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The Hon. David Sharma MP
Chair Joint Standing Committee on Treaties
Parliament House
Canberra

Dear Mr Sharman

Supplementary submission on IACEPA

This is a supplementary submission to clarify a point raised in relation to the evidence on IACEPA gave to the Committee on August 26, 2019.

The Hansard transcript p. 6 records the following

Chair (Mr Sharman)

“Under, I think, article 14.21 of that agreement, it makes clear:
... no claim may be brought under this Section ... in relation to a measure that is designed and implemented to protect or promote public health ...
I would have thought this explicitly covers the regulation of tobacco, and I believe that in DFAT's testimony at the second JSCOT hearing into the Peru FTA they mentioned that this provision did indeed cover tobacco regulation.”

Dr Ranaid: I think it is too general. It's a general exclusion, not a specific one. They do have in that agreement specific exclusions for Medicare, the PBS et cetera. In the Hong Kong one and in other agreements, there have been specific tobacco exclusions. In the TPP there's a specific tobacco exclusion, and in the Singapore agreement there's a specific tobacco exclusion. So I'm asking the question: why not a specific tobacco exclusion in the Indonesia one, which would remove all ambiguity?

Article 14.21 b) is the relevant section of the Indonesia agreement and it actually has a footnote 21, which has specific exclusions, and that is what I referred to in my evidence.
With the footnote, the whole article 14.21 b), page 152, reads:

14.21 Exclusion of claims
...no claim may be brought under this Section

(b) in relation to a measure that is designed and implemented to protect or promote public health (21);

Footnote 21 reads

21 For greater certainty:

1. for Australia, such measures include measures that comprise or relate to the:

(i) Pharmaceutical Benefits Scheme;

(ii) Medicare Benefits Scheme;

(iii) Therapeutic Goods Administration; and

(iv) Office of the Gene Technology Regulator.

2. for Indonesia, such measures include measures that comprise or relate to the Indonesia Health Service Scheme.

You can see that in Article 14.21b) footnote 21 that, in addition to the general exclusion of public health measures, there are specific exclusions for both Australian and Indonesian health bodies but no specific exclusion for tobacco regulation.

Contrast this with the comparable clause in the Hong Kong Agreement. in which there is a very detailed exclusion for tobacco products that includes electronic cigarettes.

This is relevant and may be required for future Australian regulations, since tobacco companies are now marketing electronic cigarettes as a safe alternative to smoking, when there is insufficient medical evidence to confirm they are safe.(ABC Radio National *Back ground Briefing*, August 30, 2019, <https://www.abc.net.au/news/2019-08-30/nanny-state-critics-behind-the-vaping-debate/11449806>).

If a future government introduced new regulation of electronic cigarettes, in the absence of a specific exclusion of tobacco regulation, the tobacco companies could claim it was not a public health measure and argue that electronic cigarettes area safe alternative to smoking

The relevant Hong Kong Investment Agreement clauses are on page 16, Article 22, Section C, footnotes 13 and 14:

Article 22: Settlement of Disputes between an investor and the host Party 13, 14

13. No claim may be brought under this Section in respect of the following measures of Australia: measures comprising or related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator. A reference to a body or programme in this footnote includes any successor of that body or programme.

14. No claim may be brought under this Section in respect of a Party's control measures of tobacco products (including products made or derived from tobacco), cigarettes, imitation smoking products, and other smoking products such as Electronic Nicotine Delivery Systems and Electronic Non Nicotine Delivery Systems including electronic cigarettes. A "control measure" of a Party includes measures with respect to production, consumption, importation, distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase or use, as well as fiscal measures such as internal taxes and excise taxes, and enforcement measures, such as inspection, recordkeeping and reporting requirements. "Tobacco products" means products under Chapter 24 of the Harmonised System, including processed tobacco, or any product that contains tobacco, that is manufactured to be used for smoking, sucking, chewing or snuffing (DFAT Hong Kong agreement: Article 22, Section C, footnotes 13 and 14).

There are also specific exclusions of tobacco regulation in the revised Singapore agreement, Chapter 8, p. 17, Article 22, footnote 19, and in the CPTPP (TPP-11) chapter 29, Article 29.5.

So my question still stands as to why there is a specific exclusion for tobacco regulation in the Hong Kong and agreement, but not the Indonesia agreement.

Yours sincerely

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