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Foreign Affairs, Defence and Trade Legislation Committee

Trade and Foreign Investment (Protecting the Public Interest) Bill 2014

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Members of the committee

Core members

Senator Chris Back, LP, WA (Chair) (from 1 July 2014)
Senator Alex Gallacher, ALP, SA (Deputy Chair) (from 1 July 2014)
Senator Alan Eggleston, LP, WA (Chair) (until 30 June 2014)
Senator the Hon Ursula Stephens (Deputy Chair), ALP, NSW (until 30 June 2014)
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Senator David Fawcett, LP, SA
Senator Scott Ludlam, AG, WA (from 7 July 2014)
Senator Anne McEwen, ALP, SA
Senator James McGrath, LNP, QLD (from 1 July 2014)
Senator Peter Whish-Wilson, AG, TAS (until 7 July 2014)

Participating members who contributed to the inquiry

Senator Whish-Wilson, AG, TAS (from 7 July 2014)

Substitute Member

Senator Whish-Wilson replaced Senator Ludlam for the committee's public hearing on 6 August 2014.

Secretariat

Mr David Sullivan, Committee Secretary
Mr Owen Griffiths, Principal Research Officer
Ms Shennia Spillane, Senior Research Officer
Ms Penny Bear, Research Officer
Mr Joshua Wrest, Administrative Officer

Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: + 61 2 6277 3535
Fax: + 61 2 6277 5818
Email: fadt.sen@aph.gov.au
Internet:http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/index.htm

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Chapter 1

Introduction

Referral and consideration of the bill

1.1 On 6 March 2014, the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 16 June 2014.[1] The inquiry was subsequently granted an extension by the Senate until 27 August 2014. The reasons for referral cited by the Selection of Bills Committee were:

> Investor State Dispute Settlement [ISDS] clauses are extremely complex parts of trade agreements. There is community concern about what the clauses in the recently signed free trade deal with Korea means for environmental and health regulation. The Trans Pacific Partnership Agreement which Australia is negotiating currently also may include ISDS cases.
>
> Australia is still fighting a high profile ISDS case against Phillip Morris regarding plain packaging for cigarettes.[2]

1.2 The bill was introduced as a private senators' bill by Senator Whish-Wilson on 5 March 2014.[3] The Explanatory Memorandum for the bill states that:

> The purpose of this Bill is to prevent the Commonwealth from entering into an agreement with one or one more foreign countries that includes investor-state dispute settlement provisions.[4]

1.3 In his second reading speech, Senator Whish-Wilson argued that:

> Foreign investment is an important part of trade and in fact it has become a more central part of trade agreements than the traditional exchange of goods and services. The conflict between corporations and policy sovereignty is a very complex and sensitive area. Foreign investment is important for Australia and many other countries. Sovereign risk is an important consideration for companies who want to invest in foreign countries; risk is a part of doing business. The purpose of ISDS clauses is to push more of that risk onto governments and away from corporations.[5]

Conduct of inquiry

1.4 The committee advertised the inquiry on its website and in the *Australian* newspaper. The committee also wrote to individuals and organisations likely to have

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1 *Journals of the Senate*, 6 March 2014, p. 576.

2 Selection of Bills Committee, *Report No. 2 of 2014*, 6 March 2014, Appendix 13.

3 *Journals of the Senate*, 6 March 2014, p. 561.

4 *Explanatory Memorandum*, p. 2.

5 Second reading speech, *Senate Hansard*, 5 March 2014, p. 902.

an interest in the bill, drawing their attention to the inquiry and inviting them to make written submissions.

1.5 The committee received 141 submissions to the inquiry. These submissions are listed at Appendix 1, and are available on the committee's website. The committee held a public hearing on 6 August 2014. Witnesses who appeared at the public hearing are listed at Appendix 2.

1.6 The committee also received over 11,000 emails from individuals using an online tool by which people could express their opposition to ISDS clauses in trade agreements to the committee. Due to the large number of emails received, it was not possible for the committee to accept them as submissions and publish them on the committee's website. The committee, however, agreed to accept the emails as correspondence, and acknowledge them on the committee's website.

Acknowledgements

1.7 The committee thanks all those who assisted with the inquiry.

Chapter 2

Issues

2.1 The Department of Foreign Affairs and Trade (DFAT) provides the following definition of ISDS provisions on its website:

> ISDS provisions grant foreign investors the right to access an international tribunal if they believe actions taken by a host government are in breach of commitments made in a Free Trade Agreement (FTA) or an investment treaty, thus providing additional protections for investors.[1]

2.2 Australia has negotiated ISDS provisions in free trade agreements signed over the past three decades. Currently, Australia has ISDS provisions in four free trade agreements: Australia-Chile Free Trade Agreement, Singapore-Australia Free Trade Agreement, Thailand-Australia Free Trade Agreement, ASEAN-Australia-New Zealand Free Trade Agreement. The Korea-Australia Free Trade Agreement, which has been signed but has not yet entered into force, also includes ISDS provisions.[2]

2.3 Australia currently has ISDS provisions in 21 bilateral investment treaties with Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.[3]

Australia US-Free Trade Agreement

2.4 The Senate Foreign Affairs, Defence and Trade References Committee conducted an inquiry into the Australia-United States (US) Free Trade Agreement in 2003. At the time, the committee noted that the inclusion of ISDS provisions in agreements with developing countries was a new development. These provisions had primarily been included in agreements to protect Australian investments and property from expropriation by governments in those countries where the rule of law was weak.[4]

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1 Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', https://www.dfat.gov.au/fta/isds-faq.html.

2 Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', https://www.dfat.gov.au/fta/isds-faq.html.

3 Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', https://www.dfat.gov.au/fta/isds-faq.html.

4 Foreign Affairs Defence and Trade References Committee, *Voting on Trade: The General Agreement on Trade in Services and an Australia –US Free Trade Agreement*, November 2003, p.134, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2002-04/gats/report/index

2.5 The committee recommended that 'no investor-state provisions be included in the Australia-US Free Trade Agreement'. In the government response to the committee's report, DFAT stated that:

> The Investment Chapter of the AUSFTA does not establish an Investor State Dispute Settlement mechanism. This is in recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems.[5]

Government policy

2.6 In April 2011, the Gillard government announced that it would no longer include ISDS provisions in free trade agreements. The new trade policy was announced in response to recommendations of the 2010 review of Bilateral and Regional Trade Agreements by the Productivity Commission.[6] The Gillard Government Free Trade Policy Statement stated that the government would not:

> …support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.
>
> In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.[7]

2.7 The Coalition government's position on current free trade agreement negotiations is that the inclusion of ISDS provisions will be considered on a case-by-case basis.[8]

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5 Department of Foreign Affairs and Trade, *Government response to the report of the Senate Foreign Affairs, Defence and Trade References–Voting on trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, p. [12], http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2002-04/gats/index

6 Productivity Commission, Bilateral and Regional Trade Agreements, November 2010, http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf

7 Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, April 2011, p.14, http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx.

8 Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', https://www.dfat.gov.au/fta/isds-faq.html.

Tobacco plain packaging—investor-state arbitration

2.8 To date, Australia has had one investor-state dispute claim brought against it. The *Tobacco Plain Packaging Act 2011* forms part of a comprehensive range of tobacco control measures designed to reduce the rate of smoking in Australia. Phillip Morris Asia is challenging the tobacco plain packaging legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (Hong Kong Agreement). The Attorney-General's Department summarised Phillip Morris Asia's arguments:

> Philip Morris Asia is arguing that Australia's tobacco plain packaging measure constitutes an expropriation of its Australian investments in breach of Article 6 of the Hong Kong Agreement. Philip Morris Asia further argues that Australia's tobacco plain packaging measure is in breach of its commitment under Article 2(2) of the Hong Kong Agreement to accord fair and equitable treatment to Philip Morris Asia's investments. Philip Morris Asia further asserts that tobacco plain packaging constitutes an unreasonable and discriminatory measure and that Philip Morris Asia's investments have been deprived of full protection and security in breach of Article 2(2) of the Hong Kong Agreement. Australia rejects these claims.[9]

2.9 The case has been brought before the World Trade Organisation's (WTO) dispute settlement system.[10]

Arguments in support the bill

2.10 The majority of submissions received by the committee supported the intention of the bill, based on concerns about the risks associated with the inclusion of ISDS provisions in trade agreements. These were captured in evidence from Dr Tienhaara at the inquiry's public hearing:

> In recent years the Australian public has become increasingly aware of the shortcomings of ISDS and the risk that it poses to public policy, particularly since the launch of the case against plain packaging by Philip Morris….[A]ccording to UNCTAD, by the end of 2013, 98 states had been respondents in a total of 568 known treaty based cases. Argentina has faced 53 ISDS cases, Canada 22 and the United States 15. The vast majority of ISDS cases—about 75 per cent—are brought by American and European investors.

2.11 Other submitters raised concerns over the significant growth in the number of ISDS cases being brought internationally in recent years. The Australian Fair Trade and Investment Network (AFTINET), a network of 60 community organisations, noted that the number of known ISDS cases lodged each year has increased from less

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9 Attorney-General's Department, 'Tobacco plain packaging—investor-state arbitration', http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx

10 Attorney-General's Department, 'Tobacco plain packaging—investor-state arbitration', http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx

than five in 1993 to 57 in 2013.[11] Dr Patricia Ranald outlined the concerns of AFTINET:

> ISDS basically gives additional special rights to foreign investors to sue governments for damages in an international tribunal on the basis of a claim that domestic legislation or policy has harmed their investment. It has developed from a system that originally was about compensating for the actual expropriation of property—real property. But over the years, particularly the last 20 years, it has developed into a system based on principles of indirect expropriation that simply do not exist in most legal systems and that are not available to domestic investors. In that sense it is not about free trade; it is about giving special preferential treatment to foreign investors compared with domestic investors.[12]

2.12 The implications of the Phillip Morris plain packaging case against Australia and similar cases that have been brought against other countries were also an area of concern. Dr Rimmer explained that:

> A really important theme in Australia, Canada, the United States and the European Union has been the way in which corporations have tried to deploy investor clauses to challenge decisions of superior courts.
>
> …
>
> That is a really critical issue. Think about the battle over plain packaging of tobacco products in Australia, where you had the High Court of Australia very decisively—six to one—ruling in favour of the Commonwealth government against the big tobacco companies and then Philip Morris trying to attack plain packaging through an investment clause.[13]

2.13 According to Dr Rimmer, the other important theme is the impact of ISDS upon the role of governments. He explained that:

> There has been a lot of concern about the chilling impact of investor-state dispute settlement upon public regulation and government activity, and it has been particularly prominent with the rise and rise of disputes in relation to investor-state dispute settlement.[14]

2.14 Submissions supporting the bill expressed concerns about a wide range of policy areas which could potentially be subject to ISDS claims, or threats of ISDS claims, which may impact on the government's ability to regulate. For example:

- the New South Wales Teachers Federation expressed concern that government may face ISDS claims from private education providers which may impact on the provision of public education in the future;[15]

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11 Australian Fair Trade and Investment Network (AFTINET), *Submission 105*, p. 7.

12 Dr Patricia Ranald, Australian Fair Trade and Investment Network (AFTINET), *Committee Hansard*, 6 August 2014, p. 29.

13 Dr Matthew Rimmer, *Committee Hansard*, 6 August 2014, p. 7.

14 Dr Matthew Rimmer, *Committee Hansard*, 6 August 2014, p. 7.

15 New South Wales Teachers Federation, *Submission 42*, pp. 2–4.

- a number of submitters were concerned that the Pharmaceutical Benefits Scheme may be under threat which could limit access to affordable medicines,[16] in particular the potential impacts on the health of Aboriginal and Torres Strait Islander people;[17]
- concerns were also raised about ability of future governments to regulate to protect the environment in areas such as mining permits, promoting renewable energy and restricting coal seam gas (CSG) exploration and extraction;[18] and
- in light of the cigarette plain packaging case, submitters were also concerned about the impact on other public health policies.[19]

2.15 Evidence received from Mrs Tracey Tipping expressed the types of concerns raised by individuals and organisations. Mrs Tipping told the committee that after undertaking her own research she was so concerned about the effects of ISDS provisions that she initiated a community petition to ban the provisions in all future trade agreements, which received over 9000 signatures. Mrs Tipping runs an online business specialising in organic and eco-friendly products. Her areas of concern included the possible impact of ISDS provisions on the Tasmanian government's moratorium on genetically modified organisms (GMOs), and the effect on food labelling legislation.[20]

> I think it is really important for Tasmania in terms of its overall brand as a clean, green state. I personally think the jury is still out on genetically engineered organisms and that there is nothing wrong with states wanting to have a moratorium or ban in place. I think they should have that opportunity. If they had then put in a moratorium after the ISDS provisions, they would have most likely faced a lawsuit. I think, particularly, for a small state like Tasmania, with a $250 million lawsuit, you would abandon your policy straightaway. I can see it is a pretty tough economy over there. I can't see them persevering with a policy that they feel has merit but could involve a major lawsuit.[21]

16 See for example: Professor Thomas Faunce, Australian National University, *Submission 49*, pp. 22–27; New South Wales Nurses and Midwives' Association, *Submission 67*, p. 2; Médicins Sans Frontières, *Submission 89*, pp. 3–5.

17 Mr Terry Mason, Indigenous Policy Committee, National Tertiary Education Union, *Submission 103*, p. 1.

18 See for example: 350.org, Submission 75, pp. [3–5]; Safe Climate Brisbane, *Submission 96*, p. [2].

19 See for example: New South Wales Nurses and Midwives' Association, *Submission 67*, p. 3; Australian Medical Students' Association, Submission 80, p. 2; Public Health Association of Australia (PHAA), *Submission 91*, pp. 4–5

20 Mrs Tracey Tipping, Eternal Source PTY LTD, *Committee Hansard*, 6 August 2014, pp.1–2; GM Free Australia Alliance Inc also raised concerns regarding GMOs, *Submission 29*, p. [2].

21 Mrs Tracey Tipping, Eternal Source PTY LTD, *Committee Hansard*, 6 August 2014, p. 2.

Other issues raised in evidence

2.16 A number of submitters raised a set of broader issues regarding the inclusion of ISDS provisions in trade agreements which the committee considers important to note. These focus on regulatory chill, the effectiveness of safeguards, ISDS and developing countries, transparency, parliamentary scrutiny, and international reviews of ISDS. These are discussed below.

Regulatory Chill

2.17 AFTINET argued that the increase in the number and type of ISDS claims brought against governments has led to an effect known as 'regulatory chill'.

> This is a situation in which governments are made aware of the threat and costs of both protracted litigation and damages, and are discouraged from legitimate regulation because of these threats.[22]

2.18 Dr Tienhaara explained in her submission that:

> The concept of regulatory chill reflects the fact that policy makers will be wary of introducing measures that could be challenged in arbitration because of the immense costs associated with the arbitration system and the uncertainty surrounding how investment provisions will be interpreted in any given case. Occurrences of regulatory chill are incredibly difficult to prove (effectively one has to find evidence of something that hasn't happened). Nevertheless, several scholars have put forward case studies that suggest that investor threats of arbitration had an impact on the development of specific policies.[23]

2.19 Professor Weatherall informed the committee that there were number of examples in the area of intellectual property where 'specific obligations that have been negotiated in these free trade agreements have been cited as reasons not to do law reforms that might otherwise be desirable'.[24]

2.20 In their submission, Dr Sam Luttrell and Dr Romesh Weeramantry noted that:

> Empirical evidence for the phenomenon is, however, still lacking. But that does not mean it should be dismissed, only that more work needs to be done before regulatory chill can be considered a reliable policy premise.[25]

2.21 Professor Nottage agreed that further empirical testing was necessary. He also argued that Australia, and other developed countries, are already subjected to regulatory chill because:

> …our courts are full of cases where concerned citizens and corporations are challenging government action or inaction through our court system. We are also subject to regulatory chill from interstate dispute settlement

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22 Australian Fair Trade and Investment Network (AFTINET), *Submission 105*, p. 4.

23 Dr Kyla Tienhaara, RegNet/College of Asia and the Pacific, Australian National University, *Submission 86*, p. 20.

24 Associate Professor Kimberlee Weatherill, *Committee Hansard*, 6 August 2014, p. 28.

25 Dr Sam Luttrell and Dr Romesh Weeramantry, *Submission 106*, p. 6.

> processes, including the WTO claims, including in relation to investment in services sectors under the General Agreement on Trade in Services—GATS. So, especially in developed countries, the extra regulatory chill could well be overstated. But, again, it is a matter that needs to be tested.[26]

Safeguards

2.22 Professor Weatherall noted in her submission that recent trade agreements have included safeguards designed to 'confine investor claims and in particular to ensure that legitimate regulation in the public interest does not give rise to a claim for compensation'.[27]

2.23 In her submission, Professor Emerita Dorothy Broom AM argued that:

> Promised 'carve outs' are a start, but they cannot possibly protect Australians from the harm that can arise from ISDS since they cannot anticipate the diverse grounds on which an investor might complain in the future.[28]

2.24 The National Tertiary Education Union argued that if future Australian governments enter into agreement including ISDS provisions:

> …it is fundamental that precise and detailed language circumscribing the meaning of key phrases such as 'expropriation', 'investor' and 'investment' is included to prevent cases that penalise governments for introducing legislation with public welfare objectives.[29]

2.25 Professor Weatherall pointed out that while there are ways to limit investor-state dispute claims, 'the question really is whether those ways are being inserted into the Australian negotiated agreements'.[30]

2.26 Professor Weatherall gave evidence to the committee comparing the Canada-Korea Free Trade Agreement to the Korea-Australia Free Trade Agreement, both of these agreements were concluded in 2014. Professor Weatherall noted that carve-outs and safeguards are significantly stronger in the Canada-Korea agreement. She advised the committee that:

> …the definition of expropriation is narrower [in the Canada-Korea agreement], particularly where you are talking about expropriation that occurs through indirect regulatory means. The intellectual property carve-out is better in the Korea-Canada agreement, because it refers to the TRIPS standards, which are more flexible than the specific IP chapter standards. The general regulatory exclusion in the expropriation annex is also wider, or better for allowing some regulatory freedom for the state in the Korea-

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26 Professor Luke Nottage, *Committee Hansard*, 6 August 2014, p. 28.

27 Associate Professor Kimberlee Weatherall, Sydney Law School, University of Sydney, *Submission 88*, p. 6.

28 Professor Emerita Dorothy Broom AM, *Submission 35*, p. [3].

29 National Tertiary Education Union, *Submission 129*, pp. 9–10.

30 Associate Professor Kimberlee Weatherall, *Committee Hansard*, 6 August 2014, p. 23.

> Canada agreement…I do think that the Canada agreement is a salutary comparison with the Australian one. I think it suggests that the safeguards are not the latest safeguards or the strongest safeguards that are available in international law.[31]

2.27 Professor Weatherall noted that while the safeguards that have been included in KAFTA for example, are an improvement on the language in older agreements. However, as they are drafted, they may not prevent claims being brought, although they may reduce the likelihood of success.[32]

2.28 Professor Nottage put the case for Australia to look into developing its own model international investment treaty, as is the practice of many of our trading partners, in both developed and developing countries.[33] He argued that:

> … there would be a lot of benefit in more structured public discussion led by the government about not only investor-state dispute settlement but also the broader international investment treaty regime, including the substantive rights…[34]

2.29 Professor Weatherall also raised concerns that the particular wording in the KAFTA agreement may have the undesirable effect of making the intellectual property chapter a direct subject of arbitration.[35]

2.30 In response to these concerns, Mr Braddock, DFAT stated:

> At least in terms of Australia's experience with investment agreements and ISDS, that is not the case. ISDS applies only to investment obligations; it does not apply to obligations in other chapters.[36]

Developing Countries

2.31 Some submitters expressed concern about the potential negative effect of ISDS provisions in trade agreements with developing countries. In support of the bill, AID/WATCH argued that:

> ISDS provisions have no place in Australian trade agreements not only for the important reason of protecting Australia's law and policy, but also because ISDS disproportionately disadvantages developing countries who don't have equal resources to defend cases and provisions.[37]

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31 Associate Professor Kimberlee Weatherall, *Committee Hansard*, 6 August 2014, p. 24.

32 Associate Professor Kimberlee Weatherall, Sydney Law School, University of Sydney, *Submission 88*, p. 7.

33 Professor Luke Nottage, Sydney Law School, University of Sydney, *Submission 21*, p. 5.

34 Professor Luke Nottage, *Committee Hansard*, 6 August 2014, p. 27.

35 Associate Professor Kimberlee Weatherall, Sydney Law School, University of Sydney, *Submission 88*, p. 7.

36 Mr Richard Braddock, Department of Foreign Affairs and Trade, *Committee Hansard*, 6 August 2014, p. 45.

37 AID/WATCH, *Submission 107*, p. 1; see also Dr Kyla Tienhaara, RegNet/College of Asia and the Pacific, Australian National University, *Submission 86*, p. 27.

2.32 Dr Tienhaara argued that regulatory chill is more likely to occur in developing countries due to the significant costs of arbitration.[38]

2.33 Professor Nottage noted that:

> The treaty-based ISDS system is particularly important when dealing with developing countries, where local courts and substantive rights may not meet widely-accepted global standards, although ISDS is also now found in some treaties among developed countries.[39]

Transparency

2.34 While Dr Hazel Moir supported the bill, she reasoned that if ISDS provisions are to be included in trade agreements, then minimum requirements should be set for arbitrations mechanisms. Dr Moir recommended that:

- all proceedings are public;
- judges are independent; and
- there should be a further appeal mechanism.[40]

2.35 Dr Tienhaara noted that there had been some advances in the transparency of arbitration proceedings in recent years. For example, the members of the United Nations Commission on International Law (UNCITRAL) developed a special set of rules regarding transparency that will apply to all agreements using UNCITRAL Rules that are signed after 1 April 2014. Dr Tienhaara explained that this will have limited impact however, as:

> …as most treaties allow investors to choose between different sets of rules, adoption of the new UNCITRAL transparency standards cannot be guaranteed and it remains the case that under the ICSID Rules hearings are not opened to the public unless both parties agree. Investors have opted for closed hearings in several recent cases concerning public policy. To avoid this problem, strong provisions on transparency must also be included in the text of IIAs [International Investment Agreements], but this requires that all negotiating parties agree that transparency is important.[41]

2.36 Professor Nottage commented on the concern in Australia and other developed countries to enhance the transparency of proceedings. His view was that:

> I predict that the EU and the US will retain ISDS in some form but certainly with enhanced transparency, which they have already started to introduce in some of their treaties, which will take them perhaps to the next level. I think

38 Dr Kyla Tienhaara, RegNet/College of Asia and the Pacific, Australian National University, *Submission 86*, p. 27.

39 Professor Luke Nottage, Sydney Law School, University of Sydney, *Submission 21*, p. 2.

40 Dr Hazel Moir, Adjunct Associate Professor, Research School of Social Sciences, Australian National University, *Submission 56*, p. 2.

41 Dr Kyla Tienhaara, RegNet/College of Asia and the Pacific, Australian National University, *Submission 86*, p. 7.

> that is the sort of thing Australia should be engaging in and doing as well, rather than just getting rid of ISDS completely, as proposed in this bill.[42]

Parliamentary scrutiny

2.37 Many submitters expressed concerns about the lack of transparency in trade negotiations in general, as well as in relation to ISDS provisions. Of particular concern was the secrecy surrounding the Trans-Pacific Partnership (TPP) agreement which is currently being negotiated.[43]

2.38 The National Tertiary Education Union argued that if the government does intend to continue its policy of including ISDS provisions on a case-by-case basis it has 'in the least an obligation to publicly specify the contexts and each rationale in which ISDS will be negotiated on behalf of the Australian people'.[44]

2.39 The Australia Institute submission raised concerns about the transparency of trade negotiations and, in its view the limited capacity for parliamentary oversight and scrutiny. The Australia Institute noted that the Joint Standing Committee on Treaties only get the opportunity to review trade agreements after the text has already been agreed upon by negotiating parties and cabinet. The Australia Institute is also concerned that the time allocated for parliamentary scrutiny by the Joint Standing Committee on Treaties (JSCOT) is inadequate given the scale and complexity of trade agreements.[45]

2.40 The Law Council of Australia suggested that a system, which would:

> …provide opportunities for stakeholders to provide an input into preferential trade agreements before they actually go before parliament or before cabinet so that there is an input and that they actually review them and ask: is this actually in the national interest? Is there a benefit?
>
> …
>
> I think there needs to be some more formal input by stakeholders. I know that the Department of Foreign Affairs and Trade does have consultations with stakeholders. I suggest that is probably largely ad hoc. But it will be useful for parliament to actually have industry groups reviewing particular agreements and asking: is this or is this not in the national interest?[46]

2.41 Dr Ranald, AFTINET agreed that greater scrutiny of agreements before they go to parliament would be beneficial:

> Certainly we would prefer to have a situation, as occurs in the WTO, actually, where draft texts are made available for public discussion. In our opinion that would ensure a better result at the end, because it allows a full

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42 Professor Luke Nottage, *Committee Hansard*, 6 August 2014, p. 28.

43 See for example; Lock the Gate Alliance, *Submission 133*, p. 4.

44 National Tertiary Education Union, *Submission 129*, p. 9.

45 The Australia Institute, *Submission 79*, p. 5.

46 Mr Andrew Percival, Law Council of Australia, *Committee Hansard*, 6 August 2014, p. 34.

> range of opinions, ranging from that of the chamber of commerce to AFTINET's, to have an impact on the negotiations before decisions are made.[47]

International reviews

2.42 A number of submitters drew the committee's attention to the public consultation process which has been instituted by the European Commission to provide an opportunity for public examination and debate following widespread protests against ISDS in Europe in the context of the Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations.[48]

2.43 Submitters also noted that other countries, including France, Germany, South Africa, Argentina and Brazil have been reassessing ISDS provisions.[49]

2.44 Professor Nottage argued that rather than introducing a blanket probation on the inclusion of ISDS provisions:

> It is more responsible therefore for Australia to keep engaging with the system by negotiating specific improvements in future treaties. This is also the approach taken recently by the European Commission and US government, which have been reassessing ISDS as well.[50]

Arguments against the bill

2.45 A number of submitters provided compelling arguments as to why the bill should not be supported. Professor Nottage told the committee that although he thought the bill was well-intentioned, in the sense that the ISDS treaty-based system is far from perfect, he could not support the bill because:

> [it] would make Australia unique among developed countries and put us in the company of a very few countries, even among developing countries, mainly a few very Leftists regimes in South America. I think it would torpedo future trade and investment treaty negotiations to which the major parties in Australia have long been committed, as well as potentially inhibit the development of multilateral initiatives and international investment law.[51]

2.46 In its submission, DFAT argued that the bill may prevent the Government from concluding negotiations to benefit Australian producers, consumers, investors and the broader community. Furthermore, excluding ISDS provisions from future trade agreements would impose a significant limitation on the ability of the

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47 Dr Patricia Ranald, AFTINET, *Committee Hansard*, 6 August 2014, p. 32.

48 See for example: IndutriALL Global Union, *Submission 20*, p. 2; Centre for Health Equity Training, Research and Evaluation (CHETRE), *Submission 66*, p. 4. Australian Council of Trade Unions, *Submission 81*, p. 10.

49 See for example: IndutriALL Global Union, *Submission 20*, p. 2; Australian Council of Trade Unions, *Submission 81*, pp. 9–10.

50 Professor Luke Nottage, Sydney Law School, University of Sydney, *Submission 21*, p. 3.

51 Professor Luke Nottage, *Committee Hansard*, 6 August 2014, p. 20.

Government to pursue its broader trade and investment objectives. DFAT noted that the bill is inconsistent with the Government's policy to consider the inclusion of ISDS provisions in trade agreements on a case-by-case basis.[52]

Australian Investors

2.47 Dr Sam Luttrell and Dr Romesh Weeramantry argued in their submission that even though Australia has low sovereign risk and reliable courts, it should not reject the inclusion of ISDS clauses. They note that:

> ISDS provisions are typically intended to protect investors doing business in countries with high sovereign risk. Where a treaty is signed between two countries that both have similar and low sovereign risk, the negotiators may not consider it necessary to include an ISDS clause. This is why, for example, the United States-Australia Free Trade Agreement does not include an ISDS clause. But this parity of sovereign risk is relatively rare. The far more common scenario is one in which there is a significant disparity in the sovereign risk of the states that are negotiating the treaty. In this situation, the low sovereign risk state will have a strong interest in obtaining ISDS protection for its nationals when they invest in the high sovereign risk state. To secure that essential protection for its investors, it will almost always be necessary for the low sovereign risk state to agree to a reciprocal ISDS clause, i.e. an ISDS clause that allows both contracting states to be sued, not just the high sovereign risk state.[53]

2.48 Mr De Cure, First Assistant Secretary, DFAT, advised the committee that major Australian companies and businesses, with significant investments overseas support the inclusion of ISDS provisions such as, the Business Council of Australia, the Chamber of Commerce and Industry, BHP, Rio Tinto.[54]

2.49 The Australian Chamber of Commerce and Industry expressed concern that although Australian investors have not utilised ISDS provisions to any great extent in the past, if a ban on ISDS provisions was implemented it would prevent Australian firms from being able to protect their international interests by using such provisions.[55] The Australian Dental Industry Association noted similar concerns in the dental industry.[56]

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52 Department of Foreign Affairs and Trade, *Submission 135*, p. 1.

53 Dr Sam Luttrell and Dr Romesh Weeramantry, *Submission 106*, pp. 2–3.

54 Mr Chris De Cure, Department of Foreign Affairs and Trade, *Committee Hansard*, 6 August 2014, p. 45.

55 Australian Chamber of Commerce and Industry, *Submission 105*, p. 5.

56 Australian Dental Industry Association , *Submission 122*, p. 3.

Wording of the bill

2.50 DFAT maintained that the bill fails to recognise that safeguards can be incorporated in ISDS provisions to protect the public interest.[57] Mr De Cure explained:

> In particular, more recent agreements…contain considerably more explicit safeguards than were contained in some of the earlier agreements. These safeguards have been developed in response to concerns about challenges to legitimate public welfare regulation. ISDS does not prevent governments from changing their policies or regulating in the public interest and we do not believe that it freezes existing policy settings. ISDS does not entitle investors to compensation just because they object to a government policy or because it affects their profits.[58]

2.51 DFAT also noted that the bill would prevent the government from seeking to update agreements containing ISDS in the future. In its submission, the department explained that:

> DFAT considers that the Bill may have unintended consequences which would not serve the interests it is purportedly seeking to address. In particular, the Bill would prevent the Government from seeking to update agreements containing ISDS should it wish to do so in the future, for example to include more explicit safeguards for public welfare regulation.[59]

2.52 Professor Nottage noted that there are other alternatives to manage the risks associated with ISDS more effectively, which do not require legislation such as seeking to improve the drafting of old treaties. [60] In particular, redrafting treaties such as the one with Hong Kong which was concluded in the early 1990s, which is the treaty that has led to the first ISDS claim being brought against the Australian government by Phillip Morris.[61]

2.53 DFAT argued further, the wording of the bill would exclude Australia from entering a plurilateral agreement which includes ISDS, regardless of whether Australia agrees to be bound by that particular provision.[62] Mr De Cure, First Assistant Secretary, DFAT told the committee the Trans-Pacific Partnership Agreement would be an example of an instance in which the bill might preclude the Australian government from participating in negotiations.[63]

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57 Department of Foreign Affairs and Trade, *Submission 135*, p. 2.

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

59 Department of Foreign Affairs and Trade, *Submission 135*, p. 2.

60 Professor Luke Nottage, Sydney Law School, University of Sydney, *Submission 21*, p. 5.

61 Professor Luke Nottage, *Committee Hansard*, 6 August 2014, p. 20.

62 Department of Foreign Affairs and Trade, *Submission 135*, p. 2.

63 Mr Chris De Cure, Department of Foreign Affairs and Trade, *Committee Hansard*, 6 August 2014, p. 49.

2.54 Mr Percival from the Law Council of Australia agreed with this assessment:

> So if there was an agreement such as a bilateral investment treaty which included an ISD provision and there was a proposed amendment to it, [the bill] would prohibit that amendment. Whether that is a good or bad thing would depend, in my view, and should be assessed on its merits, not as a blanket prohibition. It would depend on what the amendment was—it may have actually nothing to do with the ISD provision at all.[64]

2.55 Professor Nottage observed that the bill appears to be aimed at reinstating the April 2011 'Gillard Government Trade Policy Statement'. He argued that the bill and the 2011 Gillard Government trade policy:

> …may be well-intentioned, but it is **premature and misguided. Treaty-based ISDS is not a perfect system, but it can be improved in other ways** [emphasis in original] – mainly by carefully negotiating and drafting bilateral investment treaties (BITs) and free trade agreements (FTAs) This may also have the long-term benefit of generating a well-balanced new investment treaty at the multilateral level, which is presently missing and unlikely otherwise to eventuate.[65]

2.56 The Law Council of Australia argued that there is no case for a blanket prohibition, such as that proposed by the bill. The Law Council argues that consideration of the inclusion of an ISDS provision in an agreement should be examined on a case-by-case basis. In its submission, the Law Council of Australia noted that:

> …exceptions to ISDS provisions can be provided similar to the exceptions in Article XX of the General Agreement on Tariffs and Trade 1947 (such as, exceptions for the protection of human and animal health and welfare, the environment, public morals.) For example, investment treaties concluded by Australia, such as the Free Trade Agreement with Chile and the Free Trade Agreement with Korea, include provisions providing various safeguards to protect various public interests, including transparency of proceedings, while retaining ISDS provisions.[66]

Committee View

2.57 The committee understands the intention of the bill and notes that it has generated much public discussion regarding the inclusion of ISDS provisions in existing and new trade agreements. The committee also acknowledges the arguments put by those who made submissions to the inquiry and is encouraged by the interest shown by organisations and individuals working in this area.

2.58 The committee draws to DFAT's attention the submissions received during the inquiry. The committee sees benefit in the government giving further

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64 Mr Andrew Percival, Law Council of Australia, *Committee Hansard*, 6 August 2014, p. 35.

65 Professor Luke Nottage, Sydney Law School, University of Sydney, *Submission 21*, pp.1–2.

66 Law Council of Australia, *Submission 90*, pp. 1–2.

consideration to the issues raised in the submissions regarding the inclusion of ISDS provisions in free trade negotiations and the potential effects on Australian business.

2.59 On balance the committee is not convinced that legislation is the best mechanism by which to address the concerns raised about risks associated with ISDS provisions. The committee agrees with Professor Nottage and others 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.[67]

2.60 The committee is of the view that many of the alleged risks to Australian sovereignty and law making arising from the ISDS system are overstated and are not supported by the history of Australia's involvement in negotiating trade agreements. While the committee acknowledges that past experience may not be an accurate guide to the future in terms of potential ISDS claims against Australia, it stresses that the investment treaty arbitration field is evolving in positive ways to enable countries, including Australia, to put exclusions in place, limit the application of ISDS to the investment sections of agreements, and generally tighten up the wording of agreements. The committee is of the view that it is far more important for Australia to manage any risks associated with ISDS provisions than to reverse its longstanding treaty practice and opt out of the ISDS system altogether.

2.61 The committee accepts the view that the ISDS system has improved significantly over recent years both in the way treaties are drafted in relation to ISDS clauses and in the way that cases are argued and how arbitrators decide cases. Australia therefore stands to gain more by remaining actively engaged with the international investment law system, including where ISDS provisions apply. The committee is concerned that were Australia to legislate for a blanket ban on ISDS provisions in trade agreements, it would be sending a message to existing and potentially new trading partners that Australia was turning inward-looking and distancing itself from the international law system.

2.62 The committee is of the view that a blanket ban on ISDS would impose a significant constraint on the ability of Australian governments to negotiate trade agreements that benefit Australian business. It is for this reason that the committee considers the current case-by-case approach to ISDS is in Australia's long-tern national interest and a sound policy for weighing the risks and benefits of ISDS provisions in trade agreements.

Recommendation

The committee recommends that the bill not be passed.

Senator Chris Back
Chair

67 Professor Luke Nottage, Sydney Law School, University of Sydney, *Submission 21*, p. 5.

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]

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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-rgen-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

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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

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

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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]

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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

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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:

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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.

Appendix 1

Public submissions

1	Ms Robyn Wood
2	Mr Charles Mollison, The Foundation for National Renewal
2A	Mr Charles Mollison, The Foundation for National Renewal
3	Professor David Legge MD
4	Mr George Carrard
5	Professor Sharon Beder
6	Dr John R. Coulter
7	Mr Peter Sainsbury
8	Name Withheld
9	Ms Aniko Papp
10	Mr Michael Scott
11	Dr Rosalie Schultz
12	Ms Jane Taylor
13	Dr Bill Genat
14	Ms Joy Ringrose
15	Quaker Peace and Legislation Committee
16	Ms Darani Lewers
17	Mr Tor Larsen
18	Ms Donella Peters
19	Ms Rosie Wagstaff
20	IndustriALL Global Union
21	Professor Luke Nottage, Sydney Law School, University of Sydney

22 Mr James Turnbull

23 Name Withheld

24 Ms Maria Niermann and Ms Elizabeth Hulm

25 Ms Alice Beauchamp

26 Dr Geoff Edwards PhD

27 Communist Party of Australia

28 Mr Alex McKechnie

29 GM Free Australia Alliance Inc

30 Ms Leanne Hermosilla

31 Mr Roger Jowett

32 Mr Luke Hocking

33 Mr Charles John

34 Ms Carolyn Allen

35 Professor Emerita Dorothy Broom AM

36 Mr Raymond Dowling

37 Mr Matthew Jokovich

38 Ms Patricia Ninnes

39 Ms Ljiljana Pejkic

40 Mr Ashwin Thomas

41 Mrs Maia South

42 NSW Teachers Federation

43 Australian Food Sovereignty Alliance

44 Mrs Jenny Stevens

45 Ms Susan Pitt

46 Mr David Ninnes

47 Mr Nathaniel Roach

48 Mr Stewart Mills

49 Prof. Thomas Faunce, Australian National University

50 Civil Liberties Australia

51 Kendall Lovett and Mannie De Saxe

52 Dr Romaine Rutnam

53 Ms Kerrie Clarke

54 Ms Kate Sullivan

55 Mr Jann Dark

56 Dr Hazel Moir, Research School of Social Sciences, Australian National University

57 Ms Tracey Anton

58 Mr Phil Jones

59 Mr Rob Lidster

60 Mr John August

61 Ms Dinali Devasagayam

62 Mr Nicholas Higgins

63 Ms Kate Collier

64 Mr Christopher Royal

65 Mr Stephen Kilburn

66 Centre for Health Equity Training, Research and Evaluation (CHETRE)

67 New South Wales Nurses and Midwives' Association

68 Ms Jayne Alexander

69 Mr Michael Johnstone

70 Mr Andrew Lenart

71 Ms Josie Evans

72 Conference of Leaders of Religious Institutions NSW

73 Ms Helen Lawrence

74 Ms Audrey Naismith

75 350.org Australia

76 Sutherland Shire Environment Centre

77 Combined Pensioners & Superannuants Association of NSW Inc

78 Mr Haydon Dennison

79 The Australia Institute

80 Australian Medical Students' Association

81 Australian Council of Trade Unions

82 Australian Manufacturing Workers' Union

83 Ms Patricia McAuliffe

84 Ms Tracey Tipping, Eternal Source Pty Ltd

85 Mr Peter Murphy

86 Dr Kyla Tienhaara, RegNet/College of Asia and the Pacific, Australian National University

87 The Retired Teachers Association of New South Wales

88 Associate Professor Kimberlee Weatherall, Sydney Law School, University of Sydney

89 Médecins Sans Frontières

90 Law Council of Australia

91 Public Health Association of Australia’s (PHAA)

92 Ms Holly Willson

93 Friends of the Earth Adelaide)

94 Mr Barry Fitzpatrick

95 Gene Ethics

96 Safe Climate Brisbane

97 Pirate Party Australia

98 Ms Lorraine Watt

99 Ms Adrienne Shilling

100 Mr Ian Rose

101 Ms Serena O'Meley

102 Ms Anna George

103 Mr Terry Mason, Indigenous Policy Committee, National Tertiary Education Union

104 Dr Matthew Rimmer, College of Law, Australian National University

104A Dr Matthew Rimmer, College of Law, Australian National University

105 Australian Fair Trade and Investment Network (AFTINET)

106 Dr Sam Luttrell and Dr Romesh Weeramantry

107 AID/WATCH

108 Australian Chamber of Commerce and Industry

109 G King

110 Ms Helen Burn

111 Mr James Wight

112 Mr Marc Ahrens

113 Trevor Davis Branch- NSW ALP

114 Humanist Society of Victoria

115 Ms Marion Clarke

116 Dr Ruth Townsend, College of Law, Australian National University

117 Conservation Council of South Australia

118 Mr Peter Megens

119 Australian Conservation Foundation

120 Alex Hodges and Ray Linkevics

121 Ms Deborah Pergolotti

122 Australian Dental Industry Association

123 Environment Centre NT

124 Dr David Stratton

125 Mr Richard Sanders

126 Electrical Trades Union of Australia, Victorian Branch

127 Environment Defenders Office (Victoria) and Environmental Defenders Office (Tasmania)

128 Ms Sandra Betts

129 National Tertiary Education Union

130 Mr Jonathon Singleton

131 Mr Sergio Mason

132 Mr Leo Oz

133 Lock the Gate Alliance

134 Burwell Dodd and Lolo Houbein AM

135 Department of Foreign Affairs and Trade

136 Name Withheld

137 Name Withheld

138 Blueprint for Free Speech

139 Ms Diana Rickard

140 Ms June Zeven

141 Nimbin Environment Centre

142 Songs of Freedom and Dances of Peace Revival

Appendix 2

Public hearings and witnesses

Wednesday 6 August 2014—Canberra

BRADDOCK, Mr Richard, Director, Office of Trade Negotiations, Department of Foreign Affairs and Trade

DE CURE, Mr Chris, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade

NOTTAGE, Professor Luke, Sydney Law School, University of Sydney

PERCIVAL, Mr Andrew, Member of the Executive of the International Law Section, Law Council of Australia

RANALD, Dr Patricia, Convenor, Australian Fair Trade and Investment Network

RIMMER, Matthew Dr, College of Law, Australian National University

TIENHAARA, Dr Kyla, RegNet/College of Asia and the Pacific, Australian National University

TIPPING, Ms Tracey, Owner, Eternal Source Pty Ltd

WEATHERALL, Associate Professor Kimberlee, Sydney Law School, University of Sydney

Appendix 3

Tabled documents, answers to questions on notice and additional information

Additional information and tabled documents

1 **Received from Professor Luke Nottage**

The impact of Investor-State-Dispute-Settlement in investment law, *Study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands,* 24 June 2014

2 **Received from Dr Matthew Rimmer**

Study of Damages, *In International Center for the Settlement of Investment Disputes Cases, 1st Edition, Credibility International*, June 2014

3 **Received from Dr Matthew Rimmer**

Ho, Cynthia M., *Sovereignty under siege: corporate challenges to domestic intellectual property decisions,* 13 August 2014

Answers to questions on notice

Wednesday 6 August 2014

1 Associate Professor Kimberlee Weatherall answer to question on notice from public hearing on 6 August 2014

2 Professor Luke Nottage answer to question on notice from public hearing on 6 August 2014

3 Department of Foreign Affairs, Defence and Trade answer to question on notice from public hearing on 6 August 2014

4 Law Council of Australia answer to question on notice from public hearing on 6 August 2014