



**Dr Kyla Tienhaara**  
Visiting Fellow

School of Regulation and Global Governance

+61 4 0652 8691  
[kyla.tienhaara@anu.edu.au](mailto:kyla.tienhaara@anu.edu.au)

16 April 2018

Joint Standing Committee on Treaties  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Re: Inquiry into TPP-11

Dear Committee,

I welcome the opportunity to make a submission to this inquiry into the Proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). I will restrict my comments to my particular area of expertise, which is investor-state dispute settlement (ISDS). Under the Gillard Government, Australia maintained an exemption from the application of ISDS in the original TPP agreement. Government opposition to ISDS was dropped when the Abbott Government came to power. In TPP-11, ISDS applies to Australia and Australian investors with one exception (when it concerns investment by New Zealand investors or investment in New Zealand). Notably, New Zealand has negotiated side letters with five TPP-11 partners on ISDS.

I have previously made submissions to various Australian government inquiries about my general concerns about ISDS. I will not repeat these arguments here. Instead, I wish to highlight the threat of ISDS to one particular area of regulatory activity.

Much of the debate around ISDS in Australia has focused on tobacco giant Philip Morris' efforts to challenge the Gillard Government's plain packaging legislation. Trade Minister Ciobo likes to point to the fact that Australia won that case as proof that the system is just fine and that critics of ISDS are running a scare campaign. Setting aside the fact that the Philip Morris case was won on a technicality and not on the merits of the dispute, there is a tobacco carve-out in the TPP, which should close off this option for investors from that industry in this particular agreement. The carve-out is one of the best provisions in the TPP; there is only one problem with it – it only covers tobacco. As many others have pointed out, there are numerous areas of regulation that are worth shielding from ISDS. The narrow focus on the one area that has already been challenged in Australia is extremely short-sighted.

Globally, tobacco and health-related disputes have been quite rare. What dominates the ISDS system? Oil, gas and mining disputes, and cases concerning electric power and other investments in energy. Including ISDS in the TPP opens the door to a potential raft of new lawsuits over energy, especially if more countries join the pact or the US decides to return to the club (a possibility that has been discussed in the media last week). This will

have significant implications for the public purse, as each case can cost millions in taxpayer funds even if the government eventually prevails (the Turnbull Government is actively fighting an FOI ruling requiring disclosure of how much was spent on the Philip Morris case). But this is not the only, or arguably the most significant, reason for concern. We should also be worried about the implications of ISDS for climate policy, both at home and abroad.

In 2015, the year that the original TPP was concluded, 187 governments (including Australia) signed the Paris Climate Agreement. In this agreement, countries committed to keeping average global temperature change below 2°C of warming above pre-industrial levels. Researchers have demonstrated that in order to have a reasonable chance of meeting this commitment globally, a third of oil reserves, half of gas reserves and over 80% of current coal reserves should remain unused from 2010 to 2050. In other words, a substantial proportion of known fossil fuel deposits will have to be left in the ground and further exploration activities cannot be undertaken.

When governments begin curbing fossil fuel investments, as they must, Big Oil and Big Coal will turn to ISDS just as Big Tobacco did. In some parts of the world, this is already happening. As outlined in the attached article, ISDS cases have arisen in response to: a moratorium on oil and gas operations along the Italian coastline; restrictions placed on a coal-fired power station by the German city of Hamburg; a ban by the Canadian Province of Quebec on fracking; and the Obama Administration's rejection of the Keystone XL pipeline.

It is worth noting that legal experts suggested that TransCanada (seeking US\$15 billion in damages) had a good chance of winning the Keystone XL case before President Trump signed an executive order allowing the pipeline to proceed. But companies don't even need to win these cases to have an impact on policy. The mere threat of a legal case, costing hundreds of millions or even billions of dollars, can be enough to put a chill on regulatory action.

Compliance with the objectives of the Paris Agreement will require radical change: a future in which governments have met the collective goal of keeping below the 2°C guardrail is a future without fossil fuels. Civil society and governments at all levels will have to fight for this future, regardless of whether the TPP or any other trade agreements come into force. However, providing fossil fuel corporations with ISDS is akin to handing your opponent extra weapons and ammunition before stepping onto the battlefield.

Fossil fuel corporations will always have sufficient incentive to bring ISDS cases because they are fighting for their survival. So long as there is any ambiguity in the investment chapter of the TPP – allowing cases to play out over several years, cost millions and leave governments uncertain about outcomes—there will be policy delays. In a rapidly warming world, we simply cannot afford these delays.

As such, I recommend that the committee reject the TPP-11. At the very least, the committee should advise the Turnbull Government to negotiate side letters with TPP-11 partners ruling out or limiting the potential use of ISDS as the Ardern Government in New Zealand has done.

To supplement my brief submission, I have attached an article that I have written on this topic, which has recently been published in the Cambridge journal *Transnational Environmental Law*. Pages 13-22 of this article are of particular relevance to this inquiry. In this section, I examine the so-called safeguards in the original TPP (which remain

unchanged in the TPP-11) and explain why they are insufficient to protect the right of governments to regulate.

Please do not hesitate to contact me if you would like me to explain any of these issues further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kyla Tienhaara', with a long horizontal flourish extending to the right.

Dr. Kyla Tienhaara