

Submission to the  
Senate Foreign Affairs, Defence and  
Trade Legislation Committee  
Inquiry into the Trade and Foreign  
Investment (Protecting the Public  
Interest) Bill 2014

**Pirate Party Australia**

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# 1 Introduction

Pirate Party Australia thanks the Senate and the Foreign Affairs, Defence and Trade Legislation Committee for the opportunity to submit on the significant issue of investor-state dispute settlement provisions in treaties. The Pirate Party is in favour of the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014.

## 1.1 About Pirate Party Australia

Pirate Party Australia is a political party registered under the *Commonwealth Electoral Act 1918* since January 2013. The Pirate Party campaigns for intellectual property reform, civil liberties and governmental transparency. Globally, Pirate Parties have been elected to all levels of government, including two Members of the European Parliament, three Members of the Icelandic Parliament, 45 state seats in Germany, and many local government positions.

## 2 The text of the Bill

Pirate Party Australia believes the text of the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 casts a sufficiently broad net to give force to its aim of prohibiting investor-state dispute settlement ('ISDS') provisions in agreements with foreign countries. The Party does, however, suggest that the Committee consider the benefit of including a general definition of 'investor-state dispute settlement provisions' unless satisfied that sufficient domestic understanding of what the term means exists and a definition can be derived adequately from international law. The Pirate Party notes that little information is provided in the explanatory memorandum by way of guidance, but that Senator Whish-Wilson provides a general description of ISDS in his second-reading speech which could be useful if such a definition were pursued.<sup>1</sup>

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<sup>1</sup>Commonwealth, *Parliamentary Debates*, Senate, 5 March 2014, 902 (Peter Whish-Wilson)

### 3 Justification of the Bill

Pirate Party Australia believes the most comprehensive and relevant critique of ISDS provisions is the Productivity Commission's research report *Bilateral and Regional Trade Agreements*.<sup>2</sup> There are a number of concerns identified by the Commission.

1. ISDS provisions are additional to a country's regular legal system for settling disputes, and are not available to domestic citizens or investors (pp 265, 272).
2. ISDS provisions typically lack definition with regard to 'indirect expropriation' and 'fair and equitable treatment,' with limited success at defining these terms (pp 268, 274).
3. ISDS provisions lead to legal and settlement costs that are a drain on public funds (p 268).
4. There does not appear to be any sound economic justification for the inclusion of ISDS provisions within agreements (p 271).
5. ISDS provisions can give foreign businesses an advantage over domestic businesses (pp 269, 271–272).
6. 'Regulatory chilling' can occur, where a government chooses not to undertake regulatory action due to possible arbitration or compensation claims (p 271).
7. Foreign investors do not, in the absence of a treaty, face greater political risk than domestic businesses (p 272).
8. Arbitration tribunals have a high degree of freedom when determining the amount of compensation to be paid (p 272).
9. Institutional bias and conflicts of interest in ISDS arbitration that favours investors (pp 272–273).
10. General lack of binding precedent regarding determinations by ISDS arbitration bodies (p 273).
11. ISDS disputes do not lend themselves to transparency and there are concerns that high costs make ISDS arbitration only accessible to larger investors (p 273).
12. 'Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions' (p 274)

These points indicate that there is limited to no need for ISDS provisions to be included in future agreements, and that the negative aspects significantly outweigh any slim benefits that might result.

Pirate Party Australia is unaware of any instances where an Australian investor has used ISDS provisions to its advantage against a foreign country, and understands that the only instance of a foreign investor

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<sup>2</sup>Productivity Commission, *Bilateral and Regional Trade Agreements*, research report (2010), <http://www.pc.gov.au/projects/study/trade-agreements/report>

attempting to use ISDS provisions against the Australian Government involves Philip Morris Asia with regard to tobacco plain packaging, which is fundamentally a public health issue.

There is growing opposition to ISDS provisions internationally. The German government has made it clear that it will oppose the Transatlantic Trade and Investment Partnership if ISDS clauses are included, pointing out that both the United States and the European Union have sufficient legal protections for investors.<sup>3</sup>

Indonesia, Australia's twelfth largest trading partner and third largest buyer of Australian agricultural products<sup>4</sup> has announced plans to terminate all trade agreements with ISDS provisions. Considering this means withdrawing from over sixty trade agreements, the change in the Indonesian position has not been made lightly. The approach was explained by Riza Damanik, Executive Director of Indonesia for Global Justice:

There is a new modus operandi of foreign investors using these treaties to threaten weak governments. We do not want it like this. We want dignity. Indonesia is an independent country and we have the sovereignty to regulate our country including foreign investment, especially when it comes to protecting natural resources.<sup>5</sup>

For these reasons, Pirate Party Australia is in support of the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014.

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<sup>3</sup>Yahoo Seven News, 'German stumbling block to transatlantic trade talks', *Yahoo Seven News* (online), 28 March 2014, <https://au.news.yahoo.com/a/22213844/german-stumbling-block-to-transatlantic-trade-talks/>

<sup>4</sup>Department of Foreign Affairs and Trade, 'Indonesia country brief' (January 2014), [http://www.dfat.gov.au/geo/indonesia/indonesia\\_brief.html](http://www.dfat.gov.au/geo/indonesia/indonesia_brief.html)

<sup>5</sup>Ben Bland and Shawn Donnan, 'Indonesia to terminate more than 60 bilateral investment treaties', *Financial Times* (online), 26 March 2014, <http://www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html>