

20 April 2018

Joint Standing Committee on Treaties TPP-11 Inquiry, and
Senate Inquiry

SUBMISSION TO THE PROPOSED TPP-11, REBADGED AS THE COMPREHENSIVE PROGRESSIVE TRANS-PACIFIC PARTNERSHIP (CPTPP) AGREEMENT

I have been concerned about the Trans-Pacific Partnership (TPP) since I first heard about it in mid-2013.

The TPP is not mainly about free trade. It is more about weakening the power of sovereign governments and strengthening the power of multinational corporations. Sixty per cent of the world's 150 wealthiest entities are global companies (the rest are nation states).

If implemented, the TPP-11 will do much to prevent the Australian government and state governments from acting in the public interest on a range of issues. Rather than a 'free trade deal', the TPP-11 is more accurately described as a 'corporate power deal'.

THE TPP-11 IS POOR VALUE AND HIGH RISK

The TPP-11 is full of risk for Australia and devoid of any significant gain. Economic analysis by the World Bank shows that the original TPP would boost Australia's economy by only 0.7% by 2030, that is an annual rate of less than one half of one 10th of 1 per cent ([Sydney Morning Herald](#) 12 January, 2016).

One reason why the TPP-11 will have almost no economic benefit for Australia is because we already have free trade agreements with nine of the other eleven Pacific Rim TPP countries. While the deal opens up trade between member nations, it makes trading with non-member nations more difficult through a process known as 'cumulative rules of origin'. Member nations will lose privileges if they source inputs from countries outside the TPP, thus harming many of Australia's established trade relations.

The Productivity Commission has been strongly critical of recent trade deals, including the TPP, saying that they turn so-called free trade agreements into 'preferential' agreements. From a trade and economic perspective there is little to gain from the TPP and much to lose.

ISDS IS A THREAT TO AUSTRALIA'S SOVEREIGNTY

The Investor-State Dispute Settlement clauses (ISDS) are a particular concern. These give foreign companies the right to sue governments in secret tribunals composed of un-elected corporate lawyers. If the TPP-11 goes ahead, many of our laws and policies, achieved through decades of public advocacy and measured government responses, will be threatened by trans-national corporations pursuing their own interests, backed by these provisions.

ISDS establishes international tribunals which have no independent judiciary, no following of precedents and no appeals. Cases against tobacco regulation can be excluded, but other health, environment, labour rights and public interest regulation are not excluded and will be litigated. The ISDS would confer greater legal rights on foreign businesses operating in Australia, than those available to domestic businesses – this is neither fair nor reasonable.

Fifty ISDS challenges occurred between 1950 and 2000. Since then more than 600 cases have been launched and ISDS provisions now include compensation to multinationals for loss of future profits, resulting in claims often in billions of dollars against nation states. ISDS can be used to undermine financial market regulations Australia has in place since 2008 to stabilise financial markets, relating for example to the banks and insurance industry.

If the ISDS provisions present a real threat to our sovereignty, legal system and democratic values, why are the Coalition parties so keen to ratify the TPP? One reason is because ISDS provisions will help the Coalition defeat the environment, social justice and other democratic movements, for example by giving the government an excuse to take away the rights of these groups to use Australia's legal system to challenge damaging projects like the Adani Carmichael coal mine.

Much of the TPP's environment chapter speaks only of 'voluntary' and 'flexible' measures to protect environment. This soft approach contrasts with severe penalties available to companies if a nation state introduces environmental regulations which may threaten their potential future profits.

As an example, ISDS gives corporations the opportunity to challenge regulations aimed at regulating land clearing, mining and forestry operations, as well as pollution controls. Australia could be sued for millions in a foreign ISDS tribunal. The threat of mounting a defence will assist any government intent on weakening environment protections, as has already happened in several ISDS cases around the world (see pp 3-4 for some examples).

ISDS cases cost vast sums for nations to defend, with no guarantee of being awarded costs. On current results, nations are losing over half the challenges they have faced. This threat creates a reluctance to introduce new or improved environmental, health or workplace regulations for fear of being sued (known as 'regulatory chill'). Democratic regulation is paralysed by ISDS provisions like those in the TPP. The TPP will lock governments into a regime which entrenches market domination over parliamentary accountability for the next 100 years.

THE TPP-11 AND US CORPORATE INTERESTS

President Obama said the TPP will allow the USA to, 'write the rules for the region'. However, what benefits powerful US corporate interests is not always

in the interests of the other 11 nation states. Proponents of the TPP-11 have indicated there will be no concession to the USA however it is certain that the USA will seek further concessions from other governments through what is known as the certification process. This allows the US Congress to vet other countries' implementing legislation to see if it meets US interests. If not, the USA may demand the legislation be changed.

Opposition to the TPP-11 in the US is growing and opposition is growing in Australia too - sixty diverse community organisations representing more than two million Australians have expressed concerns. These groups include public health groups, unions, environment organisations, faith groups, women's advocacy groups, overseas aid and development organisations.

CONCLUSION

I support fair trade but I do not support the inclusion of ISDS provisions. As it stands, the TPP-11 is dangerous and should not be ratified with ISDS. I believe the TPP-11 is not in the public interest, and I urge you not to support this deal.

Instead, I urge senators and others inquiring into the TPP-11 to go for independent evaluations of the economic, health and environmental impacts of the TPP-11 to judge if it is in the public interest. If it is not, as I argue here, the Senate should block the implementing legislation. Thank you for the opportunity to make a submission.

H F (Harry) Creamer

(Retired NSW public servant and former president of Climate Change Australia – Hastings, based at Port Macquarie on the mid north coast of NSW).

APPENDIX – LIST OF SOME RECENT AND CURRENT ISDS CASES

This list is from secondary sources, not from my own research, so I cannot be sure of details in each case. The cases provide examples of what the ISDS provisions will mean for Australia if the TPP is ratified.

Canada is similar to Australia socially, legally and democratically. Under the North American Free Trade Agreement (NAFTA) the Canadian government is facing a number of challenges from companies using ISDS provisions:

1. Bilcon vs Canada. US company Bilcon proposed a rock quarry and a processing facility at Nova Scotia's Bay of Fundy. A panel recommended that both the federal and provincial governments reject the plan because of adverse affects to land, marine and human environments. Bilcon has an ISDS claim against the government of Canada, claiming it had treated the company unfairly, and is seeking large monetary compensation. References:

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng>
<http://investmentpolicyhub.unctad.org/ISDS/Details/304>

2. SD Myers vs Canada: US waste treatment company SD Myers challenged a Canadian ban on toxic PCB exports - the ban complied with multilateral treaties on the trade of toxic waste. The NAFTA ISDS tribunal dismissed SD.

Myers' claim of expropriation, but upheld claims of discrimination and equated this with a violation of the minimum standard of treatment required by international law. Canada lost and paid \$4.8 million to the company - <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/SDM.aspx?lang=eng>

3. Sunbelt Water vs British Columbia. Sunbelt Water brought a claim for loss of future earnings from bottled water exports, due to a change in policy regarding water resource exports, and is suining for \$10.5 billion - <http://www.cbc.ca/news/canada/u-s-firm-sues-canada-for-10-5-billion-over-water-1.180821>

4. Lone Pine Resources is suing the Canadian government for more than \$250 million over Quebec's moratorium on hydraulic fracking - <http://www.cbc.ca/news/business/ottawa-sued-over-quebec-fracking-ban-1.1140918>

In a turn of events, the **Trans-Canada** company is suing the US government for \$15 billion because the latter decided not to proceed with the Keystone tar sands pipeline for environmental reasons. Reference: The Corporation Behind Keystone XL Just Laid Bare the TPP's Threats to Our Climate (The Huffington Post, 7/1/16) - http://www.huffingtonpost.com/ben-beachy/the-corporation-behind-ke_b_8931802.html?ir=Australia

Renco Group used ISDS to demand \$800 million from Peru's government when it sought compensation for children in La Oroya who were injured by toxic contamination - <http://www.citizen.org/documents/peru-tpa-investment-memo.pdf>

Pacific Rim vs El Salvador. This case aims to overturn a decision by the El Salvador government to halt mining to protect its last sources of clean water - <http://www.theguardian.com/sustainable-business/2015/may/27/pacific-rim-lawsuit-el-salvador-mine-gold-free-trade>

Metalclad vs Mexico: US company Metalclad sued for losses after the Mexican government refused permits for the company to operate a waste dump that was polluting a town's water supply. The town's main water well was about 60 metres from where Metalclad was dumping material. The ISDS tribunal found in favour of Metalclad and awarded the company \$15.6 million - <https://en.wikipedia.org/wiki/Metalclad>

Chevron vs Ecuador: a 22 year battle in which oil giant Chevron sued the Ecuadorian Government in an international tribunal because an Ecuadorian court ordered Chevron to pay for widespread pollution caused by its operations in the Ecuadorian rain forest - <http://aftinet.org.au/cms/node/566>

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