Dear Sir, 27 March 2014

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

As a lawyer, I am particularly interested in the proposed TPPP treaty, which the Federal Government is considering joining. I wish to make submissions into the proposed Bill submitted by Senator Whish-Wilson.

I support the intention of the Bill, ie, to protect Australian law and policy by banning Investor-State Dispute settlement clauses (ISDS) in all trade and investment agreements. I do not agree with the ISDS system which essentially expanded legal rights and remedies for corporations and investors, to the detriment of the overall public interest.

ISDS enables foreign investors and corporations to sue both State and Federal Governments and claim for compensation in an international tribunal, by allowing them to claim that a domestic law or policy "harms" their investment or operations. There has been an expansion of legal concepts like "indirect expropriation" and "fair and equitable treatment" well 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.

For example, the High Court rejected Phillip Morris's claim that the Federal Government ban on plain paper packaging for tobacco products, was illegal or appropriated their intellectual property. The proposed ISDS would now enable Phillip Morris to claim and obtain millions of dollars worth of compensation for public health policy protection measures. The effect of this is to stop Governments from being able to enact public health measures, for fear that a corporation can effectively overrule such measures, or be paid millions of dollars. The latter scenario would be enough to stop such measures being passed in the first instance. (United Nations Committee on Trade and Development, (UNCTAD), 2000, p. 11)

There are number of cases in which foreign investors are suing governments over health, environment and other public interest legislation. Recent examples include:

- the Philip Morris Tobacco C0mpany 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 (Gaukrodger and Gordon OECD, 2014, p. 7, Public Citizen Table of Cases, 2014).

The costs to our Governments (and ultimately us as tax payers) of defending such claims are huge (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) will discourage our governments from enacting our own domestic legislation. The highest compensation award so far is $1.8 billion against the government of Ecuador. (Gaukrodger and Gordon, OECD, 2012, p. 19, UNCTAD, 2013a, p. 3)

The disputes are heard by international investment tribunals, operating in under quite outside of our local domestic legal system. Why should we allow our local laws to be so overruled and overturned ? The Tribunal proceedings remain secret unless both parties agree and even the results of proceedings can remain secret; The arbitrators can also be practising lawyers employed by the same companies that are taking action – and so lack the independence of judges in our own legal systems

There is no system of precedents, and no appeal system, so decisions lack consistency. There is litigation 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*". UNCTAD, 2013b, p. 1, Gaukrodger and Gordon, OECD, 2014, p. 36)

I don't agree that the 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.

For example, 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).

As a lawyer, the phrase "*except in rare circumstances*" leaves a very big loophole, which recent cases have used to advantage corporations. 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). 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 tried 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 stopped action against domestic 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. (see case studies in Public Citizen, 2010, 2013, 2014)

When other governments are reviewing and terminating their involvement in ISDS, including members of the European Union like France and Germany, Brazil, Argentina and eight other countries in Latin America, India and South Africa- why should Australia not learn from their mistakes ? Why enter into such an Treaty that has the potential to disable our own domestic legislative protections ? What benefit to us - qui bono ?

Please consider these submissions and reject the proposed TPPP.

Regards,

Aniko Anna Papp