

11 March 2016

Trans-Pacific Partnership Agreement

Submission to the Joint Standing Committee on Treaties

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments on the Trans-Pacific Partnership (TPP) Agreement to the Joint Standing Committee on Treaties. This submission focuses on two key concerns: the inclusion of an investor-state dispute settlement mechanism in the TPP, and the lack of transparency during the negotiation process.

The TPP has been signed, but there is still an opportunity for the Federal Government to minimise the worst of the risks that the trade agreement carries with it. CHOICE urges the Government to take steps to re-negotiate on a party-by-party basis provisions that will allow Australia to opt out of ISDS mechanisms with all participating countries. As a matter of priority, opt outs should be secured with the United States and Japan, given their legal systems.

The Government has already opted out of ISDS with New Zealand. It should seek the same option with the rest of the TPP parties. This won't resolve all of the issues that CHOICE has raised with the TPP. For instance, excising ISDS from the agreement does not address the risks associated with locking in outdated copyright provisions that would benefit from reform. However, it will help reduce the risk of harm and safeguard our Parliament's ability to make laws that benefit Australians.

The TPP's ISDS provision places future reform to benefit Australian consumers at risk. Specifically, CHOICE is concerned about ISDS action against Australia should the Federal Parliament pass legislation or if the Government implements regulations to:

- Require specific-ingredient labelling on food products, like palm oil;
- Change or strengthen our country of origin labelling system;¹
- Require the display of 'health stars' or 'traffic lights' on the front of packaged foods;
- Ban the import of products that are dangerous or potentially dangerous; or
- Improve the Australian Consumer Law to, for example, ban unfair trading or to strengthen consumer guarantees.

In the long term, the treaty-making process needs significant reform to ensure that Australia's national interest is better represented in the negotiation process and that unintended consequences of complex agreements are captured earlier. CHOICE reiterates our call for negotiating texts to be made public in the

¹ For example, the WTO case against the US brought by Canada and Mexico objecting to country of origin labelling requirements for beef. See World Trade Organization, 20 October 2014, 'WTO issues compliance panel reports on US "country of origin" disputes', available at https://www.wto.org/english/news_e/news14_e/news14_e/384_386rw_e.htm

negotiation phase, for plain-English explanatory documents for each section of the agreement and for genuine public consultation that includes consumers, advocates and public interest groups.

Recommendations

- **The Australian government should not ratify any international treaty containing an Investor-State Dispute Settlement Mechanism.**
 - **CHOICE recommends that the Federal Government take steps to opt out of ISDS with individual parties to the TPP by negotiating side letters using the Australia-New Zealand side letter as a model. Agreements with Japan and the United States should be prioritised.**
- **In future trade agreement negotiations, the full negotiating texts of any international trade agreement should be made public, in a timely manner and an accessible format. The text should clearly identify which parties have proposed specific language. The full text should be accompanied by plain English explanatory documents for each section of the agreement.**
 - **If it is not possible to release the full text, a redacted version that anonymises proposals and excludes sections relating to tariff reductions should be made available. As a priority, sections that have the potential to substantially affect domestic regulatory arrangements (e.g. sections on intellectual property) should be made public.**
 - **In the absence of publication of the actual texts, plain-English explanatory documents should be made public to assist in consultation for any agreement.**
- **At the conclusion of negotiations, the full text of any treaty or agreement should be made public. This should occur well in advance of the document being signed and ratified, to facilitate a robust consultation process.**

1. Investor-State Dispute Settlement

The Trans-Pacific Partnership includes a mechanism for Investor-State Dispute Settlement (ISDS).² ISDS provisions in trade agreements “grant foreign investors the right to access an international tribunal if they believe actions taken by a host government are in breach of commitments made in a Free Trade Agreement”.³ In practice, ordinary policy decisions can be challenged under ISDS, even if the decision was made in the interests of the Australian public.

ISDS agreements should not be included in trade agreements

CHOICE does not support trade agreements with ISDS provisions. This opposition is based on well-founded concern that ISDS provisions allow corporations to take action against reform that can be in the general public’s interest and that the provisions have a freezing effect, often preventing government from pursuing much needed future reform.

CHOICE is opposed to ISDS provisions in trade agreements because they prevent sensible law reform in the interests of consumers. ISDS provisions are not necessary to protect business interests and offer no benefits to the Australian public.

CHOICE’s position is supported by a range of bodies and experts, many of whom also generally support free trade policies. Critics of ISDS include the Productivity Commission (PC) and the Chief Justice of the High Court. The PC concluded in 2010⁴ that:

“Australia should seek to avoid accepting ISDS provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already afforded in Australian law”.

The PC found that there is no economic reason for including ISDS clauses in trade agreements, and such clauses are associated with significant risks.

Chief Justice French expressed serious concerns about ISDS in 2014, noting the tensions that exist between ISDS arbitration and the legitimate functioning of the parliament, executive branch of

² Trans-Pacific Partnership Agreement, Chapter 9, section B: Investor-State Dispute Settlement.

³ Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', formerly available at <https://www.dfat.gov.au/fta/isds-faq.html>

⁴ Productivity Commission Research Report, Bilateral and Regional Trade Agreements, November 2010.

government and the courts.⁵ French CJ referenced a paper by the EU Parliamentary Research Service that identified no less than nine significant procedural issues with ISDS, including the very high costs borne by governments, the vagueness and inconsistency in interpretation of ISDS clauses and the absence of any effective review or appeal processes.

TPP ISDS carve-outs do not protect public policy objectives

The TPP includes two carve-outs intended to prevent certain laws and policies from being challenged under ISDS: one specific carve-out for tobacco control measures, and one general carve-out for public health and the environment “except in rare circumstances”.⁶

The tobacco carve-out may prevent ISDS actions being brought over tobacco control policies. However, this begs the question of how effective the general carve-outs for public health and the environment will be. General carve-outs for the environment and health in other trade agreements have not prevented actions being brought challenging environmental protection laws.⁷ The wording of the general carve-out in the TPP also provides a loophole, stating that it protects against ISDS actions, except in “rare circumstances”.⁸ It is entirely unclear as to what will constitute rare circumstances.

Even if the general carve-out were effective at protecting public health laws and regulations, it will not provide any protection for laws passed on consumer protection. This could lead to expensive cases being brought if the parliament passes legislation or if the government implements regulations:

- Requiring specific-ingredient labelling on food products, like palm oil;
- Changing or strengthening our country of origin labelling system;⁹
- Requiring the display of ‘health star’ or ‘traffic lights’ on the front of packaged foods;
- Banning the import of products that are dangerous or potentially dangerous;¹⁰ or
- To improve the Australian Consumer Law to, for example, ban unfair trading or to strengthen consumer guarantees.

⁵ French CJ, 9 July 2014, ‘Investor-State Dispute Settlement: A Cut Above the Courts?’, available at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>

⁶ See Chapter 29, Exceptions and General Provisions, Article 29.5: Tobacco Control Measures and Chapter 9, Investment, Annex 9-B: Expropriation.

⁷ The Peru-US Trade Promotion Agreement includes a general carve-out (see Chapter 10, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>) but this did not prevent US company Renco from bringing an action against the Peruvian government objecting to regulations on lead pollution (<http://www.italaw.com/cases/906>). This matter is ongoing.

⁸ Chapter 9, Investment, Annex 9-B: Expropriation, s3(b).

⁹ For example, the WTO case against the US brought by Canada and Mexico objecting to country of origin labelling requirements for beef. See World Trade Organization, 20 October 2014, ‘WTO issues compliance panel reports on US “country of origin” disputes’, available at https://www.wto.org/english/news_e/news14_e/384_386rw_e.htm

¹⁰ For example, see *Ethyl Corp v Canada*. This case was brought under NAFTA by the US company after Canada sought to ban the import of a gasoline product that contained a potential neurotoxin. The company won US\$15m in damages and the import ban was removed.

Country of origin labelling is a particularly live concern given ISDS-like processes have been used successfully to prevent the US from changing its own labelling requirements for beef, on the basis that this would unfairly advantage domestic producers.¹¹ Australia should be able to pass laws requiring products be labelled in a way that provides consumers with relevant information, even if these laws are not welcomed by international companies.

ISDS is not a necessary element of the TPP

ISDS poses significant risks, and is simply not necessary. As the Cato Institute has noted, companies have open to them a simple and effective way to mitigate risk - by buying insurance.¹² Under ISDS, the Australian public is subsidising international companies, effectively paying for insurance on their behalf. This situation is unfair and unnecessary, and could be addressed by refusing to negotiate free trade agreements that include ISDS mechanisms.

It is possible to enter into the TPP without including ISDS. Australia and New Zealand have opted out of ISDS processes between the two nations and their investors. The side letter on investment between Australia and New Zealand states that:

- No investor of New Zealand shall have recourse to dispute settlement against Australia under Chapter 9, Section B (Investor-State Dispute Settlement) of the TPP Agreement; and
- No investor of Australia shall have recourse to dispute settlement against New Zealand under Chapter 9, Section B (Investor-State Dispute Settlement) of the TPP Agreement.

ISDS is not necessary when dealing with countries whose legal systems we trust, and this side letter provides proof that the Department of Foreign Affairs and Trade accepts that. If ISDS were necessary, we would not have risked opting out of it with New Zealand.

When the Australia-United State Free Trade Agreement (AUSFTA) was negotiated, the government of the time was clear in its view that ISDS was not necessary due to the countries' "open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems".¹³

¹¹ World Trade Organization, 20 October 2014, 'WTO issues compliance panel reports on US "country of origin" disputes', available at https://www.wto.org/english/news_e/news14_e/384_386rw_e.htm

¹² Ikenson D., 4 March 2014, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement', Free Trade Bulletin No. 57, The Cato Institute, available at <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purgenegotiations-investor-state>

¹³ Statement by DFAT, in response to the recommendation by the Senate Foreign Affairs, Defence and Trade References Committee that ISDS clauses not be included in AUSFTA.

The same justifications for excluding ISDS from AUSFTA apply to the TPP. The same justifications for seeking to opt out of ISDS with New Zealand particularly apply to our dealings with the United States, Japan, and the various other parties to the TPP with reliable legal systems comparable to Australia's. For instance, Canada's government has paid US corporations more than CAD\$200 million in the seven ISDS cases brought under the North American Free Trade Agreement (NAFTA) that it lost. Just defending cases that may not be successful for the US claimants has also been extremely expensive for Canada, costing over CAD\$65 million to date. Canada and Australia are both dominated by US investors.¹⁴ Australia could see a similar rush of US-led ISDS cases if the TPP is ratified without an ISDS opt-out between the US and Australia.

ISDS is expensive

After the introduction of tobacco plain-packaging rules in Australia, cigarette companies unsuccessfully challenged the new laws twice in our High Court. Rather than accept the court's decision, Philip Morris Asia acquired Philip Morris Australia and challenged the plain packaging rules using an ISDS provision in a 1993 bilateral investment treaty between Hong Kong and Australia.

To access the benefits of ISDS, an investor has to be from one party, bringing an action against the other party's government. In this case, the investor would need to be from Hong Kong, bringing a case against the Australian Government. Philip Morris Australia was an Australian company, so could not access the arbitration provided in the investment treaty. Almost a year after the government announced the plain packaging policy, Philip Morris Asia acquired Philip Morris Australia.

On 18 December 2015, the international tribunal hearing the case rightly decided that it had no jurisdiction to hear Philip Morris Asia's claim. Philip Morris clearly tried to manipulate its corporate structure to take advantage of the ISDS system.

No decision was made on the substance of the case. Had Philip Morris Asia acquired Philip Morris Australia a year earlier, the case likely would have proceeded and it is not clear whether the Australian Government would have won on the merits or not. The Philip Morris decision on a procedural matter does not affirm the right of the Australian Government to pass laws in the public interest without being

¹⁴ Nearly 50% of Canada's investors (Tienhaara K, 9 October 2015, 'Canada has an ISDS clause with the US. It has faced 35 challenges. Is this Australia's future?', The Conversation, available at <https://theconversation.com/canada-has-an-isds-clause-with-the-us-it-has-faced-35-challenges-is-this-australias-future-48757>) and 27% of Australia's (Australian Bureau of Statistics, 8 May 2015, 'International Investment Position: Australia: Supplementary Statistics 2014', available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5352.0>) are US-based.

subject to ISDS action. The substance of the Philip Morris decision has yet to be published due to the confidentiality regime governing the arbitration.

Even when ISDS cases are successfully defended by governments, they cost taxpayers enormous amounts of money. Reports estimate that the recent Philip Morris ISDS action cost us approximately \$50 million in fees.¹⁵

The OECD estimates a lower, but still substantial, average cost for ISDS arbitration at roughly \$8 million per case. As discussed above, Canada's government has paid US corporations more than CAD\$200 million following ISDS cases brought under NAFTA, and spent CAD\$65 million to date defending cases that have not yet been settled or decided.

Recommendation:

- **The Australian Government should not ratify any international treaty containing an Investor-State Dispute Settlement Mechanism.**
 - **CHOICE recommends that the government take steps to opt out of ISDS with individual parties to the TPP by negotiating side letters using the Australia-New Zealand side letter as a model. Agreements with Japan and the United States should be prioritised.**

2. Transparency in negotiations

This submission focuses on CHOICE's primary concern with the content of the TPP; investor-state dispute settlement. However, CHOICE also has concerns about the treaty-making process as it unfolded during TPP negotiations.¹⁶ There is significant room for improvement regarding the level of openness, transparency and accountability in the treaty negotiation process.

Consultation is necessary both to reach an ideal policy outcome and to ensure that stakeholders, including the general public, have a voice in the development of rules that will affect them. Transparent consultation provides an agreement with legitimacy in the eyes of the public, and also provides the

¹⁵ Martin P, 28 July 2015, 'Australia faces \$50m legal bill in cigarette plain packaging fight with Philip Morris', Sydney Morning Herald, available at <http://www.smh.com.au/federal-politics/political-news/australia-faces-50m-legal-bill-in-cigarette-plain-packaging-fight-with-philip-morris-20150728-gim4xo.html>

¹⁶ For more information on CHOICE's position, see CHOICE's submission to the Inquiry into the Commonwealth's Treaty-Making Process, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions

negotiators with additional access to expert advice in a range of areas that they themselves may not be expert in, reducing the risk of unintended consequences arising from the complex ways in which international agreements can interact with Australian law.

Access to negotiating text

While free trade agreements traditionally focused on the removal of barriers to trade between signatories, agreements increasingly include far broader provisions. The TPP includes sections that will impact on intellectual property and domestic copyright law, access to medicines, investment and environmental protection. Stakeholders, including the public and their elected representatives and advocacy bodies, should be given the opportunity to voice their concerns on an agreement of this scope during the negotiation phase.

CHOICE strongly supports the release of the entire negotiating text associated with each round of negotiations at the earliest opportunity to facilitate ongoing feedback and consultation with stakeholders. However, incremental steps to improve transparency are far preferable to the status quo, even if these steps fall short of complete and ongoing disclosure.

Such incremental steps could include redacting the text so that proposals cannot be linked to particular parties, or excluding sections dealing with tariff reductions. Transparency is most vital in relation to sections of agreements that have the potential to substantially affect domestic regulatory arrangements.

Trade documents and information should be proactively published online at the earliest stage possible, in an accessible format. Summaries of key terms, issues and policy positions should be made available in plain language, to better facilitate public engagement and consultation. The current highly secretive approach to negotiations, typified by the TPP, stifles public debate on issues that are likely to affect a broad section of the Australian public.

Transatlantic Trade and Investment Partnership (TTIP)

The TTIP provides a positive example of how to improve transparency when negotiating complex international treaties. Since negotiations commenced, positive changes have been made to improve community consultation on the TTIP. These include the publication of many of the position papers, a commitment to publish the EU negotiating mandate, the creation of an evenly-balanced Advisory Group, and briefing sessions that take place during each negotiating round. All of these initiatives could be replicated and applied in the Australian context.

In particular, the publication of position papers and establishment of an expert advisory group would aid in ensuring consumer interests are taken into account during negotiations. The EU's Advisory Group is comprised of 14 experts each representing a different interest group. They provide TTIP trade negotiators with advice on the TTIP's likely impact on environmental, health, consumer, business and workers' interests. The broad composition of the group reflects the wide scope of the TTIP; similar groups could be created to assist in Australian free trade negotiations, and help ensure these agreements result in positive outcomes for Australian citizens.

The EU has also published various TTIP texts as part of its transparency initiative. These texts include the EU textual proposals on sections of the TTIP, setting out the legal language proposed to be included in the agreement. The EU position papers have been published, outlining what the EU sought to achieve in each chapter of the agreement. The EU has also committed to make the full text of the agreement public at the conclusion of negotiations, 'well in advance of [the TTIP's] signature and ratification'.

The Department of Foreign Affairs and Trading states on its website that it engaged in direct consultations and discussions with over 1000 stakeholders during the TPP negotiations. CHOICE attended several of these meetings. Departmental staff were unable to provide CHOICE with any negotiating documents, position papers, issue papers or the wording of any sections of the agreement. They could not provide face-to-face descriptions of the content of the agreement, or directly answer questions on the contents. Regardless, the Department asked CHOICE staff to raise any concerns around the wording of particular sections. Being asked to first imagine a text and then develop intelligent, worthwhile questions about the details of that text can best be described as farcical.

Consultations for the TPP began in 2008; CHOICE was first involved in 2012. On 26 January 2016, CHOICE was able to access the formal, legally verified text of the TPP for the first time. Less than a month and a half later, we are lodging this submission on this document, which is thirty chapters and more than two thousand pages long. CHOICE's contribution to the lengthy consultation process would have been more valuable had access to any of the TPP documentation been granted at an earlier stage.

The evolution of the TTIP negotiation process demonstrates it is possible to release information, including proposals and policy positions, regarding sensitive treaties being negotiated by a number of countries.

Recommendations:

- **In future trade agreement negotiations, the full negotiating texts of any international trade agreement should be made public, in a timely manner and an accessible format. The text**

should clearly identify which parties have proposed specific language. The full text should be accompanied by plain English explanatory documents for each section of the agreement.

- If it is not possible to release the full text, a redacted version that anonymises proposals and excludes sections relating to tariff reductions should be made available. As a priority, sections that have the potential to substantially affect domestic regulatory arrangements (e.g. sections on intellectual property) should be made public.
- In the absence of publication of the actual texts, plain-English explanatory documents should be made public to assist in consultation for any agreement.
- At the conclusion of negotiations, the full text of any treaty or agreement should be made public. This should occur well in advance of the document being signed and ratified, to facilitate a robust consultation process.