



**Submission to Department of Foreign Affairs and Trade on  
the Regional Comprehensive Economic Partnership  
(RCEP) September 2015**

Contact: Dr Patricia Ranald  
Coordinator, Australian Fair Trade and Investment Network  
128 Chalmers St, Surry Hills NSW 2010  
Email: [campaign@aftinet.org.au](mailto:campaign@aftinet.org.au) Ph. 0419 695 841

# Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Department of Foreign Affairs and Trade on the RCEP negotiations.

AFTINET is a network of 60 community organisations and many more individuals which advocates for fair trade based on human rights, labour rights and environmental sustainability. We also support greater transparency and democratic accountability in trade negotiations. AFTINET supports fair trade with all countries, and supports efforts to develop Australia's positive trade, cultural and other relationships with all of the RCEP countries.

AFTINET made a submission at the commencement of negotiations. This second submission has been prompted by concern about recent developments in the RCEP negotiations revealed by leaked documents, which appear to be closely based on proposals which have been strongly criticised by civil society and by many governments in the Trans-Pacific Partnership (TPP) negotiations. We are aware that governments have made a commitment to accelerate the pace of the RCEP negotiations and are concerned that a rush to finish could result in a poor quality agreement which would disadvantage many people in RCEP countries, not only in Australia but especially in developing and least developed countries.

We are gravely concerned about the secrecy of the RCEP negotiations. It is clear that there has been very close consultation with some business organisations, but until recently, very little with civil society groups. It is not acceptable that our knowledge of RCEP proposals should come only from leaked documents.

We have grave concerns about the leaked RCEP proposals from Japan and Korea on intellectual property protection for medicines, which have been subject of a recent submission from the Public Health Association of Australia (PHAA). We support the criticisms of these proposals expressed in the submission and support its recommendations, including opposition to the adoption of TRIPS-Plus proposals on medicines in the RCEP (PHAA, 2015).

We are also gravely concerned that the RCEP governments have made a decision in principle to include proposals for Investor-State Dispute Settlement (ISDS). This submission deals with transparency issues, recent research and evidence about ISDS and our concerns about its inclusion in the RCEP.

# Summary of Recommendations

***1. That RCEP draft texts be released, and that the final negotiated text of the RCEP be released for public and parliamentary discussion before the decision to sign it is made by Cabinet***

***2. Failing release of texts, there should be regular consultation by Australian negotiators and discussion of the details of negotiations and of Australian policy positions with civil society groups as well as business***

***3. There should be opportunities for civil society groups to present their views to RCEP negotiators from other countries when negotiations take place in Australia***

***4. That the RCEP exclude ISDS provisions because of its fundamental flaws of a lack of an independent judiciary, and lack of precedents and appeals***

***5. If the RCEP does include ISDS provisions, they should include the following:***

- recognition of the fundamental rights of states with regard to their development and their right to regulate for implementation of domestic policies in the public interest;***
- exhaustion of domestic legal remedies before any resort to ISDS;***
- no most-favoured nation clause, and a national treatment clause that is based on intentional, nationality-based discrimination;***
- definition of expropriation which clearly excludes non-discriminatory regulatory actions in pursuit of public health, environmental and other public welfare objectives, without any qualifying conditions that would allow such measures in rare circumstances;***
- exclusion of the “fair and equitable treatment” standard which has been interpreted very widely by tribunals in favour of corporations, and its replacement with more limited protections against denial of justice under Customary International Law, violations of due process or manifestly abusive treatment;***
- limits on compensation and reductions in compensation by mitigating factors, and***
- obligations on investors to not engage in corruption, to disclose information and to comply with host state law, including human rights, labour rights and***

***environmental law, and provisions for the host state to bring counterclaims to enforce investor obligations.***

## Secrecy of negotiations and release of texts

Trade agreements increasingly deal with topics like medicines, copyright, the environment, and regulation of investment and essential services which can change or limit domestic legislation. These policies would normally be the subject of open and democratic parliamentary debate. They should not be decided behind closed doors as part of a trade negotiation.

There is a global groundswell of critical public discussion about the secrecy of trade agreements and the fact that the decision to sign them is made by executive levels of government before the text is released for public and parliamentary discussion. There are increasing numbers of examples of more open processes in trade negotiations.

Since 2003, World Trade Organisation proposed texts, offers and background papers have been placed on the WTO public website (WTO 2003). The text of the Anti-Counterfeiting Trade Agreement was released in 2011 before it was signed (ACTA 2011).

Most recently the European Union has been involved in a public debate about the lack of transparency in its negotiations with the US for a Trans-Atlantic Trade and Investment Partnership. The European Commission announced in January 2015 that it would release its own negotiating proposals, and would release the full text of the agreement at the end of the negotiations for public and parliamentary debate before it was signed. This is a very significant precedent for all trade negotiations (EU 2015).

This public debate prompted a recent Senate Inquiry into the Australian trade agreement process. Its report was entitled *Blind Agreement*, a title which encapsulated the strong criticism of secrecy and lack of accountability of the current trade agreement process (Senate Committee on Foreign Affairs and Trade 2015).

The report reflects the views of the overwhelming majority of submissions. These criticised the current process and called for the text of trade agreements to be released for public and parliamentary scrutiny and for an independent assessment of costs and benefits before Cabinet authorises them for signing.

## **Recommendations:**

- 1. That RCEP draft texts be released, and that the final negotiated text of the RCEP be released for public and parliamentary discussion before the decision to sign it is made by Cabinet.***
- 2. Failing release of texts, there should be regular consultation by Australian negotiators and discussion of the details of negotiations and of Australian policy positions with civil society groups as well as business.***
- 3. There should be opportunities for civil society groups to present their views to RCEP negotiators from other countries when negotiations take place in Australia.***

## **ISDS**

### **Background and most recent evidence about ISDS**

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to sue governments for damages in an international tribunal if they can claim that a change in domestic legislation has 'harmed' their investment.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has developed concepts like "indirect" expropriation which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in law or policy has "harmed" their investment.

Many experts including Australia's High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment law experts who can continue to practice as investment law advocates. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest (Kahale 2014, French 2014, Productivity Commission 2015).

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of

precedents which judges must consider and appeal mechanisms to ensure consistency of decisions.

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. Even if a government wins the case, a 2012 OECD Study found ISDS cases last for 3 to 5 years and the average cost is US\$8 million per case, with some cases costing up to US\$30 million (Gaukrodger and Gordon 2012).

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Committee on Trade and Development show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and 608 in 2014 (UNCTAD 2015a: 5-7). The most recent UNCTAD figures show most cases are won by investors (Mann 2015, UNCTAD 2015b). There are increasing numbers of cases against health, environment and other public interest legislation. Tobacco companies are systematically using ISDS cases against Australia and Uruguay to undermine public health regulation of tobacco advertising (Chan 2012, Voon *et al* 2012).

The June 2015 Productivity Commission study of ISDS confirmed its 2010 study that there is no evidence that ISDS increases levels of foreign investment, or has any economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses “considerable policy and financial risks” to governments (Productivity Commission 2015). This is why the previous ALP government had a policy against ISDS from 2011, and why many other governments, including Germany, France, Brazil, India, South Africa and Indonesia are reviewing ISDS. (Filho 2007, Ministerial Meeting of Latin American States 2013, Biron 2013, Uribe 2013, Carim 2013, Mehdudia 2013, Bland and Donnan 2014).

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Coalition Howard government did not include ISDS in the US-Australia free trade agreement in 2004. That is why the US Philip Morris Company had to move some assets to Hong Kong and claim to be a Hong Kong company so that it could use ISDS in a Hong Kong-Australia investment agreement to sue the Australian government for billions of dollars over plain packaging legislation. This case has been ongoing for 4 years and has already delayed the New Zealand government from proceeding with similar legislation (Voon *et al* 2012, TVNZ 2013).

Recent ISDS “safeguards” for health, environment and other public welfare measures have not prevented ISDS cases. These “safeguards” do not address the main structural deficiencies of ISDS tribunals, which have no independent judiciary, no precedents and no appeals process. This means that the tribunals have enormous discretion and no accountability in interpreting the meaning of “safeguards” (Tienhaara 2015).

The US-Peru FTA has similar general “safeguards” but this has not prevented the Renco lead smelting company from suing the Peruvian government over a court decision which ordered it to clean up and compensate for lead pollution (Public Citizen, 2012). The US pharmaceutical company Eli Lilly is currently suing the Canadian Government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than an existing medicine (Gray 2012). The US Lone Pine mining company is suing the Canadian Government because the Québec provincial government conducted a review of environmental regulation of gas mining (CBC 2012). The French Veolia Company is suing the Egyptian Government over a contract dispute in which they are claiming compensation for a rise in the minimum wage (Breville and Bulard 2014).

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning Report which argues strongly that trade agreements like the TPP should **not** include ISDS.

The Report says ISDS is incompatible with human rights principles because it “encroaches on the regulatory space of States and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability” (de Zayas 2015).

This evidence supports the Productivity Commission recommendation that ISDS should not be included in trade agreements.

If ISDS is included in the RCEP, it should include the following provisions based on the draft Indian Bilateral Investment Treaty, which was made available for public discussion in April 2015 (Indian Government 2015). This draft does not remedy the fundamental flaws of ISDS, which are a lack of an independent judiciary and no system of precedents or appeals. However it does contain the following features, which limit corporate rights to sue governments more than other ISDS models:

- recognition of the fundamental rights of states with regard to their development and their right to regulate for implementation of domestic policies in the public interest;
- exhaustion of domestic legal remedies before any resort to ISDS;
- no most-favoured nation clause, and a national treatment clause that is narrowly based on intentional, nationality-based discrimination;



- a definition of expropriation which clearly excludes non-discriminatory regulatory actions in pursuit of public welfare objectives, without any qualifying conditions that would allow such measures in “rare” circumstances;
- exclusion of the “fair and equitable treatment” standard which has been interpreted very widely in favour of corporations by tribunals and its replacement with more limited protections against denial of justice under Customary International Law, violations of due process or manifestly abusive treatment;
- limits on compensation and reductions in compensation by mitigating factors and
- obligations on investors to not engage in corruption, to disclose information and to comply with host state law, including human rights, labour rights and environmental law, and provisions for the host state to bring counterclaims to enforce investor obligations.

#### **Recommendations:**

***4. That the RCEP exclude ISDS provisions because of its fundamental flaws of a lack of an independent judiciary, and lack of precedents and appeals.***

***5. If the RCEP does include ISDS provisions, they should include the following:***

- *recognition of the fundamental rights of states with regard to their development and their right to regulate for implementation of domestic policies in the public interest;*
- *exhaustion of domestic legal remedies before any resort to ISDS;*
- *no most-favoured nation clause, and a national treatment clause that is based on intentional, nationality-based discrimination;*
- *definition of expropriation which clearly excludes non-discriminatory regulatory actions in pursuit of public health, environmental and other public welfare objectives, without any qualifying conditions that would allow such measures in rare circumstances;*
- *exclusion of the “fair and equitable treatment” standard which has been interpreted very widely by tribunals in favour of corporations, and its replacement with more limited protections against denial of justice under Customary International Law, violations of due process or manifestly abusive treatment;*

- *limits on compensation and reductions in compensation by mitigating factors and*
- *obligations on investors to not engage in corruption, to disclose information and to comply with host state law, including human rights, labour rights and environmental law, and provisions for the host state to bring counterclaims to enforce investor obligations.*

## References

Anti-counterfeiting Agreement (ACTA) Text (2011) found at [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147937.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf) [accessed November 10, 2013].

Bland, B., and Donnan, S., (2014) "Indonesia to terminate more than 60 bilateral investment treaties", *Financial Times*, March 27 found at <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz2xrYOwsEb>.

Biron, C., (2013) "Latin American countries put up front against corporate Lawsuits", Inter Press Service, October, found at <http://www.mintpressnews.com/latin-american-countries-put-front-corporate-lawsuits/170030/>.

Breville and Bulard, (2014) "The injustice industry and TTIP", *Le Monde Diplomatique*, English edition, June.

Canadian Broadcasting Company (CBC) (2012) "Ottawa sued over Québec fracking ban", November 23, found at <http://www.cbc.ca/news/business/ottawa-sued-over-quebec-fracking-ban-1.1140918>.

Chan, M., (2012) "The Changed face of the tobacco industry: galvanizing global action towards a tobacco-free world", Keynote address at the 15th World Conference on Tobacco or Health Singapore 20 March, found at [http://www.who.int/dg/speeches/2012/tobacco\\_20120320/en/](http://www.who.int/dg/speeches/2012/tobacco_20120320/en/).

De Zayas, A., (2015) "UN Charter and Human rights treaties prevail over free trade and investment agreements," Media Release, September 17, Geneva, found at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16439&LangID=E#sthash.WdxSGvIb.dpuf>.

Donnan, S., and Wagstyl, S., (2014) "Transatlantic trade talks hit German snag," *Financial Times*, March 14 found at <http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html#axzz2xCOjUOB t>.

European Union (2015) *EU negotiating texts in TTIP*, February, Brussels, found at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> [accessed February 12, 2015].

Filho, J., (2007) "The Brazilian Experience with Bilateral Investment Agreements: A Note", UNCTAD Expert Meeting On Development Implications of International Investment Rule Making, June 28-29, found at [http://unctad.org/sections/wcmu/docs/c2em21p15\\_en.pdf](http://unctad.org/sections/wcmu/docs/c2em21p15_en.pdf).

French, R.F Chief Justice (2014), "Investor-State Dispute Settlement - a cut above the courts?" Paper delivered at the Supreme and Federal Courts Judges conference, July 9, 2014, Darwin found at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>.

Gair, K., (2015) "Migrant worker lured to Australia, held captive in restaurant for 16 months," *Sun Herald* July 19, found at: <http://www.smh.com.au/nsw/migrant-worker-lured-to-australia-held-captive-in-restaurant-for-16-months-20150718-gjeud6.html#ixzz3qJjr67Q7>.

Gaukrodger, D., and Gordon, C., (2012) "Investor-state dispute settlement: a scoping paper for the investment policy community", *OECD Working Papers on International Investment*, no. 2012/3, OECD Investment Division, Paris, December found at [http://www.oecd.org/daf/inv/investment-policy/WP-2012\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf).

Gray, J., (2012) "Eli Lilly fights Canada's move to strip drug patent," *Globe and Mail*, December 7, found at <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/eli-lilly-fights-canadas-move-to-strip-drug-patent/article6082557/>.

Indian government (2015) *Model Text for the Indian Bilateral Investment Treaty*, New Delhi, found at [http://mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](http://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf).

Kahale, (2014) *Keynote Address, Eighth Juris Investment Arbitration Conference* Washington DC, March 8, found at <http://www.curtis.com/siteFiles/Publications/8TH%20Annual%20Juris%20Investment%20Treaty%20Arbitration%20Conf.%20-%20March%2028%202014.pdf> [accessed September 1, 2014].

Mann, H., and (2015) ISDS: "Who Wins More, Investors or States?" *Investment Treaty News*, February, found at [http://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf?utm\\_source=lists.iisd.ca&utm\\_medium=email&utm\\_campaign=ITN+Breaking+News+Analysis+-+ISDS:+Who+Wins+More,+Investors+or+States?](http://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf?utm_source=lists.iisd.ca&utm_medium=email&utm_campaign=ITN+Breaking+News+Analysis+-+ISDS:+Who+Wins+More,+Investors+or+States?)

Mehdudia, S., (2013) "BIPA talks put on hold", *The Hindu*, January 21, found at <http://donttradeourlivesaway.wordpress.com/2013/01/breaking-news-indian-government-puts-negotiations-on-all-bilateral-investment-treaties-bits-on-hold/> [accessed November 19, 2013].

Productivity Commission, (2015) *Trade and Assistance Review 2013-14*, June, found at <http://www.pc.gov.au/research/recurring/trade-assistance/2013-14>.

Public Citizen, (2012) *U.S.-Peru FTA Investor Rights: Lessons Learned and New Approaches Needed for Trans-Pacific Partnership*, found at <http://www.citizen.org/documents/peru-tpp-investment-memo.pdf>.

Public Health Association of Australia, (2015) *Submission to the Department of Foreign Affairs and Trade on the Regional Economic Comprehensive Partnership*, found at <http://dfat.gov.au/trade/agreements/rcep/Documents/public-health-association-of-australia-rcep.pdf>

Senate Standing Committee on Foreign Affairs Defence and Trade (2015) *Blind agreement: reforming Australia's treaty-making process*, May, found at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Treaty-making\\_process/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report).

Tienhaara, K., (2015) "These TPP safeguards won't protect us from ISDS", *The Drum*, March 26, found at <http://www.abc.net.au/news/2015-03-26/tienhaara-these-tpp-safeguards-wont-protect-us-from-isds/6350358>.

TVNZ (2013) "Key admits plain cigarette packaging may not go ahead," *News*, February 19, found at <http://tvnz.co.nz/politics-news/key-admits-plain-cigarette-packaging-may-not-go-ahead-5345464>.

United Nations Committee on Trade and Development (UNCTAD) (2015a) *Recent Trends in IIAS and ISDS*, February, found at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf).

United Nations Committee on Trade and Development (UNCTAD) (2015b) *World Investment Report, Reforming International Investment Governance* June 24, found at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>.

Uribe, M., (2013) "Investment arbitration in Latin America: Irreconcilable Differences?" *Kluwer Arbitration Blog*, May 13. Found at <http://kluwerarbitrationblog.com>.

Voon, T., Mitchell, A., Liberman, J., Ayres, G., (2012) *Public Health and Plain Packaging of Cigarettes: Legal Issues*, Edward Elgar, London.

World Trade Organisation (2015) *Documents and Resources*, found at [https://www.wto.org/english/res\\_e/res\\_e.htm](https://www.wto.org/english/res_e/res_e.htm).