

**From:**

Dr K.H. Sievers

**To:**

Foreign Affairs, Defence and Trade Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
[fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)

## **Submission to the Senate Inquiry into the Commonwealth's Treaty-Making Process**

### **a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties;**

While the role of the Executive should be to negotiate treaties, since Australia is a democracy, it should be the role of the Parliament to approve and review such treaties. Most of the submissions so far agree that any approval and/or reviewing of treaties should be done in this way. Unfortunately the Australian Constitution does not require the approval by Parliament. This means that the Constitution needs to be changed.

### **b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation;**

If the role of Parliament should be to approve and review such treaties, parliamentary committees should have the central role in reviewing and reporting on treaties. This is the only way that a serious examination and discussion of the issues raised by such treaties can take place. Again, most submissions emphasize there can be no democracy without such frank and open discussion of important issues. The submission by Vanessa and Robert Howe, Jared Hardy and Dr Clem Stanyon, make interesting suggestions about how such a process might proceed in a way consistent with any government which wishes to be considered democratic.

### **c. the role of other consultative bodies including the Commonwealth-State-Territory Standing Committee on Treaties and the Treaties Council**

Such consultative bodies would be expected to present their assessment of any proposed treaties to the parliamentary committees.

### **d. development of the national interest analysis and related materials currently presented to Parliament;**

Under the part of the national interest analysis covered by “reasons Australia would take to the proposed treaty action” there should be a focus on the well-being and prosperity of Australia’s population. See e. below.

### **e. development of the national interest analysis and related materials not currently presented to parliament, such as the inclusion of environmental impact statements;**

While the impact on treaties on our environment is clearly important, there are many other factors which cannot be ignored, such as their impact on people's living standards, their job prospects, and their health and safety. How could a country approve a treaty which would lower the living standards of much of the

population, reduce their incomes and opportunities for employment, or make the cost of their health care rise to levels that many could not afford?

**f. the scope for independent assessment and analysis of treaties before ratification;**

If there is to be independent assessment and analysis of treaties before ratification, a democracy could only allow that there is a range and variety of such assessments. This will allow for their examination from a number of different perspectives. These reports can then be used by parliamentary committees to reach a final conclusion. If there is only one "independent assessment", this simply replaces the job of the parliamentary committees. It should be their job to assess and analyse treaties. However, if an "independent assessment" is code for a hand-picked committee of "experts", such a strategy is simply a means for taking the decision out of any democratic political influence. Surely this is not what is intended.

**g. the scope for government, stakeholder and independent review of treaties after implementation.**

Obviously such reviews are necessary; however the comments made in **f.** with respect to "independent review" apply here as well. If there is an adequate review of these treaties by stakeholders and government, one more "independent review" is simply unnecessary unless the plan is to simply remove the decision from normal political processes.

**h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties;**

The current process for public and stakeholder consultation does not even exist. For several years the government while controlled by both major parties has been in the process of negotiating a treaty which is so secret that virtually no legislator in any country involved knows or can talk about the details of this treaty. Such a level of secrecy is completely incompatible with any form of democracy. There can be absolutely no opportunity for greater openness, transparency and accountability in negotiating treaties with such secrecy. Any country which signed a treaty under such conditions can hardly be called a democracy. If there is no openness, transparency and accountability, there is no democracy.

**Secret Treaties and Agreements:**

It is a simple matter to understand why any country would enter into a secret treaty or agreement. Either the treaty is in the public interest or it is not. Further, either the government believes that the public can understand the impact of a particular treaty or that they cannot. This gives us four possibilities:

- i)** If the treaty is in the public interest and the public cannot understand the impact of the treaty, then secrecy is not necessary. The treaty can simply be announced, described and accepted by a government.
- ii)** If the treaty is not in the public interest and the people cannot understand the impact of the treaty, then secrecy is also not necessary. The treaty can be announced, described and then accepted or rejected by a government with little negative public reaction.
- iii)** If the treaty is in the public interest and the public can understand the impact of the treaty, then secrecy is again not necessary. The treaty can be announced, described and accepted by a government.
- iv)** If the treaty is not in the public interest and the public can understand the impact of the treaty, then secrecy is necessary, particularly if the government wants to accept the treaty anyway and avoid widespread popular opposition.

Of course one way to deal with the problem of an alert and understanding public would be to **keep the plan to consider a secret treaty itself a secret by hiding its existence from the public.** This kind of devious behaviour is not the way a healthy democracy would function. Surely a vibrant free press would uncover and expose such reprehensible behaviour. Still this strategy might allow a less than fully democratic government a way to approve a secret and undesirable treaty with a minimum of public fuss, particularly if there was no real press freedom.

**So what is the conclusion?** The only reason to keep a treaty secret is when it is not in the public interest and the people would be able to discover this once they saw what was being agreed to. The only reason to keep the negotiations for a secret treaty secret is the same: to make sure the treaty is approved before people realize what has been done to them.

**i. a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements;**

A comparison with our trading partners could be useful. In Brussels on the 7th of January 2015 the European Commission "published a raft of texts setting out EU proposals for legal text in the Transatlantic Trade and Investment Partnership (TTIP) it is negotiating with the US. This is the first time the Commission has made public such proposals in bilateral trade talks and reflects its commitment to greater transparency in the negotiations." (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231>) The EU is one of our trading partners and the TTIP treaty is very similar to the TPP being considered by Australia. We would do well to adopt their policies on this question. The submission by the Communist Party of Australia also noted that it is common practice in WTO negotiations for position papers and drafts of treaties to be released on the WTO website. Completely secret negotiations are not the norm.

**j. exploration of what an agreement which incorporates fair trade principles would look like, such as the role of environmental and labour standard chapters; and**

If agreements "which incorporate fair trade principles" mean the sort of process we see in the ISDS system, there is nothing to explore. The ISDS system is not fair and not about trade. Companies that don't like our laws or regulations are cordially invited to use the exit at the earliest possible opportunity.

**Treaties involving the Investor-State Dispute Settlement (ISDS):**

It is hard to understand why any country would choose freely to enter into any treaty or other agreement which involves the ISDS. There are so many problems with this system it is hard to know where to start.

- 1) Deregulation:** The ISDS system is not about trade. Its sole purpose is to force deregulation on a country.
- 2) Sovereignty:** Such forced deregulation is a surrender of a nation's sovereignty, its power to frame and enforce legislation and policies.
- 3) No Consideration of Public Interest:** Under the ISDS system, there is no possibility for consideration of what we all understand as public interest. The only reason relevant to remove a given law or regulation is that it will diminish the profitability of a foreign company.
- 4) Anti-democratic:** The ISDS system is totally beyond the usual democratic processes of elections, advocacy and public protest. How a robust democracy could even consider accepting such a system is incomprehensible.
- 5) One-Sided:** The ISDS system does not allow for States to sue corporations. Alanna Hardman states in her submission that this is "unbalanced". As a legal document, it is a one way street. It is incomprehensible how any government, democratic or not, would agree to the ISDS system without a gun being held to its head. So who is holding the gun?
- 6) Consider This Analogy:** Perhaps the best way to illustrate the belligerent and aggressive approach embodied in the ISDS system is to consider an analogous situation in ordinary life. Suppose you invited one of your friends over for dinner. When they arrive, you explain politely to you that you do not like to have people smoking in your house. A normal response would be to accept your "house rules" and come in for dinner. However suppose instead they said that they were damn well going to smoke during dinner,

and if you continue to protest they would smash down your door and break your windows. It is like the guest who won't take off their dirty shoes at the door.

This aggressive behaviour resembles the actions of the corporations who are behind the ISDS system. Instead of realizing that it is a privilege to be allowed to invest in Australia, they think it is their right to invest here. Furthermore, it is their right to do whatever they want to in order to maximize their profits. How can the leaders of any self-respecting country tolerate such an arrogant approach by foreign corporations?

**7) An ISDS Treaty is a Blank Cheque:** There is no limit to the laws or regulations which could be challenged and removed. People who believe such a system might be reasonable are either lying, kidding themselves, or seriously lacking in imagination.

One of the early advocates of the deregulation which is the core of the ISAS system was the philosopher John Stuart Mill. In his essay *On Liberty* Mill defends the British position in the Opium War. He insisted the Chinese government was restricting the freedom of the people in China to buy what they wanted. He believed "that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." From this, he argued against limitations on free trade in alcohol and opium as unjustified infringements on the rights of the buyer. That is, one of the main advocates of "free trade" actually argued for complete deregulation of alcohol and drugs. His reasoning would apply equally to all the modern drugs such as ecstasy, ice, cocaine, heroin and amphetamines.

The point is that there is nothing in the ISDS system which could hinder a demand for the kind of deregulation advocated by Mill. The defenders of the ISDS system will say that this is extreme and nobody is going to suggest such changes be enforced by the ISDS system. This may seem extreme, however Mill was not speculating about possible laws. He was defending what was a real and very profitable policy of the British government and the East India Company, namely harvesting opium in India and selling it to China.

There is no place for what we call public interest in the ISDS system. In fact it is devised to avoid any such consideration. So, to repeat: it follows from the structure of the ISDS system that ANY law or regulation, however wise it might seem to the people of Australia, can in principle be overturned or used as a basis for a compensation payment. **This system has absolutely no safeguards of any kind.** It is a blank cheque which can be filled out in any way a foreign company sees fit. **Only a fool or a fanatical supporter of deregulation could think the ISDS is good for anybody but the huge corporations that came up with the ISDS system.**

Political life in today's democracies is made up of hundreds of decisions which balance what can be called the greater good with the legitimate interests of individuals and corporations. For example we have drawn the line between legal and illegal drugs and ignore the extreme position taken on this by J.S. Mill. But in the ISDS system, who is going to draw the line which restricts the interests of large foreign companies? Just the companies themselves and the handful of overpaid lawyers they have set up as their own private legal system? It certainly looks like the fox guarding the proverbial henhouse.

**8) Some Results of ISDS Decisions:** Let us look at a few of the hundreds of examples of what has been, or what could be, demanded from Australia as part of an ISDS system:

**i. Tax Rates:** One obvious candidate for challenge would be tax rates for foreign companies. "We don't want to pay so much tax. It is bad for our bottom line." The less tax these companies pay, there will be either higher taxes on us or fewer services funded by tax.

**ii. Wage Rates:** Another obvious candidate is rates of pay. Australia is somewhat unusual in having a centralised wage fixing system which is based on laws and regulations. The large foreign companies would love to destroy this system. The only obvious consequence would be lower rates of pay for most people covered by the system. How the Labor party, supposedly controlled by the unions, could even

entertain an agreement which would have such a drastic effect in working people can only be answered by the leaders of that party themselves. Anne Jackson in her submission also raises this issue of the use of foreign workers used for dangerous jobs with low pay. It would be bad for our workers and bad for the people who are enticed to work here under these conditions.

**iii. Immigration Policies:** At the moment Australia has reasonably strict laws about granting visas. Suppose however that a foreign construction firm put in a bid to undertake a large public works project which contains a proposal to use foreign "guest workers" who would be paid less than they would be paid under Australian law. Such a bid would almost certainly win over any Australian competitor. The same is true for any other area of the economy, such as mining, agriculture, education or health. As explained above, an ISDS treaty is a blank cheque. **ANYTHING could be forced on Australia.**

**iv. Food and Product Standards:** We know from other countries that food and product safety standards will be challenged. In the process of "harmonising" food standards between Vietnam and Australia, who is going to insist that Vietnam raise its standards to ours? So it will be legal to import and sell food from Vietnam and other countries which would be illegal to sell if they were produced here. Let the buyer beware. No need for protection of consumers by the "nanny state" is there? We will also have to kiss goodbye our plane cigarette packages and restrictions on media advertising for tobacco and alcohol. This is an obvious restraint of trade. What about age limits on the sale of these products?

Anne Jackson's submission also raises the issue of cheap irradiated imported foods. Not only would they be dangerous, it would almost certainly be illegal to inform customers of this fact. **This amounts to a total rejection of the principle of "let the buyer beware", since it would be illegal to give customers the information necessary for them to make an informed choice.** The principle is: "Buy this because it is cheap. You don't need to know anything about it. Just trust us." This is of course absurd as the "us" we are expected to trust are the same people who make it illegal for us to obtain relevant information. So the real policy is this: **"Buy this. It is cheap at the moment. Otherwise you can starve."**

**v. Prices and Quality of Drugs:** Another obvious target would be our PBS system for drugs. Will the foreign pharmaceutical companies want to help us keep prices for drugs down, or subsidise certain ones? A subsidy distorts the market, and therefore reduces someone's profits.

**vi. Restrictions on the Sale of Firearms:** What do you think that the foreign companies who manufacture firearms would think of Australia's restrictive laws on gun ownership? Clearly they restrain the liberty of consumers to purchase what they want. If someone wants a Glock in every room, why should the "nanny state" deny them this pleasure?

**vii. Regulations about Land Use:** There are laws in Australia to forbid mining in national parks, and there could be laws against fracking. Such laws have been challenged by the ISDS system in other countries. Australia would be no exception.

**9) Enforcement:** Suppose Australia does not wish to remove the law or regulation demanded by a foreign company. The penalty for such bad behaviour in the eyes of the ISDS system is a fine seen as compensation for loss of income. So who is going to collect the money? Does the ISDS system have a police force or army? If a handful of overpaid corporate lawyers think Australia should pay the MegaBig Corporation \$100,000,000, what is going to happen if Australia decides to ignore this demand?

One obvious alternative for the MegaBig Corporation, other than sending some mercenaries to teach us a lesson, is to say that they will no longer invest in Australia. Some people might see this as a great disaster, but it is hard to understand why this is so.

People do not invest in Australia because they want to give us something. **They invest money in Australia so they can take even more money out.** Since modern Australia originated as a British colony, the idea of existing as a nation to create wealth for the mother country is almost second nature. However Australia has been occupied for 60,000 years without foreign investment, and clearly it is not going to sink into the Southern Ocean if it were to be removed. In fact, we might even be richer. The wealth created here could stay here and be spent on what we want to spend it on.

If the idea of just ignoring the demands of a treaty seems out of the question, we need only remember how Australia is happy to ignore its obligations under treaties relating to the treatment of refugees. Many

countries ignore treaties and agreements all the time. Why would a treaty involving the ISDS system any different?

**k. related matters: The ISDS System Will Change Australia's Political Landscape:** The ISDS is a giant deregulatory disaster which the leaders of the Liberals, Nationals and Labor should be ashamed of. Our leaders should realize that by accepting the ISDS system, **they have put themselves out of a job, the job of framing laws which govern Australia.** Even the current pretence of democracy will be removed. By adopting an ISDS system Australia's political leaders are in effect tying their own hands about any issue that involves the regulation of foreign corporation. "We don't deal with that any more. There is a higher authority we must answer to."

Up to now, people in Australia have been able to come to their political leaders to push for legislative change on such issues. Under an ISDS system this is pointless, and people will soon understand that. If an ISDS agreement is accepted by Australia, people will realize that nothing is going to get better until all treaties involving the ISDS system are removed. Those who have stood up to defend and accept such treaties will find themselves increasingly unpopular. Our political leaders will not be part of the solution, but part of the problem. Australia's politicians need to think very carefully. Is this what they really want? The choice is theirs.