftinet-submissions>
- ⁸ Public Citizen (2013). U.S. Pharmaceutical Corporation Uses NAFTA Foreign Investor Privileges Regime to Attack Canada's Patent Policy, Demand \$100 Million for Invalidation of a Patent Eli Lilly Claims Canadian Patent "Utility" Doctrine, Divergence from Other Nations' Patent Standards, and "Favoring" of Generics Violate Its NAFTA-Granted Property Rights. <http://www.citizen.org/eli-lilly-investor-state-factsheet>
- ⁹ Australian Government Attorney General's Department (2015). Tobacco plain packaging—investor-state arbitration. <https://www.ag.gov.au/tobaccoplainpackaging>
- ¹⁰ Davison, M (2016). Philip Morris loses plain packs battle, but the war continues. Castan Centre for Human Rights Law. <http://castancentre.com/2016/02/16/philip-morris-loses-plain-packs-battle-but-the-war-continues/>
- ¹¹ Johnson L, Sachs L. The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system. Columbia Centre on Sustainable Investment. Columbia University. Nov 2015.
- ¹² Kawharu A. Trans-Pacific Partnership Agreement New Zealand Expert Paper Series, Expert Paper #2, TPPA: Chapter 9 on investment. The Law Foundation. New Zealand. Nov 2015.
- ¹³ Tienhaara, K (2015). The TPP has been released and our concerns have been vindicated. The Drum, 6 November. <http://www.abc.net.au/news/2015-11-06/tienhaara-ttp-investment/6918810>