

Foreign Affairs, Defence and Trade References Committee
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28 October 2016

Submission on Proposed Trans-Pacific Partnership (TPP) Agreement

The North Queensland Conservation Council (NQCC) welcomes the opportunity to make a submission on the proposed TPP Agreement.

NQCC is the regional conservation council for the area from Cardwell to Bowen, and from the Reef to the Northern Territory border. Established in 1974, it falls under the broad umbrella of the Queensland Conservation Council and focuses on education, advocacy and policy development.

As an organisation with environmental conservation as its focus, our submission will concentrate on the environmental implications of the proposed TPP Agreement.

Investor-State Dispute Settlement (ISDS)

The most problematic aspect of the TPP is the Investor-State Dispute Settlement (ISDS). This supra-national legal power grants corporations the right to sue governments over the introduction of legislation that impedes upon their profits. These cases would be held in international tribunals with no independent judiciary and without precedents or appeals.¹

Australia has robust legislation to protect our environment, and a comprehensive approval process for ventures that impact upon our natural assets. The ISDS could facilitate a corporation to sue the Australian Government for loss of profits due to our stringent environmental protections, or for financial losses incurred by a procedural delay. We uphold that the ISDS threatens Australia's ability to self-govern for the benefit of its people and the environment.

There have been precedents set in other jurisdictions involving ISDS lawsuits concerning environmental matters, outlining what may be the future for Australia.

¹ French, R.S. 2014, 'Investor-State Dispute Settlement — A Cut Above the Courts?', *Supreme and Federal Courts Judges' Conference*, Chief Justice AC, Darwin access at www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf

Case Study: Bilcon vs Canadian Government

An ISDS case under NAFTA resulted in the Government of Canada being sued for damages of \$101 million USD. The case was about the Environmental Assessment (EA) process for a quarry and marine terminal project in the province of Nova Scotia. The claimant, Bilcon, alleged that the EA undertaken by the Government of Canada and the Government of Nova Scotia was arbitrary, discriminatory and unfair.

The EA for the project was conducted by both levels of government from 2003-2007. It was determined that the project had widespread public concern and a possibility of significant adverse environmental effects, so the EA was referred to a Joint Review Panel. The Panel then gathered information on the environmental effects of the project, held public hearings, and issued a recommendation to government decision-makers that the Whites Point project should not be permitted to proceed because it would have a significant and adverse environmental effect on the “community core values”. The Government of Canada upheld this recommendation and concluded that the project was likely to cause significant and adverse environmental effects that were not justified.

Case Study: TransCanada vs. US Government

TransCanada, the fossil fuel corporation behind the rejected Keystone XL tar sands pipeline, made it abundantly clear the threat that ISDS poses to our communities, our climate, and our clean air and water, if the TPP Agreement is approved.

Two months after the Obama administration rejected TransCanada’s bid to build the controversial Keystone XL tar sands pipeline, the Canadian corporation announced its intention to retaliate through ISDS provisions in NAFTA. Specifically, TransCanada plans to ask a private tribunal of three lawyers to order the U.S. government to hand more than \$15 billion USD to the corporation as “compensation” for the Keystone XL decision that spared the threat of increased climate disruption and of dirty tar sands oil spills.

Even if provisions in the TPP Agreement make the success of such cases unlikely, the potential threat of costly litigation over environmental and health policies will influence public policy. The potentially devastating effects of the ISDS on Australia’s economic, social and environmental development is in itself a compelling enough reason for Australia to reject the TPP Agreement.

Weak Environmental Standards

The inclusion of an environment chapter in the TPP is welcome. However, NQCC argues that the environmental standards set out in the TPP Agreement are too weak to be considered sufficient. The environment chapter fails to provide adequate protection in five of six environmentally critical areas, while doing nothing to strengthen an enforcement mechanism.

TPP only requires countries in the pact to “adopt, maintain, and implement” domestic policies to fulfil one of the seven core Multilateral Environmental Agreements (MEAs) – the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Art. 20.17.2). Even so, it is important to note that with respect to CITES, countries are only called on to “*endeavour to implement, as appropriate, CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade*” (Art. 20.17.3c, emphasis added).²

Despite promises that the TPP would include enforceable commitments by governments to at least seven international environment agreements, the text mentions only four; only one - on trade in endangered species - has clearly enforceable commitments (Article 20.17.2). The final TPP text merely requires each TPP country to “maintain” specific existing domestic policies that adhere to the Montreal Protocol on Substances that Deplete the Ozone Layer and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL). This means that for these two critical MEAs, TPP countries are simply required to keep domestic policies named by the TPP on the books. The provision fails to require countries to effectively implement such policies, or to adopt new policies if the existing ones have proven insufficient.

Unbelievably, the text does not refer to climate change, but only to voluntary measures for lower emissions economies with no benchmarks or timeframes (Article 20.15), and the non-binding asserting that “that transition to a low emissions economy requires collective action.” The majority of the TPP signatories are also signatories of the Paris 2015 international agreement to limit global warming to between 1.5 and 2 degrees Celsius. The TPP environment chapter also fails to require TPP countries to adhere to their United Nations Framework Convention on Climate Change (UNFCCC) commitments despite the fact that all TPP countries are party to the climate convention. There is no protection offered from TPP rules that would allow foreign investors and Governments to challenge climate and clean energy policies in unaccountable trade tribunals. This is particularly concerning in the Australian context. Under the TPP Agreement, any Government policy efforts to curb emissions and act on climate change that were alleged to impede trade would be liable to litigation.

² <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf>

Any forthcoming international trade agreement should complement current efforts to limit global warming. This is not only a failure to preserve the environment, but also a failure to account for the devastating economic impacts of leaving climate change. Australia is particularly vulnerable to the effects of climate change; lowering productivity and increasing the risk of natural disasters.³ Climate change will be a massively disruptive force for the world economy and must be addressed in any international trade agreement.

The non-binding nature of commitments and weak enforceability in the environment chapter contrasts sharply with the legal rights of corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above. The absence of climate change from the TPP is unacceptable, as this is one of the biggest challenges facing the global community. Governments are not adequately protected against ISDS lawsuits should they be proactive and legislate climate change policy. This is a glaring oversight.

Regulatory Chill

“Regulatory chill” refers to the reluctance on the part of nations to introduce new or improved environmental and social regulations for fear of being sued under ISDS.

On 30 August this year, the Victorian Government announced a permanent ban on the exploration and development of all onshore unconventional gas in Victoria, including hydraulic fracturing (fracking) and coal seam gas. The environmental and health risks associated with fracking were judged to outweigh any potential benefits.⁴ Similarly, in 2013 the Quebec Government revoked fracking rights in St Lawrence after an assessment that it would impact local marine life. Now they are being sued under ISDS by an American corporation seeking US\$118.9m in compensation.⁵ The case is ongoing, but if Canada loses, we could expect to see a significant chilling effect on similar regulatory efforts elsewhere in the country and other parts of the world. Such concerns are especially pertinent in the Australian context, where fracking is widespread and governments are moving to restrict activities.

NQCC finds it unacceptable that the “regulatory chill” arising from potential ISDS litigation could impede our Government in legislating for better environmental and community protections. It is absolutely paramount that our Government

³ <https://www.climatecouncil.org.au/no-more-business-as-usual-for-australia-as-climate-change-hits-economy-for-8bn>

⁴ <http://www.premier.vic.gov.au/victoria-bans-fracking-to-protect-farmers/>

⁵ <https://www.theguardian.com/business/2016/oct/25/trans-pacific-partnership-makes-australia-vulnerable-to-court-challenges-report-claims>

maintains its ability to uphold environmental standards and legislate for environment protection, free from the threat of costly litigation from corporations.

No evidence of benefit for Australia

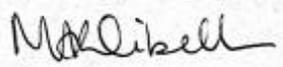
The TPP will make Australia vulnerable to costly ISDS challenges and threatens our environmental, social and health protection. However, the potential benefits of the TPP have yet to be demonstrated. There have been no independent studies of the potential impacts of the TPP. The Australian Government's National Interest Assessment was done by the Department of Foreign Affairs and Trade, which negotiated the agreement. As a negotiating partner, DFAT is incapable of making an impartial judgement of the TPP. Additionally, DFAT has made no estimate of the potential impact on the Australian economy.⁶

The World Bank's report on the TPP's effect on the Australian economy suggests that it will contribute only 0.7% growth by 2030, or less than one half of one 10th of 1 per cent annually.⁷ The Australian Productivity Commission's 2015 review claimed the TPP was a 'preferential' rather than 'free' trade agreement that would be dangerous to enter into.⁸ Rather than recognise the concerns of the Productivity Commission, the Australian Government rebuffed their offers to scrutinize the TPP, effectively seeking to ratify a trade deal without having demonstrated its benefits to our nation.

To conclude, NQCC holds serious concerns about the TPP Agreement. We urge the committee:

1. to reject the TPP Agreement in its current form,
2. to advocate for the inclusion of stronger environmental standards in the TPP Agreement,
3. to advocate for the recognition of climate change in the TPP Agreement, and
4. to recognise that ISDS and regulatory chill threatens the robustness of Australian environmental protections.

Yours faithfully,



Maree Dibella
Coordinator

⁶ Hutchens, G. 2016, "Trade Minister Andrew Robb criticised for seeking TPP ratification without independent analysis, *Sydney Morning Herald*, <http://www.smh.com.au/federal-politics/political-news/trade-minister-andrew-robb-criticised-for-seeking-tpp-ratification-without-independent-analysis-20160209-gmpmwf.html>

⁷ Martin, P. 2016, "Trans-Pacific Partnership will barely benefit Australia, says World Bank report", *The Sydney Morning Herald*, <http://www.smh.com.au/federal-politics/political-news/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html>

⁸ <http://www.smh.com.au/business/the-economy/free-trade-agreements-preferential-and-dangerous-says-productivity-commission-20150624-ghw7rk.html>