



Public Health Association
AUSTRALIA

**Public Health Association of Australia
submission to the Inquiry into the Trade
and Foreign Investment (Protecting the
Public Interest) Bill 2014**

Foreign Affairs, Defence and Trade
Committee Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Email: fadt.sen@aph.gov.au

Contact for PHAA:
Michael Moore
Chief Executive Officer
mmoore@phaa.net.au

11 April 2014

Contents

Introduction	3
Public Health	3
The Public Health Association of Australia	3
Advocacy and capacity building	3
Investor-state dispute settlement and public health	4
Background	4
1. Many investor-state cases concern public health and environmental issues	4
2. Flaws in the investor-state dispute settlement process	5
3. Regulatory chill	6
4. ‘Safeguards’ and exceptions may not be effective in preventing cases	6
5. The tide is turning: There is a growing movement against ISDS.....	6
Conclusion	6
References.....	7

Introduction

The Public Health Association of Australia Incorporated (PHAA) is recognised as the principal non-government organisation for public health in Australia and works to promote the health and well-being of all Australians. The Association seeks better population health outcomes based on prevention, the social determinants of health and equity principles. The PHAA has a vision for a healthy region, a healthy nation and healthy people living in a healthy society and a sustaining environment while improving and promoting health for all

Public Health

Public health includes, but goes beyond the treatment of individuals to encompass health promotion, prevention of disease and disability, recovery and rehabilitation, and disability support. This framework, together with attention to the social, economic and environmental determinants of health, provides particular relevance to, and expertly informs the Association's role.

The Public Health Association of Australia

PHAA is a national organisation comprising around 1900 individual members and representing over 40 professional groups concerned with the promotion of health at a population level.

Key roles of the organisation include the development of policy, capacity building and advocacy. Core to our work is an evidence base drawn from a wide range of members working in public health practice, research, administration and related fields who volunteer their time to inform policy, support advocacy and assist in capacity building within the sector. PHAA supports a preventive approach for better population health outcomes by championing appropriate policies and providing strong support for Australian governments and bodies such as the National Health and Medical Research Council in their efforts to develop and strengthen research and actions in public health.

PHAA has Branches in every State and Territory and a wide range of Special Interest Groups. The Branches work with the National Office in providing policy advice, in organising seminars and public events and in mentoring public health professionals. This work is based on the agreed policies of the PHAA. Our Special Interest Groups provide specific expertise, peer review and professionalism in assisting the National Organisation to respond to issues and challenges as well as providing a close involvement in the development of policies. In addition to these groups the PHAA's Australian and New Zealand Journal of Public Health (ANZJPH) draws on individuals from within PHAA who provide editorial advice, and review and edit the Journal.

Advocacy and capacity building

In recent years PHAA has further developed its role in advocacy to achieve the best possible health outcomes for the community, both through working with all levels of governments and agencies, and promoting key policies and advocacy goals through the media, public events and other means.

Investor-state dispute settlement and public health

Background

Investor-state dispute settlement (ISDS) is a legal mechanism included in some trade agreements and investment treaties. ISDS provides a legal mechanism for foreign investors to contest decisions by national governments that they believe impinge on their investments.

ISDS was originally included in these agreements to provide recourse for developed country corporations investing in developing countries without strong legal systems (Eberhardt & Olivet, 2012). But now ISDS cases are frequently launched against developed countries as well. Many ISDS cases involve environmental and public health policies and large amounts of money and there is widespread concern around the world about the effects on the capacity of governments to regulate to protect the environment and public health.

Including ISDS clauses in Australia's trade agreements may impact Australia's ability to enforce existing policies and implement new policies that support public health. These include tobacco control policies such as our world-leading tobacco plain packaging laws, and innovative policies in the areas of alcohol and food policy. The costs to the health system from the health effects of tobacco, alcohol and obesity are estimated at \$6 billion per year, with lost productivity as a result of these factors estimated at almost \$13 billion per year (Hirono et al, 2014). But ISDS provides an avenue for corporations to seek compensation from governments for introducing policies and laws to regulate the health-damaging products that contribute to rising rates of chronic disease.

From a public health perspective, there are **no arguments in favour of including ISDS** in trade and investment agreements. But there are **many arguments against providing this mechanism in Australia's trade and investment agreements**. This submission sets out these arguments.

1. Many investor-state cases concern public health and environmental issues

Over the last decade there has been a large increase in investment arbitration cases. By 2011 there were 450 known ISDS cases (Eberhardt and Olivet, 2012). Key examples relevant to public health include Philip Morris Asia's case against Australia under the Hong Kong-Australia Bilateral Investment Treaty, over the introduction of tobacco plain packaging. Eli Lilly, a Canadian pharmaceutical company, is also suing the Canadian Government for \$500 million over court decisions to revoke patents for two drugs that were found not to deliver the promised benefits. There have been many cases involving corporations challenging decisions to protect the environment; decisions which are often made for public health reasons as well as environmental reasons.

CASE STUDY: Impact on Non-Communicable Diseases Policy

Philip Morris has recently brought claims against Australia (2011) and Uruguay (2010) under international investment agreements (IIAs). The claims allege that Philip Morris is entitled to compensation following the introduction of innovative tobacco packaging regulations to reduce smoking and prevent noncommunicable diseases (NCDs). Since tobacco control measures are often viewed as a model for public health nutrition measures, the claims raise the question of how investment law governs the latter...As foreign investment increases across the food-chain and more global recommendations discouraging the consumption of unhealthy products are issued, investment law will increase in importance as part of the legal architecture governing the food supply. The implications of investment law for public health nutrition measures depend on various factors: the measures themselves, the terms of the applicable agreements, the conditions surrounding the foreign investment and the policies governing agricultural support...governments should adopt proactive measures – e.g. the clarification of terms and reliance on exceptions – to manage investment and protect their regulatory autonomy with respect to public health nutrition.

Thow and McGrady 2014

2. Flaws in the investor-state dispute settlement process

Investor-state dispute settlement is a fundamentally flawed and pro-investor system.

The **costs of arbitration** can be very high. It can cost millions for countries to fight legal claims under ISDS, even if they successfully defend them. The OECD (2012) has estimated the costs average more than \$8 million per case.

The **awards involved in ISDS cases are also often very high**. The Czech Republic, for example, had to pay more than \$350 million USD in an ISDS case, which is reported to have almost doubled its public sector deficit (International Institute for Sustainable Development, 2007). El Salvador has been sued for over \$300 million USD by Pacific Rim, a Canadian gold mining company over its refusal to grant permits for cyanide-based gold mining (Williams, 2013). In some cases awards have amounted to over a billion dollars.

The ISDS process lacks the safeguards of domestic legal processes. Compared with domestic legal cases, there is a lack of transparency. Hearings are generally closed unless both parties agree (Gleeson et al, 2012). Cases are decided by a panel of three arbitrators, who may have conflicts of interests, as they can act as legal representatives in other cases while serving as arbitrators in others (Gleeson et al, 2012). The fact that arbitrators are paid by the hour, and many arbitrators work for law firms with corporate clients, also creates a pro-investor bias (Tienhaara, 2010). Decisions are ad hoc as arbitrators do not have to take precedents into account (Tienhaara, 2010).

A report by Corporate Europe Observatory and the Transnational Institute (Eberhardt and Olivet, 2012), describes how the boom in investment arbitration cases over the last couple of decades has given rise to an elite investment arbitration industry dominated by a small number of investment law firms and arbitrators. According to this study, investment arbitration lawyers have encouraged governments to sign treaties with poorly worded ISDS clauses that expose them to legal cases, have encouraged corporations to use lawsuits and have actively prevented changes to the investment arbitration system.

3. Regulatory chill

The threat of legal action, or even the existence of an ISDS mechanism, can deter governments from implementing public health policies and laws. Corporations can also delay the uptake of innovative public health policies and laws in other countries by launching ISDS claims against 'first movers' (the first country to introduce a new approach).

4. 'Safeguards' and exceptions may not be effective in preventing cases

The recently signed trade agreement between South Korea and Australia FTA (KAFTA) supposedly includes exceptions/safeguards to protect public health and the environment. However experts have cautioned that these supposed exceptions/safeguards have not prevented ISDS claims in other trade agreements (Tienhaara and McGee, 2014).

5. The tide is turning: There is a growing movement against ISDS

Several countries are now recognising the risks associated with ISDS and there is a growing trend to review, terminate or renegotiate agreements containing ISDS mechanisms. India is reviewing its investment treaties (Khor, 2014). Indonesia and South Africa have reportedly decided to terminate their bilateral investment treaties containing ISDS (Bland & Donnan, 2014; Khor, 2014).

In January 2014, amidst widespread public concern, the European Commission (2014a) announced its decision to publish a draft of the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP) followed by a 3-month consultation period. The public consultation was launched on 27 March 2014 (European Commission, 2014b).

Conclusion

PHAA is strongly opposed to the inclusion of ISDS in Australia's trade and investment agreements and supports the Trade and Foreign Investment (Protecting the Public Interest) Act 2014.

PHAA appreciates the opportunity to make this submission to the Committee and would be happy to elaborate on the views expressed at a future public hearing.

Please do not hesitate to contact me should you require additional information or have any queries in relation to this submission.



Michael Moore BA, Dip Ed, MPH
Chief Executive Officer
Public Health Association of Australia

11 April 2014

References

- Bland, B and Donnan, S, (2014). Indonesia to terminate more than 60 bilateral investment treaties. *Financial Times*, March 27.
- Eberhardt, P. and Olivet, C. (2012) Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom. Brussels: Corporate Europe Observatory and the Transnational institute. <http://corporateeurope.org/trade/2012/11/profitting-injustice>
- European Commission (2014a). Press Release: Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement. Brussels, 21 January. http://europa.eu/rapid/press-release_IP-14-56_en.htm
- European Commission (2014a). Press Release: European Commission launches public online consultation on investor protection in TTIP. Brussels, 27 March. http://europa.eu/rapid/press-release_IP-14-292_en.htm
- Gleeson, D.H., Tienhaara, K.S. and Faunce, T.A. (2012) Challenges to Australia's national health policy from trade and investment agreements. *MJA*, 196: 1-3.
- Hirono, K., Gleeson, D., Haigh, F, Harris, P. (2014) The Trans Pacific Partnership Agreement Negotiations and the Health of Australians: A Policy Brief. Centre for Health Equity Training, Research and Evaluation, Centre for Primary Health Care and Equity, UNSW Australia. <http://www.phaa.net.au/documents/140217%20TPP-policy%20brief%20FINAL.pdf>
- International Institute for Sustainable Development (2007). A Parliamentarian's Guide to International Investment Agreements and their Implications for Domestic Policy-Making. Winnipeg: IISD.
- Khor, M. (2014). Investor treaties in trouble. Third World Network. <http://www.twinside.org.sg/twnf/2014/4069.htm>
- OECD (2012). Investor-State Dispute Settlement. Public Consultation: 16 May-23 July 2012, p. 18 <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>
- Thow, A. M. and McGrady, B. (2014). Protecting policy space for public health nutrition in an era of international investment agreements, *Bulletin of the World Health Organization* 2014;92:139–145 doi: <http://dx.doi.org/10.2471/BLT.13.120543>
- Tienhaara, K. (2010). Investor-State Dispute Settlement in the Trans Pacific Partnership Agreement. Submission to the Department of Foreign Affairs and Trade, 19 May 2010. https://www.dfat.gov.au/fta/tpp/subs/tpp_sub_tienhaara_100519.pdf
- Tienhaara, K. and McGee, J. (2014). Benefits and risks in South Korea trade deal. *The Canberra Times*, 19th February 2014.
- Williams, J. (2013). El Salvador fights Aussie mine takeover. *New Matilda*, December 2013. <https://newmatilda.com/2013/12/11/el-salvador-fights-aussie-mine-takeover>