

Submission

To The Committee Secretariat, Foreign Affairs, Defence and Trade Committee Department of the Senate, regarding the Trade and Foreign Investment Act 2014

Submitted on behalf of 350.org Australia
9th April 2014

About 350.org

350.org is a global grassroots movement tackling the climate crisis by pushing to return the atmosphere to a safe level of greenhouse gas concentrations – below 350 parts per million. Our online campaigns, grassroots organizing, and mass public actions are led from the bottom up by thousands of volunteer organizers in over 188 countries.

Position

350.org Australia fully supports the bill to protect Australian laws by banning Investor State Dispute Settlement (ISDS) provisions for five significant reasons. First and foremost, ISDS clauses damage our chances of climate action in this critical decade, exposing future generations to an unstable future. Secondly, they threaten a wide range of current environmental legislation. Thirdly, they empower foreign corporations but harm Australian sovereignty and citizens. Independent studies also confirm that these provisions have insignificant benefits and great costs. Finally, there is a powerful tide of citizens, NGOs and governments around the world also voicing their strong opposition to ISDS. For healthy communities, a sustainable environment, and a safe climate, 350.org Australia advocates a permanent ban on ISDS provisions.

Background

The ISDS mechanism was designed following WWII in trade agreements between developed and developing nations.¹ The intention was to assure Western companies that their investments in developing nations were protected.² In effect, they empower corporations to directly sue national governments in private trade tribunals over laws and policies which allegedly reduce company profits.

While until 2002 these procedures were hardly applied,³ more recently companies have used them to attack a raft of public health and environmental regulations. A record 58 ISDS cases were mounted in 2012, and that year saw 70% of publicly disclosed cases ruled in favour of corporations, at least in part.⁴

¹ Daniel J. Ikenson, *A Compromise to Advance the Trade Agenda* (Cato Institute, 2014).

² Productivity Commission, *Bilateral and Regional Trade Agreements* (Productivity Commission, 2010).

³ United Nations Conference on Trade and Development (UNCTAD), *Recent Developments in Investor-State Dispute Settlement (ISDS)* (UNCTAD, 2013).

⁴ *Ibid.*

Previous Australian governments thought ISDS clauses were bad public policy. The Howard government prohibited their inclusion in a free trade agreement with the US, declaring they were against Australia's national interest.⁵ Labour rejected them because they "confer greater legal rights on foreign businesses than those available to domestic businesses".⁶ Yet, the Abbott government has reversed this position. It has signed onto ISDS in the recent trade deal with Korea, and is considering them in its negotiations of the Trans-Pacific Partnership (TPP).⁷

Australia is moving in the wrong direction. ISDS must be banned for the reasons outlined below.

1. ISDS would undermine future climate regulation and support fossil fuel companies at the most critical time for climate action.

The Climate Commission's *Critical Decade 2013* report found we are already experiencing the effects of climate change including more frequent heatwaves, extreme fires and sea level rise. It showed that climate change poses substantial risks for health, property, infrastructure and natural ecosystems, and that we have very limited time to minimise these serious risks for future generations. The bottom line was that "most of the available fossil fuels cannot be burnt if we are to stabilise the climate this century." To do otherwise would "challenge the existence of our society as we know it today."⁸

Therefore, prudent government policy must recognise the need to regulate the fossil fuel industry. This is the critical time for our leaders to place the interests of the Australian people before the interests of polluting corporations. We urgently need sweeping measures to limit fossil fuel expansion and manage the transition to a renewable energy economy.

ISDS puts all of this in jeopardy. It discourages necessary regulation and emboldens multi-nationals to relentlessly pursue their profits at the expense of healthy communities and a sustainable environment.

ISDS sends a damaging signal to our politicians, encouraging legislative timidity when fortitude and vision are required. The Productivity Commission referred to this phenomenon as "regulatory chill", occurring "when governments choose not to undertake regulatory action for fear of triggering arbitration claims or paying compensation."⁹ For example, Canada withdrew plain-packaging regulations for cigarettes following an ISDS arbitration threat and similarly, UK Prime Minister David Cameron backed off such measures due to "considerable legal uncertainty."¹⁰

⁵ Mike Secombe, *Abbott: Open for Business – And Multinational Lawsuits*, (The Global Mail, September 20, 2013).

⁶ Peter Martin, *ISDS: The Trap the Australia-Japan Free Trade Agreement Escaped*, (The Sydney Morning Herald, April 7, 2014).

⁷ Peter Whish-Wilson, *Trade and Foreign Investment Bill 2014 Second Reading Speech*, (5th March, 2014).

⁸ Climate Commission, *The Critical Decade 2013: Climate Change Science, Risks and Responses*, <http://apo.org.au/research/critical-decade-2013-climate-change-science-risks-and-responses>.

⁹ Productivity Commission op cit, p.271.

¹⁰ David Martin, *It's David Cameron Who's Rolling Over For Big Corporations in the EU-US Trade Deal*, (The Guardian, November 7, 2013).

This has disastrous implications for essential climate action, and the stakes could not be higher. In the US, there has been a prominent two year campaign to stop the Keystone XL Pipeline amid fears from Professor James Hansen that Canadian tar sands exploration would mean “game over” for the climate.¹¹ However, two new mega coalmines approved recently in the Galilee Basin in Queensland equate to triple the greenhouse emissions of Keystone XL, and six times the UK’s annual footprint.¹² ISDS clauses are a massive disincentive to taking the bold action necessary to limit such projects.

Fighting for a safe climate is an uphill battle, but the chilling effect of ISDS provisions will make these efforts immeasurably harder.

Not only that, ISDS tells foreign corporations that Australia is ripe for fossil fuel investment and expansion well into the future. It invites increased coal infrastructure, deforestation, mining and CSG extraction during this critical decade. Just when 350.org Australia’s fossil fuel divestment campaign is gaining momentum, ISDS would undercut this work as well as the tireless efforts of fellow environmental campaigners. It frees up foreign corporations to exploit our natural wealth, meanwhile sending the global climate over the edge.

ISDS provisions must be seen for what they have become: a blatant attempt by the world’s richest corporations to increase their profits, and damn the consequences for human health, the environment, and a safe climate.

The TPP, negotiated in secret by representatives of 600 corporations, is the clearest example of this. These corporations support the inclusion of ISDS in the agreement, as it would allow unfettered access to fossil fuel assets and strike a blow against environmental and climate movements.

350.org Australia opposes these moves in the strongest terms.

2. ISDS clauses are a serious threat to existing environmental regulation.

Citizens, NGOs and governments have spent several decades advocating and implementing policies which protect our communities, environment and climate from harm. ISDS exposes this vital legislation to the legal actions of foreign corporations.

This is already happening regularly under current US Free Trade Agreements. Companies such as Exxon Mobil have prosecuted 500 cases against 95 governments.¹³ They have been awarded over US \$3 billion to settle these cases, 85% of which has gone to mining, oil, gas and natural resource sectors.¹⁴ Corporations have attacked everything from phase-outs of public chemicals

¹¹ Damian Carrington, *Tar Sands Exploitation Would Mean Game Over For the Climate*, (The Guardian, May 20, 2013).

¹² Graham Readfearn, *The Whopping Climate Change Footprint of Two Australian Coalmining Projects*, (The Guardian, November 7, 2013).

¹³ Mathew Rimmer and Charlotte Wood, *The TPP Greenwashes Dirty Politics*, (New Matilda, January 17, 2014).

¹⁴ Public Citizen, *TPP’s Investment Rules Harm the Environment*, (Public Citizen, 2014).

to permitting rules for mines, to timber regulations, green jobs, renewable energy programs and coal seam gas restrictions.¹⁵

This year, US consumer rights advocacy group Public Citizen reviewed a diverse series of such anti-environment examples.¹⁶ A brief description of three widely cited case studies shows how this works in practice and what Australia can expect once signed onto more trade agreements with ISDS included.

a. The municipal government of Guadalupe refused the construction of a toxic waste facility on a site previously contaminated with 20,000 tons of toxic waste. In 2001, Mexico was forced to pay landfill management firm Metaclad US \$16 million in compensation.¹⁷

b. Germany's Hamburg Environmental Authority imposed water quality standards on a coal-fired plant. In response, in 2009, Swedish energy company Vattenfall sought €1.4 billion plus interest and costs of arbitration. The case was settled, and Hamburg lowered environmental standards.¹⁸

c. In 2011, Quebec halted fracking to investigate possible environmental damage. Oil and gas corporation Lone Pine Resources has used ISDS measures to sue for C\$250 million.¹⁹

The implications of these cases are very serious in an Australian context. By agreeing to the TPP with ISDS for example, we would become vulnerable to a proliferation of such cases due to our high share of foreign ownership in mining and manufacturing.²⁰

350.org Australia is therefore worried about the impacts of ISDS on a wide variety of Australian environment and climate legislation. The threat posed to the decisions of the NSW and Victorian governments on CSG exploration is a good example. The Victorian government has banned fracking until July 2015 to explore safety concerns about its impacts on underground water and land, as well as food and agricultural production.²¹ The NSW government has banned CSG from within two kilometres of residential areas for similar reasons.²² Even these basic, sensible measures to protect our communities and environment would be vulnerable under ISDS, just as they are in Quebec.

And this would just be the beginning.

¹⁵ Ilana Solomon, *Fracking Causes Friction Between Trade and the Environment*, (Huffington Post, 2012).

¹⁶ Public Citizen op cit.

¹⁷ Sierra Club, *Responsible Trade Program: The North American Free Trade Agreement*, <http://www.sierraclub.org/trade/globalization/nafta.aspx>.

¹⁸ Friends of the Earth Europe, *Special Rights for Investors*, <https://www.foeeurope.org/isds>.

¹⁹ The Council of Canadians, *Lone Pine Resources Urged to Drop NAFTA Lawsuit*, May 14, 2013.

²⁰ Australia Institute cited in Secombe op cit.

²¹ Henrietta Cook, *Victorian Ban on Fracking to Stay Until 2015*, (The Age, November 21, 2013).

²² Echo, *Trade Deal 'Puts Communities At Risk On CSG'*, <http://www.echo.net.au/2013/10/trade-deal-puts-communities-at-risk-on-csg/>.

3. ISDS empowers multi-national corporations at the expense of Australian citizens, governments and sovereignty.

It is widely recognised that ISDS gives rights to foreign companies that are denied domestic companies and citizens. While foreign investors may seek third party arbitration against the Australian government, domestic parties may not.²³ The Australian Fair Trade and Investment Network (AFTINET) has rightly argued that this represents an “unacceptable expansion of the rights of corporate investors at the expense of democratic government”.²⁴ It is unacceptable for three clear reasons.

First, these measures respect powerful corporations but fail to respect our sovereign rights. They expose domestic laws to international interference and arbitration. 350.org Australia strongly agrees with Greens Senator Peter Whish-Wilson, who said “Sovereign governments should not be challenged simply for making laws to govern their country or making a decision to protect their environment or the health of their citizens...The Australian people elect their governments and their parliaments to design and implement legislation. Their sovereignty should be respected.”²⁵

Second, such policy protects foreign investors but fails to protect ordinary citizens. As detailed in previous sections, ISDS allows corporations to undermine existing and future regulation designed to protect the public and ensure a sustainable future. The Transnational Institute and Corporate Europe Observatory notes: “corporations have recourse to justice while citizens’ human rights are sidelined.”²⁶

In addition, ISDS clauses offer huge financial benefits to corporations but cost citizens and governments. In 2012 for example, Ecuador was ordered to pay US \$1.77 billion to Occidental Petroleum,²⁷ money the Ecuadorean people can ill afford. On top of compensation payments, such cases cost \$8-\$30 million to run.²⁸ Australia is already suffering the costs of ISDS in its case against Phillip Morris, which is using a trade agreement with Hong Kong to sue the Australian government over plain packaging legislation.²⁹ Of great concern is that, even if Australia withdraws from a treaty with ISDS clauses, companies already invested would be protected by ISDS for a further twenty years.³⁰

Ultimately, governments are being punished for making good legislation which protects their people and environment. Meanwhile wealthy corporations are enriched and workers are made poorer. This situation is grossly unjust.

²³ Productivity Commission, op cit.

²⁴ Ibid, p.272.

²⁵ Wilson op cit.

²⁶ Cecilia Olivet and Pia Eberhardt, *Profiting From Crisis*, (Transnational Institute and Corporate Europe Observatory, 2014).

²⁷ Nathan Gill and Mike Lee, *Occidental Awarded 1.77 Billion in Ecuador Contract Dispute*, (Bloomberg, October 6, 2012).

²⁸ David Gaukrodger and Catherine Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, (OECD, 2013).

²⁹ Attorney General’s Department, *Investor-State Arbitration – Tobacco Plain Packaging*, <http://www.ag.gov.au/internationalrelations/internationallaw/pages/tobaccoplainpackaging.aspx>.

³⁰ Tom Warne-Smith, *The Environment Would Pay for “Free Trade”*, (The Drum, January 9, 2014).

4. Comprehensive independent studies are highly critical of ISDS provisions.

Productivity Commission Report 2010

The Productivity Commission conducted a thorough cost-benefit analysis of ISDS conditions and concluded that “while a range of potential benefits have been posited to accrue from ISDS provisions, there is little evidence that such provisions are necessary to address potential problems faced by investors or that they generate significant benefits in practice.”³¹

Much worse than this, they reported “there are considerable policy and financial risks arising from ISDS provisions”³², noting significant issues such as institutional bias, conflict of interest and lack of transparency in the process of arbitration.

Their advice was clear: “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 provided by the Australian legal system.”³³

United Nations Committee on Trade and Development Report 2013

This report recognised four key areas of concern. These included legitimacy and transparency, problems of consistency and erroneous decisions in the arbitration process, doubts about the arbitrators themselves, as well as the cost and time-intensity of arbitrations. On this basis UNCTAD called for sweeping reforms of ISDS provisions.³⁴

Cato Institute Report 2014

Even strong free trade advocates are against this section of free trade agreements. Conservative US think tank, The Cato Institute, has denounced the ISDS mechanism as an “unnecessary, unreasonable and unwise provision to include in trade agreements.”³⁵ They have criticised ISDS because it “weakens the rule of law, forces the public to subsidize the risk of MNC investment abroad, and effectively encourages outsourcing.”³⁶ If free marketeers are against the mechanism, then environmental campaigners should be gravely concerned.

5. A groundswell of citizens, NGOs and governments also strongly oppose these undemocratic measures.

³¹ Productivity Commission op cit, p. 271.

³² Ibid, p. 274.

³³ Ibid, pp.276-277.

³⁴ UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (UNCTAD, 2013).

³⁵ Ikenson op cit, p.1.

³⁶ Ikenson op cit, p. 2.

There is now a chorus of civil society opposition resounding in nations across the globe. Here in Australia, an Avaaz petition against ISDS has nearly 10,000 signatures.³⁷ 350.org Australia joins Lock the Gate, AFTINET and many other NGOs in opposing these unjust provisions. Internationally, 350.org has collected 36,000 signatures against the TPP,³⁸ while an Avaaz petition has more than 1.5 million signatures.³⁹ 100 lawyers from countries engaged in TPP negotiations have written an open letter against ISDS.⁴⁰ An open letter from 130 US congressional representatives called for greater transparency in TPP negotiations.⁴¹ A coalition of 177 trade unions and campaign organisations in Europe and the US demands the exclusion of ISDS from the EU-USA free trade deal.⁴²

People everywhere are angry that health and environmental protections are being threatened by unaccountable corporations in the ruthless drive for profits. Governments are now listening to their constituents. Countries including Germany, France, India, South Africa, Indonesia, Brazil and nine other Latin American nations are reviewing or terminating ISDS.⁴³

350.org hopes that the Australian government will have the wisdom to do likewise and permanently ban ISDS provisions.

Conclusion

350.org Australia supports the bill to ban ISDS provisions on five grounds. Firstly, they would impede future climate regulation and encourage fossil fuel companies at a critical time for climate action. Secondly, these measures pose a serious danger to existing environmental legislation. Thirdly, ISDS privileges foreign corporations and harms citizens and sovereignty. In addition, independent reviews of ISDS find minimal benefits and huge costs. 350.org Australia stands beside citizens, NGOs and governments across the globe in urging a permanent ban on ISDS in the interests of democracy, public health, a safe climate, and a sustainable future.

³⁷ Avaaz.org, *Don't Let Foreign Corporations Sue Australia*, https://secure.avaaz.org/en/petition/Dont_let_foreign_corporations_sue_Australia_for_millionsbillions_over_our_policies_on_GE_crops_coal_seam_gas_more/?pv=24.

³⁸ 350.org, *Say No to Corporate Power Grabs – Reject the Trans-Pacific Partnership*, <http://campaigns.350.org/petitions/say-no-to-corporate-power-grabs-reject-the-trans-pacific-partnership>

³⁹ Avaaz.org, *One Million to Stop the Corporate Death Star*, http://www.avaaz.org/en/stop_the_corporate_death_star/.

⁴⁰ TPP Legal, Open Letter, <http://tpplegal.wordpress.com/open-letter/>.

⁴¹ Infojustice.org, Letter from Over 130 Members of the House of Representatives, <http://infojustice.org/archives/26456>.

⁴² Touchstone, *Unions and NGOs Oppose Foreign Investor Privileges in Trans-Atlantic Trade Deal*, <http://touchstoneblog.org.uk/2013/12/unions-ngos-oppose-foreign-investor-privileges-in-trans-atlantic-trade-deal/>.

⁴³ Ben Bland and Shawn Donnan, *Indonesia to terminate more than 60 bilateral investment treaties*, (Financial Times, March 27, 2014), European Parliamentary Research Service, *Investor-State Dispute Settlement (ISDS): State of Play and Prospects for Reform*, (2014), and Gaukrodger and Gordon op cit.