ACTU Submission

To the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Korea – Australia Free Trade Agreement

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Introduction

The ACTU welcomes the opportunity to provide these brief comments to the Senate Foreign Affairs, Defence and Trade References Committee in its review of the Korea-Australia Free Trade Agreement (KAFTA).

We believe the primary objective of all trade negotiations should be to raise living standards and make a positive difference in the lives of working people in accordance with the principles of sustainable development. Reducing barriers to trade and investment, and increasing economic cooperation and integration, are possible *means* of achieving this.

However, history has demonstrated that trade liberalisation has the potential to contribute to economic growth but this does not guarantee that the benefits of increased trade will result in tangible benefits for workers or that these benefits will be evenly distributed.

For KAFTA to promote trade integration that contributes to sustainable economies it must promote decent and secure jobs and maintain the role of government and democratic decision-making in introducing legislating and overseeing policy in the interest of communities.

Decent Work Benefits

On concluding the agreement, the Government championed the economic and job benefits that would flow from greater trade liberalisation. However, the bases for these claims are unclear. Apart from economic modelling undertaken prior to the commencement of negotiations, there is no publicly available analysis to substantiate the claim.

It would be incorrect to rely on the original modelling. First, such modelling adopts assumptions of full liberalisation rather than the negotiated outcome. This assumes outer-envelope liberalisation which does not reflect the final agreement. Second, this type of modelling adopts analysis which fails to incorporate real world assumptions into the model. If the assumptions are inaccurate, the outcomes of the analysis will be inaccurate.

Third, the modelling does not capture the impact of non-tariff commitments in the concluded agreement. The reduction of important regulation perceived as red tape or behind the border

barriers to trade and the inclusion of investor-state dispute settlement should be assessed in a full cost-benefit analysis.

We believe it is inappropriate for the government to ratify KAFTA without completing a comprehensive analysis of the concluded agreement. Otherwise the Government is making decisions in the dark about whether the agreement is in Australia's interest and the interest of workers.

Labour Chapter

Respect for labour rights will assist in the distribution of the benefits of increased trade by promoting the creation of jobs that are decent jobs. It will prevent trading partners from weakening labour standards to promote investment and trade, ultimately harming workers.

As the ACTU has repeatedly stated, the Australian Government must include enforceable labour rights commitments in all trade agreements negotiated. At a minimum this requires a labour chapter that:

- Clearly demonstrate that commitment to implement fundamental labour rights, as articulated in core ILO conventions on rights at work,[1] is a fundamental and integrated part of the agreement;
- Include a commitment by parties to not weaken but to improve labour rights;
- Provide for this obligation on labour rights to be monitored and enforced, including a role for trade unions; and
- Include procedures for alleged breaches of core labour rights and settling disputes.

However, the labour chapter in KAFTA does not require Australia or South Korea to meet the ILO standards – as outlined in conventions – under the agreement. Rather, countries must only 'endeavor'. This is inadequate.

Furthermore, the chapter does not include a dispute settlement provision and enforcement of the chapter does not fall under the agreement's general dispute settlement provision. This means the labour chapter commitments are unenforceable.

[1] With respect to freedom of association and the effective recognition of the right to collectively bargain, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

If the Government is genuinely committed to trade liberalisation that creates *decent* jobs and benefits Australians, this is not demonstrated in the labour chapter commitments it has agreed to.

Investment Chapter

KAFTA includes investor-state dispute settlement (ISDS) provisions that the ACTU does not support. In practice ISDS provisions provide foreign corporations with inappropriately broad rights that have constrained the policy-making role of government. ISDS does so by providing an avenue (outside the domestic legal system) for foreign corporations to threaten and lodge claims for actual or potential harm resulting from changes in policy and regulation in the country in which they are investing. In addition, ISDS provides foreign corporations with a legal avenue not accessible to domestic corporations, putting domestic corporations at a competitive legal disadvantage.

The ACTU has comprehensively detailed its concerns with respect to ISDS in a recent submission to this Committee's inquiry into the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014.* This submission is attached for information.

We strongly recommend that this Committee join us in calling on the government review its inclusion of ISDS in KAFTA and rejecting the inclusion of ISDS in future trade agreements.

Conclusion

The ACTU appreciates this opportunity to provide comments to the Committee, an inquiry which is adding transparency to opaque negotiations.

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ATTACHMENT 1

ACTU Submission
Investor-State Dispute Settlement (ISDS) Bill
(D. No. 49/2014)

ACTU

Submission

Investor-State Dispute Settlement (ISDS) Bill

11 April 2014

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Introduction

The Australian Council of Trade Unions (ACTU) supports trade integration that contributes to sustainable economies where workers are employed in decent and secure jobs. Intensified competition and unfettered capital mobility may lead to economic growth but it can also exacerbate inequality, social exclusion and environmental degradation. It is essential that the space for domestic policy making is maintained so the negative impacts of trade liberalisation and unequal economic growth can be anticipated and addressed. Domestic policy must also play a role in supporting a more equitable distribution of the benefits of trade liberalisation and growth more broadly. The role of government and democratic decision-making in introducing legislation and overseeing policy in the interest of workers and communities is central to this.

This has implications for how and what is negotiated in bilateral and regional trade agreements. In particular, it requires the exclusion of investor-state dispute settlement (ISDS) procedures from the investment chapters of preferential trade agreements.

In practice ISDS provides foreign corporations with inappropriately broad rights that have constrained the policy-making role of government. ISDS does so by providing an avenue (outside the domestic legal system) for foreign corporations to threaten and lodge claims for actual or potential harm resulting from changes in policy and regulation in the country in which they are investing. In addition, ISDS provides foreign corporations with a legal avenue not accessible to domestic corporations, putting domestic corporations at a competitive legal disadvantage.

The ACTU does not support the inclusion of ISDS in trade agreements negotiated by the Australian Government and calls on this Committee to support the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* as it would introduce a ban on the inclusion of ISDS in Australian trade agreements.

Failing to do so is inconsistent with sensible public policy making informed by the evidence and a risk-based analysis.

Dispute Settlement Procedures in Trade Agreements

Bilateral and plurilateral trade agreements appropriately include a state-state dispute mechanism to address violations of the agreement that may arise. This enables a signatory to the agreement to hold another signatory to the agreement accountable if they do not meet their obligations under the agreement.

In contrast, ISDS provides foreign corporations with significant rights under a trade agreement even though they are not a party to the agreement and hold no obligations under the agreement. Its inclusion is not a requirement of trade agreements. It is a choice by governments negotiating investment provisions in trade agreements.

If included, ISDS provides foreign investors with a mechanism to seek compensation in international arbitration if they believe a change in host country legislation or policy treats them 'unfairly'. This significantly increases the rights of foreign investors to seek redress because aggrieved foreign corporations are not dependent on the willingness of their government to endorse the grievance and pursue it through the state-state dispute mechanism.

Reject the Rationale for ISDS

Protecting Investments

The original intent of ISDS was to protect foreign corporations against direct expropriation or the taking of property by a host government. The focus has shifted away from direct to indirect expropriation, and in doing so has broadened substantially. Companies are now looking to shield their investments from any adverse impact, even when justified on sound public policy grounds, and using ISDS to do so.

The context, though, is one where companies have demonstrated a preparedness to invest in high risk environments due to the potential for high profits. Regardless of the type of investment environment, decisions by companies to invest are informed by risk analysis, including the political and regulatory environment of the country. Even when risks are identified, companies are choosing to make these investments because of the potential benefit: profits. It is absurd for companies to then argue that it is the role of government to underwrite foreign investment risks when they initiate investments knowing full well the potential risks.

And that is exactly what ISDS does. To provide this avenue for companies investing overseas, host governments must expose themselves to ISDS claims at home. Ultimately citizens then carry the burden because governments are restricted in the public policy they can introduce and are vulnerable to costly litigation bills and compensation pay outs if they persist with implementing public policy that a foreign corporation has targeted.

Foreign corporations may argue that changes in the regulatory environment in democratic and stable country can be unexpected, and they should be protected against this type of change. However, why should a foreign corporation be provided with an avenue for complaint that is unavailable to a domestic investor? The domestic court process is open to all corporations. It is the appropriate fora, with hearings largely open to the public and appeal mechanisms (unlike international arbitration panels which lack transparency and accountability).

If a foreign corporation is genuinely concerned that a domestic legal system will not provide it with an appropriate avenue, there are alternative options available that provide predictable, cost-effective and timely avenues for addressing investment breaches. This includes investor-state contracts, the World Bank Multilateral Investment Guarantee Agency, and Political Risk Insurance issued by the Australian Government Export Finance and Insurance Corporation. These options are available without the risk to governments, public policy and the interests of citizens.

Foreign Direct Investment

There is limited evidence to suggest that ISDS positively impacts on the level of foreign direct investment. Research by the World Bank, for example, concluded that there is little evidence that Bilateral Investment Treaties (BITs) have stimulated FDI flows from OECD countries to developing countries. Furthermore, developing countries with weak domestic institutions have not gained additional benefits from ISDS.[1]

[1] M. Hallward-Driemer, 'Do Bilateral Investment Treaties Attract FDI? Only a bit…and they could bite', (June 2003), *World Bank.*

Ineffective 'Safeguards'

Advocates of ISDS argue that the inclusion of safeguards protects public policy making. This view is naïve and ill-founded. An example is the recently negotiated Korea-Australia FTA,[2] which provides corporations with access to ISDS with 'safeguards' for public welfare. Breaches of most favoured nation treatment, minimum standard of treatment, and expropriation can be pursued by foreign corporations through ISDS.

Expropriation

With respect to expropriation, the chapter includes a carve-out that 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.

The Government argues that this carve out protects public policy from being attacked by expropriation claims. Analysis suggests, though, that this confidence is ill-placed for three reasons. First, the phrase 'excepts in rare circumstances' leaves a loophole for corporations to contest public policy. Second, corporations can argue that a specific regulatory measure is unnecessary to protect a public welfare objective; and if demonstrated, go on to argue that it harms their investment. Third, there are many areas of government public policy which are important but may not fall under the umbrella of 'public welfare' objectives.

Furthermore, issues arise when 'indirect expropriation' is interpreted broadly. In particular, arbitration panels have interpreted expropriation to require compensation based on the impact of a government measure on the value of an investment, regardless of whether there has actually been some appropriation of an asset by the government.[3] This interpretation of the standard for indirect expropriation cannot be justified as reflecting the general practice of states. The dominant practice of states is to provide for compensation only when the government has actually acquired an asset, not when the value of an asset has been adversely affected by regulatory measures.

Fair and Equitable Treatment

Investment chapters require countries to treat covered investments in accordance with the customary international law minimum standard of treatment, including fair and equitable treatment.

The term 'fair and equitable treatment' is one of the most contested terms in international investment law. The inclusion of a reference to customary international law has not created greater certainty on the minimum standard of treatment (MST) and has not prevented over-expansive interpretations of the standard by arbitration panels.[4] For example, tribunals have found in favour of foreign investors on the basis of fair and equitable treatment following government changes in regulatory action that simply contradicted what investors thought was their 'reasonable

[2] Australian Government, *Korea-Australia Free Trade Agreement* (17 February 2014), DFAT, http://www.dfat.gov.au/fta/kafta/.

[3] Goh Chien Yen, Expropriation and investor-state disputes: The dangers of international investment agreements, Third World Network.

[4] L. Wallach and B Beachy, *Memorandum: CAFTA Investor-State Ruling,* (19 July 2012), Public Citizen, http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf

expectation'. One tribunal decision against Ecuador concluded: 'there is certainly an obligation not to alter the legal and business environment in which the investment has been made'.[5]

Governments are therefore exposed to expansive interpretations by tribunals rather than the actual practices of sovereign states. This is particularly high risk as failure to uphold fair and equitable treatment is the most frequent basis of ISDS claims. Furthermore, the history of ISDS arbitration demonstrates corporations most often win cases when arguing breach of the principle of fair and equitable treatment. Cases have affected the gamut of government policy portfolios.[6]

Undermines Democratic Decision Making

ISDS allows foreign corporations to target legislation, policy and regulation at all levels of government: local, state and federal. The effect is twofold. First, corporations are able to frustrate or block decision-making by governments by threatening litigation and lodging claims for actual or potential harm resulting from local, state or federal government policy and regulation. The fear of future litigation can lead to a 'chilling effect' on domestic policy making across policy areas including environmental protection, public health, culture and the economy. This undermines the sustainable development aspirations of countries and constitutes a gross imbalance between private rights and the public interest.

Second, once legislation, regulation or policy is introduced, corporations can pursue claims for damages, ultimately driving governments to overturn legislation. There are numerous cases to demonstrate this point.

Three recent cases demonstrate the risks.

In Canada, a US-based pharmaceutical company (Eli Lilly) announced in December 2012 it was pursuing a NAFTA investment chapter breach over a decision on a drug patent. In its formal notice of intent, Eli Lilly outlined a challenge not only to the decision on this specific (ADHD) drug but Canada's entire approach to determining patents. The decision on the ADHD drug was in line with Canada's existing medicine patent standards and a Canadian court decision. The corporation is demanding compensation and if successful it will promote monopoly protection of patents, impact on affordable medicine prices for consumers, imposition of a $100 million compensation bill on the Canadian government, expose Canada to a slew of claims from other pharmaceutical companies, and lead to a chilling effect on health policy in Canada in fear of future claims by foreign corporations.[7]

[5] *Metalclad and Tecmed, the Occidental v Ecuador*, ICSD, 2005, [240].
[6] For cases under NAFTA alone see Public Citizen, *Table of Foreign Investor-State Cases and Claims under NAFTA* (August 2014) http://www.citizen.org/documents/investor-state-chart.pdf.
[7] For more detailed analysis see B.K Baker, 'Corporate Power Unbound: Investor-State Arbitration of IP Monopolies no Medicines – Eli Lilly and the TPP' *PIJIP Research Paper Series* (2013); Public Citizen, *US Pharmaceutical Corporation Uses NAFTA Foreign Investor Privileges Regime to Attack Canada's Patent Policy, Demand $100 million for Invalidation of a Patent* (March 2013) http://www.citizen.org/documents/eli-lilly-investor-state-factsheet.pdf.

In Germany, the energy company Vattenfall notified the German government in May 2012 it was taking a case against it following the government's decision to phase out nuclear energy.[8] Germany's decision followed decades of public debate on the role of nuclear and was adopted following the Fukushima disaster. Vattenfall is expected to claim over €700 million in compensation in response to the closure of two nuclear power plants. The case demonstrates the practice of arbitration panels: narrow analysis of potential breach without a requirement to consider democratic public policy making or public welfare.

A recent research report looks at the practice of 'vulture funds' that are using ISDS provisions in austerity Europe.[9] In one case against Greece, foreign investors have initiated a claim after purchasing government debt, in the form of already heavily discounted sovereign bonds. At the time of purchase, credit agencies had already warned of the risk of default. However, the investors knowingly speculated. Following the imposition of austerity measures, the foreign investors pursued an ISDS claim against the Greek government, contending their speculative investment in junk bonds made less profit than expected.

The risk rises with the incidence of ISDS litigation on the increase. The number of international arbitration cases recorded globally has risen significantly. In 1995, five cases were reported. By the end of 2012 there were a total of 514 reported cases, sixty four new cases filed in 2012 alone. The number of actual cases is likely to be higher though as most arbitration forums do not maintain a public registry of claims. The number of countries that have faced arbitration grew to 95 by 2011.[10]

Is Australian at Risk?

The argument that ISDS is not a threat to Australia because few ISDS claims have been brought against Australia to date is a weak argument.

A significant factor reducing Australia's exposure to date has been the exclusion of ISDS from the Australia-US trade agreement. As a result the country with the greatest culture and record of litigation, the United States, is not provided with an ISDS avenue for US-based corporations. This could be reversed with the inclusion of ISDS in a concluded *Trans Pacific Partnership Agreement*. The current Trade Minister has clearly stated that he will consider inclusion of ISDS in the agreement if satisfactory market access outcomes are achieved, other text based issues are resolved and *safeguards* are incorporated (emphasis added).

Furthermore, the idea that ISDS is not a threat to Australia because all other ISDS mechanisms that Australia are a party to, are with less developed countries that are not major exporters of investment is inaccurate. First, it is based on an assumption that the current nature of investment flows will remain the same. However, global trade and investment patterns are rapidly changing. Developing countries are increasingly becoming foreign investors, with 31 percent of world investment flows originating in developing countries; a record high in 2013.[11] Thus the current

[8] N. Bernasconi-Osterwalder and R.T. Hoffmann, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute *Vattenfall v Germany (II)*' *IISD Briefing Note* (June 2012).
[9] C. Olivet and P. Eberhardt, 'Profiting from Crisis: How corporations and lawyers are scavenging profits from Europe's crisis countries' *Transnational Institute and Corporate Europe Observatory* (March 2014).
[10] UNCTAD, 'Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy Making' *IIA Issues Note,* (No. 5, July 2013).
[11] UNCTAD, *Global Investment Trends 2013*, (2013) http://unctad.org/en/PublicationChapters/wir2013ch1_en.pdf

assumption that Australia is immune to claims from developing country investors will not necessarily hold.

Second, Australia has concluded an agreement with South Korea that includes ISDS. And as noted above, ISDS is on the table in *Trans Pacific Partnership Agreement* negotiations, which includes the US, Canada, Chile, Mexico, New Zealand, and Japan; also OECD economies.

Third, the use of ISDS by Philip Morris to challenge plain packaging for cigarettes demonstrates that corporations will treaty shop in order to access ISDS provisions. Thus, the development status of the host country is a non-factor. To target Uruguay's tobacco control measures, Philip Morris used a Switzerland – Uruguay investment treaty. To target Australia's plain packaging legislation, Philip Morris is using a Hong Kong – Australia investment treaty. The case is a current example of how ISDS exposes the Australian government to litigation.

Philip Morris and Cigarette Plain Packaging

The decision to introduce mandatory plain packaging legislation for cigarettes (as part of a suite of reforms focused on reducing smoking and its harmful effects) in December 2011 followed thirty years of tobacco control measures that had reduced the smoking rate in Australia to 18 percent of the population. However, tobacco-related deaths and the cost to the economy remain high. Smoking is one of the leading causes of preventable disease and death in Australia, killing about 15,000 people annually. Smoking-related diseases cost the Australian economy approximately $31 billion a year.[12] Of concern was the high percentage of new smokers starting before the 18 years of age.

Consistent with the World Health Organisation's *Framework Convention on Tobacco Control*[13] and extensive research showed that plain packaging:

- Increases the noticeability, recall and impact of health warning messages;
- Reduces misleading packaging about the harmfulness of tobacco; and
- Reduces the attractiveness of tobacco products (particularly to smokers under 18 years of age).[14]

In response, British American Tobacco and JT International challenged the legislation in the High Court of Australia. The companies were unsuccessful and the High Court decision found that the legislation was not contrary to 'acquisition of property on just terms'.[15]

[12] National Preventative Health Taskforce, *Taking Preventative Action: A Response to Australia – the Healthiest Country by 2020* (2010) http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/6B7B17659424FBE5CA25772000095458/$File/tpa.pdf.

[13] WHO, *Media Release: WHO welcomes landmark decision from Australia's High Court on tobacco plain packaging act,* (15 August 2012) http://www.who.int/mediacentre/news/statements/2012/tobacco_packaging/en/

[14] For more information see Department of Health, 'Plain Packaging of Tobacco Products' (31 July 2013) http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain

[15] *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia* [2012] HCA 30

Now Philip Morris is challenging the legislation using an investment provision included in an Australian investment treaty negotiated with Hong Kong in the early 1990s. Philip Morris is seeking a roll back of the legislation, compensation for loss of revenue and profit, costs for complying with the legislation, and compensation for loss of the value of intellectual property.[16]

Philip Morris has previously utilised ISDS provisions to challenge tobacco control measures. In 2010, proceedings were initiated against Uruguay. Tobacco companies have also threatened litigation against Canada after it proposed plain packaging. This resulted in a withdrawal of the proposal by the government. In the United Kingdom, an independent expert is shortly expected to recommend the introduction of plain packaging. News reports suggest tobacco companies are preparing to oppose plain packaging legislation. ISDS provides an avenue outside the domestic system and one that lacks transparency and accountability to do so.

The Nature of Trade Negotiations

To conclude a trade agreement trade-offs are made, compromises are agreed to. That is the nature of negotiations. However, there must be red lines in any negotiation; and the role of government in legislating democratically in response to community concerns across a range of issues should not be traded away.

The recently concluded Korea-Australia trade agreement is an example of this. The Australian government was able to secure access to the South Korean market for Australian been farmers at a comparable level to the access provided to US beef farmers under the Korea-US trade agreement. For this stakeholder group, this was a prima facie good outcome. But the risks that ISDS poses to this same constituency alone – let alone the broader Australian community – are significant and real:

- *Coal Seam Gas* exploration, and its impact on land use, is of concern to many farmers and community groups. In NSW, for example, the State Government responded to community concerns by initiating a review of existing legislation which recommended the adoption of revised regulations.

  The capacity of government to respond to community concerns like this is at risk with ISDS provisions in trade agreements. This is demonstrated by an ISDS case in Canada (under NAFTA) initiated by US Lone Pine Energy Company.[17] Lone Pine is suing the Quebec provincial government for $250 million in response to a decision to suspend shale gas mining pending an environmental study. The Quebec government was acting in response to public pressure from the community to examine health and environmental impacts. This is similar to the role farmers and communities in NSW and Victoria have had in influencing state governments to adopt moratoriums to provide the time to examine the impact of CSG mining on land use and the environment.

- *Water* allocations are informed by consultation with key stakeholders – farmers, regional communities, Indigenous groups, industry, environmentalists, etc. – informs the suite of legislation, policies and procedures that determine allocations of water in Australia. While the allocation is not considered perfect by many, it reflects a democratic and consultative process.

[16] For more information see Attorney-General's Department, 'Investor-State Arbitration – tobacco plain packaging' http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx
[17] Public Citizen, 'TPP Investment Rules Harm the Environment', (http://www.citizen.org/documents/TPP-and-the-environment.pdf.

If steps, consistent with democratic decision-making, were taken to change water allocations, and this affected a foreign corporation's access to water, that corporation could challenge the decision under ISDS; negating the need to rely on domestic legal remedies. This is not an avenue that is open to domestic water rights holders and circumvents domestic decision-making processes.

Water policy has not been immune from ISDS. Claims have been filed against a number of countries including Canada, Mexico, Bolivia, and Argentina. While ultimately unsuccessful, a water irrigation case was brought against Mexico (under NAFTA) following alleged breaches of water-sharing arrangements. The Canadian government settled a case involving water rights held by a paper mill for $122 million.

- *Food Labelling* provides important information on country of origin, content of genetically modified goods, and the sustainability principles that underpin the farming and production of the good. This supports Australian producers to market their products and assist consumers to make informed choices about the food they purchase.

  If labelling requirements advocated for by Australian producers were introduced by government, a foreign corporation could challenge the labelling requirements – even if they are WTO compliant – through ISDS provisions if they believed the labelling reduce the value of their investment.

The Financial Cost of ISDS

At a time when the Australian Government is talking about fiscal responsibility and responsible management of the budget, it is at odds to expose the government to costly ISDS litigation. OECD research of publicly available information shows that the legal and arbitration costs averaged in excess of US$8 million per case.[18] In some cases, costs exceeded US$30 million. This does not include the compensation payment if a government is unsuccessful in defending a case. The most costly award to day was in 2012 against Ecuador, with the government ordered to pay $1.8 billion.

History of ISDS in Australia

In 2010 the Productivity Commission in its *Review of Bilateral and Regional Trade Agreements* found ISDS has no statistically significant impact on foreign investment, risks regulatory chilling with governments reluctant to introduce public policy in the public interest due to fears of arbitration, confers rights to foreign investors that are not available to domestic citizens and investors, exposes governments to large claims for compensation, and lacks transparency.[19]

Thus the Commission concluded:

> Although some of the risks and problems associated with ISDS can be ameliorated through the design of relevant provisions, significant risks would remain.

[18] D. Gaukrodger and C. Gordon, 'Investor-state dispute settlement: a scoping paper for the investment policy community', *OECD Working Papers on International Investment* (2012/3), 19.
[19] Productivity Commission, *Review of Bilateral and Regional Trade Agreements* (2010.

> Meanwhile, it seems doubtful that the inclusion of ISDS provisions within…[investment and trade agreements] affords material benefits to Australia or partner countries.

Therefore the Commission recommended:

> Australia should seek to avoid accepting ISDS provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system.

In 2005, Howard Government acknowledged the risks when negotiation the Australia-US FTA. Then Trade Minister, Mark Vaile, argued that the Australian government was ensuring negotiations took 'account of Australia's foreign investment policy, and the need for appropriate policies to encourage foreign investment, while addressing community concerns about foreign investment.'[20] State and Territory governments at the time expressed opposition to the inclusion of ISDS. The Victorian government, for example, warned that NAFTA's investment provisions had been used to 'undermine local and state sovereignty and control' and 'given foreign investors better treatment than local businesses'.[21]

The Senate Foreign Affairs, Defence and Trade Reference Committee ultimately recommended that no investor-state provisions be included in the Australia-US Free Trade Agreement[22] noting with concern that an FTA modelled on NAFTA would grant US corporations inappropriate powers to challenge government regulation at local, State and Commonwealth levels.[23]

Increasing Recognition of the Risks

ISDS is becoming an increasingly unattractive proposition for Governments. As early as 2004, the Nobel Prize winning economist, Joseph Stiglitz reflected that the inclusion of ISDS in NAFTA had 'potentially weakened democracy throughout North America'[24]. As the number of documented cases continues to rise, Governments are taking steps to remove ISDS from existing agreements and exclude it in new negotiations.

In 2012, South Africa's Minister of Trade and Industry, Rob Davies, announced his Government was looking to remove existing ISDS provisions from trade and investment agreements and not agree to such provisions in the future. The rationale was clear:

> Investor-state dispute resolution that opens the door for narrow commercial interests to subject matters of vital national interest to

[20] M. Vaille, 'Vaile Announces Objectives for Australia - US FTA' (3 March 2003) http://www.trademinister.gov.au/releases/2003/mvt013_03.html
[21] See A. Capling 'The Rise and Fall of Chapter 11: Investor-State Dispute Mechanisms in NAFTA and AUSFTA' *Paper Prepared for the Oceanic Conference on International Studies* (July 2004).
[22] Senate Foreign Affairs, Defence and Trade References Committee, 'Voting on Trade: The GATS and the AUSFTA', November 2003, [6.134]
[23] Senate Foreign Affairs, Defence and Trade References Committee, 'Voting on Trade: The GATS and the AUSFTA', November 2003, [6.130]
[24] J.E. Stiglitz, 'The Broken Promise of NAFTA', *New York Times* (6 January 2004).

> unpredictable international arbitration is of growing concern to constitutional and democratic policy-making.[25]

In January, the investment aspect of the EU-US trade agreement negotiations were suspended after the European Commission announced a round of public consultations on the issue of ISDS.[26] This reflected public concern about its inclusion. In addition to public opposition, EU member countries are opposing its inclusion. In March, the Germany government announced it was joining France in opposing the inclusion of ISDS in the EU-US trade negotiations.[27]

A number of Latin American countries have recalled their support for ISDS. The Brazilian parliament has consistently refused to ratify investment agreements that include ISDS. The experience of Argentina is a real example of the risks. Argentina has been sued fifty-one times following the introduction of economic reforms by the Government in response to the 2011 economic crisis. Awards against Argentina have reached US$912 million and pending decisions are estimated at a further $20 billion, almost six times Argentina's current public budget for health.

In the Asian region, India is planning to abolish ISDS provisions in its agreement. Indonesia announced that it will terminate over 60 investment treaties that include ISDS in response to foreign corporations 'pressuring' Indonesia.[28] The South Korean Government agreed to ISDS in the Korea-US FTA, despite mass protests against the agreement. Furthermore, the Supreme Court of South Korea recommended exclusion of ISDS, warning the provision 'could give rise to extreme legal chaos'.[29] Regular reports suggest the Korean Government is looking to review the provision.

Conclusion

ISDS provisions are complicated legal provisions. We cannot, however, allow the technical nature of the topic to block public debate. Nor should the complicated detail be used by advocates of ISDS as a protective shield when placating those that are raising genuine concerns about ISDS.

The risks from ISDS are clear and no longer hypothetical. The growing list of cases demonstrates the increasing and strategic use of ISDS provisions by corporations. The Philip Morris case demonstrates that Australia is not immune from the risks.

This does not mean that Australia should not conclude trade agreements (preferably multilateral agreements) but it requires us to ask how our Government is seeking to balance economic growth with principles of equality and a fair distribution of the benefits. These are not abstract decisions being taken around a table. Rather ISDS expands the rights of corporations at the expense of government decision-making and public welfare; affecting the lives of real people.

We strongly recommend the committee support the *Trade and Investment (Protecting the Public Interest) Bill 2014.*

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[25] Rob Davies, 'Investment Policy Framework for Sustainable Development', *Speech to the South African Launch of the UNCTAD,* University of The Witwatersrand (26 July 2012).
[26] European Commission, 'Press Release: Commission to Consult European Public on Provisions in EU-US Trade Deal on Investment and ISDS' (21 January 2014) available at http://europa.eu/rapid/press-release_IP-14-56_en.htm.
[27] S. Donnan & S. Wagstyl 'Transatlantic Trade Talks Hit German Snag' *Financial Times* (14 March 2014)
[28] B. Bland & S. Donnan 'Indonesia to Terminate More than 60 Bilateral Investment Treaties' *Financial Times,* (26 March 2014).
[29] Jung Eun-joo, 'Supreme Court Recommends Renegotiation of ISD Clause', *The Hankyoreh* (26 April 2012).

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