Report 183

Aspects of the Peru-Australia Free Trade Agreement Revisited

Joint Standing Committee on Treaties

November 2018
CANBERRA
Executive Summary

On 23 October 2018 the Minister for Trade, Tourism and Investment, Senator the Hon Simon Birmingham, wrote to the Joint Standing Committee on Treaties’ (JSCOT) referring the Peru—Australia Free Trade Agreement (PAFTA) to the Committee for a second inquiry.

The Minister informed the Committee that following the passage of the enabling legislation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), the Australian Labor Party (ALP) was seeking further investigation into PAFTA in order to satisfy themselves on the merits of the agreement prior to consideration of the enabling legislation.

Although the Committee agreed in August 2018 that PAFTA be ratified, there were some aspects of the broader trade environment on which the ALP sought further information. The terms of reference for this inquiry therefore considered:

- 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 (ISDS) provisions in recently concluded trade agreements.

The Committee determined that the evidence received regarding the complexity caused by the proliferation of trade agreements and subsequent difficulties posed for users of those agreements is conflicting and inconclusive. This suggests that further work needs to be done in this area and that it cannot be dealt with either by investigation of a single treaty, or within the tight timeframe of this inquiry. The evidence from both sides of the argument deserves closer investigation.

With regard to the inclusion of ISDS mechanisms within trade agreements, the Committee acknowledges the long standing and ongoing concerns but understands that these provisions also provide protection for Australian businesses operating abroad. The Committee considers that, again, in light of the
continuing nature of this issue, a separate dedicated inquiry to enable a comprehensive investigation of the topic may be warranted.

However, overall the Committee acknowledges the gains and opportunities that PAFTA will provide for Australian businesses and exporters and notes the importance of early ratification. Therefore the Committee reiterates its recommendation that binding treaty action be taken.
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IPPA  Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, and Protocol

ISDS  investor-state dispute settlement

JSCOT  Joint Standing Committee on Treaties

MCA  Minerals Council of Australia

METS  Mining Equipment, Technology and Services

NFF  National Farmers’ Federation

NIA  National Interest Analysis

OBPR  Office of Best Practice Regulation

PAFTA  Peru—Australia Free Trade Agreement (Free Trade Agreement between Australia and the Republic of Peru)

RIS  Regulation Impact Statement

SMEs  small business enterprises

TPP  Trans-Pacific Partnership (Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam)

TPP-11  Trans-Pacific Partnership (Comprehensive and Progressive Agreement for Trans-Pacific Partnership)

UNCITRAL  United Nations Commission on International Trade Law

US  United States

WFA  Winemakers’ Federation of Australia

WTO  World Trade Organization
Members

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Mr Russell Broadbent MP

Deputy Chair

Hon Michael Danby MP

Members

Mr John Alexander OAM, MP

Senator Slade Brockman

Mr Chris Crewther MP

Senator Sarah Hanson-Young

Senator the Hon Kristina Keneally

Senator Kimberley Kitching

Senator the Hon Ian Macdonald

Mrs Nola Marino MP

Senator Jenny McAllister

Senator the Hon James McGrath

Ms Susan Templeman MP
Mr Ross Vasta MP
Mr Andrew Wallace MP
Mr Josh Wilson MP
Committee Secretariat

Ms Julia Morris, Committee Secretary
Dr Narelle McGlusky, Inquiry Secretary
Kevin Bodel, Senior Researcher
Ms Cathy Rouland, Office Manager
Terms of Reference

The Joint Standing Committee on Treaties adopted a reference from Minister Birmingham, Minister for Trade, to investigate aspects on the Peru-Australia Free Trade Agreement, with the Committee agreeing to report by 21 November 2018.

Noting its August 2018 report into PAFTA, the Committee will again consider:

- 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.
List of Recommendations

Recommendation 1

5.20 The Committee supports the Free Trade Agreement between Australia and the Republic of Peru (PAFTA) and recommends that binding treaty action be taken.
1. Introduction

Referral of the inquiry

1.1 The Minister for Trade, Tourism and Investment, Senator the Hon Simon Birmingham, wrote to the Joint Standing Committee on Treaties (JSCOT) on 23 October 2018 referring the Peru-Australia Free Trade Agreement (PAFTA) to the Committee for a second inquiry at the request of the Australian Labor Party (ALP).

1.2 The Minister informed the Committee that following the passage of the enabling legislation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP 11), the ALP was seeking further investigation into PAFTA in order to satisfy themselves on the merits of the agreement prior to consideration of the enabling legislation.

1.3 Although the Committee agreed in August 2018 that PAFTA be ratified, there were some aspects of the broader trade environment on which the ALP sought further inquiry. These issues include:

- Investor-State Dispute Settlement provisions; and
- concerns over the increasing complexity created by the number of trade agreements, particularly multiple agreements with the same partner.

1.4 Minister Birmingham, in the spirit of bipartisanship in which recent trade agreements have been negotiated, asked the Committee to support a short inquiry that would still enable the legislative deadline to be met for PAFTA.
Conduct and scope of the inquiry

1.5 The Committee acknowledges that many aspects of its earlier examination were considered in its earlier report and does not propose to revisit them in detail. Information from the first report is reproduced where relevant.

1.6 The Committee notes that the views of some stakeholders have progressed since the earlier inquiry and has sought to ensure that any changes are reflected in later evidence to this second inquiry.

1.7 The Committee adopted the inquiry on 25 October 2018. A media release announcing the inquiry was issued on 26 October 2018. Written submissions were invited by 2 November 2018.

1.8 Noting the narrow focus of the inquiry, the Committee held one public hearing in Melbourne on 8 November 2018 and invited participants identified as having a clear interest in the specific issues being considered. The transcript of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee’s website:


1.9 The Committee received 19 submissions which are listed in Appendix A. A list of witnesses who appeared at the public hearing is at Appendix B.

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1 Joint Standing Committee on Treaties (JSCOT), Report 180: Peru FTA; EU Framework Agreement; Timor Treaty-Maritime Boundaries; WIPO Australian Patent Office; Scientific Technical Cooperation: Italy and Brazil, Canberra, August 2018.
2. PAFTA

*Free Trade Agreement between Australia and the Republic of Peru*

2.1 This Chapter provides background information on the *Free Trade Agreement between Australia and the Republic of Peru* (PAFTA) with particular reference to those provisions under consideration by the Joint Standing Committee on Treaties (JSCOT).

2.2 PAFTA was signed in Canberra on 12 February 2018 and tabled in the Parliament on 26 March 2018. The Committee considered the treaty action and recommended ratification in its report tabled in the Parliament on 15 August 2018.¹

**Background**

2.3 The National Interest Analysis (NIA) emphasised the importance of the Peruvian market for Australian goods and service exporters. Peru’s GDP is comparable to that of Vietnam (US$189 and $US193 billion respectively), and it has been one of the fastest growing economies in Latin America over the last ten years. In 2016, two-way trade with Peru was worth $A590 million. PAFTA is expected to provide Australian businesses with an opportunity to expand and deepen engagement with Latin American

markets. Evidence received by the Committee during the original inquiry into PAFTA confirmed this assessment.

Current market status

2.4 According to the Regulation Impact Statement (RIS) Australia’s current trading relationship with Peru is governed by Peru’s obligations under the World Trade Organization (WTO) Agreement. Australia’s exports of beef, sheep meat, horticulture, wheat, barley, rice, canola, sugar and wine are effectively shut out of the Peruvian market because of high tariff barriers. Sugar, dairy, rice and corn are subject to Peru’s price band system, which can result in applied tariffs of up to 29 per cent. There are also tariffs of up to 11 per cent on beef, and up to 9 per cent on sheep meat, almonds, vegetables and wine.

2.5 The RIS notes that Peru’s market access commitments in relation to services are as agreed under the WTO GATS. These commitments do not include services in sectors of commercial interest to Australia, including telecommunications, financial services, professional services, energy and mining-related services, environmental services, construction services, and transport services.

2.6 The RIS considers that Australian investment is the most important feature in Australia’s commercial ties with Peru. Australia’s commercial presence in Peru has increased significantly with nearly 90 Australian companies now represented in Peru. The RIS estimates that Australian investment in Peru is around $5 billion. Australia is the fourth largest investor in Peru’s mining and energy sector. Australia’s investment relationship with Peru remains governed by a 1995 bilateral investment treaty. The RIS explains that, while this older treaty provides protections for Australian investors, it does not include the more effective, modern safeguards aimed at better protecting

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3 JSCOT, Report 180, pp. 6–8.


5 RIS, para 6.
Australia’s right to regulate in the public interest. Nor does it contain procedural safeguards regarding investor-state dispute settlement. The RIS claims that these safeguards provide greater legal certainty and reduce the risk of investors bringing claims against the government for regulations designed for legitimate public policy purposes.6

2.7 The RIS points out that a number of Australia’s competitors, including the United States (US), Canada, European Union (EU), and Singapore, have Free Trade Agreements (FTAs) with Peru. As a result Australian exporters face additional barriers including tariffs, restrictions on the sale of services, additional red tape, and barriers on temporary entry for business people. The RIS considers that this places Australian exporters of goods and services at a significant disadvantage to their competitors.7

2.8 For these reasons, the Australian Government considered that a bilateral FTA was justified.8 The RIS maintains that PAFTA provides unprecedented market access for Australian businesses and makes Australian exporters competitive in the Peruvian market.9

**Improvements under PAFTA**

2.9 Evidence to the Committee suggests that Australian businesses and exporters will significantly benefit from the implementation of PAFTA and that it will improve on the options available under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP 11). The Department of Foreign Affairs and Trade (DFAT) summarised the overall benefits:

In PAFTA, Peru has provided Australia with greater market access than it agreed to provide in the TPP-11. PAFTA provides for better treatment than the TPP-11 for goods covered by 1405 tariff lines. 93.5 per cent of Peru’s tariff lines will be eliminated to zero on entry into force, rising to 99.4 per cent of tariff lines within 10 years.10

2.10 The Department explained that there were a range of important benefits that were provided under PAFTA that were not available under the TPP-11:

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6 RIS, para 7.
7 RIS, para 8.
8 RIS, paragraphs 10–16.
9 RIS, para 9.
10 Department of Foreign Affairs and Trade (DFAT), Submission 19, p. 1.
Other benefits include outcomes that we were not able to achieve in TPP-11 at all, where there was no market access for a number of products. They include sugar, dairy, rice and sorghum, where there are no outcomes in the TPP-11 because the price band was not removed. There was improved market access for a range of agricultural commodities including wine, beef and almonds. And on the services side the major outcome that was not included in TPP-11 was the recognition of Australian university degrees, which the Peruvians agreed to do in PAFTA.\textsuperscript{11}

2.11 There was some question as to the value of the gains to Australian businesses as Peru is perceived as a ‘small marketplace’.\textsuperscript{12} However, individual industry sectors emphasised the importance to their members of even incremental gains. The National Farmers’ Federation (NFF) explained that increased market access provided choices for producers and increased industry resilience:

When you look at the Peru market in and of itself at the moment, some people might assess our trade with that country to be relatively small. For all our exporters the fact is: what maintains prices is the ability to go to the market where you’re going to get the best price and the best outcome, so having more markets with better market access outcomes increases your choice. It also increases your resilience, because where one market might close down for whatever reasons you have options to then move your exports to different markets. It’s easy for people to say this doesn’t mean a lot; actually it means a heap not only for maintaining high prices for agricultural products but also for building farmer resilience by enabling them to move product as the international market conditions change. It’s a bit hard to underestimate. We export two-thirds of what we produce. Without access to those markets, Australian farmers would absolutely struggle, and that’s an understatement.\textsuperscript{13}

2.12 This assessment was confirmed separately by specific sectors. The Australian Dairy Industry (ADI) referred the Committee to its submission to the previous inquiry into PAFTA and reiterated that the gains the industry will achieve under PAFTA will not be achieved under TPP-11:

The PAFTA reduces 99.4 per cent of the tariffs Australian exporters have previously faced with Peru. For the dairy industry, tariffs are eliminated on

\textsuperscript{11} Mr Andrew Jory, Assistant Secretary, Goods and Market Access Branch, Department of Foreign Affairs and Trade (DFAT), \textit{Committee Hansard}, Melbourne, 8 November 2018, p. 36.

\textsuperscript{12} Mr Bryan Clark, Director, International Trade and Affairs, Australian Chamber of Commerce and Industry (ACCI), \textit{Committee Hansard}, Melbourne, 8 November 2018, pp. 2 and 5.

\textsuperscript{13} Dr Prudence Gordon, General Manager, Trade and Economics, National Farmers’ Federation (NFF), \textit{Committee Hansard}, Melbourne, 8 November 2018, pp. 23–24.
7000 tonnes of product per annum, growing to 10,000 tonnes (capped amount) in year five. Based on current export volumes, this provides Australia with significant export growth potential.\textsuperscript{14}

2.13 Likewise, the Australian red meat and livestock industry drew the Committee’s attention to, not only the quicker tariff phase-out that the industry will receive under PAFTA compared to the TPP-11, but the ‘distinct competitive advantage compared to other TPP-11 member countries’ that it provides.\textsuperscript{15}

2.14 The Winemakers’ Federation of Australia (WFA) also sees Peru as a growing market and an opportunity to diversify their export markets:

PAFTA is a good agreement for the wine sector. Immediate elimination of duties across lines of commercial interest to Australia with the remainder being phased out over 5 years (up to 9 per cent) provides an opportunity for exporters.\textsuperscript{16}

2.15 The Group of Eight (Go8) explained that the Agreement will open up important opportunities for the Australian international education industry that will not be available under TPP-11:

Current Peruvian law only permits recognition of foreign degrees with countries with which a bilateral agreement is in place. Due to its nature as a multilateral agreement, the TPP-11 will not meet this criterion. Therefore, unless the PAFTA comes into force, the Peruvian government cannot recognise any degrees issued by an Australian university. This significantly reduces the attractiveness of Australian offerings to foreign students, since any qualification gained in Australia will not advantage them once they return to their home country.\textsuperscript{17}

2.16 The competitive edge that PAFTA will provide was also highlighted by AUSTMINE, the leading industry body for the Australian Mining Equipment, Technology and Services (METS) Sector. With $52 billion in proposed projects expected to be developed over the next 10 years, the Peruvian market provides significant opportunities for the Australian METS sector:

\begin{flushleft}
\textsuperscript{14} Australian Diary Industry (ADI), Submission 6.
\textsuperscript{15} Australian Red Meat and Livestock Industry, Submission 11.
\textsuperscript{16} Winemakers’ Federation of Australia (WFA), Submission 1, p. 2.
\textsuperscript{17} Group of Eight (Go8), Submission 3, p. [2].
\end{flushleft}
We have over 60 members who do business in Peru. This includes those who export there and have established offices. PAFTA would help to increase our METS companies’ competitiveness in the market, which would lead to increased exports and employment in Australia.18

2.17 Confirming the benefits to the Australian mining sector of PAFTA, the Minerals Council of Australia (MCA) noted that specialised mining equipment, technology and materials dominate Australia’s top exports to Peru:

Seven out of Australia’s top eight biggest merchandise exports to Peru in 2017 were METS or mining commodities: prepared additives for minerals ($14.7 million), iron and steel bars and rods ($8.5 million), measuring and analysing instruments ($7.0 million), civil engineering equipment and parts ($3.8 million), mechanical handling equipment and parts ($3.8 million), specialised machinery and parts ($2.8 million) and aluminium ($2.2 million).19

2.18 Submitters acknowledged that commercial activity between Australia and Peru is growing. The Australia Peru Chamber of Commerce noted that:

... Australia’s commercial presence in Peru has increased significantly with nearly 90 Australian companies currently present in Peru and an estimated Australian investment of around $5 billion …20

Ratification

2.19 Submitters urged the Australian Government to ratify and implement PAFTA as soon as possible in order to enable Australian businesses to secure the market access and competitive advantage that it will provide.21 Implementation before the end of 2018 would allow a second round of tariff cuts to occur on 1 January 2019, improving the position of Australian businesses in the Peruvian market.22 Although recognising the benefits of the TPP-11, submitters expressed concern that it will take longer for Peru to complete its domestic processes to bring it into effect than it will for PAFTA.

18 AUSTMINE, Submission 12.
19 Minerals Council of Australia (MCA), Submission 15, p. 6.
20 Australia Peru Chamber of Commerce Inc., Submission 9, p. [2].
21 ADI, Submission 6; AUSTMINE, Submission 12; National Farmers’ Federation (NFF), Submission 17, p. [1]; Business Council of Australia (BCA), Submission 18, p. 3.
22 ADI, Submission 6.
DFAT clarified the internal procedures that Peru will have to undertake to ratify the two agreements:

… PAFTA can be brought into force through executive action, and we understand from Peru that could be done very quickly. We understand that TPP-11 requires going through their parliament, which would not be possible to do by the end of this year and they’re not going to be one of the first who enters into force in the TPP-11.\textsuperscript{23}

\textsuperscript{23} Mr Jory, DFAT, \textit{Committee Hansard}, Melbourne, 8 November 2018, p. 44.
3. Proliferation of trade agreements

3.1 This Chapter considers the issue of the proliferation of trade agreements, particularly multiple agreements with the same partner.

3.2 The perceived benefits of these arrangements are discussed before considering the complexity of multiple agreements and the challenges this may present for businesses. The Committee then examines the assistance available for businesses to address these issues and finally looks at the possibility of using side letters to retain the benefits of PAFTA within the TPP-11 or a future trade agreement.

Multiple trade agreements

3.3 Australia currently has multiple free trade agreements (FTAs) with five countries: Chile, Malaysia, New Zealand, Thailand and Singapore. According to the Department of Foreign Affairs and Trade (DFAT), when the TPP-11 enters into force on 30 December 2018 it will increase Australia’s FTA arrangements with New Zealand to three, Singapore to three and Japan to two. Bilateral FTA negotiations with Japan took place alongside TPP and Regional Comprehensive Economic Partnership (RCEP) negotiations. DFAT further notes that every Australian FTA partner also provides access opportunities under the WTO approach.¹

3.4 Submitters to the inquiry acknowledge that the preference is for multilateral trade agreements.² Nevertheless they recognise that the difficulties encountered attempting to negotiate such agreements has hampered the

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¹ Department of Foreign Affairs and Trade (DFAT), Submission 19, p. 3.

² Winemakers’ Federation of Australia (WFA), Submission 1, p. 4; National Farmers’ Federation (NFF), Submission 17, p. [2].
progress of trade liberalisation and that alternatives must be found. The National Farmers’ Federation (NFF) told the Committee that, although preferring one set of trade rules, they accept the need for multiple FTAs to ensure market access for their members:

Considering that [one set of trade rules] has been impossible to achieve except to the extent that we already have under the World Trade Organization agreement, the FTAs that the Australian government’s been able to negotiate have significantly improved the market access that Australian agricultural exporters have been able to achieve, and the fact that additional FTAs have built on both the outcomes of existing FTAs and the multilateral outcomes—WTO outcomes—we think is far more preferable than not being able to achieve a single set of rules.\(^3\)

3.5 The Winemakers’ Federation of Australia (WFA) likewise endorses the necessity of negotiating multiple trade agreements to secure market access:

Unfortunately, for a number of well documented reasons the [World Trade Organization (WTO)] has been hamstrung in the pursuit of multilateral reform. However, our reliance on exports mean that [Winemakers’ Federation of Australia (WFA)] is a strong supporter of free trade. In the absence of an effective negotiating platform for multilateral negotiations through the WTO, Free Trade Agreements provide an effective mechanism to liberalise trade.\(^4\)

3.6 In the case of Peru, Australia and Peru have negotiated the bilateral Peru Australia Free Trade Agreement (PAFTA) and are both parties to the plurilateral *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP 11). The plurilateral *Pacific Alliance Free Trade Agreement* is also currently under negotiation between Australia, Chile, Mexico and Peru.

3.7 DFAT defended the need for multiple agreements with the same trading partner, explaining that often better market access can be obtained through a bilateral rather than a regional or plurilateral agreement.\(^5\) In the case of Peru this was confirmed by the Australia Peru Chamber of Commerce Inc.:

PAFTA gives access to Australian businesses to sensitive agricultural Peruvian products as dairy, grains and sugar, something that didn’t happen in the

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\(^3\) Dr Prudence Gordon, General Manger, Trade and Economics, National Farmers’ Federation (NFF), *Committee Hansard*, Melbourne, 8 November 2018, p. 22.

\(^4\) WFA, *Submission 1*, p. 4.

CPTPP as understandably Peru was not able to give access to those products in a multilateral arena.⁶

3.8 The Export Council of Australia (ECA) sees distinct advantages to bilateral trade agreements:

Firstly, bilateral communications move more quickly than plurilateral ones ... Secondly, bilateral FTAs are generally broader: they provide more favourable preferential tariffs or additional market access to services. This is for some products and services in particular, but by no means all of them. They also cover a broader range of areas, such as trade facilitation, digital trade, standards alignment and mobile phone arrangements ... They really go beyond traditional trade agreements to much more closely align the economies. Thirdly, bilateral FTAs provide a framework and impetus for bilateral cooperation, regular reviews, updates and things like that, and they can be updated much more quickly and easily. Lastly, bilateral FTAs are an insurance policy in the event that a partner were to withdraw from a plurilateral agreement.⁷

Benefits

Market access

3.9 Submitters stressed the benefits provided by multiple trade agreements with the same partner, reiterating the argument that multiple agreements often provide better market access. The Minerals Council of Australia (MCA) provided two examples:

For example, the FTA that Australia is currently finalising with Indonesia goes much further than the ASEAN-Australia-New Zealand FTA on issues such as investment and reducing behind-the-border issues related to the trade in services. Similarly, the TPP-11 offers greater tariff reductions for Australian agriculture exports to Japan compared to the Japan-Australia Economic Partnership Agreement.⁸

3.10 The National Farmers’ Federation (NFF) also noted the improvements obtained for Australian agricultural products under the TPP-11 compared to

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⁶ Australia Peru Chamber of Commerce Inc. (APCCI), Submission 9, p. [2].
⁷ Mr Heath Baker, Head of Policy, Export Council of Australia (ECA), Committee Hansard, Melbourne, 8 November 2018, p. 9.
⁸ Minerals Council of Australia (MCA), Submission 15, p. 12.
the Japan-Australia Economic Partnership Agreement, as did the red meat and livestock industry.\(^9\)

3.11 Specifically in the case of Peru, submitters maintain that market access has been significantly improved through PAFTA compared to TPP-11. DFAT summarised the improved market access benefits provided by PAFTA:

If you look at what we were able to achieve in PAFTA versus the TPP-11, there were 1,405 tariff lines where there was better market access treatment in PAFTA compared with TPP-11. The majority of those products were industrial products, including machinery; paper and paperboard; retail medicines; plastics; and wood products.\(^10\)

3.12 The NFF explained that for agricultural products the improvements may appear incremental but have ongoing, lasting benefits:

The critical thing we got in PAFTA which we didn’t get in TPP-11 was removal of the price bands\(^11\)… only the US has been able to achieve that competitive footing in Peru as well. Our competitive position puts us on another level altogether in getting products into Peru. There are the amazing outcomes—sugar: initially 30,000 tonnes but increasing to 90,000 tonnes over a period of 18 years—but … all of these incremental increases increase the competitiveness of our agricultural exports, increase opportunities to achieve maximum farmgate profits or returns or returns and increase the flexibility that farmers have to move their product to the most profitable markets.\(^12\)

Choice

3.13 Submitters maintain that multiple trade agreements with the same partner provide Australian businesses and exporters with choices. DFAT explained that providing choice for Australian businesses is one of the drivers of the negotiating process:

When we negotiate these treaties we negotiate them so that traders can make a choice of which agreement they want to use. The agreements are designed so that a trader can choose: ‘I want to use the rule of origin in this particular agreement,’ or, ‘I want to use a different rule of origin in another agreement.’

\(^9\) NFF, Submission 17, p. [1]; Red Meat and Livestock Industry, Submission 11.

\(^10\) Mr Andrew Jory, Assistant Secretary, Goods and Market Access Branch, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Melbourne, 8 November 2018, p. 36.

\(^11\) Price band products attract an additional variable tariff of up to 20 per cent. (DFAT, Submission 19, p. 2.)

\(^12\) Dr Gordon, NFF, Committee Hansard, Melbourne, 8 November 2018, p. 24.
They have the choice, and they need to make that choice based on the market access that is available and the rule of origin and how they would meet that rule of origin.\textsuperscript{13}

3.14 The Business Council of Australia (BCA) argue that choice provides ‘additional flexibility’ to Australian traders:

Should they wish to avail themselves of the benefits available under PAFTA, they will be able to do so by identifying the applicable preferential rates of tariff and requirements for meeting rules-of-origin (ROO).\textsuperscript{14}

3.15 The NFF also highlights the flexibility provided to agricultural producers by multiple agreements:

The NFF does not believe multiple trade agreements, including multiple agreements with the same trade partner, present any significant difficulties for Australian agricultural exporters. This view is based on the flexibility agricultural exporters have to choose the trade agreement that provides them with the best trade conditions and market access.\textsuperscript{15}

3.16 The red meat and livestock industry also note the advantage for their members of selecting which agreement best suits their needs:

With TPP-11 sitting alongside PAFTA, Australian beef exporters servicing Peru will have the choice of using the tariff schedule under either agreement.\textsuperscript{16}

**Complexity**

3.17 Submitters are concerned that the increasing complexity created by the proliferation of trade agreements, particularly with the same partner, is deterring Australian businesses from taking full advantage of the opportunities provided by these agreements. The Australian Chamber of Commerce and Industry (ACCI) have reiterated these concerns to the Committee over many years and quote external research and analysis to support their argument:

The Australian Chamber of Commerce and Industry has repeatedly warned of the aggregate complexity associated with negotiation of multiple agreements that cover the same market. Our call has been supported and economically

\textsuperscript{13} Mr Jory, DFAT, *Committee Hansard*, Melbourne, 8 November 2018, p. 36.

\textsuperscript{14} Business Council of Australia (BCA), *Submission 18*, p. 1.

\textsuperscript{15} NFF, *Submission 17*, p. [1].

\textsuperscript{16} Red Meat and Livestock Industry, *Submission 11*. 
analysed by the Productivity Commission, along with academics from the ANU who agree that the increasing complexity of overlapping trade agreements is detrimental to our trade liberalising efforts.\textsuperscript{17}

3.18 ACCI represents more than 80 state chambers of commerce and national industry associations who in turn represent over 300,000 businesses across Australia.\textsuperscript{18} ACCI draws on evidence from member surveys to support their arguments on the aggregate complexity of trade are backed up by our member surveys which ‘confirm that, in general, businesses do not understand trade agreements, nor how to access their benefits’.\textsuperscript{19}

3.19 This assessment is supported by submitters from a range of sectors. The Australian Fair Trade and Investment Network (AFTINET) highlight that the resources required to decipher multiple agreements can discourage the use of trade agreements:

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.\textsuperscript{20}

3.20 The Australian Council of Trade Unions (ACTU) argue that implementing three trade agreements with Peru is ‘clearly unsustainable and does not add to the wealth of the nation’.\textsuperscript{21} They too link the complexity of a proliferation of agreements with underutilisation, observing that ‘[R]esearch has shown that fewer than one in 5 Australian exporters use FTAs, due to the sheer complexity of the agreement’.\textsuperscript{22}

3.21 Referring specifically to Peru, the ACTU supported the ACCI findings:

These overlapping agreements between the same partners present problems for both exporters and other organisations in trying to understand and utilise the agreements. We also note that some business groups, like ACCI, have also recognised this complexity in the number of trade agreements, particularly

\textsuperscript{17} Australian Chamber of Commerce and Industry (ACCI), Submission 16, pp. 1–2.
\textsuperscript{18} Mr Bryan Clark, Director, International Trade and Affairs, Australian Chamber of Commerce and Industry (ACCI), Committee Hansard, Melbourne, 8 November 2018, p. 1.
\textsuperscript{19} ACCI, Submission 16, p. 2.
\textsuperscript{20} Australian Fair Trade and Investment Network (AFTINET), Submission 8, p. 3.
\textsuperscript{21} Australian Council of Trade Unions (ACTU), Submission 13, p. 1.
\textsuperscript{22} ACTU, Submission 13, p. 1.
multiple agreements with the same partner. In our view, PAFTA adds unnecessarily to the confusing noodle bowl of overlapping agreements and should not be ratified.23

3.22 In contrast, many submitters denied that the proliferation of multiple trade agreements, even with the same partner, is causing difficulties for Australian businesses and exporters. The BCA point out that these agreements do not ‘impose complexity on Australian traders’ as individual businesses can continue to trade under existing arrangements and suggests that the ‘claims about the complexity of over-lapping agreements are exaggerated’.24

3.23 It was confirmed in DFAT’s evidence to the Committee that in respect of the labour market testing required under PAFTA for contractual service providers seeking access for temporary foreign labour, this requirement could be avoided by using the matching provisions available under the CPTPP, for which no labour market testing is required. This is an example of the choice created by multiple overlapping agreements.

3.24 The NFF also considered the level of complexity overstated and reported that the issue of multiple FTAs has not caused concern for their members:

The fact that farmers can choose the FTA under which they get the best access and the fact that there are multiple FTAs have not caused any significant issues for agricultural exporters.25

3.25 Asked if the proliferation of trade agreements with one partner made it difficult for small business enterprises (SMEs) to choose the one that would best suit their requirements, the ECA maintained that it would not add to the complexity:

I don’t think it’s tremendously more complex. The majority of the complexity comes with using an FTA at all. On using one FTA versus many FTAs, the additional complexity of many FTAs is a lot less than the threshold complexity of using an FTA.26

3.26 The MCA also refute the claims:

23 Mr Damian Kyloh, Associate Director, Economic and Social Policy, Australian Council of Trade Unions (ACTU), Committee Hansard, Melbourne, 8 November 2018, p. 27.
24 BCA, Submission 18, p. 1.
25 Dr Gordon, NFF, Committee Hansard, Melbourne, 8 November 2018, pp. 22 and 25.
26 Mr Baker, ECA, Committee Hansard, Melbourne, 8 November 2018, p. 14.
There has also been some criticism about the so-called ‘noodle bowl’ effect of a large number of FTAs creating confusion for Australian exporters. However, the MCA disagrees with claims that additional FTAs makes it more complex and imposes additional red-tape and costs on Australian exporters.27

3.27 With regard to the choice between PAFTA and TPP-11, the red meat and livestock industry suggest that for Australian beef exporters it ‘will not be complex—as the benefits of utilising PAFTA are obvious’.28

Assistance for Australian businesses

3.28 The Committee heard that there is considerable assistance available for those businesses seeking to access FTAs. DFAT explained the range of assistance that it provides including extensive outreach through FTA roadshows, the establishment of an FTA Portal, and regular consultation with businesses.29 The FTA Portal was singled out by witnesses as being particularly useful. DFAT told the Committee that the Portal has ‘attracted over 210,000 unique users since its launch in 2015 and is attracting 2,600 users each week’.30

3.29 The MCA has received positive feedback from a number of its members claiming that the Portal is an ‘effective and simple to use mechanism’.31 The NFF reports a similar experience of the Portal:

… [our commodity group members] have told me that the FTA portal has been brilliant in terms of them being able to easily access information on the different conditions under different FTAs and for them to then help their exporters to decide which FTA is most preferable for them to export under.32

3.30 The ECA promote the use of DFAT’s ‘excellent’ FTA Portal to their clients and explained that, in their opinion, it is simple and effective.33 However, the ECA cautioned that FTAs were only a small segment of the export process and not the focus of its training:

27 MCA, Submission 15, p. 12.
29 DFAT, Submission 19, p. 4.
30 DFAT, Submission 19, p. 4.
31 MCA, Submission 15, p. 12.
32 Dr Gordon, NFF, Committee Hansard, Melbourne, 8 November 2018, p. 23.
33 Mr Baker, ECA, Committee Hansard, Melbourne, 8 November 2018, pp. 9 and 12.
... when we work with either businesses that are new to exporting or new people within an exporting business, we would spend quite a lot of the time on the documentation side of things, and that’s Australian Customs requirements, agriculture department requirements, requirements to get products into other countries and certificates of origin, and FTAs would only be a subset of that ... It is a very complex process.34

Side letters

3.31 Submitters concerned by the effect of the proliferation of trade agreements with Peru in particular proposed that the gains for Australian businesses gained through PAFTA could perhaps be secured in a side letter either to the TPP-11 or to the future Pacific Alliance FTA. The ACCI noted the use of side letters in the TPP-11 negotiated on a bilateral basis between parties and suggested a similar arrangement for Australia and Peru:

... we would also encourage the terms of the existing PAFTA be taken forward and included in a prospective Pacific Alliance agreement. In the event that Columbia and Chile do not accept these terms and the conditions of the CPTPP (which Peru and Mexico have already done), then again we would think that a bilateral side letter between Peru and Australia could be used to capture the additional benefits offered by PAFTA. This will result in PAFTA being redundant.35

3.32 The Committee explored this idea during the public hearing. Mr Bryan Clark the Director of International Trade and Affairs at the ACCI expanded on their proposal, noting that other trade agreements have been renegotiated and amended from time to time, and asking if side letters may provide a viable option to address the concerns over PAFTA and TPP-11:

Where we have looked at it in the past, it’s certainly apparent that countries can offer terms which are greater than those which are in their agreements to parties either bilaterally or collectively within those regional agreements. With the advent of the CPTPP … it contains a number of side letters, and that mechanism has been used in other agreements as well. We’ve wondered whether we really need another bilateral agreement. Could we bring these terms inside that using that mechanism?36

34 Mr Baker, ECA, Committee Hansard, Melbourne, 8 November 2018, p. 12.
35 ACCI, Submission 16, pp. 2 and 3.
36 Mr Clark, ACCI, Committee Hansard, Melbourne, 8 November 2018, p. 2.
3.33 The ACCI acknowledged that it could be difficult to implement such an option but that it would be worth ‘having those discussions with Peru’.  

3.34 Asked to elaborate on what information could possibly be included in the side letters Mr Clark suggested that the mechanism could be used for a variety of purposes:

If we consider the CPTPP side letters, they cover a range of topics depending on which country is involved. Australia is not a signatory to all of the side letters. There are a number of bilaterals that are in there. Australia has a number of its own. Some of them include some labour issues. There are a range of things included in the side letters. It would seem to us that the side letters offer a very wide range of opportunities for what you could include.

Where the benefits can be defined that are substantial between the Peru agreement bilateral and the CPTPP—those considerations you would bring back into the CPTPP side letter or, alternately, take forward into the negotiations for the Pacific Alliance.

3.35 AFTINET supported the proposal for side letters to be negotiated including the favourable market access provisions secured in PAFTA. AFTINET also noted the previous use of side letters, particularly with regard to the exclusion of investor-state dispute settlement (ISDS) clauses:

Australia and New Zealand have side letters in every agreement that they have that contains ISDS. Australia and New Zealand have a side letter which says that Australia and New Zealand will not apply ISDS provisions to each other. That exists in the ASEAN-Australia-New Zealand FTA, and it exists in the TPP-11 as well. New Zealand has negotiated in … a total of four side letters with other government in the TPP-11 that those governments and New Zealand will not apply ISDS to each other.

3.36 Concern was raised over the delay that such a procedure may cause to the ratification and implementation of PAFTA:

In terms of the avenue for achieving the market access outcomes, we are agnostic, as long as they are achieved and put in place as quickly as possible. My understanding of trade negotiations is that that would be difficult, and, if

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37 Mr Clark, ACCI, Committee Hansard, Melbourne, 8 November 2018, p. 2.
38 Mr Clark, ACCI, Committee Hansard, Melbourne, 8 November 2018, pp. 6–7.
39 Dr Patricia Ranald, Convener, Australian Fair Trade and Investment Network (AFTINET), Committee Hansard, Melbourne, 8 November 2018, p. 16.
40 Dr Ranald, AFTINET, Committee Hansard, Melbourne, 8 November 2018, p. 19.
that also requires reopening PAFTA and the TPP, I know that that can be a very difficult process and would likely lead to delay in terms of Australian farmers being able to access the better market access conditions under PAFTA. If that were the case … we would prefer not to delay ratification of PAFTA.\footnote{Dr Gordon, NFF, Committee Hansard, Melbourne, 8 November 2018, p. 23.}

3.37 The Committee asked DFAT if it was a realistic option to replace the gains secured under PAFTA with side letters in either the TPP-11 or a future plurilateral trade agreement with Peru. The Department cautioned that, although side letters are used regularly in such agreements, such a mechanism is limited and ‘cannot materially change the obligations that the parties have agreed to’.\footnote{Mr Jory, DFAT, Committee Hansard, Melbourne, 8 November 2018, p. 40.}

3.38 DFAT explained that the first consideration would be whether or not Peru was willing to agree to that course of action. Given the difference between the nature of a bilateral or a plurilateral agreement, concessions or conditions granted to Australia alone would have to be considered for 11 other countries. Mr Jory explained:

Peru was negotiating with us in the TPP-11 and they did not extend those market access benefits to us. If you look at the example of universities and degree recognition, Peru has only ever granted that recognition in bilateral agreements. They’ve done it for the United States and they’ve done it for the European Union. They did not recognise Canadian degrees in the TPP-11, they did not recognise New Zealand degrees in the TPP-11, they did not recognise Singaporean degrees in the TPP-11 and they did not recognise our degrees in the TPP-11, but they were willing to do that in a bilateral context.\footnote{Mr Jory, DFAT, Committee Hansard, Melbourne, 8 November 2018, p. 37.}

3.39 Mr Jory advised the Committee that the interaction between different sections of the agreement could also present difficulties, particularly tariffs and rules of origin:

If you are looking to take the tariff outcomes and the quota outcomes and put those into the TPP, the problem that we would foresee with that approach would be that it’s not just the tariff outcomes. When we negotiate a market access package, we negotiate a rule of origin to go with that particular tariff and they have to work together … when we negotiate PAFTA, it’s a different agreement to TPP. It’s a bilateral agreement between two countries … If you took those tariff outcomes and put them into the TPP, you would want new rules of origin to go with those tariff outcomes because the rules of origin in the TPP, for a lot of products, are about creating a good in the region. The test
for the rule of origin is whether this good was made amongst the 11 parties, as opposed to it being made amongst two parties. In some cases that wouldn’t make a difference, but in some cases it would mean that other exporters would be able to gain access to Australian preferences, because the test is: was this good made amongst 11 countries?\(^{44}\)

3.40 DFAT pointed out that the TPP-11 negotiations have closed and that reopening those talks to consider new rules of origin attached to the particular tariffs involved would require the agreement of other TPP parties.\(^ {45}\) In DFAT’s view this would inevitably lead to considerable delay in achieving and implementing the gains available in PAFTA, as Mr Jory explained:

> It is difficult to understate the degree of difficulty and complexity of bringing a market access package of the sort as we’ve just described that would be embedded in a bilateral set of rules of origin and bring that into an agreement that is based on regional rules of origin. Basically, that group of members have to look at that as a new negotiation. So it is difficult to understate the degree of technical and, to be fair and balanced about it, political complexity that would be entailed in a project of that nature.\(^ {46}\)

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44 Mr Jory, DFAT, *Committee Hansard*, Melbourne, 8 November 2018, p. 37.
45 Mr Jory, DFAT, *Committee Hansard*, Melbourne, 8 November 2018, p. 37.
46 Mr George Mina, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Melbourne, 8 November 2018, pp. 40–41.

4.1 This Chapter reviews the inclusion and operation of investor-state dispute settlement (ISDS) provisions in trade agreements generally with some specific reference to the provisions in the Peru-Australia Free Trade Agreement (PAFTA).

4.2 The Committee has regularly reviewed this topic in recent years and much of the information in this Chapter is taken from previous reports of the Committee.¹

4.3 The Chapter explains the ISDS mechanism, considers both the criticism of and support for these provisions before reviewing some proposed improvements and alternative mechanisms.

ISDS explained

4.4 ISDS an international arbitration procedure that is intended to be an impartial, law-based approach to resolving conflicts between countries and

foreign investors. These mechanisms provide a means for foreign investors to settle disputes with host governments through a third party outside of either country’s formal judicial system. ISDS provisions are designed to protect foreign investors from direct or indirect expropriation of their investments. Originally established to protect foreign investors in developing countries, ISDS clauses are now included in the majority of FTAs.

4.5 From a country’s point of view, an ISDS scheme offers a number of advantages:

- it provides a mechanism to resolve investment conflicts without creating country to country conflict;
- it protects a country’s citizens who invest abroad; and
- it provides foreign investors in a country with reassurance that the country will respect the rule of law in relation to their investments.

4.6 From a foreign investor’s point of view, ISDS is a more reliable mechanism for resolving disputes than the alternatives:

- taking action in the legal system of the host country, which may not have laws to permit such an action, or may give certain institutions immunity; or
- seeking the diplomatic assistance of the investor’s home country, which relies on the willingness of the home country to provide such assistance.

4.7 ISDS is now widespread and well established. The world’s first ISDS institution, the International Centre for Settlement of Investment Disputes (ICSID) was established in 1966. ICSID was established by an international
convention to which Australia is a signatory, and operates under the auspices of the World Bank.\(^7\)

4.8 ISDS provisions vary across the range of agreements in which they are contained, but there is a constant framework at the core of all ISDS schemes. To bring an ISDS case, a foreign investor must believe that an arbitrary or capricious action of the host Government has caused them to lose their investment.

4.9 ISDS cases are heard by a tribunal of three: one appointed by the investor, one appointed by the country, and a third agreed by both parties. The cases can be either public or private.

4.10 As explained to the Committee at its inquiry into the original Trans-Pacific Partnership Agreement (TPP), the role of the tribunal is to review the host Government’s actions to determine if those actions were arbitrary or capricious:

They are essentially conducting what has rightly been described in some ways as global administrative law. They are reviewing the process that led to the law being passed. They are reviewing matters such as whether the reasoning that informed the passage of the law was sufficiently conveyed to the public and the affected investors, whether it was arbitrary, whether it was capricious and whether it was disguised expropriation. Those are the points they are considering.\(^8\)

4.11 An ISDS tribunal cannot overturn domestic laws and regulations. The tribunal can only require an investor be compensated for the loss of the investment.\(^9\)

**Risks**

4.12 The risks identified and reiterated to the Committee by witnesses during their inquiries into trade agreements include:

- ‘regulatory chill’: governments may be hesitant to introduce regulations, particularly in the areas of environmental legislation or taxation, because these could be challenged and leave the government open to

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\(^7\) JSCOT, Report 165: Trans-Pacific Partnership Agreement, Canberra, November 2016, p. 49.

\(^8\) Dr Sam Luttrell, Committee Hansard, Perth, 5 October 2016, p. 13.

compensation claims. This is perceived as impinging on sovereignty and undermining democracy;

- rights of investors: foreign investors gain greater legal rights than domestic businesses by granting them access to third-party arbitration;
- compensation payments: foreign investors have been awarded large compensation payments running into billions of dollars; and
- international tribunals: the tribunals are made up of three corporate lawyers and usually hold closed hearings. The tribunal members are practicing advocates, not independent judges. There is no system of precedents and no appeal system.10

4.13 These issues were again raised during the current inquiry. The Australian Council of Trade Unions (ACTU) focused on the perceived undue influence that ISDS clauses may place on a government’s ability to legislate in the public interest:

For us, this part of trade agreements is probably the most threatening and the most dangerous, because we do believe that it threatens democracy and our sovereignty … ISDS provides corporations with disproportionate rights and power with this avenue to threaten and lodge claims for actual or potential harm resulting from local, state and federal government policy regulation. This results in an unacceptable expansion of the rights of corporate investors at the expense of democratic governments, as ISDS can be used to frustrate or block the democratic right of government to develop laws and policies across all government portfolios. ISDS constitutes a gross imbalance between private rights and the public interest, because claims lodged and a threat to lodge a claim by foreign corporations can result in what we call a chilling effect, which means people fear making future domestic policy promises.11

4.14 The Australian Fair Trade and Investment Network (AFTINET) restated its opposition to the inclusion of ISDS provisions in trade agreements generally and stressed that the United States (US) and the European Union (EU) are both currently retreating from the inclusion of ISDS clauses in their trade agreements:


11 Ms Andrea Maksimovic, Associate Director, International and Civil Society, Australian Council of Trade Unions (ACTU), Committee Hansard, Melbourne, 8 November 2018, p. 28. See also Electrical Trades Union of Australia (ETU), Submission 5, p. [2] and Australian Manufacturing Workers’ Union (AMWU), Submission 14.
There’s going to be no ISDS in the current Australia-EU free trade agreement which is being negotiated, because the European Court of Justice has found that ISDS is not compatible with EU law on national sovereignty, and we note that, in the recently revamped version of the of the American Free Trade Agreement, concluded between the US, Canada and Mexico, the US and Mexico have agreed to end ISDS provisions between themselves, and the provisions which will remain between the US and Mexico will only deal with the direct expropriation of assets; they will not enable companies to actually sue over domestic laws, which could include environmental, health or other public interest laws. We believe that both of those examples are evidence of concern about the impact of ISDS on the ability of governments to regulate in areas of public interest like health, the environment and even Indigenous land rights and others.  

### Support for ISDS

4.15 Despite these ongoing issues and growing community concerns, there is also considerable support for the inclusion of ISDS mechanisms in trade agreements. ITS Global summarised the perceived benefits of ISDS mechanisms for businesses:

- ISDS allows businesses to protect their investments in an FTA country without having to rely on domestic legal remedies or require their government to take action against the other government party. There is substantial precedent for ISDS being used to protect investment and minimise unreasonable sovereign risk;
- ISDS de-politicises the FTA dispute settlement process. An investor can have their claim determined by an independent arbitral tribunal. To action state-to-state dispute resolution measures under an FTA, the affected investor must first persuade its government to pursue a claim. This can be difficult for investors and investments which are politically less attractive to defend; and
- ISDS gives businesses some degree of confidence that a host state will be held accountable for breaches of its investment obligations and commitments. Without effective enforcement mechanisms, the rights granted by the FTA are less likely to be effective in promoting investment.

4.16 ISDS mechanisms are seen as providing protection for Australian businesses operating abroad from ‘arbitrary, opaque or unfair decisions by foreign

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12 Dr Patricia Ranald, Convenor, Australian Fair Trade and Investment Network (AFTINET), *Committee Hansard*, Melbourne, 8 November 2018, pp. 16–17.

13 ITS Global, *Submission 2*, p. [1].
governments’. In Peru, this is particularly relevant in the mining industry. Rio Tinto notes its strong support for the inclusion of an ISDS mechanism:

This mechanism helps us reduce the sovereign and political risks and protects us against expropriation. Having the right to access an international tribunal to resolve investment disputes protects high capital investment industries such as mining, from discrimination and instability.

4.17 The Minerals Council of Australia (MCA) echoed these sentiments, stressing the need to provide certainty for Australian investors operating abroad:

… ISDS provisions provide investment certainty for international investments. This makes Australia a more attractive destination for investors, as well as provide [sic] greater certainty for investment overseas which in the case of the minerals sector can be significant. It is important to ensure that foreign investors are broadly treated the same as domestic investors, subject to specific exceptions and carve outs. From the MCA’s perspective, this is crucial in ensuring greater certainty and stability for Australian investors abroad. This will help reduce the risk of protectionist investment measures, such as discrimination and expropriation and ensuring a minimum standard of treatment.

Improvements and safeguards

4.18 Dr Luke Nottage told the Committee that, contrary to previous arguments against the inclusion of ISDS mechanisms in trade agreements, recent evidence suggests positive outcomes from these provisions, including that:

- even qualified procedural rights for investors to bring direct action against host states for expropriation or other violation of substantive treaty commitments, in addition to the option of inter-state arbitration, has led historically to increased FDI on a world-wide basis;
- Australian investors now make good use of ISDS protections to recoup losses incurred by alleged treaty violations, notably by developing states;
- the risk of successful claims against Australia and hence supposed ‘regulatory chill’ should be minimal—as shown by the outcome of the Philip Morris claim (and the merits decision in its claim against Uruguay over

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14 Business Council of Australia (BCA), Submission 18, p. 2.
15 RioTinto, Submission 7.
16 Minerals Council of Australia (MCA), Submission 15, p. 10.
tobacco regulation) even under some old treaties without CPTPP-like elaborations, as well as the ambit claims recently by some US investors.\textsuperscript{17}

4.19 The difference between older ISDS provisions and current examples was highlighted by other submitters:

Compared to older provisions, the modern ISDS provisions of agreements like PAFTA, TPP-11 and the updated Singapore-Australia Free Trade Agreement include extensive safeguards and protections for public policies.

The Committee can be satisfied that the PAFTA ISDS provisions are state-of-the-art in terms of safeguards to protect public policy, to ensure investment disputes are resolved in a transparent, accountable and fair manner and to address community concerns over ISDS.\textsuperscript{18}

4.20 The Department of Foreign Affairs and Trade (DFAT) explained that an ISDS mechanism has existed between Australia and Peru for over 20 years pursuant to the Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, and Protocol (IPPA). Negotiating PAFTA and TPP-11 has provided an opportunity to update this older-style bilateral investment treaty. The IPPA will terminate upon entry into force of PAFTA, or upon entry into force of TPP-11, whichever happens first.\textsuperscript{19}

4.21 According to DFAT, although both agreements include improved safeguards, PAFTA contains additional safeguards to those available in TPP-11:

Both TPP-11 and PAFTA explicitly recognise that governments have an inherent right to regulate in the public interest, such as in relation to health and the environment. PAFTA also includes a broader safeguard on public health measures, as well as a general exceptions provision in relation to, amongst other things, animal or plant life or health, and the conservation of exhaustible natural resources. Like TPP-11, PAFTA also maintains Australia’s right to take measures for the protection of its essential security interests. Unlike the TPP-11, ISDS does not apply to the financial services chapter in PAFTA.\textsuperscript{20}

4.22 PAFTA also includes procedural safeguards to enhance the arbitration process, including:

\textsuperscript{17} Dr Luke Nottage, Submission 4, pp. 2–3.
\textsuperscript{18} MCA, Submission 15, p. 11.
\textsuperscript{19} Department of Foreign Affairs and Trade (DFAT), Submission 19, pp. 4–5.
\textsuperscript{20} DFAT, Submission 19, p. 5.
- a requirement that hearings will be open to the public;
- a requirement that documents filed in the arbitration, as well as the tribunal’s decision, will be made public;
- expedited review of claims that are baseless, or manifestly without legal merit; and
- rules preventing a claimant pursuing a claim in parallel proceedings, such as before an Australian court or other dispute settlement procedures.\(^{21}\)

4.23 Further, under PAFTA arbitrators are required to comply with rules on independence and impartiality, including on conflicts of interest.\(^{22}\)

4.24 AFTINET welcomes the inclusion of these safeguards but remains concerned that the safeguards are not consistent between PAFTA and the TPP-11, are in places ambiguous and open to interpretation and still contain legal loopholes.\(^{23}\) In particular, AFTINET questions the discrepancy regarding the treatment of tobacco between the two Agreements:

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.\(^{24}\)

4.25 Asked about this discrepancy, DFAT highlighted the difference between a bilateral and plurilateral agreement and assured the Committee that tobacco is covered by the broad public health carve-out in PAFTA:

The TPP-11 offers an excellent and very high standard of protection for the government in terms of the right to regulate. It contains safeguards that are not generally included in the earlier ISDS treaty … But in PAFTA we negotiated something that better reflected the views of Australia and Peru, whereas the TPP-11 better reflects the views of the 11 negotiating parties to

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\(^{21}\) DFAT, *Submission 19*, p. 5.

\(^{22}\) DFAT, *Submission 19*, p. 5.

\(^{23}\) Australian Fair Trade and Investment Network (AFTINET), *Submission 8*, p. 10.

\(^{24}\) AFTINET, *Submission 8*, p. 2.
that agreement. It was an opportunity to provide the safeguards you see in that particular agreement.25

Possible improvements

4.26 Support for the inclusion of ISDS mechanisms does not ignore the need for continuing improvement in implementation of the ISDS framework. Although Dr Nottage does not see any cause not to ratify PAFTA because of the inclusion of the ISDS provisions, he does suggest that those provisions could be further improved.26 He points out that there is already scope within PAFTA for these improvements to progress:

In particular, Australia can (and should) take an active role in developing a Code of Conduct for ISDS arbitrators, which must be done before the FTA comes into effect.27

4.27 Further:

Under Article 8.24.1 Australia shall ‘consider’ adding an appellate review mechanism ‘if’ such an institutional mechanism is developed elsewhere (eg through UNCITRAL multi-laterally, or regionally perhaps alongside the CPTPP). It should already commence negotiations with Peru about adding such a mechanism, but this can be agreed separately even after ratification of this FTA.28

4.28 Dr Nottage also suggests that Australia could follow the lead provided by New Zealand and ‘agree with Peru to make a separate joint declaration on how it views ISDS provisions. New Zealand has taken this action with two other states alongside the CPTPP.29

4.29 AFTINET drew the Committee’s attention to new models being implemented by India and the EU. The Indian model strengthens the right of government to regulate in the public interest:

25 Mr Andrew Jory, Assistant Secretary, Goods and Market Access branch, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Melbourne, 8 November 2018, p. 38.


27 Dr Luke Nottage, Submission 4, p. 2.


29 Dr Luke Nottage, Submission 4, p. 2.
For example, the definition of expropriation in the draft India [Bilateral Investment Treaty] does not contain the loophole ‘except in rare circumstances’ …

4.30 The Committee understands that the EU model has been incorporated into the Transatlantic Trade and Investment Partnership between the EU and the US:

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).

Alternatives

4.31 Submitters including AFTINET identified two alternatives to ISDS provisions being included in trade agreements. The first is the state-to-state dispute settlement mechanism included in these agreements which allow governments to act if they consider that an agreement has been breached:

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.

4.32 The second is for investors to be responsible for their own risk management insurance:

The alternative for foreign investors are to take out risk insurance themselves—if they believe they’re investing into a risky environment, they can take out risk insurance and cover those risks in those ways. That form of insurance doesn’t expose the government of the country to cases which could claim compensation for health, environment or other public interest laws.

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30 AFTINET, Submission 8, p. 12.
31 AFTINET, Submission 8, p. 12.
32 AFTINET, Submission 8, p. 4; Ms Maksimovic, ACTU, Committee Hansard, Melbourne, 8 November 2018, p. 28.
33 Dr Ranald, AFTINET, Committee Hansard, Melbourne, 8 November 2018, p. 18.
5. Committee comment

5.1 This is the second inquiry that the Joint Standing Committee on Treaties (JSCOT) has held into the Peru-Australia Free Trade Agreement (PAFTA). At the request of the Australian Labor Party, this inquiry examined two specific aspects of PAFTA – the number of trade agreements and the investor state dispute settlements (ISDS) provisions. Having reported as recently as August 2018, this Committee has found no evidence to warrant a change to its original recommendation that binding treaty action be taken.

Number of trade agreements

5.2 Australia is entering a growing number of trade agreements, and the number of agreements with one partner is increasing. It is important to note, however, that Australia has previously negotiated multiple free trade agreement pathways in order to achieve greater market access.

5.3 Australia has multiple existing agreements with Malaysia, New Zealand, Thailand and Singapore.

5.4 While there was discussion about the number of trade agreements with Australia’s trading partners, evidence shared also showed that this can produce benefits for exporters. The Export Council of Australia stated to the Committee:

Regarding the issue of multiple FTAs with one partner, that is something that we have taken a position on, and it is something that we do not consider to be a problem. I should say at the outset that I’m not aware of any of our members complaining about too much market access.¹

¹ Mr Heath Baker, Head of Policy, Export Council of Australia (ECA), Committee Hansard, Melbourne, 8 November 2018, p. 9.
5.5 The National Farmers Federation expressed a similar view:

Essentially, we don’t see any significant problem with there being multiple trade agreements. We say in the submission that our preference, of course, would be for one set of trade rules that apply to all countries in order to make it easier for our exporters to know the regulatory conditions and the market access conditions that they face in all markets.²

5.6 The PAFTA is a good example where an additional agreement has opened up more market access for Australian exporters. PAFTA was able to achieve market access gains for Australian exporters that exceed the TPP 11, because the TPP 11 is a plurilateral agreement of 11 parties representing interests of a diverse group of countries.

5.7 The DFAT submission provides a useful summary of the additional benefits of PAFTA, namely:

The TPP 11 eliminates 99.3% of tariffs over 16 years. Under PAFTA more than 99 per cent of tariffs will be eliminated in 5 years. PAFTA offers Australian exporters a significantly lower phasing period to access tariff eliminations...³

Peru provided significant new market access for Australia in PAFTA for four of its so called “price band” products (an additional variable tariff of up to 20 per cent). Australia will receive tariff-free and price band-free quotas on:

- Sugar: on entry into force of the agreement, Australia will have duty free access of 30,000 tonnes of sugar into Peru, growing to 60,000 tonnes in five years and 90,000 tonnes in 18 years;
- Dairy: on entry into force, Australia will have duty free access of 7,000 tonnes of dairy products into Peru, growing to 10,000 tonnes in five years;
- Rice: on entry into force, Australia will have duty free access of 9,000 tonnes of rice products into Peru, growing to 14,000 tonnes in five years;
- Sorghum: on entry into force, Australia will have duty free access of 15,000 tonnes of sorghum products into Peru, growing to 20,000 tonnes in five years.

The price band was not subject to reduction in the TPP-11 thereby effectively excluding trade. A comprehensive list of PAFTA market access outcomes that are better than TPP-11 outcomes is at Attachment A.⁴

² Dr Prudence Gordon, General Manager, Trade and Economics, National Farmers’ Federation (NFF), Committee Hansard, Melbourne, 8 November 2018, p. 22.
³ Department of Foreign Affairs and Trade (DFAT), Submission 19, p. 1.
5.8 Beyond goods market access, Peru has undertaken to recognise Australian university degrees following the ratification of PAFTA.

5.9 Throughout the public hearing, there was a lengthy discussion about whether these benefits would be incorporated into the TPP-11. In response to this DFAT noted that:

- it “would be difficult” to incorporate PAFTA into the TPP-11 through a side letter:

  The limits of a side letter are that it cannot materially change the obligations that the parties have agreed to.\(^5\)

5.10 and

- in the case of the additional market access Australia has negotiated with Peru in PAFTA:

  … the TPP-11 already has rules of origin for all of those products, and those rules of origin are for most cases regional rules of origin. So you would need to change those rules of origin either to protect Australia’s preference to make sure that the benefit was quarantined for Australia or to stop others getting it, which would mean, basically, we would need New Zealand’s agreement that they would allow us to have this better dairy access, which they don’t have.\(^6\)

5.11 While the Committee noted that it would be preferable to see multilateral trade treaties negotiated to ensure a harmonious set of trade rules that govern global trade, the reality of today’s trade environment makes this increasingly difficult. Therefore the Committee pragmatically accepts the need to negotiate plurilateral and bilateral agreements to ensure that market access is a priority. Australian businesses and exporters should be able to take full advantage of the demand for Australian products and expertise.

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\(^4\) DFAT, Submission 19, p. 2.

\(^5\) Mr Andrew Jory, Assistant Secretary, Goods and Market Access Branch, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Melbourne, 8 November 2018, p. 40.

\(^6\) Mr Jory, DFAT, Committee Hansard, Melbourne, 8 November 2018, p. 41.
Investor-state dispute settlement mechanisms

5.12 Australia and Peru have had an ISDS mechanism for over 20 years through the Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments and Protocol which entered into force on 2 February 1997.

5.13 The Committee acknowledges that the government includes ISDS on a case by case basis and there has never been a successful ISDS claim against Australia but that successful ISDS claims have been made by Australian investors overseas.

5.14 The Committee understands that ISDS provisions protect Australian businesses operating overseas, including in Peru.

5.15 The BCA submitted that:

Treaty-backed ISDS provisions provide an important avenue for Australian investors to seek remedy in the event of arbitrary, opaque or unfair decisions by foreign governments.7

5.16 The BCA further pointed out that:

….the existing IPPA will be terminated upon entry-into-force of PAFTA, and the old ISDS provisions replaced with updated provisions that include new limitations and safeguards on ISDS proceedings. For example, there are new provisions on the transparency of arbitral proceedings and safeguards on the right of both Australia and Peru to regulate for environment, health and other social policy objectives. These provisions are not part of the existing ISDS arrangements with Peru. It would be ironic, therefore, if opponents of ISDS sought to delay the ratification of PAFTA, as they would in effect be supporting the retention of older and less circumscribed ISDS arrangements.8

5.17 The Committee acknowledges that the ISDS mechanism in PAFTA includes the safeguards that are contained in the TPP-11 investment chapter, as well as additional safeguards, such as a broader safeguard on public health measures.

7 Business Council of Australia (BCA), Submission 18, p. 2.
8 BCA, Submission 18, p. 2.
Ratification of PAFTA

5.18 The Committee acknowledges the gains and opportunities that PAFTA will provide for Australian businesses and exporters and notes the importance of early ratification.

5.19 Therefore the Committee reiterates its previous recommendation that binding treaty action be taken.

Recommendation 1

5.20 The Committee supports the Free Trade Agreement between Australia and the Republic of Peru (PAFTA) and recommends that binding treaty action be taken.

Mr Russell Broadbent MP
Chair
20 November 2018
## A. Submissions

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B. Witnesses

Thursday, 8 November 2018

MELBOURNE

Australian Chamber of Commerce and Industry (ACCI)

Export Council of Australia - via teleconference

Australian Fair Trade and Investment Network (AFTINET) - via teleconference

National Farmers’ Federation - via teleconference

Australian Council of Trade Unions (ACTU)

Department of Foreign Affairs and Trade (DFAT)
As a matter of first principles, Labor Committee members point to the fact that Australian Labor has long supported fair and free trade.

As we expressed clearly in additional comments to Report 165 on the Trans-Pacific Partnership:

From the time of the Hawke-Keating government, Australia has looked to participate openly in the global market on the basis that fair and free trade is in our national interest – economically, socially, and geopolitically – and because it is supportive of developing nations in our region. Labor has pursued tariff reduction and the winding-back of non-tariff barriers, and we recognise that multilateral agreements are preferable to a ‘noodle bowl’ of bilateral arrangements.

According to a 2017 Report by The Centre for International Economics the careful and balanced liberalising trade reforms of the Hawke-Keating government have increased the average Australian household’s real income by $8448 per year.

At the same time, there are costs and impacts associated with trade agreements, and they can be analysed and negotiated with more or less rigour and quality. For that reason Labor has been clear in insisting upon the best process and the right substantial outcomes from the consideration and settlement of trade and
investment agreements. On that basis, Labor Committee Members have a number of serious concerns with the Peru-Australia Free Trade Agreement (PAFTA).

**The ‘noodle bowl’ problem**

It’s important at the outset to note the PAFTA was negotiated on a track that ran in parallel to the process that saw, first, the consideration of the Trans-Pacific Partnership (TPP); second, the apparent dissolution of the TPP following the election of President Donald Trump and the withdrawal from that agreement of the United States of America; and, finally, the subsequent revival of the TPP, absent the US, in the form of the Comprehensive Progressive Trans-Pacific Partnership (CPTPP).

Considering the fact that a key argument for the TPP/CPTPP was the consistency of arrangements delivered by a plurilateral agreement within our region, and the corresponding benefit of reducing the ‘noodle bowl’ effect of multiple and overlapping bilateral trade agreements, it is legitimate to ask why PAFTA continued to be negotiated once the CPTPP was back afoot. It is not entirely clear that some of the tariff and market access benefits in PAFTA could not have been incorporated through mechanisms that exist in the CPTPP.

We note that with the Pacific Alliance Free Trade Agreement (Pacific Alliance FTA) currently under negotiation, there could soon be three recently settled trade and investment agreements between Australia and Peru that among them contain overlapping inconsistencies.

At the public hearing for this second Inquiry into PAFTA, the Australian Chamber of Commerce and Industry (ACCI) expressed concern that the added complexity of having, potentially, four trade agreements between Australia and Peru could lead to perverse outcomes, and that such arrangements should be rationalised and harmonised.

> Four market entry arrangements for the same market seem excessive and lead us to consider how we would rationalise and harmonise these agreements.¹

In its submission to this Inquiry, the ACCI has argued that instead of proceeding with this agreement, the tariff and market access benefits should be incorporated in the CPTPP or perhaps in the forthcoming Pacific Alliance FTA framework.

While there are beneficial terms contained within PAFTA relative to CPTPP, particularly for the agricultural sector (notwithstanding the small volume of trade),

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¹ Mr Bryan Clark, Director, International Trade and Affairs, Australian Chamber of Commerce and Industry (ACCI), *Committee Hansard*, Melbourne, 8 November 2018, p. 1.
we believe the Government should have worked to incorporate these benefits into the CPTPP.

History has shown this risk is high and so we would also encourage the terms of the existing PAFTA be taken forward and included in a prospective Pacific Alliance agreement. In the event that Columbia and Chile do not accept these terms and the conditions of the CPTPP (which Peru and Mexico have already done), then again we would think that a bilateral side letter between Peru and Australia could be used to capture the additional benefits offered by PAFTA. This will result in PAFTA being redundant.²

Independent economic analysis and modelling

As was the case with the TPP and CPTPP, Labor Committee members are disappointed the government continues to negotiate trade agreements that contain provisions whose operation is outside the core purpose of achieving fair and free trade, especially when some of these provisions are not only extraneous, but risky or harmful to Australia’s interests.

Further, we reiterate the shortcomings previously identified in the process through which trade agreements are negotiated and determined, namely:

- The inadequacy of stakeholder engagement in the negotiation phase, and
- the absence of independent economic analysis or modelling, including analysis for specific consideration by this Committee.

Labor members of the Committee note that in the course of the 45th Parliament, the Joint Standing Committee on Treaties has recommended on several occasions that the Australian government introduce the practice of commissioning appropriate independent economic modelling as part of the process by which trade and investment agreements are considered (for example see Report 165: TPP, Report 172: Singapore FTA, and Report 179: PACER).

For example, in Report 165: Trans-Pacific Partnership, the following recommendation was made:

The Committee recommends that the Australian government consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Assessment (NIA) to improve assessment of the agreement.

² ACCI, Submission 16, p. 3.
As the need for this reform has been the consistent view of this Committee, Labor members again moved the inclusion of this recommendation, in the following terms:

**Recommendation 1**

The Committee recommends that the Australian government consider implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Assessment (NIA) to improve assessment of the agreement, and, further, that the projected benefits be subsequently assessed and reported on at appropriate intervals.

It is disappointing the Committee decided to depart from its consistent approach on this question by not supporting this recommendation.

On this issue, as we have previously pointed out, and in reinforcement of the merit of the recommendation, it is important to note that in *Blind Agreement: reforming Australia’s treaty-making process*, the June 2015 Report of the Foreign Affairs, Defence and Trade References Committee, stated:

> The Opposition favours incremental change building on the package of sensible reforms introduced by government in 1996. This is why the report makes practical recommendations aimed at improving the level of transparency in negotiating treaties and the quality of consultations between DFAT and stakeholders, and making parliament a real player in treaty-making.

Specifically, the report’s key recommendations are that JSCOT engage more in the oversight of trade agreements under negotiation and not wait until the end of the process; that parliamentarians and stakeholders be given access to treaty text on a confidential basis during negotiations and not a token look at the end as with the TPP; that trade agreements be subject to an independent cost-benefit analysis prepared up front at the commencement of negotiations.

It is salient to note that Labor has since committed to the following approach if elected to government:

- strengthening the role of the Parliament by briefing the Joint Standing Committee on Treaties at the end of each round of negotiations and providing it with the Government’s Statement of Objectives for Negotiation for consideration and feedback;
- legislating to establish a system of ‘Accredited Trade Advisors’ from industry, unions and civil society groups who would provide real time feedback on draft trade agreement text during negotiations;
- providing public updates on each round of negotiations and releasing draft texts during negotiations where this is feasible; and
- legislating to require an Independent National Interest Assessment to be conducted on every new trade agreement before it is signed to examine the economic, strategic, and social impact of any new trade agreement.

**Labour market concessions and labour deregulation through trade**

We know the CPTPP will undermine Australia’s temporary foreign labour visa system by failing to apply labour-market testing for ‘contractual service suppliers’ for six signatory countries. This will mean jobs in Australia will be able to be filled by workers from Canada, Peru, Brunei, Mexico, Malaysia and Vietnam without being offered to Australians first.

While PAFTA requires labour-market testing, evidence to the Inquiry was that Peruvian contractual service providers would be able to choose the more permissive option provided to Peruvian companies under the CPTPP.

That suggests the inclusion of a labour-market testing requirement in PAFTA is a hollow gesture, and begs the question of why the government would allow the removal of labour-market testing in the CPTPP in the first place.

It is worth highlighting that more than 650 professions are currently covered by the term ‘contractual service supplier’ and this includes electricians, plumbers, carpenters and nurses. No other country has provided Australia with such generous reciprocal visa rights and it is unclear why such concessions were offered up by this government, unless it is a lateral means of undermining existing pay and conditions.

While Labor members of the Committee acknowledge that foreign workers have an important role within the Australian economy, it is important that Australians are given the chance to work and that temporary foreign workers are brought into the country only once there is a demonstrated need. Our temporary foreign labour visa system is supposed to supplement the skills of the Australian workforce and bridge labour gaps on a temporary basis; it was never intended to obstruct Australians in search of work, nor to undermine safety and other workplace conditions.
Investor-state dispute settlement (ISDS)

It is particularly concerning that the proposed PAFTA includes an Investor-State Dispute Settlement (ISDS) mechanism, not least because it is different from the ISDS clause in the CPTPP, and in evidence provided by the Department of Foreign Affairs and Trade to the Committee it is clear that aggrieved corporations can choose from either version in seeking to bring an action against the Australian government. No good explanation has been given as to why there should be two such mechanisms, nor as to why they should coexist in different forms. Indeed, we say there is no good reason for ISDS mechanisms at all.

On that basis, Labor members of the Committee sought to have the following recommendation included in this Report, but were unsuccessful.

Recommendation 2

The Committee recommends the Australian government negotiate with the Peruvian Government to withdraw the proposed ISDS arrangements in the PAFTA as there is no clear benefit to such mechanisms, they bring well-established and serious risks, and in any case there is no justification for having a second and different ISDS mechanism between Australia and Peru.

On this issue Labor Committee members again draw attention to the Productivity Commission’s Bilateral and Regional Trade Agreements report (2010) which said the Australian government should “seek to avoid accepting provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system”.

It also stated:

There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows.

Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.3

Against this background, the Commission considers that Australia should seek to avoid accepting ISDS provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system. Nor, in the Commission’s assessment, is it advisable in trade negotiations for Australia to

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3 Productivity Commission, 2010, Bilateral and Regional Trade Agreements, p. xxxiv.
expend bargaining coin to seek such rights over foreign governments, as a means of managing investment risks inherent in investing in foreign countries. Other options are available to investors.\(^4\)

We further point to recent developments in relation to trade arrangements involving the European Union and, indeed, the Unites States, Mexico, and Canada, both of which look to remove ISDS mechanisms.

We note that in October, the Shadow Trade Minister introduced a Bill into the House of Representatives that will stop a future Australian government including an ISDS clause in any new trade and investment agreements. An identical bill was introduced by Senator Carr in the Senate and passed the Second Reading last week.

In his Second Reading Speech the Shadow Trade Minister said:

> If the current government were to sign a trade agreement between now and the next election that includes clauses that are prohibited in this legislation we wouldn’t support it in the Parliament before the election and if we win the next election we will go back and renegotiate that agreement to take out those clauses before bringing any enabling legislation before the Parliament.\(^5\)

We also note that Labor has asked the Government to approach the Peruvian Government in order to seek the removal of the ISDS clause from PAFTA. The New Zealand Labour Government was successful in the same course of action through the CPTPP negotiations, using an agreement by way of a side letter with the Peruvian Government that the ISDS clauses in the CPTPP would not apply with respect to their two countries.

Labor is pleased the Government is willing to work with the Peruvian Government to remove this clause, and this is an example of the positive outcomes that can be achieved through bipartisanship.

Needless to say, consideration of the implementing legislation should be postponed until these negotiations are completed and the relevant clause is removed.


\(^5\) Jason Clare MP, House of Representatives, 15 October 2018.
Hon Michael Danby MP

Mr Josh Wilson MP

Senator Jenny McAllister

Ms Susan Templeman MP

Senator Kitching

Senator the Hon Kristina Keneally
Dissenting Report

Senator Sarah Hanson-Young

Joint Standing Committee on Treaties
Report: Peru-Australia Free Trade Agreement
The Australian Greens

The Australian Greens do not support the passage of the implementing legislation for the Peru-Australia Free Trade Agreement (PAFTA). The Greens are troubled by key components of the PAFTA and its negotiation and assessment by the Australian Government. Concerns include;

- the ability for large multi-national corporations to sue Australian governments under Investor State Dispute Settlement (ISDS) provisions;
- a lack of enforceable commitments to key international environmental agreements;
- the absence of an independent evaluation of the costs and benefits of PAFTA to the economy as a whole; and
- the unnecessary addition of a second free-trade agreement with Peru who are signatory to the disastrous TPP.

This deal was negotiated to afford advantage to major, international corporations, not to help regular Australians. Australia’s trade negotiation needs a major overhaul and to be oriented toward transparency and the benefit of hard-working Australian’s not multinational corporations.
Recommendations

Recommendation 1:
That the Peru Australia Free Trade Agreement not be ratified.

Recommendation 2:
That the process for signing and ratifying trade deals and treaty agreements be radically overhauled to ensure genuine transparency and community consultation. The current system is opaque, outdated and no longer serves the public interest.

Recommendation 3:
A legislated ban on current and future Governments negotiating or signing any trade agreement or treaty that includes ISDS provisions.

Senator Sarah Hanson-Young
Greens Senator for South Australia