

Dissenting Report by the Australian Greens

1.1 The Australian Greens welcome that the majority report of the committee has drawn the Department of Foreign Affairs and Trade and the Government's attention to the issues raised by many of the submissions and called for a sound policy for weighing the risks and benefits of Investor State Dispute Settlement (ISDS) provisions in trade agreements.

1.2 The Australian Greens however do not support the recommendation of the majority report that this bill not be passed by the Senate. The key reasons for this include:

- (a) Litigation using ISDS has proliferated in recent times and this is likely to increase into the future.
- (b) ISDS clauses have outlived their usefulness and are now under review in a number of countries and trade negotiations, including 10 countries in Latin America, South Africa, India, Indonesia and the European Union. After decades of public debate it is time to rethink their inclusion in modern trade agreements.
- (c) There is no evidence that ISDS clauses have any economic benefits for trade or investment, however the risks of using them are clear and supported by evidence and numerous case studies.
- (d) Trade deals are changing from historic “market access trade” driven considerations to facilitating and protecting “foreign investment” through limits placed on the ability of government to develop domestic laws and policies in a wide range of areas, including public health, patents on medicines, the environment, food labelling, Internet use and privacy and local media content . This makes the inclusion of ISDS more dangerous.
- (e) Although current ISDS litigation by the Philip Morris tobacco company against Australia’s plain packaging legislation is globally significant, we have only escaped the danger of more cases because previous Labor and Liberal governments have only included ISDS in trade agreements with developing countries, which do not have investments in Australia, and haven’t included them in the US-Australia Free Trade Agreement. US corporations are the most frequent users of ISDS. The current Trans Pacific Partnership Agreement (TPP) proposals for ISDS in ongoing negotiations would therefore expose Australia to a much higher risk of litigation.
- (f) There was strong evidence presented to the inquiry that ISDS “safeguard” clauses can and have been be reinterpreted and overturned through the arbitration process.

- (g) Parliament has no oversight or control over the inclusion of ISDS in trade negotiations (or over other aspects of secretive trade negotiations), so legislation is the simplest way to remove the risk of their use into the future.

Introduction

1.3 This bill was introduced by the Australian Greens because ISDS clauses in trade agreements have triggered an “explosion” of litigation with large powerful multinational corporations challenging the decisions of sovereign governments and domestic courts of law. Although ISDS clauses have been included in trade and investment agreements ratified by Australia over the past 25 years, the United Nations Conference on Trade and Development (UNCTAD) has highlighted the alarming increase in the number of cases that are being brought both against developed and developing countries.¹

1.4 ISDS inclusion in trade deals are under review in a number of countries, and it is a significant matter of public interest in many countries throughout the world, especially in Europe and America. The recent Phillip Morris ISDS litigation against our own government’s public health policy of plain packaging for tobacco products has brought the issue to the attention of the Australian public, policy makers and legal experts as an element of Australian trade agreements that needs further investigation.

1.5 ISDS inclusion in trade deals is now widely debated and recognised by many legal experts and trade commentators as both risky and unnecessary in modern trade agreements, with no clear or proven economic benefits.

1.6 At the heart of this international debate is the perception that corporations have too much power in our democracies, and that the inclusion of ISDS clauses in international trade agreements helps tip the ‘balance of power’ further in favour of corporations over the broader public interest, in areas such as public health, the environment, access to the ‘commons’ and intellectual property.

1.7 This debate has been made more acute in recent years by the changing nature of our trade deals. Nobel Laureate Paul Krugman summed this up when he said, “The first thing you need to know about trade deals...is that they aren’t what they used to be.”² Rather than old fashioned trade in goods and services, current negotiations in trade deals are aimed at standardizing domestic regulations between countries, through investment and other chapters that have ramifications for important aspects of the economy and society that go beyond traditional trade.

1.8 ISDS clauses introduce significant potential risks to the public interest and sovereignty of any nation, as shown by recent events and case studies. This Inquiry

1 United Nations Conference on Trade and Development, Recent Developments in Investor State Dispute Settlement, No 1., April 2014.

http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

2 Paul Krugman, ‘No Big Deal’, The New York Times, February 27 2014,

<http://www.nytimes.com/2014/02/28/opinion/krugman-no-big-deal.html?hp&rref=opinion&r=1>

highlighted opinions of legal and academic experts who agreed that risks posed by ISDS clauses meant they shouldn't be included in modern trade agreements.

1.9 Evidence from over 100 academic experts to the European commission inquiry into ISDS shows that the many risks of ISDS clauses imposed on the public interest cannot be simply managed by 'carve outs' or 'safe guards' in the drafting of future ISDS clauses.³ Even if future ISDS clauses could be written and structured to avoid the many risks they posed to the public interest, it has become increasingly clear to the Greens that the current Government's proposed 'safeguards' in deals like the Korea FTA are far less extensive than those proposed for the US-EU trade deal. But even these more extensive 'safeguards' have been rejected as inadequate by the over 100 academic experts. This means the government's proposed 'safeguards' will not be effective in reducing the risks of ISDS.

1.10 As highlighted by submissions, Australia is currently subjected to litigation by Phillip Morris regarding plain packaging laws introduced by the previous government. Although this is one of the few cases of ISDS litigation under historic Australian trade deals, it was explained during the inquiry this is because Australia has no ISDS in its trade agreement with the USA. This is why Philip Morris, a US company, had to shift some investment to Hong Kong and use an ISDS clause in an obscure Hong-Kong–Australia investment agreement. The Howard Government refused to allow ISDS inclusion in the Australia-US FTA and the previous Gillard-Rudd Labor government also refused to include ISDS in the Malaysia FTA and the TPP negotiations.

1.11 Most alarmingly, and why it is critical to take a strong stance now to prevent the future use of ISDS clauses in trade deals, Australia is part of the ongoing Trans Pacific Partnership (TPP) regional trade negotiations which includes the USA and 11 other countries. This will be the biggest and most important regional trade deal in our country's history and negotiations currently include the possibility of ISDS clauses. Based on recent experience overseas, the Greens are concerned by the potential and likely proliferation of ISDS litigation both against Australia and other countries in our region, especially against those poorer nations who are more acutely impacted by ISDS litigation. The vast majority of ISDS cases are brought by Western Corporations against the governments of developing countries.⁴

1.12 ISDS inclusion in trade deals on a "case by case" basis puts our sovereignty and public interest at risk. ISDS inclusion will be at the discretion of the 'policy' or more to the point the 'politics' of the government of the day. The Greens believe this is especially dangerous given the flawed trade negotiation process currently in place, which removes the role of parliament in providing any real oversight in trade deals. Currently there is no transparency around our trade negotiations which are conducted in secret, and deals are signed off on by cabinet prior to the limited scrutiny allowed

3 'Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)' https://www.kent.ac.uk/law/isds_treaty_consultation.html, Accessed on 4 August 2014.

4 AID/WATCH, *Submission 107*, p. 2.

by the Parliament. This adds an additional layer of risk to the inclusion of ISDS in our trade deals.

1.13 All these factors combine to underline why the strong action of banning the inclusion of ISDS clauses through legislation must be undertaken. ISDS is an issue of significant ethical, moral and economic importance, and should be thoroughly debated and overseen by parliament and this country's judiciary. The Greens believe the issue is important enough to warrant legislative action and should be removed from the 'politics of the day.'

Approach by the Government to ISDS

1.14 The majority report states that, "the risks associated with ISDS can and should be managed more effectively and in ways which do not require legislation, including careful treaty drafting (of both old and new agreements) and development of a well-balanced Model Investment Treaty."⁵

1.15 This Government and particularly the current Minister for Trade and Investment (the Minister) has so far been misleading regarding or demonstrated very little understanding of the issues surrounding ISDS in trade and investment agreements.

1.16 Following the signing of the Korea–Australia Free Trade Agreement (KAFTA), the Minister stated regarding ISDS:

In the Korean Free Trade Agreement that I've just concluded, we did insist on explicit safeguards to ensure that regulation or law that's passed in public interest areas, such as health and the environment, cannot be covered by this ISDS... you could not have the plain packaging exercise repeated there because it has been essentially carved out those areas of public policy interests, especially to do with health and the environment.⁶

1.17 This assertion was disputed during hearings on the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014. Professor Luke Nottage, who is in favour of Australia maintaining its current position on ISDS and therefore opposes the bill, when asked whether the ISDS clause in KAFTA would preclude a Phillip Morris type case occurring again responded:

The answer is no under the current wording. If that sort of claim by tobacco companies is a particular concern, the obvious way to preclude it completely is to have a carve-out for measures in relation to tobacco.⁷

5 Foreign Affairs, Defence and Trade Legislation Committee, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, August 2014, paragraph 2.59, p. 17.

6 Andrew Robb, Interview with Linda Mottram, 702 ABC Sydney, February 19 2014. <http://www.andrewrobb.com.au/Goldstein/LocalIssues/tabid/123/articleType/ArticleView/articleId/1602/INTERVIEW-WITH-LINDA-MOTTRAM--702-ABC-SYDNEY.aspx>

7 Professor Luke Nottage, Sydney Law School, University of Sydney, *Committee Hansard*, 6 August 2014, p. 22.

1.18 While Australia has only ever been sued once under ISDS (the current Phillip Morris case) the majority report does make it clear that, "past experience may not be an accurate guide to the future in terms of potential ISDS claims against Australia." The current Government's approach to ISDS indicates it does not take ISDS seriously.

1.19 Minister Robb has made it clear that he and the Government want to speed up the process of trade agreements. For the KAFTA agreement, ISDS was a sticking point that needed to be overcome. A DFAT representative stated that:

Korea made it clear that ISDS was essential for it to conclude the negotiations.⁸

1.20 It is unclear why Australia did not at least ensure the strongest ISDS clauses possible were in place when KAFTA was signed. Evidence from Associate Professor Kimberlee Weatherall following her comparison of ISDS clauses in KAFTA, the Korea-Canadian FTA and the Canadian-European Union FTA indicated that while KAFTA does have safeguards, on the face of it, "other agreements and texts reviewed here have stronger and broader safeguards and exclusions and narrower definitions for investor rights."⁹

1.21 This begs the question why Canada managed to negotiate more extensive safeguard clauses for ISDS than Australia.

Consultation and transparency

1.22 Questions have also been raised beyond academia regarding ISDS. Community groups and the judiciary have also expressed reservations about consultation over ISDS clauses. Chief Justice French of the High Court made it clear that:

So far as I am aware the judiciary, as the third branch of government in Australia, has not had any significant collective input into the formulation of ISDS clauses in relation to their possible effects upon the authority and finality of decisions of Australian domestic courts. This is an issue which presently is of small compass. It has the potential to become larger and it is desirable that it be addressed earlier rather than later.¹⁰

1.23 Justice French raises the pertinent issues of transparency, a recurring theme amongst many submitters to the inquiry. It is clear not just for ISDS clauses but for the entirety of trade and investment agreements that greater transparency and external input is needed.

1.24 While many submitters caveated their opposition to this bill by also calling for greater transparency and improved processes, the current Government and their

8 Mr Richard John Braddock, Department of Foreign Affairs and Trade, *Committee Hansard*, 6 August 2014, p. 46.

9 Associate Professor Kimberlee Weatherall, Sydney Law School, University of Sydney, Response to Questions on Notice - public hearing - 6 August 2014, Canberra, p. 4.

10 Chief Justice French, 'Investor-State Dispute Settlement – A Cut Above the Courts?'. Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014. p. 15.

predecessors have not changed these processes despite calls from the community, stakeholders and Parliamentary committees such as the Joint Standing Committee on Treaties.

1.25 Aside from the Government's failure to appropriately consider and attempt to ameliorate the risks of ISDS in trade agreements, the bill has been introduced because of the growing evidence that ISDS clauses in trade agreements are not in the public interest and do not deliver economic benefits.

Risk of ISDS clauses

1.26 A number of submissions and evidence presented in the hearing outlined the risks associated with including ISDS clauses in trade and investment agreements. Patricia Ranald from the Australian Fair Trade and Investment Network states one of the major issues with ISDS clauses is they:

[G]ive additional rights to foreign investors to challenge domestic laws which may be made as part of protecting or advancing human rights or environmental sustainability. Those are the kinds of examples that we cite in our submission. So our worry is that ISDS has the potential to undermine or challenge domestic law which seeks to protect those broad principles of human rights and environmental sustainability.¹¹

1.27 ISDS clauses allow corporations to challenge policy decisions and legislation of democratically elected sovereign Governments. Even in the cases where corporations do not win, they have still dragged governments through lengthy and expensive legal processes.

1.28 Strategic litigation by corporations and the concept of 'regulatory chilling' was also raised in submissions to the inquiry. As an example, in the context of the Phillip Morris case, the committee heard evidence that by suing the Australian Government the company is able to put pressure on other countries who may be considering introducing their own plain packaging regimes. According to Dr Kyla Tienhaara:

[T]he Australian government has suggested that Philip Morris is currently engaged in trying to achieve global regulatory chill through its case by basically showing other countries that might want to introduce plain packaging legislation 'Look what we're doing to Australia.' This is actually working because countries are saying, 'We're going to wait to find out what happens with that case before we go ahead with our regulations.'¹²

1.29 There are clear risks associated with allowing ISDS clauses in trade and investment agreements and it not clear what economic benefits these clauses bring.

Lack of economic benefits

1.30 In 2010 the Productivity Commission (PC) in their research report titled *Bilateral and Regional Trade Agreements* came to the conclusion that:

11 Dr Patricia Ranald, AFTINET, *Committee Hansard*, 6 August 2014, p. 31.

12 Dr Kyla Tienhaara, RegNet/College of Asia and the Pacific, Australian National University, *Committee Hansard*, 6 August 2014, p. 16.

There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows.¹³

1.31 No evidence presented to the inquiry contradicted this conclusion of the Productivity Commission's 2010 report.

Bill drafting

1.32 In their submission and during the course of the hearing representatives of the Department of Foreign Affairs were concerned that the bill "would prevent Australia from entering into plurilateral agreements which contain ISDS whether or not we agree to be bound by that particular provision."¹⁴ This is not the intention of the bill and if redrafting is considered necessary this will be carried out.

Conclusion

1.33 The current Government and the Minister have demonstrated they are unwilling to effectively engage with the risks of ISDS provisions. For them, it is more important that trade and investment agreements are signed rather than working through ways to address ISDS risks effectively. Although legislation banning ISDS clauses has been determined by the majority of the committee to not be the best way to deal with the risks associated with ISDS it is clear that this Government doesn't have any mechanism to deal with the risks. The Government has also not given any indication that it intends to develop a mechanism.

1.34 The existing signing and ratification process does not enable Parliament to provide appropriate oversight of trade and investment agreements, including ISDS clauses. It seems unlikely that the current government or future governments will improve this process. This bill is the best way to manage the risk of ISDS clauses until the Government and the Minister can prove they are able and willing to do so.

Recommendation 1

1.35 That the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 be passed.

Senator Peter Whish-Wilson

Senator Scott Ludlam

13 Productivity Commission, *Bilateral and Regional Trade Agreements*, November 2010, p. 271.

14 Mr De Cure, Department of Foreign Affairs and Trade, *Committee Hansard*, 6 August 2014, p.42.

