

Submission on the Senate Foreign Affairs, Defence and Trade Committee inquiry into the Korea-Australia Free Trade Agreement

I am calling for rejection of the current version of the Korea-Australia Free Trade Agreement because it includes ISDS.

1. ISDS has been extended beyond its original intention. It allows foreign investors to challenge the sovereign right of nations to freely make decisions to protect the wellbeing of their residents and natural environment.

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. ISDS has expanded beyond its original intention, which was to pay monetary compensation to foreign investors in the event of the actual expropriation or taking of their property by host governments. There has been an expansion of legal concepts like 'indirect expropriation' and 'fair and equitable treatment' beyond the scope of their meaning in national legal systems, to enable investors to lodge claims against domestic law or policy on the grounds that it reduces the value of their investment.

(United Nations Committee on Trade and Development, (UNCTAD), 2000, p. 11)

2. Increasing numbers of multi-million dollar ISDS cases are being brought against governments attempting to enact health and environmental legislation. This is particularly concerning where an investor is likely to be a foreign government, as it is from Korea, with the capacity to mount lengthy and expensive legal action in an international court.

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. Recent examples include:

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

(Gaukrodger and Gordon OECD, 2012, p. 7, Public Citizen Table of Cases, 2014).

3. Weak safeguards in the ISDS clause contained in KAFTA encourage foreign investors to successfully sue governments over health, environment or other public interest legislation.

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.

4. These safeguards have proven ineffective in other recent agreements. 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.

(See case studies in Public Citizen, 2010, 2013, 2014)

5. The immense cost of recent legal challenges under ISDS, places an unacceptable burden on governments and taxpayers, exerting undue pressure on governments to disregard national interests. For example:

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 can have a 'freezing effect' on legitimate domestic legislation

(Gaukrodger and Gordon, OECD, 2012, p. 19, UNCTAD, 2013a, p. 3)

6. Proceedings are heard by international investment tribunals whose rules lack the safeguards provided under Australian legislation. For example:

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.

(UNCTAD, 2013b, p. 1, Gaukrodger and Gordon, OECD, 2012, p. 36)

7. Australia should follow the example of the increasing numbers of enlightened governments that are rejecting ISDS clauses in agreements.

Increasing numbers of governments are reviewing and terminating their involvement in ISDS. These include members of the European Union like 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.

(Gaukrodger and Gordon, OECD, 2012, p.7, European Parliamentary Research Service, 2014. p.2, Bland and Donnan, 2014)

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