



The Hon Andrew Robb
Minister for Trade and Investment
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

1 April 2015

Dear Minister

We, the under-signed health and community organisations, write to express our grave concerns about the proposed investment chapter of the Trans Pacific Partnership Agreement (TPP) and in particular the investor-state dispute settlement (ISDS) mechanism.

Our concerns about the potential for the TPP to constrain the ability of governments to protect public health are set out in the report *Negotiating Healthy Trade in Australia: Health Impact Assessment of the Proposed Trans-Pacific Partnership Agreement*, which we submitted to the Department of Foreign Affairs and Trade in early March 2015. This report found that ISDS represents a serious threat to public health policies and recommended that ISDS be excluded from the TPP.

If ISDS is to be included in the TPP, we believe it is absolutely essential that it incorporate the strongest and most effective safeguards to prevent investors from making claims related to public health: claims like those by Philip Morris Asia over Australia's tobacco plain packaging policies and by American pharmaceutical company Eli Lilly and Company over Canadian court decisions to invalidate patents.

We are extremely disappointed to see that the latest leaked draft of the investment chapter, dated January 20, 2015, does not appear to include effective safeguards to prevent these types of cases from being brought against governments.

We note the following problematic issues with the draft:

- The chapter appears to be closely modeled on previous American trade and investment agreements such as the Central America Free Trade Agreement (CAFTA), where similar so-called "safeguards" have not prevented claims over health and environmental issues (for example, a case against Peru over pollution related to a lead mine).
- The definition of investment is extremely broad, incorporating intangible as well as tangible property, and intellectual property rights (which include trademarks – at issue in the Philip Morris v. Australia case – and patents – the focus of the Eli Lilly v. Canada dispute). Language

in the chapter relating to “indirect expropriation” and “fair and equitable treatment” presents further risks in terms of facilitating these types of cases.

- Although Article 11.7.5 appears to exempt compulsory licenses (an important mechanism for ensuring access to medicines), its cross-referencing of the World Trade Organization’s TRIPS Agreement and the Intellectual Property Rights chapter of the TPP appears to in fact put compulsory licenses at risk, as pharmaceutical companies could use the ISDS mechanism to argue that a compulsory license is not compliant with TRIPS or the TPP IP chapter.
- While an annex appears to carve out “non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment”, any protective effect of this clause appears to be negated by the phrase “except in rare circumstances”. We note that this clause in other trade agreements has not prevented corporations from launching cases to argue that their circumstances are indeed rare (for example, a case against Costa Rica over measures taken to protect an endangered species).
- Tribunal members are not independent judges and can still be practicing lawyers, creating the potential for bias.
- There is no appeal process available to governments in the event of a tribunal finding in favour of an investor.

Further, we note that there is an annex that seeks to exclude the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and the Office of the Gene Technology Regulator (although this remains in brackets). While we agree that these programs should definitely not be subject to ISDS, we are concerned that the inclusion of this annex indicates that the Australian Government may not have confidence in the “safeguards” in the investment chapter. We are very concerned about the implications for other public health policies and programs which are not named as specific exclusions.

We note that the Australian Government has repeatedly given assurances that an outcome in the TPP which adversely affects the Australian health system would not be acceptable. Given the risks ISDS presents to public health and the problems with the investment chapter as it stands, we strongly urge the Government not to agree to ISDS applying to Australia.

Failing this, we believe the following issues with the draft chapter must be urgently addressed:

- Intellectual property must be excluded from the definition of investment;
- Indirect expropriation must be removed as grounds for bringing an ISDS claim;
- Language relating to “fair and equitable treatment” should be removed;
- Compulsory licenses should be exempted outright, without reference to the TRIPS Agreement or the TPP intellectual property chapter; and
- The clause “except in rare circumstances” must be removed from the clause which ostensibly protects public health and the environment.

Due to the potential for threats to use ISDS, or even the mere existence of this mechanism to have a deterrent effect on public health policy innovation, we do not believe it is sufficient to include only safeguards which make it more likely that governments will win ISDS cases, rather than preventing their initiation. Effective safeguards must be included to prevent claims against public health and environmental policies and laws.

Finally, we repeat our previous requests for the text of the TPP to be made public before it is signed by Cabinet, and for a comprehensive, independent health impact assessment to be undertaken before the agreement is finalized.

Yours sincerely,



Michael Moore,
CEO, Public Health Association of Australia

On behalf of the following:

- Rob Lake, Executive Director, Australian Federation of AIDS Organisations
- Suzanne Gleeson, National Secretary, Australian Health Promotion Association
- Dr Patricia Randal, Co-ordinator, Australian Fair Trade and Investment Network
- James Lawler, President, Australian Medical Students Association
- Judith Kiejda, Assistant General Secretary, NSW Nurses and Midwives' Association
- Fiona Haigh, Research Fellow, The Centre for Health Equity Training Research and Evaluation, UNSW Australia
- Professor Mike Daube AO, Director, Public Health Advocacy Institute of Western Australia