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Dangers of ISDS provisions in CPTPP are not a myth

DFAT “myth busters” document ignored the main risks

Open Source Industry Australia Ltd
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Following yesterday’s comments on the excuses made in DFAT’s “Myth Busters” document¹ for CPTPP’s lack of independent analysis, economic modelling or real economic benefit², today OSIA has criticised the document’s dismissive treatment of the risks of Investor-State dispute settlement (ISDS) provisions.

The “myth buster” in question focuses on “mere loss of profits” as a mooted cause for an arbitration claim. DFAT’s document correctly asserts that loss of profits alone does not meet the criteria for arbitration claims in Chapter 9 of TPP: such losses form one criterion of Art. 9.19, but the aggrieved investor must also show that the loss resulted from a breach of an obligation under Section A.

However, in presenting that “myth buster”, DFAT carefully cherry-picked as examples the *least* controversial Section A obligations—the prohibition on nationalisation without compensation & the requirement to provide due process (Art. 9.6–9.8)—completely ignoring the far more controversial provisions of Section A, such as Art. 9.10 (“Performance Requirements”), which prohibits a cornucopia of policy measures, many of which would seem desirable from an economic & industry development perspective.

‘Most Australians realise that everyone deserves due process of the law and that any investor whose assets have been nationalised deserves fair compensation’, said OSIA Chairman Mark Phillips, ‘but far fewer would see any benefit for Australia in prohibiting our Government from making sensible policies around technology transfer, domestic content, technology regulation or royalty arrangements.’

Likewise, DFAT is technically correct in asserting that the Australian Government will remain free to determine laws & policies. Under CPTPP, the Government can indeed continue to make laws as it sees fit, even where those laws breach TPP obligations, so long as the Government is willing to run the risk of having to compensate those foreign investors who suffer losses as a result.

‘DFAT has failed to recognise regulatory chill as the inevitable result of such broad ISDS provisions,’ said OSIA Company Secretary Jack Burton, ‘Most telling is the complete omission from that “myth buster” of any answer at all to the serious charge that the ISDS provisions will turn Australian companies

¹ <http://dfat.gov.au/trade/agreements/tp/outcomes-documents/Documents/tp-11-myth-busters.pdf>

² http://osia.com.au/f/osia_cptpp_pr2a.pdf

such as OSIA's members into second class citizens in our own market: the new right of action against the Commonwealth that CPTPP creates is only available to foreign investors, *not* to Australian companies.'

OSIA has warned of the dangers of including ISDS provisions in TPP before^{3,4,5,6}, as has the Productivity Commission⁷ amongst many others.

'Given that industry are at least in theory supposed to be the intended beneficiaries when Australia enters into trade agreements', said Burton, 'it is disappointing to see DFAT publish a document dismissing off-hand the concerns around ISDS provisions that Australian industry—particularly innovative industries like the open source software sector—have raised so often over the years.'

About Open Source Industry Australia Ltd

Open Source Industry Australia Ltd (OSIA) represents & promotes the Australian open source software industry by:

- Ensuring that the Australian business, government and education sectors derive sustainable financial and competitive advantage through the adoption of open source and open standards;
- Helping Australian Governments to achieve world leadership in providing a policy framework supportive of open standards and of the growth and success of the Australian open source industry; and
- Ensuring Australia's global standing as the preferred location from which to procure open source services & products.

OSIA's members are organisations in Australia who invest in or build their future on the unique advantages of open source software.

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³s. 1.2, Item 7, p.5 in http://osia.com.au/f/osia_trans_pacific_partnership_submission_0.pdf

⁴s. 3.1, p. 6 in http://osia.com.au/f/osia_sub_201603_jscot.pdf

⁵p. 26 in

http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/a6fa4bc7-9c2e-4788-9378-e676fc0a3f53/toc_pdf/Joint%20Standing%20Committee%20on%20Treaties_2016_10_07_4491_Official.pdf;fileType=application%2Fpdf

⁶s. 3, pp. 5–7 in http://osia.com.au/f/osia_sub_201610_sscfadt.pdf

⁷pp. 274–277 in

<https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>