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Submission to the Joint Standing Committee on Treaties Inquiry into the Free Trade Agreement between Australia and Hong Kong, China

And

The Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China

August 2019

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1. Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 community organisations and many more individuals supporting fair regulation of trade, consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental protection.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make this submission on the Free Trade Agreement between Australia and Hong Kong, China and the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China.

This submission will address our concerns relating to:

a) The lack of transparency and accountability in negotiations with Hong Kong
b) The inclusion of Investor-State Dispute Settlement provisions
c) The potential impact of the trade in services chapter on essential services
d) The potential risks of the electronic commerce chapter
e) Compliance with International Human rights and labour rights law and environmental standards
f) Technical barriers to trade

2. Summary of recommendations

2.1 Given the risks of ISDS to government policy and revenue, the Investment Agreement should not include ISDS.

2.2 The A-HKFTA should include commitments from both governments to enforceable labour rights and environmental standards.

2.3 Given the risks of ISDS and trade in services and e-commerce provisions; the lack of any commitment to labour rights and environmental standards; and in the absence of evidence of the benefits of the agreements, the implementing legislation for the A-HKFTA and the Investment Agreement should not be approved.

3. A transparent and democratic process for negotiating and ratifying trade agreements

Australia's current procedure for negotiating and ratifying trade agreements is highly secretive and is not compliant with the basic democratic principles that underpin our domestic policy making processes. Trade negotiations are conducted in secret and neither the Parliament nor the wider public had input into, or oversight over, the development of Australia's negotiation mandate.

Negotiation texts are confidential throughout the negotiations and the final text of the agreements are not made public until after the government has made the decision to sign them. The decision to sign trade agreements lies with the Cabinet and is made before the text is tabled in Parliament. It is only after they have been tabled in Parliament that they are examined by the Joint Standing Committee on Treaties.

The National Interest Analysis (NIA) presented to the Committee is not independent but is conducted by the same department that negotiated the agreement. There are no independent human rights or environmental impact assessments. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

A Senate Inquiry in 2015 entitled *Blind Agreement* criticised this process and made some recommendations for change. The Productivity Commission has made recommendations for the public release of the final text and independent assessments of the costs and benefits of trade agreements before they are authorised for signing by Cabinet. The direction of travel at the international level is towards increased transparency and accountability. For example, the EU has developed a more open process, including public release of documents and texts during negotiations and release of texts before they are signed (Senate Foreign Affairs, Defence and Trade Committee 2015, European Union 2015a, Productivity Commission 2010).

AFTINET supports the publication of negotiating texts, publication of the final text of agreements and independent evaluation of the economic, health and environmental impacts of agreements before a decision is made to sign them. In order to uphold fundamental democratic principles, Parliament should vote on the whole text of the agreement (AFTINET 2015).

4. Investor-State Dispute Settlement process (ISDS)

We understand that the constitutional arrangements between Hong Kong and China require that the investment agreement containing ISDS is separate from the agreement dealing with other chapters, but both are legally enforceable.

The *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China* (Investment Agreement) includes Investor-state dispute settlement (ISDS) provisions that enable international investors to sue governments for compensation over changes to policy decisions that they can argue harms their investment.

Over the last 20 years there has been a dramatic increase in the number of known ISDS cases, from less than 10 in 1994 to 300 in 2007 and 942 in 2018 (UNCTAD 2019a).

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to sue governments for damages in an international tribunal. Because ISDS cases are very costly, they are mostly used by large global companies that already have enormous market power, including tobacco, pharmaceutical, agribusiness, mining and energy companies.

3.1 Background and history

ISDS originated in the post-World War Two decolonisation period and was originally designed to compensate for nationalisation or expropriation of actual property, through bilateral investment treaties between industrialised and developing countries.

But over the last half century, the ISDS system has developed concepts like “indirect” expropriation, “minimum standard of treatment” and “legitimate expectations” which do not involve taking of property and do not exist in most national legal systems. These concepts enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in domestic law or policy has reduced the value of their investment, and/or that they were not consulted fairly about the change, and/or that it did not meet their expectations of the regulatory environment at the time of their investment.

The World Trade Organisation does not recognise or include ISDS in its trade agreements, and it has only become a feature of other regional and bilateral trade agreements since the North American Free Trade Agreement in 1994.

There have been increasing numbers of cases against health, environment other public interest laws and policies.

3.2 ISDS Tribunals not independent, no precedents or appeals

Many experts including Australia’s former High Court Chief Justice French and investment law experts have noted that ISDS tribunals are not independent or impartial and lack the basic standards of national legal systems (French 2014, Kahale 2014, Kahale 2018).

ISDS has no independent judiciary. Tribunals are organised by one of two institutions, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID). Tribunals for each case are chosen by investors and governments from a pool of investment lawyers who can continue to practice as advocates, sitting on a tribunal one month and practising as an advocate the next. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest. ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider, and appeal mechanisms to ensure consistency of decisions.

Leading international investment law expert and practitioner George Kahale has recently criticized ISDS in an April 2018 lecture at the Brooklyn Law School titled **“**The wild, wild west of international arbitration law” (Kahale 2018).

Kahale uses examples from his own experience representing governments in ISDS cases to argue that the ISDS system based on commercial arbitration principles is not fit to arbitrate cases in which international companies seek compensation from governments for changes in health, environment or other public interest laws.

Kahale says, “It’s one thing to have party-appointed arbitrators negotiate a decision to settle a commercial dispute having no particular significance beyond the case at hand ... it is quite another to decide fundamental issues of international law and policy that affect an entire society” (Kahale 2018: 7).

Adding “there really are no hard and fast rules” in ISDS, he cites examples of claims of billions of dollars based on false documents, methodologies for calculations of future corporate income which are unacceptable in World Bank accounting practice, and similar claims before different tribunals resulting in inconsistent decisions (Kahale 2018: 14).

He notes the growth of third-party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation, and argues they fuel the growth of "surrealistic" claims and are "more about making money than obtaining justice" (Kahale 2018:17).

3.3 Recent ISDS cases on medicines, environment, carbon emissions reduction, Indigenous land rights, minimum wage

The most comprehensive figures on known cases, compiled by the United Nations Conference on Trade and Development (UNCTAD), show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 to 942 in 2018. Most cases are won by investors or settled with concessions from governments (UNCTAD 2019a and UNCTAD 2019b).

There are growing numbers of cases against health, environment (including laws to address climate change), Indigenous land rights and other public interest laws. Recent cases include the following:

- The US Philip Morris tobacco company shifted assets to Hong Kong and used ISDS in a Hong Kong investment agreement to claim billions in compensation for Australia's plain packaging law. It took over 4 years and $24 million in legal costs for the tribunal to decide that Philip Morris was not a Hong Kong company, and the case was an abuse of process, and the government only recovered half the costs (Ranald 2019).
- US Pharmaceutical company Eli Lilly used the ISDS provisions of NAFTA to claim compensation for a Supreme Court decision that found a medicine was not sufficiently different from existing medicines to deserve a patent, which gives monopoly rights for at least 20 years. Canada has a higher standard of patentability than the US and some other countries. The Canadian government won the case after six years and $15 million in costs, but the tribunal decision was ambiguous on some key points about Canada's right to have distinctive patent laws (Baker 2017).
- The US Bilcon mining company won US$7million plus compound interest from 2007 in compensation from Canada because its application for a quarry development was refused for environmental reasons (Withers 2019, Permanent Court of Arbitration 2019). The Canadian Federal Court found that this impinged on Canada's "ability to regulate environmental matters" but could do nothing to change the decision (Mann 2018).
- The US Westmoreland mining company is suing the Canadian government over the decision by the Alberta province to phase out coal-powered energy as part of its emission reduction strategy (UNCTAD 2019c).
- The Canadian Bear Creek mining company recently won $26 million in compensation from the government of Peru because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests. The tribunal essentially rewarded the company despite the fact that it had violated its obligations in the ILO Convention on Indigenous Peoples to which Peru is a party (ICSID 2017).
- The French Veolia Company sued the Egyptian Government over a local government contract dispute in which they claimed compensation for a rise in the minimum wage. This claim eventually failed but it took seven years and the costs to the Egyptian government are unknown (Breville and Bulard 2014, UNCTAD 2019d).

4.1 ISDS cases cost governments millions to defend, even if they win

Companies and governments fund the arbitration costs and their own legal costs. ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. A 2012 OECD Study found ISDS cases last for three to five years and the average cost to governments for defending cases was US$8 million per case, with some cases costing up to US$30 million. A more recent UNCITRAL paper indicated that ISDS costs are still a major concern (OECD 2012, UNCITRAL 2018).

ISDS tribunals have discretion about whether they decide to award some or all costs to the winning party, and applying for costs to be awarded prolongs the duration and costs of the case.

This differs from national systems. The Australian Government defeated the Philip Morris tobacco company's High Court claim for billions in compensation, and the High Court ordered the company to pay all of Australia's costs. The case and costs decision took less than a year.

Contrast this with the ISDS experience. Australia also won the 2011 Philip Morris ISDS case against our plain packaging law in 2015, but the costs were not awarded until 2017. Only half of Australia's almost A$24 million in legal and arbitration costs were awarded to Australia, despite the fact that the tribunal found that Philip Morris had abused the process (Ranald, 2019).

4.2 United Nations criticism of ISDS: not compatible with human rights

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning Report which argued strongly that trade agreements should not include ISDS (DeZayas 2015).

The Report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of States and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability".

In April 2019, six UN special rapporteurs on human rights wrote an open letter identifying similar fundamental flaws in the ISDS system, and arguing for systemic change (Deva et al 2019).

4.3 The Australian experience of ISDS

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Howard Coalition government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

In 2010 a Productivity Commission study found that ISDS gives additional legal rights to foreign investors not available to domestic investors and lacked evidence of economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments. The then ALP government developed a policy against ISDS during the years 2011-2013 and did not include it in trade negotiations (Productivity Commission 2010).

A June 2015 Productivity Commission study of ISDS confirmed the findings of its 2010 study (Productivity Commission 2015).

The Philip Morris case against Australia's tobacco plain packaging law

In 2012 the US Philip Morris tobacco company lost its claim for compensation for Australia's 2011 plain packaging legislation in the Australian High Court and was ordered to pay all of the government's costs.

The company could not sue under the Australia-US Free Trade Agreement because the Howard government had not agreed to include ISDS in that agreement. The company moved some assets to Hong Kong, claimed to be a Hong Kong company and used the 1993 Hong Kong-Australia Investment Agreement to sue the Australian government. It took over four years for the ISDS tribunal to decide in December 2015 that Philip Morris was not a Hong Kong company and that its case was an "abuse of process" (Tienhaara 2015).

The Australian government applied for costs but was only awarded a proportion of the costs by the tribunal in 2017. However, the total costs and proportion awarded to Australia were blacked out of the tribunal decision. It took another two years and two FOI cases to reveal that the legal and arbitration costs were almost A$24 million, but Australia was awarded only half of its costs, with the cost to taxpayers remaining at almost A$12 million (Ranald 2019).

The substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested.

Even so, the case had a freezing effect on other governments' introduction of plain packaging legislation. The New Zealand government delayed introducing its own legislation pending the tribunal decision (Johnston 2015).

International corporations are well aware of this freezing effect and use ISDS to attempt to prevent public interest regulation. The Canadian Chevron Company has lobbied for ISDS to be included in EU trade agreements as a deterrent against environmental protection laws (Nelson 2016).

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors. They have been used to claim compensation for new public interest regulation and to deter governments from introducing such regulation, including regulation to address climate change and to improve the minimum wage.

4.4 EU and US governments are retreating from ISDS

Both the EU and the US governments have in the past been major proponents of ISDS. However, recently there have been increasing numbers of cases taken against changes to EU and US government laws and policy decisions, and there has been an enormous growth in public opposition to ISDS. Opposition has been expressed by legal experts, state and provincial governments, court decisions and the general public. Both the EU and the US are now retreating from ISDS in trade negotiations.

The EU

The use of ISDS by the Swedish company Vattenfall to sue the German government over the phasing out of nuclear energy, and the inclusion of ISDS in proposed trade agreements with Singapore, Canada and the US prompted fierce public debate. In 2014, the European Commission launched an online public consultation on ISDS. The consultation received over 150,000 submissions, the majority of which were critical of ISDS (European Union 2015b).

The ongoing debate about ISDS has led to several EU court cases in which national governments have challenged the ability of the EU to make collective commitments on ISDS on behalf of national governments without such commitments being subject to democratic processes in each country.

On 16 May 2017, the Court of Justice of the European Union issued a landmark opinion on the investment and ISDS clauses in the EU-Singapore free trade agreement. It found that most of the agreement fell under the EU's powers, and that the EU could ratify it on behalf of member countries, except for some investment provisions, including ISDS. The court found that EU Member States' national and regional parliaments and the European Parliament must vote on provisions regarding investors, particularly ISDS (Court of Justice of the European Union 2017).

In March 2018, in a separate case brought by the government of Slovakia, the Court of Justice found that ISDS between EU governments is incompatible with EU law. The Court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal breached EU law (Court of Justice of the European Union 2018).

The 28 EU member states decided in January 2019 to terminate all Bilateral Investment Treaties between themselves by December 6, 2019 (EU Member States 2019).

Following the court decisions, the European Commission has developed a "fast track" process for agreements without ISDS for non-EU countries, which would enable them to be approved by the European Commission alone, without seeking approval from national parliaments. Such agreements cannot include ISDS (Von der Burchard 2017).

The EU-Australia FTA now being negotiated does not include ISDS.

The EU is pursuing longer-term but equally controversial proposals for a Multilateral Investment Court (Van Harten 2016).

The US

Over the last three years, there has also been strong public opposition expressed in the US to the inclusion of ISDS in trade agreements from state governments and legal experts, which has influenced state and national governments.

In February 2016 the National Conference of State Legislatures (NCSL) declared that it "will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations" (National Conference of State Legislatures 2016).

In October 2017, more than 200 prominent law professors and economists signed an open letter arguing that ISDS undermines the rule of law and urging the US government to oppose ISDS in its renegotiation of the North American Free Trade Agreement (NAFTA). Signatories included Nobel laureate Joseph Stiglitz, former Labor Secretary Robert Reich, former California Supreme Court Justice Cruz Reynoso and Columbia University professor and UN Senior Advisor Jeffrey Sachs (Public Citizen 2017).

The US and Canada have since excluded ISDS from the revised US Mexico Canada Agreement (International Institute for Sustainable Development 2018).

4.5 Ongoing Reviews conducted by ISDS institutions reflect community concerns about ISDS

Growing community concern about ISDS has also had an impact on the two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), both of which are conducting ongoing reviews of the system.

The November 2017 discussion paper for the UNCITRAL review involving member states, identified the following issues:

> "(i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-appointment"), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns … have been said to undermine the legitimacy of the ISDS regime and its democratic accountability" (UNCITRAL 2017:6).

UN Human Rights Rapporteurs and hundreds of civil society groups have made submission to the UNCITRAL review criticising the fundamental imbalance of power in the ISDS system, as have sixty-five academics from around the globe (Deva et al 2019, Civil Society Groups 2019, Academics 2019).

A recent paper from the South Centre says there is a growing international consensus to fundamentally reform ISDS, and that developing countries are under-represented in the UNCITRAL process. The UN Conference on Trade and Development also recognises that there is a new trend to limit companies' access to ISDS, by omitting ISDS from trade and investment treaties altogether, limiting treaty provisions subject to ISDS and excluding policy areas from ISDS coverage (South Centre 2019, UNCTAD 2019b).

In October 2016, the Secretariat of ICSID initiated a consultation with its Member States, which identified some similar areas of concern for review. The review is ongoing (ICSID 2016).

4.6 Safeguards in the Hong Kong Investment Agreement not adequate to prevent ISDS cases against public interest policies

The Hong Kong Investment Agreement includes some clear limitations of the scope for ISDS cases against public interest legislation, particularly in relation to public health. We welcome the clear exclusion of claims relating to the Pharmaceutical Benefits Scheme, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology regulator, and of public health control measures on tobacco products (DFAT 2019a: Article 22, footnotes 13 and 14).

However, the need to specifically exclude claims relating to these bodies brings into question the effectiveness of broader ISDS "safeguards" for health, environment and other public welfare measures that are included in the Investment Agreement. These broad exclusions do not prevent ISDS cases from being launched. Tribunals then have enormous discretion in interpreting the meaning of "safeguards" (Tienhaara 2015). This means that policies relating to other health issues, the environment, essential services, industrial relations and other public interest regulation that are not specifically excluded continue to be at risk from ISDS claims.

Inadequate safeguards in the Investment Agreement

Article 15: Investment and Environmental, Health and Other Regulatory Objectives states that:

> "nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its Area is undertaken in a manner sensitive to environmental, health or other regulatory objectives" (DFAT 2019a, Article 15).

This safeguard is limited by the inclusion of the the phrase 'otherwise consistent with this chapter,' which is circular and could require interpretation through a dispute process.

Annex 2: Expropriation, Article 3(b) states that:

> "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" (DFAT 2019a, Annex 2, Article 3(b)).

The inclusion of the phrase 'except in rare circumstances' provides a loophole for investors to argue that their circumstances are rare. The reference to 'non-discriminatory regulatory actions' enables investors to argue that the actions taken by a government were discriminatory and the inclusion of the phrase 'legitimate public welfare objectives' opens up scope for investors to challenge the legitimacy of the public welfare objectives.

Because it is a separate agreement, the Investment Agreement has its own Annex 1 of non-conforming measures, separate from the services chapter, for which both parties reserve the right to maintain existing and introduce new measures.

The DFAT NIA claims that these non-conforming measures include the Australian reservations of social security services, and measures with respect to creative arts and cultural heritage, and are exempted from the ISDS provisions (DFAT 2019b: 8, para 26). This is not accurate. The Annex of non-conforming measures attached to the investment chapter only exempts the nominated measures from Articles 4 and 5 of the investment chapter, which deal with Non-discriminatory Treatment (DFAT 2019a Annex 1, 33, Para 1).

The nominated measures are not exempted from Section B of the investment chapter which includes ISDS.

This interpretation that the non-conforming measures are not automatically exempted from ISDS provisions is confirmed by Article 32 of the ISDS provisions in the Investment chapter, which states that:

> 'If a respondent asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure set out in a Party's Schedule to Annex 1, the tribunal shall, on the request of the respondent, request the joint interpretation of the Parties on the issue. The Parties shall submit in writing their joint interpretation to the tribunal within 90 days of delivery of the request If the Parties fail to do so, the tribunal shall decide the issue" (DFAT 2019a: Article 32).

This means that the exemption of non-conforming measures is not automatic, but is subject to agreement by both parties.

We note and welcome that the previous Hong-Kong Australia investment agreement, which has no specific exemptions or general safeguards at all, is to be cancelled if the Hong Kong FTA comes into force (DFAT 2019b: 2-3, para 4).

Recommendation

- **Given the risks of ISDS to government policy and revenue, the Investment Agreement should not include ISDS.**

5. Trade-in-Services Chapter: negative list and ratchet structure restrict government regulation

Trade agreements should not undermine the ability of Governments to regulate in the public interest, particularly for essential services like health, education, social services, water and energy. Yet, the provisions in chapter seven of the the Free Trade Agreement between Australia and Hong Kong, China (A-HKFTA) which govern cross-border trade in services could limit regulation across a broad range of service industries.

The aim of the trade in services chapter is to increase cross border trade in services. Services are opened up to international investment and treated on a commercial basis and barriers to trade in services are minimised. Considerations about the ability of governments to regulate access to essential services in the public interest are secondary to this aim.

5.1 The structure of the trade in services chapter

The trade in services chapter includes a number of provisions that open up services to international investment and that can restrict regulation of services. The chapter does not require privatisation of public services but can make it more difficult to re-regulate or re-establish public provision if privatisation fails.

The negative list and ratchet structure
The chapter uses a negative list structure, which means that all services are covered by the agreement unless they are specifically excluded in Annex I and II. It also follows a "ratchet" structure, which means that regulation of services is treated as if it were a tariff and is frozen at existing levels or reduced over time. Regulation cannot be increased in future unless it is excluded under Annex II of the agreement.

Under the negative list governments must specifically exclude service sectors, laws and regulation that they do not want to be covered by the agreement. Annex I lists current non-conforming laws and policies that can be maintained, but they cannot be changed in ways which would make them more "trade restrictive" in future, and new restrictions cannot be introduced (DFAT 2019c: Annex I). Annex II lists non-conforming laws and policies that can be both maintained and changed in future. However, the aim is to reduce over time the measures listed in both Annexes (DFAT 2019c: Annex II).

Restrictions on regulatory space
The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade. But this structure erodes governments regulatory power, limiting policy space available to respond to changed circumstances or to implement alternative policy proposals. The adoption of a negative list also means that new services that may be developed in the future are automatically covered by the agreement and their regulation is restricted.

For example, the recent failure of deregulation and privatisation of Australian vocational education services resulted in government reregulation of those services late in 2016 (Conifer 2016). Without very specific exclusions for specific services, the ratchet structure in this agreement could prevent such reregulation in the future.

Governments are also responding to the need for new forms of regulation of energy markets and carbon emissions to respond to climate change. Future governments will need to have the flexibility to adjust such policies as new evidence emerges. This flexibility should not be reduced by restrictions on new regulation.

The inclusion of the negative list may mean that Governments may not be aware of the implications of the inclusion of all services in the agreement, or of the need to specify very detailed exclusions if they want to maintain policy flexibility for particular services or respond to new developments.

Market access provisions
Market access provisions in Article 7.3 prevent governments from regulating the number of service suppliers, the number of service operations and number of people employed in a particular service sector or by a service supplier (DFAT 2019c: Article 7.3).

This may limit planning for the distribution of services and staffing levels in services like childcare and aged care.

Domestic Regulation and Recognition provisions
Domestic Regulation and Recognition provisions in Article 7.8-9 create obligations for governments governments on the domestic regulation of services to ensure that regulations for licensing, qualifications and technical standards are "reasonable" (DFAT 2019c: Article 7.8.1), do not constitute "unnecessary barriers to trade" (DFAT 2019c: Article 7.8.9) and "are not more burdensome than necessary" (DFAT 2019c: Article 7.8.9(b)).

This could have an impact on future governments that regulate to lift qualifications in areas like childcare and aged care.

5.2 Exclusion for Public services is inadequate

The exclusion of public services in Article 7.2.2(c) is ambiguous because a public service is defined as "a service supplied in the exercise of governmental authority [which] means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" (DFAT 2019c: Article 7.1). In Australia, as in many other countries, many public and private services are provided side-by-side, meaning few public services are covered by this definition.

6.2 Services exclusions do not exclude ISDS cases

The exclusions for public interest legislation in the Annexes of non-conforming measures do not prevent foreign corporations from suing governments over these forms of regulation under the separate ISDS provisions in the Investment Agreement for measures introduced at national, state or local government level. The DFAT NIA is misleading in quoting these exclusions and claiming they apply to ISDS, as is fully explained in the ISDS section of this submission.

What this means in practice is a potential double whammy of state-to-state and ISDS disputes. This is demonstrated by the example of the need to re-regulate Australian vocational education services after the failure of deregulation and privatisation in 2016 described above. If an agreement with similar provisions had already been in place, and private vocational education services were not fully covered by an Annex ll exception, the partner government could have invoked the state-to-state dispute mechanism to prevent reregulation. Even if there were an effective exclusion from state-to-state disputes, this would not prevent the possibility of an ISDS dispute.

5.3 Financial Services chapter

Unlike the Trade in Services chapter, the Financial services chapter uses a positive list, which enables the government to identify which financial services are covered under the agreement.

However, policy space is limited by the inclusion of standstill provisions that freeze regulation at existing levels and market access provisions that prevent governments from regulating the number of service suppliers, the number of service operations, number of people employed in a particular service sector or by a service supplier and the types of legal entities or joint ventures that can be used to supply a financial service. (DFAT 2019c: Article 8.3).

The prudential exception is supposed to enable governments to adopt measures to maintain the integrity of the financial system. However, the use of the term "reasonable measures" enables investors to challenge new regulation (DFAT 2019c: Article 8.19). Article 8.19.2 also states that measures that are adopted must conform with the provisions of the agreement, undermining the prudential exception (DFAT 2019c: Article 8.19.2).

An additional concern is that new financial services are covered under Article 8.12. The authorisation for supply of these services can only be refused for prudential reasons, which is subject to the same concerns outlined in the paragraph above (DFAT 2019c: Article 8.19).

6. Electronic Commerce

Electronic commerce is a complex area of trade law that is directly tied with provisions relating to financial services and broader trade in services. The e-commerce agenda is highly influenced by the US tech industry lobby and e-commerce rules seek to codify the tech industry wishlist known as the Digital2Dozen principles (Office of the United States Trade Representative 2016).

Australia is increasingly including more extensive provisions on e-commerce in recent trade agreements. There is significant concern about the lack of analysis undertaken by the Australian government regarding the impact that these rules could have on a human rights and our ability to govern the digital economy (Greenleaf 2018).

The aim of e-commerce rules is to secure the free flow of cross-border data and to establish an international regulatory framework that prevents governments from regulating the digital domain and the operations of big tech companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of big tech companies including:

- Facebook and Google's data abuse scandals (Waterson 2018, MacMillan and McMillan 2018);
- Uber classifying itself as as a technological platform to avoid regulation and enable its exploitation of workers (Bowcott 2017);
- Apple's tax avoidance (Drucker and Bowers 2017);
- Anti-competitive practices by Facebook, Google and Amazon (Ho 2019).

The Australian Competition and Consumer Commission (ACCC) completed its inquiry into the impact of digital platforms in July this year. The report made 23 recommendation for government action, including regulatory reform, to address concerns about the market power of big tech companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms (ACCC 2019).

The provisions in the A-HKFTA appear to contradict the ACCC findings and could restrict the government's ability to implement the recommendations from the report.

Concerning provisions in the Electronic Commerce chapter

Article 11.3 prevents governments from developing measures to govern electronic authentication, which are the security standards for electronic transactions (DFAT 2019c: Article 11.3). This can prevent governments from regulating electronic transactions to ensure their security. For example, requiring encryption of personal data (Reid Smith 2018:8).

Article 11.7 locks in the free flow of data including personal data across borders. Government regulation of data flows is permitted but it must not "constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade" (DFAT 2019c: Article 11.7.3). Article 11.8.2 prevents governments from requiring companies have a local presence in the country where they are providing services (DFAT 2019c: Article 11.8.2).

These provisions undermine the government's ability to protect privacy by enable companies to move data, including personal data, to jurisdictions where privacy laws are more limited, as privacy requirements are determined by the country where the data is stored not the country where it originated.

Governments are required to adopt consumer protection laws under Article 11.5 (DFAT 2019c: Article 11.5) and a "legal framework that provides for the protection of the personal information" under Article 11.9.2 but there are no minimum standards for this legislation (DFAT 2019c: Article 11.9.2).

Provisions that prevent governments from requiring that companies have a local presence can also make it more difficult to hold companies accountable if there are issues of noncompliance with consumer protection laws and rights and other national legislation.

Article 11.12 prevents governments' from requiring companies transfer or give access to their source code (DFAT 2019c: Article 11.12). This can prevent governments from reviewing source code or algorithms in response to potential race, gender, class or other biases. This is of particular concern given the growing evidence that algorithms "are inescapably value-laden.

> Operational parameters are specified by developers and configured by users with desired outcomes in mind that privilege some values and interests over others" (Mittelstadt et al 2016:1).

The A-HKFTA is the first trade agreement to include e-commerce provisions relating to financial services (DFAT 2019b: Para 28). The NIA asserts that this is a positive development that will "greatly assist business's operational capacity and its ability to compete" (DFAT 2019b: Para 48) and that e-commerce provisions will not restrict Australia's regulatory space (DFAT 2019b: Para 48).

However, Articles 11.15.1-2 enable the free flow of financial data and prevent governments from requiring a local presence in the country where they are providing financial services (DFAT 2019c: Article 11.15.1, Article 11.15.2). As mentioned above, these provisions undermine the government's ability to protect privacy by enabling companies to move financial data to jurisdictions where privacy laws are more limited. Once finance data has moved offshore it is extremely difficult for states to control or have oversight over this data.

The Global Financial Crisis demonstrated the risks of foreclosing governments' control over financial data. US Treasury Secretary Lew told Congress there were times during the crisis when they were cut off from timely and appropriate information (Lew 2016, Guida 2016). Because of that experience, the US insisted in the TPP that financial data was treated more restrictively than other data and was exempted from the data transfer rules that prevent requirements that data is stored and processed locally. This provision remained in the TPP-11 text after the US left the agreement (DFAT 2018: Article 14.1).

The NIA does not address these concerns and does not include an assessment of the potential risks of the e-commerce provisions in relation to financial services. There is no assessment of the risk to privacy and no analysis of how they could impact on government's ability to regulate financial services. The Royal Commission into Banking demonstrated the need for strong oversight of the banking and financial services sectors. Yet, these provisions appear to reduce rather than strengthen regulatory space in this area.

There is an urgent need for these provisions to be reviewed in terms of their impact on privacy, human rights and the regulation of financial services.

7. Compliance with international human rights and labour rights law and environmental standards

There are no commitments in the agreement relating to international laws and standards relating to human rights, labour rights, women's rights, the right to health, the right to privacy and the environment.

The NIA does not include an assessment of the potential impacts on human rights and the environment and there is no independent human rights and environmental impact assessment.

The Australian Government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and the associated Conventions. These include:

- the right of workers to freedom of association and the effective right to collective bargaining (ILO conventions 87 and 98)
- the elimination of all forms of forced or compulsory labour (ILO conventions 29 and 105)
- the effective abolition of child labour (ILO conventions 138 and 182)

- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111)

There should also be national standards for maximum hours of work and health and safety standards based on ILO standards. The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

Trade agreements should require full compliance with an agreed-upon set of Multilateral Environmental Agreements, including the Paris Agreement, with effective sanctions for non-compliance. At the same time, trade agreements must ensure that other provisions, such as investor-state dispute processes, do not undermine the ability of governments to regulate in the interest of protecting the environment.

Trade policy must also work cohesively with measures to address climate change. Trade agreements should not restrict governments' ability to adopt measures to address climate change.

The implementation of environmental standards should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

- **The A-HKFTA should include commitments from both governments to enforceable labour rights and environmental standards.**

8. Technical Barriers to Trade

The objective of the Technical Barriers to Trade chapter is to ensure that "technical regulations, standards and conformity assessment procedures do not create unnecessary technical barriers to trade" (DFAT 2019c: Article 5.2). However, the harmonisation of standards is not always in the public interest, particularly where countries have different standards.

We note the inclusion of Annex 5-A which sets out rules for wine labelling (DFAT 2019c: Annex 5-A). This provides for a standard labelling regime allowing a manufacturer to use the same main label in both countries. Any additional mandatory labelling requirements by individual governments must be on a supplementary label, not on the main label. These rules reduce the flexibility of governments in the future to design labelling requirements based on new public health research.

For example, the requirement to use supplementary labelling could restrict options for future warnings on the health effects of alcohol for pregnant women. Such labelling is currently voluntary in Australia, and not widely in use. Where it is used, the warnings are often small and difficult to see.

There are plans to introduce mandatory warnings on the health effects of alcohol for pregnant women (Australia and New Zealand Ministerial Forum on Food Regulation 2018). Although governments are not prohibited from introducing health warnings, the use of a supplementary label, which would typically be smaller and less noticeable than the main label, could restrict the options for future governments to introduce more prominent health warnings (O'Brien and Gleeson 2015).

9. Conclusion

The purpose and benefit of the A-HKFTA and the Investment Agreement are unclear. As the NIA states, Hong Kong does not currently apply tariffs on goods and services imported from Australia so there are few gains to market access, aside from providing business certainty (DFAT 2019b:4-5).

Australia already has zero or low tariffs on many imports from Hong Kong and the NIA calculates that tariff reductions in the A-HKFTA will result in a loss to government revenue of $25 million over forward estimates (DFAT 2019b:12-13). However, there has been no Australian economic modelling of the specific impacts of the A-HKFTA on the Australian economy as a whole measured by GDP, despite advice from key bodies like the Productivity Commission and the Australian Competition and Consumer Commission that such studies should be done.

The agreements do not include commitments to implement internationally agreed human rights and environmental standards and there have not been any independent studies of the health, environmental and gender impacts of the A-HKFTA in Australia, despite advice from public health, environment and other experts.

The NIA identifies gains across a range of services sectors, including financial and education services, as well as the benefits stemming from the free flow of data and the commitment not to require data to be stored locally. However, no evidence is provided that demonstrates how the provisions on services and e-commerce are in the public interest, given the significant risk to human rights and regulatory space. The inclusion of e-commerce rules on financial services is of particular concern considering the findings of the Royal Commission into Banking and the fragility of the global economy.

The decision to terminate the 1993 Investment Agreement is welcome, as is the clear exclusion of claims against specific health institutions and tobacco regulation. However, the general “safeguards” do not prevent cases against other health, environmental, industrial relations or other public interest regulation. The inclusion of ISDS provisions in the new Investment Agreement therefore still poses a significant risk to Australia’s regulatory sovereignty and to human rights and environmental sustainability in both countries.

Recommendation

- **Given the risks of ISDS and trade in services and e-commerce provisions; the lack of any commitment to labour rights and environmental standards; and in the absence of evidence of the benefits of the agreements, the implementing legislation for the A-HKFTA and the Investment Agreement should not be approved.**

10. References

Academics (2019) "An open letter to the chair of concert trial working group and to all participating States concerning the reform of the Investor-State Dispute Settlement addressing the asymmetry of ISDS" April found at https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3Af165cc95-6957-4e12-a042-9ec43387725e.

Australian Competition and Consumer Commission (2019) "Digital Platforms Inquiry: Final Report", found August 6 at https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

AFTINET (2015) Submission to the Senate Standing Committee on Foreign Affairs Defence and Trade Inquiry into Australia's treaty making process, found April 11, 2018 at http://aftinet.org.au/cms/sites/default/files/AFTINET%20DFAT%20submission%20final%20edited%200215.pdf#overlay-context=node/954.

Australia and New Zealand Ministerial Forum on Food Regulation (2018) "Communiqué of outcomes from the Australia and New Zealand Ministerial Forum on Food Regulation meeting held on 11 October 2018", found August 12, 2019 at https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/forum-communique-2018-October.

Baker, B., (2017) "The Incredible Shrinking Victory: *Eli Lilly v. Canada*, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS cases," Loyola University Chicago Law Journal, Vol. 49, 2017, Northeastern University School of Law Research Paper No. 296-2017 found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012538.

Bowcott, O., (2017) "Uber to face stricter EU regulation after ECJ rules it is transport firm", The Guardian, December 21, found August 13, 2019 at https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu.

Breville, B and Bulard, M., (2014) "The injustice industry and TTIP", Le Monde Diplomatique, English edition, June, found April 14, 2018 at http://www.bresserpereira.org.br/terceiros/2014/agosto/14.08.injustice-industry.pdf.

Civil Society Groups (2019) "More Than 300 Civil Society Organizations From 73 Countries Urge Fundamental Reform at UNCITRAL's Investor-State Dispute Settlement Discussion" found at https://drive.google.com/file/d/1s-bTcSJBRw1ShnQKGaxR8TSJ2TPd1Mrs/view.

Conifer, D., (2016) "Parliament passes bill to scrap troubled VET loans, overhaul vocational education sector," ABC News online, December 2, found April 16, 2018 at http://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860.

Court of Justice of the European Union (2017) Opinion 2/15 of the Court (Full Court) on the Singapore free trade agreement, May 16, found April 11, 2018 at http://www.mlex.com/Attachments/2017-05-16_2CW21X23B07N046Z/C0002_2015%20EN.pdf.

Court of Justice of the European Union (2018) "The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not mpatible with EU law," Media Release March 6, Luxembourg, found April 11, 2018 at https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf.

Department of Foreign Affairs and Trade (2018) *Text of the Trans-Pacific Partnership,* found August 22, 2019 at https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents.aspx.

Department of Foreign Affairs and Trade (2019a) *Text of the Investment Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People's Republic of China,* found August 6 at https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/Documents/a-hkfta-investment-agreement.pdf.

Department of Foreign Affairs and Trade (2019b) *National Interest Analysis of the Free Trade Agreement between Australia and Hong Kong, China and the Investment Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People's Republic of China*, found August 6 at https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/a-hkfta-text/Documents/a-hkfta-national-interest-analysis.pdf.

Department of Foreign Affairs and Trade (2019c) *Text of the Free Trade Agreement between Australia and Hong Kong, China,* found August 6 at https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/a-hkfta-text/Pages/default.aspx.

Deva, S., et al (2019) Letter to the UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform from six UN Special Rapporteurs, April 2019 found at https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf.

De Zayas, A., (2015) "UN Charter and Human rights treaties prevail over free trade and investment agreements," Media Release, September 17, Geneva, found April 18, 2018 at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16439&LangID=E#sthash.WdxSGvlb.dpuf.

Drucker, J and Bowers, S., (2017) "After a Tax Crackdown, Apple Found a New Shelter for Its Profits", The New York Times, November 7, found August 13, 2019 at https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html.

European Union (2015a) EU negotiating texts in TTIP, February, Brussels, found April 14, 2018 at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230.

European Union (2015b) "Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement," found August 13, 2019 at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

European Union Member States (2019) "On the legal consequences of the judgment of the court of justice in ACHMEA and on investment protection in the European Union", Declaration of the representatives of the governments of the member states, January 15, found August 13, 2019 at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

French, R.F Chief Justice (2014) "Investor-State Dispute Settlement-a cut above the courts?" Paper delivered at the Supreme and Federal Courts Judges conference, July 9, 2014, Darwin, found April 14, 2018 at http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf.

Greenleaf, G., (2018) "Free Trade Agreements and data privacy: Future perils of Faustian bargains", in Svantesson, D and Kloza D (eds.) *Transatlantic Data Privacy Relationships as a Challenge for Democracy,* Intersentia. doi:10.1017/9781780685786, found August 6, 2019 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732386&download=yes.

Guida, V., (2016) "Lew defends financial services data carveout", *Politico,* 11 February 2016, found August 22, 2019 at https://www.politico.com/tipsheets/morning-trade/2016/02/lew-defends-financial-services-data-carveout-senate-to-vote-on-customs-bill-democrats-weigh-in-on-tpp-212657.

Ho, V., (2019) "Tech monopoly? Facebook, Google and Amazon face increased scrutiny", The Guardian, June 4, found August 13, 2019 at https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon.

International Centre for Settlement of Investment Disputes (2016) "International Backgrounder on Proposals for Amendment of the ICSID Rules" found at https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf.

International Centre for Settlement of Investment Disputes (2017) *Bear Creek Mining Corporation vs the Republic of Peru Award*, September 12, found April 10, 2018 at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf.

International Institute for Sustainable Development (2018) "USMCA Curbs How Much Investors Can Sue Countries—Sort of", found August 13, 2019 at https://www.iisd.org/library/usmca-investors.

Johnstone, M., (2015) "Pressure to bring in tobacco plain packaging," New Zealand Herald, March 2, found April 13, 2018 at http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11410127.

Kahale, G ., (2014) *Keynote Address*, Eighth Juris Investment Arbitration Conference, Washington DC, March 8, found September 1, 2014 at http://www.curtis.com/siteFiles/Publications/8TH%20Annual%20Juris%20Investment%20Treaty%20Arbitration%20Conf.%20-%20March%2028%202014.pdf.

Kahale, G., (2018) "ISDS: The Wild, Wild West of International Law and Arbitration," Lecture given at Brooklyn Law School, April 3, 2018 found at https://www.bilaterals.org/IMG/pdf/isds-the_wild,_wild_west_of_international_law_and_arbitration.pdf.

Lew, J., (2016) Evidence given to the House Financial Services Committee hearing on the international financial system, March 22, 2016, found August 22, 2019 at https://www.c-span.org/video/?407079-1/treasury-secretary-jack-lew-testimony-international-financial-system&start=2490.

MacMillan, D and McMillan, R., (2018) "Google Exposed User Data, Feared Repercussions of Disclosing to Public", The Wall Street Journal, October 8, found August 13, 2019 at https://www.wsj.com/articles/google-exposed-user-data-feared-repercussions-of-disclosing-to-public-1539017194.

Mann, H., (2018) "The Federal Court of Canada and the end of ISDS in NAFTA?" International Institute for Sustainable development, May 4, found August 22, 2019 at https://www.iisd.org/blog/federal-court-canada-and-end-investor-state-dispute-settlement-nafta.

Mittelstadt, B., Allo, P., Taddeo,M., Wachter, S and Floridi, L., (2016) "The ethics of algorithms: Mapping the debate", *Big Data & Society,* July–December: 1-21. DOI: 10.1177/2053951716679679.

National Conference of State Legislatures, (2016) *Policy Directive*, found April 11, 2018 at http://www.ncsl.org/ncsl-in-dc/task-forces/policies-labor-and-economic-development.aspx.

Nelson, A., (2016) TTIP: "Chevron lobbied for controversial legal right as 'environmental deterrent,'" *The Guardian*, April 26, found April 14, 2018 at https://www.theguardian.com/environment/2016/apr/26/ttip-chevron-lobbied-for-controversial-legal-right-as-environmental-deterrent.

OECD (2012) "Investor-State Dispute Settlement: A scoping paper for the investment policy community", OECD Working Papers on International Investment, 2012/03, OECD Publishing.

O'Brien, P and Gleeson, D., (2015) "Trans-Pacific Partnership Agreement – Alcoholic Beverages and Health Information/Warning Labels" November. found March 18, 2016 at https://tpplegal.files.wordpress.com/2015/12/tpp-and-alcohol-health-warnings-summary-nov-2015.pdf.

Office of the United States Trade Representative (2016) "The Digital2Dozen", found August 13, 2019 at https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen.

Permanent Court of Arbitration (2019) Award on Damages Clayton Bilcon v. Canada, January 10, Toronto, found August 22, 2019 at https://www.italaw.com/sites/default/files/case-documents/italaw10377_0.pdf

Productivity Commission (2010) *Bilateral and Regional Trade Agreements Final Report*, Productivity Commission, Canberra, December, found April 10, 2018 at https://www.pc.gov.au/inquiries/completed/trade-agreements/report.

Productivity Commission (2015) Trade and Assistance Review 2013-14, June, found April 10, 2018 at http://www.pc.gov.au/research/recurring/trade-assistance/2013-14.

Public Citizen (2017) *230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement* (ISDS) From NAFTA found April 14, 2018 at https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

Ranald, P., (2019) 'When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging' *The Conversation*, 27 March, 2019 https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279.

Reid Smith (2018) "Preliminary note: Electronic authentication: some implications", found August 6 2019 at https://ourworldisnotforsale.net/2018/esignatures2018-9.pdf.

Senate Standing Committee on Foreign Affairs Defence and Trade (2015) *Blind agreement: reforming Australia's treaty-making process,* May, found October 5, 2015 at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report.

South Centre (2019) The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime, March found at https://www.southcentre.int/wp-content/uploads/2019/03/IPB16_The-Future-of-ISDS-Deliberated-at-UNCITRAL_EN.pdf.

Tienhaara, K., (2015) “Dismissal of case against plain cigarette packaging good news for taxpayers,” *Canberra Times*, December 20 found December 21, 2015 at http://www.smh.com.au/comment/the-dismissal-of-a-case-against-plain-cigarette-packaging-is-good-news-for-taxpayers-20151218-glrb53.html.

UNCITRAL (2017) Possible reform of investor-State dispute settlement (ISDS) note by the Secretariat, Vienna, 27 November, found April 14, 2018 at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/067/48/PDF/V1706748.pdf?OpenElement.

UNCITRAL (2018) Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017) published June 25, 2018 , found April 14, 2018 at http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf.

UNCTAD (2019a) Investment Policy Hub: *Known treaty-based cases*, found at http://investmentpolicyhub.unctad.org/ISDS.

UNCTAD (2019b) Review of ISDS Decisions in 2018 Highlights IIA Reform Issues, July, found at https://investmentpolicy.unctad.org/news/hub/1618/20190723-review-of-isds-decisions-in-2018-highlights-iia-reform-issues.

UNCTAD (2019c) Investment Dispute Settlement Navigator, Westmoreland v. Canada, found August 13, 2019 at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/936/westmoreland-v-canada.

UNCTAD (2019d) Investment Dispute Settlement Navigator, Veolia v. Egypt 2012, found August 13, 2019 at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt.

Von der Burchard, (2017) “Juncker proposes fast-tracking EU trade deals,” Politico, August 31, 2017, found April 11, 2018 at https://www.politico.eu/article/juncker-proposes-fast-tracking-eu-trade-deals/.

Van Harten, G., (2016) “Key flaws in the European Commission’s proposals for foreign investor protection in TTIP”, Osgood Hall Law School Legal Studies Research Paper Series No. 16, Volume 12 issue 4, York University, Toronto, found March 1, 2016 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122

Waterson, J (2018) “UK fines Facebook £500,000 for failing to protect user data”, The Guardian, October 25, found August 13, 2019 at https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica.

Withers, P., (2019) “Canada ordered to pay US concrete company $7m in NAFTA case,” Canadian Broadcasting Company, February 25, found at https://www.cbc.ca/news/canada/nova-scotia/nafta-bilcon-digby-neck-quarry-environmental-sovereignty-1.5032727.