

WILL THE ABBOTT GOVERNMENT CONTINUE TO ABANDON DEMOCRACY & NATIONAL SOVEREIGNTY, OR WILL THEY BAN ISDS TYPE FOREIGN TRIBUNALS?

Legal Experts Explain Why National Courts Should NOT be Replaced by Secretive Foreign ISDS Tribunals

Graham Williamson

March 2014

The highly secretive Trans Pacific Partnership or TPP ([1](#), [2](#)) is currently attracting world attention. While the TPP masquerades as a free trade agreement, it is much more, so much so that some experts claim it has little or nothing to do with trade ([3](#), [4](#)). The TPP includes [Investor State Dispute Settlement \(ISDS\)](#) provisions to enable foreign corporations to sue governments in a [closed shop tribunal system](#) ([5](#), [6](#), [7](#), [8](#), [9](#), [10](#), [11](#)). By permitting foreign corporations to control elected governments, national sovereignty, democracy and our national judicial system, are progressively subverted and surrendered to corporate rule and global governance ([12](#), [13](#), [14](#), [15](#)). According to [the New American](#):

“The architects and promoters of the TPP and FTAAP frequently point with admiration to the “integration” process of the European Union (EU) as the model they would like to see implemented for the Asia-Pacific rim nations. As with the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership has been designed to follow the EU example of relentless widening and deepening, constantly eroding national sovereignty, while building “transnational governance” that is not restrained by the checks and balances of national constitutions.”

[As is noted by Buxton and colleagues in their extensive report](#), ISDS investment lawyers actively “push” corporations to pursue arbitration:

“Investment lawyers have become aggressive promoters of a skewed and unjust system on which their six- or seven-digit salaries depend. As this report shows, investment lawyers have:

- *actively encouraged cases and sometimes even pushed corporations to pursue arbitration, exploiting loopholes in investment treaties to create an explosion in the number and the costs of dispute settlement cases*
- *acted behind the scenes to push countries to adopt investment treaties*
- *promoted the use of vague language in treaty clauses which increases the scope for investor-friendly interpretation by arbitrators and the chances of disputes*
- *tended to approach investment law from an almost exclusively commercial angle rather than public interest, ignoring or even denouncing arguments based on human rights and sustainable development*
- *aggressively and successfully fought to maintain and expand the current system of investment treaties and arbitration, both through academic circles and by lobbying against reforms that would serve the public interest*
- *worked alongside speculative investment funds to provide the finance for corporations to bring more cases, at the expense of states and taxpayers*

These actions have not only confirmed the pro-corporate bias of current investment agreements, they have tilted the regime even further in the favour of large multinational corporations. The result is a system driven by commercial interests rather than the delivery of justice."

[Wendy Jeffus notes](#) increasing concerns regarding the surrender of governments to undemocratic corporate globalisation:

"He goes on to say that 'our opposition is to corporate globalization, that is the corporate domination of the planet, the use of trade agreements to strengthen corporate rights and to remove constraints to their pillage of the Earth. This type of globalization is an artificial product of rules made through undemocratic and illegitimate processes by people seeking to free themselves from democratic accountability for their actions'."..... "Corporate libertarianism is not about creating the market conditions that market theory argues will result in optimizing the public interest. It is not about the public interest at all. It is about defending and institutionalizing the right of the economically powerful to do whatever best serves their immediate interests without public accountability for the consequences."

In [Unfair, Unsustainable and Under the Radar](#), Thomas McDonagh highlights the global struggle between big government and sustainable development on the one hand, and the power of the mega corporations on the other, a struggle highly relevant to the outcome of current TPP negotiations:

"the movement to steer public policy in the direction of sustainable and inclusive development faces significant winds blowing in precisely the opposite direction.....SOCIAL AND ECONOMIC development that respects nature's boundaries and incorporates the broad interests of all citizens is in direct conflict with the interests of global corporations and the conflict is not an accident.....Any careful look at the last thirty years of global policymaking reveals the construction of two parallel and contradictory movements to shape the course of development policy. One is the global drive towards sustainable development policies discussed above, much of which aims directly at the environmental and social abuses of international corporations. The other has been the decades-long effort to force developing economies to implement policies designed to attract foreign corporations and the foreign investment prescribed as the key to economic health.....in all cases governments are under enormous political pressure from corporations to keep their profit-making interests safe from the incursion of environmental protections and other policies and rules that threaten them."

Over the past 2-3 decades the UN, with the undemocratic cooperation of national governments, has been extremely successful in strangling the world with environmental regulations and internationalisation. Although there is now a political reaction opposing this undemocratic treacherous sell out to the UN, this political drive to support the UN is now being replaced by a similar political sell out to the TPP and foreign corporations. And once again it seems, our elected representatives will attempt to deceive the public and avoid democratic scrutiny by [ramming the TPP through parliament](#). According to [Professor Thomas Faunce](#) who notes the serious threat the TPP poses to Australian sovereignty and democracy:

"as a result of the TPPA, this country risks displacing the authority of citizens who live and support families, friends, local communities and ecosystems in this land, in favour of a system privileging artificial people called corporations.....The multinational corporations to which the KAFTA and the TPPA will be ceding rights to challenge our democratic laws are regarded by the law as "people". They can sue in courts to protect their rights.....So we are in the middle of one of the biggest governance debates our country will ever have. And how much time how our leaders allowed for this debate to take place?.....One day, all our government assets will be sold off. They'll be owned by

foreign corporations that have rights to challenge overseas our attempts to regulate them in the national interest.....The deliberate disengagement of Australian citizens from the governance changes being wrought on Australia through the TPPA may mark a turning point in a wider disengagement of citizens from the political process in this country.”

Given the role of ISDS in subverting democracy, national sovereignty, and domestic judicial systems, it is hardly surprising that the [Productivity Commission has warned that ISDS provisions are both unnecessary and risky](#), noting *“there are considerable policy and financial risks arising from ISDS provisions.”* It is also hardly surprising that the Gillard government rejected ISDS because of the serious risks ISDS provisions posed for Australia ([16](#), [17](#)). [According to the Gillard government’s trade policy](#):

“The Gillard Government supports the principle of national treatment—that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.”

Even the United Nations has warned about the serious risks posed by the secretive ISDS tribunal system ([18](#), [19](#)). In their [“Roadmap” for ISDS reform](#), UNCTAD emphasises the urgency of ISDS reform, especially given the exploding number of ISDS cases:

“Concerns with the current ISDS system relate, among others things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures.

But given the fact that the international ISDS arbitration system was constructed to favour foreign corporations as opposed to domestic courts, negative effects upon national sovereignty and democracy are hardly surprising. Justice Heydon, [as cited by Phillips](#), has referred to the potentially unjust nature of specialist courts and tribunals in [Kirk v Industrial Relations Commission of NSW](#):

“This led in turn to Justice Heydon stating how sometimes the legislature elects to create separate or specialist courts to determine particular types of litigation (at [122]). He said some specialist courts “tend to lose touch with the traditions, standards and mores of the wider profession and judiciary”. And that they become over-enthusiastic about vindicating the purposes for which they were set up and exult that purpose above all other considerations. He cited Walker on the Rule of Law (1988) (at p 35) as follows (at [122]):

‘History teaches us to be suspicious of specialist courts and tribunals of all descriptions. They are usually established precisely because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the government wants. From the Court of Star Chamber to the multitude of military courts and revolutionary tribunals in our own century, this lesson has been repeated time and time again.’

[Walkers comments have been cited again and reinforced by Judge ME Rackemann](#) of the Queensland Planning and Environment Court:

“There is a related danger in that course in that the courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules... Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up... So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are “preoccupied with special problems”], like tribunals or administrative bodies of that kind, are “likely to develop distorted positions”.

But given the above facts, the eagerness of the Abbott government to overturn the ISDS ban imposed by the Gillard government and include ISDS in TPP negotiations is alarming ([20](#), [21](#), [22](#), [23](#)). In defence of the government’s position, [Trade Minister Andrew Robb claimed](#) “ISDS provisions weren't new, having existed in Australian trade deals for 30 years.” But though I wrote to the office of the Trade Minister seeking clarification of the following issues, I have yet to receive any response (pers. comm. 9/3/2014):

Andrew Muratore
Desk Officer
Department of Foreign Affairs and Trade
Investment Policy and TPP Section
Goods and Investment Branch
Office of Trade Negotiations

Dear Andrew,

Thank you for taking the time to send your enclosed response dated 3rd March.

In connection with ISDS you state:

The Australian Government is not intending to sign up to international agreements that would restrict Australia’s capacity to govern in our own interest – whether in the area of healthcare, environment or any other regulated area of the economy.

Contrary to some public commentary, ISDS does not protect an investor from a mere loss of profits and does not prevent the Government from changing its policies or regulating in the public interest. A loss of profits, by itself, does not amount to a breach of an FTA.

In spite of these claims however, Australian taxpayers are currently being forced to pay for an ISDS international arbitration case with Phillip Morris suing the Australian government because of loss of trade resulting from plain packaging laws ([1](#), [2](#), [3](#), [4](#), [5](#), [6](#), [7](#)). Unless you are claiming the outcome of the Phillip Morris case will definitely have no effect upon government health regulation in Australia then it is a simple fact that this case directly contradicts your claims. This brings to mind the following questions which you have so far refused to answer.

- 1. Will you be abandoning any consideration of ISDS provisions and taking positive proactive steps to protect and preserve Australian democracy and sovereignty? Please describe in detail how you intend to protect Australian sovereignty and safeguard national security.**

2. **And what steps will you be taking to ensure fairness and transparency, not only of the TPP negotiations, but also every aspect of the international arbitration system?**
3. **Will you be seeking to discriminate against Australian domestic businesses by supporting a secretive closed shop tribunal to resolve disputes involving foreign businesses and thereby enable foreign corporations to ride roughshod over the domestic legal system and local businesses?**

Although ISDS provisions are not new, in recent times experts from around the world acknowledge that there has been an explosion in ISDS cases with increasing use in Western countries and increasing use to override the decisions of democratically elected governments ([8](#), [9](#), [10](#), [11](#), [12](#), [13](#), [14](#), [15](#)). These cases include ([8](#)) *“the highest award in the history of ISDS (US\$ 1.77 billion) in Occidental v. Ecuador, a case arising out of a unilateral termination by the State of an oil contract.”*

It is not enough to simply pretend this is not happening, Australians have a right to know what proactive steps you will be taking to strengthen our democracy and national sovereignty. You have an excellent opportunity here, and it is in your interest, to display leadership and be seen to be actively strengthening democracy and sovereignty. What steps have you taken to ensure there will never be another “Phillip Morris case” and Australia is protected from foreign corporate lawyers suing Australian taxpayers in secret tribunals?

Given your government’s abandonment of climate change mitigation strategies I asked below whether the TPP was intended to strengthen or weaken such mitigation strategies. You also chose to ignore this question.

I conclude by repeating previous queries:

*“In recent years successive Australian governments have continued to destroy Australia’s strength and independence by progressively selling Australia out and systematically eroding national sovereignty as they surrender to foreign interests. Will you be just another government dedicated to continuing this abandonment of the Australian people? Or will you stand up for Australia and Australians?
Australians are waiting for a clear and decisive answer.”*

Regards

Graham Williamson

Prime Minister Tony Abbott, at the [World Economic Forum](#), did make it abundantly clear that as far as his government is concerned, trade comes first and everything else comes last:

“As always, trade comes first. People trade with each other because it’s in their interest to do so. Every time one person freely trades with another, wealth increases. Just as trade within countries increases wealth, trade between countries increases wealth – that’s why we should all be missionaries for freer trade. At the very least, the G20 should renew its commitment against protectionism and in favour of freer markets. Each country should renew its resolve to undo any protectionist measures put in place since the Crisis.Australia is determined, as a responsible and committed G20 chair, to promote better global governance. We will strive to build on the good work of Russia’s presidency and lay the foundations for further progress under Turkey in 2015. Better governance, though, is not the same as more government. Ultimately, the G20 is not about us in government; it’s about the people, our masters.”

Prime Minister Abbott's belief that "*trade comes first*" (and everything else last) is alarming. Indeed, a slight rephrasing of the Prime Minister's statements provides an extremely useful insight into the problems facing those Australians who favour democracy, independence, and freedom:

"As always, trade comes first, people and democracy come last. People trade with each other because they think at the time, it's in their interest to do so. Every time one person freely trades with another, the wealth of the buyer is transferred to the seller, dependent upon the value the buyer receives and the satisfaction of the needs of the buyer. Just as trade within countries transfers wealth from buyer to seller, trade between countries also transfers wealth from Australia to foreign countries – that's why, if we put other countries first, we should all be missionaries for freer trade. At the very least, the G20 should renew its commitment against protecting Australian farms and businesses and be in favour of foreign corporations instead. Each country should renew its resolve to undo any measures to protect their own businesses and farmers put in place since the Crisis.Australia is determined, as a responsible and committed G20 chair, to give priority to global governance and place democracy in our own country last. We will strive to build on the good work of Russia's presidency and lay the foundations for further progress under Turkey in 2015. Better global governance though, is the opposite of more democracy at a national level. Ultimately, the G20 is not about us in government; it's about putting global trade first and still convincing the people they are our masters."

Because of the determination of successive Australian governments to defy the will of the people and erode the democratic, cultural, and moral values which made Australia one of the greatest nations on earth, Australia no longer proudly leads the world as a pinnacle of freedom, democracy, and social harmony. Australia has the opportunity to lead the world again. Words must be translated into actions by our politicians, demonstrating allegiance to Australia and Australians with enduring policy at all 3 levels of government. Good government clearly cannot be built upon deception and betrayal and undemocratically working against the interests of ordinary Australians.

If our elected representatives are at all serious about wishing to unite rather than divide, and represent the Australian people, rather than foreign corporations or foreign agencies such as the UN, then the way forward is perfectly clear. These issues must be democratically presented to the people, and the politicians must acknowledge and correct systemic democratic problems, strengthen national sovereignty and democracy, proactively promote traditional Australian cultural and moral values, and prevent domestic political interference from foreign agencies and corporations.

Politicians must represent Australians - as they did when Australia led the world.