Submission to JSCOT

Information about the committee and the download portal can be found at:

[**http://www.aph.gov.au/Parliamentary\_Business/Committees/Joint/Treaties/9\_February\_2016**](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016)

**Date letterhead** (**if applicable)**

**To the members of the Joint Standing Committee on Treaties:**

**I/we submit that ratifying the TPP with ISDS inclusions will not be in Australia’s national interest because…**

**1. Contrary to what former Minister Robb has argued**, **in the 21st century ISDS has evolved to become an insidious threat to our democratic rights, the environment, and the Australian legal system.** The Australian government is entering into this risky space at a time when there is an enormous ramping up of ISDS challenges globally. Only 50 ISDS challenges occurred in the 50 years to 2000. Since 2000 more than 600 cases have been launched, the majority of these challenging environmental and resource regulations.

**2. While Australia has had trade agreements before with various nations, until now it has not had a free trade deal with the US that included ISDS provisions**, and therefore has not been subject to ISDS lawsuits from litigious US multinationals. (500 US multinationals were closely involved in shaping the negotiations for the TPP). Australian voters do not want to see American-style litigation becoming a normal part of the Australian way of life and Australians do not want the protection of their Reef, rainforests and farmland to be subject to the outcomes of multinational law suits heard in foreign tribunals.

**3. ISDS will privilege foreign multinational investors,** elevating them above citizens, legislatures, Australian Federal and State courts and even domestic corporations in violation of the basic principle of equality before the law. ISDS is clearly not in Australia’s national interest, as it presents an unacceptable risk to our sovereignty, legal system and core democratic values.

**4. ISDS has been extended to include compensation to multinationals for loss of future profits**, resulting in claims often in billions of dollars against nations, the majority of which relate to environmental and resource industry regulations. This expansion of ISDS provides aggrieved multinationals with the opportunity to both threaten and punish nations, leading many analysts to conclude that ISDS has led to widespread [‘regulatory chill’](http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/6634538) - a reluctance by governments to act to protect the environment and other public interest areas because of the risk of ISDS challenge.

**5. Australian decision-makers must take heed of the growing global backlash against ISDS**. Governments around the world are seeking to extricate themselves from this anti-democratic insertion into modern trade treaties. Brazil has refused to accept ISDS provisions in agreements (much to its benefit in the recent BHP/Vale mine waste dam disaster, as the offending multinational will not have the opportunity to use ISDS to counter-sue). More than 50 nations are now reviewing their approach to ISDS because of its threat to sovereignty, environment and other public interest regulations. Some countries, like Bolivia, Ecuador, and Venezuela, are cancelling their trade treaties, and proposing alternatives for resolving investment disputes. However, once ratified through parliament by a nation, ‘cancelling’ a free trade treaty with ISDS inclusions will not stop prior individual ISDS rulings from remaining in force for up to 20 years. It will clearly be against the national interest for the Australian Parliament to pass enabling legislation for the TPP while ISDS provisions are included.

**6.** **Decision makers should note that Australian voters are now seeing growing levels of expert opinion condemning free trade agreements like the TPP because of the inclusion of ISDS provisions.** Robert French, chief justice of Australia’s High Court in a speech last July said: “Arbitral tribunals set up under ISDS provisions are not courts, nor are they required to act like courts, yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states.” The United Nations Conference on Trade and Development (UNCTAD) recently concluded that ISDS is a proven threat to governments’ rights to regulate and therefore to achieving sustainable development goals. A recent Productivity Commission study of ISDS recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses “considerable policy and financial risks” to governments. In a recent report the ACCC [agreed](http://www.brisbanetimes.com.au/federal-politics/political-news/accc-airs-concerns-over-intellectual-property-provisions-in-transpacific-partnership-20151201-glcef0.html#ixzz3t70r9PgY) with the Productivity Commission's view that such [ISDS] provisions risk impeding domestic reforms in the public interest.

**7. According to a recent analysis of the TPP by the World Bank, the Australian economy will gain almost nothing from the TPP.** This first [comprehensive economic analysis](http://www.brisbanetimes.com.au/federal-politics/political-news/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html) of the TPP has found that the Trans-Pacific Partnership would boost Australia's economy by just 0.7 per cent by the year 2030.’ This begs the question: why, if we get so little out of it, is the Australian Government pushing so hard to ratify this agreement which, through ISDS challenges, will demonstrably weaken our capacity to regulate in the public interest, attack our sovereignty and reduce our democratic rights? Clearly not in the national interest.

**8. Expert analysis of the text of the TPP chapters finds it falling short on protections for the environment and other public interest areas:** George Kahale, chairman of one of the world’s leading legal arbitration firms – Curtis, Mallet-Prevost, Colt & Mosle LLP - has [said](http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer) there are critical loopholes in the Trans-Pacific Partnership’s investment chapter that ‘leave Australia wide open’ to ISDS challenges on environmental and other public interest regulation. [Analysis of the TPP environment chapter text](https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf) by Conservative US conservation organisation the Sierra Club concludes that ‘the environment chapter would fail to protect the environment and in some respects falls short of past U.S. trade agreements’, and that ‘Far from an environmentally-friendly agreement, the TPP text also fails to protect environmental policies from the threats posed by the deal’s many polluter-friendly rules, including those related to foreign investment and fossil fuel exports. For the environment, the TPP’s net balance is decidedly negative.’

**9.** **The TPP with ISDS inclusions provides multinationals operating in Australia with unfair and inequitable rights**, as researcher Dr Kyla Tienhaara (ANU) [explains](http://www.abc.net.au/news/2015-11-06/tienhaara-ttp-investment/6918810): ‘on the one hand, the TPP provides extensive rights to foreign investors to challenge government measures. On the other hand, it provides no mechanism for those same investors to be held accountable for any environmental harm or human rights abuses they are responsible for.’

**10. ISDS is an unnecessary threat to Australia’s environment and sovereignty because it is not needed in free trade agreements for nation states to successfully trade.** In its 2015 report on ISDS, the [Productivity Commission concluded](http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/6634538) that there was no proof that ISDS impacts positively on foreign investment, and that if Australia signs the Trans Pacific Partnership, the potential legal and financial risk could engender a chilling effect on public interest policy. Brazil is a leading recipient of multinational investment, even though it has never accepted investor-state dispute settlement in any treaty. Multinationals, if they believe they are making a risky investment, can rely instead on foreign risk insurance. Domestic corporations have to go through domestic courts; it would be consistent with the TPP’s advocacy of ‘fair and equitable treatment’ for foreign firms to also use the domestic legal system rather than bypass it through offshore ISDS tribunals.

11. **Using ISDS to bypass Australia’s court system allows multinationals to neutralise court challenges by Australians exercising their democratic rights** to enforce environment regulations aimed at preventing damage resulting from multinational operations. ISDS is demonstrably not a necessary element in Free trade agreements for nations to trade successfully - Brazil is a world leading recipient of multinational investment, even though it has never accepted investor-state dispute settlement in any treaty. Multinationals have recourse to domestic courts and the use of foreign risk insurance to protect their interests. It is not consistent with our national interest thatISDS can privilege foreign multinationals, elevating them above citizens, legislatures, Australian Federal and State courts and even domestic corporations in violation of the basic principle of equality before the law.

**12. ISDS challenge outcomes in other free trade agreements present a clear and present warning for Australia.** [Analysis of the TPP environment chapter text](https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf) by Conservative US conservation organisation the Sierra Club concludes that ‘the environment chapter would fail to protect the environment and in some respects falls short of past U.S. trade agreements’. In other free trade deals there are numerous examples of ISDS challenges to public interest regulations which have resulted in outcomes which have clearly not been in the national interest of the nations involved. The following handful of examples serve to illustrate this:

**Chevron vs Ecuador**: a continuing 22 year battle over massive oil pollution in the upper Amazon. Ecuador wants Chevron to clean up its mess. Chevron has said it wouldn’t and counter-sued Ecuador. [(See the video)](http://aftinet.org.au/cms/node/566)

**Pac Rim Cayman LLC v. Republic of El Salvador -** this case demonstrates very clearly how the ISDS pro­cess can be used to directly [challenge government actions](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1898&context=jil) taken in the pub­lic interest. Mining company Pacific Rim, now owned by Australian/Canadian OceanaGold, is [suing El Salvador](http://www.theguardian.com/commentisfree/2014/oct/03/australian-mining-is-poisoning-el-salvador-it-could-soon-send-it-broke-too) under ISDS for halting gold mining in the upper catchment of El Salvador’s last source of clean water.

**Canadian pipeline company TransCanada** recently gave notice that it intends to sue the U.S. government for over $15 billion under the North American Free Trade Agreement (NAFTA) in response to the U.S. Administration’s decision to deny a permit for the Keystone XL Pipeline. This highlights the type of action that may occur under the TPP.

**Swedish firm Vattenfall brought** [**two cases**](http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf) **against Germany**, seeking $1.9 billion in damages for permit delays related to the construction of a coal-fired power plant. In settlement, Germany agreed to waive the environmental obligations embedded in Vattenfall’s permits, and alarmingly also waived the company’s obligations to mitigate the coal-plant’s environmental impacts on the Elbe River. This demonstrates how ISDS cases have resulted in the roll-back of environmental protections and the potential for ISDS to restrict a nation’s authority to regulate on behalf of citizen welfare.

**Renco Group Inc** used ISDS to [demand](http://www.citizen.org/documents/peru-tpp-investment-memo.pdf) $800 million from Peru’s taxpayers and to derail a U.S. court case seeking compensation for children in La Oroya injured by toxic contamination.

**The Canadian** [**Bilcon ruling**](http://www.theglobeandmail.com/%20report-on-business/nafta-ruling-against-canada-sparks-fears-over-future-dispute-settlements/%20article23603613/) demonstrates how ISDS enables private arbitrators to hold elected governments to impossible standards of consistency where any perceived difference in treatment can be framed, at the arbitrator’s discretion, as nationality-based discrimination. Democratic regulation is paralysed by such presumption.

 **Ethyl Corporation v.s. Government of Canada** demonstrates how [investors can use](http://www.citizen.org/trade/article_redirect.cfm?ID=6221) ISDS to Challenge Environmental Safeguards: <http://www.citizen.org/trade/article_redirect.cfm?ID=6221>

**Conclusion**

Cabinet Secretary Arthur Sinodinos in November last year [refused to guarantee](https://newmatilda.com/2015/11/12/tpp-turnbull-government-cant-confirm-it-wont-be-sued-over-climate-regulation/) that the Australian government won’t be sued if it regulates on climate change, coal seam gas, or renewable energy when asked about ISDS provisions allowing companies to sue states under the Trans-Pacific Partnership. ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors. We submit that provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses are not in the national interest, nor are unacceptable ISDS provisions that clearly would constrain the ability of Australian governments – State and Federal - to make laws on environmental and other matters in the public interest.

Name

Address/Contact details