



ASU –Submission

To

## **Inquiry into the Proposed Trans-Pacific Partnership (TPP) Agreement**

Foreign Affairs, Defence and Trade Committee

Department of the Senate

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## About the ASU

The Australian Municipal, Administrative, Clerical and Services Union (ASU) is one of Australia's largest unions, representing approximately 135,000 members. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

- Local government (both blue and white collar employment)
- State government
- Social and community services, including employment services
- Transport, including passenger air and rail transport, road, rail and airfreight transport
- Clerical and administrative employees in commerce and industry generally
- Call centres
- Electricity generation, transmission and distribution
- Water industry
- Higher education (Queensland and South Australia).

The Union has a long history of involvement in the electricity industry and water industry. That history reaches back through our local government heritage - with local government involvement in water supply going back to 1871 and electricity from the mid 1890's. We are a community-based organisation that continues to maintain a strong interest in local government, state government and the privatised industries.

The ASU has members in every State and Territory of Australia, as well as in most regional centres. Our members tend to live in the communities where they work.

In both urban and regional areas, the local council is often the largest single employer; therefore, uncertainty has significant economic impacts locally. The economic interests of Australian urban, rural and remote communities need a resolution.

Therefore, ASU advocacy extends beyond negotiated industrial outcomes for members. The ASU has a true commitment to the local government industry with a proud history; since 1871, of representing employees and that has a far-reaching effect on the sustainability of all communities.

## Introduction

The Australian Municipal, Administrative, Clerical and Services Union, trading as the Australian Services Union (ASU) welcomes the opportunity to make a submission to this important Inquiry, particularly given the growing number of bilateral and multilateral trade agreements Australian governments have entered into or are currently negotiating.

The ASU is a member of AFTINET (Australian Fair Trade & Investment Network Ltd) and as such, we are in receipt of their well-researched information on issues related to trade agreements. AFTINET supports the development of fair trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.<sup>1</sup>

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

## Terms of Reference

The proposed Trans-Pacific Partnership (TPP) Agreement, with particular reference to the impact of the agreement on:

- a) Australia's economy and trade;
- b) Australia's domestic labour market testing obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders;
- c) Australian investment;
- d) Australia's social, cultural and environmental policies;
- e) The effect of Investor-State Dispute Settlement;
- f) Rights for copyright holders;
- g) Rights for consumers; and
- h) Any other related matters.

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<sup>1</sup>See AFTINET Australian Fair Trade & Investment Network Ltd website <<http://aftinet.org.au>>

## Australia's economy and trade

The Trans-Pacific Partnership Agreement (TPP) involves 12 Pacific Rim countries but the US President, in his 2016 State of the Union speech, assured listeners that the United States set the rules for global trade.<sup>2</sup>

The Union is concerned that such rules have been considerably influenced by U.S. pharmaceutical, media and other U.S. corporate interests. As such, the TPP includes provisions which have the capacity to restrict future Australian governments (at all three levels of government) from being able to adequately regulate in the public interest.

At a time when the Australian Government claims to be concerned about reducing unnecessary cost and getting better deals for Australian taxpayers, it seems quite baffling that it would agree to the inclusion of provisions in the TPP (such as the ISDS provisions) which have the potential to place unnecessary burden on taxpayers and threaten a range of public interests in Australia and elsewhere.

The process and outcome raises concerns about the wide reach of the provisions, the risks they raise and the impact they can have on democratic rights, the health of populations, worker's rights and the environment – as demonstrated in the experience of other nations.

Despite the high risks involved with the TPP, a World Bank study has estimated that the TPP will only result in a minute 0.7% growth in the Australian economy.<sup>3</sup> As can be deduced from this ASU submission, the risks are not worth this small amount of predicted growth.

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<sup>2</sup> See President Obama's 2016 'State of the Union Address', *The White House*, <<https://medium.com/the-white-house/president-obama-s-2016-state-of-the-union-address-7c06300f9726#.js5bcfij>> accessed 6 October 2016.

<sup>3</sup> World Bank, *Global Economic Prospects*, Chapter 4, 'Topical Issues: Potential Macroeconomic Impacts of the Trans-Pacific Partnership', January 2016, p227 < <http://pubdocs.worldbank.org/en/847071452034669879/Global-Economic-Prospects-January-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf> > accessed 6 October 2016; for finance market news item which includes comparison of trade minister's claims of enormous growth for Australia from the TPP compared to World Bank forecast that the TPP will increase by only 0.7%, see Market Pulse, 'World Bank Forecasts TPP will add less than 1% to Australian Economy', *OANDA*, 12 January, 2016 <http://www.marketpulse.com/20160112/world-bank-forecasts-tpp-will-add-less-than-1-to-australian-economy/> accessed 6 October, 2016.

## Labour

The Union is concerned that labour rights as expressed in the TPP are weak and will not provide adequate protections for workers. Much of it is not legally binding and those provisions which are enforceable are shrouded in more convoluted lengthy parts of the agreement.<sup>4</sup>

It is disappointing that in relation to labour standards, only the general principles in the ILO Declaration are listed and not the detailed ILO Conventions. This can limit the implementation of the Conventions.

The wording of the provisions does not provide protection for many workers (for example public sector workers and others in non-traded sectors are not covered).

The provisions do not ensure an effective way of eliminating the use of forced labour - including compulsory child labour. The governments are only called upon to “recognise the goal” of eliminating forced labour and “discourage” through “initiatives they consider appropriate”.<sup>5</sup>

The TPP allows increased numbers of temporary migrant workers, which will create more exploitation (such as has been witnessed in the 7- Eleven stores). The TPP will also allow this increase without first testing whether local workers are available. Given that many industries in Australia are undergoing significant transitions, closure and downsizing of workers, there are likely to be many more local workers seeking employment but having to rely on unemployment benefits and family support. This doesn't seem to be the best way forward for the nation, the workers or their families.

## Medicines

The Union is concerned that the TPP would lock in stronger monopoly rights for pharmaceutical companies and will delay access to cheaper versions of expensive biologics medicines, used to treat serious diseases. The cost to the Pharmaceutical Benefits Scheme could spill into hundreds of millions of dollars per year of delay.<sup>6</sup>

As already indicated, the strengthening of provisions in favour of wealthy multinational corporations would increase global inequality. It is already evident that there are correlations between poverty and health outcomes across the globe, yet provisions contained in the TPP would make it more difficult for millions of people in developing countries to have access to the cheaper generic medicines they need.

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<sup>4</sup> See discussion in AFTINET *Submission to the Joint Standing Committee on Treaties Inquiry into Trans-Pacific Partnership Agreement*, March 2016, p21f.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid p17f.

## Investor-State Dispute Settlement

It is usual for trade agreements to have government-to-government dispute processes. However Investor-State Dispute Settlement (ISDS) provisions, such as those included in the TPP, go further to give additional special rights to foreign investors. ISDS provisions undermine democratic processes by enabling foreign investors to sue governments for compensation where they consider domestic law or policy harms their investment. The foreign corporations can sue governments over laws, regulations and even domestic court decisions that are perceived to affect profits or anticipated future profits. It effectively enables foreign corporate interests to override legitimate public policy measures – even if those measures were the result of democratic domestic processes.

Although there are claimed safeguards intended to protect health, workers' rights, environment and other public welfare measures, overseas experience indicates that similar 'safeguards' have proved to be inadequate.

The Productivity Commission has noted that 'Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions'.<sup>7</sup>

In 2010 the Productivity Commission advised against Australia including ISDS provisions in agreements:

In relation specifically to investor-state dispute settlement provisions, the government should seek to avoid accepting provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system. Nor is it advisable in trade negotiations for Australia to expend bargaining coin to seek such rights over foreign governments, as a means of managing investment risks inherent in investing in foreign countries. Other options are available to investors.<sup>8</sup>

In another report released by the Productivity Commission in 2016, it noted that there is no legitimate rationale for giving special legal rights to global corporations to sue governments over domestic legislation. The Productivity Commission again made it clear that the use of ISDS provisions should be avoided:

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<sup>7</sup> Productivity Commission, *Bilateral and Regional Trade Agreements, Research Report*, Canberra, 2010, Findings and Recommendations, p xxxii

<sup>8</sup> Ibid.

The Australian Government should seek to avoid the inclusion of Investors-State Dispute Settlement (ISDS) provisions in bilateral and regional trade agreements that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.<sup>9</sup>

The global experience of the use of ISDS provisions has indicated the readiness of wealthy corporations to use the provisions against the interests of communities and nation states.

Outstanding ISDS cases increased dramatically in 2015 with U.S. companies being the most frequent users of the provision. The growth in cases has coincided with the increased use of ISDS provisions within trade agreements.

Citizens in the US are also becoming increasingly concerned about the impact of ISDS provisions on democracy and there is increased recognition that US corporations have benefited from over-riding good public policy. This is indicated in the following statement on the US Public Citizen Blog on Globalisation and Trade:

Under existing U.S. pacts, nearly \$3 billion in taxpayer money has been paid to corporations by other countries for toxics bans, land-use rules, regulatory permits, and water and timber policies, among others. More than \$70 billion is pending under U.S. treaties in corporate claims against medicine patent policies, pollution cleanup requirements, climate and energy laws, and other public interest policies.<sup>10</sup>

It is noteworthy that the TPP exposes Australia directly to ISDS claims from US companies for the first time.

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<sup>9</sup> Productivity Commission, *Trade & Assistance Review 2014-15*, Annual Report Series, Canberra, July 2016, p 50 <http://www.pc.gov.au/research/recurring/trade-assistance/2013-14> accessed 4 October 2016.

<sup>10</sup> PublicCitizen, Eyes on Trade, 'Six Things to Know About the TPP', Public Citizen's Blog on Globalisation and Trade, 28 July, 2016 <<http://citizen.typepad.com/eyesontrade/2016/07/six-things-to-know-about-the-tpp.html>> accessed 18 October 2016.

## Investor State Arbitrations

The United Nations UNCTAD Investment Policy website provides lists of known treaty-based investor-State arbitrations. However the number of ISDS disputes could be much higher than. Searches can be made on this website but details are often not available. The following table provides data on known treaty based investor-State arbitrations:

Known treaty-based investor-State arbitrations	
Total	739
Pending	257
Concluded	471
Unknown	11

Source: United Nations, UNCTAD, Investment Dispute Settlement Navigator <http://investmentpolicyhub.unctad.org/ISDS?status=0> viewed 29 September 2016.

There are hundreds of examples of cases involving corporate use of ISDS provisions.<sup>11</sup> Many relate to the activities in areas of essential services and include water companies, mining corporations, energy corporations, telecommunications, and other industries in which many powerful corporations operate.

Not only are US corporate interests well represented by hundreds of their advisors engaged in the trade negotiation processes, but their interests are also well represented on the international investor tribunal (which are often accused of being no more than corporate courts looking after the financial interests of large corporations<sup>12</sup>).

Even the threat of an international investor court case can result in governments withdrawing proposed laws and regulations. This phenomenon has been referred to as “regulatory chill”.<sup>13</sup>

An article in Investment Treaty News stated frankly that the role and design of ISDS was never properly discussed and resulted in “a regime shaped through practice, controlled primarily by the investors and their lawyers, and arbitrators.”<sup>14</sup>

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<sup>11</sup> See information at United Nations, UNCTAD, Investment Dispute Settlement Navigator, <<http://investmentpolicyhub.unctad.org/ISDS?status=0>>; also see discussion in Productivity Commission, *Bilateral and Regional Trade Agreements*, Op. Cit., p268.

<sup>12</sup> See discussion AFL CIO summary of issues in leaflet ‘End Corporate Courts Now’, <[http://www.aflcio.org/content/download/138571/3647761/AFL-CIO\\_ISDSReport\\_5.pdf](http://www.aflcio.org/content/download/138571/3647761/AFL-CIO_ISDSReport_5.pdf)>.

<sup>13</sup> See discussion in Productivity Commission, *Bilateral and Regional Trade Agreements*, Op. Cit., p274f.

<sup>14</sup> Nathalie Bernasconi-Osterwalder, Investment Treaty News, “Rethinking Investment-Related Dispute Settlement” International Institute for Sustainable Development, May 21, 2015 <<https://www.iisd.org/itn/2015/05/21/rethinking-investment-related-dispute-settlement/>> accessed 11 October 2016.

### What it means for a government to 'win' an ISDS case

Only corporations can bring ISDS cases against governments.

Governments, therefore, can't 'win' cases as such.

Although we use the word 'win', the best possible outcome for a State is to not lose.

And even when States defend themselves successfully, they are often liable for all of their own legal expenses – on average \$8million.

Source: Thomas McDonagh, 'Who really wins more ISDS cases – governments or corporations?', OpenDemocracyUK <<https://www.opendemocracy.net/ourkingdom/thomas-mc-donagh/who-really-wins-more-isds-cases-governments-or-corporations>> viewed 7 October 2016.

## Examples of ISDS Cases

The following are summaries of a few ISDS cases. You will notice that in many cases the governments had taken legislative and policy action to protect the interests of their citizens, the environment or labour rights but these efforts were sometimes used against the government by the foreign corporations or simply over-ridden by the international investment tribunal.<sup>15</sup>

### Metalclad v. Mexico

A US corporation (Metalclad) obtained federal and state permits in Mexico to expand a hazardous waste transfer station in Mexico. However the local government refused to grant the corporation a building permit for the toxic waste facility - the local citizens had reason to be concerned that the facility would pollute their water supply. The citizens petitioned their local government to deny Metalclad a construction permit. Having considered the concerns of the citizens, the local government continued to refuse the construction permit to the company.

However the corporation continued to construct without local government approval. Metalclad then successfully sued the government of Mexico under provisions in the trade agreement (NAFTA) claiming the denial of the permit was an indirect expropriation without compensation. The international investor court found in Metalclad's favour and Mexico was required to pay Metalclad \$16.2 million.<sup>16</sup>

### Azurix Corp v The Argentine Republic

In a privatisation deal in 1999 the US water company Azurix Corp. (an Enron subsidiary) won a 30 year concession to provide water and sewage treatment to 2.5 million people. Within months residents complained of foul odors from the water and the problem was later identified as algae contamination from a reservoir. Azurix alleged the algae was the government's responsibility and demanded the government compensate the company for associated costs. The government claimed that Azurix had a contractual responsibility to ensure

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<sup>15</sup> See the international law website < <http://www.italaw.com/case-types/international-investment-agreement>> in addition to viewing the summaries provided in links relating to specific cases.

<sup>16</sup> A summary of this case is provided in the Productivity Commission, *Bilateral and Regional Trade Agreements, Research Report*, Canberra, 2010, p268 and more details are available on the ISDS Corporate Attacks website <<http://www.isdscorporateattacks.org/environment>> accessed 7 October 2016.

clean drinking water. In the year that followed, residents experienced a series of shutdowns of their water supply and repeated over-billing by Azurix. Azurix withdrew from its contract in 2001. However, Azurix then launched a claim against Argentina under the US Argentina BIT. The Tribunal ruled that Argentina had to pay the Enron subsidiary \$165 million plus interest in addition to the Tribunal's costs.<sup>17</sup>

The French Veolia company suing the Egyptian government over a contract dispute in which they are claiming compensation for a rise in the minimum wage. The company is using the ISDS provisions in an investment treaty between France and Egypt.<sup>18</sup>

#### Renco v Peru

American company Renco is a lead smelting company which is said to have “a pattern of buying up factories that poison their neighbours and then avoiding blame”<sup>19</sup>. When Renco purchased the lead smelting plant in La Oroya, Peru, it was required by the Peruvian government to complete an environmental remediation plan. Instead, the surrounds of the plant remained toxic. Community groups have been fighting for an environmental cleanup for a long time. However, Renco itself initiated an international arbitration against the Peru government before an International Investor-state tribunal. Renco claimed violations of the US Peru Free Trade Agreement because of a court decision which ordered Renco to clean up and compensate for toxic waste which caused considerable damage. Renco demands \$800 million from the Peruvian government.<sup>20</sup>

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<sup>17</sup> A summary of this case is provided in the Productivity Commission, *Bilateral and Regional Trade Agreements, Research Report*, Canberra, 2010, p268; more details are available on the ISDS Corporate Attacks website <<http://www.isdscorporateattacks.org/environment>> accessed 7 October 2016.

<sup>18</sup> AFTINET, 'The Injustice Industry: Egypt challenged over rise to minimum wage', AFTINET News item 25 June 2014 <http://aftinet.org.au/cms/veolia-vs-egypt-workers-2014> accessed 7 October 2016; see also UNCTAD, Investment Policy Hub, '2012 Veolia v. Egypt, (ICSUD /case Bi, ARB.12.15) <<http://investmentpolicyhub.unctad.org/ISDS/Details/458>> .

<sup>19</sup> See more detail on this case at NJGI Network for Justice in Global Investment, “A brief introduction of the Doe Run/Renco Vs Peru case”, 12 April 2012, <<http://justinvestment.org/2012/04/fact-sheet-la-oroya-peru/>> accessed 30 September 2016.

<sup>20</sup> Ibid.

### Lone Pine Resources Inc. v. Government of Canada

The Québec provincial government in Canada responded to community concerns about the environmental impact of shale gas mining. The government conducted a review of environmental regulation of the mining. The Quebec government put in place a moratorium on the mining license pending the outcome of the environmental review. The US Lone Pine mining company put a claim for damages against the Canadian government under provisions in NAFTA. This dispute is still active.<sup>21</sup>

### Dow AgroSciences LLC v. Government of Canada

Dow AgroSciences LLC sued for losses allegedly caused by the Quebec government's ban on the use of pesticides containing the active ingredient 2, 4-D – this case has since settled.<sup>22</sup>

### Chevron v. Ecuador

Chevron is one of the largest US oil corporations. After many years of struggle by Indigenous communities and their supporters, an Ecuadorian court ordered Chevron to pay for widespread pollution of the Amazon rainforest, poisoned water sources, destruction of natural resources, health effects of the contaminated communities and the destruction of cultural heritage (including six indigenous groups).<sup>23</sup> However, instead of adhering to the decision of the Ecuadorian court, Chevron used ISDS provisions to sue Ecuador in the international court.

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<sup>21</sup> See Global Affairs Canada, 'NAFTA Chapter 11 Investment: Lone Pine Resources Inc. v Government of Canada', Government of Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng> accessed 11 October 2016.

<sup>22</sup> Global Affairs Canada, 'NAFTA Chapter 11 Investment: Dow AgroSciences LLC v. Government of Canada', Government of Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/agrosciences.aspx?lang=eng> accessed 11 October 2016.

<sup>23</sup> For more discussion on various cases from the perspective of American civil action groups see Investor-State Attacks: Environment < <http://www.isdscorporateattacks.org>>.

It can be deduced that Investor State Dispute Settlement (ISDS) is a costly system which enables foreign corporations to use special courts even where domestic courts have ruled against the corporation. As can be seen from the cases listed above, trade agreements with ISDS provisions have often been used by large wealth corporations against the people and the environment of poorer countries. The ISDS provisions undermine democratic processes and the people who have the most to lose and suffer the most from the impact of pollution and the abuse of their labour rights have not been given a voice. Their interests are not adequately represented at the negotiation table. The corporate courts appear to unfairly benefit large wealthy corporations. In effect ISDS provisions help to accelerate global inequality. It also raises serious intergenerational equity issues for future tax payers who will have to pay for the consequences of these unfair ISDS provisions.

### **What it means for a government to settle an ISDS case**

A settlement implies that the government has changed its position in relation to the case. This involves a concession of some sort to the investor – either a payment of compensation or a change in laws or regulations. For example, in Germany when the government faced an ISDS case brought by Swedish energy multinational Vattenfall, it settled by getting the city of Hamburg to lower the environmental standards for a planned coal-fired power plant. (Ironically, legal action is now being brought against the German government by the EU Commission for not sufficiently protecting the Elbe River that surrounds the plant). If we count settled ISDS cases – that involve some form of concession to the investor – as at least partial wins for the corporation, we see to what extent the system is skewed in their favour

Source: Thomas McDonagh, 'Who really wins more ISDS cases – governments or corporations?', OpenDemocracyUK <<https://www.opendemocracy.net/ourkingdom/thomas-mc-donagh/who-really-wins-more-isds-cases-governments-or-corporations>> viewed 7 October 2016.

Globally there are many other examples of corporations using ISDS provisions to threaten and intimidate governments for decision making in the public interest. Sometimes actions have related to privatisation decisions made in the past. For example the decision of the newly elected government of Portugal to cancel the bus privatisation plans put in place by the previous government but which had not yet been approved. The Mexican company which expected to make profits from the privatisation threatened to bring a €42 million investment treaty claim against the Portugal government over the cancelation of the deal to privatise the transport system. The Mexican transport company ADO argues

that it constitutes “a serious violation of its international obligations which has damaged our investment”.<sup>24</sup>

Even when populations democratically elect a change of government in order to change policy directions, ISDS provisions can threaten to usurp democratic decision making even where it is in the public interest.

Given the experiences of many nations in relation to the provisions, it seems outrageous that the Australian government would include such ISDS provisions in any free trade agreement. It is particularly risky as a number of Australian governments consider privatisations in areas that have proved to be susceptible to corporate actions under ISDS. For example there have been substantial cases relating to water contracts, transportation, energy, climate change, financial stability, environment and health.<sup>25</sup>

Imagine the financial burden which would result from cases being brought against Australian governments and the impact it would have on the budget. What potential costs could there be for taxpayers where several corporations sue federal, state or local governments? It leads us to ask “Why further bleed our public finances by giving extensive rights to foreign corporations?”

Many of these corporations have an annual turnover that dwarf the GDP of many nation states and are well able to finance long running court cases even if it has a crippling impact. Why would we choose to allow foreign corporations the ability to sue our government and override policies and legislation which is designed in the public interest?

The inclusion of ISDS provisions in a free trade agreement sends a signal to the community that the Australian Government is prepared to put foreign company interests ahead of the interests of its own people, its own resources and its national wealth. It also indicates that it would not be concerned about the consequences of such provisions being used against the citizens of other nations.

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<sup>24</sup> Tom Jones, ‘Portugal threatened with first treaty claim’, Global Arbitration Review, 27 September 2016, <<http://bilaterals.org/?portugal-threatened-with-first>> accessed 6 October, 2016.

<sup>25</sup> For example see ISDSCorporateattacks website, <<http://www.isdscorporateattacks.org/>> accessed 6 October 2016.

## Nations withdrawing from ISDS Provisions

Many nation states have found that, as a result of ISDS provisions, the cost of running cases and related compensation can have crippling impacts on their economy (often running into billions of dollars). It has also been noted that such potential impacts can inhibit governments from initiating legitimate domestic legislation. It is therefore not surprising that there is an increasing number of governments refusing to sign trade agreements containing ISDS provisions and many governments are withdrawing from the ISDS system.

Indonesia announced it would terminate all 67 bilateral investment treaties. India is seeking to terminate 57 bilateral investment treaties (BITs). Ecuador is withdrawing from their BITs. Germany advised the EU that it could no longer accept trade agreements that expanded the existing ISDS regime. Debate is ongoing within the EU with regard to Investor State Disputes. South Africa was seeking to terminate most of their BITs because in the South African government's view "overall, BITs are a greater harm to the country's development objectives". Many more countries have been reassessing their ISDS provisions over recent years in the light of their experiences.<sup>26</sup>

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<sup>26</sup> See 2015 discussion, Investment Treaty News, 'Rethinking Investment-Related Dispute Settlement' International Institute for Sustainable Development, < <https://www.iisd.org/itn/2015/05/21/rethinking-investment-related-dispute-settlement/>> accessed 13 October 2015.

# Need for Re-democratisation

## Secretive and undemocratic processes

The Union is concerned that the trade agreement processes are secret and undemocratic. Whilst they are legally binding on governments and can have far reaching impacts, it is disturbing that they are negotiated in secret.

Trade agreements, such as the Trans-Pacific Partnership (TPP), now deal not only with traditional trade issues like tariffs or taxes on imports, but with a wide range of domestic law and policy issues that affect workers, families and communities. These include issues affecting medicines, internet regulation, data privacy, cultural policies, food, tobacco and alcohol regulation, labour rights and environmental policies. In effect, they appear to be less about traditional trade issues and more about limiting the ability of domestic governments to regulate in these areas.

These policy issues should be decided through public democratic parliamentary processes. They should not be the subject of negotiations secretly traded away behind closed doors where corporate interests are represented but civil society is not given a voice

It is significant that prior to the signing of the agreement, much of the detail about the negotiations and draft texts only became known to Australian civil society through leaked documents and not as part of an open process.<sup>27</sup> By contrast we understand that a plethora of U.S. corporate representatives played a significant advisory role in the process.<sup>28</sup> This raises significant concerns about the way trade deals threaten our democracy as a result of favouritism being shown to corporate interests.

Further, with the TPP, there is no effective role for Parliament, parliamentary committees, or other consultative bodies such as the Commonwealth-State-Territory Standing Committee on Treaties, or the Treaties Council in reviewing proposed treaties prior to them being signed. They are not given the opportunity to change the text before it is signed, even if significant issues of public interest are at stake.

Parliament only gets to vote on the implementing legislation, not the text of the agreement.

We object to this current process because it is secret and undemocratic. There are alternatives to this procedure and the Union is aware that there are growing numbers of examples of public release of trade agreement texts before signing. For example, since 2003, World Trade Organisation draft texts

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<sup>27</sup> For example see article about the leaks in Michael Janda, 'Trans-Pacific Partnership leaked chapter raises health, environment concerns', *ABC News*, 27 March 2015, <<http://www.abc.net.au/news/2015-03-26/trans-pacific-partnership-leaked-chapter-raises-regulatory-conc/6350584>> accessed 6 October 2016.

<sup>28</sup> See discussion by U.S. citizen group PublicCitizen, at <[www.citizen.org/tpp](http://www.citizen.org/tpp)>.

have been placed on the WTO public website. The Anti-Counterfeiting Trade Agreement (ACTA), text was released in 2011 before it was signed.<sup>29</sup>

The TPP was signed by the Minister for Trade and Investment on 4 February 2016. The text of the agreement and accompanying National Interest Analysis was later tabled in the Australian Parliament on 9 February 2016.

## Undemocratic ISDS system

The ISDS system which over-rides domestic laws are not adequately accountable, they lack transparency and hinder the sovereign right of governments to legislate in the public interest.

The cost of fighting ISDS cases can be an enormous burden on the nation and can cost taxpayers tens of millions of dollars in legal fees - even where governments win the case. If multiple cases were to be successfully claimed against Australian governments, the costs would likely to be in the \$billions and lumber future taxpayers with ongoing financial burden.

The union is of the view that citizens and their governments have a right to determine how best to safeguard public health, labour rights and the environment -it should not be over-ridden by the interests of powerful foreign companies. Nor should developing countries be subjected to corporate courts which do not respect their health or democratic rights.

The Union is not opposed to fair trade agreements however the TPP is a bad deal for democracy, health, workers' rights, the environment as well as the tax-payers who ultimately have to foot the bill for any ISDS prosecutions.

It is not fair to have trade agreements that push for deregulation and override legislation that is in the public interest. It doesn't make sense to have a separate international court to uphold the interests of multinational corporations with the outcome of increasing their power and weakening domestic democratic institutions. We need global economic justice at work to ensure trade agreements are fair. We call for a re-democratisation of the trade negotiation process.

The Union is of the view that the systems of justice should be transparent, democratic and available to all on an equal basis.

In relation to essential services, such as the provision of water and energy, the Union is of the view that by maintaining such services in public hands, governments can maintain control of service quality, continue to gain benefit from dividends, have more direct ability to adapt service provision in response to environmental changes or policy needs. In addition, maintaining public ownership and control would

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<sup>29</sup> We note that these and other alternatives were explored in the AFTINET *Submission to Foreign Affairs and Trade on the Regional Comprehensive Economic Partnership (RCEP)*, September 2015, p5 <http://aftinet.org.au/cms/sites/default/files/RCEP%20second%20sub%200915.pdf> accessed 6 October 2016.

enable governments to avoid the risk of being sued under ISDS provisions and having multinational corporations avoid their taxation and other obligations to maximise profits going overseas.

## Conclusion

A number of concerns were raised in this submission. They included concerns about the secrecy surrounding the content of negotiations, the limited role of parliament, the existence of provisions in the TPP which enable foreign corporations to over-ride public interest and democratic measures, the weak labour protection components and the ability of pharmaceutical companies to lock in strong monopoly rights which will have a detrimental impact on our Pharmaceutical Benefits Scheme.

We reflected upon the reports of the Productivity Commission and their advice to the government not to include ISDS provisions in agreements.

We reflected on the experience across the globe and the ways in which similar ISDS provisions have been used to sue governments, causing crippling economic burdens on nations and over-riding democratic public policy measures. We find it disturbing that ISDS provisions have been included in the TPP agreement.

Considering all these factors, the Union is of the view that the Committee should recommend against the implementing legislation for the Trans – Pacific Partnership Agreement.

Furthermore, we are of the view that the Committee should advocate for increased transparency and democratisation of trade negotiations processes.