

Labor Senators' Additional Comments

Community concern

1.1 Labor Senators recognise community concern about the inclusion of Investor State Dispute Settlement (ISDS) provisions in trade and investment treaties and acknowledge the issues raised by the many individuals and organisations that made written and/or verbal submissions or sent emails to the committee outlining their concerns.

Incidence and rationale for ISDS provisions

1.2 Labor Senators note that the use of ISDS provisions has become more prevalent. In the decade between 1992 and 2002 the cumulative number of cases under ISDS provisions grew from 0 to almost 100. In the following decade to 2012, the number grew to over 500.

1.3 We contend that the inclusion of ISDS provisions in treaties is unnecessary.

1.4 The potential of expropriation risk is largely resolved in the market place by 'reputational effects'. That is, governments which tend to seek foreign direct investment on an on-going basis will be significantly harmed by any expropriation type behaviour, even on a single account.

1.5 Studies have found that foreign firms tend to enjoy regulatory advantages, rather than bias, as compared to their domestic equivalents.¹ This could be attributed to the antidote of the first risk – namely the desire of governments to maintain and improve their reputation as an attractive country for investment.

1.6 The Productivity Commission has concluded that there is no available evidence to suggest that ISDS provisions have a significant impact on foreign investment flows.² Labor notes, and welcomes, current empirical research being conducted by leading Australian academics on the subject.³

1 Huang 2005, study analysing results of the World Business Environment Survey (10 000 business responses from 80 countries).

2 Ibid, at p.271.

3 Trakman, Nottage, Kurtz and Armstrong, "Investor-state Dispute Settlement", ARC Discovery Project 2014-2016. Project summary: "This project will evaluate the economic and legal risks associated with the Australian Government's current policy on investor-state dispute settlement through multidisciplinary research, namely econometric modeling, empirical research through stakeholder surveys and interviews, as well as critical analysis of case law, treaties and regulatory approaches. The aim of this project is to identify optimal methods of investor-state dispute prevention, avoidance and resolution that efficiently cater to inbound and outbound investors as well as Australia as a whole. The goal is to promote a positive climate for investment inflows and outflows, while maintaining Australia's ability to take sovereign decisions on matters of public policy." <http://www.law.unimelb.edu.au/research/research-achievements/grants-awarded/australian-research-council-arc/arc-discovery-projects/leon-trakman-luke-nottage-j-rngen-kurtz-and-shiro-armstrong-arc-discovery-project>

1.7 Multinational companies have significant political leverage when making investments in developing countries. Companies also have access to private sector insurance and reinsurance markets.

1.8 It is sometimes contended that ISDS provisions provide investors with an objective legal forum devoid of the problems that typically plague underdeveloped legal systems. We note, however, that the current ISDS legal system suffers from some of the same problems as underdeveloped legal systems, including substantial delays, substantial costs, lack of precedent and lack of an appeal mechanism.

1.9 Another unintended consequence from the growth of ISDS litigation is “regulatory chill” where states may delay or fail to implement public policy measures for fear of an ISDS claim.

2011 trade policy statement

1.10 In 2010 the Productivity Commission recommended Australian Governments should seek to avoid including ISDS provision in subsequent international agreements.⁴

1.11 In 2011 the Labor Government announced it would not provide foreign investors with greater legal rights than those available to domestic businesses and therefore would not agree to the inclusion of ISDS provisions in new trade and investment treaties.

1.12 This policy change did not prevent Australia from progressing bilateral and plurilateral treaty negotiations. Indeed, under this policy, Australia concluded negotiations on a free trade agreement with Malaysia.

International developments

1.13 As noted in submissions to this committee, there has been an increase in international concern about the operation of ISDS provisions, accompanied by calls for reform.

1.14 In 2013 the United Nations Conference of Trade and Development (UNCTAD) advocated for a roadmap for ISDS reform.⁵ The European Commission is currently analysing the results of almost 150,000 submissions to its public

4 Australian Productivity Commission, Australia's bilateral and regional trade agreements, at pp xxxvi and xxxviii; also see chapter 14 of the report.

Key Findings: (a) 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. (b) Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.

Recommendations: That Australian Governments should seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.

5 UNCTAD IIA Issues Note No.2, June 2013, “Reform of Investor-State Dispute Settlement: In search of a Roadmap.”

consultations on the ISDS in the Transatlantic Trade and Investment Partnership (TTIP). Governments and groups in Germany, France, Indonesia and South Africa have all expressed their lack of support for future ISDS provision in multilateral agreements.

Executive responsibility

1.15 In our parliamentary system the responsibility for negotiating and signing international treaties, including trade and investment treaties, is vested in the executive government.

1.16 Previous Labor Governments have utilised this executive treaty making power to enter treaties, agreements and contracts to make progressive reforms in the national interest, including protecting workers against unfair dismissal; saving the Franklin River through world heritage listing; ratifying the Kyoto Protocol to tackle climate change, and tackling discrimination and other abuses of human rights.

1.17 Governments are ultimately accountable to the people through the ballot box for their exercise of executive power.

1.18 In our view it is not desirable to radically constrain the executive's treaty-making power in the manner proposed by this bill.

1.19 Labor will continue to scrutinise the actions of the Government, including its treaty-making actions, to ensure its conduct is in the national interest and will give appropriate consideration to enabling legislation.

1.20 Labor has moved in the Senate to order the tabling of all proposed trade agreements at the conclusion of negotiations and before signing.

Conclusion

1.21 Labor Senators support the committee's recommendation.

Senator Alex Gallacher

Deputy Chair

