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The “Anti-ISDS Bill” before the Australian Senate

Luke Nottage (University of Sydney & Williams Trade Law) · Wednesday, August 27th, 2014

Indonesia is not the only Asia-Pacific nation that is reassessing investment treaties containing provisions on Investor-State Dispute Settlement (ISDS, especially arbitration). India announced a review in 2013, partly in the wake of the successful claim from an Australian mining investor, although the impact in practice is hard to discern or predict – especially under the new Modi government. In both countries, the reviews may also have been linked to domestic politics during election years.

More surprisingly, public debate over ISDS has resurfaced in Australia. For the political left, it really began when Philip Morris Asia announced in 2010 that it would claim under a 1992 treaty with Hong Kong if Australia went on to enact tobacco plain packaging legislation – which it did nonetheless. ISDS was also questioned from the economic right, by the Productivity Commission’s 2010 report generally critical of preferential Free Trade Agreements (preferring unilateral or multilateral liberalisation measures). In April 2011, the (Labor) Gillard Government Trade Policy Statement declared that it would no longer agree to ISDS in future treaties, even with developed countries. After the (Liberal) Abbott Government won the general election on 7 September 2013, it quietly reverted to including ISDS on a case-by-case assessment. ISDS was included in Australia’s FTA with Korea (KAFTA, signed on 8 April 2014) but not Japan (8 July 2014).

Remarkably, however, a (minority Greens Party) Senator from Tasmania introduced in on 3 March a private Member’s Bill, *The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, which simply states: “The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor-state dispute settlement provision.” (The Senate referred the Bill to the Committee on 6 March 2014. The reporting date was 11 April 2014, but on 16 June the Senate extended this until 27 August 2014.)

After a slow start followed by an internet campaign, the Bill attracted 141 Submissions and the Foreign Affairs, Defence and Trade Legislation Committee also received “over 11,000 emails from individuals using an online tool asking people to express their opposition” to ISDS. I was invited with eight others to give evidence in public hearings that were held (and recorded) on 6 August, and the Committee is due to report on 27 August. Although the Bill is unlikely to pass the Senate and certain not to pass the lower House of Representatives (where the Abbott Government retains a majority), this debate may also impact on Australia’s ratification of KAFTA, which must first be reviewed by the Joint Parliamentary Standing Committee on Treaties (JSCOT).

Procedurally, the Anti-ISDS Bill is trying to have the Parliament set in advance specific parameters for treaty negotiations conducted by the executive branch of government. Yet s 61 of the Constitution states that treaty-making is the formal responsibility of the executive. This starting point, differing say from the US system, has limited the scope for longstanding calls for greater prior Parliamentary scrutiny of treaty-making. Those date back to at least 1983, resulting in establishment of JSCOT in 1996, but the rejection of the *Treaties Ratification Bill 2012*.

Substantively, the Anti-ISDS Bill also faces an uphill battle in that no other developed country has decided that all forms of ISDS – in conjunction with substantive protections offered by investment treaties – are so flawed as to justify excluding them altogether. The benefits of ISDS are admittedly more obvious when treaty partners are developing countries or those where domestic courts provide processes and substantive rights for all investors that fall below widely-accepted international standards. The risks are also lower for a developed country agreeing to ISDS with such countries, which are likely to be sources of inbound investment and eventual arbitration claims against the developed country. Yet Australia's Bill would preclude ISDS even in such situations, including negotiating a plurilateral arrangement in a regional treaty such as the Trans-Pacific Partnership Agreement or ("ASEAN+6") Regional Comprehensive Partnership Agreement, with an ISDS carve-out between developed countries (as between Australia and New Zealand, in their FTA with ASEAN signed in 2009).

Even between developed countries, it may be worth including some form of ISDS. No domestic legal system is perfect, especially when judged against evolving international standards, as Canadian investors found in the *Loewen* proceedings brought against the US (ultimately unsuccessfully, in 2004) or US investors are alleging at present against Korea. International arbitrators may be able to resolve disputes with greater expertise and even expedition, compared to domestic court judges with multiple levels of appeals. If treaty partners want additional scope for review, they can agree to an appellate mechanism (even one staffed with permanent appointees, like the WTO Appellate Body for trade disputes). Several treaties now provide for further negotiations to establish such a mechanism, including now KAFTA, although interestingly no states have chosen to actually set one up. ISDS can be brought even closer to domestic court proceedings by first requiring (time-limited) "exhaustion of local remedies" by foreign investors, as suggested recently by the Chief Justice of Australia. Transparency of proceedings can also be enhanced, as under KAFTA which adopts detailed provisions as well as a side agreement on the new UNCITRAL Transparency Rules. The risks of excessive claims or "regulatory chill" for host states, namely not introducing measures for good public health reasons, should be less anyway for developed countries (with generally higher standards of good governance) and can also be managed through drafting general and specific exceptions.

For similar reasons, both the European Commission and US government have proposed the inclusion of appropriate provisions on ISDS and substantive rights in the Trans-Atlantic Trade and Investment Partnership presently under negotiation. The Commission has initiated a public consultation, given concerns by those mostly unfamiliar with the rationales and current operation of the treaty-based international investment law system, but a recent comprehensive Report for the Dutch Government recommends the retention of ISDS even in the TTIP. Admittedly, the net benefits of ISDS are reduced in treaties among developed countries. But a broader advantage of such an approach is that it should also then make it easier to negotiate such protections in treaties with developing countries.

Accordingly, the Anti-ISDS Bill represents an over-reaction. Australia should continue down the

path of carefully negotiating and drafting both procedural and substantive rights in future investment treaties, joining with counterparts in other parts of the world (including indeed Indonesia and India), instead of simply opting out of the ISDS system altogether (as in a few South American countries). It would be useful to initiate a public consultation to develop a Model Investment Treaty or standard provisions. Australia should also review its old treaties as they come up for renewal, and even consider approaching treaty partners to renegotiate provisions that do not meet its contemporary standards (albeit for future investments). Unfortunately, that approach may also be precluded by this Bill. Yet the Philip Morris Asia arbitration reveals problems for host states under the old treaty with Hong Kong, while the recent ICSID jurisdictional decision in *Planet Mining v Indonesia* has serious implications for investors claiming under oddly drafted provisions in many of Australia's other treaties from the 1990s.

At least in Australia, the Parliamentary process and related media coverage have allowed some reasoned debate and a better understanding of the pros and cons of ISDS in the 21st century. Happily, too, the Australian Research Council agreed last year to fund a major joint research project related to this topic over 2014-6, including a focus on Asia.

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P.S. Update of 28 July 2014:

The Senate Committee's Report is now uploaded here. The main Committee Report and an additional Report from (the two) Labour Party Senators recommend that the Bill not be passed. A Dissenting Report from Senator Whish-Wilson who proposed this private member's Bill, and the other Greens Party Senator on the Committee, unsurprisingly recommend enactment. Because the main opposition (Labor) party members sided in its conclusion with the (Coalition) government members, it is highly improbable that the Bill will now pass the Senate.

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 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.

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.

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The Labour Party Senators' Report also does not support the Bill, but by emphasising that it would undermine Australian constitutional practice regarding treaty negotiations by the executive (see pp 21-22 / paras 1.15-20 below). At p20 / fn 3 it mentions our ARC research project testing the Productivity Commission's argument(s) in 2010 for not including ISDS protections:

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. Labor notes, and welcomes, current empirical research being conducted by leading Australian academics on the subject.[1)]

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.

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The two Greens Senators presented a Dissenting Report supporting instead recommending enactment of the Bill (citing, at 1.17, rather selectively from my Evidence transcribed in Hansard).

References

[1] 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."
https://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

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