



November 1, 2018

Committee Secretary  
Joint Standing Committee on Treaties  
PO Box 6021  
Parliament House  
Canberra ACT 2600

**RE: Aspects of the Peru-Australia Free Trade Agreement revisited**

Dear Secretary,

Attached is a submission from ITS Global addressing the second of the terms of reference for this inquiry: ***the specific inclusion and operation of the Investor-State Dispute Settlement provisions in recently concluded trade agreements.***

Please direct any queries to the undersigned.

Yours Sincerely,

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ITS Global



## ISDS in Australia's recently concluded FTAs

### Investment is a key driver of trade and growth

- Foreign direct investment is now a key element of trade. Businesses are establishing operations in foreign markets as well as exporting goods and services from Australia. For example, in 2015 over half of Australia's exporting METS (mining equipment and technology services) businesses had offices or operations offshore.<sup>1</sup>
- But in many countries, the regulatory environment for foreign investments can be uncertain. Foreign investors may not be able to rely on domestic legal institutions to ensure their investments are secure. This can increase investment risk and impede trade.

### ISDS in FTAs protects Australian investments abroad

- ISDS allows businesses to protect their investments in an FTA country without having to rely on domestic legal remedies or require their government to take action against the other government party. There is substantial precedent for ISDS being used to protect investment and minimise unreasonable sovereign risk.<sup>2</sup>
- ISDS de-politicises the FTA dispute settlement process. An investor can have their claim determined by an independent arbitral tribunal. To action state-to-state dispute resolution measures under an FTA, the affected investor must first persuade its government to pursue a claim. This can be difficult for investors and investments which are politically less attractive to defend.
- ISDS gives businesses some degree of confidence that a host state will be held accountable for breaches of its investment obligations and commitments. Without effective enforcement mechanisms, the rights granted by the FTA are less likely to be effective in promoting investment.

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<sup>1</sup> Austmine, *New Realities, Bigger Horizons: Australian Mining Equipment, Technology and Services (METS) National Survey*, 2015.

<sup>2</sup> See <http://moulislegal.com/investor-state-dispute-settlement-a-critical-tool-in-the-international-investment-toolkit/>



- Australia's outward foreign direct investment performance has historically underperformed its peers:<sup>3</sup> mechanisms which mitigate risks associated with outward FDI would help address this underperformance.

#### ISDS does not threaten Australia's sovereignty

- ISDS does not prevent the Government from regulating in the public interest, including for public health and the environment. ISDS is focused on enforcing investment obligations in the FTA - such as treating foreigners and locals similarly and safeguarding against unreasonable expropriation of investments. Agreements include safeguards and exemptions to the operation and application of ISDS. There are general 'exceptions' to the investment obligations which expressly clarify the right of governments to regulate.
- ISDS has not restricted the ability of the government to regulate in the past. Australia has numerous Investment Protection and Promotion Agreements (IPPAs)<sup>4</sup> which include ISDS and which pre-date the negotiation of most of our FTAs.

#### ISDS opponents have no clear case

- Opponents of ISDS in Australia's FTAs, such as unions (ACTU) and anti-free trade organizations (AFTINET) have failed to articulate a cogent case as to why they oppose it. The ACTU's claim that ISDS 'provides an avenue for foreign corporations to threaten and lodge claims for actual or potential harm resulting from changes in policy and regulation in the country in which they are investing'<sup>5</sup> reflects a basic misunderstanding of how ISDS operates.

#### Procedural frameworks could be improved

- Informed legal commentators and international arbitration specialist's criticisms of ISDS (including in Australia<sup>6</sup>) relate to the procedural standards applicable to ISDS and less so the value of the mechanism itself. For example, they point out there is no standard framework for

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<sup>3</sup> ANZ Banking Group (2015). *ANZ Insight - Winning the away game: Australia-based Global Companies and the Economy*, Issue 7 August 2015. <http://www.anz.com/about-us/corporate-sustainability/ad/2015-awaygame/>

<sup>4</sup> Australia has IPPAs with Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

<sup>5</sup> See *ACTU Submission Investor-State Dispute Settlement (ISDS) Bill* 11 April 2014, Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 Submission 81.

<sup>6</sup> such as James Spigelman, former Chief Justice of the NSW Supreme Court, and Luke Nottage, Senior Fellow at the Melbourne Law School and Professor of Comparative and Transnational Business Law at Sydney Law School.



measuring judgments and calculating costs that are awarded by tribunals, resulting in sometimes haphazard damages awards.

- Consideration of these concerns is increasingly reflected in more recent trade agreements. The Comprehensive Progressive Trans Pacific Partnership Agreement (CPTPP) incorporates language that helps clarify protections, particularly the protection against expropriation. The text of the recently updated NAFTA agreement (the United States/ Mexico/Canada Agreement – USMCA<sup>7</sup>) also includes more specific language on expropriation claims.

#### A flexible approach to ISDS in FTAs is preferred

- A blanket exclusion of ISDS in FTAs does not address (undue) concerns about a government's right to regulate. It simply fails to afford Australian business the best available rights to make and protect their investments in other countries.
- Australia should continue to consider ISDS in FTAs on a case by case basis – ie: include ISDS in FTAs where investment protection is a concern (for example in some ASEAN countries), and negotiate FTAs without ISDS where this level of protection is not warranted (for example where existing domestic legal systems are robust such as is the case between Australia and New Zealand).
- When ISDS is included in FTAs the focus should be on achieving substantive and procedural rules which balance the rights of investors to protect their investments and the rights of governments to regulate in the public interest. The USMCA demonstrates how FTAs can adopt flexible outcomes on ISDS to accommodate the needs of the FTA parties (ie: ISDS does not apply between the US and Canada in USMCA but does apply between Mexico and parties, on more narrow terms than previously under NAFTA).
- Rules on investment in FTAs, including on ISDS, should be non discriminatory and transparent, consistent with core obligations governing trade in goods and services.

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<sup>7</sup> Not yet in force.