

QUESTION ON NOTICE / Spoken

Monday 30 July 2018

1 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: Economic modelling

Senator Patrick

Question

Senator PATRICK: Flowing on from that, the Minerals Council of Australia, which just gave evidence, were unable to provide the committee with the totality of the benefit that would flow from the TPP-11. Can the department provide the committee with some analysis as to the benefit to the resource sector in dollar terms?

Mr Mina: The modelling to which I referred, which is a fairly large body of different studies, finds positive results from the TPP-11 to the Australian economy of somewhere 0.2 per cent of our national income to around two percentage points of our national income. In terms of dollars—

Senator PATRICK: Mr Mina, just to cut you short, I am talking about one sector. The devil is often in the detail.

Mr Mina: Sorry, I heard two aspects to your question—the dollar impact on the economy and then the—

Senator PATRICK: I have heard about the 0.5 per cent. That's fine. I just want to go by sector. So we have a sector. Here is a good example: the Minerals Council of Australia were unable to advise or were unaware of the economic benefit in dollar terms—

Mr Mina: Yes, I heard the question.

Senator PATRICK: So they are clearly aware of the size of the sector. But whether this agreement is signed or not signed, what would be that dollar value difference for the mineral sector?

Mr Mina: As I was about to say, the dollar value of that kind of a boost to national income—that relates to your first question: what was the dollar impact—is something in the order of \$10 billion to \$20 billion annually. In respect of the minerals sector in particular, there is potentially some disaggregated effects in the respective models to which I am referring. I would need to take on notice whether they do desegregate down to the

sectoral level. The mining and resources sector that you mentioned has a very strong interest in services and investment—mining, technology goods, investment related to mining and of course services related to mining technology. In respect of investment, one of the things it has consistently sought is investor state dispute provisions so that it can support sometimes up to multibillion-dollar investments.

Senator PATRICK: The council made that point. I am just going to the questions that I wish to have answered. If you could provide on notice what you think the improvement to that sector would be, by way of example, and any other sectors you feel would be helpful to the committee. Economic analysis on the TPP-11 by the Australian government or an analysis commissioned by the Australian government by someone independent has not occurred. I take your point that there are a number of other studies that circle around and give some indication. Was a conscious decision made within the department to not do that? Was that decision made by government?

Mr Mina: On your first point of taking it on notice, of course we will take it on notice if there are in fact—I am not confirming now but I will check—disaggregated sectoral impacts in those studies. On the other question about whether there was a conscious decision taken in the department, quite evidently, the department would, if the government directed it, and the government has not directed it.

Answer

The Department of Foreign Affairs and Trade is not aware of any economic studies that disaggregate sectoral impacts to the mining sector.

2 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: Economic modelling

Senator Patrick

Question

Senator PATRICK: So the minister has not directed you to conduct a study?

Mr Mina: Do you mean to conduct an economic evaluation in-house?

Senator PATRICK: I mean in-house or externally.

Mr Mina: No, the government has not directed that.

Senator PATRICK: Has the department talked about that with the minister?

Mr Mina: I would need to go back and look at the question of whether there has been discussion—

Senator PATRICK: I'm happy for you to take that on notice. I'm just trying to understand how we get to a point where we're being asked to vote on enabling legislation without specific economic modelling and whether that was a conscious choice of government or an accidental situation. One way or the other, that's what I'm trying to get to. So it would be appreciated if you could take that on notice.

Answer

The Department of Foreign Affairs and Trade has engaged with Minister Ciobo on economic modelling. In this particular instance, given the availability of a wide range of modelling of the original Trans-Pacific Partnership and Comprehensive and Progressive Agreement for Trans-Pacific Partnership and other variations, including most recently from the Peterson Institute for International Economics, the Minister has not directed the Department to undertake additional modelling.

3 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: Government procurement

Senator Patrick

Question

Senator PATRICK: Just going back briefly to the CPRs, section 10.30 of the CPRs—this change occurred in 2017. There was an inserted provision that said:

... for procurements above \$4 million, Commonwealth officials are required to consider the economic benefit of the procurement to the Australian economy.

So, as an economic benefit test, that occurs during procurement? It then goes on to say in 10.31:

The policy operates within the context of relevant national and international agreements and procurement policies to which Australia is a signatory—

and talks about one example being the Australia-New Zealand GPA. Have you had discussions in relation to this provision and TPP-11? My question is: do you expect 10.30, the economic benefits test, to somehow change as a result of obligations with TPP-11?

Mr Mina: I understand that arrangements to have Finance on the telephone this afternoon have had to be put aside, given time constraints, so unfortunately I'd need to take that on notice for them, I'm sorry.

Senator PATRICK: No, Mr Mina, in the context that Finance are one party to a discussion that would need to take place and DFAT, being the experts and the lead on this agreement, would've had to have had a discussion with Finance about whether or not to change that provision—

Mr Mina: That's true.

Senator PATRICK: or whether there was an impact on the provision.

Mr Mina: What I'm explaining is that the lead on this issue in the agreement is the Department of Finance, so I'll defer to them on that.

Senator PATRICK: Maybe on notice from your perspective, have you had discussions with Finance in respect of that particular clause, 10.31, and any advice you can give the committee on whether or not TPP-11 will have effect on that economic benefits test?

Mr Mina: I'm happy to take that on notice.

Answer

The Department of Foreign Affairs and Trade has had discussions with the Department of Finance about paragraph 10.31 of the Commonwealth Procurement Rules (CPRs). No change to paragraph 10.31 of the CPRs is necessary as a result of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

4 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: ISDS provisions

Senator Patrick

Question

Senator PATRICK: in some sense this would require corporate memory—I'm hoping there's some at the table. We've gone through an ISDS case with Philip Morris, which has now been finalised. It didn't really go to the substantive matter, but it was a rather painful process. I'm presuming that the department in effect has learnt from that, and that's why we now see a carve-out in the TPP-11 in respect of tobacco packaging. Is it because of that experience that you've made that provision explicit?

Mr Mina: It's fair to say that practice has been evolving in this area and, yes, it is very clear that we will be working hard to ensure in the TPP and in other trade agreements that our capacity to legislate in favour of the public interest is protected in important areas. The TPP-11's got a couple of important provisions in that respect—I won't detail them given time constraints—but we are confident we have now secured in this agreement, and in other agreements we're negotiating, the right kinds of safeguards to ensure that we can continue to legislate in the public interest in areas like health, environment and other public policy areas.

Senator PATRICK: The submission that I saw—and it might have even been yours—talked about investment related areas and financial related areas. Just on notice, could you perhaps point me to the exact provisions and any additional information or advice that you have prepared that would give comfort that what you say is correct, because there has been lots of evidence contrary to that idea.

Mr Mina: This is very important. I have been hearing some of that evidence. What I want to say in this opportunity is that in the TPP—in article 9.16 of the agreement—we have made specific reference to our ability to legislate in pursuit of legitimate public policy objectives in health, the environment and other areas. We have a specific carve-out for tobacco, as you mentioned yourself, in respect of procedural safeguards. We have established a whole new range of procedural safeguards that go to transparency and participation at hearings et cetera, including on how we actually hear a claim and the definition of 'investor' in that context. So the practice has been evolving.

Answer

The Investment Chapter in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) contains a set of high-quality, modern rules governing the treatment of investors and their investments. It also contains robust safeguards. For example:

- there is explicit recognition that TPP-11 Parties have an inherent right to regulate to protect public welfare, including in the areas of health and the environment (Article 9.16);
- Australia's tobacco control measures cannot be challenged (Article 29.5);
- certain ISDS claims in specific policy areas in Australia cannot be challenged, including:
 - social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities (Australia's Annex II);
 - measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage (Australia's Annex II);
 - Australia's foreign investment policy (Australia's Annex I and Annex II), including decisions of the Foreign Investment Review Board (Annex 9-H);
- non-discriminatory regulatory actions designed and applied to safeguard public welfare, do not constitute indirect expropriation, except in rare circumstances (Annex 9-B);
- the fact that a subsidy or grant has not been issued or renewed, or has been reduced, does not breach the minimum standard of treatment obligation, even if it results in loss or damage to the investment (Article 9.6 (5))
 - this includes subsidies issued under Australia's Pharmaceutical Benefits Scheme; and
- government action which may be inconsistent with an investor's expectations does not constitute a breach of the minimum standard of treatment obligation even if it results in loss or damage to the investment (Article 9.6 (4)).

The ISDS mechanism in the TPP-11 also includes procedural safeguards to enhance the arbitration process, such as:

- a requirement that hearings will be open to the public, and that documents filed in the arbitration, as well as the tribunal's decision, will be made public (Article 9.24);

- . a right for any TPP-11 Party that is not involved in an ISDS case to make oral and written submissions on the interpretation of the Agreement (Article 9.23 (2));
- . the ability to permit submissions from interested individuals, including from civil society and non-governmental organisations (Article 9.23 (3));
- . a requirement that the burden of proof rests with the claimant to establish its claim against a government (Article 9.23 (7));
- . a direction that tribunals are to decide cases in accordance with applicable rules of international law (Article 9.25 (1));
- . rules preventing a claimant pursuing a claim in parallel proceedings, such as before an Australian court (Article 9.21 (2));
- . expedited review of claims that are baseless, or manifestly without legal merit (Article 9.23 (4));
- . the ability of TPP-11 Parties to issue interpretations of the Agreement, which must be followed by ISDS tribunals (Article 9.25 (3));
- . mechanisms to disincentivise unmeritorious claims, such as through the award of costs against a claimant and the ability for a respondent government to recoup costs (Article 9.23 (6) and Article 9.29 (4));
- . interim review and award challenges (Article 9.23 (10) and Article 9.29(9));
- . time limits on bringing a claim (Article 9.21 (1)); and
- . a requirement for arbitrators to comply with rules on independence and impartiality, including on conflicts of interests (Article 9.22 (6)).

5 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: ISDS

Senator Patrick / Senator Moore

Question

Senator MOORE: Who wants ISDS? My understanding is we are all gathered around the table—11 countries now—and we have to all agree. Who wants ISDS?

Mr Mina: Quite clearly the TPP-11 parties—

Senator MOORE: All of them?

Mr Mina: at the time had decided they wanted to include an ISDS mechanism with these relevant safeguards in it. From the Australian perspective, it is quite clear. We have \$340 billion of investment in the TPP-11 markets. We have 15 per cent of Australia's global outward investment stocks in TPP-11 parties. We have mining resources and an energy sector that are increasingly making very substantial investments in the TPP-11 countries. They want to be able to give confidence—

Senator MOORE: 'They' being the mining sector?

Mr Mina: They being the particular investors of the \$340 billion. There are a range of sectors. They want the confidence to be able to underwrite their investments with access to a mechanism of judicial review.

Senator MOORE: Can you tell us which sectors? It's a simple question: who wants it?

Mr Mina: As I mentioned—

Senator MOORE: You've only mentioned one sector. You've given me some beautiful global figures. My question is: who wants ISDS? We've had lots of evidence from people who don't want it, so I'd love to see the other side. Who wants it? You can take that on notice.

Mr Mina: I think there have been a number of business representatives even today who have been outlining their interest in ISDS—

Senator MOORE: Only mining.

Mr Mina: In certain submissions we saw that the Chamber of Commerce and Industry—

Senator PATRICK: But you had direct dialogue with these players. You said that.

Mr Mina: The Chamber of Commerce and Industry, the Law Council, the Minerals Council, members of the legal profession—

Senator MOORE: You're giving me the answer now?

Mr Mina: Indeed.

Senator MOORE: You're not taking it on notice?

Mr Mina: No, I'm happy to tell you now in terms of the Australian contribution to our domestic stakeholder inquiries. These are the stakeholders that express support from ISDS. I'll continue.

Senator MOORE: Mr Mina, I don't know how many ways I can say it. I interrupted with a question and I put that on notice to you. We're running out of time, and I don't want to take any more of Senator Patrick's time. I said to take it on notice.

Answer

Through their public statements and submissions to the Joint Standing Committee on Treaties and the Senate Foreign Affairs, Defence and Trade References Committee, the following stakeholders have expressed support for the Investor-State Dispute Settlement mechanism in the original Trans-Pacific Partnership and Comprehensive and Progressive Agreement for Trans-Pacific Partnership:

- Minerals Council of Australia
- Business Council of Australia
- Law Council of Australia
- Australian Chamber of Commerce and Industry
- Export Council of Australia
- Australian Industry Group
- ANZ Banking Group
- Financial Services Council
- Australian Petroleum Production and Exploration Association
- Rio Tinto
- BHP Billiton
- Centre for Independent Studies
- Chatto Creek Advisory

6 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: ISDS

Senator Patrick

Question

Senator PATRICK: Right now my understanding is that three members sit on the tribunal, and if a decision is made to turn that into five and make a qualification to be a judicial officer as opposed to simply a lawyer, you say that there's a change required to the treaty if that were to occur.

Mr Schofield: If it's helpful I could tie a few things together relating to your earlier question about some of the moves for reform in relation to ISDS. There are actually two processes that are underway at the moment which Australia is actively involved in. The first one is UNCITRAL, which is the UN Commission on International Trade Law. They've set up a working group that's looking at procedural reform of ISDS, which I think is what you're talking about. Obviously it's a UN body and a multilateral process. We're engaging with quite a few other countries in relation to that process, looking at things like developing a code of conduct for arbitrators to address some of the concerns regarding independence and impartiality. If you look at the TPP and the treaty, it actually provides for the parties to agree on a code of conduct. Some of those procedural mechanisms you're talking about are already provided for in the treaty itself. Separately we're also involved in ICSID, the International Centre for Settlement of Investment Disputes process. I think that's what you're talking about, which are very technical, procedural rules about the number of days for lodging a submission, et cetera. Some of those changes would not require a change to the treaty text, but, as Mr Mina has pointed out, if there is to be any change to the treaty text that would require an amendment, it would have to come through JSCOT.

Senator PATRICK: That's clear. The question is: is there a requirement to change the treaty text simply because the United Nations changes the regime?

You can see the issue there is that on the United Nations we may have one vote, but that may bind us in the context of the treaty that we've signed up to.

Mr Schofield: I think the short answer to your question is: no. Those

subsequent processes aren't able to unilaterally change the obligations that are in the investment chapter.

Senator PATRICK: Maybe on notice, would you be able to provide a brief that explains the two bodies, how they go about changing them and the interaction with the treaty and a requirement for either the Australian government to sign off on a change and/or the Australian parliament separately—just to see what needs to happen when a change occurs?

Mr Schofield: Sure.

Answer

Investor-State Dispute Settlement (ISDS) arbitral proceedings require a comprehensive body of procedural rules to deal with issues such as the working of the tribunal. The most commonly applied sets of rules are those provided for under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). The Australian Government is actively involved in both ICSID and UNCITRAL.

ICSID was established in 1966 by the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention). There are 154 Contracting States to the ICSID Convention. Australia has been a Contracting State since 1 June 1991. Further information about ICSID, including information about the current ICSID amendment process, is available here:

<https://icsid.worldbank.org/en>

UNCITRAL was established by the United Nations General Assembly via resolution 2205 (XXI) of 17 December 1966 in order to promote the progressive harmonization and unification of the law of international trade. UNCITRAL comprises 60 member States elected by the United Nations General Assembly for a term of six years. Australia has been a member of UNCITRAL during the following periods: 1968-1989; 1995-2001; and 2004-present (with its current term expiring in 2022). Further information about UNCITRAL, including information on possible reform of the procedural mechanism of ISDS, is available here: <http://www.uncitral.org/>

Article 9.19 (Submission of a Claim to Arbitration) of TPP-11 sets out various alternatives for claimants in ISDS proceedings in terms of procedural rules, including the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules. Should any discussions in UNICTRAL or ICSID lead to an amendment of an existing treaty or consideration of a new treaty, Australia's normal treaty making processes would be triggered. This would include

consideration by the Australian Parliament through, for example, the Joint Standing Committee on Treaties.

7 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: Post-facto analysis of FTAs

Senator Patrick

Question

Senator PATRICK: One of the things I'd like to know is—we haven't done any analysis for this particular treaty, for the TPP specific to Australia. For the other treaties, trade agreements, that we have signed up to can you advise me which we have done some ex post facto analysis on, basically baseline, whether or not we achieved what we intended to achieve or whether we got a benefit from those treaties? Are there lots of them?

Mr Mina: There are 10 existing free trade agreements and there have been, on occasion, economic analyses commissioned by the government in-house or through a contractor. I'm happy to go through and detail those for you.

Senator PATRICK: Perhaps on notice....

Answer

Trade liberalisation is one of many factors impacting on bilateral trade outcomes. Isolating its impact from a broader set of macroeconomic and microeconomic factors that drive our trade performance in any bilateral economic relationship, including with Australia's FTA partners, is a challenge for economic modelling, however sophisticated. These factors include relative growth levels, exchange rates, the respective domestic savings and investment balances, comparative levels of openness, advantage and productivity, and other global economic factors.

The Department of Foreign Affairs and Trade (DFAT) has not undertaken or commissioned post-facto analysis of individual FTAs currently in force.

DFAT commissioned the 2017 Centre for International Economics report *Australian Trade Liberalisation: Analysis of the Economic Impacts* which identified strong GDP and household income gains arising from three decades of trade liberalisation, including (but not limited to) liberalisation through FTAs.

DFAT also commissioned the 2015 Centre for International Economics analysis on the economic benefits of Australia's North Asian FTAs following their negotiation.

It is also relevant to note that a study was recently commissioned by DFAT and undertaken by PwC, considering the effects on Australian businesses of Australia's FTAs, with an emphasis on Australia's most recently implemented FTAs with China, Japan and Korea. The field research occurred in mid-2017, when the North Asian FTAs had been in force for sufficient time for trends and perceptions to be evident. The study showed that these FTAs have high utilisation rates for merchandise trade, and are influencing business activity, confidence, strategy, expansion planning and international investment.

8 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: Post-facto analysis of FTAs

Senator Patrick

Question

Senator PATRICK: Just getting back to studies, you're talking about a general equilibrium approach. That's not going into an agreement; that's a modelling where you don't have any empirical data. You make some assumptions and the model gives you some view as to what's going to happen if you go down that particular pathway. The best models are those that you develop and then you baseline. After the event you go back and say, 'How accurate was the model? Did it work? What do we need to tweak to make it better next time?' I'm wondering about that sort of due diligence process the government has done in respect of the past treaties that we have signed.

Mr Mina: It is important at this point to emphasis that these models are only just that. They're models. They're approximations of economic effects. And whether it's at the ex post facto stage or ex ante stage, the general equilibrium approach is the best equipped approach to handle economic modelling for trade agreements, because it does best the job of studying the allocative efficiency gains from trade—that is, the gains that arise from specialisation and the gains that arise from a country's ability to adapt economically to change.

Senator PATRICK: But you would agree that you do the modelling, it predicts an outcome, then you embark upon that course and, at that point, you get some measurement of the real data, not the predicted data. I want to know whether or not the department has done any comparison, in any of its treaties, in respect of the modelling that we went into the treaty with versus data that you measured after the treaty—maybe a year later, two years later, 10 years later.

Mr Mina: I suppose what I'm saying is that doing so before and after—both would be an approximation of the impact. But your point would be, I suppose, that, ex post, one has a better idea of the negotiated outcomes.

Senator PATRICK: Absolutely.

Mr Mina: Perhaps more certainty, if you like, on the model's ability to predict about the negotiated outcomes. We'll certainly answer that question in the questions on notice that we'll respond to you on.

Senator PATRICK: Sure. I'd like some specific examples.

Mr Mina: If indeed we have done such a—

Senator PATRICK: If you haven't, I'll be very interested in that too. But you are sitting before the committee making some predictions, some statements, about where we're going. I'm not doubting in any way your honesty or your understanding of the situation, but sometimes it doesn't work out the way you genuinely thought it was going to work out. I'm looking to see your past history of your predictions versus the actuals so that I can understand how I weight your evidence today.

Mr Mina: It is perhaps useful, given your question, to just pick up the most reputable of the modellers that are out there that have been studying the TPP, who are the Peterson Institute for International Economics, from the United States. They have in fact done what you've just talked about. They modelled the TPP-12 and then they modelled the TPP-11, more recently. I think it was a number of months ago. There are differences, it's true, in the impact. The first model found—

Senator PATRICK: Sure, but neither of those are post facto.

Mr Mina: In fact, they are post facto to negotiation. They are not post facto to implementation if that's your point.

Senator PATRICK: That's right. Well, implementation is the thing that counts.

Mr Mina: And you're thinking that, with a certain record of several years of implementation, one has a better—

Senator PATRICK: I'm suggesting that, if I went back 10 years, to when you were sitting here, or someone was sitting here, advocating for the Australia-US free trade agreement, you or they might well have been saying very similar words, from the heart, from the mind, as to the benefits of the treaty, but it may be that we haven't achieved those benefits. I'm trying to get an understanding of how well the department has scored in the past.

Mr Mina: Sure. I'll certainly come back to you on that question of whether such a comparison exists.

Answer

Please refer to the response to question seven.

9 – Senate Foreign Affairs, Defence and Trade References Committee

Topic: Open source software

Senator Patrick

Question

Senator PATRICK: We had a witness today talk about ambiguities—and this may have to be taken on notice; I don't expect you to know the details here—in 14.17, talking about open-source software. He said that there may well be some unintended consequences as a result of the ambiguity in the terms, the way in which the words are written. On notice, could you please examine the evidence of Mr Burton?

Mr Mina: I'm happy to do so. I'll say here on the record that there are no changes to Australian IP laws, and the analysis that we've done of that submission confirms there is no impact on our open-source software industry.

Answer

The Department of Communications and the Arts has advised that the copyright provisions in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) are consistent with Australia's existing intellectual property regime, including in relation to open source software, and do not require any changes to Australia's intellectual property laws or settings.

Open Source Industry Australia's specific concerns appear to relate to a particular class of open source licence and perceived uncertainty as to whether the TPP-11 would preclude the enforcement of terms and conditions relating to the provision of source code in free and open source licences and limit the availability of certain remedies for copyright infringement. The Australian Government considers that the TPP-11 does not have this effect. Article 14.17 is designed to restrict governments from unjustifiably requiring source code disclosure, and to ensure that businesses can freely conduct their commercial negotiations.