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Submission to the second Joint Standing Committee on Treaties Inquiry on the Peru-Australia Free Trade Agreement (PAFTA)
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Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 community organisations and many more individuals supporting fair regulation of trade, consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental protection.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners, and create a noodle bowl of overlapping agreements. We are also concerned about the impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make a submission to the second inquiry on the Peru-Australia Free Trade Agreement (PAFTA) which is focussed on

- ongoing concerns over the increasing complexity created by the number of trade agreements, particularly multiple agreements with the same partner; and
- the specific inclusion and operation of the Investor-State Dispute Settlement provisions in recently concluded trade agreements.

We are disappointed that the time frame for submissions is extremely short. Our submission will focus on these two terms of reference, and the lack of evidence about the impact of the agreement on the economy as a whole, but we ask the committee to note the other concerns in our submission to the first JSCOT inquiry.

Summary of Submission and Recommendations

1. **Concerns over the increasing complexity created by the number of trade agreements, particularly multiple agreements with the same partner**

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners, and create a noodle bowl of overlapping agreements

Australia and Peru could potentially have three overlapping trade agreements through the PAFTA, the TPP-11 and the Pacific Alliance, which is still under negotiation. The TPP-11 has now been ratified.

These overlapping agreements between the same partners present problems for both civil society organisations and exporters trying to understand and utilise the agreements.

Recommendation One:

PAFTA adds unnecessarily to the confusing noodle bowl of overlapping agreements and should not be ratified.

2. Investor-State Dispute Settlement (ISDS)

There is increasing evidence of the flaws in the ISDS system including that the EU and US are moving away from ISDS, and that ISDS institutions have acknowledged its flaws and are reviewing it structures. AFTINET believes that ISDS should not be included in any trade agreement.

PAFTA excludes ISDS cases against public health measures, specifically mentioning cases related to the PBS, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology Regulator. But there is no specific exclusion of tobacco regulation. This is a curious omission, given Australia's experience of the Philip Morris case, and the fact that it is the only specific exclusion in the TPP-11. The more general safeguards for public health measures will not prevent tobacco companies from taking cases if a future government should decide on further changes to tobacco regulation.

The need for these specific carveouts casts doubt on the effectiveness of the general safeguards for other public interest legislation contained in the text and raises the question of why other public interest regulation like environmental regulation is not specifically excluded.

The only way to prevent ISDS cases against the whole range of public interest law and policy is to exclude ISDS from trade agreements.

Recommendation Two:

There is increasing evidence that other trading partners are rejecting ISDS and that the inclusion of ISDS in PAFTA presents unacceptable risks and costs to governments. ISDS should not be included in PAFTA or other agreements.

3. No evaluation of the costs and benefits of the PAFTA

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of PAFTA despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts.

Recommendation Three:

In the absence of any evaluation of the costs and benefits of PAFTA to the economy as a whole, there is insufficient information to support the PAFTA implementing legislation, and the agreement should not be ratified.

Concerns over the increasing complexity created by the number of trade agreements, particularly multiple agreements with the same partner

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners, and create a noodle bowl of overlapping agreements.

In our submission to the first JSCOT inquiry we raised concerns about the fact that Australia and Peru could potentially have three overlapping trade agreements through the PAFTA, the TPP-11 and the Pacific Alliance. The TPP-11 has now been ratified.

The text of these two agreements is generally similar, but they have variations in market access and in particular clauses of the text. This raises the question of the relationship between the two agreements. The standard response to this question is that particular companies or governments can choose to apply the clauses of the agreement that are more favourable to their interests.

This response presents problems for both civil society organisations and exporters trying to understand and utilise the agreements.

AFTINET is concerned that different clauses in the text on ISDS or the removal of labour market testing in one agreement may be more restrictive of government regulation in the public interest than clauses in the other.

For exporters, differences in the terms of market access or rules of origin can be confusing in practice. It takes time and effort to research different agreements and calculate which rules apply most favourably to particular products. Research has shown that this leads to underutilisation of agreements and reduces their claimed economic benefits.

We note that the Australian Chamber of Commerce and Industry submission to the first JSCOT inquiry shared this view and stated:

> "Business wants government to simplify, not complicate, the rules and compliance requirements governing trade." (ACCI, 2018:1)

The ACCI submission also argued that the PAFTA would be redundant and should be withdrawn if the TPP-11 came into force.

AFTINET restates our position that the PAFTA adds to the confusing noodle bowl of overlapping agreements.

Recommendation One: PAFTA adds unnecessarily to the confusing noodle bowl of overlapping agreements and should not be ratified.

Investor-State Dispute Settlement process (ISDS)

In recent years, numbers of ISDS cases have increased and even more evidence has come to light about the flaws in the ISDS system. The critical debate has affected all sides of politics and had an impact in the EU and the US which are now negotiating agreements without ISDS. The two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the

World Bank International Centre for Settlement of Investment Disputes (ICSID) are conducting ongoing reviews which have identified serious flaws in the system.

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to sue governments for damages in an international tribunal.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has developed concepts like “indirect” expropriation, minimum standard of treatment and legitimate expectations which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in domestic law or policy has reduced the value of their investment.

Many experts including Australia’s former High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen by investors and governments from a pool of investment law experts who can continue to practice as investment law advocates. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest (Kahale 2014, French 2014, Productivity Commission 2015).

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider and appeal mechanisms to ensure consistency of decisions.

Leading international investment law expert and practitioner George Kahale has recently criticized ISDS in an April 2018 lecture at the Brooklyn Law School titled **“**The wild, wild west of international arbitration law**”.**

Kahale uses examples from his own experience representing governments in ISDS cases to argue that the ISDS system based on commercial arbitration principles is not fit to arbitrate cases in which international companies seek compensation from governments for changes in health, environment or other public interest laws.

Kahale says “It’s one thing to have party-appointed arbitrators negotiate a decision to settle a commercial dispute having no particular significance beyond the case at hand ... it is quite another to decide fundamental issues of international law and policy that affect an entire society” (Kahale 2018: 7).

Adding “there really are no hard and fast rules” in ISDS, he cites examples of claims of billions of dollars based on false documents, methodologies for calculations of future corporate income which are unacceptable in World Bank accounting practice, and similar claims before different tribunals resulting in inconsistent decisions (Kahale 2018: 14).

He notes the growth of third-party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation, and argues they fuel the growth of “surrealistic” claims and are "more about making money than obtaining justice" (Kahale 2018:17).

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. A 2012 OECD Study found ISDS cases last for 3 to 5 years and the average cost to governments for running cases was US$8 million per case, with some cases costing up to US$30 million (Gaukrodger and Gordon 2012). More recent studies indicate that costs to governments are increasing (UNCITRAL 2017).

Even if governments win cases, they have to spend years and millions of dollars defending them, and these costs are not necessarily recoverable. The default position in ISDS cases is that each party pays its own costs, which include both legal and arbitration costs. Tribunals have discretion about whether they decide to award costs to the winning party and applying for costs to be awarded prolongs the duration and costs of the case. For example, the Philip Morris tobacco case against Australia was decided after four years in 2015, the government won but the costs were not awarded until 2017, and only a proportion of the costs were awarded, and both the costs and the proportions were redacted from the tribunal decision. It took an FOI application to reveal that legal costs alone to the Australian government were $39 million, and the proportion of costs awarded is still secret (Patrick, 2018).

The Australian experience of ISDS

The June 2015 Productivity Commission study of ISDS confirmed its 2010 study that ISDS gives additional legal rights to foreign investors not available to domestic investors and lacks evidence of economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments (Productivity Commission 2015). This is why the previous ALP government had a policy against ISDS from 2011, and why many other governments, including Germany, France, Brazil, India, South Africa and Indonesia are reviewing ISDS (Filho 2007, Biron 2013, Uribe 2013, Mehdudia 2013, Bland and Donnan 2014).

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Coalition Howard government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

Claimed ISDS "safeguards" for health, environment and other public welfare measures have not prevented ISDS cases. Tribunals have enormous discretion in interpreting the meaning of "safeguards" (Tienhaara 2015b).

Once a case is under way, defending it can take years and cost tens of millions of dollars. The US Philip Morris tobacco company lost its claim for compensation for the 2011 plain packaging legislation in the Australian High Court. The company could not sue under the Australia-US Free Trade Agreement because the Howard government had not agreed to include ISDS in that agreement. The company moved some assets to Hong Kong and used the Hong Kong-Australia investment agreement to sue the Australian government. It took over four years for the tribunal to decide the threshold issue that Philip Morris was not a Hong Kong company (Tienhaara 2015b).

The Australian government was awarded a proportion of the legal and arbitration costs by the tribunal, but the proportion and total costs were blacked out of the tribunal decision, and the Australian government initially refused to reveal them. It took an FOI case to reveal that legal costs alone were $39 million. The proportion of legal costs awarded to the government remains secret (Patrick 2018).

The Australian government won on the issue of jurisdiction, so the substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested.

Even so, the case had a freezing effect on other governments' introduction of plain packaging legislation. The New Zealand government delayed introducing its own legislation pending the tribunal decision (Johnstone 2015).

International corporations are well aware of this freezing effect and use ISDS to attempt to prevent public interest regulation. The Chevron Company has lobbied for ISDS to be included in EU trade agreements as a deterrent against environmental protection laws (Nelson 2016).

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning Report which argued strongly that trade agreements should **not** include ISDS.

The Report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of States and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability" (de Zayas 2015).

Recent ISDS cases on medicines, environment, Indigenous land rights

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Conference on Trade and Development show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and over 850 in 2017 (UNCTAD 2018). Most cases are won by investors or settled with concessions from governments (Mann 2015, UNCTAD 2018).

There are growing numbers of cases against health, environment, Indigenous land rights and other public interest laws. Recent cases include the following:

- Swiss Pharmaceutical company Novartis filed an ISDS dispute against the Colombian government under the Switzerland-Columbia bilateral investment treaty over plans to reduce prices on a patented treatment for leukemia (Williams 2016).

- The Canadian Bear Creek mining company recently won $26 million from the government of Peru because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests (International Centre for Settlement of Investment Disputes 2017). The tribunal essentially rewarded the company despite the fact that it had violated its obligations in the ILO Convention on Indigenous Peoples to which Peru is a party.

- The US Bilcon Company won millions in compensation because its application for a quarry development was refused for environmental reasons. The exact amount is still being determined (Global Affairs Canada 2018).

- The French Veolia Company is suing the Egyptian Government over a contract dispute in which they are claiming compensation for a rise in the minimum wage (Breville and Bulard 2014).

Ongoing reviews conducted by ISDS institutions reflect community concerns about ISDS

Growing community concern about ISDS has also had an impact on the two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), both of which are conducting ongoing reviews of the system.

The November 2017 discussion paper for the UNCITRAL review involving member states identified the following issues to be addressed:

> "(i)inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-appointment"), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns…have been said to undermine the legitimacy of the ISDS regime and its democratic accountability" (UNCITRAL 2017:6).

In October 2016, the Secretariat of ICSID initiated a consultation with its member States to identify areas of concern. The consultation was extended to the public in January 2017 and is ongoing.

The preliminary outcome of the consultations indicated 16 potential areas of concern, many of which were similar to the UNCITRAL list. They include arbitrator-related issues (appointment, code of conduct, challenge procedure), third-party funding, consolidation of cases, means of communication, preliminary objections proceedings, rules on witnesses, experts and other evidence, provisional measures, time frames and allocation of costs (UNCITRAL 2017:5)

EU and US governments retreating from ISDS

Both the EU and the US have been major proponents of ISDS. However, recently there have been increasing numbers of cases taken against changes to EU and US government laws and policy decisions, and there has been an enormous growth in public opposition to ISDS. Opposition has been expressed by legal experts, state and provincial governments, court decisions and the general public**.** Both the EU and the US are now retreating from ISDS in trade negotiations.

The EU

The inclusion of ISDS in negotiations for the Trans-Atlantic Trade and Investment Partnership Agreement between the US and the EU prompted fierce public debate, resulting in a European Commission decision to pause the negotiations to allow for further public consultation about ISDS. In 2014, the European Commission launched an online public consultation on ISDS. The consultation received over 150,000 submissions, the majority of which were critical of ISDS (European Commission 2016, Donnan and Wagstyl 2014, European Parliamentary Research Service 2014).

The ongoing debate about ISDS has led to several EU court cases in which national governments have challenged the ability of the EU to make collective commitments on ISDS on behalf of national governments without such commitments being subject to democratic processes in each country.

On 16 May 2017, the Court of Justice of the European Union issued a landmark opinion on the investment and ISDS clauses in the EU-Singapore free trade agreement. It found that most of the agreement fell under the EU's powers, and that the EU could ratify it on behalf of member countries, except for some investment provisions, including ISDS. The court found that EU Member States' national and regional parliaments and the European Parliament must ratify provisions regarding investors, particularly ISDS (Court of Justice of the European Union 2017).

In March 2018, in a separate case brought by the government of Slovakia, the Court of Justice found that ISDS has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law. The Court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal breached EU law (Court of Justice of the European Union 2018).

The Slovakian case involved two EU member states, but the Belgian government has also requested the court to consider whether the EU proposal for an ISDS investment court in the Canada-EU free trade agreement is compatible with EU law (Kingdom of Belgium 2017).

The European Union now faces a situation resulting from the 2017 decision in which any proposal for ISDS in a trade agreement must be subjected to parliamentary decision-making processes in each EU member country. The 2018 decision and the pending Belgian case also cast doubt on the legal competence of the EU to include ISDS in any agreement.

Because of the unpopularity of ISDS, European Commissioner Jean Claude Juncker has proposed a "fast track" process for agreements without ISDS, which would enable them to be approved by the European Commission alone, without seeking approval from national parliaments. Such agreements could not include ISDS (Von der Burchard 2017).

This has been the case for EU agreements recently concluded with Japan and Vietnam. The EU has confirmed publicly that ISDS will not be included in the Australia-EU FTA currently under negotiation (Office of the Prime Minister, 2018) .

The US

Over the last two years, there has also been strong public opposition expressed in the US to the inclusion of ISDS in trade agreements from state governments and legal experts, which has influenced state and national governments.

In February 2016 the National Conference of State Legislatures declared that it "will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations" (National Conference of State Legislatures 2016).

In October 2017, more than 200 prominent law professors and economists signed an open letter arguing that ISDS undermines the rule of law and urging the US government to oppose ISDS in its renegotiation of the North American Free Trade Agreement (NAFTA). Signatories included Nobel laureate Joseph Stiglitz, former Labor Secretary Robert Reich, former California Supreme Court Justice Cruz Reynoso and Columbia University professor and UN Senior Adviser Jeffrey Sachs (Public Citizen (2017).

The United States put forward a proposal to withdraw from the ISDS provisions in NAFTA because of the risk and costs of US governments being sued by foreign corporations.

The US Trade Representative Robert Lighthizer said in his testimony to the US House of Representatives Ways and Means Committee Hearing on June 22, 2017:

> "There is a legitimate interest in people who go overseas and invest, and the United States has an obligation to do what it can to make sure that those people are treated fairly. On the other hand, as you suggest, Congressman, I am troubled by the sovereignty issue. I am troubled by the fact that anyone – anyone – can overrule the United States Congress, or the President of the United States, when it's passed a law. That is troubling to me." (US House Ways and Means Committee 2017).

Lighthizer also said in a media conference in October 2017:

> "I've had people come in and say, literally, to me: 'Oh, but you can't do this: you can't change ISDS. … You can't do that because we wouldn't have made the investment otherwise.' … The bottom line is, business says: 'We want to make decisions and have markets decide. But! We would like to have political risk insurance paid for by the United States' government. And to me that's absurd. You either are in the market, or you're not in the market."
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> "It's always odd to me when the business people come around and say, 'Oh, we just want our investments protected.' … I mean, don't we all? I would love to have my investments guaranteed. But unfortunately, it doesn't work that way in the market," (quoted in Ikenson 2017).

On March 21, 2018 Lighthizer confirmed in evidence to the US House Ways and Means Committee that the US was seeking in the NAFTA negotiations an opt-out provision to exempt the US from ISDS. He repeated the arguments quoted above about US sovereignty and that it was not the job of the US government to provide a political risk insurance policy for investors. He argued that investors were protected by state-to-state disputes processes and could also include risk insurance in their individual investment contracts, and did not require ISDS (US House Ways and Means Committee 2018).

The recently revised NAFTA agreement between the US, Mexico and Canada, now called the United States-Mexico-Canada Agreement, announced on October 4 2018, is consistent with this policy. The agreement will phase out ISDS between the US and Canada altogether after three years. The agreement also limits the scope for ISDS cases between the US and Mexico to cases of direct government takeover of assets. This means that cases cannot be launched for compensation over changes in environmental or health law or policy. Foreign investors must also exhaust national court processes before launching ISDS cases (US Trade Representative 2018).

ISDS provisions in the PAFTA: some more specific carveouts but general safeguards still not effective

We welcome the fact that PAFTA excludes ISDS cases against public health measures, specifically mentioning cases related to the Pharmaceutical Benefits Scheme, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology Regulator (PAFTA Section B, Footnote 17). However this footnote has no specific mention of tobacco regulation, a curious omission, given Australia's experience of the Philip Morris case, and the fact that it is the only exclusion in the TPP-11 (Clause 29.8 of the chapter dealing with exceptions). There is no equivalent clause in PAFTA's Chapter 28, which is the exceptions chapter. The general "safeguards" for public health measures elsewhere in the text will not prevent tobacco companies from taking cases if a future government should decide on further changes to tobacco regulation.

Overall, the need for these specific carveouts casts doubt on the effectiveness of the general safeguards for other public interest legislation contained in the text and raises the question of why other public interest laws like environmental regulation are not specifically excluded.

The claimed "safeguards" which apply to the ISDS section of the investment chapter cannot be described as clear carveouts or exclusions.

The general "safeguard" articles in the investment chapter which do apply to key ISDS definitions have the same pitfalls as in previous FTAs, which have not prevented foreign investors from bringing cases against governments in areas like environmental regulation.

One claimed safeguard in Chapter 9 refers to laws or policies which can be seen by investors as "indirect expropriation". This has the same wording as the equivalent article in the Korea-Australia Free Trade Agreement (KAFTA) and other recent agreements (DFAT 2014: Annex 2B).

The article in PAFTA reads:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances" (Annex 8-B.5).

This has large legal loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Another claimed safeguard reads:

> "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives" (Article 8.16).

Associate Professor Amokura Kawharu of Auckland University has commented that this is circular language which "appears to provide no additional protection, and only affirms the right to regulate in a manner consistent with the other terms of the investment chapter" (Kawharu 2015:9). Internationally recognised investment law practitioner George Kahale shares this view (quoted in Hill 2015).

A third claimed safeguard relates to the fact that governments are required to treat international investments in accordance with customary international law, which includes "fair and equitable treatment" and "full protection and security" (Article 9.6.1).

There have been controversial cases dealing with fair and equitable treatment where tribunals have found in favour of corporations on the basis that government action has interfered with the company's own expectations of the treatment they should receive. A recent example is *Bilcon vs Canada*, in which a tribunal found in March 2015 in favour of a company claiming damages because its application for a quarry development was refused for environmental reasons. The reasons for the decision included that the decision was contrary to the company's expectations of treatment (Dundas 2015).

Choice of ISDS arbitrators and other procedural issues in PAFTA

The PAFTA reflects provisions in previous agreements on selection of arbitrators, whereby each of the disputing Parties selects one arbitrator and the third is appointed by agreement. The arbitrators are appointed from panels overseen by two different international institutions, the United Nations Commission on International Trade Law (UNCITRAL) or the World Bank International Centre for Settlement of Investment Disputes (ICSID).

If Parties cannot agree about the third appointment, that person is appointed by a neutral third party. It has been claimed that this process is a protection against arbitrator bias.

This system of appointing arbitrators is not new, provides no additional protection, and misses the point as a defence against arbitrator conflict of interest. The point is not about individual arbitrator bias, but about a systemic failure. The pool from which arbitrators can be selected consists of investment law experts who can continue to be practising advocates, representing disputing parties one month, and sitting on an arbitration panel the next month. This is not an independent judiciary. The only way to ensure an independent judiciary is to ensure that arbitrators or judges cannot continue to be practising advocates.

The PAFTA does not include an appeals mechanism. There is only a reference to a future appeals mechanism, which may be developed outside the framework of the PAFTA. There is no commitment to use such a mechanism, but only to consider whether it should be applied to the PAFTA. The relevant article reads:

> "In the event that an appellate mechanism for reviewing rewards rendered by Investor-State Dispute Settlement tribunals is developed in the future under other institutional arrangements, the parties shall consider whether awards rendered under article 8.28 should be subject to that appellate mechanism" (Article 8.24.11).

The PAFTA ISDS model compared with other recent models

PAFTA ISDS provisions are not informed by two recent models developed by India and the EU, both of which were publicly available before the conclusion of the PAFTA negotiations. Australia has been engaged with India in both bilateral negotiations and through the Regional Comprehensive Economic Partnership negotiations between the 10 ASEAN countries plus India, China, Japan, South Korea, Australia and New Zealand. Australia has also been engaged in discussions for a bilateral agreement with the EU.

The India draft model Bilateral Investment Treaty was released publicly in March 2015, with a second draft in December. The EU draft model investment chapter for its trade negotiations was released publicly on September 15, 2015, and has since been tabled in the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the US (Government of India 2015, European Commission 2016).

The Indian model has more robust assertions of the right of government to regulate for public policy reasons with fewer qualifications than the TPP. For example, the definition of expropriation in the draft India BIT does not contain the loophole "except in rare circumstances" discussed above (Government of India 2015: Article 5.5). The draft also avoids the pitfalls discussed above in the definition of fair and equitable treatment and legitimate expectations by omitting these concepts altogether.

The EU model attempts to address the structural flaws of the lack of an independent judiciary and appeals system by establishing a panel of qualified judges to serve on tribunals (EU Commission 2015: Section 3 article 9 p.17). It also establishes an appeals tribunal consisting of more senior qualified judges (European Union 2015: section 3 Article 10).

However, the judges would not be full-time, could accept other work and would be paid a retainer. This would initially be a bilateral arrangement under the rules of the TTIP. While the use of more qualified arbitrators and the addition of an appeals tribunal is a step forward, Van Harten has argued that this is not an independent judiciary because part-time judges paid a retainer and able to accept other work would not have the same independence as full-time judges in national court systems (Van Harten 2016).

The EU has foreshadowed that it wishes to establish an International Investment Court similar to the International Court of Justice, which could be used multilaterally. Presumably these judges would be full-time and barred from accepting other work, and thus more independent and similar to national judicial appointments (European Union 2015: Article 12).

These proposals attempt to address the issues of independence of arbitrators and an appeals system. However, they do not address the basic issue that ISDS gives unfair additional legal rights to international corporations that already have enormous market power, and the definitions of indirect expropriation, minimum standard of treatment and investor expectations.

Moreover, as discussed above, recent EU court decisions have since cast doubt on whether any of these models would be compatible with EU law.

These attempts to adjust the ISDS system are responses to widespread recognition of its flaws. But regardless of future changes to ISDS systems, the basic question remains as to why any government would agree to ISDS at all. As the Productivity Commission has noted, there is no legitimate rationale for giving special legal rights to global corporations to bypass national courts and sue governments over changes in domestic legislation, resulting in financial and policy risks to governments.

Recommendation Two:

There is increasing evidence that other trading partners are rejecting ISDS and that the inclusion of ISDS in PAFTA presents unacceptable risks and costs to governments. ISDS should not be included in PAFTA or other agreements.

Weighing the costs and benefits of PAFTA: no analysis provided

The NIA for the first JSCOT PAFTA inquiry emphasises the gains from PAFTA to particular sectors in services and agriculture,but does have any information on the impact of PAFTA on the economy as a whole.

There has been no economic modelling of the specific impacts of PAFTA on the Australian economy measured by GDP.

THE NIA does not even provide an estimate of the actual costs of loss of revenue from tariff elimination by Australia under PAFTA, describing those costs only as “negligible” (DFAT 2018e: 9).

In the absence of such information, it is impossible to say whether the risks and costs of PAFTA outweigh the benefits.

These possible risks and costs include:

- employment losses
- losses to government revenue from reductions on remaining tariffs
- losses resulting from possible regulatory risks and costs to government arising from ISDS
- costs of other possible environmental, health and other impacts arising from future restrictions on government regulation.

Conclusion

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of PAFTA despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts.

Recommendation Three

In the absence of any evaluation of the costs an benefits of PAFTA to the economy as a whole, the committee does not have enough information to support the PAFTA implementing legislation and the agreement should not be ratified.

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