A SUBMISSION TO THE AUSTRALIAN PARLIAMENT

TROJAN HORSE CLAUSES:

INVESTOR-STATE DISPUTE SETTLEMENT

DR MATTHEW RIMMER

AUSTRALIAN RESEARCH COUNCIL FUTURE FELLOW

ASSOCIATE PROFESSOR

THE AUSTRALIAN NATIONAL UNIVERSITY

COLLEGE OF LAW

The Australian National University College of Law,

Canberra, ACT, 0200

Work Telephone Number: (02) 61254164

E-Mail Address: Matthew.Rimmer@.anu.edu.au

'The *Trans-Pacific Partnership* (TPP) proposes to freeze into a binding trade agreement many of the worst features of the worst laws in the TPP countries, making needed reforms extremely difficult if not impossible. The investor state dispute resolution mechanisms should not be shrouded in mystery to the general public, while the same provisions are routinely discussed with advisors to big corporations.'

Professor Joseph Stiglitz, Nobel Laureate in Economics

'Investment arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of disputes between sovereign nations and private investors.'

Retired Justice Elizabeth Evatt and leading jurists

'Opening Australian governments to lawsuits over resource extraction, foreign land purchases, pharmaceutical benefits and health measures is a potential minefield for the government.'

Peter Martin, Economist for *The Age* and *The Sydney Morning Herald*

'Investor state dispute settlement (ISDS) is a subsidy for multinational corporations and a tax on everyone else.'

Daniel Ikensen, the Cato Institute

"The *Trans-Pacific Partnership* (TPP) negotiators should consider the rights of everyone affected by the deal and act in the public interest, not just the special interests of the economic players that stand to benefit the most."

UN Special Rapporteur on the Right to Food, Olivier De Schutter, and Kaitlin Cordes

BIOGRAPHY

I am an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. I am an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I hold a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. I received a PhD in law from the University of New South Wales for my dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. I am a member of the ANU Climate Change Institute. I have published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. My work is archived at *SSRN Abstracts* and *Bepress Selected Works*.

I am the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). I explore the significance of key judicial rulings and consider legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. I have also also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2010, and the *Trans-Pacific Partnership*.

I am also the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. I edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). I was also a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), and an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions (2003). I am currently a chief investigator in an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). I have participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

I am a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (RED) Campaign, the Gates Foundation, and the Clinton Foundation. I am also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

I am a researcher and commentator on the topic of intellectual property, public health, and tobacco control. I have undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian

parliamentary inquiry on the topic. I have also participated in the New Zealand debate.

I am the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. I am currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

I also have a research interest in intellectual property and traditional knowledge. I have written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics.

RECOMMENDATIONS

Recommendation 1

In light of the Productivity Commission report, the Australian Government and Parliament should seek to exclude investment clauses from trade agreements and investment agreements, as recommended by the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014 (Cth).

Recommendation 2

There has been an international debate over the usefulness and the legitimacy of investor-state dispute settlement clauses. The United Nations Conference on Trade and Development (UNCTAD) has highlighted the rise in investor-state dispute settlement cases, and the significant issues relating to public regulation and government liability. A number of experts, policy-makers, and nation states have been highly critical of the investor-state dispute settlement scheme.

Recommendation 3

Investment clauses could be used and abused by Big Tobacco. The World Health Organization and tobacco control advocates have warned that Big Tobacco has sought to use investment clauses to challenge tobacco control measures, such as graphic health warnings and plain packaging of tobacco

products, and frustrate the implementation of the *World Health Organization Framework Convention on Tobacco Control*.

Recommendation 4

There has been much controversy over the *Trans-Pacific Partnership*, intellectual property, investment, and pharmaceutical drugs. There has been much concern that investment clauses could be deployed to challenge domestic law reforms – such as those proposed in the independent *Pharmaceutical Patents Review Report.* The dispute between *Eli Lilly v. Canada* highlights the dangers of investment clauses in this field.

Recommendation 5

UNITAID, public health advocates, intellectual property experts, and legislators have all expressed concern about the impact of investment clauses upon access to essential medicines – especially in respect of HIV/AIDS, tuberculosis, and malaria, and neglected diseases.

Recommendation 6

As highlighted by the dispute between *Lone Pine Resources* v. *Canada*, gas companies have deployed investment clauses to challenge regulations and moratoria in respect of coal seam gas and mining. This raises larger questions about public regulation in respect of land, water, and the environment.

Recommendation 7

Investment clauses could undermine and undercut public regulation in respect of the environment, biodiversity, and climate change.

Recommendation 8

Investment clauses could be deployed in the field of agriculture. Big food and soda companies could question food nutrition labelling laws. Foreign biotechnology companies could challenge GM food labelling laws. Multinational agricultural companies could question Australian agricultural policies. The United Nations Special Rapporteur on the Right to Food, Olivier De Schutter, has raised larger issues about the impact of trade deals like the *Trans-Pacific Partnership* upon food security, nutrition, hunger, and the right to food.

Recommendation 9

Investment clauses could have a chilling effect upon the Digital Economy. Investor-state dispute settlement could be deployed by copyright industries to challenge significant copyright reforms. Investment clauses could be invoked by IT companies, such as Apple, Adobe, and Microsoft, to challenge IT pricing reforms. Both old media and new media could rely upon investment clauses to test law reform in respect of privacy law.

Recommendation 10

Investment clauses could be invoked in relation to foreign investment in respect of confidential information, trade secrets, and data protection (particularly in respect of agriculture and pharmaceutical drugs). This could raise issues in respect of regulatory review.

Recommendation 11

There is a need to ensure that investment clauses are not deployed against financial regulations, particularly in the wake of the Global Financial Crisis.

Recommendation 12

Investor-state dispute settlement raises significant problems in respect of industrial relations, workers' rights, and trade unions.

Recommendation 13

In light of the dispute in *Metalclad* v. *Mexico*, investor-state dispute settlement clauses could threaten local, state, and territory government laws and regulations in Australia.

Part 1

The Australian Debate over

Investor-State Dispute Settlement

Prime Minister John Howard was opposed to the inclusion of an investor-state dispute settlement regime in the *Australia-United States Free Trade Agreement* 2004. The Department of Foreign Affairs and Trade boasted that such a clause was unnecessary: 'The Agreement preserves Australia's foreign investment policy and maintains our ability to screen all investment of major significance.'[1] The Department of Foreign of Affairs and Trade emphasized: 'Reflecting the fact that both countries have robust, developed legal systems for resolving disputes between foreign investors and government, the Agreement does not include any provisions for investor-state dispute settlement.'[2]

After Australia was sued by Philip Morris over plain packaging of tobacco products under an investment clause, Prime Minister Julia Gillard emphasized that Australia would not agree to investor-state dispute settlement clauses.[3] Reflecting upon the controversy, Gillard observed that the question of the inclusion of investor-state dispute settlement provisions matters. She noted: 'Such provisions give companies a new place to take disputes – a tribunal that stands separate from and above domestic

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1 The Department of Foreign Affairs and Trade, 'Australia-United States Free Trade Agreement: Fact Sheets', https://www.dfat.gov.au/fta/ausfta/outcomes/09_investment.html

2 Ibid.

3 Julia Gillard, 'Tobacco's Ugly Truth Must Be Uncovered', *The Guardian,* 23 December 2013, http://www.theguardian.com/commentisfree/2013/dec/23/tobaccos-ugly-truth-must-be-uncovered

legal systems'.[4] Gillard has warned: 'Philip Morris, having lost in Australia's high court, is using such a provision in an Australia-Hong Kong investment treaty signed in the early 1990s to keep contesting plain packaging.'[5]

In 2010, the Australian Productivity Commission was critical of the adoption of Investor-State Dispute Settlement clauses.[6] In its executive summary, the Productivity Commission warned the Australian Government against accepting such investment provisions:

> In relation specifically to investor-state dispute settlement provisions, the government should seek to avoid accepting provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system. Nor is it advisable in trade negotiations for Australia to expend bargaining coin to seek such rights over foreign governments, as a means of managing investment risks inherent in investing in foreign countries. Other options are available to investors.[7]

The Productivity Commission recommended that the Australian Government should 'seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.'[8]

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4 Ibid.

5 Ibid.

6 Productivity Commission, *Bilateral and Regional Trade Agreements*, Canberra: Research Report, 2010, http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf

7 Ibid., xxxii.

8 Ibid., xxxviii.

The Productivity Commission heard a range of evidence from stakeholders about investor-state dispute settlement. The Productivity Commission decisively rejected arguments made by DFAT, the Law Council of Australia, and Luke Nottage about the need for investor-state dispute settlement clauses. The Productivity Commission observed:

> The Commission notes that, if perceptions of problems with a foreign country's legal system are sufficient to discourage investment in that country, a bilateral arrangement with Australia to provide a 'preferential legal system' for Australian investors is unlikely to generate the same benefits for that country than if its legal system was developed on a domestic non preferential basis. To the extent that secure legal systems facilitate investment in a similar way that customs and port procedures facilitate goods trade, there may be a role for developed nations to assist through legal capacity building to develop stable and transparent legal and judicial frameworks. While not an immediate solution, over time such capacity building goes towards addressing the underlying problem, and provides benefits not only for foreign investors (including Australian investors), but all participants in the domestic economy. [9]

It was the Commission's assessment that 'although some of the risks and problems associated with ISDS can be ameliorated through the design of relevant provisions, significant risks would remain'.[10] The Commission thought that it 'seems doubtful that the inclusion of ISDS provisions within IIAs (including the relevant chapters of BRTAs) affords material benefits to Australia or partner countries'.[11] The Commission concluded that it had 'not received evidence to suggest that Australia's systems for recognising and resolving investor disputes have significant shortcomings

9 Ibid., 276-277.

10 Ibid., 276.

11 Ibid., 276.

that should be rectified through the inclusion of ISDS in agreements with trading partners.'[12]

The Prime Minister, Tony Abbott, has emphasised that free trade and foreign investment will be the centrepiece of the Coalition's agenda to encourage economic growth. The Coalition's trade policy is ambitious, hectic, and febrile — covering multilateral, regional and bilateral trade deals. Its policy emphasised: 'We are committed to the negotiation of a Trans-Pacific Partnership Agreement as a stepping stone to a longer term goal of an Asia-Pacific free trade area.'[13] The Coalition has also been enthusiastic about the Regional Comprehensive Economic Partnership, saying it wants to 'fast-track the conclusion of free trade agreements with China, South Korea, Japan, India, the Gulf Cooperation Council and Indonesia'.[14]

The Coalition Government under Tony Abbott has taken a different approach to investor-state dispute settlement. Controversially, the Coalition has said that it remains 'open to utilising investor-state dispute settlement clauses as part of Australia's negotiating position'. Such a stance reflects the influence of the Australian Chamber for Commerce and Industry, with journalist Mike Seccombe commenting that the chamber is 'an enthusiastic booster of both the Trans-Pacific

12 Ibid., 276.

13 *The Coalition's Policy for Trade,* September 2013, http://lpaweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20%E2%80%93%20Trade%20%E2%80%93%20final.pdf

14 Ibid.

Partnership and the inclusion of ISDS provisions in trade agreements'.[15] This position is highly problematic. As the astute Fairfax economist Peter Martin has commented: 'Opening Australian governments to lawsuits over resource extraction, foreign land purchases, pharmaceutical benefits and health measures is a potential minefield for the government'.[16]

Controversially, the Australian Coalition Government agreed to an investor-state dispute settlement clause in *Korea-Australia Free Trade Agreement* (KAFTA).[17] The Coalition has boasted that the deal shows that Australia is open for business. Critics would observe that Australia is also open to litigation. The Prime Minister's Office released a fact sheet on the agreement, elaborating upon the investment clause. The Coalition Government emphasized that 'the FTA includes an investor-state dispute settlement mechanism' and 'the Government has ensured the inclusion of appropriate carve-outs and safeguards in important areas such as public welfare, health and the environment'.[18] The Coalition maintained that 'This will provide new protections for Australian investors in Korea as well as Korean investors in Australia, promoting

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15 Mike Seccombe, 'Abbott: Open for Business – And Multinational Lawsuits', The Global Mail, 20 September 2013, http://www.theglobalmail.org/feature/abbott-open-for-business-and-multinational-lawsuits/700/

16 Peter Martin, 'Robb Stands Firm on Foreign Lawsuits', *The Age* and *Sydney Morning Herald*, 23 September 2013, http://www.smh.com.au/business/robb-stands-firm-on-foreign-lawsuits-20130922-2u7tv.html#ixzz2fgFwqGn4

17 See Matthew Rimmer, 'Free Trade, Gangnam Style: The Korea-Australia Free Trade Agreement', *InfoJustice*, 11 December 2013, http://infojustice.org/archives/31701

18 'Korea-Australia Free Trade Agreement (KAFTA) – Key Outcomes', https://www.pm.gov.au/sites/default/files/media/13-12-05_kafta_fact_sheet_docx.pdf

investor confidence and certainty in both countries.'[19] The text of KAFTA has been published – including the Investment Chapter, and the General Provisions.

This decision is extremely controversial. Senator Penny Wong from the Australian Labor Party said that the investment clause was 'a particular matter of concern for Labor'.[20] Senator Peter Whish-Wilson from the Australian Greens objected: 'The investor-state dispute resolutions provision exposes future governments to being sued for simply making laws on behalf of their citizens'.[21] He commented: 'We have no confidence that there are any safeguards in place to prevent a litigation free-for-all that would reduce the sovereignty of our national and state parliaments.'[22] Senator Peter Whish-Wilson raised the example of Archer Daniels Midland suing Mexico under an investment clause under the North American Free Trade Agreement.[23] He wondered whether the multinational company would sue Australian under an investment clause, given that its bid for GrainCorp was recently rejected under a National Interest Test.

There was a debate over an investor-state dispute settlement clause in the *Japan-Australia Free Trade Agreement* (JAFTA) – but in the end the Coalition Government

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19 Ibid.

20 Daniel Hurst, 'Australia Finalises Free Trade Agreement with South Korea', *The Guardian*, 5 December 2013, http://www.theguardian.com/world/2013/dec/05/australia-finalises-free-trade-agreement-south-korea

21 Ibid.

22 Ibid.

23 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5 http://www.italaw.com/cases/91

resisted the demands for the inclusion of such a clause.[24] Peter Martin warned: 'The so-called investor state dispute settlement (ISDS) clauses would give Japanese companies the right to take Australia to international tribunals over decisions they felt impinged on their interests, a right denied to Australian companies.'[25] Dr Pat Ranald of AFTINET commented upon the decision:

> I am relieved the agreement does not include the right of foreign investors to sue governments in international tribunals over domestic legislation, known as investor-state dispute settlement (ISDS). Thousands of social media messages expressing strong opposition to ISDS have also been sent to the Trade Minister, Andrew Robb.
>
> The Minister claimed on ABC radio this morning that ISDS was not needed because both Australia and Japan had robust national legal systems. This makes the decision to include ISDS in the South Korea FTA very puzzling. Is the Minister claiming that South Korea does not have a robust legal system?
>
> The Japan agreement is a rehearsal for the much bigger *Trans-Pacific Partnership* (TPP) agreement, still being negotiated between Australia, the US, Japan and nine other Asia-Pacific countries, (not including South Korea). The US is insisting on the inclusion of ISDS. The Australian Government has said it is willing to consider it.
>
> The lack of ISDS in the Japan FTA should be a positive precedent for the TPP. ISDS gives foreign investors the right to sue a government for hundreds of millions [26]

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[24] Peter Martin, 'Concern Australia Could Get Mauled by Japan Free Trade Clause', *The Age*, 6 April 2014, http://www.theage.com.au/business/concern-australia-could-get-mauled-by-japan-free-trade-clause-20140406-zqrj6.html

[25] Ibid.

[26] Pat Ranald, 'Australia Must Reject Legal Straightjacket on Trade', ABC The Drum, 8 April 2014, http://www.abc.net.au/news/2014-04-08/ranald-australia-must-reject-legal-straightjacket-on-trade/5375094

Economist Peter Martin praised the decision to reject the inclusion of an investor-state dispute settlement in the Fairfax papers.[27] He observed that 'Australia has said no to an ISDS in its free trade agreement with Japan', and 'the agreement will be better and simpler because of it.'[28]

In 2012, the investment chapter of the *Trans-Pacific Partnership* was leaked to the public. UNITAID has provided an overview of the regime:

> The text proposed by the USA for the investment chapter of the TPPA was leaked and made available on the Internet in June 2012. The 52-page text is divided into two main sections: section A of the chapter spells out the definitions and obligations of the parties, while section B outlines an investor–state dispute settlement system that would provide arbitration in the event of a dispute between a party and an investor. The text demonstrates a high degree of similarity to the investment chapter in NAFTA, which has been criticized for restrictions on the regulation of corporations and for the grant of broad-ranging rights which, inter alia, permit investors to seek compensation for domestic rules that they claim undermine their investments. The text also has a number of annexes; including Annex 12-C in which the parties confirm their understanding of the rules related to expropriation. [29]

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[27] Peter Martin, 'ISDS: The Trap the Australia—Japan Free Trade Agreement Escaped', The *Sydney Morning Herald* and *The Age*, 7 April 2014, http://www.smh.com.au/federal-politics/political-opinion/isds-the-trap-the-australiajapan-free-trade-agreement-escaped-20140407-zqrwk.html

[28] Ibid.

[29] UNITAID, *The Trans-Pacific Partnership: Implications for Access to Medicines and Public Health*, Geneva: World Health Organization, 2014, 77, http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf

The treaty provides that no party may expropriate or nationalise a covered investment except for a public purpose, and with prompt, adequate, and effective compensation. The investment chapter contains vague safeguards such as: 'the parties recognise that it is inappropriate to encourage investment by relaxing its health, safety or environmental measures'. The key question is whether such safeguards – in respect to health, industrial relations, and the environment – will be meaningful and effective or insubstantial and spectral.

In light of this debate, the Australian Greens have introduced the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014 (Cth) into Parliament. In his second reading speech, Senator Peter Whish-Wilson commented upon the objective of the legislative bill:

> This Bill seeks to ban ISDS provisions in new trade agreements. The Greens believe there shouldn't be ISDS provisions in any agreements, but we recognise that the legislation we are presenting is not retrospective. Sovereign governments should not be challenged simply for making laws to govern their country or making a decision to protect their environment or the health of their citizens. What happens to laws governing coal seam gas legislation or the ban on genetically manipulated organisms in my home state of Tasmania? Under ISDS there is great uncertainty. Uncertainty that is unnecessary.[30]

[30] Senator Peter Whish-Wilson, 'Second Reading Speech on the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014', Australian Senate, Australian Parliament, 5 March 2014, 902-904, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/3a8e6372-a9f6-4c1a-abdd-279cbfe5aec3/0133/hansard_frag.pdf;fileType=application%2Fpdf

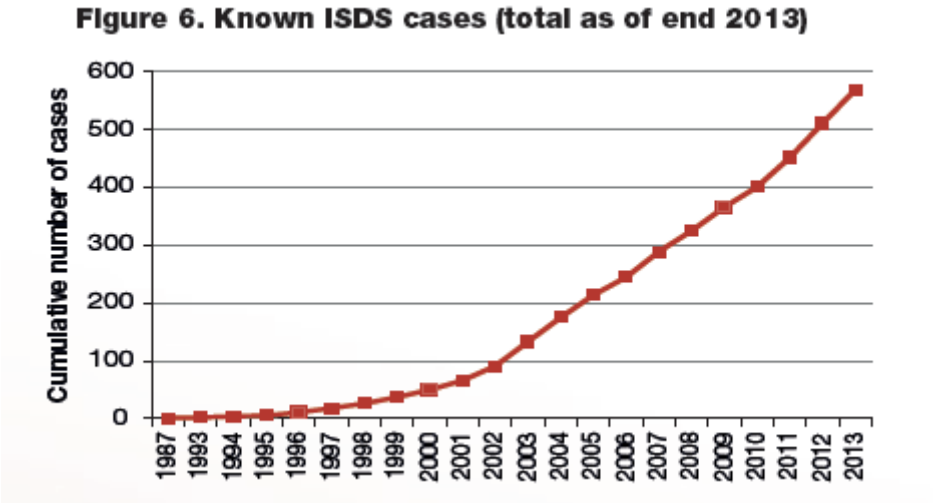
Senator Peter Whish-Wilson commented: 'The Australian people elect their governments and their parliaments to design and implement legislation. Their sovereignty should be respected.'[31]

Recommendation 1

The Australian Government and Parliament should seek to exclude investment clauses, as recommended by the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014 (Cth).

[31] Ibid.

2. The International Debate over Investor-State Dispute Settlement



UNCTAD report (2014)

In April 2014, the United Nations Conference on Trade and Development (UNCTAD) released a report on Recent Developments in Investor-State Dispute Settlement.[32] The overall figures are staggering. UNCTAD reported:

> The total number of known treaty-based cases reached 568 by the end of 2013 (figure 6). Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher. In total, over the years at least 98 governments have been respondents to one or more investment treaty arbitration. About three-quarters of all known cases were brought against developing and transition economies. Argentina (53 cases) and Venezuela (36) continue to be the most frequent respondents. The Czech Republic (27) and Egypt (23) replaced last year's Ecuador and Mexico as number three and four respectively. The overwhelming majority (85 per cent) of ISDS claims were brought by investors from

[32] United Nations Conference on Trade and Development (UNCTAD), 'Recent Developments in Investor-State Dispute Settlement: Updated for the Multilateral Dialogue on Investment', April 2014, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

> developed countries. Arbitrations have been initiated most frequently by claimants from the European Union (299 cases, or 53 percent or all known disputes) and the United States (127 cases, or 22 percent). Among the EU Member States, claimants most frequently come from the Netherlands (61 cases), the United Kingdom (43), Germany (39), France (31), Italy (26) and Spain (25). Apart from countries in the European Union and the United States, only Canada, with 32 cases, counts as a home State with a significant number of investment claims. The three investment instruments most frequently used as a basis for ISDS claims have been NAFTA (51 cases), the Energy Charter Treaty (42) and the Argentina-United States BIT (17). At least 72 arbitrations have been brought pursuant to intra-EU BITs. The majority of cases have been brought under the ICSID Convention and the ICSID Additional Facility Rules (353 cases) and the UNCITRAL Rules (158). Other venues have been used only rarely, with 28 cases at the Stockholm Chamber of Commerce and six at the International Chamber of Commerce.[33]

The UNCTAD reports a significant growth in investment-state dispute settlement, across a wide array of different fields of public regulation.

Focusing upon disputes in 2013, the report noted:

> In 2013, investors initiated at least 57 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs). This comes close to the previous year's record high number of new claims. An unusually high number of cases (almost half of the total) were filed against developed States; most of these have the Member States of the European Union as respondents. Of the 57 new cases, 45 were brought by investors from developed countries and the remaining by investors from developing countries.[34]

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33 Ibid. 7-9.

34 Ibid, 1.

The report observed that there was a wide variety of disputes: 'Claimants have challenged a broad range of government measures, including changes related to investment incentive schemes, alleged breaches of contracts, alleged direct or de facto expropriation, revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions, invalidation of patents, and others.'[35]

UNCTAD noted: 'In 2013, ISDS tribunals rendered 37 known decisions, 23 of which are in the public domain, including decisions on jurisdiction, merits, compensation and applications for annulment.'[36] UNCTAD stressed: 'In seven out of the eight decisions on the merits, the tribunal accepted – at least in part – the claims of the investors.'[37] UNCTAD highlighted one particular award: 'The award of USD 935 million in the *Al-Kharafi* v. *Libya* case is the second highest known award in history.'[38]

The previous year, in April 2013, UNCTAD released a report on *Recent Developments in Investor–State Dispute Settlement (ISDS)*.[39] The report revealed that 62 new cases were filed in 2012, 'confirming the increasing tendency of foreign

35 Ibid.

36 Ibid.

37 Ibid.

38 Ibid.

39 United Nations Conference on Trade and Development, 'Recent Developments in Investor-State Dispute Settlement: Updated for the Multilateral Dialogue on Investment', 28-29 May 2013, http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

investors to resort to investor–State arbitration'.[40] The report also highlighted the outcomes of disputes. UNCTAD observed of the 244 concluded cases: 'Out of these, approximately 42 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 27 per cent of the cases were settled.' [41]

The UNCTAD Report observed: 'While ISDS reform options abound, their systematic assessment including with respect to their feasibility, expected effectiveness and implementation methods remains wanting.'[42] The UNCTAD report recommended: 'A multilateral policy dialogue could help to develop a consensus about the preferred course for reform and ways to put it into action.'[43]

Ciaran Cross summarizes a number of the concerns about the operation of investor-state dispute settlement provisions:

> ISDS provisions enable foreign investors to enforce these protections by suing host-states directly at ad-hoc arbitral tribunals, established under the aegis of arbitration centres such as the International Centre for the Settlement of Investment Disputes (ICSID). These mechanisms are particularly attractive because they often allow investors to initiate litigation before an international tribunal without first exhausting remedies available in the host-state. As a result, investors are able to 'leapfrog' domestic courts. However, ISDS has been accused of inherent bias towards investors and of a democratic deficit (Choudhury 2008; Sornarajah 2010); of lacking core judicial safeguards of transparency and independence (Brower 2002;

40 Ibid.

41 Ibid.

42 Ibid.

43 Ibid.

> Van Harten 2010); and of investing immense power in a small core of professional arbitrators who dominate the ISDS circuit (Eberhardt & Olivet 2012). One recent report labelled ISDS the 'world's worst judicial system' (Khor 2013).[44]

Cross comments that the 'experiences of investor-state disputes to date show that policies implemented in pursuance of 'legitimate' public objectives often have direct or tangential impact on investments, and that such effects can and do give rise to costly litigation before arbitral tribunals.'[45] Cross observes: 'In the absence of explicit and comprehensive treaty provisions that enable host-states to pursue legitimate policy objectives, prior ISDS cases suggest that the progressive realisation of environmental, economic or human rights policies can become a target for arbitration claims.'[46]

Academic research has also indicated that arbitrators in investment tribunals have taken a broad view of their powers, and have shown little inclination to take into account national interest concerns, particularly about labor, the environment, and health.

A number of countries, policy-makers, and commentators have expressed concerns about the operation of Investor-State Dispute Settlement clauses.

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44 Ciaran Cross, 'The Treatment of Non-Investment Interests in Investor-State Disputes: Challenges for the TAFTA | TTIP Negotiations', *The Transatlantic Colossus*, 14 February 2014, http://futurechallenges.org/local/the-treatment-of-non-investment-interests-in-investor-state-disputes-challenges-for-the-tafta-ttip-negotiations/#.UzqiWtzHGMU.twitter

45 Ibid.

46 Ibid.

In 2012, 100 leading jurists and lawyers led by retied justice, Elizabeth Evatt, wrote an open letter, calling upon the negotiators involved in the *Trans-Pacific Partnership* to reject investor-state dispute settlement.[47] Evatt and the jurists were concerned that 'the expansion of this regime threatens to undermine the justice systems in our various countries and fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of legal disputes.'[48] Evatt and company observed that investor-state dispute settlement undermined the rule of law, the judicial process, and democratic decision-making:

> As lawyers, we believe that all investors, regardless of nationality, should have access to an open and independent judicial system for the resolution of disputes, including disputes with government. We are strong supporters of the rule of law. It is in this context that we raise our concerns.
>
> The ostensible purpose for investor protections in international agreements and their Investor-State enforcement was to ensure that foreign investors in countries without well-functioning domestic court systems would have a means to obtain compensation if their real property, plant or equipment was expropriated by a government. However, the definition of "covered investments" extends well beyond real property to include speculative financial instruments, government permits, government procurement, intangible contract rights, intellectual property and market share, whether or not investments have been shown to contribute to the host economy.
>
> Simultaneously, the substantive rights granted by FTA investment chapters and BITs have also expanded significantly and awards issued by international arbitrators against states

47 'An open letter from lawyers to the negotiators of the Trans-Pacific Partnership urging the rejection of investor-state dispute settlement', 8 May 2012, http://tpplegal.wordpress.com/open-letter/

48 Ibid.

> have often incorporated overly expansive interpretations of the new language in investment treaties. Some of these interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right of states to regulate and the sovereign right of nations to govern their own affairs.[49]

The jurists stressed: 'Investment arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of disputes between sovereign nations and private investors.'[50] The jurists warned: 'The current regime's expansive definition of covered investments and government actions, the grant of expansive substantive investor rights that extend beyond domestic law, the increasing use of this mechanism to skirt domestic court systems and the structural problems inherent in the arbitral regime are corrosive of the rule of law and fairness.'[51]

In 2014, Daniel Ikenson – from the Cato Institute, a conservative think-tank – has argued that the United States should purge negotiations in the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership* of investor-state dispute settlement.[52] He comments that the 'the so-called Investor-State Dispute Settlement (ISDS) mechanism, which enables foreign investors to sue host governments in third-party arbitration tribunals for treatment that allegedly fails to

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49 Ibid.

50 Ibid.

51 Ibid.

52 Daniel Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement', *Free Trade Bulletin No. 57*, The Cato Institute, 4 March 2014, http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state

meet certain standards and that results in a loss of asset values, is an unnecessary, unreasonable, and unwise provision to include in trade agreements.'[53] Ikenson emphasized that investor-state dispute settlement is inessential to free trade: 'Purging both the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership* of ISDS makes sense economically and politically, would assuage legitimate concerns about those negotiations, splinter the opposition to liberalization, and pave the way for freer trade.'[54]

Daniel Ikenson – from the Cato Institute – enumerates eight good reasons to drop investor-state state dispute settlement from the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*.

First, Ikenson observed that 'ISDS is overkill'. He commented that 'multinational companies can mitigate their own risk by purchasing private insurance policies.' [55]He also point that 'Asset expropriation or other forms of shabby treatment of foreign companies is not likely to be rewarded by new investment.'[56]

Second, Ikenson commented that 'ISDS socializes the risk of foreign direct investment'.[57] He observed that 'ISDS is a subsidy for multinational corporations and

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

a tax on everyone else.'[58] Ikenson is particularly concerned that ISDS benefits risk-averse companies: 'By reducing the risk of investing abroad, then, ISDS, is a subsidy for more risk-averse companies.'[59]

Third, Ikenson makes the interesting point that 'ISDS encourages 'discretionary' outsourcing'.[60] From a United States perspective, he observed: 'While ISDS may benefit U.S. companies looking to invest abroad, it neutralizes what was once a big U.S. advantage in the competition to attract investment.'[61]

Fourth, Ikenson comments that 'ISDS exceeds "national treatment" obligations, extending special privileges to foreign corporations'.[62] He emphasizes that 'an important pillar of trade agreements is the concept of "national treatment," which says that imports and foreign companies will be afforded treatment no different from that afforded domestic products and companies.'[63] There will be much debate as to whether foreign investors will be privileged over and above domestic investors.

Fifth, Ikenson warns that 'U.S. laws and regulations will be exposed to ISDS challenges with increasing frequency.'[64] He stressed: 'The number of cases is on the

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid.

rise. Most claims have been brought against developing countries—with Argentina, Venezuela, and Ecuador leading the pack—but the United States is the eighth-largest target, having been the subject of 15 claims over the years'.[11] Noting the plain packaging dispute under an investment clauses between Philip Morris and Australia, he observed: 'Investor-State Dispute Settlement raises concerns about domestic sovereignty.'[65] Ikenson also highlighted the vulnerability of environmental and safety laws to challenge under investment lawsuits. Ikenson commented: 'Realistically, it is difficult to conceive of any benefits to including ISDS provisions in the TTIP, given the advanced legal systems in the United States and Europe, unless the wave of the economic future is expected to arrive in a tsunami of international litigation.'[66]

Sixth, Ikenson warns that 'ISDS is ripe for exploitation by creative lawyers':

> There is a lot of latitude for interpretation of what constitutes 'fair and equitable' treatment of foreign investment, given the vagueness of the terms and the uneven jurisprudence. Thus, ISDS lends itself to the creativity of lawyers willing to forage for evidence of discrimination in the arcana of the world's laws and regulations.[67]

Arbitration lawyers, and law firms are particularly keen on the profitable business for providing legal services for the international arbitration dispute system.[68]

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65 Ibid.

66 Ibid.

67 Ibid.

68 Elizabeth Olson, 'Growth in Global Disputes Brings Big Paychecks for Law Firms', *The New York Times*, 26 August 2013, http://dealbook.nytimes.com/2013/08/26/growth-in-global-disputes-brings-big-paychecks-for-law-firms/?_php=true&_type=blogs&smid=tw-share&_r=0

Seventh, Ikenson warned that ISDS was 'effectively a subsidy that mitigates risk for U.S. multinational corporations and enables foreign MNCs to circumvent U.S. courts when lodging complaints about U.S. policies'.[69]

Finally, Ikenson argues that 'dropping ISDS would improve U.S. trade negotiating objectives, as well as prospects for attaining them.'[70]

In Canada, there has been concern about investor-state dispute settlement, particularly in light of the *North American Free Trade Agreement*. Glyn Moody warns that 'ISDS actions threaten to become the global version of patent trolls: by merely threatening to sue they can cause governments to change their plans in order to avoid the risk of huge payouts'.[71] He observes: 'It's been happening in Canada for over a decade, thanks to the ISDS chapter in the *North American Free Trade Agreement*. Glyn Moody cites a former government official in Ottawa:

> I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five

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69 Daniel Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement', *Free Trade Bulletin No. 57*, The Cato Institute, 4 March 2014, http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state

70 Ibid.

71 Glyn Moody, 'TTIP Update III', *ComputerWorld*, 10 October 2013, http://blogs.computerworlduk.com/open-enterprise/2013/10/ttip-update-eu-spreads-fud-on-isds/index.htm

> years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day.'[72]

There has been widespread concern over government liability in respect of the operation of investment clauses. Equally, there has been an alarm that the threat of investor rules will have a chilling effect upon public regulation.

In New Zealand, Professor Jane Kelsey from the University of Auckland has provided a critical analysis of investor-state dispute settlement: 'Although investor-state claims often involve matters of vital importance to the public welfare, the environment and national security, international arbitrators are rarely well versed in human rights, environmental law or the social impact of legal rulings.' [73] She noted: 'Most would consider such considerations to be irrelevant unless they were specifically referred to in the investment treaty text.'[74] Kelsey highlighted issues of government liability:

> These ad hoc tribunals can order states to compensate investors with many millions of taxpayer dollars for actual losses, loss of future profits and compound interest that can date back to the date of the government's action. The largest ever award, of US$1.7 billion, was made in October 2012 in a dispute by Occidental Petroleum against Ecuador, even though the mining company had breached the terms of its contract. The award included US$589 million

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[72] William Geidner, 'The Right and US Trade Law: Invalidating the 20th Century', *The Nation*, 15 October 2001, http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century?page=0,5

[73] Jane Kelsey, *Hidden Agendas: What We Need to Know about the Trans-Pacific Partnership Agreement (TPPA),* Wellington: Bridget Williams Books Limited, 2013, 19.

[74] Ibid., 19.

> in backdated compound interest. Even when states win, they have to carry their own costs, including the costs of the arbitral tribunal. The OECD estimates that legal and arbitration costs average US$8 million, with costs exceeding US$30 million in some cases. As the OECD noted, compensation claims of hundreds of millions, or sometimes billions, of dollars 'can seriously affect a respondent country's fiscal position'.[75]

Kelsey is concerned about the emergence of an arbitration industry of entrepreneurial lawyers, advising clients to bring actions in respect of investor-state dispute settlement in a wide range of circumstances: 'Investment arbitration is now a growth industry, with the handful of international law firms that specialise in these disputes becoming ambulance chasers and private equity funds offering to underwrite the costs in exchange for a share of any final award.'[76]

In Germany, there has been a reaction against investor-state dispute settlement clauses in the context of the *Trans-Atlantic Trade and Investment Partnership*. Glyn Moody reported that senior members of the German Government were highly critical of such measures:

> The German federal government rejects special rights for corporations in the free trade agreement between the EU and the USA. 'The federal government is doing all it can to ensure that it doesn't come to this,' said the Secretary of State in the Federal Ministry of Economics, Brigitte Zypries, on Wednesday during question time in parliament. 'We are currently in the consultation process and are committed to ensuring that the arbitration tribunals are not included in the agreement,' said Ms Zypries.

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75 Ibid., 19.

76 Ibid., 18.

> 'The German federal government's view is that the U.S. offers investors from the EU sufficient legal protection in its national courts,' said the SPD politician Zypries. Equally, U.S. investors in Germany have sufficient legal protection through German courts. 'From the beginning, the federal government has examined critically whether such a provision should be included in the negotiations for a free trade agreement,' Zypries said.[77]

Glyn Moody commented: 'Germany's leaders obviously feel the need to distance themselves from ISDS, which is fast turning into a serious political liability.'[78]

Martin Khor has identified a number of reasons for disillusionment with investor-state dispute settlement clauses in the European Union:

> ISDS cases are also affecting the countries. Germany has been taken to ICSID by a Swedish company Vattenfall which claimed it suffered over a billion euros in losses resulting from the government's decision to phase out nuclear power after the Fukushima disaster. And the European public is getting upset over the investment system. Two European organisations last year published a report showing how the international investment arbitration system is monopolised by a few big law firms, how the tribunals are riddled with conflicts of interest and the arbitrary nature of tribunal decisions. That report caused shock waves not only in the civil society but also among European policy makers.[79]

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[77] Glyn Moody, 'Even the German Government Wants Corporate Sovereignty out of TAFTA/ TTIP', *TechDirt*, 17 March 2014, http://www.techdirt.com/articles/20140313/10571526568/even-german-government-wants-corporate-sovereignty-out-taftattip.shtml

[78] Ibid.

[79] Martin Khor, 'Investor Treaties in Trouble', *The Star*, 24 March 2014, http://www.thestar.com.my/Opinion/Columnists/Global-Trends/Profile/Articles/2014/03/24/Investor-treaties-in-trouble/

There is both a concern here about government liability in respect of investor-state dispute settlement clauses; and an anxiety about the independence and the legitimacy of the international tribunal system.

In 2014, the European Commission has held separate consultations about the inclusion of the investor-state dispute settlement regime, given the controversy over the topic:

> EU Trade Commissioner Karel De Gucht today announced his decision to consult the public on the investment provisions of a future EU-US trade deal, known as the Transatlantic Trade and Investment Partnership (TTIP). The decision follows unprecedented public interest in the talks. It also reflects the Commissioner's determination to secure the right balance between protecting European investment interests and upholding governments' right to regulate in the public interest. In early March, he will publish a proposed EU text for the investment part of the talks which will include sections on investment protection and on investor-to-state dispute settlement, or ISDS. This draft text will be accompanied by clear explanations for the non-expert. People across the EU will then have three months to comment.
>
> EU Trade Commissioner Karel De Gucht said: 'Governments must always be free to regulate so they can protect people and the environment. But they must also find the right balance and treat investors fairly, so they can attract investment. International investment agreements like TTIP should ensure they do both. But some existing arrangements have caused problems in practice, allowing companies to exploit loopholes where the legal text has been vague. I know some people in Europe have genuine concerns about this part of the EU-US deal. Now I want them to have their say. I have been tasked by the EU Member States to fix the problems that exist in current investment arrangements and I'm determined to make the investment protection system more transparent and impartial, and to close these legal

> loopholes once and for all. TTIP will firmly uphold EU member states' right to regulate in the public interest.'[80]

The European Commission still seems to be pushing for an investment clause – but there is concerted opposition to the regime from nation-states, political parties, and civil society groups. There remains great concern about the drastic increase in government liability under investor-state dispute settlement.[81]

There has been heavy criticism of investment-state dispute settlement clauses in the European consultations. Jan Kleinheisterkamp from the London School of Economics provided a useful critique of the weak justifications for the regime.[82] First, the academic questions the need

> It is uncontroversial that the implementation of the TTIP obligations relating to investment in the US will be politically difficult. But this circumstance cannot, in itself, provide a justification for a rather **fundamental policy choice**, i.e. to accept the creation of a new jurisdiction that would allow US investors in the EU to take regulatory disputes out of European courts – with the reverse discrimination that this entails for EU investors in the EU. The question to be asked is ultimately whether there is something fundamentally wrong with

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[80] European Commission, 'Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement', 21 January 2014, http://europa.eu/rapid/press-release_IP-14-56_en.htm

[81] Melinda St. Louis, 'Public Interest Critique of ISDS: Drastic Increase in Government Liability', *Public Citizen's Global Trade Watch*, 17 March 2014.

[82] Jan Kleinheisterkamp, 'Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?' (February 14, 2014), SSRN: http://ssrn.com/abstract=2410188

> the judicial systems on both sides of the Atlantic. And even if that were the case, the real question would be whether any structural deficiencies in the U.S. or EU judiciaries should be reformed by the creation of a parallel new jurisdiction, for which there is less than a good arguable case. Whereas there might be good justifications for inserting ISDS in future EU agreements, those presented by the Commission in relation to the United States so far are not really convincing.[83]

The academic makes the point that there is no broader problem with the judicial systems to justify an investor-state dispute settlement regime: 'Whereas some few cases may have been unfortunate, they **do not reveal any systemic deficiency** capable of proper remediation'.[84] The academic observes: 'On the contrary, those cases cited by the Commission, if anything, rather suggest weaknesses of investor-state arbitration as well as a lack of efficiency of ISDS mechanisms to overcome the foreign investors' problem.'[85]

South Africa has planned to terminate and renegotiate treaties, which include investor-state dispute settlement clauses.[86] Glyn Moody noted that South Africa had been targeted by foreign investors under investments clauses in respect of anti-apartheid measures. The South African Independent Online site explained:

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83 Ibid.

84 Ibid.

85 Ibid.

86 Glyn Moody, 'South Africa Plans to terminate and Renegotiate Treaties that include Corporate Sovereignty', *TechDirt*, 8 November 2013, http://www.techdirt.com/articles/20131107/09591825170/south-africa-leads-moves-to-terminate-renegotiate-bilateral-investment-treaties.shtml

> One would assume that no nation state would have the audacity to file such a [ISDS] claim against a post-apartheid country that has been widely held up as a model for the world. That, however, didn't stop European firms from filing claims under their bilateral investment treaties. Worse, they went right at the core of South Africa's post-apartheid transformation plan. The reason the country was taken to these private tribunals was an attempt to shoot down South Africa's policy to seek greater equality in its lucrative mining sector. South Africa had required that these companies be partly owned by 'historically disadvantaged persons'.[87]

Writing about the decision of South Africa to abandon investment clauses, Professor Joseph Stiglitz, the Nobel Laureate in Economics, praised their choice.[88] He observed: 'It is no surprise that South Africa, after a careful review of investment treaties, has decided that, at the very least, they should be renegotiated.' Stiglitz noted: 'Doing so is not anti-investment; it is pro-development'.[89] He maintained: 'And it is essential if South Africa's government is to pursue policies that best serve the country's economy and citizens.'[90] Stiglitz commented: 'Indeed, by clarifying through domestic legislation the protections offered to investors, South Africa is once again demonstrating – as it has repeatedly done since the adoption of its new Constitution in 1996 – its commitment to the rule of law.'[91] He observed: 'It is the investment

87 Ibid.

88 Joseph Stiglitz, 'South Africa Breaks Out', *Project Syndicate*, 5 November 2013, http://www.project-syndicate.org/commentary/joseph-e--stiglitz-on-the-dangers-of-bilateral-investment-agreements

89 Ibid.

90 Ibid.

91 Ibid.

agreements themselves that most seriously threaten democratic decision-making.'[92] The Nobel Laureate hoped that other countries followed the lead of South Africa.[93]

Indonesia has given notice it will terminate its bilateral investment treaty (BIT) with the Netherlands. The Indonesian Government has also mentioned it intends to terminate all of its 67 bilateral investment treaties. Martin Khor has explained some of the motivations behind this decision:

> The Indonesian government has been taken to the International Centre for Settlement of Investment Disputes (ICSID) tribunal based in Washington by a British company, Churchill Mining, which claimed the government violated the United Kingdom-Indonesia BIT when its contract with a local government in East Kalimantan was cancelled. Reports indicate the company is claiming compensation of US$1bil to US$2bil (RM3.3bil to RM6.6bil) in losses. This and other cases taken against Indonesia prompted the government to review whether it should retain its many BITS.[94]

Professor Hikmahanto Juwana from the University of Indonesia has recently written that Indonesia should withdraw from the International Center for Settlement of Investment Disputes in the *Jakarta Post*.[95] He stressed: 'The current situation in Indonesia with its democratic system and more independent judiciary should be

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92 Ibid.

93 Ibid.

94 Martin Khor, 'Investor Treaties in Trouble', *The Star*, 24 March 2014, http://www.thestar.com.my/Opinion/Columnists/Global-Trends/Profile/Articles/2014/03/24/Investor-treaties-in-trouble/

95 Hikmahanto Juwana, 'Indonesia Should Withdraw from the ICSID!', *The Jakarta Post*, 2 April 2014, http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html

similar to that in developed states.'[96] The Professor of International Law recommended: 'If there is dispute against the government, investors, be they foreign or local, they should bring their cases to the Indonesian judiciary or other available national dispute mechanisms.'[97]

India is also concerned about investor-state dispute settlement clauses. Martin Khor noted: 'India is also reviewing its BITS, after many companies filed cases after the Supreme Court cancelled their 2G mobile communications licences in the wake of a high-profile corruption scandal linked to the granting of the licences.' [98]

In addition, a number of Latin American countries have also rejected investor-state dispute settlement regimes.

There has also been concern as to how to such mega-trade agreements will affect other countries, particularly African, Caribbean, and Pacific nations.[99]

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96 Ibid.

97 Ibid.

98 Martin Khor, 'Investor Treaties in Trouble', *The Star*, 24 March 2014, http://www.thestar.com.my/Opinion/Columnists/Global-Trends/Profile/Articles/2014/03/24/Investor-treaties-in-trouble/

99 Peter Draper, Simon Lacey, Yash Ramkolowan, 'Mega-regional Trade Agreements: Implications for the African, Caribbean and Pacific Countries', ECIPE Occasional Paper No. 02/2014, http://www.ecipe.org/publications/mega-regional-trade-agreements-implications-african-caribbean-and-pacific-countries/

A number of commentators have argued that it would be appropriate to describe investor-state dispute settlement clauses as 'corporate sovereignty clauses'.[100] Glyn Moody notes that such a name 'represents the rise of the corporation as an equal of the nation state, endowed with a financial sovereignty that allows it to claim compensation if its expectation of future profits is somehow diminished by a country's courts or legislative changes.'[101]

[100] Glyn Moody, 'Trade Agreements Are Designed To Give Companies Corporate Sovereignty', *TechDirt*, 25 October 2013, https://www.techdirt.com/articles/20131024/11560725004/what-does-isds-mean-corporate-sovereignty-pure-simple.shtml

[101] Ibid.

3. Tobacco Control, Graphic Health Warnings, and the Plain Packaging of Tobacco Products

There has been controversy over Big Tobacco using investor-state dispute resolution measures to challenge public health measures – such as graphic warnings and the plain packaging of tobacco products. The Director-General of the World Health Organization, Dr. Margaret Chan, has warned of tobacco companies seeking to use investment clauses to undermine the *World Health Organization Framework Convention on Tobacco Control*:

> Tactics aimed at undermining anti-tobacco campaigns, and subverting the Framework Convention, are no longer covert or cloaked by an image of corporate social responsibility. They are out in the open and they are extremely aggressive.
>
> The high-profile legal actions targeting Uruguay, Norway, Australia, and Turkey are deliberately designed to instil fear in countries wishing to introduce similarly tough tobacco control measures.
>
> What the industry wants to see is a domino effect. When one country's resolve falters under the pressure of costly, drawn-out litigation and threats of billion-dollar settlements, others with similar intentions are likely to topple as well.
>
> Numerous other countries are being subjected to the same kind of aggressive scare tactics. It is hard for any country to bear the financial burden of this kind of litigation, but most especially so for small countries like Uruguay. This is not a sane, or reasonable, or rational situation in any sense. This is not a level playing field.
>
> Big Tobacco can afford to hire the best lawyers and PR firms that money can buy. Big Money can speak louder than any moral, ethical, or public health argument, and can trample even the most damning scientific evidence. We have seen this happen before.
>
> It is horrific to think that an industry known for its dirty tricks and dirty laundry could be allowed to trump what is clearly in the public's best interest.[102]

The World Health Organization has been worried about the use of trade deals and investment clauses to challenge the legitimacy of tobacco control measures.

A. Philip Morris vs Australia

After moving the shares of its Australian subsidiary to Hong Kong, Philip Morris has brought a contrived investor-state arbitration claim under the *Australia-Hong Kong*

[102] Margaret Chan, 'The Changed Face of the Tobacco Industry', the World Health Organization, 20 March 2012, http://www.who.int/dg/speeches/2012/tobacco_20120320/en/

Agreement on the Promotion and Protection of Investments 1993.[103] The economist, Peter Martin, notes: 'The almost comic attempt to get mileage out of the treaty (moving from Australia to Hong Kong in order to complain that it was being discriminated against because it was from Hong Kong) masks a broader, more serious attempt to turn trade treaties into instruments that allow corporations to sue governments'.[104]

Professor Tania Voon and Professor Andrew Mitchell are sceptical of such claims by the tobacco industry.[105] Professor Mark Davison quipped: 'It appears that PMA's claim for 'billions of Australian dollars' has about as much life as the parrot in the famous Monty Python sketch.' [106] Dr Kyla Tienhaara from the Australian National University has observed: 'The Philip Morris case perfectly highlights the many problems with investment arbitration, while the purported benefits of the system

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[103] Philip Morris v. Australia, 'Tobacco Plain Packaging – Investor-State Arbitration', http://www.ag.gov.au/tobaccoplainpackaging

[104] Peter Martin, 'Plain Packs: The New Lines of Attack. Big Tobacco tries the WTO and TPPA' *The Age and The Sydney Morning Herald*, 20 August 2012, http://www.petermartin.com.au/2012/08/plain-packs-new-lines-of-attack-cancer.html

[105] Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14 (3) *Journal of International Economic Law* 1-35. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906560

[106] Mark Davison, 'Big Tobacco vs. Australia: Philip Morris Scores an Own Goal', *The Conversation*, 20 January 2012, http://theconversation.edu.au/big-tobacco-vs-australia-philip-morris-scores-an-own-goal-4967

remain unproven.'[107] She contends that the government also should maintain its policy against the inclusion of investor-state dispute settlement procedures in trade and investment agreements.

Professor Thomas Faunce has lamented of investment tribunals: 'Such off-shore investment tribunals are not accountable to the Australian populace and have extremely limited capacity to refer to governance arrangements directly endorsed by Australian citizens.'[108]

Professor Mark Davison of Monash University has provided an extended analysis of the bilateral investment dispute between Australia and Philip Morris Asia.[109] He comments:

> The BIT dispute between Australia and PMA is primarily a dispute about the nature of PMA's intellectual property rights and entitlements and the extent, if any, to which the treatment of that intellectual property by the TPP contravenes one or more of the obligations imposed on the Australian government by the BIT. While PMA does not directly hold any intellectual

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[107] Kyla Tienhaara, 'Government Wins First Battle in Plain Packaging War', *The Conversation*, 13 August 2012, https://theconversation.edu.au/government-wins-first-battle-in-plain-packaging-war-8855

[108] Thomas Faunce, 'An Affront to the Rule of Law: International Tribunals to Decide on Plain Packaging', *The Conversation*, 29 August 2012, http://theconversation.edu.au/an-affront-to-the-rule-of-law-international-tribunals-to-decide-on-plain-packaging-8968

[109] Mark Davison, 'The Bilateral Investment Treaty Dispute between Australia and Philip Morris Asia: What Rights are Relevant and How Have they Been Affected?' (2012) 9 (5) *Transnational Dispute Management* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214833

> property in Australia, it owns companies that do. It owns 100% of the shares in Philip Morris (Australia) Ltd which, in turn, owns 100% of the shares in PML. PML either owns or holds licences to use in Australia some key trademarks for cigarettes and other intellectual property. In particular, PML holds a licence from Philip Morris Brands Sarl (a Swiss company) to use trademarks such as Alpine, Longbeach and Marlboro. PML also owns the registered trademark Peter Jackson. It is the impact of the TPP on that intellectual property that is the primary source of the complaint by PMA. While it claims that its shareholdings will be affected, that effect is the direct consequence of the alleged impact on the intellectual property of its subsidiary, PML. There are multiple potential responses to the claims of PMA.[110]

Davison contends that the ruling of the High Court of Australia has implications for the investment dispute: 'While the BIT is a different legal beast from the Australian Constitution, it is difficult to see how a conclusion could be reached that there has been expropriation if that term is interpreted, in essence, as involving an acquisition of property.'[111]

B. Philip Morris vs. Uruguay

Australia is not unique in being targeted by tobacco companies under investment treaties.

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110 Ibid.

111 Ibid.

Philip Morris has also used international investment rules to challenge Uruguay's restrictions on cigarette marketing.[112] In particular, the tobacco company has complained about graphic health warnings being used by the Uruguay Government, lamenting: 'Many of these pictograms are not designed to warn of the actual health effects of smoking; rather they are highly shocking images that are designed specifically to invoke emotions of repulsion and disgust, even horror.'[113] Philip Morris protest: 'The 80 per cent health warning coverage requirement unfairly limits Abal's right to use its legally protected trademarks, and not to promote legitimate health policies'.[114]

Matthew Porterfield and Christopher Brynes comment on the matter: 'Philip Morris's challenge to Uruguay's tobacco regulations raises a number of fascinating (although not entirely new) issues concerning international investment law, including the scope of fair and equitable treatment, the use of most favored nation (MFN) provisions to invoke more lenient procedural standards, and the availability of injunctive relief in investment arbitration.'[115]

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112 *Request for Arbitration, FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID case no. ARB/10/7 (February 19, 2010), available at http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf

113 Ibid.

114 Ibid.

115 Matthew Porterfield and Christopher Byrnes, 'Philip Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing Up In Smoke?', Investment Treaty News, International Institute for Sustainable Development, 12 July 2011 , http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/

Benn McGrady provides a thoughtful analysis of the ramifications of the dispute.[116]

In the context of the *Trans-Pacific Partnership* discussions, the dispute between Philip Morris and Uruguay will be particularly pertinent for Latin American countries, such as Peru and Chile.

C. Australian Trade Policy

In its trade policy, the Australian Government has disavowed the inclusion of state-investor dispute resolution clauses in any future free trade agreements – including the *Trans-Pacific Partnership*.[117] The statement notes:

> Some countries have sought to insert investor-state dispute resolution clauses into trade agreements. Typically these clauses empower businesses from one country to take international legal action against the government of another country for alleged breaches of the agreement, such as for policies that allegedly discriminate against those businesses and in favour of the country's domestic businesses.[118]

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116 Benn McGrady, 'Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: Philip Morris v. Uruguay', Tania Voon, Andrew Mitchell, Jonathan Liberman with Glyn Ayres (ed.), *Public Health and Plain Packaging of Cigarettes: Legal Issues*, Cheltenham UK and Northampton, MA, USA: Edward Elgar, 2012, 173-199.

117 The Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, Canberra: the Department of Foreign Affairs and Trade*, April 2012, http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html

118 Ibid.

The policy document states: 'The Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses'.[119] The trade statement emphasizes: 'The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme'.[120] Moreover, the policy document observes: 'If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.'[121]

A number of industry groups and trade lawyers have been irked by the policy of the Australian Government (under the Australian Labor Party) to refuse to sign trade agreements with state-investor dispute resolution clauses. The Australian Chamber of Commerce and Industry has lobbied for the inclusion of investment clauses in free trade agreements – including the *Trans-Pacific Partnership*. The law firm Clifford Chance has argued: 'It is Australian companies investing offshore that will perhaps suffer most from the Australian government's new approach.'[122] Trade lawyer Leon Trakman has protested: 'Australian investors abroad probably will suffer'.[123]

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119 Ibid.

120 Ibid.

121 Ibid.

122 Chris Merritt, 'Change in Treaty Policy Detrimental to Aussie companies: Clifford Chance', *The Australian*, 7 September 2012.

123 Ibid.

Arbitrator Michael Pryles has observed: 'We have the recent example of tobacco companies saying their trademarks have been expropriated, but it's unusual.'[124]

Such advocacy for investment clauses is weak and unconvincing. The abuse of investment clauses by tobacco companies is not unusual or exceptional. It is commonplace. The involvement of Philip Morris in the *Trans-Pacific Partnership* highlights this problem.

D. The *Trans-Pacific Partnership*

A key chapter of the *Trans-Pacific Partnership* relates to investment. Philip Morris has been a strong supporter of the inclusion of a state-investor trade dispute mechanism in the *Trans-Pacific Partnership*:

> Philip Morris International has made significant investments in many countries, including the identified U.S. *Trans-Pacific Partnership* partners. For that reason, we believe strong investor protections must be a critical element of the *Trans-Pacific Partnership* and any future U.S. Free Trade Agreements. PMI supports the inclusion in the *Trans-Pacific Partnership* of an investor-state dispute settlement mechanism. The strong investment chapter of the yet–to-be ratified U.S.-South Korea Free Trade Agreement should be used as a model for negotiating a similar chapter in the *Trans-Pacific Partnership*. Philip Morris International considers the availability of an investor-state dispute settlement mechanism, including the right for investors

124 Ibid.

> to submit disputes to independent international tribunals, a vital aspect of protecting its foreign investments.[125]

Under such a mechanism, Philip Morris would be able to challenge government regulations – much like they have done so in disputes with Australia and Uruguay.

There has been much concern about the investment chapter of the *Trans-Pacific Partnership* – especially since a draft text of the text has been leaked in 2012.[126] The regime provides that no party may expropriate or nationalise a covered investment except for a public purpose, and with prompt, adequate, and effective compensation. The chapter also establishes an investor-state dispute settlement system: one that enables corporations from one country to take legal action against the government of another country for alleged breaches of the agreement. Professor Thomas Faunce of the Australian National University has observed of this text:

> The leaked *Trans-Pacific Partnership* text would even provide investors with a right to demand compensation for 'indirect' expropriation (Article 12.12) and allow foreign investors to claim government actions (such as the plain packaging laws) require technically unlimited financial compensation because of a slightly higher burden in complying with the law (Article

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125 Philip Morris, 'Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed *Trans-Pacific Partnership Trade Agreement*', 22 January 2010, http://www.regulations.gov/#!documentDetail;D=USTR-2009-0041-0016.1

126 Zach Carter, 'Obama Trade Document Leaked, Revealing New Corporate Powers and Broken Campaign Promises', *The Huffington Post*, 13 June 2012, http://www.huffingtonpost.com/2012/06/13/obama-trade-document-leak_n_1592593.html

12.4 and 12.5). Such proposals give foreign investors (such as tobacco multinationals) greater rights than domestic investors.[127]

There are only vague safeguards in respect of public health – such as 'the parties recognise that it is inappropriate to encourage investment by relaxing its health, safety or environmental measures'. There is no specific, explicit recognition in this draft regime for the *WHO Framework Convention on Tobacco Control*.

With the leak of the investment chapter, the Obama administration stands accused of breaking its 2008 campaign promise: 'We will not negotiate bilateral trade agreements that stop the government from protecting the environment, food safety, or the health of its citizens; give greater rights to foreign investors than to U.S. investors; require the privatization of our vital public services; or prevent developing country governments from adopting humanitarian licensing policies to improve access to life-saving medications.'[128]

Taking a principled stance, the Gillard Government refused to submit the state-investor dispute resolution clause. However, the New Zealand Prime Minister John Key has argued that there should not be special treatment for Australia: 'An exclusion solely for Australia, not for everybody else, is unlikely to be something that we would

127 Thomas Faunce, 'An Affront to the Rule of Law: International Tribunals to Decide on Plain Packaging', *The Conversation*, 29 August 2012, http://theconversation.edu.au/an-affront-to-the-rule-of-law-international-tribunals-to-decide-on-plain-packaging-8968

128 Ibid.

support'.[129] His position is misguided. Professor Jane Kelsey from the University of Auckland has commented: 'The global multi-billion-dollar commercial players that dominate the alcohol and tobacco industries can afford to fund lengthy and costly arbitration to stop precedent-setting policies, even where their legal case is weak.'[130] She has written a report on international trade law and tobacco control.[131] She has commented: 'The proposed *Trans-Pacific Partnership* poses the most serious imminent risk to New Zealand's ability to design, introduce and implement the innovative tobacco control policies needed to achieve the 2025 goal, as it would legally guarantee the tobacco industry and supply chain stronger, enforceable legal rights and the opportunity to influence domestic policy.'[132]

Robert Stumberg has warned of the dangers of investment clauses in the Trans-Pacific Partnership for tobacco control measures:

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[129] Radio New Zealand News, **'**New Zealand Prime Minister John Key says it is unlikely the Government will support any special deal for Australia in a Trans-Pacific trade agreement', 14 June 2012, http://www.radionz.co.nz/news/political/108189/nz-%27unlikely%27-to-support-special-tpp-deal-for-australia

[130] Jane Kelsey 'Implications of the Proposed *Trans-Pacific Partnership Agreement* for alcohol and tobacco policies' (2012) 107 *Addiction*: doi: 10.1111/j.1360-0443.2012.03874.x

[131] Jane Kelsey, *International Trade Law and Tobacco Control: Trade and Investment law issues relating to proposed tobacco control policies to achieve an essentially smoke free Aotearoa New Zealand by 2025*' A report to the New Zealand Tobacco Control Research Tūranga, May 2012, http://www.turanga.org.nz/sites/turanga.org.nz/files/Kelsey%20Trade%20Law%20Tobacco%20Control%20Report.pdf

[132] Ibid., 62.

> Investor rights are distinctly WTO-plus, and the TPPA chapter expands pre-existing investment agreements among TPP countries… it could provide ISDS where it does not yet exist. For example, Australia is defending against PMI's investment claim under the Australia-Hong Kong treaty on jurisdictional grounds (in addition to substantive grounds). The TPPA chapter could give PMI, a U.S. investor, standing to challenge the law of a TPP country.[133]

Laurent Huber, the executive director of Action on Smoking and Health in Washington, DC, makes an eloquent case for why tobacco should be excluded from the *Trans-Pacific Partnership* altogether:

> Responsible trade policy acknowledges what we've known for decades: Tobacco is a uniquely dangerous product that causes death and disease from ordinary use. Tobacco is not just another agricultural product that deserves promotion through U.S. trade policy. It is the target of the world. The World Health Organization's first and only treaty – which all of the TPPA countries, except for the United States, have ratified – recognizes the devastating effects of tobacco and its increasing threat to global health and welfare. Including tobacco in the TPPA would undermine the success of this treaty in preventing tobacco-related disease around the world.[134]

Susan Liss, the executive director of the Campaign for Tobacco-Free Kids, reflects that: 'Reforms to specific parts of the TPPA such as the technical barriers to trade, intellectual property, or investment chapters may address part of the problem, but

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[133] Robert Stumberg, 'Safeguards for Tobacco Control: Options for the TPPA', (2013) 39 (2) and (3) *American Journal of Law and Medicine* 382-441 https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/Stumberg-Safeguards-for-tobacco-control-ASJM-2013.pdf

[134] Laurent Huber, 'Tobacco from all Nations Excluded in Trade Pact', *Kentucky.com*, 30 April 2012, http://www.kentucky.com/2012/04/30/2169551/tobacco-from-all-nations-excluded.html

even that would not prevent second guessing of legitimate efforts as being more trade restrictive than necessary.'[135] She insists that: 'Anything other than exclusion of tobacco products may continue the chilling effect of threatened lawsuits, preventing countries from enacting public health protections for their citizens.'[136] As such, there is a need to ensure that the *Trans-Pacific Partnership* is not hijacked by Big Tobacco for the purposes of encouraging the trade in tobacco, and warding off the introduction of tobacco control measures.[137]

Mike Bloomberg – billionaire, philanthropist, and the former Mayor of New York – has been concerned that President Barack Obama has been equivocating on tobacco control.[138] He wrote in *The New York Times*:

> Instead of the safe harbor, the Obama administration is now calling for a clause requiring that before a government can challenge another's tobacco regulation under the treaty, their health

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135 Susan Liss, *Campaign for Tobacco-Free Kids Urges Trans Partnership Agreement Negotiators to Exempt Tobacco Products from the Proposed Free Trade Agreement*, Campaign for Tobacco Free Kids, http://www.tobaccofreekids.org/content/what_we_do/federal_issues/trade/TPP.pdf

136 Ibid.

137 The Editorial Board, 'The Hazard of Free-Trade Tobacco', *The New York Times*, 31 August 2013, http://www.nytimes.com/2013/09/01/opinion/sunday/the-hazard-of-free-trade-tobacco.html; Ellen Shaffer, 'Stop TPP Protections for Big Tobacco', *The Huffington Post*, 9 September 2013, <http://www.huffingtonpost.com/ellen-r-shaffer/stop-tpp-protections-for-big-tobacco_b_3886771.html and Eric Mar, 'U.S. Must Take Tobacco Out of Global Trade Talks', *San Francisco Chronicle*, 24 September 2013, http://www.sfgate.com/opinion/openforum/article/U-S-must-take-tobacco-out-of-global-trade-talks-4819528.php

138 Mike Bloomberg, 'Why is Obama Caving on Tobacco?', *The New York Times*, 22 August 2013, http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html

> authorities must "discuss the measure." The administration will also try to ensure that a general exception for matters to protect human life or health (typical in trade agreements) applies specifically to tobacco regulation.
>
> But these are weak half-measures at best that will not protect American law — and the laws of other countries — from being usurped by the tobacco industry, which is increasingly using trade and investment agreements to challenge domestic tobacco control measures.
>
> If the Obama administration's policy reversal is allowed to stand, not only will cigarettes be cheaper for the 800 million people in the countries affected by the trade pact, but multinational tobacco corporations will be able to challenge those governments — including America's — for implementing lifesaving public health policies. This would not only put our tobacco-control regulations in peril, but also create a chilling effect that would prevent further action, which is desperately needed.[139]

Bloomberg emphasized the dangers of allowing tobacco companies to challenge tobacco control measures under investor-state dispute settlement regimes. He stressed that the Obama administration must put a stop to such actions altogether.

Recommendation 3

Investment clauses could be used and abused by Big Tobacco. The World Health Organization and tobacco control advocates have warned that Big Tobacco has sought to use investment clauses to challenge tobacco control measures, such as graphic health warnings and plain packaging of tobacco products, and frustrate the implementation of the *World Health Organization Framework Convention on Tobacco Control*.

139 Ibid.

4. Patent Law, Pharmaceutical Drugs, and Pricing

The secrecy surrounding an independent Australian report on patent law and pharmaceutical drugs has been lifted, and the work has been published to great acclaim.

On the 20th March 2014, the Australian Government published the final version of an independent policy report, the *Pharmaceutical Patents Review Report*, after much public pressure.[140] The report has significant implications in respect of patent law, pharmaceutical drugs, the Pharmaceutical Benefits Scheme, and trade policy – particularly in respect of the *Trans-Pacific Partnership*. The independent report has also highlighted the opportunity of great savings for the Australian health-care system through shortening patent term extensions. The economist Peter Martin has warned: 'Australia's enthusiastic approach to extending the life of pharmaceutical patents has cost the economy "billions of dollars" an independent review has found.'[141]

This section provides a short review of the *Pharmaceutical Patents Review Report*, and highlights key recommendations. In particular, it looks at the call by the review for a frugal, parsimonious approach to the granting of patent rights in respect of pharmaceutical drugs in Australia. The paper considers the recommendations of the *Pharmaceutical Patents Review Report* to shorten and reduce patent term extensions.

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140 Tony Harris, Dianne Nicol, and Nicholas Gruen, *Pharmaceutical Patents Review Report*, Canberra, 2013, http://www.ipaustralia.gov.au/pdfs/2013-05-27_PPR_Final_Report.pdf

141 Peter Martin, 'Drug Patents Costing Billions', *The Sydney Morning Herald*, 2 April 2013, http://www.smh.com.au/national/health/drug-patents-costing-us-billions-20130402-2h52i.html

It examines the proposed recommendations to address the problem of evergreening. This paper also considers the debate over data protection. Finally, the *Pharmaceutical Patents Review Report* is critical of Australia's passive approach to the negotiation of intellectual property and international trade. The findings of the report emphasize the need for Australia to protect its public health interests in the negotiation of the *Trans-Pacific Partnership*.

A. The *Pharmaceutical Patents Review Report*

Under the leadership of Julia Gillard, the Australian Labor Party took a keen interest in the impact of patent law upon research, patient care, and the provision of health-care.[142] Indeed, Gillard had taken a particular interest in patent owners engaging in the nefarious practice of 'evergreening' – extending the life of patents beyond their natural term by making minor changes.

The report had been commissioned by Mark Dreyfus QC MP, a Parliamentary Secretary for Innovation in the former Australian Labor Party Government. The review was designed to examine whether Australia's patent system was 'effective in securing timely access to competitively priced pharmaceuticals and in supporting innovation and employment in the industry.' The report was undertaken by three well-respected experts – Tony Harris; intellectual property academic Professor Dianne Nicol, and economist Dr Nicholas Gruen.

142 Matthew Rimmer, 'Julia Gillard, Big Pharma, Patent Law, and Public Health', *The Conversation*, 27 November 2012, https://theconversation.edu.au/julia-gillard-big-pharma-patent-law-and-public-health-10226

Initially, the Minister for Industry Ian McFarlane for the new Coalition Government was reluctant to release the final report. Melissa Parke MP – the member for Fremantle – asked in the Australian Parliament: 'By what date will he release the final report of the 2012 Pharmaceutical Patents Review, and is he considering the draft recommendations released in April 2013.' [143] Ian McFarlane responded that 'the Government has no plans to release the final report at this stage' and 'the Government is not considering the recommendations made by the panel in the draft report.' Ian McFarlane maintained: 'As the Pharmaceutical Patents Review was commissioned by the previous government and conducted by an independent panel, the government is not obliged to release the report.'

Dr Deborah Gleeson from LaTrobe University highlighted the failure of the Coalition Government to publish the report.[144] She noted: 'While Treasurer Joe Hockey is complaining that Australia is running out of money to fund the health system, the Coalition Government has buried a report with recommendations for large-scale savings on drug costs.' But the burial of the final report, the submissions made to the review and the economic estimates of the costs of patent term extension is particularly concerning in the light of the current Government's search for cost-cutting measures.'

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143 Melissa Parke MP, 'Pharmaceutical Patents Review', House of Representatives, Australian Parliament, 11 February 2014, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F55d46158-f865-4a9f-9015-36543a3b6b7b%2F0183%22

144 Deborah Gleeson, 'Cost-Cutting Crusade Ignores Health Savings', ABC, The Drum, 6 March 2014, http://www.abc.net.au/news/2014-02-28/gleeson-cost-cutting-crusade-ignores-vital-health-report/5289726

Gleeson lamented: 'It will be a shame if we end up with knee-jerk policies like $6 GP co-payments in an attempt to cut health system costs when sensible reforms to patent law could generate hundreds of millions of dollars of savings through the [Pharmaceutical Benefits Scheme'. She warned that 'an even worse prospect would be the further extension of patent monopolies through our international trade agreements, adding hundreds more millions to the health budget.'

Information activist Brendan Molloy – a member of Pirate Party Australia, and Electronic Frontiers Australia - sought to reveal the report through freedom of information requests.[145]

In the end, the Australian Government relented, and published the *Pharmaceutical Patents Review Report*. The Australian Government was non-committal about the recommendations of the report:

> Government statement on the Pharmaceutical Patent Review final report The Pharmaceutical Patent Review was commissioned by the previous government and conducted by an independent panel. The review panel provided its final report to the previous government in May 2013, which did not release the report. The government notes that the report is one of a number of reviews of the pharmaceutical system conducted during the term of the previous government. The government has no plans to respond to the report at this stage but may take information in the report into account when considering future policy. The views expressed and recommendations made in the report are those of the review panel and do not necessarily reflect government policy.

145 Brendan Molloy, 'Pharmaceutical Patents Review', Right to Know, 28 February 2014, https://www.righttoknow.org.au/request/pharmaceutical_patents_review_fi

It is a credit to the Minister Ian MacFarlane to release the report, so that there could be a full and frank public discussion in respect of patent law and pharmaceutical drugs.

B. A Frugal Approach to Patent Rights

The final 233-page report - *Pharmaceutical Patents Review Report* - is essential reading for those interested in intellectual property and public health. The combination of Tony Harris, Dianne Nicol, and Nicholas Gruen has ensured that the work is a multi-disciplinary investigation into patent law and pharmaceutical drugs. The report is a thorough, systematic, and balanced piece of work. The report is informed wide-ranging consultations and interactions with industry, government, academia, and consumers.

The *Pharmaceutical Patents Review Report* emphasizes that 'the question of how much patent protection to offer is crucial.' The study noted:

> Pharmaceutical patent rights that run for too long or that are defined too expansively will deprive people of drugs because purchasers, including Governments, cannot afford them. They can also constrain follow on innovation: too weak a patent system means patients will suffer because the industry has inadequate incentives to develop new drugs.

The *Pharmaceutical Patents Review Report* proposed a frugal approach to the grant of patent rights. The Review recommended that 'the Government should expeditiously seek a situation where Australia has strong yet parsimonious IP rights – that is, rights that are strongly enforced and that provide the incentive necessary to underpin an

appropriate level of investment in innovation - but that are not defined so broadly as to impose costs on innovation or other activity without commensurate benefits.' The report suggested: 'Australia should take a leadership role in seeking consensus with jurisdictions with similar interests to identify and pursue a range of changes in international patent law and practice along these lines.'

The report observed: 'While the patent system must be strong to be effective, it should also be parsimonious, avoiding restrictions on trade and innovation that are not necessary for it to deliver incentives to innovate.'

C. Patent Term Extensions

The *Pharmaceutical Patents Review Report* makes a number of important recommendations relating to patent term extensions. Under Australia law, the patent term lasts for twenty years. Since 1998, pharmaceutical drug patents can obtain additional term extensions for up to a further years. The inquiry noted:

> An important part of the terms of reference of this inquiry is to evaluate the extension of term (EOT) that the Australian patent system allows. It applies to some pharmaceuticals for which patentees have taken at least five years from the effective patent filing date to obtain regulatory approval for the pharmaceutical's use. The current scheme dates from 1998. It aims to attract investment in pharmaceutical R&D in Australia, as well as providing an effective patent term for pharmaceuticals more in line with that available to other technologies. The scheme currently provides an effective patent term of up to 15 years.

The report noted that patent term extensions were expensive for the Australian Government: 'The estimate for 2012-13 is around $240 million in the medium term

and, in today's dollars, around $480 million in the longer term'. The report stressed: 'The total cost of the EOT to Australia is actually about 20 per cent more than this, because the PBS is only one source of revenue for the industry.' The report emphasized: 'Using the patent scheme to preferentially support one industry is inconsistent with the TRIPS rationale that patent schemes be technologically neutral.'

The inquiry canvassed a number of policy options to address patent term extensions:

> Australia is required by AUSFTA to provide some form of pharmaceutical EOT but its scope and length are not specified. Actual savings obtained from reducing the term of the extension would be affected by many factors, including price changes caused by increasing sales volumes, the 16 per cent mandated price reduction following the entry of a second drug, the influence of competing generic manufacturers and reductions from price disclosure mechanisms. But there are timing issues in reducing the EOT provisions immediately without compensation. Savings from the options considered in this report, including the recommendation to reduce the effective life of extended Australian pharmaceutical patents, would take several years to reach full effect.

The inquiry recommended: 'The Government should change the current EOT to reduce the maximum effective patent life provided from 15 years.' There was a difference of opinion between the members of the review: 'Harris and Gruen support reducing the effective life to 10 years, whereas Nicol supports reducing the effective life to 12 years.' The report advised: 'The length of the extension should be calculated as being equal the number of days between the patent date and the date of first inclusion on the Australian Register of Therapeutic Goods minus 20 years less the maximum effect patent life.' The report noted: 'The current 5 year cap on extensions should remain, providing a maximum of 25 years patent term for extended patents.'

The *Pharmaceutical Patents Review Report* emphasized that there could be significant savings to Australian tax-payers from the reform of Australian patent term extensions. The recommendation by Harris and Gruen was predicted to provide for massive savings:

> Mr Harris and Dr Gruen recommend reducing the effective patent life from 15 to 10 years. Over time this would save the PBS approximately $200 million a year. in today's dollars, based on current pricing arrangements (that the entry of generics will lead to price falls of 35 per cent) which the Government has agreed with Medicines Australia. The savings would grow in line with PBS costs which are growing at 4.5% per annum, substantially faster than real GDP. If the Government secured all of the pricing benefits allowed by the entry of generics, annual savings in today's dollars could amount to around $400 million which would similarly be expected to grow with PBS costs. This is calculated on data that generics have led to a 70% price reduction in the United States. This is consistent with recent findings by the Grattan Institute that the price of generics paid by the PBS is several times the price secured by relevant Australasian Governments.

It is calculated that Professor Nicol's recommendation to shorten the effective patent life would result in significant savings: 'The estimated savings resulting from this reduction would be approximately $130 million a year.' Moreover, it was noted: 'If a 70% price reduction from generic entry was achieved as discussed above, the savings would be approximately $260 million a year.'

D. Patent Standards and the Problem of Evergreening

The former High Court of Australia Justice Michael Kirby observed in a case that patent law 'should avoid creating fail-safe opportunities for unwarranted extensions of monopoly protection that are not clearly sustained by law.'

The *Pharmaceutical Patents Review Report* also addressed the pernicious problem of evergreeening – where patent owners seek to indirectly extend the life of patent protection, beyond its natural monopoly. The report noted:

> In most developed countries, including the United States and Europe, there are concerns about pharmaceutical manufacturers using patents and other management approaches to obtain advantages that impose large costs on the general community. The cost arises because these actions impede the entry of generic drugs to the market. Although some find the term to be a pejorative, relevant literature has dubbed such actions 'evergreening': steps taken to maintain the market place of a drug whose patent is about to expire.

The report noted: 'It is probable that less than rigorous patent standards have in the past helped evergreening through the grant of follow-on patents that are not sufficiently inventive.' The report called for improvements in the oversight of patent quality standards: 'The Panel sees a need for an external body, the Patent Oversight Committee, to audit the patent grant processes to help ensure these new standards are achieved, and to monitor whether they inhibit the patenting of follow-on pharmaceuticals which promote evergreening with no material therapeutic benefit.'

E. Data Protection

The inquiry also considered the vexed question of data protection for pharmaceutical drugs. The report noted:

> When an originator seeks regulatory approval for a drug, it must provide data to the TGA demonstrating the drug's safety and efficacy. Although these data remain confidential to the TGA, it may use them after a five year period to approve a generic or equivalent drug. This saves the pointless replication of tests to show safety and efficacy.

The pharmaceutical drugs industry argued that the five-year period of data exclusivity in Australia was too short.

The *Pharmaceutical Patents Review Report* found that there was no need to extend data protection in respect of pharmaceutical drugs:

> It is conceivable that drugs might not be brought to Australia, for example, because regulatory and marketing costs cannot be recouped within five years. Medicines Australia submits that some of its members chose not to supply a total of 13 drugs to the Australian market because of the inadequacy of the data exclusivity period. However, they are only able to identify three of these, and the Panel's analysis - shown in chapter 8 - suggests they are not convincing. AbbVie offers a more compelling example, but even there the Panel believes that expanding data exclusivity for all or for a wide class of drugs is a poorly targeted response to issues affecting a small number of pharmaceuticals. A policy of subsidising drug development discussed above seems more appropriate.

The report noted: 'The Government should actively contribute to the development of an internationally coordinated and harmonised system where data protection is provided in exchange for the publication of clinical trial data.'

Such a finding has a broader significance, given the push by the United States for stronger data protection in the *Trans-Pacific Partnership*.

F. Trade and the Trans-Pacific Partnership

The *Pharmaceutical Patents Review Report* observed that 'Larger developed countries that are major net IP exporters have tended to seek longer and stronger patents, not always to the global good.' The report warned: 'The acquiescence of Australia and other countries to that agenda means that some features of Australia's patent law are of little or no benefit to patentees but impose significant costs on users of patented technologies.'

The *Pharmaceutical Patents Review Report* was highly critical of Australia's passivity in international negotiations over intellectual property and trade. The report found:

> In their negotiation of international agreements, Australian Governments have lacked strategic intent, been too passive in their IP negotiations, and given insufficient attention to domestic IP interests. For example, preventing MFE appears to have deprived the Australian economy of billions of dollars of export revenue from Australian based generic manufactures. Yet allowing this to occur would have generated negligible costs for

> Australian patentees. The Government does not appear to have a positive agenda regarding the IP chapters of the TPP Agreement.

The report noted: 'The Government has rightly agreed to only include IP provisions in bilateral and regional trade agreements where economic analysis has demonstrated net benefits, however this policy does not appear to be being followed.'

The *Pharmaceutical Patents Review Report* recommended that 'the Government should ensure that future trade negotiations are based on a sound and strategic economic understanding of the costs and benefits to Australia and the world and of the impacts of current and proposed IP provisions, both for Australia and other parties to the negotiations.' The *Pharmaceutical Patents Review Report* stressed that 'the Government should strongly resist changes – such as retrospective extensions of IP rights – which are likely to reduce world economic and social welfare and it should lead other countries in opposing such measures as a matter of principle.'

Furthermore, the *Pharmaceutical Patents Review Report* recommended: 'Given the current constraints placed on Australia by its international obligations, as an interim measure the Government should actively seek the cooperation of the owners of Australian pharmaceutical patents to voluntarily agree to enter into non-assertion covenants with manufacturers of generic pharmaceuticals seeking to manufacture patented drugs for export'. In its view, 'This would help them avoid the embarrassment of Australia's trade and investment performance being penalised by its previous agreement to strengthen IP rights.'

The *Pharmaceutical Patents Review Report* warned: 'There are signs that these past failures are being replicated in the current *Trans-Pacific Partnership* (TPP) negotiations because small, net importers of intellectual property, including Australia, have not developed a reform agenda for the patent system that reflects their own economic interests – and those of the world.'

WikiLeaks has published a draft text of the Intellectual Property Chapter of the *Trans-Pacific Partnership*.[146] The Intellectual Property Chapter contains a number of measures, which support the position of pharmaceutical drug companies and the biotechnology industry.[147] Notably, the United States has pushed for extensions of the patent term in respect of pharmaceutical drugs, including where there have been regulatory delays. There has been a concern that the *Trans-Pacific Partnership* will impose lower thresholds for patent standards, and result in a proliferation of evergreening. There has also been a concern about patent-registration linking to marketing regimes. The United States has also pushed for the protection of undisclosed data for regulatory purposes. There has been wide concern that the *Trans-Pacific Partnership* will result in skyrocketing costs for health-care systems in the Pacific Rim.

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146 WikiLeaks, 'Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions (30 August 2013 consolidated bracketed negotiating text)' https://wikileaks.org/tpp/

147 Alexandra Phelan and Matthew Rimmer, 'Trans-Pacific Partnership #TPP #TPPA Drafts Reveal a Surgical Strike against Public Health', *East Asia Forum*, 2 December 2013,http://www.eastasiaforum.org/2013/12/02/tpp-draft-reveals-surgical-strike-on-public-health/

Disturbingly, Australia has been quite passive in the debate over intellectual property and public health in the *Trans-Pacific Partnership* negotiations. Other countries – such as Canada, New Zealand, and Malaysia – have argued, more passionately, that there is a need for the patent system to protect public health.

Moreover, the *Trans-Pacific Partnership* also contains an investment chapter, with investor-state dispute settlement. In June 2013, the United States-based brand name pharmaceutical drug company Eli Lilly deployed an investor clause under the *North American Free Trade Agreement* to challenge Canada's drug patent laws.[148] Eli Lilly and Company is alleging that the invalidation of its Strattera and Zyprexa pharmaceutical patents under Canadian patent law is inconsistent with Canada's commitments under the *North American Free Trade Agreement*. Eli Lilly alleged:

> Canada, through its own actions and through the actions of the Canadian courts, is responsible for measures inconsistent with its commitments under NAFTA Chapter Eleven, including without limitation: (1) the Judge-made law on utility (the 'promise doctrine') according to which the Canadian Courts have invalidated the Strattera and Zyprexa Patents; (2) the failure of the Government of Canada to rectify the Judge-made law on utility in a manner that is consistent with Canada's treaty obligations; and (3) Canada's incorporation of the Judge-made law on utility into Canadian law. These measures breach Canada's investment obligations under Article 1110 (Expropriation and Compensation), as well as Articles 1105 (Minimum Standard of Treatment) and 1102 (National Treatment).
>
> The exclusive rights conferred by the Strattera and Zyprexa Patents constitute intangible property acquired in the expectation or used for the purposes of economic benefit or other business purposes. By reason of Canada's breach of its investment obligations, Eli Lilly

[148] *Eli Lilly and Company* v. *Government of Canada* (2013) http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng

> and Company, an investor of a Party, has incurred damages in relation to its investments. Lilly must be compensated for Canada's failure to comply with its NAFTA Chapter Eleven obligations.[149]

This is a disturbing action – particularly because Canada has a well-developed patent system. The Supreme Court of Canada – renowned for expertise in intellectual property law – has carefully delineated the threshold standard of utility under patent law.

Mike Masnick at *TechDirt* has been incredulous at the demands of Eli Lilly for a half-a-billion dollars in respect of the action against Canada:

> The Canadian court reasonably felt that it shouldn't give Eli Lilly a patent on something that wasn't determined to be useful. Normally, if a country doesn't give you a patent, you move on. However, Eli Lilly used a questionable part of NAFTA, the so-called investor-state dispute resolution mechanism, to argue that Canada was 'expropriating its property,' and thus demanded compensation -- starting at $100 million, which it then raised to $500 million. A few weeks ago, Eli Lilly's CEO wrote an op-ed piece, claiming that by not granting his company a monopoly, Canada was 'suffocating life-saving innovation.' That's wrong. And it's obnoxious. For years we've covered how the pharmaceutical industry has actually used patents to hold back life-saving innovations by locking them up, blocking advances, jacking up the price to absolutely insane rates, and by using a variety of other questionable practices (including patenting historical folk medicines). But, more importantly, every country gets to

[149] 'Notice of Intent to submit a Claim to Arbitration under NAFTA Chapter Eleven' in *Eli Lilly and Company* v. *Government of Canada* (2013) http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/eli-02.pdf

> determine what is and what is not patentable. For Eli Lilly to use *trade policies* to effectively try to negate Canada's patent validity standards is a blatant attack on Canadian sovereignty. [150]

Glyn Moody comments that the case has disturbing implications: 'As this makes clear, what started out as a series of measures for a few special cases in order to protect Western companies in countries with weak legal systems and a high risk of tangible investments being expropriated by the state, has been twisted to an entirely different use: enabling deep-pocketed multinationals to circumvent any kind of legislation they don't like, even in countries with fair and independent judiciaries.'[151]

Professor Richard Gold of McGill University is critical of the Eli Lilly action: 'I believe they are fighting this to satisfy their shareholders.'[152] He commented:

> There is no such thing as an international concept of utility. Everything points to the ability of the states to do what they want. Legally, they have no case, not under NAFTA and not under TRIPS [Agreement on trade-related aspects of intellectual property rights]. Neither cover this issue.[153]

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150 Mike Masnick, 'Eli Lilly Officially Sues Canada for "Lost Profits" because Canada Rejected Eli Lilly's Patents', *TechDirt*, 13 September 2013, https://www.techdirt.com/articles/20130913/11204224509/eli-lilly-officially-sues-canada-because-canada-rejected-patent-that-unfairly-diminishes-eli-lillys-profits.shtml

151 Glyn Moody, 'How Investor-State Dispute Resolution Threatens Access to Medicines, and Much Else', *TechDirt*, 9 May 2013, https://www.techdirt.com/articles/20130505/02445622949/how-investor-state-dispute-mechanisms-threaten-access-to-medicine-much-else.shtml

152 Marc-Andre Seguin, 'The $500-million Doctrine', *National Magazine*, September-October 2013, http://www.nationalmagazine.ca/Articles/Sept-Oct-2013/The-$500-million-doctrine.aspx

153 Ibid.

According to Gold, Eli Lilly was trying to set a political precedent. 'Canada represents two to three per cent of the world market. The company has to appease its shareholders, and it has to try to prevent other countries from following Canada's lead and developing a doctrine that goes against its interests.'[154]

There is a concern that the investor-state dispute settlement regime in the *Trans-Pacific Partnership* could be deployed to challenge public health measures, and reforms to the patent system designed to combat problems such as drug pricing, and evergreening.

Professor Joseph Stiglitz has been concerned about the impact of the *Trans-Pacific Partnership* upon equality and human rights.[155] He observed that 'Agreements like the TPP have contributed in important ways to this inequality'. Stiglitz warned: 'Corporations may profit, and it is even possible, though far from assured, that gross domestic product as conventionally measured will increase'.[156] He feared that 'the well-being of ordinary citizens is likely to take a hit.'[157] The Nobel Laureate warned that 'Trickle-down economics is a myth'.[158] Stiglitz concluded that 'enriching

154 Ibid.

155 Joseph Stiglitz, 'On the Wrong Side of Globalization', *The New York Times*, 15 March 2014, http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/

156 Ibid.

157 Ibid.

158 Ibid.

corporations — as the TPP would — will not necessarily help those in the middle, let alone those at the bottom.'[159]

Summary

The *Pharmaceutical Patents Review Report* is a landmark report, which should receive serious consideration by policy-makers in Australia, and throughout the Pacific Rim. The study deserves a wide readership amongst intellectual property academics, economists, and health experts. The *Pharmaceutical Patents Review Report* provides a cautionary warning of the need to design a patent regime, which is appropriate and well-adapted to Australia's economy, research and development system, and public health-care regime:

> The Report shows that the Australian patent system has worked against Australia's best interests. Patents are clearly necessary and important for the development of and access to needed drugs. But Australia's patent system has allowed and will continue for some time to allow patents to be granted which would not be granted elsewhere; it has awarded a longer effective patent life than is provided in the United States or than seems necessary to underpin drug development in Australia; it has allowed patents to expire later in Australia than in its major trading partners. All of this has limited the generic manufacturing base, employment and exports and it has increased Australia's pharmaceutical costs. The Raising the Bar Act which recently came into force may moderate this, but its efficacy will not be evident for some years, and there is the prospect that, even with the changes introduced by Raising the Bar, patent standards are still insufficient to moderate evergreening in the pharmaceutical industry. The Panel's recommendations, if adopted, would only start the next phase of the repair work.

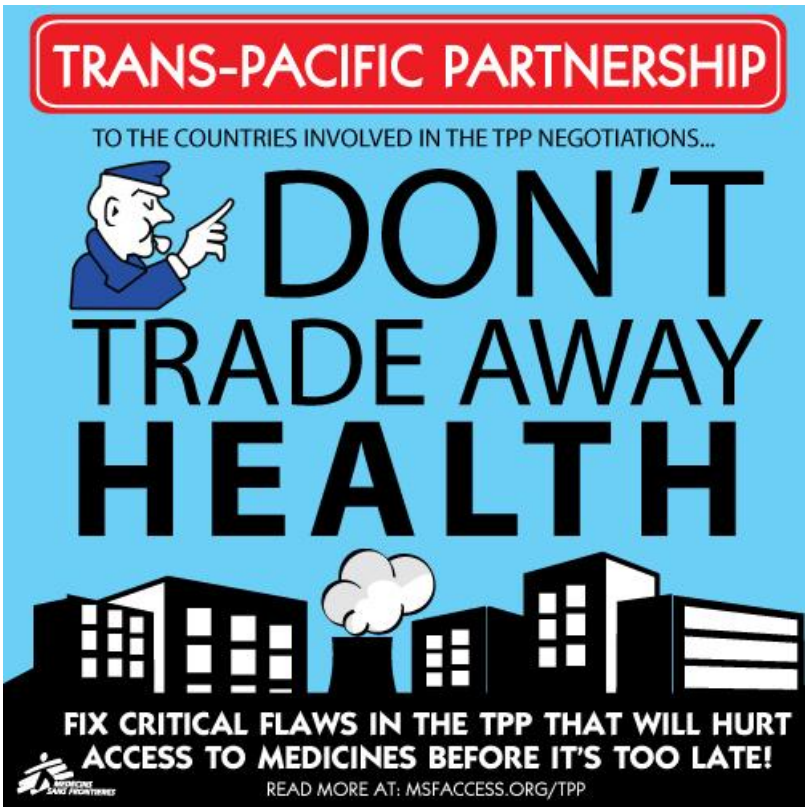
159 Ibid.

The report also highlights the problem of patent owners seeking corporate welfare in domestic patent law reform and international negotiations. There is a need to guard the integrity of the patent system against being co-opted by brand-name pharmaceutical companies and biotechnology companies. Patent term extensions and evergreening undermine the public bargain of patent law to promote the progress of science and the useful arts. There is a need to ensure that the public domain is not captured by private companies. The report should be a guide in Australia's future approach to domestic patent law reform, and international negotiations over intellectual property and trade. The study highlights the need for greater consideration of the economic impact of legal revisions – particularly in the area of patent law and pharmaceutical drugs. Australia's patent regime should protect the public health of its citizens.

Recommendation 4

There has been much controversy over the *Trans-Pacific Partnership*, intellectual property, investment, and pharmaceutical drugs. There has been much concern that investment clauses could be deployed to challenge domestic law reforms – such as those proposed in the independent *Pharmaceutical Patents Review Report.* The dispute between *Eli Lilly v. Canada* highlights the dangers of investment clauses in this field.

5. Access to Essential Medicines



There have longstanding conflicts over intellectual property, trade, health, and access to essential medicines.[160]

In 2013, Professor Brook Baker from the Northeastern University School of Law provided an analysis of the danger of investment clauses to access to medicines.[161] He

[160] See Thomas Pogge, Matthew Rimmer and Kim Rubenstein, (ed.) *Incentives for Global Public Health: Patent Law and Access to Medicines*. Cambridge: Cambridge University Press, 2010.

[161] Brook Baker, 'Investors' IP Rights Unbound: The Danger of Investment Clauses to Access to Medicines', Equilibri, GESPAM, 24 April 2013, http://www.equilibri.net/nuovo/articolo/investors%E2%80%99-ip-rights-unbound-danger-investment-clauses-access-medicines

commented: 'Although access to medicines activists have been wise to focus our attention intently on convincing low- and middle-income countries to adopt and use all possible TRIPS-compliant flexibilities and to oppose the TRIPS-plus IP chapters in free trade agreements, we have neglected to interrogate another chapter in free trade agreements and bilateral investment treaties that perhaps pose an even greater threat to our collective access to medicines – investment chapters.'[162] Baker highlighted the threat posed investor-state dispute settlement to access to essential medicines:

> Under investment chapters, foreign IP investors, like Novartis and Bayer, are recognized as 'investors' who have made 'investments' involving expenditures and expectations of profit [xv]. Suddenly intellectual property rights, already hugely protected, are given another mantle of protection, namely protections as investments. In addition, investors are given rights to bring claims for private arbitration directly against governments whenever their expectations of IP-based profits are frustrated by government decisions and policies. Decisions of these private arbitral tribunals consisting of three international trade lawyers are not subject to judicial review, but are reducible into court judgments that can be levied against government property. [163]

Professor Brook Baker recommends: 'Preferably, investment chapters will be rejected in their entirety, as they are becoming a corporate sword of Damocles that hangs over the head of rich and poor governments alike'.[164] He insists: 'At the very least, IP should be totally defined out of "investments" and no investor claims whatsoever should be available for alleged frustration of IP-based expectations.'[165] Professor

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162 Ibid.

163 Ibid.

164 Ibid.

165 Ibid.

Brook Baker makes the excellent point that 'IP right holders already have multiple forms of enforcement including private lawsuits, border seizures, criminal prosecution, and state-state dispute resolution.'[166] He insists that 'Expanded and unbound investment rights for Big Pharma under the cover of underscrutinized investment chapters is a grave threat – a threat with deadly consequences to millions of patients who rely on governments' rights to regulate IPRs and to use any and all TRIPS-compliant flexibilities to ensure affordable access to medicines for all.'[167]

Professor Brook Baker insists: 'At the very least, IP should be totally defined out of 'investments' and no investor claims whatsoever should be available for alleged frustration of IP-based expectations.'[168] Professor Brook Baker makes the excellent point that 'IP right holders already have multiple forms of enforcement including private lawsuits, border seizures, criminal prosecution, and state-state dispute resolution.'[169]

166 Ibid.

167 Ibid.

168 Brook Baker, 'Investors' IP Rights Unbound: The Danger of Investment Clauses to Access to Medicines', Equilibri, GESPAM, 24 April 2013, http://www.equilibri.net/nuovo/articolo/investors%E2%80%99-ip-rights-unbound-danger-investment-clauses-access-medicines

169 Ibid.

In March 2014, UNITAID published its full report upon the *Trans-Pacific Partnership*, highlighting implications for access to medicines and public health.[170]

The report singled out the proposed Investment Chapter for extensive criticism: 'The proposal of the USA on investment demonstrates a high degree of similarity to the investment chapter in the *North American Free Trade Agreement* (NAFTA), which has been criticized for restrictions on the regulation of corporations and the grant of broad-ranging rights which, inter alia, permit investors to seek compensation for domestic rules that they claim undermine their investments.'[171]

UNITAID identifies the overly-broad definition of investment as a problem in its analysis of the *Trans-Pacific Partnership*:

> The investment chapter starts with Article 12.2 which defines the terms used in the chapter. Key terms include 'investment', 'investor' and 'covered investment'. 'Investment' is defined broadly, going well beyond the 'bricks and mortar' definition of property and covering any asset owned or controlled directly or indirectly by an investor, whose characteristics include a 'commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'. The definition also includes a non-exhaustive list of the forms such investments may take, including intellectual property rights, licences and permits, as well as debt securities and loans, futures, options and other derivatives. The effect of such a broad definition of 'investment' would be that parties will be required to protect all such forms of investment within their territories; failure to do so would lay them open to the risk of a dispute by the

170 UNITAID, *The Trans-Pacific Partnership: Implications for Access to Medicines and Public Health*, Geneva: World Health Organization, 2014, http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf

171 Ibid., 10.

> affected investor. Intellectual property rights are specified as a form of investment under Article 12.2(g), and this covers all forms of intellectual property rights. Article 12.2(g) also includes, in brackets, the words 'which are conferred pursuant to domestic laws of each Party'. It is unclear whether the text in brackets would significantly affect the definition, since intellectual property rights are in fact conferred under domestic laws. The definition of 'investor' is similarly expansive—merely 'attempting' to make an investment by a concrete action suffices to qualify one as an investor.[172]

This analysis highlights how the *Trans-Pacific Partnership* will protect a panoply of foreign investments.

The report highlighted three main areas of concern about the impact of the Trans-Pacific Partnership's investment chapter upon public health.

First, UNITAID noted that 'the provisions of the proposed investment chapter of the TPPA provide expansive rights and privileges to foreign investors, with the obligation on governments to provide protection of such rights'.[173] UNITAID warned: 'The limitation on "performance requirements" can prevent governments from imposing conditions on the conduct of foreign companies, even when those conditions are imposed in the interest of protecting public health and promoting access to medicines.'[174] UNITAID illustrated its point: 'For example, it may be a contravention

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172 UNITAID, *The Trans-Pacific Partnership: Implications for Access to Medicines and Public Health*, Geneva: World Health Organization, 2014, http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf, 86.

173 Ibid., 10.

174 Ibid., 10.

of the proposed TPPA provisions if a government were to require that a foreign pharmaceutical company should ensure a domestic supply (whether through import or production) of a minimum quantity of active pharmaceutical ingredients.'[175]

Second, UNITAID worried that 'the proposed investment chapter combines strong investors' rights and a broad scope of protection with an investor-state dispute settlement mechanism, which provides the "teeth" for enforcement of obligations.'[176] UNITAID warned: 'The investor-state dispute settlement, however, would allow for the possibility that investors could sue a government with respect to intellectual property and regulatory issues pertaining to medicines.'[177] UNITAID expands upon its analysis:

> As already noted above, intellectual property rights are defined as investments within the investment chapter of the TPPA, thus implying that a government measure that affects the intellectual property holdings of investors may be considered an 'expropriation' or a withholding of 'fair and equitable treatment'. The disputes over tobacco packaging regulations focus on the investor's claim that its trademarks have been infringed. In the context of access to medicines, defining investment as including intellectual property rights would raise concerns about the ability of governments to implement and use the range of TRIPS flexibilities, many of which could be seen as limitations or restrictions of the exclusive rights granted under a patent. Although Article 12.12(5) states that the use of compulsory licensing does not constitute an expropriation where the compulsory licence is granted 'in accordance with the TRIPS Agreement', this may still leave room for investor corporations to challenge the compulsory licence using the ISDS on the grounds that it does not comply with TRIPS.

175 Ibid., 10.

176 Ibid., 10.

177 Ibid., 10.

> [164] Article 12.12(5) also has text, in brackets, specifying that 'the revocation, limitation, or creation of intellectual property rights' would not be considered expropriation when consistent with the intellectual property chapter of the TPPA. Even if this text were to be accepted, this exemption might be of only limited effect since the proposed text of the intellectual property chapter of the TPPA leaves little room for revocation or limitation of intellectual property rights.[178]

UNITAID noted that 'only WTO members (i.e. governments) may challenge each other for non-compliance with TRIPS or any other WTO agreements'.[179] The organisation was worried that 'the ISDS would allow for the possibility that an investor could sue a government on the grounds that the use of compulsory licensing (or another TRIPS flexibility) is in violation of both the provisions of the investment chapter (because of adverse effects on investment) and the provisions of the TRIPS Agreement.'[180] UNITAID warns: 'Such a course of action would effectively create a TRIPS-plus or WTO-plus forum in which corporations could challenge governments on the implementation of the TRIPS Agreement on the grounds of its effect on investors' rights.'[181]

Third, UNITAID observed that 'it is important to note that the jurisdiction of arbitration tribunals is defined by the provisions of the relevant investment treaty'.[182] UNITAID commented: 'Typically, these provisions do not impose obligations on the

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178 Ibid., 89.

179 Ibid., 89.

180 Ibid., 89.

181 Ibid., 89.

182 Ibid. 10.

arbitrators to take into account in their decision-making the constitutional obligations of governments or even human rights considerations.'[183]

In conclusion, UNITAID warns that the investment chapter of the Trans-Pacific Partnership could have a chilling effect on government regulations:

> A key lesson that can be learned from the rising numbers of investor-state disputes with exorbitant compensation awards is that they may have a 'chilling effect' on government regulations. Regardless of the robustness of the legal basis of investor challenges, the risk of legal suits on the interpretations of strong investor rights, coupled with the ability of private international arbitration tribunals to award large compensation amounts, may now cause governments to be cautious when making policy or law that affects investor rights. This situation can expose governments to vast liabilities, since investor-state tribunals can have enormous discretion in awarding compensation amounts, which is a serious concern for developing countries with limited resources, particularly where this may mean the diversion of budgetary resources from meeting public interest and public health needs in the country. [184]

United States Representative Raul M. Grijalva – co-chair of the Congressional Progressive Caucus, and Peter Maybarduk – have been concerned about the implications of the *Trans-Pacific Partnership* for access to essential medicines.[185] Grijalva and Maybarduk warn that: 'Trade agreements have become a favorite tool for

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183 Ibid. 10.

184 Ibid.

185 Representative Raul Grijalva and Peter Maybarduk, 'the Trans-Pacific Partnership is terrible for Public Health', *The Huffington Post*, 8 April 2014, http://www.huffingtonpost.com/raul-m-grijalva/the-trans-pacific-partner_b_5111792.html

corporations and their lobbyists to get what they want when Congress -or any country's deliberative body - rejects their arguments.'[186] The pair emphasized:

> According to the Sunlight Foundation, pharmaceutical company lobbying reports mentioned TPP 251 times in a recent four-year period, far more than any other industry. That money has paid off: the U.S. Trade Representative seems to be taking Big Pharma's line. Doctors Without Borders calls TPP the 'worst trade deal ever' for access to medicines. The Vatican, the American Medical Association and AARP, among many other organizations, have raised serious concerns about the damage it would certainly do to public health. [187]

The pair commented: 'The TPP is a bad deal for taxpayers, for doctors and for everyone who believes in corporate transparency'.[188] The United States Congressman and the expert on access to medicines warned: 'If rammed through Congress via fast-track trade authority, which doesn't allow Congress to offer any amendments, it will lead to lost jobs and lost lives.'[189]

Recommendation 5

UNITAID, public health advocates, intellectual property experts, and legislators have all expressed concern about the impact of investment clauses upon access to essential medicines – especially in respect of HIV/AIDS, tuberculosis, and malaria, and neglected diseases.

186 Ibid.

187 Ibid.

188 Ibid.

189 Ibid.

6. Regulation of Coal Seam Gas and Fracking

The Obama Administration has pushed such issues into sharp relief, with its advocacy for sweeping international trade agreements, such as the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*. There has been much public concern about the impact of the mega-trade deals upon the protection of the environment. In particular, there has been a debate about whether the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership* will promote dirty fracking. There has been a particular focus upon investor-state dispute settlement being used by unconventional mining companies. Will the *Trans-Pacific Partnership* transform the Pacific Rim into a Gasland? Likewise, will the *Trans-Atlantic Trade and Investment Partnership* open the way for fracking in the European Union?

A. The United States

In the United States, there has been a boom in the extraction of natural gas in a number of states. [190] As a recent report noted:

> Fracking is widespread across the United States. The oil and gas industry are fracking or want to frack in 31 states, with more than 500,000 active natural gas wells throughout the country. The most heavily fracked states are Pennsylvania, Ohio, West Virginia, Oklahoma, and Texas. Fracking and natural gas production are poorly regulated at both the federal and state level. At the federal level, the oil and gas industry is exempt from seven major environmental laws, including the Safe Drinking Water Act, the Clean Air Act, and the Clean Water Act. [191]

There has been much public debate in the United States about the regulation of hydraulic fracturing – known as 'fracking'.

The intrepid documentary film-maker Josh Fox has made a series of films, *Gasland*, and *Gasland 2,* which raise concerns about the impact of fracking upon air, water, and

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190 Gregory Zuckerman, *The Frackers: The Outrageous Inside Story of the New Energy Revolution*, London and New York: Penguin Books, 2013.

191 Natacha Cignotti, Pia Eberhardt, Timothe Feodoroff, Antoine Simon, and Ilana Solomon, *No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking*, ATTAC, the Blue Planet Project, Corporate Europe Observatory, Friends of the Earth Europe, Powershift, Sierra Club and the Transnational Institute 2014, http://action.sierraclub.org/site/DocServer/FoEE_TTIP-ISDS-fracking-060314.pdf?docID=15241

land.[192] He also charted the larger impacts of the gas industry upon the environment, society, government, and the economy. His work has highlighted the impact of the Bush Administration providing regulatory loopholes for the gas industry, which exempted them from proper environmental regulation. Josh Fox has depicted the development of a strong civil society movement against fracking, which spread around the world. At the recent United States municipal elections, a number of Colorado cities approved bans or moratoriums on fracking.[193] Over a hundred municipalities in the United States have approved similar controls in such of fracking.

There has been a concern that foreign investors can challenge such regulations under investment clauses in the *Trans-Pacific Partnership*. The environmental group – The Sierra Club – has been concerned about the use of investment clauses to challenge public regulation in respect of energy, the environment, and climate change. The Sierra Club warns of an increase in dirty fracking:

> The *Trans-Pacific Partnership* may allow for significantly increased exports of liquefied natural gas without the careful study or adequate protections necessary to safeguard the American public. This could mean an increase of hydraulic fracturing, or fracking, the dirty and violent process that dislodges gas deposits from shale rock formations. It would also likely

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192 Josh Fox, *Gasland*, HBO Documentary Films, 2010, http://www.imdb.com/title/tt1558250/?ref_=nm_knf_t1 and Josh Fox, *Gasland 2*, HBO Documentary Films, http://www.imdb.com/title/tt2795078/

193 Michael Wines, 'Colorado Cities' Rejection of Fracking Poses Political Test for Natural Gas Industry', *The New York Times*, 7 November 2013, http://www.nytimes.com/2013/11/08/us/colorado-cities-rejection-of-fracking-poses-political-test-for-natural-gas-industry.html?smid=tw-share&_r=0

> cause an increase in natural gas and electricity prices, impacting consumers, manufacturers, workers, and increasing the use of dirty coal power.[194]

Michael Brune, the dynamic leader of the Sierra Club has argued: 'With our jobs, our access to clean air and water and our environment at stake, we deserve a say in the way these trade rules are being written.'[195]

Sharon Kelly has commented that the *Trans-Pacific Partnership* could also be a boost for the export of natural gas.[196] She warned: 'A trade agreement being secretly negotiated by the Obama administration could allow an end run by the oil and gas industry around local opposition to natural gas exports'.[197] Kelly observed: 'The shale gas rush has caused a glut in the American market thanks to fracking, and now the race is on among industry giants to ship the liquefied fuel by tanker to export markets worldwide, where prices run far higher than in the U.S.'[198] The *Trans-Pacific Partnership* has predicted to relax regulatory controls over the export of natural gas. Kelly feared: 'This will mean that exports to any partner countries will automatically be given a stamp of approval, without having to undergo the public hearings that are

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194 The Sierra Club, 'An Explosion of Fracking: One of the Dirtiest Secrets of the Trans-Pacific Partnership Free Trade Agreement', http://www.sierraclub.org/trade/downloads/TPP-Factsheet.pdf

195 Michael Bruce and James Hoffa, 'Trade is Good When It's Fair', *Common Dreams*, 20 September 2013, https://www.commondreams.org/view/2013/09/20-6

196 Sharon Kelly, 'What a Secretly-Negotiated Free Trade Agreement Could Mean for Fracking in the U.S.', *DeSmog Blog*, 25 September 2013, http://www.desmogblog.com/2013/09/25/what-secretly-negotiated-TPP-free-trade-agreement-means-fracking

197 Ibid.

198 Ibid.

otherwise required.'[199] In particular, there is a concern that the Trans-Pacific Partnership will be used to promote the export of natural gas to Japan.[200]

In addition to questions about environmental regulation, there have also been matters raised about the role of intellectual property in respect of fracking. [201] Daniel R. Cahoy, Joel Gehman, and Zhen Lei have written an important paper called 'Fracking Patents: The Emergence of Patents as Information-Containment Tools in Shale Drilling' for the *Michigan Telecommunications and Technology Law Review*. The paper observed: 'Our analysis reveals that at the very moment when the use of hydraulic fracturing was becoming more widespread, visible, and controversial, patenting activity related to the practice began to rise.' The work also worries whether patent law is being used to contain and suppress information about fracking, rather than provide for full disclosure and dissemination of such information.

There has been a similar concern in the debate in respect of trade secrets and fracking. In a United States District Court case in Pennsylvania, Dr. Alfonso Rodriguez has lost a case against fracking gag order over access to trade secrets.[202]

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199 Ibid,

200 Ibid.

201 Daniel R. Cahoy, Joel Gehman, and Zhen Lei, 'Fracking Patents: The Emergence of Patents as Information-Containment Tools in Shale Drilling', (2013) 19 *Michigan Telecommunications and Technology Law Review* 279-330 http://www.mttlr.org/volnineteen/Cahoy_Gehman_Lei.pdf

202 Trisha Marczak, 'Doctor Loses Case Against Fracking Gag Order', MintPress News, 4 November 2013, http://www.mintpressnews.com/doctor-loses-case-against-fracking-gag-order/171850/

Such disputes raise questions about whether intellectual property law should promote research and development into extractive industries, such as fracking.

B. Canada

There has been particular disquiet about the use of state-investor clauses to challenge environmental regulations in Canada.[203]

In 2011, the Quebec National Assembly introduced and passed Bill 18, and placed a moratorium on fracking below the St. Lawrence River in order to allow for a full and timely evaluation of the public health and environmental impacts of such activity.

In 2012, the United States energy company Lone Pine Resources Inc. notified the Canadian Government that it would challenge the moratorium on fracking in Quebec's St Lawrence River under an investment clause Chapter 11 of the *North American Free Trade Agreement* (NAFTA).[204] The full complaint was filed on the 6th September 2013.[205]

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[203] The Canadian Press, 'Quebec Fracking Ban Lawsuit: Lone Pine Resources Wants $250 million from Ottawa', *Huffington Post Canada*, 23 November 2013, http://www.huffingtonpost.ca/2012/11/23/quebec-fracking-ban-lawsuit-lone-pine_n_2176990.html

[204] *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL http://www.italaw.com/cases/1606

[205] *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL http://www.italaw.com/cases/1606

Lone Pine objected to the 'arbitrary, capricious, and illegal revocation of the Enterprise's valuable right to mine for oil and gas under the St. Lawrence River by the Government of Quebec without due process, without compensation, and with no cognizable public purpose.'[206] The company complained that there had been a lack of consultation by the Quebec Government:

> Between 2006 and 2011, Lone Pine, the Enterprise, and their predecessors expended millions of dollars and considerable time and resources in Quebec to obtain the necessary permits and approvals from the Government of Quebec to mine for oil and gas in the province of Quebec, including beneath the St. Lawrence River. Suddenly, and without any prior consultation or notice, the Government of Quebec introduced Bill 18 into the Quebec National Assembly on May 12, 2011 to revoke all permits pertaining to oil and gas resources beneath the St. Lawrence River without a penny of compensation.[207]

The energy company lamented: 'Neither Lone Pine nor the Enterprise were given any meaningful opportunity to be heard, any notice that the Act would be passed, or provided any reason or basis for the outright revocation of the Enterprise's permits relating to oil and gas below the St. Lawrence River'.[208] The energy company bemoaned the political decision: 'All they were told was that the Act was "a political decision," and that nothing could be done to prevent it from being passed'.[209]

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206 *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL http://www.italaw.com/cases/1606

207 Ibid.

208 Ibid.

209 Ibid.

Lone Pine claimed that 'the moratorium on fracking violated the provision of NAFTA's investment chapter that offers investors a "minimum standard of treatment" and "fair and equitable treatment."'[210] The company complained that 'Lone Pine and the Enterprise have suffered significant damages as a result of Canada's [alleged] violation of Chapter Eleven of NAFTA.'[211]

The company has brought this investment action at the same time as it has sought to restructure itself in bankruptcy.[212] Glyn Moody has also noted that Lone Pine is really a Canadian firm: 'Lone Pine is a Calgary-based firm and would not have standing as a foreign entity to sue Canada under NAFTA [*North American Free Trade Agreement*], but [Lone Pine company president] Granger said it can do so because it is registered in Delaware.'[213]

Martine Châtelain, president of Eau secours!, the Quebec-based coalition for a responsible management of water, argued: 'Based on the principle of precaution, Quebec government's response to the concerns of its population is appropriate and

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210 Ibid.

211 Ibid.

212 Jamie Santo, 'Lone Pine Aims to Restructure, Raise $100 m in Bankruptcy', Law 360, 25 September 2013, http://www.law360.com/articles/475765/lone-pine-aims-to-restructure-raise-100m-in-bankruptcy

213 Glyn Moody, 'Canadian-Based Company Sues Canada Under NAFTA, Saying that Fracking Ban Takes Away Its Expected Profits', *TechDirt*, 4 October 2013, https://www.techdirt.com/articles/20131004/07500724750/canada-hit-with-another-massive-investor-state-dispute-settlement-demand.shtml

legitimate'.[214] The President maintained: 'No companies should be allowed to sue a State when it implements sovereign measures to protect water and the common goods for the sake of our ecosystems and the health of our peoples.'[215]

Stuart Trew of the Council of Canadians maintained that 'Quebec's moratorium on fracking is legal and supported strongly by the public'.[216] He maintained that 'corporate profit should never get in the way of environmental and public health safeguards'. Stuart Trew insisted: 'It's outrageous to even think that we may have to pay Lone Pine not to drill in the St. Lawrence River'.[217] Trew contended: 'Trade rules shouldn't be used to appease the whims of dirty oil and gas companies.'[218]

Ilana Solomon of the Sierra Club observed: 'My right to clean water, clean air, and a healthy planet for my family and community has to come before Lone Pine's right to mine and profit'.[219] She warned: 'This egregious lawsuit - which Lone Pine Resources must drop - highlights just how vulnerable public interest policies are as a result of

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214 Sierra Club and Council of Canadians, 'Lone Pine Resources Files Outrageous NAFTA Lawsuit Against Fracking Ban', Press Release, 2 October 2013, https://content.sierraclub.org/press-releases/2013/10/lone-pine-resources-files-outrageous-nafta-lawsuit-against-fracking-ban

215 Ibid.

216 Ibid.

217 Ibid.

218 Ibid.

219 Ilana Solomon, 'No Fracking Way: How Companies Sue Canada to Get More Resources', *The Huffington Post*, 10 March 2013, http://www.huffingtonpost.ca/ilana-solomon/lone-pine-sues-canada-over-fracking_b_4032696.html See also: Ilana Solomon of the Sierra Club discussing the Lone Pine Island dispute and the *Trans-Pacific Partnership* http://vimeo.com/79027080

trade and investment pacts.'[220] She observed: 'Governments should learn from this and other similar cases and stop writing investment rules that empower corporations to attack environmental laws and policies.'[221] Highlighting the case study of Lone Pine Island, Ilana Solomon has warned against the inclusion of investment clauses in the *Trans-Pacific Partnership*.

Elizabeth May, the leader of the Green Party of Canada, has expressed concerns about investor-state provisions being used to challenge sustainability or environmental protection measures in Canada – such as the action by the US energy company Lone Pine Resources against Quebec's moratorium on fracking.[222] She observed: 'Such cases represent clear barrier to environmental protection and regulation in Canada.'[223] Her preference was that the Trans-Pacific Partnership should not include investor clauses'.[224]

May maintained: 'At minimum, I would insist that any inclusion of investor-state arbitration clauses into the *Trans-Pacific Partnership Free Trade Agreement* include clearly stated exceptions against claims of expropriation for any laws or regulations pertaining to environmental, social, or labour policies that a future government may

220 Ibid.

221 Ibid.

222 Elizabeth May MP, 'Submission: Environmental Assessment of Trans-Pacific Partnership Free Trade Agreement', the Green Party of Canada, 29 January 2013, http://elizabethmaymp.ca/submission-environmental-assessment-tpp

223 Ibid.

224 Ibid.

want to pursue.'[225] She noted: 'Yet while better than nothing, even here such exceptions present unacceptable risks to Canadian's sovereign, democratic rights to govern ourselves, including in environmental protection.'[226]

C. Australia

In his excellent book, *What the Frack?*, investigative journalist Paddy Manning charts the conflicts in Australia over unconventional resources:

> In Australia, where coal seam gas has taken off in the space of a decade, the land is the battleground: grazing country, cropping country, state forest, water catchment areas, rural-residential and even urban areas. Nowhere appears to be off-limits for this new industry that has coined a new vernacular: 'gas mining'.[227]

Manning observed that 'two key technological breakthroughs in America have opened up huge new possibilities in unconventional gas extraction: horizontal drilling and hydraulic fracturing, often shortened to 'hydro-fracking' or just 'fracking'.[228]

Ian Macfarlane, the new industry minister for the Coalition Conservative Government, has been a great supporter of coal seam gas. He has argued that mining companies should extract all the possible resources:

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225 Ibid.

226 Ibid.

227 Paddy Manning, *What the Frack? Everything You Need to Know about Coal Seam Gas*, Sydney: New South Books, 2012, 14.

228 Ibid., 14.

> We've got to make sure that every molecule of gas that can come out of the ground does so. Provided we've got the environmental approvals right, we should develop everything we can.[229]

In Australia, the issue of whether farmers can 'Lock the Gate' to mining companies has united farmers, environmentalists, and climate change activists.[230] The Lock the Gate Movement is concerned that 'mining and unconventional gas companies are riding roughshod over our governments and local communities' and 'our farmland, bushland and water resources are being put at risk.' The Lock the Gate movement wants to ban fracking in Australia: 'Our Call to Country provides a plan for national reform that delivers a moratorium on unconventional gas mining and a Royal Commission into corruption and maladministration associated with the mining industry.'[231] Gabrielle Chan has observed that the 'alliance between farmers and the environmental movement on land issues around coal seam gas and mining' has 'the capacity to change the political landscape in rural Australia and leave a scar as gaping as an open-cut mine on the predominant Coalition support.'[232] The Lock the Gate

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229 Ben Packham, 'Use It or Lose It, Miners Warned by Coalition', *The Australian*, 18 September 2013, http://www.theaustralian.com.au/national-affairs/use-it-or-lose-it-miners-warned-by-coalition/story-fn59niix-1226721368923#sthash.jWWQRUXb.dpuf

230 Lock the Gate Alliance, http://www.lockthegate.org.au/ and Lock the Gate Alliance, Call to Country http://www.youtube.com/watch?v=X4-dUKBvwrY

231 Ibid.

232 Gabrielle Chan, 'Farmers Joining Environmental Movement in their Fight Against Mining', *The Guardian*, 10 April 2014, http://www.theguardian.com/news/bush-mail/2014/apr/10/farmers-joining-environmental-movement-in-their-fight-against-mining

movement has demanded greater regulation of coal, and coal seam gas in order protect agriculture, farming, the environment, and the climate.[233]

On the 1st October 2013, the Lock the Gate Alliance and the Australian Fair Trade and Investment Network (AFTINET) put out a joint statement[234], expressing 'their strong opposition to clauses in trade agreements which would enable foreign investors to sue governments for damages in international tribunals if government regulation is seen to 'harm' their investment'.[235] Drew Hutton, the President of Lock the Gate, observed: 'Investor State Dispute Settlement would reduce the ability of governments to regulate the activities of foreign companies even if these activities have a negative impact on health and the environment.'[236] He worried: 'This would prevent

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233 For a legal analysis of the Lock the Gate movement, see Janice Gray and David Brown, 'Constituencies of Resistance to Coal Seam Gas Mining, the Political Art of Suture and the Public Good', New Thinking on Sustainability, Victoria University of Wellington, 16 February 2014, http://www.victoria.ac.nz/law/about/events-old/nz-centre-for-public-law/new-thinking-on-sustainability

234 The Lock the Gate Alliance and the Australian Fair Trade and Investment Network, 'Rural anti-gas mining groups say no to investors suing governments for environmental regulation as Trans-Pacific trade talks resume', Press Release, 2 October 2013, http://aftinet.org.au/cms/sites/default/files/Robb%20Media%20Release%20October%202%202013%20-%20Copy.pdf The Lock the Gate Alliance and the Australian Fair Trade and Investment Network, 'Letter to the Hon. Andrew Robb, Minister for Trade and Investment', 1 October 2013, http://aftinet.org.au/cms/sites/default/files/AFTINET%20%26%20LTG%20letter%20Minister%20Robb%20300913%20-%20Copy.pdf

235 Ibid.

236 Ibid.

governments from responding to community concerns about Coal Seam Gas mining (CSG)'.[237]

Hutton was particularly concerned about the precedent of the Lone Pine energy company using ISDS clauses in the North American Free Trade Agreement to sue the Canadian Quebec provincial government for $250 million over a moratorium on fracking. He noted that 'farmers and community members in NSW and Victoria have influenced their state governments to review the environmental impact of CSG mining and to consider regulation'.[238] Hutton concluded: 'If Australia agrees to include ISDS in trade agreements, governments could be sued for millions of dollars for responding to community concerns.'[239]

Isabel McIntosh from Lock the Gate has expressed concerns about the impact of the Trans-Pacific Partnership on the public regulation of coal and coal seam gas:

> A trade agreement with investor–state dispute settlement provisions that are being discussed for the *Trans Pacific Partnership Agreement* will lock the door on our electoral democracy. The restrictions imposed could tie the hands of government to regulate in areas such as foreign investment in farmland and the expansion of coal and CSG. It is this regulation on CSG and coal that is critical: we campaign, the government then plays catch up as the power shifts into the community's hands and the voices of independent experts lead the conversation. But if a

237 Ibid.

238 Ibid.

239 Ibid.

> trade agreement is signed that puts the power in the hands of overseas companies, then it's over.[240]

McIntosh worries that 'the Trans-Pacific Partnership Agreement will protect the rights of corporate investors at the expense of democratic governance'.[241] She was concerned that the mining industry 'want to jeopardise land and water security for the short-term – and diminishing – profits of fossil fuels'.[242] In her view: 'If the mining industry is allowed to carry out its business plan, the planet tanks'.[243] McIntosh comments: 'Whether through invasive mining or the impact of catastrophic climate change, Australia's agricultural land will diminish to a fraction of what it is now.'[244]

Considering the *Trans-Pacific Partnership* and the Lone Pine Island case, Richard Denniss of the Australia Institute observed that the matter of free trade and fracking could divide and fracture the Conservative Government – a coalition of the Liberal Party and the National Party - in Australia: 'The issues of coal seam gas and free trade are combining to create a perfect storm for the National Party, and in turn, the

240 Isabel McIntosh, 'A Trans-Pacific Partnership Agreement will lock the Door on Our Electoral Democracy', *Lock the Gate*, 25 October 2013, http://isabelmcintosh.wordpress.com/2013/10/25/a-tppa-will-lock-the-door-on-our-electoral-democracy/

241 Ibid.

242 Ibid.

243 Ibid.

244 Ibid.

Coalition government.'[245] He commented: 'The problem for Tony Abbott and Warren Truss is that CSG forces the Coalition partners to decide whether they are on the side of farmers or the mining industry.'[246] Denniss noted that 'the issue of foreign investment forces them to choose whether they are on the side of free trade or Australian sovereignty.'[247] He concluded: 'Both issues could end up splitting the Coalition, and if they don't, they will likely deliver more National Party seats to the Palmer United Party, Katter's Australian Party or independents willing to put their constituents' interests first.'[248]

There will be a consideration of the use of investor-state dispute settlement in an inquiry by the Australian Senate in 2014. The Australian Greens have introduced the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014 (Cth) into Parliament, and have been seeking to exclude investor-state dispute settlement from all trade and investment agreements.

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245 Richard Denniss, 'Trade Threatens to Split Coalition', *Australian Financial Review*, 22 September 2013, http://www.afr.com/p/opinion/trade_threatens_to_split_coalition_mMYN42vDfryQZX96Wl5MiO

246 Ibid.

247 Ibid.

248 Ibid.

D. New Zealand

There has also been controversy in New Zealand over the Conservative Government's push to mine Middle Earth, with the end of the filming of series of *The Hobbit*.[249]

Gareth Hughes MP of the New Zealand Greens commented:

> Protections afforded to foreign investors under the *Trans-Pacific Partnership* will seriously undermine our environment. Similar agreements have resulted in Governments being forced to pay billions because they put in place rules to protect the environment from harm caused by foreign corporations.[250]

He observed: 'In a democracy, people should have the right to know the detail of, and have input into, international agreements that the National Government wants to sign us up to.'[251]

The New Zealand Sustainability Council has observed that 'The environment will be a major loser under terms put forward for the latest free trade deal.'[252] The Council is

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249 Graham Readfearn, 'New Zealand Pushing Plans to Drill Middle-Earth as Hobbit Filming Ends', *The Guardian*, 29 July 2013, http://www.theguardian.com/environment/planet-oz/2013/jul/29/hobbit-new-zealand-lord-of-the-rings-middle-earth-oil-gas-drilling

250 Green Party, 'Government Failing the Environment in the TPP Talks', *Scoop NZ*, 16 January 2014, http://www.scoop.co.nz/stories/PA1401/S00057/government-failing-the-environment-in-tpp-talks.htm

251 Ibid.

alarmed that the mechanism of investor-state dispute clauses 'would give foreign companies the ability to sue a government in an offshore tribunal if that company believed its reasonable investment expectations (such as its profits or asset values) had been breached'.[253] The Council worries that such a regime 'ends up privileging foreign companies over local communities and local companies who do not have such rights to sue.'[254]

Professor Jane Kelsey from the University of Auckland has noted that the investment chapter could affect the environment in a number of ways, with 'challenges to tighter rules on mining and remediation rules, bans on fracking and nuclear energy, performance requirements on foreign investors to use of clean technology, restrictions on numbers and locations of waste plants or eco-tourism projects, not lowering environmental standards to attract investors.'[255]

Professor Jane Kelsey has been concerned about the undemocratic nature of the trade negotiations.[256] She reflected that fair trade deals are possible: 'It would be possible to conceive of a twenty-first century trade agreement that reflected this realisation and

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252 Sustainability Council of New Zealand, 'The TPP's Threat to the Environment', April 2013, http://www.sustainabilitynz.org/wp-content/uploads/2013/08/TheTPPThreatToTheEnvironment2013.pdf

253 Ibid.

254 Ibid.

255 Jane Kelsey, 'TPPA Environment Chapter & Chair's Commentary Posted by WikiLeaks Issues for NZ', 16 January 2014, https://wikileaks.org/tppa-environment-chapter.html

256 Jane Kelsey, 'Introduction' in Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*, Wellington: Bridget Williams Books Inc., 2010, 9-28 at 28.

embraced a socially progressive and democratic agenda where governments put their people centre stage in the negotiations.'[257] Kelsey was concerned: 'The failure of governments to seize that opportunity means that the *Trans-Pacific Partnership* negotiations are destined to become a fraught arena in which ideologies, interests and agendas compete.'[258]

E. The European Union

In the European Union, there has been a strong resistance to the introduction of hydraulic fracturing.

Notably, France's highest court, the Constitutional Council, has upheld a government ban on hydraulic fracturing.[259] The Constitutional Council rejected a challenge by a United States company, Schuepbach Energy, an American company whose exploration permits were revoked after the French Parliament banned the practice. President François Hollande observed of the decision: 'This law has been contested several times.' He noted: 'It is now beyond dispute.'[260] Hollande observed, though, that the law 'only prohibits recovering shale gas by hydraulic fracturing, it does not

257 Ibid at 28.

258 Ibid at 28.

259 David Jolly, 'France Upholds Ban on Hydraulic Fracturing', *The New York Times*, 11 October 2013, http://www.nytimes.com/2013/10/12/business/international/france-upholds-fracking-ban.html

260 Ibid.

prevent research on other techniques.'[261] France's Energy Minister Philippe Martin added: 'It's a legal victory, but also an environmental and political one.'[262]

There has been a concern that energy companies will seek to use the *Trans-Atlantic Trade and Investment Partnership* to challenge bans and moratoria in respect of fracking. Notably, the energy giant, Chevron, has been lobbying for a 'world-class investment chapter' in the *Trans-Atlantic Trade and Investment Partnership*.[263] The company has focused on investment protection as 'one of our most important issues globally' in consultations with the United States Trade Representative. Chevron has demanded that the *Trans-Atlantic Trade and Investment Partnership* oblige governments to 'refrain from undermining legitimate-backed expectations.' Chevron has previously deployed investor-state dispute settlement clauses in a multi-billion dispute with Ecuador over oil drilling related-contamination of the Amazonian rainforest.

In 2014, a Trans-Atlantic coalition of environmental groups have released a report entitled, *No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking*.[264] Citing the dispute between Lone Pine and Canada, the report warns of the dangers of investor-state dispute settlement:

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261 Ibid.

262 'Fracking Ban Upheld by French Court', BBC News, 11 October 2013, http://www.bbc.com/news/business-24489986

263 Chevron, 'Request for Public Comment on the Transatlantic Trade and Investment Partnership', 7 May 2013, http://www.regulations.gov/#!documentDetail;D=USTR-2013-0019-0054

264 Natacha Cignotti, Pia Eberhardt, Timothe Feodoroff, Antoine Simon, and Ilana Solomon, *No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking*, ATTAC, the Blue Planet

> The TTIP deal threatens to give more rights to companies through a clause called an 'investor-state dispute settlement' (ISDS). If included in the deal, this would enable corporations to claim damages in secret courts or 'arbitration panels' if they deem their profits are adversely affected by changes in a regulation or policy. This threatens democratically agreed laws designed to protect communities and the environment. Companies which claim their investments (including expectations of future profits) are affected by a change in government policies could have the right to seek compensation through private international tribunals. US companies (or any company with a subsidiary in the US) investing in Europe could use these far-reaching investor rights to seek compensation for future bans or other regulation on fracking. These tribunals are not part of the normal judicial system, but are specifically set up for investment cases. Arbitrators have a strong bias towards investors – and no specialised knowledge about our climate or fracking. Companies are already using existing investment agreements to claim damages from governments, with taxpayers picking up the tab. [265]

The report feared that 'US companies investing in Europe could directly challenge fracking bans or regulations at private international tribunals – potentially paving the way for millions of euro in compensation, paid by European taxpayers.'[266]

Glyn Moody has observed: 'The fear is that both the *Trans-Pacific Partnership* and the *Trans-Atlantic Free Trade Agreement* will cast a chill over policy making around the Pacific and across the Atlantic, as businesses take advantage of the punitive

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Project, Corporate Europe Observatory, Friends of the Earth Europe, Powershift, Sierra Club and the Transnational Institute 2014, http://action.sierraclub.org/site/DocServer/FoEE_TTIP-ISDS-fracking-060314.pdf?docID=15241

265 Ibid., 1-2.

266 Ibid.

damages available to bully governments into scrapping existing or proposed regulations in key consumer areas like food, health, safety and the environment.'[267]

Summary

The *Trans-Pacific Partnership* poses significant threats to the environmental protection of the air, water, and land in the Pacific Rim. There has been a groundswell of support for public regulation of fracking in the United States, Canada, Australia, and New Zealand. There have also been similar concerns raised about the *Trans-Atlantic Trade and Investment Partnership*, and its impact upon the regulation of fracking in the European Union.

However, trade agreements, with investment clauses, could be used to challenge public regulation. The environmental writer George Monbiot has warned of the dangers of investment clauses in trade deals:

> Investor-state rules could be used to smash any attempt to save the NHS from corporate control, to re-regulate the banks, to curb the greed of the energy companies, to renationalise the railways, to leave fossil fuels in the ground. These rules shut down democratic alternatives. They outlaw left-wing politics.[268]

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[267] Glyn Moody, 'Canadian-Based Company Sues Canada Under NAFTA, Saying that Fracking Ban Takes Away Its Expected Profits', *TechDirt*, 4 October 2013, https://www.techdirt.com/articles/20131004/07500724750/canada-hit-with-another-massive-investor-state-dispute-settlement-demand.shtml

[268] George Monbiot, 'A Global Ban on Left-Wing Politics', *The Guardian*, 4 November 2013, http://www.monbiot.com/2013/11/04/a-global-ban-on-left-wing-politics/

Professor Joseph Stiglitz, the Nobel Prize winner in Economics, has similarly warned that such agreements would 'significantly inhibit the ability of developing countries' governments to protect their environment from mining and other companies.'[269] That is a particularly acute concern for developing countries in the Pacific Rim.

Recommendation 6

As highlighted by the dispute between *Lone Pine Resources* v. *Canada*, gas companies have deployed investment clauses to challenge regulations and moratoria in respect of coal seam gas and mining. This raises larger questions about public regulation in respect of land, water, and the environment.

[269] Joseph Stiglitz, 'Developing Countries are Right to Resist Restrictive Trade Agreements', *The Guardian*, 9 November 2013, http://www.theguardian.com/business/2013/nov/08/trade-agreements-developing-countries-joseph-stiglitz

7. The Environment

There have been a number of controversial disputes in respect of investor-state dispute settlement, and the protection of the environment.

In her prescient 2009 book, *The Expropriation of Environmental Governance*, Kyla Tienhaara foresaw the rise of investor-state dispute resolution of environmental matters.[270] She observed:

> Over the last decade there has been an explosive increase of cases investment arbitration. This is significant in terms of not only the number of disputes that have arisen and the number of states that have been involved, but also the novel types of dispute that have emerged. Rather than solely involving straightforward incidences of nationalization or breach of contract, modern disputes often revolve around public policy measures and implicate sensitive issues such as access to drinking water, development on sacred indigenous sites and the protection of biodiversity.[271]

Kyla Tienhaara commented: 'While the success that states have had in attracting foreign investment through investment agreements is a subject of heated debate, the success that investors have had in stretching the traditional meaning of clauses on 'expropriation' and 'fair and equitable treatment is unquestionable'.'[272]

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270 Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge: University of Cambridge Press, 2009.

271 Ibid., 1.

272 Ibid., 1.

In her study, Kyla Tienhaara observed that investment agreements, foreign investment contracts and investment arbitration had significant implications for the protection for the protection of the environment. She surveyed the conflicts in this field:

> To date, a number of conflicts between investors and states related to environmental policy have been resolved in arbitration. These disputes have concerned a wide range of regulatory actions and several different environmental issues (e.g. hazardous waste, biodiversity, air/ water pollution). Disputes between investors and the governments of Canada, Costa Rica, Mexico, Peru and the United States are discussed in this study. While the cases are, in many respects, illuminating, they raise more questions than they answer. This is, in part, becauise the decisions made by the arbitral tribunals in these claims are inconsistent.[273]

Kyla Tienhaara concluded that 'arbitrators have made it clear that they can, and will, award compensation to investors that claim to have been harmed by environmental regulation.'[274] She also found that 'some of the cases suggest that the mere threat of arbitration is sufficient to chill environmental policy development.'[275] Tienhaara was equally concerned by the 'possibility that a government may use the threat of arbitration as an excuse or *cover* for its failure to improve environmental regulation.'[276] In her view, 'it is evident that arbitrators have *expropriated* certain fundamental aspects of environmental governance from states.'[277] Tienhaara held: 'As

273 Ibid., 2.

274 Ibid., 2.

275 Ibid., 3.

276 Ibid., 3.

277 Ibid., 3.

a result, environmental regulation has become riskier, more expensive, and less democratic, especially in developing countries.'[278]

A. Investor-State Dispute Settlement over the Environment

In the European Union, there has been a great deal of controversy over the Vattenfall cases.[279] In the first dispute, the Swedish energy company Vattenfall initiated an investor-state dispute settlement procedure against Germany. After constructing a coal fired power plant, Vattenfall claimed that the quality standards for waste water of Hamburg's Environmental Authority made the project unviable. The company demanded compensation totalling €1.4 billion. Vattenfall and the city of Hamburg eventually settled the case with an agreement. In the second dispute, Vattenfall brought an investor-state dispute settlement action against Germany in respect of its decision to close down its nuclear power plants, in the wake of the Fukushima accident in Japan. According to press sources, the claim for compensation by Vattenfall could amount up to €3.7 billion

The Canadian mining firm Pacific Rim, recently taken over by Australian Oceana Gold, brought an arbitration case against El Salvador after it took action over a gold

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278 Ibid., 3.

279 *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, http://www.italaw.com/cases/1654 and *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 (formerly *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. The Federal Republic of Germany*) http://www.italaw.com/cases/1148

mining project.[280] Jemma Williams reported upon the dispute in *New Matilda*.[281] She observed:

> Late last month Australia-based mining company OceanaGold acquired Pacific Rim, a mining company currently demanding $315 million from the government of El Salvador over their refusal to grant permits for a controversial project.
>
> The El Dorado gold mine in northern El Salvador has been stalled since 2008, when the government of El Salvador refused to grant a permit to Pacific Rim.
>
> The government's decision came after many in the local community had protested against the mine, concerned about the effects of acid drainage, heavy metals and the use of cyanide in the mining process, which they fear could contaminate major water catchment areas and impact on public health and the environment.
>
> However, despite local support for the government's move, Pacific Rim was able to take the case to an international tribunal and demand $315 million in compensation from the developing Central American nation.
>
> This amount reflects the predicted value of Pacific Rim's investment. According to the company, its investments are 'significantly higher in value than the to-date investment that has already been made in El Salvador'.[282]

There has been concern about the implications of the dispute for democratic decision-making, and environmental regulation.

Writing in *The Guardian*, Claire Provost reported that 300 organisations had accused

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280 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, http://www.italaw.com/cases/783

281 Jemma Williams, 'El Salvador Fights Aussie Mine Takeover', *New Matilda*, 11 December 2013, https://newmatilda.com/2013/12/11/el-salvador-fights-aussie-mine-takeover

282 Ibid.

Pacific Rim of an 'assault on democratic governance.'[283] The Open Letter to the President of the World Bank is damning about the investment action.[284] The signatories comment: 'We are writing out of solidarity with the communities of El Salvador that have been working through the democratic process to prevent a proposed cyanide-leach gold mining project, over well- founded risks that it will poison the local communities' environment as well as the country's most important river and source of water.'[285] The letter observed: 'Rather than complying with the environmental permitting process of El Salvador, the Canadian company Pacific Rim launched an attack under the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA).'[286] The letter commented: 'Pacific Rim is demanding $301 million US dollars in compensation from the government of El Salvador or to provide it with an operating permit in spite of the huge risks to the country's water supply.'[287] The letter noted: 'Pacific Rim is using ICSID to subvert a democratic nationwide debate over mining and environmental health in El Salvador'. The letter maintained: 'When it comes to such issues, local democratic institutions should prevail, not foreign corporations seeking to exploit natural resources.'[288]

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283 Claire Provost, 'El Salvador Groups Accuse Pacific Rim on "Assault on Democratic Governance"', *The Guardian*, 10 April 2014, http://www.theguardian.com/global-development/2014/apr/10/el-salvador-pacific-rim-assault-democratic-governance?CMP=twt_gu

284 'Open Letter to the President of the World Bank in Defense of El Salvador' http://www.stopesmining.org/j25/index.php/campaigns/letter-to-the-world-bank

285 Ibid.

286 Ibid.

287 Ibid.

288 Ibid.

Provost commented that the dispute was a warning as to the dangers of investor-state dispute settlement: 'The case comes as a raft of free trade agreements are being considered worldwide, with the role of investor-state arbitration considered a key debate around the proposed Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership.' [289]

There has been much controversy over the dispute between the Canadian gold-mining company Infinito Gold Ltd. and Costa Rica.[290] In 2013, it was reported: 'Canadian gold-mining company Infinito Gold Ltd. announced its intentions to go forward with a $1 billion lawsuit against Costa Rica over the retracted Las Crucitas open-pit gold mining concession in northern Costa Rica, in a statement released on Friday.'[291] The contract was withdrawn for environmental reasons: 'Costa Rica and the Canadian mining company have been ensnarled in a protracted legal battle over the canceled Las Crucitas project in Cutris de San Carlos, Alajuela, since environmentalists and locals decried the loss of virgin forest and health concerns over leeching chemicals contaminating drinking water.'[292] In 2014, Infinito Gold requested arbitration

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289 Claire Provost, 'El Salvador Groups Accuse Pacific Rim on "Assault on Democratic Governance"', *The Guardian*, 10 April 2014, http://www.theguardian.com/global-development/2014/apr/10/el-salvador-pacific-rim-assault-democratic-governance?CMP=twt_gu

290 *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5 http://www.italaw.com/cases/2258

291 Glyn Moody, 'How Much Does Gold-Plated Corporate Sovereignty Cost? $1 Billion or About 2% of a Developing Country's GDP', *TechDirt*, 30 October 2013, https://www.techdirt.com/articles/20131028/10170325035/how-much-does-gold-plated-corporate-sovereignty-cost-about-2-developing-countrys-gdp.shtml

292 Ibid.

regarding loss and damage incurred by it and by its Costa Rican investment, Industrias Infinito S.A.in respect of the Government of the Republic of Costa Rica's ('Costa Rica') treatmentof Industrias Infinito, the Crucitas mining concession and other mining rights held by Industrias Infinito and the funds that Infinito has invested in and loaned to Industrias Infinito. The Request for Arbitration is made pursuant to Article XII of the Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments. Infinito claimed that Costa Rica has violated obligations it owes to Infinito and Industrias Infinito under the Bilateral Investment Treaty with respect to the Crucitas project, a gold mining project in Costa Rica.

In 2014 round-up, UNCTAD highlights a number of new environmental disputes.[293] In particular, it draws attention to a number of battles over tourism, development, and the environment in the European Union:

> In *Spence* v. *Costa Rica*, the claimants contend that the land they had acquired was expropriated to create a beachfront ecological park, without prompt or effective compensation paid to them. They also suggest that the government's decisions were marred by conflicts of interest of the decision maker and that their decisions were not unbiased or objective. In *Lieven Riet* et al. v. *Croatia*, the claimants maintain that due to the misleading assurances they received from the local zoning office, they purchased land where residential development was barred, which did not allow their beach resort project to proceed.[294]

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293 United Nations Conference on Trade and Development (UNCTAD), 'Recent Developments in Investor-State Dispute Settlement: Updated for the Multilateral Dialogue on Investment', April 2014, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

294 Ibid., 5-6.

Such conflicts are of interest to Australia, given the battles over planning in respect of sensitive locations. Think, for instance, of the current Sydney battle over plans to build a hotel on the domain.

The report also highlights a number of investor-state dispute settlement actions in respect of renewable energy:

> 2013 is notable for a large number of cases filed by investors in solar energy installations against the Czech Republic and Spain. In fact, nearly a quarter of all arbitrations initiated in 2013 involve challenges to the regulatory actions by those two countries that affected the renewable energy sector. With respect to the Czech Republic, investors are challenging the 2011 amendments that placed a levy on electricity generated from solar power plants. They argue that these amendments undercut the viability of the investments and modified the incentive regime that had been originally put in place to stimulate the use of renewable energy in the country. The claims against Spain arise out of a seven per cent tax on the revenues of power generators and a reduction of subsidies for renewable energy producers. In addition to the solar energy claims, there is another case where an investor is complaining of the revocation of an investment incentive (VAT subsidy).[295]

In Canada, there is also an action over Ontario's moratorium on offshore wind farm.[296] In this dispute, the claimant contends that the temporary ban breaches its contract for the electricity supply which it had concluded with the Ontario Power Authority for a 20-year period. Such actions are of interest in an Australian context – given the debate over the removal of support for the renewable energy industry.

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295 Ibid. 5.

296 Ibid. 6.

In light of such controversies, Tom Warne-Smith has considered the impact of an investment chapter upon Australian environmental regulation.[297] He warned: 'Under the secretive *Trans Pacific Partnership Agreement*, Australia could be forced to pay foreign corporations not to dig up or destroy its coastline or native forests.'[298] Tom Warne-Smith commented:

> Under Australian federal environmental law there are a number of provisions which allow our environment minister to vary or revoke approvals for projects like mines in certain circumstances, such as when there is new evidence about the environmental effects. An Australian licence holder has to accept the minister's decision. But under the new rules, an international investor would be able to seek compensation for any loss of profits from the project.
>
> This opens up a legal nightmare. Imagine that there's been a bushfire, and an endangered Australian species has suffered a huge loss of habitat. If any Australian government then wanted to change a permit to stop a foreign company from clearing habitat that had become vital to the survival of this species, we would have to pay the company 'compensation'. Similarly, if our government made a decision to protect a rural community from coal seam gas extraction, a foreign investor could potentially take Australia to court and be compensated for their loss of earnings. [299]

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297 Tom Warne-Smith, 'The Environment Would Pay for "Free Trade"', *ABC The Drum*, 9 January 2014, http://www.abc.net.au/news/2014-01-09/warne-smith-the-environment-will-pay-for-free-trade/5192156

298 Ibid.

299 Ibid.

Tom Warne-Smith was concerned that the presence of such clauses 'creates the significant risk of 'regulatory chill'; a reluctance by governments to act because of the risk of an investor-state dispute'.[300] He worried: 'Even in claims when the investor corporations are unsuccessful, governments often end up having to pay half the cost of the arbitration and their own legal expenses.'[301] Tom Warne-Smith maintained: 'Our laws should protect Australians and the places we love - not the profits of foreign multinationals.'[302]

For their part, green political parties and civil society organisations have been concerned about the secretive nature of the negotiations; and the substantive implications of the treaty for the environment. The Green Party of Aotearoa New Zealand, the Australian Greens and the Green Party of Canada have released a joint declaration on the *Trans-Pacific Partnership*, observing: 'More than just another trade agreement, the *Trans-Pacific Partnership* provisions could hinder access to safe, affordable medicines, weaken local content rules for media, stifle high-tech innovation, and even restrict the ability of future governments to legislate for the good of public health and the environment'.[303] In the United States, civil society groups

300 Ibid.

301 Ibid.

302 Ibid.

303 The Green Party of Aotearoa New Zealand, the Australian Greens and the Green Party of Canada, Joint Statement on the Trans-Pacific Partnership, http://wa.greens.org.au/content/joint-statement-trans-pacific-partnership-agreement

such as the Sierra Club, [304] Public Citizen,[305] the Friends of the Earth,[306] and the Rainforest Action Network[307] have raised concerns about the *Trans-Pacific Partnership* and the environment. Allison Chin, President of the Sierra Club**,** complained about the lack of transparency, due process, and public participation in the *Trans-Pacific Partnership* talks: 'This is a stealth affront to the principles of our democracy.' Maude Barlow's The Council of Canadians has also been concerned about the *Trans-Pacific Partnership* and environmental justice.[308]

The Sierra Club has been particularly vocal in its criticism of investor-state dispute settlement:

> To address our environmental and climate crisis, governments must act quickly and decisively. Now, more than ever, governments need to have at their disposal a wide array of policy tools for promoting clean energy use, reducing reliance on fossil fuels, and protecting the environment. The investment rules in many current and proposed free trade agreements and bilateral investment treaties threaten to undermine current environmental safeguards and constrain future climate policy action. By creating a system that privileges corporate profits

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304 The Sierra Club, 'Secretive Trade Negotiations Begin in Leesburg**'**, *Environmentalists, Congress Demand Transparency',* 6 September 2012, http://action.sierraclub.org/site/MessageViewer?em_id=249026.0

305 Public Citizen, http://www.citizen.org/tpp

306 Friends of the Earth, http://www.foe.org/projects/economics-for-the-earth/trade/trans-pacific-partnership

307 Rainforest Action Network, http://understory.ran.org/tag/trans-pacific-partnership/

308 The Council of Canadians, http://www.canadians.org/trade/issues/TPP/index.html

> over the well-being of communities and the environment, these investment rules have allowed foreign corporations to attack sound and democratic policymaking.[309]

The Sierra Club has maintained that 'A new model of trade and investment is urgently needed that provides governments with the unconstrained freedom to safeguard our environment, protect communities, and tackle climate change.'[310]

B. Exceptions, Defences, and Safeguards

It is notable that there have been significant investment disputes over the environment, notwithstanding the existence of public interest exceptions, defences, and so-called safeguards.

Public Citizen has provided an excellent analysis of the use of the language of exceptions in the *Trans-Pacific Partnership*.[311] Public Citizen warns:

> As anger about regressive TPP rules has increased, negotiators have responded by claiming that the pact will include 'exceptions' language that can safeguard public interest policies that the pact would otherwise undermine. Yet, the exceptions language being negotiated for the TPP is based on the same construct used in Article XX of the World Trade Organization's

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309 The Sierra Club, 'Trading Away our Climate: How Investment Rules Threaten the Environment and Climate Protection', http://www.sierraclub.org/trade/resources/Investor-State-Climate-TPP-6-4.pdf

310 Ibid.

311 Public Citizen, 'Only One of 35 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded', 2013, https://www.citizen.org/documents/general-exception.pdf

> (WTO) General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). This is alarming, as the GATT and GATS exceptions have only ever been successfully employed to actually defend a challenged measure in one of 35 attempts. That is, the exceptions being negotiated in the TPP would, in fact, not provide effective safeguards for domestic policies. [312]

Public Citizen maintains: 'An effective TPP general exception that covers the Investment Chapter cannot simply "read-in" GATT Article XX and GATS Article XIV, given both the limited scope of those exceptions and the way in which the threshold tests in those measures have largely limited their application.'[313]

Public Citizen has recommended that an effective general exception in the *Trans-Pacific Partnership* would require major reforms. First, Public Citizen maintains that there is a need to widen the scope of coverage of any general exception. The Public Citizen commented: 'The subject matter of domestic policies that could be implicated by the TPP Investment Chapter is vast, and thus an effective general defense would need to expand beyond the scope of even GATT Article XX, which is more expansive than GATS Article XIV.'[314] The civil society highlighted the need to cover countries' obligations under other international treaties. Second, Public Citizen observes that there is a need for countries to be able to deploy public interest exceptions, with greater ease.

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312 Ibid.

313 Ibid.

314 Ibid.

C. The Environment Chapter[315]

The *Trans-Pacific Partnership*, a highly secretive and expansive free trade agreement being negotiated between the US and eleven Pacific Rim countries, including Australia and New Zealand, has been promoted as a boon to the environment. But the text of the Environment Chapter of the agreement, which has been negotiated in secret until it was released in January 2014 by WikiLeaks, appears to be little more than an exercise in greenwashing.

The US trade representative maintains that the US has pushed for 'a robust, fully enforceable environment chapter in the *Trans-Pacific Partnership*', and Andrew Robb, the Australian Trade and Investment Minister, has vowed that the *Trans-Pacific Partnership* will contain safeguards for the protection of the environment.

But on 15 January 2014, WikiLeaks released the draft Environment Chapter of the *Trans-Pacific Partnership* — along with a report by the Chairs of the Environmental Working Group. Julian Assange, WikiLeaks' publisher, said the leak showed 'The fabled TPP environmental chapter turns out to be a toothless public relations exercise with no enforcement mechanism.'

Far from being an ambitious 21st century agreement, the *Trans-Pacific Partnership* provides little in the way of environmental protection of land, water, air, or the

315 This section is based on this article: Matthew Rimmer and Charlotte Wood, 'Trans-Pacific Partnership Greenwashes Dirty Politics', *New Matilda*, 17 January 2014, https://newmatilda.com/2014/01/16/tpp-greenwashes-dirty-politics

climate. New Zealand Sustainability Council executive director Simon Terry said the agreement showed 'minimal real gains for nature'.

This is a concern. The *Trans-Pacific Partnership* will cover a broad range of issues, including objectives and commitments; the relationship to multilateral environmental treaties; dispute resolution; trade and biodiversity; climate change; the regulation of fisheries; and trade and investment in environmental goods and services.

It will also give more power to fossil fuel multinationals; the leaked text reveals that the deal would, through the inclusion of Investor State Dispute Settlement (ISDS) clauses, empower corporations to sue governments in private and non-transparent trade tribunals over regulation that corporations allege reduces their profits. This means that laws and policies designed to address climate change, curb fossil fuel expansion and reduce air pollution or toxic chemicals could all be subject to attack by corporations as a result of *Trans-Pacific Partnership.*

The *Trans-Pacific Partnership* will undermine decades of work that progressive governments, citizens and NGOs have done to protect our climate and environment from exploitation. The burgeoning campaign for fossil fuel divestment in particular will face major obstacles, as the *Trans-Pacific Partnership* grants the fossil fuel industry new rights to ignore any legislative wins we secure to curb fossil fuel investment and expansion.

Instead, they can claim multi-million dollar compensation claims for being refused the 'right' to dig up state forests or turn the Great Barrier Reef into a coal and gas

shipping highway. Using similar clauses in current US Free Trade Agreements, companies like Exxon Mobil and Dow Chemical have launched more than 500 cases against 95 governments.

Over US$3 billion has been awarded to corporations to settle these cases, 85 per cent of that money going to oil, gas, mining and natural resource industries. In fact, as we speak, Canadian oil and gas company Lone Pine is suing the Canadian government for $250 million over Quebec's moratorium on fracking.

The Pacific Rim is a rich and diverse environment, with ecosystems such as the Great Barrier Reef, the Amazon and a third of all the threatened species on Earth. Article SS.13 of the Environment Chapter of the *Trans-Pacific Partnership* addresses the topic of trade and biodiversity. The text recognises the 'importance of conservation and sustainable use of biological diversity and their key role in achieving sustainable development'.

The text promotes access to genetic resources, benefit-sharing, and the protection of Indigenous Knowledge. The US has opposed this text on the basis that it is not a member of the Convention on Biological Diversity. As such, the *Trans-Pacific Partnership* will do little to protect the magnificent biodiversity of the Pacific Rim.

When it comes to trade and climate change, the *Trans-Pacific Partnership* 's language is weak and aspirational. Article SS.15 acknowledges 'climate change as a global concern that requires collective action and recognise the importance of implementation of their respective commitments under the United Nations Framework

Convention on Climate Change (UNFCCC) and its related legal instruments.' However, the United States and Australia have opposed the inclusion of the drafted text on climate change.

US President Barack Obama ostensibly supports domestic action on climate change, but has been unwilling to push for substantive obligations on climate change at an international level. Australia's position against the text on climate change will no doubt harden as Prime Minister Tony Abbott winds back our domestic climate policies.

The removal of fossil fuel subsidies has also been contested by a number of countries, including Vietnam, Peru, and Malaysia: 'The Parties recognise their respective commitments in APEC to rationalise and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption, while recognising the importance of providing those in need with essential energy services.'

There is also a lack of consensus amongst the negotiating parties about dispute resolution over environmental matters, including enforcement, which has drawn ire from a range of commentators and authorities.

'The Environment Chapter does not include enforcement mechanisms serving the defence of the environment; it is vague and weak, and adheres to the lowest common denominator of environmental interests', observed WikiLeaks in its analysis.

'It rolls back key standards set by Congress to ensure that the environment chapters are legally enforceable, in the same way the commercial parts of free-trade agreements are,' commented Ilana Solomon of the Sierra Club.

Professor Jane Kelsey of the University of Auckland said 'the leaked text shows that the obligations are weak and compliance with them is unenforceable.'

In a petition, 350.org has emphasised the need to challenge the *Trans-Pacific Partnership*, which would protect and secure investments in fossil fuels. The climate movement 'won't stand for foreign corporations disabling our sovereignty, democratic processes or the right to a safe future,' it reads.

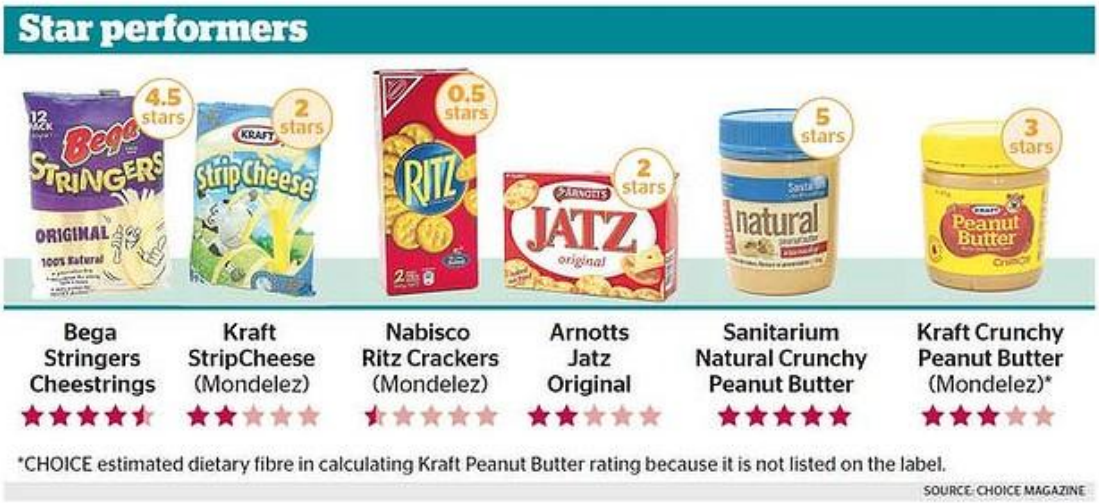
'If the environment chapter is finalised as written in this leaked document, President Obama's environmental trade record would be worse than George W. Bush's,' said Michael Brune, executive director of the Sierra Club. 'This draft chapter falls flat on every single one of our issues — oceans, fish, wildlife, and forest protections — and in fact, rolls back on the progress made in past free trade pacts.'

As it stands, the *Trans-Pacific Partnership* will endanger the protection of the environment, the rich biodiversity of the Pacific Rim, and the climate.

Recommendation 7

Investment clauses could undermine and undercut public regulation in respect of the environment, biodiversity, and climate change.

8. Agriculture



There has been significant debate over the Obama administration's pursuit of regional trade agreements – such as the *Trans-Pacific Partnership*, involving a dozen countries in the Pacific Rim,[316] and the *Trans-Atlantic Trade and Investment Partnership*, a proposed trade agreement between the United States and the European Union.

Will the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership* affect policy flexibilities in respect of the public governance of food, the environment, and public health? There here has been concern about the impact of such regional trade initiatives on packaging and labelling laws and regulations – such as graphic health warning and the plain packaging of tobacco products; food nutrition information; and GM food labelling.

316 Kerry Brewster, 'Trans-Pacific Partnership Could Damage Australia', Lateline, ABC, 10 October 2013, http://www.abc.net.au/lateline/content/2013/s3866749.htm

There has been concern about the impact of the *Trans-Pacific Partnership* upon food regulation. Professor Sharon Friel, Dr Deborah Gleeson, and Libby Hattersley have stressed that 'international trade agreements bring new transnational food companies into countries, along with new food advertising and promotion.'[317] The health and trade researchers observed:

> The *Trans Pacific Partnership* is likely to provide stronger investor protections and enable greater (food) industry involvement in policy-making. It could lead to sweeping changes to domestic regulatory systems, and open up new opportunities for companies to appeal against domestic policies they consider to be a violation of their privileges under the agreement. Together, these changes would weaken the ability for governments to protect public health by, for example, limiting imports and domestic manufacturing of unhealthy foods and drinks.[318]

There has been particular disquiet that 'at the 15th round of negotiations in Auckland last December, the Malaysian government – supported by the United States – reportedly suggested restricting the amount of information food companies would be required to provide about ingredients and formulae of processed food products.'[319] Friel and her collaborators comment that 'these sorts of proposals raise concerns about consumer access to information about food products, as well as the ability of governments to regulate food labelling on public health grounds'.[320] The group maintained: 'Measures like that one will undermine health policy goals and extend the

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317 Sharon Friel, Deborah Gleeson, and Libby Hattersley, 'Trans Pacific Partnership Puts Member Countries' Health At Risk', The Conversation, 9 May 2013, http://theconversation.com/trans-pacific-partnership-puts-member-countries-health-at-risk-13711

318 Ibid.

319 Ibid.

320 Ibid.

control of the food industry over domestic policy.' In their view, 'Re-balancing food industry influence in the negotiation process with input from the health sector is vital.'[321] Friel and her collaborators called for a greater focus upon the protection of public health and nutrition in the trade negotiations: 'Public health advocates and health policymakers must engage with trade negotiations to preserve policy space for public health goals before the window of opportunity closes.'[322]

CHOICE Australia has been concerned about the impact of the *Trans-Pacific Partnership* on food labelling initiatives. Zoya Sheftalovich has written about this issue.[323] She noted that 'Mexico's attempts to limit the importation of high fructose corn syrup were also struck down by the ISDS provision in the North American Free Trade Agreement, with a panel awarding the US-based food producer Cargill more than $77m in damages, plus interest and costs'. Sheftalovich observed: 'After interest, Mexico reportedly now owes Cargill close to $100m.'CHOICE Australia has also 'been campaigning for the labelling of palm oil - which is much higher in saturated fats than other oils and is responsible for widespread deforestation due to unsustainable production - for some time now'.[324] It was concerned that the *Trans-Pacific Partnership* could spell the end of palm oil labelling. Angela Cartwright

321 Ibid.

322 Ibid.

323 Zoya Sheftalovich, 'Trans-Pacific Partnership Secretly Trading Away Rights', CHOICE Australia, 11 February 2014, http://www.choice.com.au/reviews-and-tests/money/shopping-and-legal/legal/trans-pacific-partnership-secretly-trading-away-rights.aspx

324 Ibid.

commented: 'We have fought to get to where we are on food labelling, but the *Trans-Pacific Partnership* could mean a big step backwards.'[325]

There has been significant opposition to the fast-tracking of the *Trans-Pacific Partnership*, and the *Trans-Atlantic Trade and Investment Partnership*. A grand coalition of civil society organisations – including campaigners on GM food labelling - have lobbied the United States Congress against fast-tracking the trade deals.[326] The Organic Consumers Association has opposed Fast Track because it is concerned that secret trade agreements threaten food safety and subvert democracy: 'If these deals are rammed through Congress without scrutiny or debate, we could lose our right to regulate factory farms and GMOs.'[327] Label GMOs.org has also opposed Fast Track: 'We believe in food sovereignty for all people and are taking a strong stand against corporate control of our food supply.'[328] GMO Inside opposes Fast Track because of its concern that 'under the *Trans-Pacific Partnership* GMO labels for US food would not be allowed.'[329] GMO Free Arizona fears that the '*Trans-Pacific Partnership* will

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325 Ibid.

326 Stop Fast Track, http://www.stopfasttrack.com/

327 Stop Fast Track, http://www.stopfasttrack.com/ See Organic Consumers Association, 'Don't Let Congress "Fast-Track" Dangerous Trade Deals', http://salsa3.salsalabs.com/o/50865/p/dia/action3/common/public/?action_KEY=12779

328 Stop Fast Track, http://www.stopfasttrack.com/ See also Stacey Hall, 'Monsanto to outlaw GM labelling worldwide through Secret Trade – the TPP', Label GMOs.org, 26 November 2013, http://www.labelgmos.org/monsanto_to_outlaw_gmo_labeling_worldwide_through

329 Stop Fast Track, http://www.stopfasttrack.com/ See also GMO Inside.org http://gmoinside.org/

pre-empt important GMO labelling and moratoriums'[330] GMO Free USA is concerned that 'the *Trans-Pacific Partnership* would unravel our movement's work with GMO labelling, GMO cultivation bans and gut food & environmental safety standards.' [331] In addition to such specific concerns about GM food labelling, there are broader concerns about how the trade deals will affect intellectual property, public health, the environment, consumer rights, and workers' jobs and wages.

The debate over GM food labelling is a highly polarised discussion – even in international discussions over the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*. It is still hard to determine whether such hopes or fears are justified, in the absence of open, public text and negotiating positions.

There has been much debate about the secrecy of such regional trade agreements. Critics have lamented the lack of transparency, accountability, legislative, and public participation. United States Congressional Democrat Senator Elizabeth Warren warned of the dangers of the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*:

> For big corporations, trade agreement time is like Christmas morning. They can get special gifts they could never pass through Congress out in public. Because it's a trade deal, the negotiations are secret and the big corporations can do their work behind closed doors. We've seen what happens here at home when our trading partners around the world are allowed to ignore workers' rights, wages, and environmental rules. From what I hear, Wall Street,

330 Stop Fast Track, http://www.stopfasttrack.com/

331 Stop Fast Track, http://www.stopfasttrack.com/

> pharmaceuticals, telecom, big polluters, and outsourcers are all salivating at the chance to rig the upcoming trade deals in their favor'.[332]

She commented: 'I believe that if people would be opposed to a particular trade agreement, then that trade agreement should not happen.'[333] The Democrats in the United States Congress have been reluctant to provide President Barack Obama with a fast-track authority in respect of the regional trade deals.[334] As such, there is an impasse between the Obama administration and the United States Congress over these sweeping trade deals, spanning the Pacific Rim, and the Atlantic.

There has been much controversy over the *Trans-Pacific Partnership* – a plurilateral trade agreement involving a dozen nations from throughout the Pacific Rim.[335] One of the most contentious areas of debate has been the question of agriculture. Deborah Elms comments that there has been discussion over the inclusion of agriculture in the deal:

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[332] Elizabeth Warren, 'Remarks to the AFL-CIO Convention', 8 September 2013, http://www.warren.senate.gov/?p=press_release&id=234

[333] Ibid.

[334] Vicki Needham, 'Pelosi Comes Out Against Fast Track', *The Hill*, 12 February 2014, http://thehill.com/homenews/house/198297-pelosi-comes-out-against-fast-track-bill

[335] Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*, Wellington: Bridget Williams Books Inc., 2010; Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013; and C.L. Lim, Deborah Elms and Patrick Low (ed.), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement*, Cambridge: Cambridge University Press, 2012.

> In preparing their calculations about the net benefits of the TPP, many officials realised that if agricultural trade were excluded from the final agreement (or if significant sectors were carved out of the final document, the net economic benefits from the TPP would be lower. Because some agricultural sectors had not been liberalised or had not been fully liberalised in past agreements, there was still scope for improvement in the TPP… If any one area could be carved out as too sensitive for inclusion, it would establish the possibility that countries could carve out other highly sensitive issues from the text elsewhere.[336]

There are a range of agricultural issues under debate – including tariffs and harmonised system codes; rules of origin sanitary and phytosanitary rules; intellectual property standards; investment; the protection of the environment; and the use of regulations, such as food labelling.

In November 2013, WikiLeaks published a Draft Text of the Intellectual Property chapter of the *Trans-Pacific Partnership*.[337] The Intellectual Property chapter includes text on patent law; trade mark law; copyright law; data protection; and intellectual property enforcement.[338] A number of the United States proposals are particularly are boosting the intellectual property rights of agricultural companies, the biotechnology industry, and the food industry. In January 2014, WikiLeaks also published a Draft

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336 Deborah Elms, 'Agriculture and the Trans-Pacific Partnership' in Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013, 106-130 at 107.

337 WikiLeaks, 'Secret Trans-Pacific Partnership Agreement: the IP Chapter', 13 November 2013, https://wikileaks.org/tpp/

338 Matthew Rimmer, 'Our Future is at Risk: Disclose the Trans-Pacific Partnership Now', *New Matilda*, 15 November 2013, https://newmatilda.com/2013/11/15/our-future-risk-disclose-tpp-now

Text of the Environment Chapter of the *Trans-Pacific Partnership*.[339] The revealed text reveals a weak regime for the protection of the environment, biodiversity, and climate change.[340] As such, the Environment Chapter will do little provide for protection of public regulation in respect of food and the environment. There has also been much concern about the proposals in respect of the Investment Chapter.[341] The investor-state dispute settlement regime would enable foreign investors to bring tribunal action against nation states in respect of government decisions, which adversely affect their foreign investments.

The Biotechnology Industry Organization (BIO) has maintained that the status quo in the United States should be a model for the *Trans-Pacific Partnership*:

> With regard to labelling of foods derived from agricultural biotechnology, BIO recommends the development of labelling practices consistent with the U.S. Food and Drug Administration (FDA) Draft Guidance. Therefore, any mandatory or required labelling for genetically engineered products should be science based, such as if the product has been significantly changed nutritionally or if there have been changes in other significant health-related

339 WikiLeaks, 'WikiLeaks Release of Secret Trans-Pacific Partnership: Environment Chapter Consolidated Text', 24 November 2013, https://wikileaks.org/tpp-enviro/

340 Matthew Rimmer and Charlotte Wood, 'Trans-Pacific Partnership Greenwashes Dirty Politics', *New Matilda*, 17 January 2014, https://newmatilda.com/2014/01/16/tpp-greenwashes-dirty-politics

341 Matthew Rimmer, 'A Dangerous Investment: Australia, New Zealand, and the Trans-Pacific Partnership', *The Conversation*, 2 July 2012, http://theconversation.edu.au/a-dangerous-investment-australia-new-zealand-and-the-trans-pacific-partnership-7440

> characteristics of the food (allergenicity, toxicity, or composition). Voluntary labelling should be truthful and not misleading.[342]

BIO has maintained: 'The U.S. government has stated the intention to treat the *Trans-Pacific Partnership* as a model agreement for the 21st century, and therefore BIO believes that sound, objective and science-based approaches to agricultural biotechnology regulation should be a top priority, particularly with respect to the challenges facing global agriculture and energy supplies in the 21st century and beyond.'[343] The biotechnology industry is thus keen for the *Trans-Pacific Partnership* to address regulatory restrictions in respect of agricultural biotechnology – including in respect of labelling.

James Trimarco has warned: 'The *Trans Pacific Partnership* is likely to be a setback for efforts to regulate and label GMO foods.'[344]

Barbara Chicherio complained that the *Trans-Pacific Partnership* was a boon to Monsanto, and would undermine public regulation in respect of food and health.[345] She was particularly worried about the labelling of GM foods:

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342 Biotechnology Industry Organization, 'BIO comments on the proposed accession of Malaysia to the *Trans Pacific Partnership* (TPP) negotiations', 22 November 2010, http://www.bio.org/node/228

343 Ibid.

344 James Trimarco, 'Will a Secretive International Trade Deal Ban GMO Labelling?', *Yes Magazine!*, 18 October 2013, http://www.yesmagazine.org/planet/will-secretive-international-trade-deal-ban-gmo-labeling-trans-pacific-partnership

> The labelling of foods containing GMOs (Genetically Modified Organisms) will not be allowed. Japan now has labelling laws for GMOs in food. Under the TPP Japan would no longer be able to label GMOs. This situation is the same for New Zealand and Australia. The US is just beginning to see some progress towards labelling GMOs. Under the TPP GMO labels for US food would not be allowed.[346]

The Sustainability Council in New Zealand has also been particularly concerned about the impact of the Trans-Pacific Partnership upon GM Food Labelling. In an opinion-editorial for *The New Zealand Herald*, Stephanie Howard and Simon Terry wondered: 'Will losing the right to choose GM-free food be a price of the next and biggest free trade deal?'[347] The researchers at the Sustainability Council observed:

> The United States has made clear that a priority for the proposed *Trans Pacific Partnership* (TPP) is the abolition of laws that require genetically modified foods to be labelled. That puts New Zealand in its sights because of GM ingredients in food products must generally be labelled here.
>
> Although there are exemptions such as highly refined oils and GM contamination below 1 per cent, New Zealand food companies and supermarkets have avoided ingredients in their products that would trigger the labelling and retailers essentially do not stock products tagged as GM.

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345 Barbara Chicherio, 'How New 'Free' Trade Deal Aids Monsanto', *Green Left Weekly*, 28 September 2013, https://www.greenleft.org.au/node/55054

346 Ibid.

347 Stephanie Howard and Simon Terry, 'Let's Insist on Labels for GM Food', *The New Zealand Herald*, 10 November 2011, http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=10764893

> Without the labelling law, New Zealanders who want to avoid genetically modified food would have to rely on the willingness of producers to declare such content - or a patchwork of independent testing.
>
> Loss of the right to know when a product contains GM ingredients could quickly slide into effective loss of the right to choose everyday foods that are not genetically modified. Instead of it being the norm for food companies to strive to keep GM out of their products, this could become the preserve of niche eco brands.[348]

The writers alleged: 'The reason Washington wants to stamp out all mandatory labelling is plain: the US is the world's largest producer of GM crops and its soy and corn are now almost all genetically modified.'[349]

Olivier De Schutter, the United Nations special rapporteur on the right to food, and Kaitlin Cordes, a food security researcher from Columbia University have made an important contribution to the policy debate over the *Trans-Pacific Partnership*.[350] The writers lament the failure to consider the human rights implications of the agreement:

> Whether trade liberalization generally helps or harms the most vulnerable is a complex question. But that theoretical debate should not prevent us from carrying out a thorough human-rights impact assessment on the terms of the deal currently on the table. Such an assessment should be conducted before the TPP negotiations reach any final agreement on the relevant issues, and it should not overlook how the terms are implemented in practice.

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348 Ibid.

349 Ibid.

350 Olivier de Schutter and Kaitlin Cordes, 'Trading Away Human Rights', *Project Syndicate*, 7 January 2014, http://www.project-syndicate.org/commentary/olivier-de-schutter-and-kaitlin-y--cordes-demand-that-the-trans-pacific-partnership-s-terms-be-subject-to-a-human-rights-impact-assessment#9Lq5cFjsOIfGZhhf.99

> Unfortunately, TPP member states have not only failed to do this; they have also excluded independent organizations from the assessment process by refusing to provide access to draft texts.[351]

Citing the work of Joseph Stiglitz, Olivier De Schutter and Kaitlin Cordes worry that 'the TPP's emphasis on regulatory policies suggests that business interests will trump human rights.'[352]

In particular, Olivier De Schutter and Kaiirlin Cordes express concerns about the impact of the *Trans-Pacific Partnership* upon farming, agriculture, and food security:

> Leaked drafts of intellectual-property proposals show an obstinate US effort to require patent protections for plants and animals, thus going beyond the World Trade Organization's *TRIPS Agreement* 1994. The US stance could further restrict farmers' access to productive resources, thus affecting the right to food. And such proposals would limit governments' options when addressing wider food-related human-rights issues.

The writers warn: 'This clash of interests contravenes basic principles of international law, namely that countries' trade deals must not conflict with their obligations under human-rights treaties'.[353] The policy-makers emphasized: 'That is why a human-rights impact assessment must be conducted – and necessary additional safeguards added – before any TPP deal is signed.'[354]

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351 Ibid.

352 Ibid.

353 Ibid.

354 Ibid.

The writers stressed that transparency and inclusiveness should be the prerequisites of any deal: 'Although trade negotiations require discretion to avoid political grandstanding by participants, the secrecy that currently surrounds the TPP talks is preventing important human-rights arguments from being aired'.[355] Olivier De Schutter and Kaitlin Cordes emphasized that a change in the process could address significant injustices: 'If they truly want the TPP to be a model for the twenty-first-century global economy, as they claim, then they should show real leadership'.[356] The pair advised: 'The TPP negotiators should consider the rights of everyone affected by the deal and act in the public interest, not just the special interests of the economic players that stand to benefit the most.'[357]

In a report to the United Nations on the right to food, Olivier De Schutter has explored the interaction between intellectual property and food security.[358] The Special Rapporteur argued that 'in order to ensure that the development of the intellectual property rights regime and the implementation of seed policies at the national level are compatible with the right to food, States should… support efforts by developing countries to establish a sui generis regime for the protection of intellectual property rights which suits their development needs and is based on human rights.'[359] Olivier

355 Ibid.

356 Ibid.

357 Ibid.

358 Olivier De Schutter, *The Transformative Potential of the Right to Food: Report of the Special Rapporteur on the Right to Food*, Human Rights Council, United Nations General Assembly, A/HRC/25/57, 24 January 2014, http://www.srfood.org/images/stories/pdf/officialreports/20140310_finalreport_en.pdf

359 Ibid., 21-22.

De Schutter was hopeful that democracy and diversity could help mend broken food systems.[360] He observed: 'The greatest deficit in the food economy is the democratic one'.[361] Olivier De Schutter argued: 'By harnessing people's knowledge and building their needs and preferences into the design of ambitious food policies at every level, we would arrive at food systems that are built to endure.'[362] He maintained that 'food democracy must start from the bottom-up, at the level of villages, regions, cities, and municipalities.'[363] Olivier De Schutter has insisted that there is a need for an 'alternative paradigm for the 21st century': 'There is much that can be done by developing countries themselves to support small-scale farmers with the land, credit, technology and market access they need.'[364]

Recommendation 8

Investment clauses could be deployed in the field of agriculture. Big food and soda companies could question food nutrition labelling laws. Foreign biotechnology companies could challenge GM food labelling laws.

360 Olivier De Schutter, 'Democracy and Diversity can Mend Broken Food Systems – Final Diagnosis from UN Right to Food Expert', United Nations, 10 March 2014, http://www.srfood.org/en/democracy-and-diversity-can-mend-broken-food-systems-final-diagnosis-from-un-right-to-food-expert

361 Ibid.

362 Ibid.

363 Ibid.

364 Olivier De Schutter, 'Ending Hunger – the Rich World Holds the Keys', *The Ecologist*, 25 March 2014, http://www.theecologist.org/blogs_and_comments/commentators/2333245/ending_hunger_the_rich_world_holds_the_keys.html

Multinational agricultural companies could question Australian agricultural policies. The United Nations Special Rapporteur on the Right to Food, Olivier De Schutter, has raised larger issues about the impact of trade deals like the *Trans-Pacific Partnership* upon food security, nutrition, hunger, and the right to food.

9. Copyright Law, IT Pricing, and the Digital Economy

Floppy Disk Petition Urges Senator Wyden to Oppose Outdated Trade Policy (2014)

Disturbingly, the investment chapter in the *Trans-Pacific Partnership* defines investment broadly – including intellectual property rights. The treaty transforms intellectual property rights from privileges designed to promote the 'progress of science and the useful arts' into instrumental tools for foreign investment. This means companies could challenge, frustrate and even block intellectual property reforms under the investment chapter of the *Trans-Pacific Partnership*. The same problem arises in respect of the *Korea-Australia Free Trade Agreement*. The linkage between intellectual property and investment also raises issues in respect of copyright law, IT Pricing, and the Digital Economy.

A. The Intellectual Property Chapter

WikiLeaks published a draft Intellectual Property Chapter of the Trans-Pacific Partnership in November 2013.[365]

The leaked intellectual property chapter of the *Trans-Pacific Partnership* looks like it has been dictated by the United States Chamber of Commerce. Among other things, the agreement seeks to provide for longer and stronger copyright protection for transnational corporations.

In the light of day, the *Trans-Pacific Partnership* appears to be a monster. The Intellectual Property chapter is long, complex, prescriptive, bellicose and diabolical. What's missing, as the Electronic Frontier Foundation observed, is any recognition of the public interests to be served by copyright law:

> The leaked text, from August 2013, confirms long-standing suspicions about the harm the agreement could do to users' rights and a free and open Internet. From locking in excessive copyright term limits to further entrenching failed policies that give legal teeth to Digital Rights Management (DRM) tools, the TPP text we've seen today reflects a terrible but

[365] WikiLeaks, 'Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions (30 August 2013 consolidated bracketed negotiating text)' https://wikileaks.org/tpp/

> unsurprising truth: an agreement negotiated in near-total secrecy, including corporations but excluding the public, comes out as an anti-user wish list of industry-friendly policies.[366]

Instead of promoting the progress of science and the useful arts, the *Trans-Pacific Partnership* transforms intellectual property into a means to protect and secure the investment of transnational corporations. Professor Michael Geist of the University of Ottawa said that there was a debate over the philosophical goals of intellectual property:

> [Other nations have argued for] balance, promotion of the public domain, protection of public health, and measures to ensure that IP rights themselves do not become barriers to trade. The opposition to these objective[s] by the US and Japan (Australia has not taken a position) speaks volumes about their goals for the TPP.[367]

It is particularly disappointing that Australia has been such a passive partner to the United States in the Pacific Rim negotiations, showing little inclination to stand up for the public interest.

The *Trans-Pacific Partnership* will impoverish the number and variety of works in the public domain with outrageous demands for copyright. The United States,

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366 Parker Higgins and Maira Sutton, 'TPP Leak Confirms the Worst: US Negotiators Still Trying to Trade Away Internet Freedoms', Electronic Frontier Foundation, 13 November 2013, https://www.eff.org/deeplinks/2013/11/tpp-leak-confirms-worst-us-negotiators-still-trying-trade-away-internet-freedoms

367 Michael Geist, 'The Trans-Pacific Partnership IP Chapter Leaks: Canada Pushing Back against Draconian U.S. Demands', the University of Ottawa, 13 November 2013, http://www.michaelgeist.ca/content/view/6994/125/

Australia, Peru, Singapore and Chile have proposed a term of life plus 70 years for natural persons. Mexico wants copyright protection for life plus 100 years. New Zealand, Canada and other countries who follow the Berne Convention norm, particularly stand to suffer, given they only have a copyright term of life plus 50 years.

For corporate owned works, the United States has proposed 95 years of protection, while Australia, Peru, Singapore and Chile are pushing for 70. The United States' proposals in respect of copyright term extension in the Trans-Pacific Partnership would be a form of corporate welfare.

Such windfalls would be money for jam. A copyright term extension throughout the Pacific Rim would have an adverse impact upon cultural heritage, innovation, competition, and freedom of speech.

The *Trans-Pacific Partnership* will also undermine domestic Australian policy initiatives. It will lock nation states into a defective and anachronistic regime for technological protection measures. As Timothy Lee said:

> The treaty includes a long section, proposed by the United States, requiring the creation of legal penalties for circumventing copy-protection schemes such as those that prevent copying of DVDs and Kindle books.[368]

[368] Timothy Lee, 'Leaked Treaty is a Hollywood Wish List. Could it Derail Obama's Trade Agenda?', *The Washington Post*, 13 November 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/13/leaked-treaty-is-a-hollywood-wish-list-could-it-derail-obamas-trade-agenda/

Economist Peter Martin lamented that the Trans-Pacific Partnership undermined the Australian inquiry into IT Pricing. 'Australia backs the US at every turn against its own consumers,' he wrote.[369] Greens Senator Scott Ludlam concurred. 'The current *Trans-Pacific Partnership* text also entrenches the disadvantages Australians experience in being ripped off with unfair IT pricing,' he said.[370]

The *Trans-Pacific Partnership* will seemingly be beneficial to some of the companies most criticised in the IT Pricing inquiry: Adobe, Microsoft, and Apple. It also limits the policy space for governments to craft copyright exceptions. This is disturbing, especially given that the Australian Law Reform Commission is considering whether Australia should adopt a defence for fair use. James Love of Knowledge Ecology International observed:

> One set of technically complex but profoundly important provisions are those that define the overall space that governments have to create exceptions to exclusive rights ... In its current form, the TPP space for exceptions is less robust than the space provided in the 2012 WIPO Beijing treaty or the 2013 WIPO Marrakesh treaty, and far worse than the TRIPS Agreement.[371]

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369 Peter Martin, 'Australia backs the US at every turn against its Own Consumers', *The Sydney Morning Herald*, 14 November 2013, http://www.smh.com.au/federal-politics/political-news/australia-backs-the-us-at-every-turn-against-its-own-consumers-20131113-2xh0p.html

370 Senator Scott Ludlam, 'Greens act to expose threats to Australians after damning leak of secret trade deal document', Press Release, 14 November 2013, http://scott-ludlam.greensmps.org.au/content/media-releases/greens-act-expose-threats-australians-after-damning-leak-secret-trade-deal-do

371 James Love, 'Knowledge Ecology International analysis of TPP IPR Text, from August 30, 2013', Knowledge Ecology International, 13 November 2013, http://keionline.org/node/1825

Maira Sutton and Patrick Higgins of the Electronic Frontier Foundation said that 'Given the important role that flexibility in copyright has played in enabling innovation and free speech, it's a terrible idea to restrict that flexibility in a trade agreement.'[372] Only Vietnam sought to put forward positive positions in respect of copyright exceptions in the agreement, noted Sean Rintel of Electronic Frontiers Australia.

Australia stands to be left in a woeful position. We will be burdened with heavy commitments in respect of copyright protection, without the flexibility of the United States regime, with its defence of fair use and first amendment protection for freedom of speech.

The *Trans-Pacific Partnership* is like the notorious Stop Online Piracy Act (SOPA) or Anti-Counterfeiting Trade Agreement (ACTA) in certain respects. It seeks to increase civil remedies, criminal penalties, and border measures. As Senator Ludlam said:

> The TPPA text still forces internet providers to police Australian internet users and enables the US to place us under surveillance, justified as a US-led crackdown on internet piracy ... It's clear this secret deal, driven by foreign interests to benefit some of the largest multinationals, will still censor internet content, impose harsh criminal penalties for non-commercial

[372] Parker Higgins and Maira Sutton, 'TPP Leak Confirms the Worst: US Negotiators Still Trying to Trade Away Internet Freedoms', Electronic Frontier Foundation, 13 November 2013, https://www.eff.org/deeplinks/2013/11/tpp-leak-confirms-worst-us-negotiators-still-trying-trade-away-internet-freedoms

copyright infringements, and force Australian internet service providers to police users and hand information over to law enforcement.[373]

B. The Investment Chapter

The investment chapter may frustrate any efforts by parliaments in the Pacific Rim to engage in progressive reform in respect of intellectual property. An investor-state dispute resolution mechanism could be deployed by foreign investors to challenge intellectual property reforms.

The tobacco industry has already used an investor clause to question Australia's plain packaging regime. Eli Lilly has challenged Canada's patent laws under an investment clause in the North American Free Trade Agreement. Copyright reforms could similarly be challenged by copyright industries under an investment clause in the Trans-Pacific Partnership.

Corynne McSherry and Maira Sutton from the Electronic Frontier Foundation have considered the impact of investor state dispute settlement upon copyright law reform under the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment*

[373] Senator Scott Ludlam, 'Greens act to expose threats to Australians after damning leak of secret trade deal document', Press Release, 14 November 2013, http://scott-ludlam.greensmps.org.au/content/media-releases/greens-act-expose-threats-australians-after-damning-leak-secret-trade-deal-do

Partnership.[374] The writers observed that Big Content companies could use investment clauses to undermine copyright law reform and other digital regulation:

> Let's say a country adopts a new flexible copyright law. For instance, one that gives users a blanket right to remix songs or videos for noncommercial purpose and post them online, or one that ensures greater user protections for everyone including educational institutions, libraries, or people with visual or learning disabilities. Companies could bring an investor-state case, alleging that the policy undermines their copyright protections, and therefore, their profits. Or, more likely, it could use the threat of such a lawsuit to stop that law from getting passed in the first place. Indeed, given the perverse nature of investor-state powers, even if all the other harmful provisions are taken out of the TPP, corporations could still have the ability to attack and potentially unravel virtually any pro-user digital regulation.[375]

McSherry and Sutton noted: 'The investor–state provision is just one of many problems in the *Trans-Pacific Partnership*.'[376] The Electronic Frontier Foundation attorneys said: 'At the root of all of this, however, is that the secret trade negotiation process is a vehicle for multinational corporations to lobby for provisions that will impact how users interact, share, and develop technological tools and content — without any opportunity for those users to know about, much less comment on, those

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374 Corynne McSherry and Maira Sutton, 'Another Reason to Hate TPP: It Gives Big Content New Tools to Undermine Sane Digital Rights Policies', the Electronic Frontier Foundation, 24 October 2013, https://www.eff.org/deeplinks/2013/10/another-reason-hate-tpp-it-gives-big-content-new-tools-undermine-sane-digital

375 Ibid.

376 Ibid.

provisions.'[377] The *Trans-Pacific Partnership* will steamroll domestic laws and regulations.

C. Fast-Track Authority

Politicians around the Pacific Rim have become increasingly concerned about how it overrides national sovereignty, democracy, and good governance. In the United States, Democrats and Republicans alike have rebelled against Obama's demands for the *Trans-Pacific Partnership* to include 'fast-track' authority provisions to override the US Congress' authority on trade matters. Representative Mark Pocan and fellow Democrats observed: 'Twentieth Century 'Fast Track' is simply not appropriate for 21st Century agreements and must be replaced.' The members insisted that:

> A new trade agreement negotiation and approval process that restores a robust role for Congress is essential to achieving U.S. trade agreements that can secure prosperity for the greatest number of Americans, while preserving the vital tenets of American democracy in the era of globalization.[378]

The Australian Greens have demanded that the Coalition reveal the full text of the *Trans-Pacific Partnership* to the Australian Parliament. Senator Whish-Wilson has

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377 Ibid.

378 'DeLauro, Miller Lead 151 House Dems Telling President They Will Not Support Outdated Fast Track for Trans-Pacific Partnership', http://delauro.house.gov/index.php?option=com_content&view=article&id=1455:delauro-miller-lead-151-house-dems-telling-president-they-will-not-support-outdated-fast-track-for-trans-pacific-partnership&catid=2:2012-press-releases&Itemid=21

maintained that 'Tony Abbott must end the secrecy and hidden agendas that have defined his Government.' Brendan Molloy of the Pirate Party of Australia warned that 'This corporate wishlist masquerading as a trade agreement is bad for access to knowledge, access to medicine, and access to innovation.' In New Zealand, Gareth Evans MP has observed that the *Trans-Pacific Partnership* will not provide a fair deal for New Zealand citizens and consumers.

Now that Wikileaks has published the intellectual property chapter, the full text and the chapters and the negotiating texts of the *Trans-Pacific Partnership* should also be fully disclosed. Given the extent of the corporate capture of the negotiating process, the *Trans-Pacific Partnership* cannot and should not be fast-tracked.

On the 20th March 2014, twenty-five leading technology companies wrote to the United States Congress, asking its representatives to oppose any form of fast-track authority for trade agreements like the *Trans-Pacific Partnership*.[379] The signatories included reddit, Automattic (the company behind WordPress), Imgur, DuckDuckGo, CREDO Mobile, BoingBoing, Thoughtworks, Namecheap, and Cheezburger.

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[379] Parker Higgins and Maira Sutton, 'Tech Companies Urge Senator Wyden to Reject Fast Track and Bring Transparency to TPP', Electronic Frontier Foundation, 20 March 2014, https://www.eff.org/deeplinks/2014/03/tech-companies-urge-senator-wyden-reject-fast-track-and-bring-transparency-tpp

The letter emphasizes that massive trade deals like the Trans-Pacific Partnership are an 'emerging front in the battle to defend the free Internet.'[380] The technology companies warn: 'These highly secretive, supranational agreements are reported to include provisions that vastly expand on any reasonable definition of 'trade,' including provisions that impact patents, copyright, and privacy in ways that constrain legitimate online activity and innovation'[381]

The letter is concerned that 'None of the usual justifications for trade negotiation exclusivity apply to recent agreements like the *Trans-Pacific Partnership*'.[382] The technology companies comment: 'Even assuming that it is legitimate to shield the discussions of certain trade barriers—like import tariffs—from political interference, the provisions in these new trade agreements go far beyond such traditional trade issues.'[383]

The technology companies expressed concerns about the intellectual property chapter and the investment chapter:

> Based on what we've seen in leaked copies of the proposed text, we are particularly concerned about the U.S. Trade Representative's proposals around copyright enforcement. Dozens of digital rights organizations and tens of thousands of individuals have raised alarm over provisions that would bind treaty signatories to inflexible digital regulations that undermine

380 Technology Companies, 'Letter to Senator Ron Wyden', 20 March 2014, https://www.eff.org/files/2014/03/20/tech-companies-wyden-letter-20140320.pdf

381 Ibid.

382 Ibid.

383 Ibid.

> free speech. Based on the fate of recent similar measures, it is virtually certain that such proposals would face serious scrutiny if proposed at the domestic level or via a more transparent process. Anticipated elements such as harsher criminal penalties for minor, non-commercial copyright infringements, a 'take-down and ask questions later' approach to pages and content alleged to breach copyright, and the possibility of Internet providers having to disclose personal information to authorities without safeguards for privacy will chill innovation and significantly restrict users' freedoms online.[384]

The technology companies are concerned that the trade deal, with its intellectual property chapter, and its investment chapter, will frustrate domestic law reform: 'In light of these needed revisions, the U.S. system cannot be crystallized as the international norm and should not be imposed on other nations.' The technology companies stress: 'It is crucial that we maintain the flexibility to re-evaluate and reform our legal framework in response to new technological realities.' The technology companies emphasized: 'Ceding national sovereignty over critical issues like copyright is not in the best interest of any of the potential signatories of this treaty.'[385] The technology companies stressed: 'Our industry, and the users that we serve, need to be at the table from the beginning to design policies that serve more than the narrow commercial interests of the few large corporations who have been invited to participate.'[386]

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384 Ibid.

385 Ibid.

386 Ibid.

Recommendation 9

Investment clauses could have a chilling effect upon the Digital Economy. Investor-state dispute settlement could be deployed by copyright industries to challenge significant copyright reforms. Investment clauses could be invoked by IT companies, such as Apple, Adobe, and Microsoft, to challenge IT pricing reforms. Both old media and new media could rely upon investment clauses to test law reform in respect of privacy law.

10. Trade Secrets, Confidential Information, and Privacy

The *Trans-Pacific Partnership* (TPP) is a secret trade deal, which proposes greater criminal sanctions in respect of the disclosure of trade secrets. The draconian agreement has wider implications for government and business, spies and intelligence agencies, journalists, media and news organisations, and whistleblowers.

Last week, WikiLeaks published the draft text of the Intellectual Property Chapter, with a dramatic flourish. Its editor-in-chief, Julian Assange, declared: 'If instituted, the TPP's IP regime would trample over individual rights and free expression, as well as ride roughshod over the intellectual and creative commons'.

With the publication of the text, there has been an outcry about the push for longer and stronger copyright protection by the United States Trade Representative (USTR). There has been a wide concern about the impact of such copyright proposals upon creativity, freedom, innovation, privacy, consumer rights, and competition. There has also been alarm that the patent obligations proposed in the Intellectual Property Chapter will raise the price of pharmaceutical drugs, undermine public health, and obstruct access to essential medicines – particularly in respect of HIV/AIDS, tuberculosis, and malaria. There have also been reservations about the increased powers of trademark holders, particularly in respect of legal action for counterfeiting, and cybersquatting. One controversial area which has been overlooked, but is deserving of greater attention, is the push by the United States Trade Representative for stronger protection of trade secrets across the Pacific Rim.

A. The United States Trade Representative and Trade Secrets

In its Special 301 Report for 2013, the USTR placed increased emphasis on the need to protect trade secrets, noting: 'Companies in a wide variety of industry sectors – including information and communication technologies, services, biopharmaceuticals, manufacturing, and environmental technologies – rely on the ability to protect their trade secrets and other proprietary information.' The USTR noted: 'The theft of trade secrets and other forms of economic espionage, which results in significant costs to U.S. companies and threatens the economic security of the United States, appears to be escalating.' The USTR feared: 'If a company's trade secrets are stolen, its past investments in research and development, and its future profits, may be lost'. The USTR observed that 'trade secret theft threatens national security and the U.S. economy, diminishes U.S. prospects around the globe, and puts American jobs at risk.'

With much pressing by the US Chamber of Commerce, the USTR has been alarmed about economic espionage – particularly in respect of hacking by China. Such concerns are apparent in a recent dispute. The US Department of Justice has brought this year an action against a Chinese company called Sinovel and three associated individuals for the theft of trade secrets of a United States wind technology company called AMSC (formerly known as American Superconductor Inc). FBI Executive Assistant Director Richard McFeely observed: 'The Sinovel case is a classic example of the growing insider threat facing our nation's corporations and their intellectual property.' He commented: 'The FBI will not stand by and watch the haemorrhage of

U.S. intellectual property to foreign countries who seek to gain an unfair advantage for their military and their industries.'

As part of its larger push for greater powers for intellectual property enforcement, the US hopes that further reforms to trade secret protection under the *Trans-Pacific Partnership* will provide better protection and security for its flagship technology companies.

B. The Trans-Pacific Partnership and Trade Secrets

In the *Trans-Pacific Partnership* there is a general agreement in the text amongst the Pacific Rim nations that 'Parties shall ensure that natural and legal persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state commercial enterprises) without their consent in a manner contrary to honest commercial practices.' There also appears to be agreement that 'trade secrets encompass, at a minimum, undisclosed information as provided for in Article 39.2 of the TRIPS Agreement.' This is the current obligations for members of the WTO.

However, the US has made a radical proposal: 'Each Party shall provide for criminal procedures and penalties at least in cases in which a trade secret relating to a product in national or international commerce is misappropriated, or disclosed, willfully and without authority for purposes of commercial advantage or financial gain, and with the intent to injure the owner of such trade secret.' The US proposal on criminal procedures and penalties for trade secrets has been supported by Mexico, Canada,

New Zealand, and Japan. This proposal has been opposed by Singapore, Malaysia, Peru, Vietnam, Chile, and Brunei. Curiously, Australia opposes this paragraph ad referendum – which means to subject to agreement by others and finalisation of the details. There has been a debate about the nature of disclosure of trade secrets between Australia and the US.

Disturbingly, there is no text about defences and exceptions in respect of these broad proposals for trade secret protection. This is concerning. On occasion, companies have invoked trade secrets against journalists. Apple, for instance, filed suit against the site Think Secret, claiming that there had been a breach of trade secrets. Such an action was highly controversial. On other occasions, companies have tried to use trade secrets to frustrate public criticism. In the US, gas companies have tried to rely upon trade secrets to deny information to medical doctors who are concerned about the impact of fracking upon the health of their patients.

Furthermore, the *Trans-Pacific Partnership* has an investment chapter. Under an investor-state dispute settlement system, intellectual property owners could challenge government regulation on the grounds that it interfered with its investments in trade secrets. That could be particularly problematic for various forms of regulatory review involving confidential information.

C. The National Security Agency, Wikileaks, and Whistleblowers

Trade secrets have been invoked not only in commercial matters, but in respect of government information. In Australia, there has been much litigation over defences in

respect of the disclosure of confidential information. In the 1980 case of *Commonwealth* v. *Fairfax,* the Australian Government sought to prevent Fairfax from publishing Defence Papers, relying upon copyright law and confidential information. In the 1988 Spycatcher case, the British Government sought to prevent the publication of the book Spycatcher, claiming a breach of fiduciary duty, a breach of confidence, and a breach of contract. In New Zealand, there have been battles of the publication of memoirs of special forces. Given such past precedents, overly strong protection of confidential information in the Trans-Pacific Partnership could have a chilling effect upon the freedom of press, the freedom of speech, and whistleblowers.

In the United States, there was much controversy over the disclosure of the Pentagon Papers. The issue is particularly acute in contemporary times with the war of whistleblowers. The Obama Administration has been zealous in its pursuit of whistleblowers, such as Julian Assange, Manning, and Edward Snowden. It certainly has WikiLeaks in its cross-hairs. The Obama Administration seems also aggrieved by journalists, such as Glenn Greenwald, reporting on such sensitive matters as national security. Would the introduction of criminal penalties for trade secrets extend to such journalists, hackers, and whistleblowers?

Paradoxically, the US wants to jealously guard its own trade secrets, while at the same time wanting to know the world's secrets. As revealed by Edward Snowden, the NSA has engaged in massive, dragnet surveillance, at home and abroad. The *New York Times* has reported: 'This huge investment in collection is driven by pressure from the agency's 'customers,' in government jargon, not only at the White House, Pentagon, F.B.I. and C.I.A., but also spread across the Departments of State and Energy,

Homeland Security and Commerce, and the United States Trade Representative.' There has been concern that the NSA has been engaged in economic espionage, even amongst supposedly friendly nations.

There has been even alarm amongst trading partners at the prospect that the NSA has conducted surveillance for its customer the USTR for trade agreements, such as the *Trans-Pacific Partnership,* and the *Trans-Atlantic Trade and Investment Partnership*. Dozens of civil society groups led by the Electronic Frontier Foundation have written to the USTR, asking whether the NSA is spying on individuals or groups involved in the *Trans-Pacific Partnership* negotiations. The letter emphasized: 'Core American principles ranging from the right to privacy to the right to petition our government are at stake.' The civil society groups emphasized: 'Simply put, we believe that our organizations as well as all others advocating on trade policy matters have right to an assurance that their operations are not under surveillance by U.S. government agencies.'

In light of such wide-ranging and far-reaching surveillance by the NSA, could the US proposal on trade secrets backfire? Could the US itself be targeted with criminal penalties in respect of NSA surveillance if such proposals were agreed to?

Summary

In conclusion, the provisions of trade secret protection in the *Trans-Pacific Partnership* are significant, broad, punitive, and over-reaching. There is far too great an emphasis upon criminal law, economic espionage, and national security in the

design of regime. The unbalanced agreement seeks to provide expansive protection for the trade secrets of transnational corporations and governments, without due and proper consideration for the public interest in access to information, freedom of expression, and freedom of the press. There are insufficient safeguards in the *Trans-Pacific Partnership* for the protection of civil liberties, human rights, and internet freedom. More broadly, the Intellectual Property Chapter of the *Trans-Pacific Partnership* is concerning, given its favouritism towards longer and stronger rights. United States Senator Ron Wyden's spokesman has observed: 'This chapter of the trade deal will have broad implications on the Internet economy, innovation and public health and should be considered as transparently and deliberately as possible.'

The *Trans-Pacific Partnership* itself should not be a trade secret. Governments have sought to frustrate freedom of information requests on spurious grounds of national security, defence, or international relations. The public interest demands that a treaty of such scale and scope, ambition and import, be disclosed for all to see. Given the content of the Intellectual Property chapter, the rest of the text of the *Trans-Pacific Partnership* should be disclosed, and subjected to open and vigorous public scrutiny.

Recommendation 10

Investment clauses could be invoked in relation to foreign investment in respect of confidential information, trade secrets, and data protection (particularly in respect of agriculture and pharmaceutical drugs). This could raise issues in respect of regulatory review.

11. Financial Regulation

Wall Street Bull, Wikipedia

There has been a worry amongst policy-makers and legislators that Wall Street will use trade agreements and investment clauses to challenge and undermine financial regulation established in the wake of the Global Financial Crisis.

There has been concern about the close relationships between trade representatives, and financial and banking institutions in the negotiation of trade agreements – like the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*.

Financial disclosures obtained by the Republic Report have shown that key trade representatives from the United States have recently worked for financial institutions, and received significant payments from CitiBank and the Bank of America.[387] Michael

[387] Lee Fang, 'Obama Admin's TPP Trade Officials Received Hefty Bonuses From Big Banks', *Republic Report*, 17 February 2014, http://www.republicreport.org/2014/big-banks-tpp/

Froman, the current United States Trade Representative, received over $US 4 million in exit payments when he left CitiGroup, and joined the Obama administration. Forman was awarded a $US2 million payment in connection to his holdings in two investment funds in recognition of his service to the CitiGroup since 1999. (He donated some of the money to a charity). Stefan Selig – an Undersecretary for International Trade at the Department of Commerce – was a Bank of America investment banker. He received $5.1 million in incentive pay, and $9 million in bonus pay. In light of such connections, the Republic Report was concerned about the influence of banking and financial institutions upon the trade policy of the United States Trade Representative.

In this context, there have been demands for greater transparency in respect of the negotiations over the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*. In particular, there has been a concern about lobbying by banks and financial institutions, amongst other organisations. The Sunlight Foundation has revealed heavy political donations and lobbying from major corporations and industry associations.[388]

United States Congressional Democrat Senator Elizabeth Warren has been concerned that financial deregulation allowed big banks to loot the American economy during the Global Financial Crisis.[389] She has argued that 'Congress must act to protect our

[388] The Sunlight Foundation, 'TPP Lobby', 13 March 2014, http://sunlightfoundation.com/blog/2014/03/13/tpp-lobby/

[389] Luke Johnston, 'Elizabeth Warren Picks a Fight with Paul Ryan', 7 April 2014, http://www.huffingtonpost.com/2014/04/07/elizabeth-warren-paul-ryan_n_5106395.html

economy and prevent future crises.' She has argued: What we need is a system…that recognizes we don't grow this country from the financial sector; we grow this country from the middle class.'

In this context, Warren warned of the dangers of the *Trans-Pacific Partnership*:

> For big corporations, trade agreement time is like Christmas morning. They can get special gifts they could never pass through Congress out in public. Because it's a trade deal, the negotiations are secret and the big corporations can do their work behind closed doors. We've seen what happens here at home when our trading partners around the world are allowed to ignore workers' rights, wages, and environmental rules. From what I hear, Wall Street, pharmaceuticals, telecom, big polluters, and outsourcers are all salivating at the chance to rig the upcoming trade deals in their favor.[390]

She commented: 'I believe that if people would be opposed to a particular trade agreement, then that trade agreement should not happen.'[391]

Senator Elizabeth Warren of the United States Congress has been particularly worried about the negotiations over new trade agreements being used as a backdoor way to water down financial regulations.[392] She warned that the agreements are 'a chance for these banks to get something done quietly out of sight that they could not accomplish

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390 Senator Elizabeth Warren, 'Speech to the AFL-CIO Convention', 8 September 2013, http://www.warren.senate.gov/?p=press_release&id=234

391 Ibid.

392 Kate Davidson, 'Elizabeth Warren: Trade Talks Could Weaken Bank Oversight', *Politco Pro*, 8 May 2013, http://www.politico.com/story/2013/05/elizabeth-warren-trade-talks-bank-oversight-91033.html#ixzz2rSjoXluW

in a public place with the cameras rolling and the lights on'.[393] Warren appeared concerned about the trade agreements providing new avenues for corporations to challenge financial regulations at home and abroad in ad hoc arbitration tribunals. She was also worried whether the trade agreements will limit the ability of governments to ban certain financial transactions or instruments.

Professor Jane Kelsey from the University of Auckland and Lori Wallach from Public Citizen highlight the fundamental problem of definition in respect of investor-state dispute settlement:

> The definition of 'Investment' in FTAs and BITs is much broader than the real property rights and other specific interests in property that are typically protected under domestic property rights law. This includes regulatory permits and licenses; financial instrument such as futures, options, and derivatives; intellectual property rights; procurement contracts between a state and a foreign investor; and concessions to natural resources granted by a national government to a foreign investor, as well as vague terms such as 'assumption of risk' and 'expectation of profit.' As well, the standard definition of an 'investor' as a person or legal entity that makes an investment has not required that person or entity's actual business activities or commitment of capital in the host country to be substantial or involve actual substantial business activities.[394]

The broad definition of investment will enable a wide range of financial investors to bring action in respect of investor-state dispute settlement.

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393 Ibid.

394 Jane Kelsey and Lori Wallach, '"Investor-State" Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems', 2012, http://tpplegal.files.wordpress.com/2012/05/isds-domestic-legal-process-background-brief.pdf

In its report, the United Nations Conference on Trade and Development (UNCTAD) has expressed concerns about investment clauses being applied in respect of financial measures:

> In 2012, a number of cases emerged that have their origin in the recent financial crisis and the ongoing economic recession. For example, a pair of Chinese investors brought an ISDS claim against Belgium relating to that Government's treatment of Fortis, a Belgian-Dutch financial institution, in the midst of the financial crisis. The claimants reportedly allege damages of US$ 2.3 billion. A Cypriot bank notified its intention to initiate arbitration proceedings against Greece arguing that the latter had discriminated against the claimant's Greek subsidiary when implementing its bank bail-out programme. [395]

UNCTAD was concerned about how investment clauses could be deployed in respect of financial crisis measures and financial austerity measures.

UNCTAD has been particularly concerned about disputes brought in 2013 in relation to the Greek financial crisis.[396] In the case of *Marfin Investment Group* v. *Cyprus*,[397] a Greek investment company has brought legal proceedings against the Republic of

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395 United Nations Conference on Trade and Development (UNCTAD), 'Recent Developments in Investor-State Dispute Settlement: Updated for the Multilateral Dialogue on Investment', 28-29 May 2013, 23-24, http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

396 United Nations Conference on Trade and Development (UNCTAD), 'Recent Developments in Investor-State Dispute Settlement: Updated for the Multilateral Dialogue on Investment', April 2014, 5, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

397 *Mafin Investment Group* v. *Cyprus* ICSID Case No. ARB/13/27 http://www.italaw.com/cases/2068

Cyprus to recover an investment in respect of the Cyprus Popular Bank. The Government of Cyprus took over the Cyprus Popular Bank in order to stabilise the financial system, which was suffering from exposure to Greek sovereign debt and loans in Greece. The Marfin Investment Group has argued that Cyprus has breached obligations relating to a bilateral treaty between Greece and Cyprus. Andreas Vgenopoulos, chairman of Marfin, said: 'We have no doubt that if there is no imminent agreement [on the restoration of private ownership] prior to the referral of the case to the International Arbitration Tribunal, then [Marfin] will be vindicated completely and fully compensated for its investment in Cyprus Popular Bank via legal proceedings.'[398] The claimant is demanding EUR 824 million in compensation.

The report *Profiting from a Crisis* is concerned that 'corporations, backed by lawyers, are using international investment agreements to scavenge for profits by suing governments from Europe's crisis countries'. [399] The report is worried: 'While speculators making risky investments are protected, ordinary people have no such protection and – through harsh austerity policies – are being stripped of basic social rights.'[400] The report notes: 'At a time when the world has seen the enormous social costs of excessive corporate control over economic and legal systems and of short-sighted deregulation of capital, calls for re-regulation and corporate accountability are

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398 Paul Hodkinson, 'Greek Firm Launches Legal Claim Against Cyprus', *Financial News*, 23 January 2013, http://www.efinancialnews.com/story/2013-01-23/marfin-investment-group-greece-cyprus-popular-bank-legal-claim?ea9c8a2de0ee111045601ab04d673622

399 Corporate Europe, *Profiting from a Crisis*, Transnational Institute and Corporate Europe Observatory, 2014, http://corporateeurope.org/sites/default/files/profiting_from_crisis.pdf

400 Ibid.

increasing.'[401] The report fears that 'investment agreements dramatically curtail the regulatory space that governments require to rein in corporate power.'[402] The report recommends: 'What is needed is a root-and-branch review of the investment regime.'[403]

Associate Professor Kevin Gallagher from Boston University warned: 'Not only do US treaties mandate that all forms of finance move across borders freely and without delay, but deals such as the *Trans-Pacific Partnership* would allow private investors to directly file claims against governments that regulate them, as opposed to a WTO-like system where nation states (ie the regulators) decide whether claims are brought.'[404] He warned that 'under investor-state dispute settlement a few financial firms would have the power to externalize the costs of financial instability to the broader public while profiting from awards in private tribunals.'[405] Gallagher commented:

> Such provisions fly in the face of recommendations on investment from a group of more than 250 U.S. and globally renowned economists in 2011. The 2012 IMF decision echoed these sentiments, saying, 'These agreements in many cases do not provide appropriate safeguards or

401 Ibid.

402 Ibid.

403 Ibid.

404 Kevin Gallagher, 'Trade Deals Must Allow for Regulating Finance', *Institute for New Economic Thinking*, 3 October 2013, http://ineteconomics.org/blog/institute/trade-deals-must-allow-regulating-finance

405 Ibid.

> proper sequencing of liberalization, and could thus benefit from reform to include these protections'.[406]

Gallagher emphasized: 'Emerging market and developing countries should refrain from taking on new trade and investment commitments unless they properly safeguard the use of cross-border financial regulations.'[407] He stressed that there is a need to 'devise an approach that gives all nations the tools they need to prevent and mitigate financial crises.'[408]

The Pardee Center Task Force Report in March 2013 reviews the compatibility of capital account regulations and the trading system.[409] In the executive summary of the report, Kevin Gallagher and Leonardo Stanley observed:

> The global financial crisis has re-confirmed the need to regulate cross-border finance. As this consensus has emerged, some policymakers and academics have expressed concern that many nations may not have the flexibility to adequately deploy such regulations because of trade and investment treaties they are party to. This report validates that such concerns are largely justified, and offers remedies to make the trading system more compatible with the proper regulation of global finance. [410]

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406 Ibid.

407 Ibid.

408 Ibid.

409 Pardee Center Task Force Report, *Capital Account Regulations and the Trading System: A Compatibility Review*, Boston University, March 2013, http://www.bu.edu/pardee/car-task-force/

410 Ibid., 1.

In the report, Sarah Anderson provides a close analysis of the Trans-Pacific Partnership, the investment chapter, and capital account regulations.[411] She warns: 'Such [investor-state dispute settlement] suits could be particularly harmful in the context of a financial crisis.'[412] She recommends that countries should follow the approach of the Gillard and Rudd Governments, and refuse to accept investor-state dispute settlement clauses. Otherwise, Anderson recommends a range of measures to limit investor-state dispute settlement. The report recommends that countries should refrain from taking on new commitments in regimes incompatible with the ability to deploy capital account regulations.

There has been much concern about the Wolves of Wall Street, predatory companies and vulture capitalists exploiting investment clauses to undercut and undermine financial regulation.

There is a need to ensure that mega trade deals like the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership* do not undercut the safety net of financial regulation established after the Global Financial Crisis.

411 Sarah Anderson, 'The Trans-Pacific Partnership and Capital Account Regulations: An Analysis of the Region's Existing Agreements', Pardee Center Task Force Report, *Capital Account Regulations and the Trading System: A Compatibility Review*, Boston University, March 2013, 81-89, http://www.bu.edu/pardee/car-task-force/

412 Ibid., 89.

Recommendation 11

There is a need to ensure that investment clauses are not deployed against financial regulations, particularly in the wake of the Global Financial Crisis.

12. Industrial Relations

Trade unions have been alarmed at the inclusion of an investment chapter in the Trans-Pacific Partnership that provides 'excessive rights to multinational corporations at the expense of regulators and ordinary citizens.' In 2011 submission, the Australian Council of Trade Unions and other union representatives throughout the Pacific Rim made a submission to the governments negotiating the *Trans-Pacific Partnership*:

> The investor-to-state dispute resolution (ISDR) mechanism found in the investment chapters of previous trade agreements and in bilateral investment treaties, and which is currently being proposed in the TPP negotiations, continues to raise very significant concerns. ISDR elevates corporations to the same level as governments, allowing the former to directly challenge the administrative, legislative and judicial decisions of the latter in an unaccountable, international tribunal with no appellate mechanism. Further, unlike judges in national court systems, international arbitrators often lack the expertise or understanding of national laws and societal values at issue in a dispute and thus risk undermining them. ISDR also provides another incentive for capital to move from well-developed regulatory and judicial environments into riskier (and often less expensive) environments in search of greater profit. Thus, the TPP should instead provide for state-to-state dispute settlement, which would allow disputes to be resolved in an open process where both state parties would be able to present their legal arguments on behalf of aggrieved corporations. It would also importantly guarantee the critical role of governments in determining and protecting the public interest. [413]

The trade unions noted that 'TPP negotiators must ensure that labor laws and regulations be included in the list of legitimate public welfare objectives, the non-

[413] Australian Council of Trade Unions and others, 'The Trans-Pacific Partnership', 2011, http://aftinet.org.au/cms/sites/default/files/Final%20TPP%20Investment%20Letter.pdf

discriminatory regulation of which will not constitute indirect expropriation nor a breach of minimum standards of treatment.'[414] The trade unions maintained: 'In general, improvements in labour laws and regulations should not be allowable causes for action under the investment provisions, and the labour chapter should prevail in case of conflict.'[415] The text of the leaked investment chapter, though, has bracketed text on exceptions for labor and safety. This is concerning.

The investor-state dispute settlement case of *Veolia Propreté v. Arab Republic of Egypt* is particularly disturbing.[416] In this matter, a French multinational company has launched a claim against Egypt over labor wage stabilization promises, as well as a terminated waste contract.

Celeste Drake, the trade specialist for AFL-CIO, has provided an extensive analysis of investment clauses from an industrial relations perspective.[417] She comments: 'The risk is that foreign property owners can use this system to challenge anything from plain packaging rules for cigarettes, to denials of permits for toxic waste dumps, to decisions expand public services, to increases in the minimum wage!'[418] Drake observes: 'If a foreign investor doesn't like a law, rule, judgment or administrative

414 Ibid.

415 Ibid.

416 *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15 http://www.italaw.com/cases/2101

417 Celeste Drake, 'Undemocratic and Bad for Working People: It's Time to Reform the ISDS', *Equal Times*, 5 March 2014, http://www.equaltimes.org/blogs/undemocratic-and-a-bad-for-working-people-its-time-to-reform-the-isds

418 Ibid.

decision, all it has to do is argue that the decision or measure violated its right to "fair and equitable treatment" or that it might reduce its expected profits.'[419] She cites a case of a French company suing Egypt over a number of labor market measures, including an increase in the minimum wage. Drake comments: 'ISDS isn't good for working people.'[420] She concludes: 'That's why countries like South Africa and Ecuador have been working to reduce their exposure to ISDS and the United Nations Conference on Trade and Development (UNCTAD) has recommended reform.'[421]

The Teamsters have also been active in the debate over trade and labor rights in the context of the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*.[422]

The European Trade Union Confederation has argued that there is a need to reform the investor-state dispute settlement process.[423] The Confederation has recommended: 'Fundamentally, investors should comply with relevant international guidelines and standards, including the responsibility to respect the ILO core labour standards and other human rights under the ILO MNE Declaration, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises

419 Ibid.

420 Ibid.

421 Ibid.

422 Teamsters, http://teamster.org/magazine/2013/summer/stop-tpp

423 The European Trade Union Confederation, *Resolution on EU Investment Policy*, 19 March 2013, http://www.etuc.org/documents/etuc-resolution-eu-investment-policy#.U0dLQRAXL-k

as called for by the European Parliament'.[424] The Confederation notes: 'One way would be to foreclose access to ISDS if investors cause or contribute to serious adverse human rights impacts in the host state or commit a serious breach of the OECD Guidelines'.[425] The Confederation observes: 'Host states should be able to rely on this argument as a defence to a claim, with the question determined by appropriately qualified arbitrators.'[426] The Confederation argues that there should be exclusions for public interest concerns like labor rights: 'Any EU investment must make clear that any regulatory actions by a Party that is designed and applied to protect legitimate public welfare objectives, such as public health, safety, human rights, labour and the environment, do not constitute a violation of the agreement/expropriation.'[427]

Recommendation 12

Investor-state dispute settlement raises significant problems in respect of industrial relations, workers' rights, and trade unions.

424 Ibid.

425 Ibid.

426 Ibid.

427 Ibid.

13. Local Government

Sydney Town Hall: Wikipedia

There has also been concern as to how investment clauses will affect state and territory governments, and local governments.

The dispute between *Metalclad* v. *Mexico* has highlighted the issues surrounding investor-state dispute settlement and local government.[428] Kyla Tienhaara observed of the conflict:

> This is quite possibly the most controversial of any investor-state dispute concluded to date. The case revolves around the construction and operation of a hazardous waste facility in Mexico. The American investor involved in the dispute sought compensation for breach of

[428] *Metalclad Corp.* v. *United Mexican States*, ICSID Case No. ARB (AF)/97/1, 30 August 2000.

> minimum standard of treatment (including fair and equitable treatment and full protection and security), national treatment, most-favoured-nation treatment, as well as expropriation and use of prohibited performance requirements, following the denial of a municipal construction permit and public demonstrations against the company's operations. An ICSID Additional Facility tribunal ruled in favor of the investor. Mexico challenged the award in a Canadian court, which partially annulled the award but still required Mexico to compensate the investor.[429]

Amongst other things, the dispute highlights how the decisions of local municipalities can be targeted by foreign investors under investor-state dispute settlement clauses.

The City of Sydney has passed a resolution on the *Trans-Pacific Partnership* put forward by Councillor Doutney.[430] The City of Sydney was concerned that 'the final *Trans-Pacific Partnership* agreement may have an impact on local government that will not be realised until after the Agreement is signed.'[431] The City of Sydney called on 'the Trade Minister to release the draft agreement for public consultation and parliamentary consideration prior to it being agreed to by Cabinet.'[432] The City of Sydney requested, amongst other things, that the Trade Minister ensure that the agreement does not contain provisions which 'enable a foreign investor to sue

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429 Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge: University of Cambridge Press, 2009, 166.

430 City of Sydney, *Trans-Pacific Partnership*, 7 April 2014, http://www.cityofsydney.nsw.gov.au/__data/assets/pdf_file/0006/199473/140407_COUNCIL_ITEM13.pdf

431 Ibid.

432 Ibid.

governments for damages over policy, laws or regulations at local, state or national level.'[433]

The City of Sydney was also concerned about measures, which 'would increase the period for copyright royalties and/or increases restrictions or penalties for temporary downloads from the internet'.[434] The City of Sydney was also concerned about measures, which would 'restrict local government policies which encourage local employment, support local economic and industry development and encourage good employment practices and initiatives.'[435] The City of Sydney wanted to ensure that the trade deal did not 'restrict local government policies which encourage good environmental practices and initiatives.'[436] The City of Sydney was also worried about restrictions on 'local government supply and regulation of services or require the commercialisation of services.'[437] The City of Sydney also wanted to ensure that trade obligations did not 'prevent local government procurement policy from giving preference to local suppliers.'[438]

There have been similar concerns in other jurisdictions. Sharon Treat, a legislator in Maine, has expressed worries about the impact of investment deals upon laws and regulations:

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433 Ibid.

434 Ibid.

435 Ibid.

436 Ibid.

437 Ibid.

438 Ibid.

Philip Morris at this the is very moment is suing Australia pursuant to an obscure trade agreement with Hong Kong over its tobacco plain packaging rules, rules that have already been upheld as constitutional by Australia's highest court, in part on grounds that the company's intellectual property – its trademark – has been expropriated.

In the province of Quebec, Canada, the company Lone Pine is using NAFTA to challenge a recent law establishing a moratorium on fracking underneath the St. Lawrence Seaway until that government can review the environmental issues and develop appropriate protections. Lone Pine asserts its 'property' has been expropriated and that the Quebec Parliament didn't follow fair processes in passing the law – even though the company doesn't even have a permit to frack under the St. Lawrence.

As envisioned by industry supporters and trade negotiators on both sides of the Atlantic, TTIP will include these same investor provisions that allow governments to be sued for millions of dollars by international corporations that simply don't want to play by the rules. With respect to generic medicines, the intellectual property provisions that are being sought in the TPP and most likely will be pursued for TTIP will extend patents – monopoly pricing – on drugs and newer biologic medicines and delay access to less expensive generic versions. There are also proposals that are intended to restrict government actions that reduce or cap pharmaceutical prices in government health programs.[439]

A Maine report has highlighted issues relating to local tobacco control policies; the cost of pharmaceutical drugs; and local procurement laws.[440]

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[439] Simon McKeagney, 'Concerns about TTIP not just in Europe: interview with US State Legislator, Sharon Treat' http://ttip2014.eu/blog-detail/blog/USA%20concerns.html

[440] Maine Citizen Trade Policy Commission, *Trade Policy Assessment*, 2012, http://www.maine.gov/legis/opla/CTPC2012finalassessment.pdf

Recommendation 13

In light of the dispute in *Metalclad* v. *Mexico*, investor-state dispute settlement clauses could threaten local, state, and territory government laws and regulations in Australia.

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