# Submission to the Joint Standing Committee on Treaties Inquiry into the *Trans-Pacific Partnership Agreement* (Tabled 9 February 2016)

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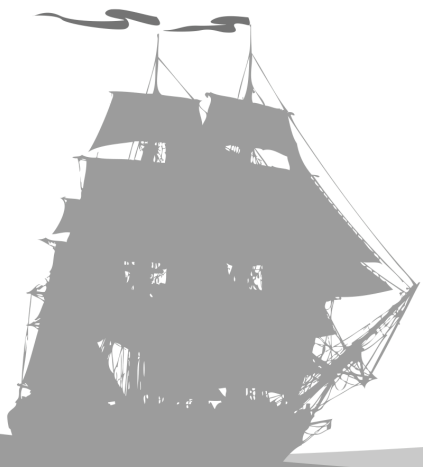

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# 1 Executive summary

The Pirate Party thanks the Joint Standing Committee on Treaties for the opportunity to submit its views on the Trans-Pacific Partnership Agreement ('TPP').[1] The Pirate Party has been following the negotiations of the TPP for many years and has had concerns relating primarily to the lack of transparency in negotiations and the inclusion of both investor-state dispute settlement provisions and an intellectual property chapter.

It is the Pirate Party's view that the TPP should not be ratified at this stage. While the Pirate Party does support trade liberalism to an extent, this should not come at the price of undemocratic negotiations, unfair legal advantages for foreign businesses, and increased layers of identical international obligations with regard to intellectual property. The Pirate Party prefers transparency in negotiations, genuinely equal treatment of domestic and foreign businesses, and flexibility in both the domestic and international trade and intellectual property regimes.

## 1.1 About the Pirate Party

Pirate Party Australia is an activist organisation founded in 2008 and since January 2013 has been a federally-registered political party. The Pirate Party promotes intellectual property reform, protection of civil liberties, and increased transparency in government.

# 2 Lack of transparency in negotiations

The Pirate Party is critical of the lack of transparency in negotiations of Australia's free trade agreements. The argument advanced for why these negotiations ought to be conducted in secret is that confidentiality ensures frank deliberations between the negotiators. The Pirate Party does not accept this argument as valid.

In the Pirate Party's experience, trade negotiations tend to follow this

[1] *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force).

process:

1. It is announced that an agreement is being negotiated.
2. The public is able to attend briefings by the Department of Foreign Affairs and Trade ('DFAT'), which consist almost entirely of a DFAT representative restating Australia's publicly-known negotiating positions and listening to concerns of interested individuals and organisations, with no ability for the public to see whether those concerns are being considered in the deliberations.
3. The public is also able to make submissions, but again with no ability to see the effect of those submissions on negotiations.
4. If fortunate, the public will be able to obtain leaked copies of draft negotiating texts, which may be up to six months out of date. In practice this only occurs where there is a substantial number of negotiating parties.
5. The negotiations are concluded, the agreement is signed, and suddenly a 30-chapter trade agreement is released to the public covering subject matter ranging from tariffs to the environment, investment to intellectual property, business visas to financial services.
6. The public is given a limited time to make submissions to the Joint Standing Committee on Treaties, but ultimately it is the Australian Government that decides whether to ratify an agreement.

The Pirate Party does not consider this satisfactory. Officially speaking, the drafts of the TPP were not made available to the public until after the negotiations were concluded and the Agreement was signed. This effectively means that by the time members of the public are in a position to verify whether their concerns have been addressed it is likely too late to engage in meaningful discourse.

Given the wide-ranging implications of the TPP, this is entirely unacceptable. The TPP is a broad agreement containing no less than 30 chapters, yet by the time anyone saw a current version — whether they be public or parliamentarian — the ability for them to have any verifiable influence is almost non-existent. It may be possible through discussion with DFAT to influence inclusion of provisions in trade agreements; but it is near-impossible to argue against the inclusion of provisions if you are completely unaware of them. This is fundamentally undemocratic and should of itself be cause to change

the way that Australia engages with other negotiating parties.

# 3 Objection to the inclusion of investor-state dispute settlement provisions

The inclusion of investor-state dispute settlement ('ISDS') provisions in trade agreements is a controversial practice. Both France and Germany have opposed the inclusion of ISDS provisions in the proposed Transatlantic Trade and Investment Partnership Agreement between the European Union and the United States on the basis that it would allow 'private tribunals … to dictate the policies of sovereign states', would bypass the national judicial systems, and would not be subject to any appeals process.[2]

Closer to home, in 2014 Indonesia — at the time Australia's twelfth-largest trading partner and third-largest buyer of Australian agricultural products[3] — announced its intention to terminate all of its trade agreements that include ISDS provisions, totalling more than 60 separate agreements.[4] The decision 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.[5]

In 2010 the Productivity Commission conducted significant research into bilateral and regional trade agreements. In relation to ISDS provisions, the Commission stated that '[e]xperience in other countries demonstrates that there are considerable policy and financial risks

[2] Cécile Barbière and Samuel White, 'France and Germany to form united front against ISDS' (online), 15 January 2015 <http://www.euractiv.com/section/trade-society/news/france-and-germany-to-form-united-front-against-isds/>.

[3] Department of Foreign Affairs and Trade, *Indonesia country brief* (January 2015) <http://www.dfat.gov.au/geo/indonesia/indonesia_brief.html>.

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

[5] Ibid.

arising from ISDS provisions'[6] and raised a number of issues that the Pirate Party believes are sufficient cause to halt the practice of including these provisions.[7] Those shortcomings included:

- In the absence of ISDS provisions, foreign investors do not face greater financial risk from political decisions than domestic business.
- There does not appear to be any sound economic justification for the inclusion of ISDS provisions within treaties.
- There is a lack of binding precedent regarding determinations of ISDS arbitration tribunals.
- ISDS disputes are generally non-transparent and the costs associated with ISDS arbitration make it only accessible to larger investors.
- ISDS provisions are external to a country's ordinary dispute settlement system.
- The benefits of ISDS provisions are not usually available to nationals and investors against their own state, giving foreign businesses an advantage over domestic businesses.
- ISDS provisions typically lack definitions of 'indirect expropriation' and 'fair and equitable treatment', and limited success has been achieved in defining these terms.
- ISDS provisions create legal and settlement costs that consume public funds.
- 'Regulatory chilling' can occur where a government chooses to avoid regulatory action due to potential compensation claims.
- Arbitration tribunals have a high degree of freedom when determining the amount of compensation to be paid.
- There may be institutional bias and conflicts of interest in ISDS arbitration that favours investors.

The Pirate Party also refers the Joint Standing Committee on Treaties to the submissions from Dr Kyla Tienhaara, Dr Romaine Rutnam and Dr Matthew Rimmer, received by the Committee in relation to its review of the Korea-Australia Free Trade Agreement.[8] These submissions contain substantially more detailed criticisms of ISDS provisions than the Pirate Party is able to provide itself.

[6] Productivity Commission, 'Bilateral and Regional Trade Agreements' (Research Report, Australian Government, 2010) 274.

[7] Ibid 265–274.

[8] Romaine Rutnam, Submission No 2 to Joint Standing Committee on Treaties, *Inquiry into the Korea-Australia Free Trade Agreement*;

As a final comment on ISDS provisions, the Pirate Party would like to point out that it is only comparatively recently that environmental and public health exceptions have been included in free trade agreements. The fact that it took some time to acknowledge the harmful effects of ISDS provisions on the protection of the domestic environment and human health does not bode well if it becomes apparent that exceptions are needed to address future scenarios outside those spheres. The Pirate Party is concerned that it may be necessary to take action on issues unrelated to the environment or health (for example, in the context of a financial crisis) which will be hindered by obligations to uphold ISDS provisions.

# 4 Objection to the inclusion of an intellectual property chapter

Although the Pirate Party supports the admirable goals stated in article 18.2 of the TPP, the Party objects to the inclusion of intellectual property provisions in free trade agreements. It is the Pirate Party's opinion that the TPP's intellectual property provisions form an undesirable layer of obligations that will hinder future reforms of Australia's intellectual property laws.

Although the Productivity Commission expressed its view in 2010 that 'Australia's participation in international negotiations in relation to [intellectual property] laws should focus on plurilateral or multilateral settings [and] Australia should not generally seek to include [intellectual property] provisions in further [bilateral and regional trade agreements]'[9] *every* bilateral and regional trade agreement since then has contained intellectual property provisions.

The Pirate Party opposes in particular the provisions in article 18.7 that require parties to the TPP to remain party to, ratify or accede to nine separate intellectual property treaties. The Pirate Party is against this integration of treaties into trade agreements. Australia is currently party to nine bilateral or regional trade agreements that contain provisions

[9] Productivity Commission, above n 6, 264.

locking Australia into various multilateral intellectual property treaties.[10]

While the Pirate Party acknowledges that the TPP seems to require no changes to domestic legislation, Australia's approach to negotiation in regard to intellectual property appears to rest on the assumption that the international and domestic frameworks for intellectual property protection are adequate. What the Committee must consider is not merely whether Australia's current intellectual property regime is satisfactory, but whether further committing Australia to that regime by adding an additional layer of international obligations is an appropriate measure for encouraging Australia's future economic growth.

It has been acknowledged by authorities on Australia's intellectual property laws that 'Australia has a consistent net deficit in royalty transactions related to copyright, so that any extension of copyright protection is liable to adversely affect its balance of payments'.[11] This was also raised by the Productivity Commission in 2010 in relation to the Australia-United States Free Trade Agreement ('AUSFTA'),[12] with the Commission further acknowledging that previous extensions of intellectual property rights have also generated net costs for Australia.[13] Economist Rufus Pollock wrote in 2007 in regard to copyright terms: 'the level of protection is not usually determined by a benevolent and rational policy-maker but rather by lobbying. This results in policy being set to favour those able to lobby effectively ... rather than to produce any level of protection that would be optimal for society as

[10] *Singapore-Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003); *Australia-United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005); *Australia-Thailand Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005); *Australia-Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009); *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010); *Malaysia-Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013); *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014); *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015); *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015).

[11] Andrew Stewart et al, *Intellectual Property in Australia* (LexisNexis5th ed , 2014) 136.

[12] Productivity Commission, above n 6, 165–166.

[13] Ibid 259–260.

a whole.'[14]

Despite being subjected to the economic losses associated with the required extension of the copyright term under AUSFTA, in the 12 years since it was concluded no steps have been taken to 'replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair use, to counter the effects of the extension of copyright protection' as recommended by the Joint Standing Committee on Treaties *in 2004*,[15] and again by the Australian Law Reform Commission ten years later.[16] This is an example of Australia taking on international obligations without introducing measures to offset or alleviate the effects of those new obligations.

It is not the Pirate Party's intention to oppose the TPP on the basis of fear, uncertainty and doubt. Rather, the Pirate Party is drawing attention to the reality that much of Australia's approach to intellectual property has involved taking on new obligations or, as is more common the case, solidifying its current legislative framework in free trade agreements, seemingly on the assumption that these laws will *never* need to be changed, regardless of any economic evidence to the contrary. This has the undesirable effect of hampering potential future reforms of Australia's intellectual property legislation, adding layers-upon-layers of obligations that may need to be renegotiated.

[14] Rufus Pollock, 'Forever Minus a Day? Some Theory and Empirics of Optimal Copyright' (MPRA Paper No 5024, University Library of Munich, 2007).

[15] Joint Standing Committee on Treaties, Parliament of Australia, *Report 61: The Australia-United States Free Trade Agreement* (2004) 238.

[16] Australian Law Reform Commission, *Copyright and the Digital Economy*, Report 122 (2014) 13–14.