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Submission to the Joint Standing Committee on Treaties Inquiry into the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

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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 and investment 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 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

This submission will address the following issues:

- Substantive criticisms of ISDS and why it should not be included in trade and investment agreements
- In the context that ISDS is included in trade and investment agreements, support for the application of UNCITRAL Rules on Transparency
- Concerns about some limitations in the UNCITRAL Rules on Transparency
- Concerns about the inconsistent application of UNCITRAL Rules on Transparency in existing trade agreements

2. Summary of recommendations

2.1 Given the significant risk that ISDS poses to human rights, environmental sustainability and regulatory sovereignty the Australian government should commit to:

- **exclude ISDS provisions from all Australian trade and investment agreements**
- **Renegotiate existing trade and investment agreements that include ISDS provisions and remove such provisions from the agreements.**

2.2 Where trade and investment agreements do include ISDS provisions we agree that they should be, at a minimum, subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Therefore, we recommend that the Australian government should:

- **Ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.**
- **Address inconsistencies in the application of the Rules on Transparency in existing agreements to ensure they conform to the UNCITRAL rules**

3. The risks of Investor-State Dispute Settlement

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. The inclusion of Investor-State Dispute Settlement provisions (ISDS) in trade and investment agreements gives additional special rights to foreign investors to sue governments for damages in an international tribunal.

3.1 ISDS provisions

The ISDS system was initially designed to ensure ensure international investors were compensated for the expropriation of property. However, the provisions have now been expanded to include "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 provisions 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. 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.

3.2 The impact of ISDS on human rights and the environment

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 and UNCTAD 2019b). The number of cases against health, environment (including laws to address climate change), Indigenous land rights and other public interest laws and policies is also growing. 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).

3.3 ISDS Tribunals not independent, no precedents or appeals

ISDS has been widely criticised for its lack of transparency, with cases often taking place entirely behind closed doors or only limited information being being publicly released. Tribunals are not independent or impartial and 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.

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

ISDS cases result in huge costs for governments. 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 (OECD 2012). Australia's experience in the US Philip Morris tobacco case, in which only half the costs of the case were recovered despite the tribunal's decision that the case was an abuse of process, demonstrates just how significant the costs can be, even where government's win the case (Ranald 2019).

3.5 ISDS and regulatory chill

ISDS can have a significant impact on government's regulatory sovereignty. Many cases have resulted in settlements in which governments have revised the policies/legislation/legal decisions that the claim has been brought against (Canadian Centre for Policy Alternatives 2010, UNCTAD 2019e, Global Justice Now 2019). However, even the threat of ISDS can deter governments from implementing public interest policies, including in relation to health, workers' rights and the environment. For example, New Zealand delayed the implementation of its tobacco plain packaging legislation until after the Philip Morris case was concluded (Johnstone 2015).

See *Attachment 1. Latest evidence on the Investor-State Dispute Settlement process* for a detailed overview of the ISDS system and the risks its poses to human rights, the environment and regulatory sovereignty.

Recommendations:

Given the significant risk that ISDS poses to human rights, environmental sustainability and regulatory sovereignty the Australian government should commit to:

- **Exclude ISDS provisions from all Australian trade and investment agreements**
- **Renegotiate existing trade and investment agreements that include ISDS provisions and remove such provisions from the agreements.**

4. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

The lack of transparency in ISDS cases is of huge public concern and contributes to broad public opposition to ISDS (Tienhaara, 2009, European Union 2015). Noting AFTINET's recommendation that the Australian Government should commit to exclude ISDS from all existing and future trade and investment agreements, we agree that in the context in which ISDS is included in trade and investment agreements any steps taken to improve transparency are positive.

For this reason, we support the UNICTRAL Rules on Transparency in Treaty-Based Investor-state Arbitration (Rules on Transparency) and the application of these rules to Australian trade and investment agreements that include ISDS and that were concluded prior to 1 April 2014, which would be enabled by the ratification of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (The Convention).

4.1 The UNCIRAL Rules on Transparency in Treaty-based Investor-State Arbitration

The Rules on Transparency mandate that for disputes that are subject to these rules:

- Arbitration documents should be made public including:
    - information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made upon receipt of a notice of arbitration (United Nations 2014: Article 2);
    - the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal (United Nations 2014: Article 3.1);
    - expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal (United Nations 2014: Article 3.2).
- After consultation with the disputing parties, the tribunal may allow a third person to make a submission to the tribunal (United Nations 2014: Article 4.1).
- The tribunal shall allow submissions to be made by a non-disputing Party to the treaty (United Nations 2014: Article 5.1).
- Hearings for the presentation of evidence or for oral argument shall be public (United Nations 2014: Article 6.1).

4.2 Limitations of the UNCIRAL rules on Transparency in Treaty-based Investor-State Arbitration

The Rules on Transparency are limited in their application and scope, which reduces their effectiveness in increasing the transparency of ISDS disputes.

Article 1.3(a) states that:

> "The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty" (UN 2014: Article 1.3(a))

This enables parties to outline alternative transparency arrangements within the trade or investment agreement.

Article 7, also states that:

> "Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail" (United Nations 2014: Article 7).

This means that where rules in the treaty differ from the Rules on Transparency, even if these rules are less transparent, the rules in the treaty prevail.

However, we note that the Convention does address this concern for trade and investment Agreements in its remit. Under Article 2(4) of the Convention, in the case where both states are parties to the Convention and "have not made a relevant reservation under article 3(1)(a) or (b)" the Rules on Transparency will prevail (United Nations 2015: Article 2(4)). This means that in cases where a dispute was brought under an Australian trade or investment agreement that was concluded prior to 1 April 2014 and both States are parties to the Convention and do not have relevant reservations the Rules on Transparency would prevail.

The Rules on Transparency provisions relating to the public release of information (United Nations 2014: Article 3 – 4) are also limited by the exceptions for confidential or protected information provided under Article 7. These exemptions include:

> "(a) Confidential business information;
>
> (b) Information that is protected against being made available to the public under the treaty;
>
> (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
>
> (d) Information the disclosure of which would impede law enforcement." (United Nations 2014: Article 7).

The inclusion of exemptions for confidential business information and protected information without defining these terms opens up scope for corporations to claim that documents submitted to the tribunal should not be made public. Arbitration tribunals may then be required to interpret these provisions. This could limit public access to arbitration documents and reduce oversight of arbitration proceedings.

4.3 Limitations of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

AFTINET notes that the ratification of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration would result in Rules on Transparency only being applied to Australian trade and investment Agreements that were concluded prior to 1 April 2014, and where:

> "both the investor's State and the host State of the investment are parties to the Convention or where the host State is a party to the Convention and the investor agrees to the application of the Rules on Transparency" (DFAT 2019: Para 10).

This significantly reduces the scope of the Convention, particularly given that of the four Australian Free Trade Agreements and the twenty-one Investment Protection and Promotion Agreements would be impacted by the Convention, none of the partner states are yet parties to the Convention (DFAT 2019: Para 11).

We are not suggesting that this as an argument against ratification. AFTINET supports ratification of the Convention. However, without consistent application, the Rules on Transparency risk being piecemeal and of limited use in addressing the lack of transparency in the ISDS system.

4.4 Inconsistencies in the application of the UNCITRAL Rules on Transparency Treaty-based Investor-State Arbitration in Australian trade and investment agreements

AFTINET notes that there has been inconsistent application of the Rules on Transparency in Australian trade and investment agreements that have been concluded since the adoption of the Rules in 2013.

The DFAT National Interest Analysis states that the ratification of the Convention would bring trade and investment agreements concluded prior to 1 April 2014 "into line with transparency arrangements included in Australia's more recent free trade agreements" (DFAT 2019: Para 16).

Table 1. Application of the Rules on Transparency in Australian trade and investment agreements since 2014

	Arbitration documents made public	**May allow submission from a third person**	**Allows non-disputing party submissions**	**Public Hearings**
China–Australia Free Trade Agreement	Only request for consultation, notice of awards and orders, awards, and decisions of the tribunal	Yes	Yes	Only with the agreement of the respondent
Korea–Australia Free Trade Agreement	Yes	Yes	Yes	Yes
TPP-11	Yes	Yes	Yes	Yes
Peru-Australia Free Trade Agreement (not yet in force)	Yes	Yes	Yes	Yes
Hong Kong – Australia Investment Agreement (not yet in force)	Yes	Yes	Yes	Yes
Indonesia-Australia Comprehensive Economic Partnership Agreement (not yet in force)	Only awards and decisions produced by the tribunal	No	No	No
Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (not yet in force)	Yes	Yes	Yes	Yes

As Table 1 demonstrates, the Rules on Transparency have not been fully incorporated into all Australian FTA's since 2014. The China-Australia FTA, which entered into force in December 2015, includes a Side letter stating that Rules on Transparency do not apply to the Agreement (DFAT 2015: ChAFTA Side Letter on Transparency Rules Applicable to Investor-State Dispute Settlement). Inferior transparency provisions in the Agreement include the public release of documents being limited to

(a) the request for consultations; (b) the notice of arbitration; (e) orders, awards and decisions of the tribunal (DFAT 2015: Article 9.17.2(a)). Hearings are also only to be made public "with the agreement of the respondent" (DFAT 2015: Article 9.17.3). Other provisions are in line with the Rules on Transparency.

The Korea–Australia Free Trade Agreement, which entered into force 12 December 2014 also includes a Side letter stating that Rules on Transparency do not apply to the Agreement (DFAT 2014: KAFTA Side Letter UNCITRAL Transparency Rules - Australia to Korea). However, provisions within the Agreement appear to be consistent with the Rules (DFAT 2014: Chapter 11, Section B).

The Indonesia-Australia Comprehensive Economic Partnership Agreement, which has not yet been ratified and is currently under JSCOT review, only includes provisions to enable the public release of the "awards and decisions produced by the tribunal" (DFAT 2019a: Article 14.31.1). Other provisions in the Rules on Transparency are absent from the Agreement.

As noted previously, the inconsistent application of the Rules of Transparency significantly limits their effectiveness in increasing transparency of ISDS proceedings and undermines efforts to address broad and legitimate public concern about the democratic deficit in ISDS provisions.

Recommendations:

Where trade and investment agreements do include ISDS provisions we agree that they should be, at a minimum, subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Therefore, we recommend that the Australian government should:

- **Ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.**
- **Address inconsistencies in the application of the Rules on Transparency in existing agreements to ensure they conform to the UNCITRAL rules**

5. Conclusion

The Rules on Transparency provide some improvement to transparency in ISDS arbitrations. For this reason, AFTINET supports the ratification of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration and the application of these rules to Australian trade and investment agreements concluded prior to 1 April 2014.

However, we note that unless partner governments join the Convention the Rules on Transparency will not be applicable to eligible Australian FTAs and Investment Agreements. We also note the limitations of the Rules on Transparency and the discretion given to tribunals in relation to the public release of documents. These limitations place restrictions on the extent to which the Rules on Transparency may address public concerns about transparency issues.

The Convention is not intended to address the broader public concerns with ISDS, including the impact on governments' regulatory sovereignty, the potential risk to human rights and the environment and the significant costs associated with ISDS cases, even where governments win cases. For these reasons, we continue to assert that the Australia government should commit to exclude ISDS from all existing and future trade and investment agreements.

Attachment 1. Latest evidence on the Investor-State Dispute Settlement process

In recent years, number of ISDS cases has increased to 942 reported cases in 2018 (United Nations Conference on Trade and Development (UNCTAD) 2019a) and more evidence has come to light about the flaws in the ISDS system. The critical debate has affected all sides of politics, more governments are withdrawing from ISDS arrangements, and the EU and the US are now negotiating agreements without ISDS.

1. What is ISDS?

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 legal rights to a single foreign investor (rights not available to local investors) to sue governments for damages in an international tribunal if they can claim that a change in national law or policy will harm their investment. 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.

2. 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. 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).

4. 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 Lilley 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 2019d).
- 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 (International Centre for Settlement of Investment Disputes (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 have not been made public (Breville and Bulard 2014, UNCTAD 2019e).

Note that these examples include cases against court decisions and government laws and policies at national, state and local levels.

5. 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).

6. 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).

7. The Australian experience of ISDS and previous Australian policy

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).

7.1 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. Many developing country governments, including Brazil, India, South Africa and Indonesia have reviewed and/or cancelled their ISDS commitments (Filho 2007, Biron 2013, Uribe 2013, Mehdudia 2013, Bland and Donnan 2014).

8. 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.

8.1 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 2014).

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).

8.2 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 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).

8.3 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 (South Centre 2019).

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 (UNCTAD 2019b).

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

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