An Assessment of Australia's Parliamentary Report on ISDS in the TPP

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On 30 November, Australia's Joint Standing Committee on Treaties (JSCOT) released its Report 165 on its inquiry into the Trans-Pacific Partnership Agreement (TPP).

JSCOT is a 16-member parliamentary committee tasked with advising the Australian parliament on ratification of treaties.

This article presents an overview and discussion of the Report's findings on ISDS, the most common issue cited by respondents to JSCOT's public inquiry.

Although recent comments by US President-elect Trump indicate that the TPP is unlikely to come into force, the Report warrants attention as it provides an insight into the Australian parliament's understanding of the ISDS regime, particularly while the country continues negotiations on another plurilateral trade and investment agreement, the Regional Comprehensive Economic Partnership (RCEP).

This insight is important, as the attitudes of Australia's major political parties towards ISDS are historically inconsistent. Appended to the Report are certain 'Additional Comments' opposing ISDS by Committee members from the opposition Labor Party; and a short 'Dissenting Report' by the minority Australian Greens Committee member.

The Report's final view is that '[u]nder the TPP ISDS provisions, Australian investors have more to gain than the Australian Government and the Australian people have to lose'.

Australia's investment landscape:

The Report notes that Australia's outward investment is the most significant sector covered by the TPP, accounting for 45% (A$868bn) of investment made by Australians abroad. The TPP would create new ISDS commitments between Australia and some TPP parties; would replace existing commitments with some other parties; and would sit alongside existing commitments with other parties.

In their opposition to ISDS, the Labor Party Committee Members cite reporting by Australia's Productivity Commission that '[a]vailable evidence does not suggest that ISDS provisions have a significant impact on investment flows.' Economic evidence on this question has long been debated; Luke Nottage, amongst others, has recently supported the proposition that ISDS agreements can

promote foreign investment. The presence of ISDS can also affect the availability, and potentially pricing, of political risk insurance. Separate to investment flows, ISDS might still be supported for its role in protecting existing investments.

The ISDS regime:

The Report commences with a basic summary of ISDS and how it operates. At times, the Report's wording is quite terse, leading to an overly simplistic impression of ISDS. For example, the Committee notes that, for a foreign investor to bring a case, they "must believe that an arbitrary or capricious action of the host Government has caused them to lose their investment". Of course, a claimant's subjective beliefs will have minimal impact on a tribunal's ruling. More importantly, the statement ignores the possible application of a 'sole effects' approach (although, admittedly, the TPP's state-friendly language might make this less likely).

Australia's ISDS experience:

The Report next considers the use of ISDS in Australia. The Committee appears to balance the one known case brought against Australia (by Philip Morris) against ten known cases of Australian investors using (both treaty-based and contract-based) ISDS provisions against other countries.

Australian company Planet Mining (then engaged in ISDS against Indonesia), gave written and oral input contending that the availability of ISDS can be pivotal when making foreign investment decisions. The Committee relies heavily on Planet Mining's evidence, and on further submissions and oral testimony from Planet Mining's counsel, Dr Sam Luttrell. Other experts also made submissions but many, including Nottage, are surprisingly not cited.

The Report ultimately finds that 'the benefits for Australian investors from agreements that include ISDS have been largely ignored in the debate about ISDS. The debate about ISDS provisions is consequently unbalanced.'

However, these benefits often prove difficult to quantify. Since the Report's release, Planet Mining's ISDS dispute was dismissed as an abuse of process, and the investor was ordered to pay nearly US$10m in costs. One wonders if Planet Mining's views on ISDS have now changed. In any case, Planet Mining's views alone do not necessarily tell us much about whether Australian investors generally take ISDS into account when making investment decisions.

ISDS in the TPP:

The Report provides a basic description of ISDS agreements, reviewing the content of early-generation agreements, the regime's bilateral nature, and the TPP's development from the new-generation US model. The Report highlights the TPP's plurilateral nature as a key advantage, noting that the states parties currently maintain 6 free trade agreements and 21 bilateral investment treaties amongst themselves (though Wolfgang Alschner and Dmitriy Skougarevskiy count an even higher number).

Replacing these treaties with the TPP would be a positive step towards reducing uncertainty and potential abuse. But, as noted earlier, the TPP would not automatically terminate most of these agreements.

Concerns with ISDS:

The Report's final part discusses key concerns raised by participants. These appear to have centred on two issues: the question of 'regulatory chill', and the costs of ISDS disputes.

Sovereignty and public interest regulation:

The Report notes that the TPP expressly carves out regulatory actions designed to protect legitimate public welfare objectives, and thus considers that claims brought against Australia would most likely fail.

In the Committee's view, Australia would only lose an ISDS case either because the challenged regulation was poor policy in the first place (and the investor therefore deserved its compensation), or because the ISDS provisions were not functioning as intended. In the latter case, the Report notes that ISDS rulings cannot overturn domestic laws and regulations, nor directly prevent new regulations. The Labor Party Committee members' Additional Comments suggest that this point is 'false or meaningless'. Citing Dr Luttrell, the Report considers that the existence of 'regulatory chill' simply remains 'an open question'.

The Report also suggests that a state's loss resulting from malfunctioning ISDS provisions might inspire TPP parties to amend the agreement. However, amending the TPP or issuing a joint interpretation would be a difficult diplomatic process (the latter also raising contested legal issues). Feldman notes that coordination challenges might arise. These would be compounded by the TPP states parties' cultural, legal and economic dissimilarities.

The Report touches on a concern that an ISDS agreement with the US might increase inbound claims, because US investors are the most frequent ISDS users. The Report downplays this concern, noting that Australia's developed-country status makes an increase in claims unlikely. A recent study by Nottage also contended that this statistic needs to be viewed in perspective.

Philip Morris' ISDS claim against Australia was regularly cited by participants. That dispute was dismissed last year as an abuse of rights. On one hand, the case's result demonstrates that the regime is already well-equipped to prevent abuses. On the other hand, however, it says little about whether Australia's tobacco laws comply with investment treaty commitments.

Australia's success in defending against its one known claim to date should not be a determinative factor in whether to support ISDS in a treaty such as the TPP. The United States similarly promotes its 100% ISDS success rate, but it has perhaps been lucky in previous cases (such as *Loewen*), and might lose a case in the future.

Costs:

Citing Dr Luttrell as counsel for Philip Morris, the Report claims that Australia's legal bill in defending that dispute was US$37m (A$50m). The figure's origin is not made clear, but it echoes an (unsourced) figure circulated in Australian media since 2015. (The tribunal's final costs determination remains pending.)

Matthew Hodgson notes that average defence costs in investment disputes are around US$4.5m. As an extreme example, Russia's defence bill in the decade-long *Yukos* dispute was US$27m. Bearing in mind that the four-year Philip Morris dispute did not pass the jurisdictional phase, the US$37m cited seems implausibly large.

Nevertheless, the Report appears unfazed by these actual and potential costs, advising the Australian Government to assume that ISDS claims will arise, and to set aside sufficient funds to defend them.

Conclusion

The JSCOT Report's coverage of ISDS is helpful, but is at times simplistic and lacking in analytical

depth.

For Australian investors, ISDS might be beneficial (at least, where the investors' claims are not dismissed under abuse doctrines). For Australia, the TPP would replace some dated bilateral ISDS agreements, which might assist the state in managing illegitimate treaty-shopping (at least, where investors' claims are not already dismissed under those same abuse doctrines). ISDS might also increase investment into Australia. The Report has determined that these potential benefits outweigh the risks associated with defending and losing ISDS claims in the future.

If – as seems likely – the TPP fails to come to fruition, momentum in Asia looks set to shift to the RCEP. China is not part of the TPP, and the United States is not part of the RCEP, creating a degree of foreign policy significance in the TPP failing and the RCEP succeeding. RCEP might also include ISDS provisions. Accordingly, this Report serves as a good indicator, for better or worse, of Australia's likely views on ISDS in RCEP and other future agreements.