# Submission to the Foreign Affairs, Defence and Trade References Committee

# The Commonwealth's Treaty Making Process

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# About CHOICE

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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# Executive Summary

CHOICE thanks the Foreign Affairs, Defence and Trade References Committee for the opportunity to provide feedback on the Commonwealth's treaty making process.

This submission offers recommendations for improving the treaty negotiation process generally based on observations of the Trans-Pacific Partnership Agreement (TPP) process. The TPP is a trade agreement being negotiated between Australia and 11 other Pacific-Rim nations, including the US. Based on leaked versions of the negotiating text, it appears likely that the TPP will have a wide-ranging, prescriptive impact on Australian domestic policy. For example, various leaked documents suggest the TPP could lead to medicines being more expensive for longer periods of time, make taking a photograph in a movie theatre a criminal offence, and prevent new food labelling or environmental protection laws from being properly implemented.

Participating countries signed a non-disclosure agreement at the start of TPP negotiations, agreeing not to release information to the public while the agreement is being negotiated, and not to publish negotiating documents for four years after an agreement is reached. Due to the secrecy of the negotiations and their potential to have a significant impact on Australian domestic law, public concern is acute. The TPP negotiations circumvent ordinary democratic process, and stifle the necessary and useful public debate that should be had before introducing new domestic laws.

The full text of treaties like the TPP should be released at the earliest possible opportunity, in order to enable genuine consultation before an agreement is signed and finalised. Without this early disclosure, Parliament is eventually faced with a finalised document that can only be accepted or rejected in full, with no ability to influence the details of the agreement. If an agreement has beneficial elements that are overall outweighed by negative impacts, the Parliament is faced with a terrible choice – reject the agreement in its entirety, denying the public the benefits, or accept an unbalanced, flawed agreement that will damage Australia.

Recognising that the government has indicated it will not release the full text of treaties during negotiations, this submission provides suggestions for positive incremental steps that could be taken to improve consultation in the absence of releasing the entirety of the text. The EU's Transatlantic Trade and Investment Partnership (TTIP) provides a model for improving transparency. A number of explanatory documents and position statements have been published, and an expert advisory group has been established to assist negotiators by providing advice on the impact the agreement may have to health, environment, consumer and business interests.

Improving transparency and public access to documents will assist in providing the negotiation process and final agreement with greater legitimacy and public trust. Documents negotiated in secrecy without meaningful consultation or opportunity for robust public debate may be mistrusted by the public and their perceived legitimacy will suffer.

The evolution of the TTIP negotiation process demonstrates it is possible to release information, including proposals and policy positions, regarding sensitive and complex international treaties. If it can be done in Europe, it can be done here.

Finally, CHOICE is particularly concerned with the trend towards including in agreements a mechanism that will make it harder for the Australian government to pass new legislation in the future. This is the "investor-state dispute settlement" (ISDS) clause, which is in the recent Korea-Australia Free Trade Agreement, and is reported to also be included in the TPP. These

clauses provide foreign investors with an avenue for lodging disputes with the Australian government in the event that an administrative or legislative decision impacts on their profits. CHOICE opposes the inclusion of ISDS in agreements. It is not a necessary mechanism between nations that operate under a strong rule of law, and the risks of agreeing to an ISDS clause are significant. If, however, the government remains committed to considering the inclusion of ISDS clauses, then careful consideration must be given to the construction of these clauses, to ensure that the right to create legislation in the public interest is protected. This submission discusses ways in which this can be achieved, including through drafting 'carve out' clauses that protect the ability of a government to govern for the benefit of its citizens.

# Recommendations

***Recommendation 1:*** 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.

***Recommendation 2:*** 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.

***Recommendation 3:*** In the absence of publication of the actual texts, plain-English explanatory documents should be made public to assist in consultation for any agreement.

***Recommendation 4:*** The Department of Foreign Affairs and Trade should continue to hold briefing sessions with stakeholders. These briefing sessions should take place during each negotiating round, and should facilitate open and informative discussion of the potential contents of the agreement.

***Recommendation 5:*** 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 and valuable consultation process.

***Recommendation 6:*** Robust carve-out clauses drafted to protect the right to regulate in the public interest must be included with any ISDS clause. This right must be given priority over the right for corporations to access ISDS mechanisms.

***Recommendation 7:*** ISDS should not enable action to be taken in instances of indirect expropriation.

***Recommendation 8:*** Corporations should be prevented from moving investments to different jurisdictions for the primary purpose of taking advantage of a trade agreement containing an ISDS clause.

***Recommendation 9:*** Action should not be permitted under ISDS unless the party bringing the action has first exhausted all domestic legal avenues.

***Recommendation 10:*** Proceedings and outcomes of ISDS cases must be published in a timely manner and in an accessible format.

***Recommendation 11:*** ISDS arbitrators should adhere to a Code of Conduct. This would at a minimum need to include a requirement that decision-makers avoid and report conflict of interest. Decision-makers should not be able to act as advocates or advisors for the duration of their employment.

***Recommendation 12:*** Arbitration bodies should develop precedent (and record it as per Recommendation 9). In making decisions, weight should be given to the common and statutory law of the host country and to previous Tribunal decisions.

***Recommendation 13:*** Decisions should be reviewable through an appropriate appellate mechanism.

# Consultation

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 will provide an agreement with legitimacy in the eyes of the public, and will also provide the 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.[1]

## Scope of modern trade agreements

While free trade agreements traditionally focused on the removal of barriers to trade between signatories, these agreements increasingly include provisions that relate to intellectual property and domestic copyright law, access to medicines, investment and environmental protection. As trade agreements grow more complex and deal with broader issues, the potential for impact on domestic laws and policies increases.

CHOICE opposes expanding the scope of free trade agreements where this expansion will necessitate changes to domestic laws that don't directly relate to trade, or alternatively lock in domestic arrangements and prevent future reform. However, in situations where free trade agreements do include sections that directly impact on our domestic regulatory framework, the value of frank and open public debate is even greater.

The Trans-Pacific Partnership (TPP) Agreement, for example, appears to deal with traditional trade issues including tariffs and imports/exports. However, leaked negotiating texts suggest that the TPP also includes chapters on issues that directly impact on domestic law, like intellectual property. Other chapters have a significant public interest element, relating to access to medicines or 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.

## Access to negotiating text

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, we accept that 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

[1] For example, a provision criminalising private copyright infringement included in a free trade agreement between the US and Australia is likely to have a more significant impact in Australia due to the absence of certain defences available in US law, including the fair use defence.

in relation to sections of agreements that have the potential to substantially affect domestic regulatory arrangements.[2]

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 Trans-Pacific Partnership (TPP) process, 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.

After receiving 58 submissions from organisations, 257 submissions from individuals, and more than 6000 emails, the European Ombudsman (EO) recognised that there exists overwhelming public demand for the right to know and to participate in the TTIP process.[3] In July 2014, the EO opened an own-initiative inquiry towards the European Commission (EC) seeking stakeholder feedback on how to improve the degree of transparency in TTIP negotiations.

The EO acknowledged that improving transparency and public access to documents would ensure that the negotiations and final agreement would then enjoy greater legitimacy and public trust. CHOICE agrees with this position; documents negotiated in secrecy without meaningful consultation or opportunity for robust public debate may be mistrusted by the public and their perceived legitimacy will suffer.

Since negotiations commenced, positive changes have been made to improve community consultation on the TTIP. As acknowledged in submissions to the consultation, good progress has been made via "the publication of many of the position papers, the eventual official publication of the EU negotiating mandate, the creation of an evenly-balanced Advisory Group and the briefing cum-input sessions that take place during each negotiating round".[4] 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,

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[2] For example, intellectual property. See speech by Senator the Hon Penny Wong, 12 February 2015, 'Response to Statement on the Trans-Pacific Partnership by the Minister Representing the Minister for Trade and Investment', Canberra, available at http://www.pennywong.com.au/speeches/response-statement-trans-pacific-partnership-minister-representing-minister-trade-investment-speech-senate-canberra/

[3] Decision of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, 6 January 2015, available at http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark

[4] Transatlantic Consumer Dialogue (Coordinated by Consumers International), 28 October 2014, 'Response of the Transatlantic Consumer Dialogue to the European Ombudsman's public consultation in relation to the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations', available at http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58719/html.bookmark

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.

Following on from this consultation, further improvements have been made. Most vital of these has been the publication of EU TTIP texts as part of a 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, setting out what the EU seeks 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'.[5]

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. If it can be done in Europe, it can be done here.

## United States approach to TTP negotiations

The TPP negotiations appear to be opaque across all negotiating nations, with negotiators required to sign confidentiality agreements prior to entering the talks. However, even in this context Australia's approach lacks transparency compared to other nations.

The Office of the United States Trade Representative has released summaries of proposed provisions to assist stakeholders in assessing the impact of the TPP, and has held more than 1600 TTP briefings with US lawmakers.[6] Members of Congress are permitted to examine the negotiating texts. However, these Members are only able to view the agreement in the Trade Representative's office, and are not permitted to bring their staff or any experts into the office to assist their analysis. There is no procedure in place to allow US lawmakers to take a copy of the text back to their own office for a thorough, independent analysis.[7] This has been the subject of criticism in the US and is far from best-practice. Still, the United States has facilitated a more open consultation process than in Australia, where our Senators and Members are unable to view the text at all.

In addition to lawmakers, 600 'cleared advisers' in the US have had access to information and documents relevant to their interests.[8] These advisers largely represent corporations and industry groups, such as the Motion Picture Association of America. Since June 11, 2010, the Office of the United States Trade Representative has posted 110 TPP documents to a website for cleared trade advisors to review and provide comments.[9] Other groups with an interest in the

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[5] European Commission, press release, 10 February 2015, 'Now online – EU negotiating texts in TTIP', available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230

[6] D. Sirota, 6 February 2015, *The Trans-Pacific Partnership is a huge deal. So why is it being kept secret?*, In These Times, available at http://inthesetimes.com/article/17608/tpp_negotiations

[7] Liebelson, D., 13 February 2015, 'Democrat says Obama administration dodging request to read trade deals without restrictions', Huffington Post, available at http://www.huffingtonpost.com/2015/02/13/lloyd-doggett-tpp-trade_n_6680624.html

[8] Mauldin, W., 26 September 2013, 'US says not 'rushing' Asia-Pacific trade deal', The Wall Street Journal, available at http://www.wsj.com/articles/SB10001424052702303796404579099632713091994

[9] Office of the United States Trade Representative, 'Fact Sheet: Transparency and the Trans-Pacific Partnership', accessed 24 February 2015, available at https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/june/transparency-and-the-tpp

outcome of the TPP, such as consumer rights bodies, have had to rely on a series of unofficial draft chapters leaked by Wikileaks. Enabling informed consultation with business representatives but not public interest groups is an unbalanced approach, and unlikely to lead to an agreement that benefits the public.

Australian stakeholders are not granted access to the negotiating documents, and find their ability to engage constructively in consultation limited. In 2013, CHOICE representatives were invited to attend meetings with TPP negotiators in Malaysia. While the opportunity to attend these meetings and raise concerns is a vital part of any consultation process, the fact that copies of the negotiating text were not made available prior to or during the meetings stymied their usefulness.

The Department of Foreign Affairs and Trading notes on its website that it has hosted more than 700 public consultations on the TPP. CHOICE has attended several of these meetings. Departmental staff are unable to provide CHOICE with any negotiating documents, position papers, issue papers or the wording of any sections of the agreement. They cannot provide face-to-face descriptions of the content of the agreement, or directly answer questions on the contents. Regardless, the Department has 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.

The lack of consultation within Australia is particularly concerning given the complexity of the agreement, the number of nations involved and the ambitious, far-reaching implications it may have. The Office of the United States Trade Representative seeks input from a committee of 600 advisers, while Australia's Department of Foreign Affairs and Trade chooses to limit the advice it receives by maintaining utter secrecy and allowing only the team of around 20 individual negotiators access to the text. We urge the Committee to take steps to improve access to negotiating documents; the US approach of facilitating restricted access to lawmakers would be a positive step, but the more open publication of documents as seen in the TTIP process would be preferable.

**Recommendations**

These recommendations aim to increase public awareness of the contents and context of international trade agreements. This in turn will facilitate more informed, useful consultation with a broader section of the community. Acting on these recommendations will assist in reducing fear and concern around currently secretive trade agreements, providing them with legitimacy in the eyes of the public. Recommendation 1, to release the full negotiating texts of international trade agreements, will have the most significant impact. However, recognising that this is a course of action that may not be immediately taken up by the government, recommendations 2 and 3 offer options for incremental improvements to the consultation approach in Australia.

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# Investor-State Dispute Settlement

Investor-State Dispute Settlement (ISDS) clauses found in free trade agreements or investment treaties operate to 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 the agreement.[10]

CHOICE opposes the inclusion of ISDS clauses in trade agreements. ISDS clauses are not necessary in agreements between nations that have confidence in the integrity of each others' legal systems. ISDS clauses can operate to give special preferential treatment to foreign investors in comparison with domestic investors, in part by enabling foreign companies to challenge the decisions of Australian superior courts in international tribunals, whereas domestic companies have no such avenue of appeal. In addition to providing foreign investors with an unfair advantage over domestic companies, this can damage the sovereignty of Australia and encourage the government to avoid passing laws that are in the public interest if they also risk negatively impacting on business. These clauses have the potential to constrain or 'chill' the development of public interest policy and law, by providing foreign investors with a pathway for having laws declared to be in breach of international trade agreements. Governments wanting to avoid costs and penalties may avoid passing contentious legislation altogether, even in instances where legal reform could provide a significant public benefit.

**Example: plain packaging initiative at risk in international tribunal**

In late 2011, the Australian Government passed its tobacco plain packaging legislation as part of efforts to reduce smoking rates. The legislation was debated and subject to public scrutiny as it was passed into law.

British American Tobacco Australasia Pty Ltd, along with a number of other companies including Philip Morris Limited as an intervener, took legal action in Australia's High Court opposing the new law on constitutional grounds; they lost the case.

This would ordinarily have been the end of the dispute. However, an ISDS clause in a 1992 trade agreement between Australia and Hong Kong provided a new avenue for the company to pursue. Philip Morris Australia moved to Hong Kong, became Philip Morris Asia, and lodged a new case in an international tribunal using the ISDS clause in the 1992 agreement. The company claimed that the Australian Government's legislation constituted unfair treatment of a foreign investor and expropriation of the company's intellectual property.

This is the first time a foreign company has taken an action against the Australian Government using an ISDS clause in an international trade agreement. If worldwide trends are any indication, it will not be the last. This case has yet to be determined, but future policy development in Australia may be constrained if the arbitrators find in favour of Philip Morris Asia.

[10] Definition as per Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', available at https://www.dfat.gov.au/fta/isds-faq.html

While ISDS clauses pose significant risks, these mechanisms are 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.[11] 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.

## Recognition that ISDS clauses are not appropriate in trade agreements

There has been growing concern about the appropriateness of ISDS provisions from a number of official sources. ISDS provisions are not novel; these clauses are included in 21 bilateral investment treaties that Australia is party to. However, up until the negotiation of the Australia-US free trade agreement (AUSFTA) ISDS was included primarily in agreements with developing countries, for the purpose of protecting Australian investment from expropriation by governments in countries lacking a strong rule of law. It was decided that ISDS clauses were not necessary in AUSFTA due to the participating countries' "open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems".[12]

In 2011, the then Government committed to excluding ISDS clauses from future agreements due to their potential to "constrain the ability of Australian governments to make laws on social, environmental and economic matters".[13]

On 28 August 2014, the Senate's Foreign Affairs, Defence and Trade Legislation Committee released a report on the *Trade and Investment (Protecting the Public) Bill 2014*.[14] The bill, if passed, would have operated to prevent the inclusion of ISDS clauses in future free trade agreements. The Committee recommended the bill not be passed, in part because of a view that ISDS risks could be managed more effectively and in ways that do not require legislation, including through careful treaty drafting.

## Protection of the right to regulate

As discussed above, ISDS clauses have the potential to restrict the development of public interest policy by opening up governments to legal action in response to the introduction of new laws. Governments may choose to manage this risk by avoiding contentious new policies even in circumstances where reform could lead to substantial public benefit. If ISDS is included in

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[11] 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

[12] 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.

[13] Aust. Government, Department of Foreign Affairs & Trade, Gillard Government Trade Policy Statement, April 2011, 'Trading Our Way to More Jobs and Prosperity', available at http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html

[14] Available here - http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/~/media/Committees/fadt_ctte/trade_foreign_investment/report.pdf

agreements, there must be corresponding safeguards to enable the government to pass legislation in the interests of the public, even in instances where it is not in the interests of foreign corporations.

Some agreements have attempted to deal with this issue and protect the right to regulate by including 'carve-out' clauses alongside ISDS. These clauses aim to prevent laws on specific topics from forming the basis of ISDS actions. For example, an agreement might state that laws on the topic of environmental protection will not be subject to ISDS.

In theory, a government that has signed an agreement including a carve-out clause like this could enact legislation that impacts on a company's profits without risk of being sued, provided the law is for the purpose of environmental protection. In practice, however, these carve-outs have not provided the protection they were designed to. For instance, the Canadian-North American Free Trade Agreement included a carve-out for environmental policy. Despite this, a US gas company was able to use the agreement's ISDS mechanism to sue the Canadian government for lost profits following a ban on fracking.[15]

Another challenge with carve-out clauses is that they require the ability to foresee the range of public interest issues that may be important to future legislators, which is a dangerously unrealistic expectation.

The right of the government to regulate in the public interest must be protected. The best way to retain this right is to ensure that ISDS is not included in any trade agreement. Carve-out clauses may be effective provided careful thought is given to the construction of clauses. Carve-outs must be robust and not easily circumvented. The Korea Australia Free Trade Agreement provides that "except in rare circumstances non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations".[16] This clause may not be able to adequately protect the right to regulate, given the ambiguity and scope for interpretation of the phrase "except in rare circumstances". Careful consideration must be given to drafting these clauses, as improperly drafted clauses do not provide an adequate safeguard.[17]

CHOICE cannot provide suggested wording for an ideal carve-out clause, as we feel that these clauses are inherently flawed and cannot operate in any construction to effectively remove all of the risks associated with ISDS. Regardless, if ISDS clauses are included in an agreement then it follows that consideration must be given to drafting effective protections as well. Public consultation and advice from legal experts would assist in ensuring that these clauses are as strong as possible.

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[15] Australian Conservation Foundation, April 2014, 'Senate Inquiry Submission: Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, available at http://www.acfonline.org.au/sites/default/files/resources/ACF_submission_ISDS_bill.pdf

[16] KAFTA, 2014: chapter 11, annex 2B.

[17] See for example the Pacific Rim case, where the El Salvadoran government has been sued under ISDS in a free trade agreement, despite the presence of a carve-out clause. Further information available via M. Perez-Rocha, 3 December 2014, 'When Corporations Sue Governments', New York Times at http://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html?_r=0

## Indirect expropriation vs direct expropriation

Expropriation is defined as 'the action of the state in taking or modifying the property rights of an individual in the exercise of its sovereignty'.[18] In its general use, expropriation carries a connotation of 'a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person".[19] In relation to free trade agreements, two concepts of taking property have developed: direct expropriation, a 'legislative or administrative act that transfers the title and physical possession',[20] and indirect expropriation, a murky phrase which involves "the effective loss of management, use or control or a significant depreciation of the value of the assets of a foreign investor."[21]

Indirect expropriation can refer to almost any administrative or legislative act that impacts on the way in which a business is able to conduct itself. For example, indirect expropriation could potentially arise from passing a law requiring new country of origin labelling, as implementing this labelling could impact on a business's profits as consumers choose to purchase products made in Australia over other sources. The concept of "indirect expropriation" is unique to international investment arbitration, and is not recognised in most national legal systems, including Australia's.[22]

Leaked documents suggest that the TPP will allow ISDS claims to be brought in cases of indirect expropriation.[23] As has been observed by respected academics, this will "allow foreign investors to claim government actions (such as the plain packaging laws) require technically unlimited financial compensation because of a slightly higher burden in complying with the law".[24]

Enabling action under ISDS for indirect expropriation of profit compounds the risk of constraining the Australian Government's ability to develop public interest policy. The Australian Government should have the power to make executive decisions and create laws in the public interest, even if these decisions could have a negative impact on the interests of individual

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[18] See Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/expropriation

[19] S.D. Myers Inc. v Government of Canada, Partial Award (Nov. 13, 2000), International Legal Materials, para. 280

[20] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, p3, cited in El Attar et al, June 2009, 'Expropriation clauses in international investment agreements and the appropriate room for host States to enact regulations: a practical guide for States and Investors', The Graduate Institute, Geneva, available at http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Research%20Projects/Trade%20Law%20Clinic/Expropriation%20clauses%20in%20International%20Investment%20Agreements%20and%20the%20appropriate%20room%20for%20host%20States%20to%20enact%20regulations,%202009.pdf

[21] Ibid.

[22] As discussed in the Australian Fair Trade and Investment Network Ltd's (AFTINET) submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, April 2014, available at http://aftinet.org.au/cms/sites/default/files/AFTINET%20submission%20ISDS%200404.pdf

[23] See Article 12.12 of the 2012 leaked TPP investment chapter, available at http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf

[24] Faunce T., 29 August 2012, 'An Affront to the Rule of Law: International Tribunals to Decide on Plain Packaging', The Conversation, available at http://theconversation.edu.au/an-affront-to-the-rule-oflaw-international-tribunals-to-decide-on-plain-packaging-8968, as cited in Rimmer, M., April 2014, 'Trojan Horse Clauses: Investor-State Dispute Settlement', available at http://works.bepress.com/matthew_rimmer/178

corporations and investors. To the extent that ISDS clauses are included in future agreements, they should clearly exclude action on the basis of indirect expropriation.

## Procedural fairness

Given that ISDS clauses developed to protect investors operating in countries with a weak rule of law, it stands to reason that if Australia is to sign an agreement including ISDS, the procedural elements of the ISDS system should be at least on par with our domestic legal system. That is, there must be safeguards against abuse of process, requirements for transparency and accountability in decision-making, the guaranteed independence of the decision-makers, and opportunities to have decisions reviewed through appropriate appellate mechanisms.

Currently, these standards do not appear to be met in agreements containing ISDS clauses. While the wording of ISDS mechanisms included in each agreement vary, the minimum standards described in the following paragraphs should be met in any agreement that Australia is a party to.

Ideally, proceedings should be public and recorded in a public database. Arbitrators should be held to a similar standard of independence as judges in Australia; they should not also be permitted to act as advocates or advisors, and should not be involved in matters that could result in a real or perceived conflict of interest. Tribunals should develop precedent and give weight to the decisions and law of the host country and to previous Tribunal decisions in order to promote consistency and accountability in decision-making.

Potential litigants should be prevented from engaging in 'jurisdiction shopping', or the practice of shifting investment from one country to another for the purpose of taking advantage of an agreement containing an ISDS clause. Litigants should also be required to have exhausted all domestic legal avenues in relation to their dispute before commencing an action through an ISDS process.

### Recommendations

CHOICE opposes the inclusion of ISDS clauses in international trade agreements; the risks associated with these clauses are substantial and there is insufficient justification for including them in agreements with countries that have a well-developed and stable legal system. If, however, the government remains committed to considering ISDS clauses on a case-by-case basis, the following recommendations aim to improve the transparency and procedural elements of ISDS cases and ensure that the right of future governments to create laws that benefit the public is protected.

***Recommendation 6:*** Robust carve-out clauses drafted to protect the right to regulate in the public interest must be included with any ISDS clause. This right must be given priority over the right for corporations to access ISDS mechanisms.

***Recommendation 7:*** ISDS should not enable action to be taken in instances of indirect expropriation, but should be limited to direct expropriation.

***Recommendation 8:*** Corporations should be prevented from moving investments to different jurisdictions for the primary purpose of taking advantage of a trade agreement containing an ISDS clause.

***Recommendation 9:*** Action should not be permitted under ISDS unless the party bringing the action has first exhausted all domestic legal avenues.

***Recommendation 10:*** Proceedings and outcomes of ISDS cases must be published in a timely manner and in an accessible format.

***Recommendation 11:*** ISDS arbitrators should adhere to a Code of Conduct. This would at a minimum need to include a requirement that they avoid and report conflict of interests. Arbitrators should not be able to act as advocates or advisors for the duration of their employment.

***Recommendation 12:*** Arbitration bodies should develop precedent and record it. In making decisions, weight should be given to the common and statutory law of the host country and to previous arbitral decisions.

***Recommendation 13:*** Decisions should be reviewable through an appropriate appellate mechanism.