Benefits and risks in South Korea trade deal

Clause allows investors to sue, write **KYLA TIENHAARA** and **JEFFREY MCGEE**

Federal cabinet is poised to approve a new bilateral trade agreement that could throw open the door to more foreign corporations suing the government.

Late last year the Abbott government finalised a deal with South Korea, known as the Korea-Australia Free Trade Agreement. The text of the agreement was finally made public on Monday.

As previously indicated by the government, the KAFTA contains a controversial Investor-State Dispute Settlement clause. This clause will allow Korean investors, or any corporation that sets up an office in South Korea, to sue the Australian government directly in an international tribunal.

Corporations have previously used similar tribunals to pursue claims in the order of hundreds of millions of dollars when public-interest regulations have negatively affected the profitability of their investments. A recent example is the continuing case by Philip Morris against the Australian government over the legislation for plain packaging of cigarettes.

Similar situations could arise in the future over environmental laws that create new costs for foreign companies, or limit the exploitation of a resource, such as coal seam gas. This has been the experience in Canada where the government has faced more than 30 claims by investors and is now juggling eight disputes.

The Gillard government had since 2011 resisted ISDS clauses in any trade deals. In 2004 the Howard government refused to agree to an ISDS clause being included in the US-Australia Free Trade Agreement. Other countries, like South Africa, are moving away from ISDS. Nevertheless, the Abbott government has chosen to consider including ISDS clauses in Australian agreements on a case-by-case basis.

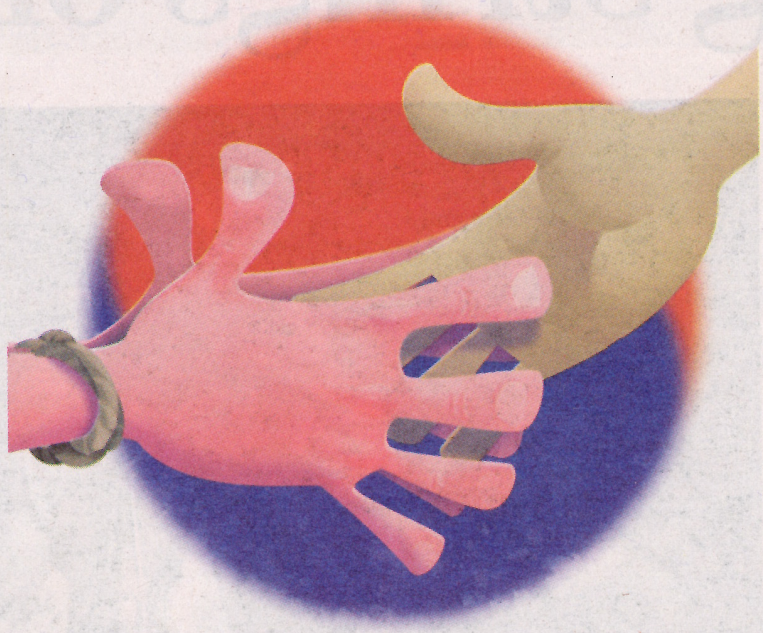
Trade Minister Andrew Robb has recently sought to calm concerns about ISDS.

He has argued that the investment protection provisions in agreements like KAFTA are quite limited in their scope. However, trade agreements provide far greater protection for foreign investors than that found in domestic law. This explains why companies like Philip Morris continue to pursue their cases in ISDS even after domestic courts have dismissed their claims.

If this were not the case, what would be the purpose of two advanced countries like South Korea and Australia, both with reliable domestic legal systems, including investment provisions in the KAFTA?

Minister Robb has also stated that "contemporary ISDS agreements with their explicit safeguards make clear that government's capacity to pass laws and regulations in the public interest in areas like health and the environment is not diminished".

Unfortunately, recent experience suggests it is difficult to draft "safeguards" to protect a government from potential legal action under ISDS. For example, a case has arisen under the 2006 US-Peru Free Trade Agreement over environmental liability for a contaminated site. An investor has also launched a dispute against El Salvador under the 2004 Central America Free Trade Agreement over a ban on mining aimed at protecting the country's limited groundwater resources.



Both of these relatively modern trade agreements contain similar purported "safeguards" for environmental and health regulation to those contained in the KAFTA.

It may be several years before these cases are decided. However, even if these tribunals find in favour of the respective governments, there is no guarantee that the "safeguards" to protect public interest regulation will work in Australia.

The ambiguity in treaty language and the lack of requirement for arbitrators to base decisions on previous cases leads to a system with significant uncertainty. The KAFTA fails to address this problem as well as other serious concerns that have been raised by legal experts about the way that ISDS cases are conducted.

The agreement does ensure that ISDS cases are open to the public. However, it does not address the problem that individuals can act as legal representatives for corporations in one case and then arbitrators in another.

The possibility of an appellate body is mooted in the KAFTA, but there is no firm commitment. Aspirations for an appeals process have cropped up in other trade agreements, but concrete action on this issue has, thus far, failed to materialise.

Given these concerns, the KAFTA should be taken back to the negotiating table for removal of the ISDS clause. In other continuing trade negotiations – like those for the Trans-Pacific Partnership Agreement – the government should also take a firm stand against the inclusion of ISDS.

To do so would not harm Australia's image as an investor-friendly country. In 2010, the Productivity Commission found that there was no compelling evidence to suggest that ISDS clauses actually help countries to attract investment. Brazil, a country that attracts a great deal of foreign investment, has never agreed to submit to ISDS under a trade agreement.

Minister Robb has justified the government's position by arguing that ISDS clauses provide Australian companies with "a safeguard in countries with unreliable legal and political systems". However, we could only find two examples of "Australian" companies utilising ISDS provisions in trade agreements: in each case the firm making the claim was a subsidiary of a foreign mining company.

Well-crafted trade agreements have the potential to bring significant benefits to our economy. However, in chasing short-term economic benefits, we should not take any risks that might make it harder for future governments to regulate to protect Australian citizens and the environment.

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