Weighing in on the Debate about the Future of ISDS in Australia: the Productivity Commission's 18th Trade and Assistance Review

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On 24 June 2015, the Australian Productivity Commission released its eighteenth *Trade and Assistance Review 2013-14*.

The Commission is an independent research and advisory body, with statutory authority to report annually on the economic impacts of Australia's international trade policy. As readers of this blog may recall, in previous years the Commission's Review has influenced the Australian Government's approach to the negotiation of trade and investment treaties. Most notably, the Commission's 2010 Review prompted the then-Labor Government to adopt a policy against the inclusion of investor-State dispute settlement (ISDS) clauses in future trade and investment treaties. This policy was reversed by the Liberal Government in 2013. An attempt to introduce a legislative ban on the negotiation of such provisions was rejected in 2014 (see, further, this 2014 post by Luke Nottage).

The Commission Remains Opposed to the Inclusion of ISDS Provisions in Australia's Treaties

The Commission's 2013-2014 Review expresses the Commission's continued opposition to the negotiation and inclusion of ISDS clauses in Australia's trade and investment treaties. Specifically, the Commission indicates its view that such provisions (p. 61):

> ...depart from national treatment principles by affording substantive appeal rights to foreigners not available to domestic firms, risk impeding domestic regulatory reform (regulatory chill), include safeguards and carve-outs of uncertain effect, lack transparency and have inadequate parliamentary scrutiny.

The Commission also highlights the "potential size of compensation claims" resulting from claims brought under such clauses (p. 79). In particular, it emphasises the potentially "substantial" costs of Australia's defence of the only ISDS claim brought against it to date (against tobacco plain packaging). The Commission argues that "[t]he open-ended nature of these costs needs to be taken

into account in any discussion regarding the appropriateness of such provisions and consideration of the net benefits (costs) that they entail" (p. 163).

In addition to highlighting these perceived costs, the Review also questions the benefits to be attained through the inclusion of ISDS provisions in Australian treaties. Specifically:

- the Commission expresses its doubt that ISDS provisions "respond to a demonstrable market failure or have been associated with the fostering of investment flows" (p. 61, 78, 83-84); and

- the Commission rejects as "very high risk" any strategy whereby ISDS provisions are used as bargaining chips in treaty negotiations (i.e., "as a trade-off against other elements of an agreement that are viewed as more important") (p. 79).

The Commission's Review draws heavily upon recent data released by UNCTAD covering trends in investment treaty arbitration. Indeed, the Commission observes that its concerns over ISDS provisions "are heightened by increases in the number of ISDS cases internationally" and by indications that "recent years have witnessed an unusually high number of cases against developed economies" (pp. 61, 77). The Commission's heavy reliance upon such statistics makes ever more relevant calls for particular care to be taken in their compilation and interpretation (see, further, this 2015 post on the utility of statistics in appraising the current state of investment treaty arbitration).

Calls for a More Fulsome Cost/Benefit Analysis of Investment and Trade Treaties

The Commission calls for a more comprehensive cost/benefit assessment to be carried out prior to the conclusion by Australia of any new trade and investment treaties. The Commission argues that "current processes fail to adequately assess the impacts of prospective agreements", including by failing to "systematically quantify the costs and benefits of agreement provisions" (p. 82). In light of its view that ISDS provisions are more costly than they are beneficial, the Commission calls for such an assessment to occur on a provision-by-provision basis, and alongside increased parliamentary oversight of the treaty negotiation process.

Reiterating its recommendations from earlier Reviews, the Commission presents a framework for evaluation of trade and investment treaties prior to their conclusion (p. 83). Under the proposed framework, the government would be required, *inter alia*, to*:*

- provide information on the potential national economic impacts of the full agreement, including estimates of the economy-wide and distributional effects of change;

- assess the scope for agreements to evolve over time…;

- report on who or what could be potentially directly affected by the agreement…;

- quantify, where practicable, the potential benefits and costs and the timescale over which they are likely to occur; [and]

- assess any potentially adverse impacts of an agreement, including regulatory chill.

This aspect of the report has been heavily criticised by Andrew Stoler (former Deputy Director-General of the WTO), who observes that governments:

> …don't have the tools to make those kind of measurements, it's not exactly fair game to insist that you have to make those measurements before you decide whether the agreement is a good one or not.

Media Reaction

The Review has fuelled a more general and ongoing discussion in Australia on the benefits of ISDS provisions. Media reporting on the Review has, for example, extrapolated the Commission's discussion of the benefits of ISDS provisions to touch upon the idea that ISDS clauses might be "a solution in search of a problem". This phrase is drawn from a recent book by Dr Jonathan Bonnitcha, and readers may be interested in this short video in which Dr Bonnitcha unpacks the concept further.

As might be expected, however, media reporting on the Review has thus far largely focussed on its implications for the ongoing negotiations of the Trans-Pacific Partnership (TPP) agreement. The Commission's criticisms of the TPP negotiations encapsulate and apply many of its more general concerns outlined above. On ISDS, the Review notes that (p. 78):

> The possible inclusion of an ISDS mechanism in the TPP could…potentially undermine the role of domestic courts and freedom of governments to regulate in the public interest.

The Commission also criticises the "confidential nature" of the negotiation process for the TPP, which it argues has made "an objective assessment" of the treaty's costs and benefits "problematic", "particularly in respect of intellectual property and investor-state dispute settlement provisions" (p. 161). It characterises the "absence of any rigorous and transparent assessment of the agreement before government commitment" as "a critical failure in transparency" (p. 161).

There is little doubt that the Review will be cited heavily in discussions of the TPP in the coming months. As one commentator put it, opponents of the TPP:

> …were delivered a beautifully timed snippet of academic firepower last week in the form of an annual trade and assistance review from the Productivity Commission.

While the Review will no doubt be invoked in such debates, it remains to be seen what effect (if any) it will have on the Australian Government's approach to the TPP negotiations or, indeed, the content or negotiation of future investment and trade treaties.