Report 188

Investments Uruguay, ISDS UN Convention and Convention
SKAO

Joint Standing Committee on Treaties
Executive summary

This Report contains the Committee’s review of the following treaty actions:

- Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (Canberra, 5 April 2019);
- United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 10 December 2014); and
- Convention establishing the Square Kilometre Array Observatory (Rome, 12 March 2019).

Australia’s approach to investment treaties has evolved over time. To reflect these changes, the government has undertaken reform including updating older style treaties so that they align with Australia’s modern investment treaty practices. The Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments is part of these efforts. The Agreement replaces a ‘broadly drafted’ 2002 bilateral investment treaty. Updated provisions include explicit procedural and substantive safeguards for investor-state dispute settlement (ISDS).

The need for greater transparency in relation to ISDS proceedings has been a longstanding matter of public concern. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Convention) will enhance transparency and public accessibility to ISDS arbitrations by allowing for the existing UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to apply to a wider pool of investment treaties.

The Rules on Transparency currently apply to ISDS arbitrations initiated under investment treaties concluded from 1 April 2014. They provide for increased transparency such as the publication of case related information and for arbitration tribunal hearings to be made public, noting that these measures are also subject to exceptions for confidential or protected information. Once ratified, the Convention enables the Rules on Transparency to apply to ISDS arbitrations initiated under investment treaties concluded prior to 1 April 2014. The Convention will update
Australia’s network of older-style bilateral investment treaties and bring them into line with the modern transparency provisions of more recent FTAs.

The Convention establishing the Square Kilometre Array Observatory provides for the establishment of the governing body of the Square Kilometre Array Observatory (SKAO). The Square Kilometre Array (SKA) project began in the early 1990s and is an international partnership to build and operate the world’s largest, most advanced radio observatories. The governing body, the SKAO Council will be responsible for the overall strategic and scientific direction of the project including policies, rules, regulations and the budget. Australia’s involvement in the project is expected to provide a range of benefits including reinforcing Australia’s commitment to international cooperation in scientific and technological fields.

The Committee recommends binding treaty action be taken for each of the treaties under consideration.
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Abbreviations

AFTINET  Australian Fair Trade and Investment Network
AGD      Attorney-General’s Department
ANU      Australian National University
ASKAO    Australian SKA Office
ASKAP    Australian SKA Pathfinder
BITs     Bilateral Investment Treaties
CERN     European Organization for Nuclear Research
CPTPP    Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSIRO    Commonwealth Scientific and Industrial Research Organisation
DFAT     Department of Foreign Affairs and Trade
DIIS     Department of Industry, Innovation and Science
FTA      Free Trade Agreement
GDP      Gross Domestic Product
IA-CEPA  Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia
ICSID    International Centre for the Settlement of Investment Disputes
ILUA     Indigenous Land Use Agreement
ISDS     Investor-State Dispute Settlement
JSCOT    Joint Standing Committee on Treaties
MFN      Most-Favoured-Nation
NIA      National Interest Analysis
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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Members

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Mr Dave Sharma MP

Deputy Chair
Mr Peter Khalil MP

Members

Senator Tim Ayres    Hon Dr John McVeigh MP
Senator Catryna Bilyk Senator Gerard Rennick
Senator Andrew Bragg  Senator Marielle Smith
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Julia Morris, Committee Secretary
Narelle McGlusky, Inquiry Secretary
Emilia Schiavo, Inquiry Secretary
Kevin Bodel, Senior Researcher
Stephanie Lee, Research Officer
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Terms of Reference

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - either House of the Parliament, or
  - a Minister; and
- such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.
List of Recommendations

Recommendation 1

3.34 The Committee supports the Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments and recommends that binding treaty action be taken.

Recommendation 2


Recommendation 3

5.39 The Committee supports the Convention Establishing the Square Kilometre Array Observatory and recommends that binding treaty action be taken.
1. Introduction

1.1 This report contains the Joint Standing Committee on Treaties’ review of the following treaty actions:

- Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (Canberra, 5 April 2019); and
- United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 10 December 2014); and
- Convention establishing the Square Kilometre Array Observatory (Rome, 12 March 2019).

1.2 The Committee’s resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in the Parliament.

1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australia will not arise.

1.4 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal, State and Territory agencies, and with industry or non-government organisations.

1.5 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business.

1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
1.7 None of the treaty actions examined in this report required a RIS.

1.8 Copies of the treaties considered in this report and the associated documentation may be obtained from the Committee Secretariat or accessed through the Committee’s website at:


**Conduct of the Committee’s review**

1.9 The treaty actions reviewed in this report were advertised on the Committee website from their respective dates of referral. For the Agreement between Australia and the Oriental Republic of Uruguay, submissions were requested by 23 August 2019 and by 6 September and 30 September 2019, for the United Nations Convention on Transparency and the Convention establishing the Square Kilometre Array Observatory, respectively.

1.10 The Committee held public hearings into those treaty actions in Canberra on 16 September and 14 October 2019. The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee’s website as listed above.

1.11 A list of submissions received for the inquiries is at Appendix A. A list of witnesses who appeared at the public hearings is at Appendix B.
2. ISDS Background

Introduction

2.1 This chapter provides background on the Investor-State Dispute Settlement (ISDS) system that is at the centre of the treaty actions reviewed in the following two chapters: Chapter 3 (Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments) and Chapter 4 (United Nations Convention on Transparency in Treaty-based Investor-State Arbitration).

2.2 ISDS provides a framework for greater certainty and protections for cross-border investments, an issue that has taken on greater importance as a result of growing global economic integration. ISDS aims to provide protections for foreign investors from arbitrary actions by host governments, particularly where domestic legal systems are weak or do not provide adequate mechanisms or remedies.

2.3 ISDS systems allow foreign investors, be they businesses or individuals, to access international arbitration mechanisms for actions by a host government which are in violation of commitments made under investment treaties or other international agreements. ISDS is an enforcement mechanism that allows foreign investors (including Australian investors overseas) to:

- directly apply investment protections in treaties, which include a minimum standard of fair and equitable treatment and granting compensation if investments are expropriated or nationalised;\footnote{National Interest Analysis [2019] ATNIA 13 with attachment on consultation, Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, (Canberra, 5 April 2019) [2019] ATNIF 12, hereafter referred to as NIA, para 6.}

- access an international tribunal to resolve investment disputes;\(^2\) and
- seek compensation for government actions which are in breach of commitments.

2.4 ISDS is a provision that can be included in a free trade agreement (FTA) or in a stand-alone investment treaty. ISDS provisions vary across the range of agreements in which they are contained, but the common thread is direct recourse to international arbitration and adjudication mechanisms for foreign investors to seek redress if a host government fails to honour its commitments.

2.5 ISDS cases are generally heard by a tribunal of three and can be either public or private. An ISDS tribunal does not have the authority to overturn domestic laws and regulations. The tribunal can only rule for an investor to receive compensation for the loss of the investment.\(^3\)

2.6 Australia has ISDS provisions in eight FTAs, including in one that is yet to enter into force (Peru–Australia Free Trade Agreement).\(^4\) Australia also has ISDS provisions in 18 bilateral Investment Protection and Promotion Agreements.\(^5\)

2.7 ISDS provisions provide significant advantages to Australian investors overseas, granting them a higher level of certainty and protection and enabling them to access a credible legal remedy. This advantage is especially pronounced in countries where local courts and local jurisprudence may be weak, corrupted, inefficient or insufficient.

**Evolution of ISDS**

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2.8 Early versions of ISDS included in free trade agreements and investment agreements were process-oriented, binding countries to participate and detailing the steps of the process.⁶

2.9 Several participants in the Committee’s inquiries into free trade agreements have regularly argued either for the removal of ISDS provisions from treaties, or for the ISDS process to be modified to curtail the scope and application of ISDS provisions.⁷ Concerns expressed include:

- the potential undermining of sovereignty implicit in a foreign investor being able to hold a host government to account in a method not available to domestic investors;
- the need for more transparency in ISDS cases;⁸
- the need to prevent ISDS cases relating to matters of national interest;⁹
- advocacy for an appellate review mechanism—ISDS tribunal decisions are final and binding;¹⁰
- the absence of precedent in tribunal rulings on ISDS cases—such that tribunals do not have a ‘base of previous decisions’ to guide their consideration of ISDS cases;¹¹
- arbitrators’ independence, highlighting the ability of ‘double hatting’ (where an ISDS arbitrator can also serve as counsel in other ISDS cases);¹² and
- ‘regulatory chill’—which is the theory that relates to governments deciding not to pursue regulation on health and environmental issues in the public/national interest as a result of ISDS.¹³

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⁸ Four levels of confidentiality in ISDS cases have been brought to the Committee’s attention. See JSCOT, Report 181, pp. 39–40.

⁹ Joint Standing Committee on Treaties (JSCOT), Report 165, p. 58.

¹⁰ JSCOT, Report 181, p. 41

¹¹ JSCOT, Report 181, p. 41.

¹² See: Dr Luke Nottage, Submission 13 to inquiry by the Joint Standing Committee on Treaties (JSCOT) into Comprehensive Progressive Agreement for Trans-Pacific Partnership, p. 3; and JSCOT, Report 181, p. 41.

¹³ JSCOT, Report 181, p. 38; and JSCOT, Report 165, p. 35.
2.10 Over time international investment law and Australia’s investment policies have evolved to incorporate explicit, substantive and procedural safeguards. The Department of Foreign Affairs and Trade (DFAT) reflected that Australia’s investment practice has evolved over time and that older style treaties:

… do not explicitly recognise the government’s right to regulate and protect legitimate public welfare objectives, such as public health and the environment, nor do they contain the same detailed procedural safeguards in relation to ISDS.\(^\text{14}\)

2.11 For example, the explicit carve-out for public health measures, including the regulation of tobacco, came about as a result of Phillip Morris ISDS case, which used the Australia–Hong Kong Investment Agreement’s ISDS provisions to seek compensation for Australia’s plain packaging tobacco laws.\(^\text{15}\) According to DFAT, this is the only ISDS case against Australia, to date—and it failed on jurisdictional grounds, before consideration of the merits.\(^\text{16}\)

2.12 The Australian Government has responded to community concerns by negotiating ISDS provisions with more precise language and additional protections for governments wishing to regulate in the national interest.\(^\text{17}\)

2.13 More broadly, Australia has participated in multilateral ISDS reform efforts, including the International Centre for the Settlement of Disputes (ICSID), and the United Nations Commission on International Trade Law (UNCITRAL).\(^\text{18}\)


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\(^\text{14}\) Mr Paul Schofield, Acting Assistant Secretary, Trade and Investment Law Branch, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 1.

\(^\text{15}\) Ms Elizabeth Ward, Special Negotiator, DFAT, *Committee Hansard*, Canberra, 9 September 2019, p. 18–19; Ms Nadia Krivetz, Director, Free Trade Agreement Services Branch, Regional Trade Agreements Division, DFAT, *Committee Hansard*, Canberra, 9 September 2019, p. 19; Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 1.


\(^\text{17}\) Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 2.

\(^\text{18}\) Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 2.
3. Investments Uruguay

Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments

3.1 This Chapter examines the Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (the 2019 Agreement). The treaty action was signed in Canberra on 5 April 2019 and tabled in the Parliament on 31 July 2019.

3.2 The National Interest Analysis (NIA) states that the 2019 Agreement will replace the Agreement between Australia and Uruguay on the Promotion and Protection of Investments, which entered into force on 12 December 2002 (the 2002 Agreement). The 2002 Agreement will terminate upon entry into force of the 2019 Agreement.¹

3.3 The 2019 Agreement imposes a number of obligations, which are detailed in full in paragraphs 10–19 of the NIA.² In brief, the provisions include:

- the explicit recognition of the ‘Government’s right to regulate and protect legitimate public welfare objectives, such as public health and the environment’;³

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² NIA, paragraphs 10–19.
tightening the drafting of key definitions, such as ‘investment’ and ‘investor of a Party’, to provide clarity;\textsuperscript{4}

- the inclusion of a ‘modern provision regarding the minimum standard of treatment’;\textsuperscript{5}

- a most favoured nation (MFN) treatment obligation that ‘requires the host State to give covered investments and investors treatment that is no less favourable than the treatment that it accords to the investments and investors of any third country in like circumstances’;\textsuperscript{6}

- the addition of a ‘Maffezini clause’ to explicitly prevent investors from using MFN to import more favourable investor-state dispute settlement (ISDS) provisions from other treaties;\textsuperscript{7}

- further elaboration and guidance regarding expropriation and indirect expropriation;\textsuperscript{8}

- protections for the free transfer of funds to and from a country related to the investment;\textsuperscript{9}

- expanding the ‘circumstances in which the benefits of the 2019 Agreement may be denied’ including that the ‘agreement of the other Party is no longer required for the denial of benefits’;\textsuperscript{10}

- significant changes to the ISDS mechanisms;\textsuperscript{11}

- the addition of explicit general and security exceptions, and an explicit taxation exception;\textsuperscript{12}

- that upon entry into force of the 2019 Agreement the 2002 Agreement will terminate.\textsuperscript{13}

\textsuperscript{3} For further information see: NIA, para 10; and Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protections of Investments, (Canberra, 5 April 2019), hereafter the Agreement, fifth paragraph of preamble.

\textsuperscript{4} For further information see: NIA, para 11; and Agreement, art. 1.

\textsuperscript{5} For further information see: NIA, para 12; and Agreement, art. 4.

\textsuperscript{6} For further information see: NIA, para 13; and Agreement, art. 5.

\textsuperscript{7} For further information see: NIA, para 13; and Agreement, art. 5.

\textsuperscript{8} For further information see: NIA, para 14; and Agreement, art. 7 and Annex B.

\textsuperscript{9} For further information see: NIA, para 15; and Agreement, art. 9.

\textsuperscript{10} For further information see: NIA, para 16; and Agreement, art. 11.

\textsuperscript{11} For further information see; NIA, para 17; and Agreement, art. 14.

\textsuperscript{12} For further information see: NIA para 18; and Agreement, art. 15 and 16.

\textsuperscript{13} For further information see: NIA, para 19; and Agreement, art. 17(5).
Background

3.4 As discussed in Chapter 2, Australia’s approach to investment treaties, including ISDS provisions, has evolved over time. To reflect these changes, the government is currently ‘pursuing ISDS reform.’ This includes updating older style treaties so that they align with Australia’s modern investment treaty practices and participating in multilateral ISDS reform efforts in a range of fora.

3.5 The 2019 Agreement sits within this broader context, and is an initiative which forms part of efforts to update and modernise Australia’s network of existing bilateral investment treaties. The Department of Foreign Affairs and Trade (DFAT) argued that this reform provides ‘greater certainty for both government and investors.’

Reasons for Australia to take the proposed treaty action

3.6 To reflect Australia’s modern investment treaty practice, the 2019 Agreement replaces the ‘broadly drafted’ and outdated provisions of the 2002 Agreement with updated requirements. In particular, the 2019 Agreement includes ‘explicit procedural and substantive safeguards’ for ISDS.

3.7 The NIA notes that ISDS provides foreign investors with the opportunity to ‘directly enforce the investment protections in treaties.’ The 2019 Agreement includes ‘detailed procedural safeguards’ in the ISDS mechanism that are intended to:

- narrow the scope of the ISDS mechanism;
- encourage the settlement of disputes;

For a general discussion of the investor-state dispute settlement (ISDS) system, see chapter 2.

NIA, para 9 and Mr Paul Schofield, Acting Assistant Secretary, Trade and Investment Law Branch, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 16 September 2019, p. 1–2.

Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 2.

Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 1.

Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 1.

NIA, para 5.

NIA, para 4.

NIA, para 6.
promote due process;
prevent forum shopping;\textsuperscript{22} and
generally enhance efficiency, consistency and State Party control in relation to the dispute settlement process.\textsuperscript{23}

3.8 The NIA suggests that these updates will ‘ensure greater certainty for investors and governments with respect to their rights and obligations.’\textsuperscript{24} Under the 2019 Agreement, Australian companies operating in Uruguay will still be able to bring an ISDS claim for breaches of any applicable investment protections.\textsuperscript{25}

3.9 DFAT noted that Uruguay is a growing market for Australian investors. Since 2018, a range of Australian companies have invested in Uruguay:

An Australian company has purchased a software logistics company in Uruguay … Warrego Energy [is] exploring oil and mineral reserves, which may be commercialised … [and] Uruguay’s decision to legalise cannabis in 2013 has seen five Australian companies go into the market for that reason.\textsuperscript{26}

3.10 Safeguards in the 2019 Agreement will encourage further investment in Uruguay and provide clarity for existing Australian investors in the country. In addition, the updated treaty will provide Australian investors in Uruguay with the opportunity to expand into the broader Latin American market.\textsuperscript{27} In particular, the 2019 Agreement could strengthen Australia’s foothold in the Mercosur market, which includes Argentina, Brazil, Paraguay and Uruguay.\textsuperscript{28} Mercosur has a combined Gross Domestic Product (GDP) of US$2.7 trillion and a consumer base of over 260 million people.\textsuperscript{29} DFAT stated:

\textsuperscript{22} DFAT has previously defined forum shopping as ‘as situation in which a party to a dispute seeks to address the dispute in the jurisdiction most favourable to its claim’ see: DFAT, Submission 83 inquiry by the Joint Standing Committee on Treaties (JSCOT) into Trans-Pacific Partnership Agreement.

\textsuperscript{23} NIA, para 7.

\textsuperscript{24} NIA, para 8.

\textsuperscript{25} NIA, para 8.

\textsuperscript{26} Mr Steven Barraclough, Assistant Secretary, Latin America and Eastern Europe Branch, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 8.

\textsuperscript{27} Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 2.

\textsuperscript{28} Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, pp. 1 and 5.

\textsuperscript{29} Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 1.
with Uruguay being a hub for investment—a country that has higher standards of transparency than a number of countries in its neighbourhood … the strategic logic of deepening protections for Australian investors in Uruguay makes a lot of sense.\(^{30}\)

3.11 The Committee queried whether the 2019 Agreement would bring an added level of investment security for Uruguay. While DFAT noted it could not speak on behalf of Uruguay, it suggested that in general, Latin American states:

… view the inclusion of ISDS as something very important to signal to foreign investors that they take the protection of investments in their countries seriously … because many of these countries … are looking to develop their economies and are very much wanting to attract foreign direct investment.\(^{31}\)

**Updated provisions**

**ISDS provisions—procedural safeguards**

3.12 Similar to previous inquiries, the Committee heard concerns that the inclusion of ISDS provisions could lead to costly litigation and potentially limit the government’s ability to regulate in the public interest.\(^{32}\)

3.13 The Australian Fair Trade and Investment Network (AFTINET) outlined that there ‘has been a dramatic increase in the number of known ISDS cases’ including some against health, environment and other public interest laws.\(^{33}\) AFTINET argued that ISDS can limit a government’s regulatory sovereignty and potentially result in the revisions of policies, legislation or legal decisions:

… even the threat of ISDS can deter governments from implementing public interest policies, including in relation to health, workers’ rights and the environment.\(^{34}\)

3.14 The Committee was interested in the specific safeguards for ISDS that would be included in the 2019 Agreement. DFAT informed the Committee that the 2019 Agreement:

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\(^{30}\) Mr Barraclough, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 5.

\(^{31}\) Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 5.

\(^{32}\) Australian Fair Trade and Investment Network (AFTINET), *Submission 1*, p. 4.

\(^{33}\) AFTINET, *Submission 1*, p. 3.

\(^{34}\) AFTINET, *Submission 1*, p. 4.
- ‘explicitly allows for preliminary objections’ so that unmeritorious claims can be addressed earlier, thereby reducing costs for the parties involved;\(^{35}\)
- limits the time on bringing a claim to three years;
- includes a detailed set of ethical rules for arbitrators and a code of conduct;
- allows for the expedited review of preliminary objections to address issues to do with frivolous claims and enhanced transparency;
- contains a provision for joint interpretations; and
- includes a World Trade Organization (WTO) style ‘general exception’.\(^{36}\)

3.15 Similar to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP),\(^{37}\) DFAT highlighted that the 2019 Agreement includes a clause that requires investors to ‘waive their rights to initiate or continue dispute settlement proceedings in any other fora.’\(^{38}\) DFAT stated that once a claim is made under the 2019 Agreement, the claimant relinquishes their rights to bring claims under domestic procedures or other international agreements. DFAT noted that this clause intends to address concerns about forum shopping and is an important provision to avoid overlapping claims.\(^{39}\)

**ISDS provisions—public policy exclusions**

3.16 The NIA claims that the 2019 Agreement includes provisions that reflect ‘Australia’s modern investment treaty practice.’\(^{40}\) However, AFTINET suggested that some of the ISDS provisions in the 2019 Agreement differ from Australia’s current practice.\(^{41}\)

3.17 According to AFTINET, the 2019 Agreement does not contain specific exclusions for public health or tobacco.\(^{42}\) In contrast, they noted that recent agreements such as the *Australia-Hong Kong Free Trade Agreement* and the

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\(^{35}\) Mr Schofield, DFAT, *Committee, Hansard*, Canberra, 16 September 2019, p. 2.

\(^{36}\) Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 6.


\(^{38}\) Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 2.

\(^{39}\) Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 7.

\(^{40}\) NIA, para 5.

\(^{41}\) AFTINET, *Submission 1*, p. 5.

\(^{42}\) AFTINET, *Submission 1*, pp. 5–6.
Singapore-Australia Free Trade Agreement include specific exclusions for public health and tobacco. AFTINET suggested that without clear exclusions the Australian government risks litigation in these areas.

3.18 DFAT suggested that other safeguards in the agreement, such as the explicit reference to the right to regulate in the preamble and a WTO-style general exception, are sufficient to address concerns relating to public health. The Committee sought clarification that the measures designed to protect public health would extend to government regulation of the use, and consumption of tobacco. DFAT assured the Committee that the measures would extend to tobacco regulation and vaping.

**The right to regulate**

3.19 The Committee sought clarification on whether ISDS provisions have compromised Australian social, environmental or health laws. DFAT explained that Australia currently has ISDS mechanisms in 18 bilateral treaties and seven free trade agreements, and that:

Over the course of the last 30 years, Australia has only appeared before one tribunal in relation to any of those agreements and had to defend the tobacco plain packaging legislation, where there was a unanimous decision by the panel that it didn’t have jurisdiction to hear that dispute, so [Australia] successfully won.

3.20 In relation to the 2019 Agreement, DFAT suggested that the addition of explicit safeguards provide further assurance that the inclusion of ISDS mechanisms will not compromise health, social or environmental law.

Moreover, the NIA states that:

[t]he 2019 Agreement explicitly recognises the Government’s right to regulate and protect legitimate public welfare objectives, such as public health and the environment.

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43 AFTINET, *Submission 1*, p. 5.
44 AFTINET, *Submission 1*, p. 5.
45 Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 3.
47 Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September, p. 6.
48 Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September, p. 6.
49 NIA, para 10.
The Committee sought clarification on what constitutes a legitimate public welfare objective. DFAT stated:

As far as we are aware, there’s no definition of ‘legitimate public welfare objective’, nor has there been any attempt to define the issue. From the basis of our research it’s clear that it’s a broadly defined term and it’s a term which States would be given a large margin of appreciation and discretion in defining what it means.  

DFAT noted that in the context of the 2019 Agreement, the fifth paragraph of the preamble provides the best guide as to what could constitute a legitimate public welfare objective:

RECOGNISING their inherent right to regulate and resolving to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.

The Committee queried whether broader protections such as ‘legitimate public welfare’ are preferred over narrower issue-by-issue carve-outs. DFAT responded that:

The approach the government takes at a macro level in relation to ISDS is that the government considers the inclusion of ISDS on a case-by-case basis in light of the national interest, taking into account issues such as the protection of Australian investors overseas, the overall balance of the agreement and the inclusion of adequate safeguards. In relation to safeguards, we look at both substantive and procedural safeguards.

**Most favoured nation (MFN) treatment obligation**

The 2019 Agreement includes an MFN treatment obligation that:

... requires the host State to give covered investments and investors treatment that is no less favourable than the treatment that it accords to the investments and investors of any third country in like circumstances.

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50 Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 4.
51 Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 4.
52 Agreement, fifth paragraph of preamble.
53 Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 5.
54 NIA, para 13.
3.25 In relation to MFN, the 2019 Agreement now includes a ‘like circumstances’ framework, which permits States to regulate in regards to legitimate public welfare objectives.\textsuperscript{55} A ‘Maffezini clause’ has also been incorporated to explicitly prevent investors from using MFN to import more favourable ISDS mechanisms from other treaties.\textsuperscript{56}

3.26 The Committee sought further details on this clause, which relates to the Maffezini vs Spain case, where an investor ‘sought to include a more favourable ISDS mechanism into a treaty which had a less favourable ISDS mechanism.’\textsuperscript{57} DFAT reflected that after the dispute:

… state practice changed such that states wanted to make it abundantly clear that you weren’t able to incorporate ISDS mechanisms into treaties that didn’t include ISDS.\textsuperscript{58}

3.27 DFAT argued that the inclusion of a Maffezini clause in the 2019 Agreement confirms that it is not possible for investors to apply more favourable ISDS mechanisms.\textsuperscript{59}

\section*{Consultation}

3.28 The NIA Attachment on Consultation outlines the consultation process:

External stakeholders, including the Australian Chamber of Commerce and Industry, the Minerals Council of Australia and the Australian Fair Trade & Investment Network, were consulted as part of the bi-annual Trade and Investment Law Outreach events held by the Department of Foreign Affairs and Trade.\textsuperscript{60}

3.29 AFTINET submitted that the consultation process for the 2019 Agreement process varied from previous agreements noting that:

… there was no information on the DFAT website and no public invitation for submissions during negotiations for this Agreement. AFTINET was not aware

\begin{flushleft}
\textsuperscript{55} Mr Schofield, DFAT, \textit{Committee Hansard}, Canberra, 16 September 2019, p. 3.\\
\textsuperscript{56} NIA, para 13.\\
\textsuperscript{57} Department of Foreign Affairs and Trade (DFAT), \textit{Submission 2}, p. [1].\\
\textsuperscript{58} Mr Schofield, DFAT, \textit{Committee Hansard}, Canberra, 16 September 2019, p. 7.\\
\textsuperscript{59} Mr Schofield, DFAT, \textit{Committee Hansard}, Canberra, 16 September 2019, p. 7.\\
\textsuperscript{60} NIA Attachment on Consultation, para 29.
\end{flushleft}
that the agreement was being negotiated until the government announced the agreement had been signed on April 5, 2019.\textsuperscript{61}

**Implementation**

3.30 The NIA states that legislative changes are not required for the 2019 Agreement to enter into force and that it is in line with Australia’s recent free trade agreement practice.\textsuperscript{62}

**Costs**

3.31 According to the NIA, the 2019 Agreement will not affect regulatory costs.\textsuperscript{63}

**Conclusion**

3.32 The Committee welcomes efforts to update older style investment treaties, bringing them into alignment with Australia’s modern practices. In particular, the Committee acknowledges the 2019 Agreement’s inclusion of detailed procedural safeguards in relation to ISDS.

3.33 The Committee supports the 2019 Agreement and recommends that binding treaty action be taken.

**Recommendation 1**

3.34 The Committee supports the Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments and recommends that binding treaty action be taken.

\textsuperscript{61} AFTINET, Submission 1, p.2.

\textsuperscript{62} NIA, paragraphs 20–21

\textsuperscript{63} NIA, para 22.
4. ISDS UN Convention

*United Nations Conventions on Transparency in Treaty-based Investor-State Arbitration*


4.2 The Attorney-General’s Department (AGD) advised that there are five states—Cameroon, Canada, Gambia, Mauritius and Switzerland—for whom the Convention has entered into force, while 23 states (including the United Kingdom and the United States of America) have signed the Convention.

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2 The three signatories were Canada, Mauritius and Switzerland.

3 Mr Edward Lee, Acting Principal Legal Officer, Legal System Branch, Attorney-General’s Department (AGD), *Committee Hansard*, Canberra, 16 September 2019, p. 10.

4 Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney-General’s Department (AGD), *Committee Hansard*, Canberra, 16 September 2019, p. 10.
4.3 The Convention imposes obligations on Australia that apply to both Australian overseas investors and foreign investors in Australia. The Convention’s obligations are detailed in full in paragraphs 23–32 of the NIA.\(^5\)

4.4 For a general discussion of the Investor-State dispute settlement (ISDS) system see Chapter 2.

**Background**

4.5 The Committee was interested in the motivations and driving force behind the drafting of the Convention. The Department of Foreign Affairs and Trade (DFAT) highlighted that internationally there is a recognition of the concerns expressed around Investor-State dispute settlements and ‘that there needs to be greater transparency in relation to ISDS proceedings’.\(^6\)

4.6 As part of the global activities in this space,\(^7\) the Convention was developed\(^8\) to enhance transparency and public accessibility to ISDS arbitrations by applying the existing *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (Rules on Transparency) to a wider pool of investment treaties. Essentially, the Convention ‘retrofits’ older-style investment treaties with modern transparency provisions available for ISDS arbitrations.\(^9\)

4.7 The Rules on Transparency currently apply to ISDS arbitrations initiated under investment treaties concluded on or after 1 April 2014. The Convention allows the Rules on Transparency to apply to ISDS arbitrations initiated under investment treaties concluded prior to 1 April 2014.\(^10\)

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\(^5\) NIA, paragraphs 23–32.

\(^6\) Mr Paul Schofield, Acting Assistant Secretary, Trade and Investment Law Branch, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 16 September 2019, p. 10.

\(^7\) Australia has participated in numerous multilateral ISDS reform efforts, including the International Centre for the Settlement of Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). See Mr Schofield, DFAT, *Committee Hansard*, Canberra, 16 September 2019, p. 2.

\(^8\) The Convention was developed by the United Nations Commission on International Trade Law (UNCITRAL) and first considered in general terms in 2010, with a draft convention developed in 2013. See Mr Lee, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 10.

\(^9\) Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 10.

Overview and national interest summary

4.8 The Convention provides a ‘consistent framework for transparency arrangements in investor-state dispute settlement, or ISDS, arbitration proceedings’. Under the Convention, the Rules on Transparency apply to ISDS arbitration where both the investor’s home State and the host State are parties to the Convention. Where the investor’s home State is not party to the Convention, the Rules on Transparency apply where the investor agrees to the application of the Rules.

4.9 Key features of the Rules on Transparency provide for:

- publication of the following information at the commencement of arbitral proceedings (Article 2):
  - the name of the disputing parties;
  - the economic sector involved; and
  - the treaty under which the claim is being made;
- documents, submissions and awards to be publicly available, as a matter of course (Article 3);
- following consultations with the disputing parties, the tribunal may allow third persons and non-disputing treaty parties to make submissions on Investor-State arbitrations (Articles 4 and 5); and
- arbitration tribunal hearings to be made public (Article 6).

4.10 The Convention also contains a provision in Article 2(5) that does not allow for a party to invoke a most favoured nation provision so that ‘parties cannot seek to circumvent the Convention’.

Increased transparency

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11 Dr Smrdel, AGD, Committee Hansard, Canberra, 16 September 2019, p. 9.

12 NIA, para 10.

13 See NIA, paragraphs 6 and 7. Note: the complete Rules on Transparency can be found at Attachment B of the NIA.

14 The World Trade Organization (WTO) describes most favoured nation to mean that ‘every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its partners—whether rich or poor, weak or strong’. See WTO, ‘Principles of the trading system’ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> viewed 25 September 2019.

15 Law Council of Australia, Submission 2, p. 3.
4.11 A number of submissions highlighted support for the key features of the Rules on Transparency and the increased transparency that would be provided to ISDS arbitrations, once the Convention is ratified.\(^\text{16}\)

4.12 The Law Council of Australia commented that ‘increased transparency aids the legitimacy and integrity of the arbitral process, [and] improves confidence in the current system’.\(^\text{17}\) Due to the nature of ISDS arbitration, there is a public interest in the proceedings, such that the:

> ... involvement of a State as a party is a matter of public importance, it concerns the potential liability and financial impact for the State, involves potential misconduct by a State, and may address broader public policy issues.\(^\text{18}\)

4.13 More specifically, the Law Council noted that the publication of documents and public access\(^\text{19}\) to hearings ‘provides greater public access to the proceedings’, including greater insight into arbitral processes and in turn, understanding of dispute outcomes.\(^\text{20}\)

4.14 One other submission noted that consensus for including more transparency in ISDS dispute resolutions is growing, particularly as a mechanism by host States to ‘encourage foreign investment flows’.\(^\text{21}\)

Confidentiality and protection of information

4.15 The increased transparency provided for in the Rules on Transparency is ‘subject to exceptions for confidential or protected information’, including confidential business information and information that would be ‘contrary to a state’s essential security interests’, if disclosed.\(^\text{22}\) Specifically, the Rules on Transparency define confidential or protected information as:


\(^{17}\) Law Council of Australia, *Submission 2*, p. 3.

\(^{18}\) Law Council of Australia, *Submission 2*, p. 3.

\(^{19}\) The Law Council noted that these two changes were both proposals put forward for consideration in the Law Council’s submissions to the Attorney-General’s Department on the International Centre for Settlement of Investment Disputes, see Attachments 1 and 2 to the Law Council of Australia, *Submission 2*.


\(^{22}\) Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 9.
confidential business information;  
- information that is protected against being made available to the public under the investment treaty;  
- information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or  
- information which if disclosed, would impede law enforcement.  

4.16 According to the Law Council, without these appropriate safeguards both the legitimacy of the Convention and the confidence of States to apply the Convention would be undermined.  

4.17 The Committee noted that concerns had been flagged around the potential misuse of the provisions to protect information, which could result in undermining the transparency objectives of the Rules on Transparency. The Australian Fair Trade and Investment Network’s (AFTINET) submission argued that the:  

... inclusion of exemptions for confidential business information and protected information without defining these terms opens up scope for corporations to claim that documents submitted to the tribunal should not be made public. Arbitration tribunals may then be required to interpret these provisions. This could limit public access to arbitration documents and reduce oversight of arbitration proceedings.  

4.18 The Committee sought further clarification on the transparency of the decision-making processes to determine what information is confidential—specifically, what measures exist to ensure the transparency of deliberations by an arbitral tribunal to determine and declare documentation or information as confidential.  

4.19 AGD provided a multi-part response, stepping through a number of articles from the Rules on Transparency. The department outlined that Article 7-Exceptions to transparency, provides the ‘procedural guidance’ for  

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23 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Article 7(2).  
24 Law Council of Australia, Submission 2, pp. 2–3.  
25 AFTINET, Submission 4, p. 5.  
26 AFTINET, Submission 4, p. 5.  
an arbitral tribunal’s determination on whether information is considered confidential or protected, with Article 7(2) defining such information.\footnote{Attorney-General’s Department (AGD), \textit{Submission 5}, pp. 1–2.}

4.20 In terms of the deliberation process, AGD highlighted that ultimately the determination is a matter for the tribunal, noting consultation with both disputing parties must occur before such a decision.\footnote{AGD, \textit{Submission 5}, p. 2; and see Article 7(3) of the Rules on Transparency.}

4.21 AGD acknowledged that the Rules on Transparency do not require an arbitral tribunal to publish decisions related to information determined to be confidential or protected.\footnote{AGD, \textit{Submission 5}, p. 2.} However, AGD noted that Article 3—\textit{Publication of documents}:

\ldots reflects the balance that must be struck between the public interest in the Rules’ transparency objectives and the need to ensure the manageability and efficiency of the arbitral procedure.\footnote{AGD, \textit{Submission 5}, p. 2.}

### Reasons for Australia to take the proposed treaty action

4.22 Australia has traditionally promoted transparency in international litigation and sees the Convention as an ‘important development in terms of ISDS globally’.\footnote{Mr Schofield, DFAT, \textit{Committee Hansard}, Canberra, 16 September 2019, pp. 10–11.} The Government considers the inclusion of ISDS provisions in free trade arrangements on a case-by-case basis in light of the national interest.\footnote{NIA, para 13.}

4.23 AGD advised the Committee that ratification presented several opportunities for Australia, including:

- demonstrating its support for greater transparency in ISDS arbitration proceedings;
- taking a lead in the Asia-Pacific region as a ‘modern, competitive, arbitral jurisdiction’;\footnote{Dr Smrdel, AGD, \textit{Committee Hansard}, Canberra, 16 September 2019, p. 9.} and
- aligning ISDS proceedings for investment treaties concluded prior to 1 April 2014 with the transparency arrangements in Australia’s recent free trade agreements.\footnote{Dr Smrdel, AGD, \textit{Committee Hansard}, Canberra, 16 September 2019, p. 9.}
4.24 Regarding the latter, the NIA explains that ratification of the Convention is an efficient way to update Australia’s network of 18 older-style bilateral investment treaties\(^\text{36}\) (and four FTAs with Chile, Singapore, Thailand and the Association of Southeast Asian Nations).\(^\text{37}\) The Convention will bring these older-style bilateral investment treaties ‘into line with the modern transparency provisions in recent FTAs’\(^\text{38}\)—meaning the Convention promotes both ‘transparency and consistency of application in ISDS arbitration proceedings’.\(^\text{39}\)

4.25 Ratification is also expected to ensure greater certainty for investors and governments with respect to their rights and obligations. Australia will also be able to participate in relevant ISDS cases as a non-disputing treaty party—including the ability to make a submission as an affected or interested third party.\(^\text{40}\) Australia will be provided the opportunity to express its views on ‘the interpretation of particular treaty provisions’,\(^\text{41}\) for example:

There might be a dispute between another investor state and another respondent where at stake is an element of principle about which Australia would usefully want to say, “This is our understanding,” and assist the tribunal in that context... [and] build up a body of decisions.\(^\text{42}\)

4.26 All four submissions from non-government bodies outlined support for ratification,\(^\text{43}\) noting the Convention will improve and strengthen

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\(^{35}\) Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 9.

\(^{36}\) AGD’s advised that technically there are 21 older-style bilateral investment treaties (as listed in Attachment C of the NIA). However three of these treaties are no longer in force (India, Mexico and Vietnam), as they’ve been terminated. See Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 10.

\(^{37}\) See NIA, para 18 and Attachment C.

\(^{38}\) Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 9.

\(^{39}\) Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 9.

\(^{40}\) NIA, para 19; and Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, pp. 9–10 and p. 14.

\(^{41}\) Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, pp. 9–10.

\(^{42}\) Dr Smrdel, AGD, *Committee Hansard*, Canberra, 16 September 2019, p. 14.

transparency around ISDS arbitration procedures, as well as address ongoing public concern in this area.\textsuperscript{44}

**Practical effect of the Convention**

4.27 The Convention automatically applies to ISDS arbitration between two states that are signatories.\textsuperscript{45} In this case, the Rules on Transparency ‘will prevail over any inconsistency’ with what’s included in the investment treaty under dispute between both states.\textsuperscript{46}

4.28 Where only one state that is party to an investment treaty is a signatory to the Convention, there is a ‘standing offer for the investor [from the other state]’ to agree to the Rules on Transparency to be applied in the case of an ISDS arbitration.\textsuperscript{47} However, if the investor does not agree to use the Rules on Transparency, where there is a conflict or difference with the provisions of the treaty and the Rules on Transparency, the treaty’s provisions will take precedence in arbitral proceedings.\textsuperscript{48}

4.29 The Law Council observed that given these parameters, the Convention ‘will be most effective if widely adopted by states’.\textsuperscript{49} DFAT also highlighted that from Australia’s perspective, the greater the number of countries that ratify the Convention ‘would be a positive step and a positive signal in relation to transparency’ in ISDS arbitrations.\textsuperscript{50}

4.30 However, as at September 2019, Australia did not have bilateral agreements with any of the five nations that have ratified the Convention (noting there are 23 signatories).\textsuperscript{51} In this circumstance, the practical application of the

\textsuperscript{44} Dr Nottage, Submission 1; Law Council of Australia, Submission 2; ActionAid, Submission 3; and Australian Fair Trade and Investment Network (AFTINET), Submission 4. Noting that broadly, AFTINET and ActionAid (which is a member of the AFTINET network) do not support the inclusion of ISDS provisions in Australian trade and investment agreements. See AFTINET, Submission 4, p. 1; and ActionAid, Submission 3, p. 1.

\textsuperscript{45} NIA, para 10.

\textsuperscript{46} Mr Lee, AGD, Committee Hansard, Canberra, 16 September 2019, p. 11.

\textsuperscript{47} See United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Article 2(2); and Mr Lee, AGD, Committee Hansard, Canberra, 16 September 2019, p. 11.

\textsuperscript{48} NIA, para 10; and Mr Lee, AGD, Committee Hansard, Canberra, 16 September 2019, p. 11.

\textsuperscript{49} Law Council of Australia, Submission 2, p. 3.

\textsuperscript{50} Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 14.

\textsuperscript{51} Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 12; and United Nations Commission on International Trade Law, ‘Status: United Nations Convention on Transparency
Rules on Transparency would only apply to ISDS arbitrations involving Australia, where the foreign investor has actively agreed to opt-in and use the rules.52

4.31 During the inquiry, this situation was raised as a limitation of the application on the Rules on Transparency. One submitter mentioned the possibility for states that are not party to the Convention to ‘apply the rules on an ad hoc basis’.53 States can choose not to apply the Rules on Transparency where there is a:

... sensitive or reputationally damaging matter that they do not want [publicised]... [which] undermines the intention of the Convention to increase transparency overall, not simply when it is convenient to a party.54

4.32 Another submission argued that this allows for the provisions of a treaty to prevail even where those ‘rules are less transparent’ than those of the Rules on Transparency.55

4.33 For example, according to Dr Nottage, the investment chapter of the new bilateral free trade agreement between Australia and Indonesia (IA-CEPA) has ‘narrower transparency provisions’ than the Convention.56 As Indonesia is yet to ratify the Convention, the Rules on Transparency will only apply where the investor chooses for this to occur.57 However, if Indonesia ratifies the Convention, the extra transparency associated with the Rules of Transparency will extend to any ISDS claim made under the IA-CEPA (even if the investor chooses current International Centre for Settlement of Investment Disputes Arbitration Rules to bring an ISDS claim).58

in Treaty-based Investor-State Arbitration (New York, 2014)’

52 Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 13.

53 Law Council of Australia, Submission 2, p. 3.

54 Law Council of Australia, Submission 2, p. 3.

55 AFTINET, Submission 4, pp.4-6, noting that Table 1 outlines where the Rules on Transparency have not been incorporated in-full into Australia’s FTA since 2014.

56 Dr Nottage, Submission 1, p. 5; and see AFTINET, Submission 4, pp. 6–7, which states that IA-CEPA ‘only includes provisions to enable the public release of “awards and decisions produced by the tribunal”... Other provisions in the Rules on Transparency are absent from the Agreement’.

57 Dr Nottage, Submission 1, p. 5.

58 Dr Nottage, Submission 1, p. 5.
AFTINET specifically argued that while they supported the ratification of the Convention, the limitation described above ‘significantly reduces the scope of the Convention’, particularly to address transparency issues surrounding ISDS.\(^5\)

DFAT expressed that they do not ‘necessarily agree’ that the Convention has limited practical applications, because of a number of factors, including that:
- investors from a range of countries outside of those five that have ratified, could agree to greater transparency for a variety of reasons; and
- based on multilateral discussions over the last couple of years, there ‘really is a mood to make some reform in relation to ISDS’ and that transparency is an issue that continues to be at the centre of reform activities.\(^6\)

More broadly, DFAT indicated that Australia’s ratification of the Convention would encourage other countries to take similar action.\(^7\)

One submitter also reiterated the NIA’s point (previously canvassed in paragraph 4.22) on the part ratification will play in modernising Australia’s older-style bilateral investment treaties, such that:

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\text{Australia’s ratification of … [the Convention] will generate a similar expansion of transparency “retrofitted” to Australia’s many other earlier investment treaties, as long as the counterparty states also ratify this framework convention. This is especially important for Australia’s early standalone BITs [bilateral investment treaties], as they usually don’t add transparency provisions to the treaty text … This lack of transparency provisions in BITs is different from Australia’s more recent (US-style) FTA investment chapters. But such FTA transparency provisions vary too, so … Convention ratification will be useful even for those FTAs by making transparency obligations more uniform and pervasive.}\]

Variation in the transparency provisions of more recent FTAs was also raised in AFTINET’s submission, which claimed that there ‘has been inconsistent application of the Rules on Transparency in Australian trade

\(^5\) AFTINET, Submission 4, pp. 5–6.
\(^6\) Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 13.
\(^7\) Mr Schofield, DFAT, Committee Hansard, Canberra, 16 September 2019, p. 13.
and investment agreements that have been concluded since the adoption of the Rules’.  

4.39 In its submission to the inquiry, AFTINET recommended that the Australian Government should ratify the Convention so that investment agreements which include ISDS provisions will be, ‘at a minimum’, subject to the Rules on Transparency and that the Australian Government should:

... address inconsistencies in the application of the Rules on Transparency in existing agreements to ensure they conform to the UNCITRAL rules.

Implementation

4.40 No legislative amendments are required to implement the Convention.

4.41 AGD advised that if the Committee recommends binding treaty action, the ‘next step would be to seek federal executive council approval to ratify’ the Convention.

Costs

4.42 The NIA states that there may be the potential for a small increase in costs where Australia is party to an ISDS arbitration. The increase would be attributed to the requirements to publish documents and permit third persons and non-disputing treaty parties to be involved in hearings.

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63 AFTINET, Submission 4, pp. 6-7, including Table 1: Application of the Rules on Transparency in Australian trade and investment agreements since 2014, which AFTINET states ‘demonstrates, the Rules on Transparency have not been fully incorporated into all Australian FTA’s since 2014’.


65 AFTINET and ActionAid (which is a member of the AFTINET network) do not support the inclusion of ISDS provisions in Australian Trade and investment agreements. See AFTINET, Submission 4, p. 1; and ActionAid, Submission 3, p. 1.


67 NIA, para 33.

68 Dr Smrđel, AGD, Committee Hansard, Canberra, 16 September 2019, p. 10.

69 NIA, para 34.
4.43 The Office of Best Practice Regulation has been consulted and advised that a Regulation Impact Statement is not required.\(^{70}\)

**Conclusion**

4.44 The Committee notes that the Convention was developed to enhance transparency and public accessibility to ISDS arbitrations by applying the existing Rules on Transparency to a wider pool of investment treaties—those initiated under investment treaties concluded prior to 1 April 2014.

4.45 Specifically, the Committee acknowledges the benefits of the Convention in promoting transparency and consistency in ISDS arbitration proceedings, addressing ongoing public concern in this area. Once ratified, the Convention will provide an efficient mechanism to modernise and update the transparency provisions in Australia’s network of older-style bilateral investment treaties and FTAs.

4.46 The Committee supports the Convention and recommends that binding treaty action be taken.

**Recommendation 2**


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\(^{70}\) NIA, para 35.
5. Convention SKA

Convention establishing the Square Kilometre Array Observatory

5.1 This chapter reviews the Convention establishing the Square Kilometre Array Observatory (the Convention). The Convention provides for the establishment of the governing body of the Square Kilometre Array Observatory (SKAO). Once ratified, the Convention will formalise Australia as a co-host for the first phase of the Observatory, SKA 1.¹

Background

Radio astronomy

5.2 The Square Kilometre Array (SKA) project is an international partnership to build and operate the world’s largest, most advanced radio observatories.² The project dates backs to the early 1990s and Australia has been a participant since its inception.³

5.3 According to representatives of the Department of Innovation, Industry and Science (DIIS):

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² Commonwealth Scientific and Industrial Research Organisation (CSIRO), Submission 4, p. [1].

³ Australian National University, (ANU) Submission 3, p. 1.
This is Australia’s first opportunity to co-host a multinational megascience facility. It will stand alongside other landmark science facilities such as the European Organization for Nuclear Research, otherwise known as CERN. The scientific benefits of Australia co-hosting the SKA observatory are substantial.4

5.4 The SKA observatories will detect radio waves. Radio waves are part of the electromagnetic spectrum, which includes visible light. Radio waves have a lower frequency than visible light. Visible light has a wavelength between 380 to 700 nanometres, while radio waves have a wavelength between seven centimetres and ten metres.5

5.5 Radio waves are a useful tool for space observation because, unlike visible light, radio waves are not impacted by atmospheric interference like clouds. This means that radio wave observatories can be built on the earth’s surface and can as a consequence be very large. The larger an observatory is, the better it will be at detecting radio waves from very distant, very dim objects.6

5.6 The SKA observatories will be used to investigate, amongst other things:

- the evolution of galaxies;
- the nature of gravity;
- the origin of cosmic magnetism; and
- the origin of stars and black holes.7

5.7 In relation to the allocation of time at the observatories:

The basic principle on access is that members have access to telescope time proportional to their contribution, but that time allocation will be on the basis of merit.8

5.8 The raw data collected by the observatories will be publicly available for all scientists to use.9

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4 Mrs Jane Urquhart, Head of Division, Science and Commercialisation Policy, Department of Innovation, Industry and Science (DIIS), Committee Hansard, Canberra, 14 October 2019, p. 1.
8 Mrs Urquhart, DIIS, Committee Hansard, Canberra, 14 October 2019, p. 4.
5.9  Professor Fred Watson AM, Astronomer-at-Large, advised the Committee that:

...this machine will generate Nobel prizes and there’s a very good chance that some of those will come to Australian scientists. In the scientific armoury, it is amongst the highest potential for delivering good science.\(^9\)

**SKA 1**

5.10  The National Interest Analysis (NIA) argues that once completed, SKA will be one of very few scientific facilities of global significance.\(^{11}\) The project will be delivered in multiple phases.\(^{12}\)

5.11  The first phase, called SKA 1, involves the construction of radio observatories in Australia and South Africa.\(^{13}\) Australia will host a low frequency observatory (SKA1-Low) and South Africa will host a mid-frequency observatory (SKA1-Mid).\(^{14}\) The SKA project is currently in the pre-construction phase.\(^{15}\) Pre-construction is expected to be completed in mid-2020.\(^{16}\)

5.12  The United Kingdom is leading the design and development of the project.\(^{17}\)

5.13  The NIA states that the SKAO comes into existence at the entry into force of the Convention. Following the establishment of the SKAO, the construction phase of the project will begin.\(^{18}\)

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\(^10\) Professor Fred Watson AM, Astronomer-at-Large, Department of Innovation, Industry and Science (DIIS), *Committee Hansard*, Canberra, 14 October 2019, p. 7.

\(^11\) NIA, para 8.

\(^12\) *Convention Establishing the Square Kilometre Array Observatory*, (Rome, 12 March 2019), hereafter referred to as the Convention, art. 5 (2).

\(^13\) NIA, para 3.

\(^14\) NIA, para 3.

\(^15\) NIA, para 7.

\(^16\) NIA, para 7.


\(^18\) NIA, para 7.
5.14 The model for on-the-ground implementation and operation of the observatories is currently under development. Precursor observatories located at the future SKA sites are currently conducting research and testing that will inform the project.\(^{19}\) The sites include the Murchison Widefield Array and the Australian SKA Pathfinder (ASKAP), both located in Western Australia.\(^{20}\)

5.15 These precursor laboratories have already produced significant benefits for Australian science. For example:

ASKAP is a telescope which consists of 36 12-metre dishes … and they work together with novel technology that we've developed in Australia to survey-telescope faster than any other radio telescope before.\(^{21}\)

5.16 During the pre-construction and construction phases of the project, the DIIS will operate the Australian SKA Office (ASKAO). ASKAO is responsible for Australia’s policy, planning and engagement role in SKA.\(^{22}\)

5.17 Phases subsequent to phase 1 will be determined by the parties to the Convention.\(^{23}\)

### The proposed Convention

5.18 According to the NIA, the Convention will provide a framework for SKA Member countries\(^{24}\) to collaborate on transformative scientific research and to explore fundamental questions in radio astronomy and physics.\(^{25}\)

5.19 There are a number of benefits to be gained for Australia, including:

- co-hosting a landmark piece of international science infrastructure;

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\(^{22}\) NIA, para 24.

\(^{23}\) The Convention, art. 5 (4).

\(^{24}\) According to the NIA, the anticipated membership of the SKAO includes Australia, the United Kingdom, and South Africa as co-hosts, together with more than 10 countries from across Europe, Asia and North America that are engaging with the project.

\(^{25}\) NIA, para 6.
cementing Australia’s status as a world leader in radio astronomy and its suitability as a location for radio wave observatories; reinforcing Australia’s commitment to international cooperation in scientific and technological fields.26

5.20 The NIA suggests that Australia’s membership of the SKAO, particularly hosting the site for SKA1-Low, will benefit Australia by:

- delivering significant scientific, economic, technological and human capital benefits;
- permitting Australian scientists access to the most powerful collection of radio telescopes in the world, enabling them to undertake ground-breaking research in astronomy and fundamental physics; and
- providing an avenue for enhancing Australia’s world-leading profile in radio astronomy research.27

5.21 In relation to the financial benefits, Mrs Jane Urquhart, representing DIIS noted:

The observatory will be, by nature, a large enterprise involving significant expenditure and employment in the member countries but particularly in host countries like Australia and South Africa...we anticipate that the observatory will expend around [A$1 billion] on the Australian component of SKA phase I over the first 10 years and, of that, we estimate around $580 million will be paid to Australian firms and employees in the form of contracts and wages. Over the same period, the Australian government itself will outlay an estimated $390 million investment in the Square Kilometre Array.28

5.22 Modelling commissioned by DIIS estimated that the Australian economy would receive $1.13 for every dollar spent by the Australian Government in the first ten years, and $1.41 for every dollar invested over the first 30 years.29

Obligations

26 NIA, para 8.
27 NIA, para 4.
28 Mrs Urquhart, DIIS, Committee Hansard, Canberra, 14 October 2019, p. 3.
29 Mrs Urquhart, DIIS, Committee Hansard, Canberra, 14 October 2019, p. 3.
5.23 The SKAO is a membership based organisation in which each party to the convention is represented on a governing body, the SKAO Council. The Council will be responsible for:

- the overall strategic and scientific direction of the SKAO;
- the appointment of a Director-General;
- the establishment of policies, rules and regulations;
- the approval of budgets; and
- the publication of annual reports.

5.24 The Australian radio wave observatory, SKA1-Low will be constructed at a site within the existing Murchison Radio-astronomy Observatory Lease and Boolardy Pastoral Lease areas, which are currently leased and managed by the Commonwealth Scientific and Industrial Research Organisation (CSIRO).

5.25 CSIRO will maintain its obligations under the existing lease until they are consolidated under a single new lease. Once the new lease is established, CSIRO will hold the lease and manage the site for SKA1-Low on behalf of the Commonwealth. CSIRO will provide a sub-license to the SKAO that will allow it to construct and operate the SKA1-Low on the new lease.

5.26 The location is ideal for radio wave detection because of the Murchison's isolation from terrestrial radio wave sources. The Murchison Radio-astronomy Observatory is 800 kilometres from Perth on the ancestral lands of the Wajarri Yamaji people.

5.27 No legislation will be required to implement the Convention.

Costs

5.28 Currently, Australia contributes 17 per cent of the annual budget of the SKA.
5.29 Once the Convention is ratified, parties will be obliged to make financial contributions according to a Funding Schedule that will been approved by the Council, based on the Financial Protocol of the SKAO (Annex B of the Convention).\textsuperscript{37}

5.30 Australia, as a host country, will have the value of the assets and infrastructure Australia provides to the SKAO incorporated in the calculation of Australia’s Funding Schedule.\textsuperscript{38}

5.31 The Australian Government estimates that the costs to Australia will be:
- an indicative contribution of 14 per cent of the SKA Phase 1 capital and operations budgets, noting that these budgets have not yet been finalised;
- making the SKA site available for a minimum of 50 years, and providing management arrangements for it; and
- contributing certain Host Country infrastructure elements to the project, including some at Australia’s expense.\textsuperscript{39}

### Draft Indigenous Land Use Agreement

5.32 An Indigenous Land Use Agreement (ILUA) has been negotiated with the Wajarri Yamaji people, the registered native title holders of the area that contains the Murchison Radio-astronomy Observatory and what will be the Australian SKA site.\textsuperscript{40}

5.33 The CSIRO and DIIS established a relationship with the Wajarri people in relation to the Square Kilometre Array in 2008.\textsuperscript{41} According to Mrs Urquhart:

\begin{quote}
... engagements with the Wajarri people have included benefits that the CSIRO has delivered as part of its existing relationship with the Wajarri Yamatji people, including around employment, business, and cultural and educational benefits under the pre-existing land use agreement.\textsuperscript{42}
\end{quote}

\textsuperscript{37} The Convention, art. 10(2).
\textsuperscript{38} The Convention, Annex B, art. 7.
\textsuperscript{39} NIA, para 26.
\textsuperscript{40} Mrs Urquhart, DIIS, Committee Hansard, Canberra, 14 October 2019, p. 6.
\textsuperscript{41} Mrs Urquhart, DIIS, Committee Hansard, Canberra, 14 October 2019, p. 6.
\textsuperscript{42} Mrs Urquhart, DIIS, Committee Hansard, Canberra, 14 October 2019, p. 6.
DIIS has also engaged the Wajarri people through a range of cultural and educational events, including tuition in the Wajarri language.\textsuperscript{43}

The current ILUA will be superseded by a new ILUA covering the SKA1-Low site, which is larger than the current site.\textsuperscript{44} The ILUAs consist of both financial benefits and non-financial benefits packages.\textsuperscript{45}

The NIA states that the negotiations involved extensive engagement with the Traditional Owners, in addition to the SKA’s program of engagement with Indigenous and regional stakeholders.\textsuperscript{46}

**Conclusion**

There are many good reasons to ratify the Convention. It will ensure that Australia is a global leader in astronomy and fundamental physics and provide Australia with a research tool of the first rank. It will enable Australia to retain talented scientists and encourage Australians to consider careers in science. It will promote the development of high technology industries in Australia. Finally, the Convention is a powerful example of the benefits of international cooperation.

The Committee recommends the Convention be ratified.

**Recommendation 3**

The Committee supports the *Convention Establishing the Square Kilometre Array Observatory* and recommends that binding treaty action be taken.

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Mr Dave Sharma MP

Chair

November 2019

\textsuperscript{43} Mrs Urquhart, DIIS, *Committee Hansard*, Canberra, 14 October 2019, p. 6.

\textsuperscript{44} Mr Jonathan Rogers, Manager, Science and Commercialisation Policy, Department of Innovation, Industry and Science (DIIS), *Committee Hansard*, Canberra, 14 October 2019, p. 6.

\textsuperscript{45} NIA, para 28.

\textsuperscript{46} NIA, Attachment on Consultation, para 42.
A. Submissions

Convention SKA
1. The University of Western Australia
2. International Centre for Radio Astronomy Research (ICRAR)
3. The Australian National University
4. CSIRO
5. National Committee for Astronomy, Australian Academy of Science
6. Dr Alan Finkel AO, Australia’s Chief Scientist
7. Government of Western Australia
8. Curtin University

Investments Uruguay
1. Australian Fair Trade and Investment Network (AFTINET)
2. Department of Foreign Affairs and Trade
   - 2.1 Supplementary to submission 2

ISDS UN Convention
1. Dr Luke Nottage
2. Law Council of Australia
3. ActionAid
4. Australian Fair Trade and Investment Network (AFTINET)
5. Attorney-General’s Department
B. Witnesses

Monday, 16 September 2019

Canberra

*Investments Uruguay*

*Department of Foreign Affairs and Trade*

*Attorney-General’s Department*

*Department of the Treasury*

*ISDS UN Convention*

*Attorney-General’s Department*

*Department of Foreign Affairs and Trade*

Monday, 14 October 2019

Canberra

*Convention SKA*

*Department of Industry, Innovation and Science*

*Commonwealth Scientific and Industrial Research Organisation (CSIRO)*
Additional Comments by the Australian Greens

Summary

1.1 The Australian Greens maintain that the inclusion of Investor-State Dispute Settlement (ISDS) in trade and investment agreements pose significant risks to human rights and environmental protections, and they impinge on national sovereignty by restricting the regulatory capacity of governments. Further, ISDS tribunals are not independent, they lack impartiality, and they do not meet basic standards of domestic judicial systems. ISDS is a mechanism which expands the legal rights of multinational corporations and offers advantages beyond those available to domestic investors. For these reasons, the Greens disagree with the inclusion of ISDS provisions in trade and investment agreements.

1.2 The Greens note that the Productivity Commission has recommended that the Australian Government avoid the inclusion of ISDS provisions in our trade negotiation processes where foreign investors have access to privileges not afforded to domestic investors.

1.3 The Greens note that the ISDS system is central to both the Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (the Uruguay Agreement), and the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (the Convention). We note the extensive analysis of the majority committee report on this issue and we seek to add analysis and recommendations to this.
1.4 Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments

1.5 The Australian Greens note with concern the evidence given in a submission by the Australian Fair Trade and Investments Network (AFTINET) that the Department of Foreign Affairs and Trade (DFAT) did not provide an opportunity for members of the broader community to engage with this agreement prior to it being signed on the 5 April 2019. This is demonstrative of a lack of transparency and public scrutiny involved with the current procedure for making trade agreements. It is essential that any proposed agreement be tabled in Parliament and open for wide public consultation prior to signing, in order to ensure consistency with domestic democratic policy-making principles and practice.

1.6 The Greens acknowledge that this agreement seeks to improve on the 2002 agreement by implementing a range of safeguards including provisions which limit the scope of what investor rights can be defined as, provisions outlining expropriation obligations, and includes a WTO-style general exception and broad security exception which seeks to reflect the sovereignty and regulatory right of governments. Further, the Greens note that this agreement provides some limitations on ISDS claims which we characterise as an improvement upon the 2002 agreement.

1.7 However, the Greens are deeply concerned by the lack of consistency in the ISDS provisions within the Uruguay Agreement and other trade agreements Australia has.

1.8 This agreement contains no explicit exclusions for the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration, and the Office of the Gene Technology Regulator. There are also no explicit exclusions for control measures relating to tobacco. ISDS provisions contained within other trade agreements Australia has, including the Australia-Hong Kong Free Trade Agreement (pending ratification), contain these specific carve outs.

1.9 We acknowledge that within the fifth paragraph of the Uruguay Agreement preamble that there is an extrapolation of what a ‘legitimate public welfare objective’ is. It broadly encompasses ‘public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.’ Further, we note that whilst a WTO-style ‘general exception’ provision exists within the agreement, in our view references to a right to regulate for ‘legitimate
public welfare objectives,’ are not sufficient protections and the lack of explicit language in these provisions leaves a vulnerability for arbitration.


1.10 The Australian Greens acknowledge that where trade agreements contain ISDS provisions, any measures to enhance transparency are positive. Therefore, we support the Convention in its aim to increase transparency and public accessibility to ISDS proceedings through expanding the application of the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency) to include treaties concluded both prior to 1 April 2014.

1.11 We note, however, that there are a number of limitations which pertain to the application of the Rules on Transparency, and the practical application of the Convention. It was made clear during the hearing and in the submissions that whilst the Convention automatically applies to ISDS arbitration between two states which are signatories, where only one state is a signatory to the Convention it is at the discretion of the investor as to whether or not they agree to submit to the Rules on Transparency. If a signatory chooses not to submit to Rules on Transparency, then existing treaty provisions for ISDS arbitration prevail, and these may indeed be less transparent that those outlined in the Convention.

1.12 In addition, the Greens agree with concerns raised in evidence regarding the potential misuse of protected information provisions within the Convention. AFTINET stated in their submission that the “inclusion of exemptions for confidential business information and protected information without defining these terms opens up a scope for corporations to claim that documents submitted to the tribunal should not be made public. Arbitration tribunals may then be required to interpret these provisions. This could limit public access to arbitration documents and reduce oversight of arbitration proceedings.”

1.13 Further, we note that the application of the Rules on Transparency have been inconsistently applied across different agreements which Australia has signed since 2014. As detailed in evidence presented to the committee, this inconsistency can undermine and limit efforts to address deep concerns about the legitimacy of ISDS processes.
The Greens also note the evidence given by the Law Council of Australia who state that the treaty ‘will be most effective if widely adopted by states.’ We are concerned that the practical effect of this treaty is limited as evidence provided to the committee during the hearing determined that only five states have ratified the Convention, and that Australia is not currently in agreements with any of these states.

**Recommendation 1**

The Australian Greens recommend that ISDS provisions be excluded from all trade agreements and that any existing trade agreements including these provisions be renegotiated to remove them.

- The Greens recommend that ISDS provisions be excluded from the Uruguay Agreement.

- The Greens do, however, accept that where ISDS are included in trade agreements that any measures to increase transparency constitute an improvement. Therefore, we support the expansion of the United Nations Commission on International Trade Law Rules and we recommend that the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration be ratified. Any inconsistencies in the application of the Rules on Transparency within existing agreements should subsequently be remedied.
Additional Comments – Report 188: Investments Uruguay, ISDS UN Convention

Peter Khalil MP, Deputy Chair; Senator Tim Ayres; Senator Catryna Bilyk; Senator Marielle Smith; Kate Thwaites MP; Josh Wilson MP

1.1 The Investments Uruguay Agreement and the ISDS UN Convention make important reforms to the ISDS process to ensure greater public and investor confidence in Australia’s trading and international business arrangements.

1.2 Despite this, the Labor members of the committee are concerned the lack of consultation may have limited the scope of reforms. In particular, a number of external stakeholders such as trade unions have raised concerns regarding the following ISDS features:

- The capacity for temporary judges to be engaged as counsel in other ISDS proceedings, otherwise referred to as ‘double-hatting’
- The lack of precedence to guide decision making by judges, inconsistent with the rule of law and Australia’s judicial principles. The potential for inconsistency in decision making threatens public and investor confidence in the ISDS process and international business arrangements as a result
- The inability to appeal a decision, also inconsistent with the rule of law and Australia’s judicial principles
1.3 The Labor members of the Committee believe that Report 188 should include recommendations which, in consultation with relevant external stakeholders, address the aforementioned concerns.

Peter Khalil MP

Senator Tim Ayres

Senator Catryna Bilyk

Senator Marielle Smith

Kate Thwaites MP
Josh Wilson MP