Level 7, 321 Pitt Street
Sydney NSW 2000
Phone: 02 9699 3686
Email: campaign@aftinet.org.au
ACN 097 603 131
ABN 83 659 681 462
www.aftinet.org.au

July 10, 2018

The Secretariat
Senate Standing Committee on Foreign Affairs and Trade
Parliament House
Canberra

Supplementary submission: Latest evidence on 2015 EU investment court proposal and EU negotiation of FTAs without ISDS and government release of Philip Morris Tobacco ISDS case legal costs in response to FOI request

1) **Clarification on timing of the 2015 EU investment court proposals for reform of ISDS, European Court of Justice decisions in 2017 and 2018, and the current EU-Australia Free Trade Agreement negotiations, in which there is no proposal for any form of ISDS.**

The EU has been pursuing a long-term 2015 proposal for a permanent multilateral investment court which is explained in our submission on pages 16 to 17.

Our submission also explains more recent decisions of the European Court of Justice on pages 10 to 11. These 2017 and 2018 decisions found that ISDS is incompatible with national sovereignty and requires decision-making by each EU state, with the result that the EU is not proposing any form of ISDS in its current negotiations, including the EU-Australia FTA negotiations. The most recent detailed evidence for this is summarised below.

a) In the original AFTINET submission we referred (pages 16 to 17) to the EU investment court proposal, which attempts to address the problems of the composition of existing ISDS tribunals, and the lack of precedents and appeals as proposed in the TPP-11.

The TPP-11 version of ISDS ad hoc tribunals are made up of part-time investment lawyers who are paid by the hour and can remain practising advocates, and there is no system of precedents or appeals. This is a lower judicial standard than most national court systems, in which judges are full-time, and cannot remain as practising advocates because of obvious conflicts of interest. In most national systems, the use of precedents is intended to ensure that judges show they are aware of decisions in other similar cases. Appeal mechanisms to an independent senior panel of judges also help to ensure consistency of decisions.

As we said in our submission, the EU investment court proposal in 2015 attempted to address these issues by establishing a permanent investment court of qualified judges to serve on tribunals, and an appeals tribunal consisting of more senior qualified judges. This would be an improvement on the TPP-11 ad hoc tribunal system, because it attempts to address the

problem of conflict of interest of tribunal members also practising as advocates, and of the lack of an appeal system to ensure consistency of decisions.

However, the AFTINET submission also made the point that, while the EU investment court proposal addresses some issues about the nature of tribunals, it does not address the basic structure of ISDS which gives foreign investors additional legal rights to claim compensation from governments for changes in law and policy which they can argue have harmed their investment, using legal concepts like "indirect expropriation" which are not found in Australia or most other national legal systems.

The EU proposal for a permanent multilateral international investment court is a long-term proposal that is likely to take years of debate to resolve.

b) The AFTINET submission also made the point that since the EU Investment court proposals in 2015, there have been two very recent European Court of Justice decisions, one in May 2017 and one in March 2018, that have found that ISDS impinges on national sovereignty. The court found that the inclusion of ISDS in trade agreements is not compatible with EU law and therefore must be decided individually by each member state. The result of these decisions is that the EU has adopted a "fast track" approach in its current FTA negotiations and is not proposing that any form of ISDS be included in these agreements.

The European Court of Justice determined in May 2017 that ISDS provisions in the EU-Singapore FTA were an intrusion on national sovereignty and that therefore the European Commission did not have the legal power to include ISDS in agreements on behalf of its member states[1]. This means that if a free trade agreement contained ISDS, EU member states each had to decide separately on the ISDS provisions. In March 2018, the same court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal were incompatible with EU law[2].

In response to these recent decisions, the European Commission has adopted a "fast track" process for trade agreements without ISDS, that would enable them to be approved by the European Commission alone. This "fast track" process has been applied to the proposed EU-Australia FTA.

EU Trade Commissioner Dr Cecilia Malmström confirmed that the EU is not making any proposal for ISDS in the current EU-Australia FTA negotiations in answer to a question at the Australian Prime Minister's press conference in Canberra on June 18, 2018, quoted verbatim below:

---

1 Court of Justice of the European Union (2017) Opinion 2/15 of the Court (Full Court) on the Singapore free trade agreement, p.54, May 16, found April 11, 2018 at http://www.mlex.com/Attachments/20in the Singapore FTA17-05-16_2CW21X23B07N046Z/C0002_2015%20EN.pdf

2 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 compatible 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

JOURNALIST:

Trade Commissioner, this agreement won't have ISDS - investor-state dispute settlement provisions - because your negotiating, your fast-track authority doesn't allow that. We agreed to them as part of the TPP and TPP-11. Why do you think they're not needed?

EU TRADE COMMISSIONER:

Well, we have very few of our member states have bilateral investment treaties with Australia. I think there's only five of them. There was an agreement that at this stage this was not really needed. We have reformed our way of looking at ISDS, because we think they are part of the parcel. We have a new investment court system and we're also working towards an international system of investment court. But I think at this stage, we agree that it was not necessary. Should that change we of course will speak with our Australian friends. But at this stage, it was not considered necessary.

JOURNALIST:

Might Australia, might this agreement make use of that investor court that you're setting up?

EU TRADE COMMISSIONER:

I'm sorry?

JOURNALIST:

Might this agreement make use of that EU investor court?

EU TRADE COMMISSIONER:

No, because we're not negotiating investor protection in the agreement so there would be no use for that.[3]

In summary, the EU proposal for a permanent multilateral investment court is being pursued as a long-term goal through the UNCITRAL review of ISDS, but more recent European Court of Justice decisions have meant that the EU has ruled out any form of ISDS in the current EU-Australia FTA negotiations, as confirmed by the EU Trade Commissioner.

2) Government release of Philip Morris Tobacco ISDS case legal costs in response to FOI request

The AFTINET submission explained on page 9 that even if governments win ISDS cases, mounting a defence can take many years and involve legal costs of tens of millions of dollars.

---

[3] Office of the Prime Minister Malcolm Turnbull (2018) transcript of Press Conference with the Minister for Trade, Tourism and Investment and EU Trade Commissioner, June 18, found June 26 at https://www.pm.gov.au/media/press-conference-minister-trade-tourism-and-investment-and-eu-trade-commissioner

We used the example of the Philip Morris Company case against the Australian government over plain packaging legislation. Philip Morris is a US-based global company, but it could not sue under the Australia-US FTA 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 an obscure Hong Kong-Australia investment agreement to sue the Australian government.

It took over four years for the tribunal to decide the threshold issue that Philip Morris was not a Hong Kong company. It then took a further two years for the tribunal to award costs. The Australian government was awarded a proportion of the costs, but the proportion and the total costs were blacked out of the tribunal decision, at the request of both parties. The Australian government initially appealed an FOI decision by the Australian information Commissioner that the cost should be made public.

The government decided to release the legal costs on July 2[4], but the proportion of costs paid by Philip Morris has still not been released. The figure released by the government for total invoices for legal costs was $38,984,642.97. It is not clear whether this also includes the payments to arbitrators which are borne by the parties. In any case, this evidence supports the argument that even if governments win, defending cases uses tens of millions of revenue which could be better spent elsewhere, and that Australian citizens have a right to know what these costs are.

Yours sincerely

Dr Patricia Ranald
Convener, Australian Fair Trade and Investment Network

[4] Gareth Hutchens and Christopher Knaus, (2018) “Revealed: $39m cost of defending Australia's plain packaging laws”, The Guardian, July 2, found at https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws