The Committee Secretariat
Foreign Affairs, Defence and Trade Committee
Department of the Senate

Dear Senators,

I urge your Committee to recommend that the Senate support the proposed Trade and Foreign Investment (Protecting the Public Interest) Act 2014.

Introduction

The proposed Act would prevent the Commonwealth from entering into any agreement with one or more foreign countries that includes an investor-state dispute settlement provision.

A useful introduction to ISDS is provided by the EPRS (2014).

There is widespread recognition of serious deficiencies in this mechanism. UNCTAD (2013) says: "The functioning of ISDS has revealed systemic deficiencies. Concerns relate to legitimacy, transparency, lack of consistency and erroneous decisions, the system for arbitrator appointment and financial stakes." A paper prepared for consultation by the OECD (2012) summarises the concerns which have been expressed. See also EU (2013) which identifies common problems in formulation of investor protection provisions and how dispute settlement works. Stiglitz (2013) comments on (and commends) the number of countries seeking to withdraw from agreements which include ISDS provisions. Public Citizen (2011) provides a useful summary of ISDS cases.

There are increasing numbers of ISDS cases being initiated and a huge amount of claimed damagers at stake. UNCTAD (2013) comments: "In 2012, 58 new known investor–State dispute settlement (ISDS) cases were initiated. This brings the total number of known cases to 514 and the total number of countries that have responded to one or more ISDS cases to 95. The 58 cases constitute the highest number of known ISDS claims ever filed in one year and confirm foreign investors' increased inclination to resort to investor–State arbitration."

Australia is highly exposed. Voon and Mitchell (2011) record that Australia has 27 investment protection agreements in force: 21 bilateral investment treaties ('BITs'), and six preferential trade agreements ('PTAs') containing investment provisions.

Concerns

I submit that investor state dispute settlement (ISDS) is bad policy for the following reasons.

- ISDS moves decision-making regarding public policy from elected representatives to unaccountable investment tribunal. Kelsey and Wallach (2012) comment on the lack public accountability, lack of standard judicial ethics rules, and lack of appeals processes. EU(2013) mentions lack of transparency, frivolous claims, conflicts of interest, inconsistency between cases and lack of effective safeguards.

- ISDS creates increased regulatory uncertainty. Instead of clear and amendable policy statements or legislative provisions regulatory provisions come to depend on arbitrary and

non-transparent interpretation by unaccountable and unappealable tribunals of complex and unamendable trade agreements.

  - The concept of 'investment' is open to wider and wider interpretations to include regulatory permits and licenses; financial instrument such as futures, options, and derivatives; intellectual property rights; procurement contracts; and resource access concessions;

  - The concept of 'indirect expropriation' interpreted comes to mean 'regulations and other government actions that reduce the value of a foreign investment' (see Kelsey and Wallach (2012) and EU(2013));

  - Legalisms such as 'minimum standards of treatment' and 'fair and equitable treatment' come to have new and highly flexible meanings (see also EU(2013));

  - ISDS provisions generally do not require exhaustion of domestic legal remedies (a core principle of international law) before proceeding to international tribunals.

- ISDS provides preferential treatment of foreign corporations as compared with domestically based investors.

- The threat of first, defending and ISDS claim, and second, having to pay huge damages is highly intimidating for small governments with limited technical and or financial capacity. The effect of this threat is common referred to as regulatory chill.

- ISDS has profound implications for the future of democracy globally; it represents a profound shift in power away from democratically accountable nation states to corporations whose accountability is by law to their shareholders.

  - The phenomenon of 'nationality shopping' whereby corporations relocate ownership in order to make most use of existing agreements (PMA to HK, Pacific Rim Mining from Cayman Islands to Nevada), illustrates the power that this tool puts in the hands of corporations and the correspondingly reduced regulatory power of the nation state.

- ISDS has implications for judicial reach where court decisions are interpreted as 'government measures' and therefore subject to review by investment tribunals (as in Loewen vs United States under NAFTA and Chevron vs Ecuador under US-Ecuador BIT; see Kelsey and Wallach 2012; see also Donziger, Garr & Page (2012) for more on Chevron in Ecuador).

Public health implications

Having regard to these dangerous flaws of the ISDS mechanism, I and many of my public health colleagues, are very apprehensive about the implications of ISDS for public health regulation.

The immediate case is the challenge to Australia's tobacco plain packaging laws under the HK-Australia BIT. Tobacco kills millions of people each year. The risk is not just that Australia's plain packaging laws are in breach of the HK-A BIT but that the threat of such litigation discourages other governments from comparable regulations.

Beyond the contemporary threat to tobacco regulation there is a serious risk that ISDS provisions could discourage or defeat public health regulation in the fields of: food labelling, food marketing, occupational health exposures, environmental health exposures, medicines regulation and many other areas.

The UN (2011) and WHO (2011) have declared that non-communicable diseases (NCDs) are a global epidemic with huge implications for premature mortality and morbidity, loss of productivity and corresponding costs. Effective food labelling and closer regulation of food marketing are fundamental principles to address the nutritional dimensions of NCDs. Both are at risk from ISDS.

Exposure to chemicals and dusts in the workplace is one of the most traditional familiar areas of public health regulation, including for example, exposure to lead, asbestos, silica, vinyl chloride, etc. While these are effectively regulated in the rich world there is no surety that developing countries who have yet to implement such regulation will be able to do so. In 2010 the Chemtura Corporation was unsuccessful in suing the Canadian Government under NAFTA over regulatory provisions associated with the pesticide lindane. The current case of Pacific Rim Mining / OceaniaGold against El Salvador arises in part from concerns about the effective control of mining exposures (Moore et al 2014).

In relation to medicines, there are a myriad of regulatory issues which could be opened to challenge. Faunce and Townsend (2010) quote the Centurion Health vs Canada case in which Centurion challenged the Canadian Medicare system. Globally there is a crisis in antimicrobial resistance (running out of antibiotics) which requires much tighter control over prescribing and marketing. ISDS could make such controls extremely hard to implement.

Finally

I urge the Committee to give due weight to these concerns and accordingly urge the Senate to pass the proposed Trade and Foreign Investment (Protecting the Public Interest) Act 2014.

Yours sincerely

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