Australian Government

Australian Government response to the Joint Standing Committee on Treaties report 188:

Investments Uruguay, ISDS UN Convention and Convention SKAO

JUNE 2020

Introduction

The Government thanks the Committee for its consideration of the *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*; the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*; and the *Convention Establishing the Square Kilometre Array Observatory*.

The Government provides the following response to the Committee's recommendations.

Response to the recommendations

Recommendation 1

The Committee supports the *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments* and recommends that binding treaty action be taken.

Response:

The Government accepts this recommendation.

Recommendation 2

The Committee supports the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* and recommends that binding treaty action be taken.

Response:

The Government accepts this recommendation and is progressing ratification of the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, in accordance with usual treaty-making practice.

Recommendation 3

The Committee supports the *Convention Establishing the Square Kilometre Array Observatory* and recommends that binding treaty action be taken.

Response:

The Government accepts this recommendation.

The Government agrees with the Committee's conclusion that there are many good reasons to ratify the Convention. Ratification is a crucial step in securing the valuable co-hosting rights for the Square Kilometre Array Observatory. Australia has much to gain from hosting an international science facility of such the scale and advanced technology as the SKA. It will not only significantly boost our science and technology performance, but provide a platform for developing cutting edge skills and industry capabilities. In addition there will be direct economic benefits for the Mid West region of Western Australia, Indigenous people and the nation as a whole.

Response to the additional comments by the Australian Greens

Recommendation 1

The Australian Greens recommend that ISDS provisions be excluded from all trade agreements and that any existing trade agreements including these provisions be renegotiated to remove them.

Response:

The Government does not accept this recommendation.

The Government considers the inclusion of Investor-State Dispute Settlement (ISDS) provisions in trade and investment agreements on a case-by-case basis in light of the national interest. This approach provides flexibility in trade agreement negotiations.

ISDS provisions provide important protections for Australian businesses investing abroad. The mechanism allows Australian investors to enforce their rights directly under trade and investment agreements.

Where the Government agrees to include ISDS, it ensures robust safeguards to protect the Government's ability to regulate in the public interest and pursue legitimate public welfare objectives, such as public health and the environment, as we have done with all of our recent trade agreements that include ISDS.

In relevant free trade agreement negotiations, the inclusion of ISDS provides an opportunity to replace older-style bilateral investment treaties lacking explicit safeguards with modern investment provisions that include them.

Where Australia is not engaged in relevant free trade agreement negotiations, the Government has committed to review older-style bilateral investment treaties, and older investment provisions in existing trade agreements, and where possible, to seek to replace them with more modem safeguards, as we have done recently with the updated Uruguay Agreement.

Concluded trade and investment agreements represent a negotiated outcome, reflecting a balance of interests of both parties. Reopening such negotiations to remove ISDS provisions would likely result in a shift in the balance of outcomes against Australia's interests in other areas.

- **The Greens recommend that ISDS provisions be excluded from the Uruguay Agreement.**

Response:

The Government does not accept this recommendation.

For the reasons outlined above, the Government decides on the inclusion of ISDS provisions in trade agreements on a case-by-case basis in light of the national interest, including the protection of Australian investors overseas.

The ISDS provisions in the updated Uruguay Agreement will maintain access to ISDS for Australian investors, which already exists under the 2002 Uruguay Agreement. JSCOT has heard in previous hearings that Australian investors and industry sectors value the inclusion of ISDS in trade and investment agreements.

The updated Uruguay Agreement's ISDS mechanism is balanced by explicit procedural and substantive safeguards, including a WTO-style general exception and a security exception that reinforce the Government's ability to regulate in the public interest and pursue legitimate public welfare objectives, such as public health and the environment. The updated Uruguay Agreement will replace the broadly drafted older-style 2002 Uruguay Agreement, which lacks these explicit safeguards. If the Uruguay Agreement is not ratified in its current form, Australia will not have these explicit safeguards.

- **The Greens do, however, accept that where ISDS are included in trade agreements that any measures to increase transparency constitute an improvement. Therefore, we support the expansion of the United Nations Commission on International Trade Law Rules and we recommend that the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration be ratified. Any inconsistencies in the application of the Rules on Transparency within existing agreements should subsequently be remedied.**

Response:

The Government does not accept that part of the recommendation relating to remedying any inconsistencies in the application of the *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration* (UNCITRAL Rules on Transparency) within existing trade agreements**.**

While Australia aims for strong transparency requirements regarding investor-State dispute settlement (ISDS) in all trade agreement negotiations, we are only able to achieve what is mutually acceptable to our trading partners. Concluded trade agreements represent a negotiated outcome, reflecting a balance of interests of both parties. Reopening such agreements to amend the ISDS transparency provisions would likely result in a shift in the balance of outcomes against Australia's interests in other areas.

Moreover, most of Australia's existing trade agreements with ISDS provisions, which were concluded after 1 April 2014, have strong transparency requirements similar to those found in the UNCITRAL Transparency Rules.