

Submission to the Inquiry on the Trade and Foreign Investment (Protecting the Public Interest) Act 2014 by the Foreign Affairs, Defence and Trade Legislation committee

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Private citizen

Many thanks for inviting submissions to this inquiry. Please consider the points I make below. I have no objection to my submission being made public.

- 1) ISDS has developed expanded legal rights for investors which are not found in national legal systems

ISDS enables foreign investors to sue governments for compensation in an international tribunal if they can claim that a domestic law or policy “harms” their investment. The original intention was to pay monetary compensation to foreign investors in the event of the actual expropriation or taking of their property by host governments. This seems fair. But ISDS has expanded beyond its original scope to enable investors to lodge claims against domestic law or policy on the grounds that it reduces the value of their investment. I do not support this at all and I very strongly suspect that if this was explained in clear simple terms to the public the vast majority would be opposed to it. Most members of the public expect the government to enact legislation and policy that protects national interests, citizens and others from harm, including harm caused by commercial companies and their products and services. Rather accepting that foreign companies can sue the government for taking action to limit or eliminate the harm done by companies that reduced the value of the company’s investments, most members of the public would expect the government to sue the company in respect of the damages done by the company in pursuit of their financial advantage.

- 2) Increasing numbers of ISDS cases against health and environmental legislation

There are increasing numbers of cases in which foreign investors are suing governments for hundreds of millions of dollars over health, environment and other public interest legislation. As a health professional and someone who is extremely interested in protecting the environment, I am particularly concerned about this. Recent examples include:

- the Philip Morris Tobacco Company suing Australia and Uruguay over regulation of tobacco packaging for public health reasons
- the Eli Lilly pharmaceutical company suing the Canadian national government over a court decision to refuse a medicine patent
- the US Lone Pine mining company suing the Québec provincial government of Canada over environmental regulation of shale gas mining
- the Swedish energy company, Vattenfall, suing the German government over its decision to phase out nuclear energy

To my mind, these are all examples of perfectly appropriate actions by governments that are well within their rights and responsibilities and it is contrary to common sense and the public good for private companies to be able to seek recompense. I, as a private citizen, might just as well, and equally ludicrously, expect to be able to sue the government for economic loss when it raises income tax or increases the toll on a road. Governments taking these sorts of actions is just one of the risks that well run companies should consider planning their activities.

3) Costs to government and taxpayers

Both the costs of running cases (OECD estimates an average of \$8 million per case, with some cases costing up to \$30 million) and the compensation awarded to foreign investors, (often hundreds of millions and in some cases billions of dollars) can discourage governments from proceeding with legitimate domestic legislation. The highest compensation award so far is \$1.8 billion against the government of Ecuador. This is damaging for any government, but particularly damaging for developing countries, and can have a freezing effect on legitimate domestic legislation. It is appropriate for a wealthy and powerful country such as Australia to resist ISDS provisions in trade agreements not only for our own good but also for the protection of less wealthy, less powerful nations who are likely to get ‘bullied’ into accepting such provisions if Australia does.

4) Lack of legal protections found in domestic legal systems

The disputes are heard by international investment tribunals, operating in under different sets of rules, but all of which lack the safeguards of national legal systems in the following ways.

- The proceedings are not made public unless both parties agree and even the results of proceedings can remain secret, unlike national legal systems, where proceedings and results are public
- The arbitrators can also be practising advocates, and so lack the independence of judges in national legal systems
- There is no system of precedents, and no appeal system, so decisions lack consistency

- third-party funding of cases, described by the OECD as “a new industry composed of institutional investors who invest in litigation by providing finance in return for a stake in a legal claim” has encouraged a growing industry of investment law firms which actively solicit business and encourage large claims.

On the one hand, we have Australian governments aggressively asserting their sovereignty on various issues (that are in some cases reflecting badly on Australia as a fair and compassionate nation) and on the other hand we see the Australian government being willing to forsake our sovereignty in ways that are contrary to the national interest.

- 5) Recent “safeguards” in ISDS clauses to protect health, environment and other public interest legislation have not been effective

There are claims that recent changes to the wording of ISDS clauses in trade and investment agreements like the Korea-Australia Free Trade Agreement (KAFTA) are “safeguards” which will prevent foreign investors from suing governments over health, environment or other public interest legislation.

But the first “safeguard” sentence in the KAFTA reads: "except in rare circumstances non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations" (KAFTA chapter 11, annex 2B). Many legal experts have pointed out that the phrase "except in rare circumstances" leaves a very big loophole, which recent cases have used to advantage. The second “safeguard” is a more limited definition of "fair and equitable treatment" for foreign investors (KAFTA chapter 11, clause 11.5.2 and Annex 2A). However tribunals have ignored these limitations and applied the previous higher standard. A third “safeguard” is a reference to the general protections for “human, animal or plant life” in article XX of the WTO General agreement on Tariffs and Trade (KAFTA Article 22.1). This article has only been successful in one out of 35 cases in the WTO which have attempted to use it to safeguard health and environmental legislation.

These same “safeguards” in recent trade agreements like the Central American Free Trade Agreement and the Peru-US Free Trade Agreement have not prevented foreign investors from launching cases against environmental legislation. For example:

- the Government of El Salvador has been sued by Pacific Rim Mining Corporation under the Central American Free Trade agreement, over a ban on mining to protect the nation’s limited groundwater resources
- the US-based Renco Group is using ISDS in the Peru-US free Trade Agreement to contest a local court decision that it was responsible for pollution from its lead mine. Both cases are ongoing and may take several years.

6) Increasing numbers of governments are withdrawing from ISDS

Increasing numbers of governments are reviewing and terminating their involvement in ISDS. These include members of the European Union such as France and Germany, Brazil, Argentina and eight other countries in Latin America, India and South Africa. Indonesia has recently announced it will terminate all 67 of bilateral investment treaties.

In summary, I consider ISDS provisions to be completely inappropriate and contrary to the national interest. I strongly urge the government to reject all such provisions and to encourage other nations to do the same.