AID WATCH
Action on Aid, Trade and Debt

Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
fadt.sen@aph.gov.au

11th April 2014

Dear Senators,

Re: AID/WATCH Submission to Inquiry on Trade and Foreign Investment (Protecting the Public Interest) Bill 2014

AID/WATCH welcomes the opportunity to respond to the call for submissions in response to the introduction of the Trade and Foreign Investment (Protecting the Public Interest) Bill.

AID/WATCH is an independent watchdog that has campaigned for over 20 years on aid, trade and debt to ensure that these systems promote social and environmental justice rather than furthering Australia's commercial interests at the expense of communities working to determine their own development pathways. We are particularly concerned at the unequal nature of economic liberalisation and free trade policies which most often see larger, developed countries disproportionately benefit from trade agreements, leaving developing countries to endure stringent conditions that have a negative impact on people and the environment.

AID/WATCH was one of the first organisations in Australia to draw attention to the impacts of free trade agreements with developing countries and we've campaigned in the past few years on the PACER-Plus Agreement currently being negotiated with Pacific Island Countries to draw attention to the negative impacts of pushing this agenda. PACER-Plus seeks to liberalise trade in goods, services and investment, as well as improve trade and investment facilitation and economic cooperation. It is also an example of how aid is used as a bargaining chip by Australia to further economic interests in the region without playing adequate regard to the possible negative impacts on the Pacific Island Countries. Potential impacts are significant such as undermining a key source of revenue for Pacific governments through the removal of tariffs. These are an important source of revenue for many Pacific island countries.

Australian and New Zealand imports under PACER-Plus will see countries such as Papua New Guinea, Samoa and Vanuatu stand to lose at least $10 million dollars in annual government revenue with other countries set to lose at least 10 per cent of their annual government revenue – in some cases greater than their entire education or health budgets. Other impacts include closure of local businesses, loss of jobs and undermining customary land tenure systems which have broad impacts on the culture and society of these countries.

As such, we have significant concerns about free-trade agreements currently being negotiated by the Australian Government though these concerns do not take into consideration the additional, myriad problems with Investor State Dispute Settlement (ISDS) clauses in trade agreements. Our existing concerns are amplified especially with regard to developing countries who in large part, already struggle to advance their development status through the existing system of trade.

ISDS grants foreign corporations the right to go before private trade tribunals and directly challenge government policies and actions that corporations allege reduce the value of their investments. Even if a new policy applies equally to domestic and foreign investors, ISDS allows foreign corporations to demand compensation for the absence of a 'predictable regulatory environment.'

ISDS provisions have no place in Australian trade agreements not only for the important reason of protecting Australia's law and policy, but also because ISDS disproportionately disadvantages developing countries who don't have equal resources to defend cases and who generally do not host private investors large enough to utilise ISDS provisions.

A few reasons from AID/WATCH in support of the Trade and Foreign Investment (Protecting the Public Interest) Bill which disallows the inclusion of ISDS clauses in all trade agreements are below.

Threats to public interest, human rights and environmental legislation

The vast majority of cases that utilise ISDS are made by Western corporations against developing country governments. Most often these cases are brought because of public interest, human rights and environmental legislation. Foreign investors increasingly challenge host countries' regulatory activities, such as environmental policies, energy policies, health policies, and policies related to economic crises. Even the threat of ISDS has been referenced as being sufficient enough for Government's to refrain from exploring legislation in these areas. Where environmental and human rights have been protected, ramifications have been serious for developing country Governments.

One example is from Mexico where the municipality of Guadalcazar refused to issue a permit to build a hazardous waste site because of the serious impacts on the 800 surrounding residents and their water source. This resulted in the US company, Metalclad suing the Mexican government for $90 million. Eventually $16.6 million in 'compensation' was finally awarded to the owners of the landfill website in a clear case of human rights and environmental protection being threatened by corporate sovereignty.

Developed countries are also not immune from having their policy space encroached upon. In an example from the provincial government of Quebec in Canada, Lone Pine Inc. are suing the Government for $250 million over a moratorium on fracking for natural gas under a river which was brought about through environmental assessments and community pressure to allow time for scientific studies of the potential impact. The company are insisting on pursuing the case unless the moratorium on fracking is lifted.

"If a government is not even allowed to take a time out to study the impact without having to compensate a corporation, it puts a tremendous chill on a governments' ability to regulate in the public interest," said Ilana Solomon, director of the Sierra Club's trade program in Washington, D.C. Numerous other examples for how ISDS has been used are referenced in the submission by Australian Free Trade and Investment Network (AFTINET), of which AID/WATCH is a member.

Exorbitant cost of litigation and compensation for taxpayers

Furthermore, the enormous cost of running a case for Government and taxpayers is often unattainable for a developing country or requires funding to be pulled from other important public resources Running a case costs an average of $8 million according to the OECD, and compensation claims can be up to billions of dollars. This is a substantial cost for a developing country. The highest compensation award so far was $1.8 billion against the government of Ecuador.

In 2012, in the case of the fifth largest petroleum company in the United States against the state of Ecuador, the petrol company, Occidental Petroleum was awarded $1.77 billion stemming from the decision by Ecuador to terminate the contract of Occidental due to their selling a stake of the Government's operations without informing them. On this point, the tribunal agreed that the petrol company had erred, the problem instead, was that the reaction of the Ecuadorian government to terminate the contract apparently wasn't in proportion to the breech. This is despite Ecuador currently seeking compensation from another oil company, Chevron, for environmental damage after dumping toxic sludge into the Amazon jungle leaving the country understandably serious about vetting companies who seek to extract oil from the Amazon region.

The $1.77 billion awarded to Occidental Petroleum was in addition to $589 million in backdated interest and other penalties amounting to a total of almost $2.4 billion. This is the equivalent of the combined annual income of the poorest 20% of Ecuadorians, around 3 million people and much more than the healthcare budget of the entire country. This is just one example of many cases brought against developing countries governments which will see people and the environment in these countries being the hardest hit.

ISDS challenges the Aid for Trade focus of Department of Foreign Affairs and Trade

The Department of Foreign Affairs and Trade (DFAT) is seeking to increase the focus on Aid for Trade, strengthening developing countries ability to benefit from trade, with the assumption that trade can play a role in development and poverty alleviation. AID/WATCH does not agree with the Aid for Trade policy focus as we see it as a tool to further trade liberalisation without an acknowledgement of how trade liberalisation disproportionately benefits wealthy countries and increases disparities.

A UNDP report entitled '"Humanity Divided: Confronting Inequality in Developing Countries" published earlier this year states that there is substantial evidence that increases in inequality over the last two decades were mainly due to trade and financial globalization processes that weakened the bargaining position of labour and they recommended increased regulation of trade and financial flows not less. The widening income gap comes as some major developing countries - such as China and India - have seen strong economic growth and an overall increase in national wealth stemming predominately from economic liberalisation policies. “The sharpest increases in income inequality have occurred in those developing countries that were especially successful in pursuing vigorous growth and managed, as a result, to graduate into higher income brackets," the UNDP report said. This is one study of many that details the impact that the focus on economic growth through trade policy can have on increasing disparities, and of the existing system of trade failing to assist the world’s poorest.

If the Government is working towards ensuring that there is an element of consideration as to how the development of a country will be affected by trade – continuing down the path of including ISDS clauses must stop. It is creating a pathway for a corporate takeover of the sovereign right of countries to their policy space and the rolling back of hard-won rights both in Australian and in developing countries to local access and management of land, and water with potential for undermining health and other public interest law.

According to the DFAT website, Australian companies “have used ISDS in other countries to protect their interests”. If the interests of a private company relate solely to increasing their profits, and the interests of countries include accountability to their people and protection of the environment, the Government needs to consider whether furthering the right of companies to threaten interests of sovereign countries is in line with the Aid for Trade focus.

Conclusion

Australia has a history of rejecting ISDS inclusions in trade agreements, and was the only country to have successfully stood up to the United States to ensure that this was not included in the Australia-United States Free Trade Agreement. In the past, Governments have pointed to noteworthy studies that point to the lack of evidence to substantiate a correlation between greater investment and ISDS clauses The Labor Government banned ISDS saying they did "not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses". No-where is such a consideration more important that in developing countries where fledgling local business and industry need to be nurtures and the policy space for environmental, human rights and health safeguards need to be protected.

Continuing inclusion of ISDS on a case by case basis is strongly recommended against. Safeguards for environmental and health legislation have not protected countries from cases being held against them. We strongly recommend that clear, decisive action is taken against inclusion of ISDS in any trade agreement. It is for these reasons that AID/WATCH strongly supports the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014.

Many thanks for your kind consideration of this submission.

Regards,

Thulsi Narayanasamy
Director, AID/WATCH

W: www.aidwatch.org.au