Productivity Commission Review of Bilateral and Regional Trade Agreements

Stakeholder Workshop on Investor-State Dispute Settlement

ACTU and AFTINET Comments

The ACTU and AFTINET thank the Productivity Commission for providing the opportunity for stakeholders to participate in a workshop on Investor-State Dispute Settlement (ISDS) and contribute to the Commission's research on ISDS. We take this opportunity to reiterate our shared position and make some general comments on the workshop discussions.

During the workshop the issue of whether ISDS attracts foreign direct investment (FDI) was discussed at length. The ACTU and AFTINET's analysis of the research to date indicates that ISDS does not positively impact on FDI. Research by the World Bank, for example, concluded that there is little evidence that Bilateral Investment Treaties (BITs) have stimulated FDI flows from OECD countries to developing countries. Furthermore, developing countries with weak domestic institutions have not gained additional benefits from ISDS.[1] In regards to foreign corporations considering whether to invest in Australia, promoting ISDS is not necessary because Australia, as a developed country, has an advanced legal system and established rule of law that provides all corporations with appropriate avenues to address investment disputes.

If ISDS is included in bilateral and regional trade agreements it results in an unacceptable expansion of the rights of corporate investors at the expense of democratic government. This is because ISDS provides corporations with the avenue to threaten and lodge claims for actual or potential harm resulting from local, state and federal government policy regulations. This can frustrate or block the democratic right of governments to develop laws

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

and policies in the public interest in areas like health, the environment, culture and the economy.

The *Philip Morris v Government of Uruguay* case is a case in point. In February 2010, Philip Morris International filed a claim challenging tobacco advertising restriction introduced by Uruguayan health authorities that was based on WHO recommendations. If the AUSFTA included ISDS legislation, the announcement on similar legislation by the Australian Government would provide Philip Morris International with an avenue to sue for damages. This is despite the fact that the Australian Constitution allows for corporate regulation to protect public health and WTO agreements that include exceptions for health measures.

The argument that ISDS is not a threat to Australia because no claims have been brought against Australia as a result of ISDS is a weak argument.

First, the argument is flawed because it fails to recognise that a significant factor which has contributed to no cases brought against Australia is the exclusion of ISDS from the AUSFTA. As a result, the country with the greatest culture and record of litigation, the United States, is not provided with an ISDS avenue for US-based corporations.

Second, the perception that ISDS is not a threat to Australia – because all other ISDS mechanisms that Australia are a party to, are with less developed countries that are not major exporters of investment – is based on an assumption that the current nature of investment flows will remain the same. However, global trade and investment patterns are rapidly changing. Thus the current assumption that Australia is immune to claims from developing country investors will not necessarily hold. If a longer-term view is adopted, there is serious risk to Australia from ISDS policy lock-in.

The position raised in the workshop that ISDS mechanisms can be written in a manner that creates parameters, provisions and procedural manners to alleviate concerns around transparency or regulatory chill, fails to recognise that ISDS still provides foreign investors with an avenue for recourse that is unavailable to domestic investors. Such measures are inconsistent with the Commission's position to date (a position supported by the ACTU and AFTINET); that foreign investors in Australia or partner countries should not be afforded with legal protections not available to residents.

When discussing the legitimacy of ISDS during the workshop, the question of alternative mechanisms was raised. The ACTU and AFTINET note the importance of not forgetting the role of state-to-state mechanisms for enforcing agreements. Alternatives to ISDS that the Commission could consider in its research include alternative dispute resolution and dispute prevention policies.[2]

[2] See UNCTAD, 'Investor-State Disputes: Prevention and Alternatives to Arbitration', *UNCTAD Series on International Investment Policies for Development,* May 2010.