A SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES

THE KOREA-AUSTRALIA FREE TRADE AGREEMENT

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BIOGRAPHY

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Introduction

Australia and South Korea have signed a new free trade agreement - the *Korea-Australia Free Trade Agreement* (KAFTA). Is it a fair trade fairytale? Or is it a dirty deal done dirt cheap? Or somewhere in between? It is hard to tell, given the initial secrecy of the negotiations, and the complexity of the texts of the agreement There has been much debate in Parliament over the transparency of the trade agreement; the scope of market access provided under the deal; the impact of the investment chapter, with its investor-state dispute settlement clause; the intellectual property chapter; the environment chapter; its impact upon public health; and the labor rights chapter. KAFTA provides an indication of the approach of the new Conservative Government in Australia to other trade deals – such as the *Trans-Pacific Partnership*.

Recommendation 1

The *Korea-Australia Free Trade Agreement* 2014 highlights the need for a reformation of Australia's international treaty-making system. In particular, there should be greater transparency in respect of trade agreements; independent economic analysis; and better oversight by the Australian Parliament.

Recommendation 2

There has been much debate about whether the *Korea-Australia Free Trade Agreement* 2014 is a comprehensive free trade agreement, or a much limited trade deal in respect of market access.

Recommendation 3

The investment chapter of the *Korea-Australia Free Trade Agreement* 2014 should be rejected. The investor-state dispute settlement mechanism in the agreement poses significant risks in respect of government regulation – particularly in respect of health, the environment, labor rights, and public interest regulation. The investor-state dispute settlement mechanism exposes the Australian Government to significant liabilities through arbitration tribunal disputes.

Recommendation 4

The intellectual property chapter of the *Korea-Australia Free Trade Agreement* 2014 is controversial. The proposed regime is one-sided and unbalanced. The intellectual property chapter is focused upon providing longer and stronger intellectual property rights for intellectual property owners. There is a failure to properly consider other public interest objectives – such as access to knowledge, the progress of science and the useful arts, and the promotion of innovation and competition.

Recommendation 5

The environment chapter of the *Korea-Australia Free Trade Agreement* 2014 is weak. Investment clauses could undermine and undercut public regulation in respect of the environment, biodiversity, and climate change.

Recommendation 6

Investment clauses in the *Korea-Australia Free Trade Agreement* 2014 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 7

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

Recommendation 8

There is a need to consider the interaction between the *Korea-Australia Free Trade Agreement* 2014 and other deals under negotiation such as the *Trans-Pacific Partnership*.

1. Treaty-Making

The *Korea-Australia Free Trade Agreement* 2014 highlights long-standing problems in respect of treaty-making in Australia – particularly in respect of the secrecy of the negotiations; the lack of independent analysis of the agreement; the limited role afforded to the Australian Parliament; and the lack of public consultation and participation in the negotiations. The lack of transparency surrounding the *Korea-Australia Free Trade Agreement* 2014 is symptomatic of larger issues in respect of trade negotiations in Australia. There have been similar problems with the *Australia-United States Free Trade Agreement* 2004; the *Australia-Chile Free Trade Agreement* 2008; the *Anti-Counterfeiting Trade Agreement* 2011; the *Japan-Australia Free Trade Agreement* 2014; and the ongoing discussions in the *Trans-Pacific Partnership*.

A. Secrecy of the Negotiations

The *Korea-Australia Free Trade Agreement* 2014 was negotiated in secrecy under both the ALP and Coalition Governments.

In Question Time on the 9th December 2013, there was a show-down on the topic of the secrecy agreement between the Coalition Government and the Australian Labor Party Opposition.

The Minister for Foreign Affairs, Julie Bishop, received a question about the benefits of the free trade agreement in South Korea. Bishop argued that the deal was 'good news'. She said that the agreement 'is going to help grow our economy, it will provide certainty for investors and it will certainly create an environment for more jobs in Australia'. Bishop maintained: 'This Korea-Australia free trade agreement will lift key tariffs off key agricultural products.' She noted: 'Some Korean tariffs are as high as 300 per cent and we will see a number of them reduced to zero on key agricultural products, particularly beef.' Bishop also emphasized: 'Tariffs also go to zero on wine, wheat, canola oil, seafood, tomatoes, grapes and others.'

The Shadow Minister for Foreign Affairs, Tanya Plibersek, took a point of order, and asked the Coalition Government to table the text of KAFTA. Bishop declined the invitation.

On the 11th December 2013, Senator Penny Wong, the Senate leader of the Australian Labor Party Opposition moved a motion in the Australian Senate:

> 'That the Senate— (a) notes that the United States Trade Representative has undertaken to publish the full text of all free trade agreements negotiated on behalf of the United States of America (US) 'well before' signing to invite further comments from the US Congress and the US people; (b) resolves that the Australian Senate and the people of Australia are entitled to scrutinise proposed agreements before signing; and (c) orders that there be laid on the table by the Minister representing the Minister for Trade, the full text of the proposed Korea-Australia Free Trade Agreement, the Trans-Pacific Partnership Agreement and other bilateral and plurilateral trade agreements at least 14 days before signing.'

This motion was supported by the Australian Labor Party and the Australian Greens, and a majority of the Australian Senate.

On the 11th February, Senator Penny Wong demanded the full text of the agreement:

> I again renew Labor's call for the release of the full text of the negotiated agreement, including the ISDS mechanism, so that the parliament and the Australian community can assess its potential benefits and, if applicable, its detriments. If the government believes this is a good deal then the government would not be frightened of releasing it to the Australian people and to the parliament. Last year the Senate ordered the release of both bilateral and plurilateral trade agreements before signing. Not only has the government not tabled the text of the agreement with Korea; it has indicated it will not comply with the audit in relation to this agreement or any other agreement. I would urge the government and the minister to reconsider their position.

The *Korea-Australia Free Trade Agreement* 2014 was finally published in February 2014.

B. Economic Modelling

In February 2014, Senator Peter Whish-Wilson put forward a motion asking economic modelling details on the *Korea-Australia Free Trade Agreement* 2014. He observed:

> The aim of the motion is to get more transparency around the decisions that have led to this free trade agreement. The Government's been on the front foot promoting a free trade agreement based on Modelling showing the benefits that this free trade agreement will bring to Australia. We've had very clear evidence this week from Toyota, and previously from companies such as Ford and Mitsubishi, about the risks that free trade agreements have had on the manufacturing industry, particularly the car industry, and it's very important that the government actually steps out its decision-making processes in relation to this free trade agreement.[1]

Whish-Wilson was concerned about the trade-offs in the agreement: 'Workers in the manufacturing industry are claiming that they're being sold down the river by the agricultural industry trying to get increased access to markets.'[2] He was worried: 'Now free trade deals are essentially a feast for friends of special interests. If you're loud enough and you get in the right decision maker's ear, that'll get passed into trade negotiations.'[3] Senator Whish-Wilson observed: 'While I respect and certainly encourage increased agricultural access into other countries, which is good for some primary producers, we need to weigh those decisions against the potential loss of jobs in other sectors.'[4]

Eventually, the Australian Government has released a summary of its commissioned study. The National Interest Analysis notes:

> The Department of Foreign Affairs and Trade (DFAT) commissioned a study, conducted by the Centre for International Economics (CIE), which examined the projected impact of KAFTA on Australia as well as the opportunity cost of not proceeding with KAFTA in light of the ROK's free trade agreements with the United States and the European Union. Their modelling, based solely on merchandise trade liberalisation, reveals KAFTA will be worth nearly $5 billion in additional income to Australia between 2015 and 2030 and will result in an annual boost to the economy of around $650 million after 15 years

1 Anna Vidot, 'Senate Asks for Modelling Details on Korea Free Trade Agreement', ABC Rural, 13 February 2014, http://www.abc.net.au/news/2014-02-13/senate-demands-korea-fta-details/5258268

2 Ibid.

3 Ibid.

4 Ibid.

> of operation. In its first year, increased exports under KAFTA would create over 1,700 jobs and increase real consumption per household by $77. After 15 years of operation – by 2030 – Australia's exports to the ROK would be 25.0 per cent higher (or $3.5 billion) than they otherwise would have been as a result of lower ROK tariffs. By 2030, exports of agricultural goods to the ROK will be 73.1 per cent higher than otherwise, mining exports 17.1 per cent higher and manufacturing exports 52.8 per cent higher. Additionally, services and investment liberalisation under KAFTA is likely to increase GDP and household incomes further.
>
> CIE's modelling indicates that the cost to Australia of not proceeding with KAFTA is a 4.7 per cent decrease in annual exports by 2030, by which time ROK will have completed tariff reductions under its FTAs with the US and EU. This reduction in exports would reflect ROK importers' choice to source beef, sugar and dairy products from Australia's competitors who are already enjoying preferential access. Failure to proceed with KAFTA would result in ROK imports of Australian agricultural goods declining by 29.0 per cent, with mining and manufacturing exports also declining by 0.9 and 7.5 per cent respectively.

This assessment seems a rather exuberant assessment of the impact of the *Korea-Australia Free Trade Agreement* 2014 – especially given the previous warnings of the Productivity Commission about over-estimating benefits, and under-estimating the costs of free trade agreements. There seems to be a significant failure to consider the costs associated with the investment chapter – and the use of the investor-state dispute settlement regime in this analysis.

This process, once again, underlines the need for the Productivity Commission, Finance, and Treasury to play an independent role in assessment of trade agreements.

C. Reform of the Treaty-Making Process

The case study of the *Korea-Australia Free Trade Agreement* 2014 highlights the need for the reform of international treaty-making by the Australian Government. In the classic work, *No Country is an Island*, the leading international and public lawyers Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams lament:

> The power to commit Australia to new international obligations lies with the executive alone. Especially in regard to bilateral agreements, governments continue to make key decisions outside the public eye and without parliamentary involvement. Whether or not this is appropriate, it is fair to say that, even after the 1996 reforms, the role of parliament in the treaty process is a minor one. Ironically, the more prominent role taken by parliament may have lessened the fears held by some about

> Australia's engagement with international treaties, although the modest role now by played by parliament has done little in reality to reduce the democratic deficit that prompted the fears in the first place.[5]

The *Korea-Australia Free Trade Agreement* 2014 highlights the need for greater transparency and information-sharing about treaty negotiations; the necessity of democratic participation in policy formulation and development; and the demand for evidence-based policy making informed by independent, critical research on the economic, social, and political costs of treaties. There is a need for evidence-based policy making – so there should be a role for the Productivity Commission and the financial departments. Moreover, as envisaged by the *Trick or Treaty* reforms in the 1990's, there should be a greater critical role for the Australian Parliament and the Joint Standing Committee on Treaties in assessing and evaluating international treaties, particularly those relating to intellectual property.

Recommendation 1

The *Korea-Australia Free Trade Agreement* 2014 highlights the need for a reformation of Australia's international treaty-making system. In particular, there should be greater transparency in respect of trade agreements; independent economic analysis; and better oversight by the Australian Parliament.

[5] Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, *No Country is an Island: Australia and International Law*, Sydney: UNSW Press, 2006, 153.

2. Market Access

The Trade and Investment Minister Andrew Robb has been spruiking the Korea-Australia Free Trade Agreement, while defending the secrecy of the text.

The Minister maintained: 'As a result of the Agreement, tariffs will be eliminated on Australia's major exports to Korea and there will be significant new market openings in services and investment'. He insisted that 'the FTA translates to higher economic growth and more jobs for Australians.'

The Minister contended: 'As part of the FTA, tariffs of up to 300 per cent will be eliminated on key Australian agricultural exports such as beef, wheat, sugar, dairy, wine, horticulture and seafood, as well as resources, energy and manufactured goods.'

Robb commented: 'Independent modelling shows the Agreement would be worth $5 billion between 2015 and 2030 and boost the economy by around $650 million annually after 15 years.' However, such modelling has not been publicly available or open for analysis.

The Minister emphasized in an editorial in *The Australian Financial Review* that 'the opening up of the major markets of Asia is essential if Australian businesses are to successfully compete with the world in the years ahead.'

The rural newspaper, The Land, was hopeful that 'the deal means the relationship between Australia and Korea has moved on from fading memories of a 1950s war and catchy pop songs such as Gangnam Style.'

The National Farmers' Federation was enthusiastic about the deal. President Brent Finlay commented: 'While the deal doesn't deliver everything the Australian agricultural sector had advocated for, it is a strong step towards securing Australia's important trading future with Korea.'

However, there has been dissent from some quarters of agricultural communities. The Ricegrowers' Association of Association has been disappointed that KAFTA excludes rice. Ruth Wade, the executive director, commented: 'Today's announcement that the Government has signed an FTA with Korea which excludes rice is particularly disappointing.' She noted: 'We have strongly supported the Australian Government's efforts to finalise these trade agreements but only if they are comprehensive, and do not exclude any agricultural products.' In her view, 'This is an FTA in name only'. Wade concluded: 'Trade agreements with exclusions are not free trade agreements.'

There has also been some disquiet in the sugar industry. At estimates on the 5th June 2014, there was a discussion between Senator Ian MacDonald and the Department of Foreign Affairs about the *Korea-Australia Free Trade Agreement* and its impact upon agricultural markets:

> Senator IAN MACDONALD: I just wanted to ask a couple of questions which I raised yesterday with the department about the sugar and the free trade agreement with Korea and Japan. I am just wondering if someone could indicate to me exactly how the agreement assists the Australian industry. Perhaps I should start with the bouquet first—this was great work getting these free trade agreements signed. They have been around for years. Nothing ever seemed to happen. I, for one, and I think most Australians were delighted when we had both Korea and Japan done in very quick time. I also appreciate, having lived through the Australia-United States Free Trade Agreement as well, that you cannot please everyone all of the time and there are lots of different complexities within the other country as well as with our own. But, as you know, I come from the sugar areas of Queensland. I am concerned that the canegrowers organisation in Queensland was not terribly happy about the deal initially. I have not spoken to them in recent weeks. I am just wondering if you could very briefly run me through how sugar works and how it is beneficial to the Australian industry.
>
> Ms Adams: Thank you, Senator, for the opening comments. With respect to the treatment of raw sugar exports in the Japan free trade agreement, as you are well aware the current arrangement with Australian exports to Japan requires Australia to produce a particular grade of low polarity sugar to work its way through the very complex set of barriers that exist in Japan through the state trading import AILEC et cetera. We currently export that low polarity sugar to Japan. It is the only country that has that system that generates the price pressures for exporting particular grade. There is a particular processing stream for current raw sugar exports to Japan. What we have been able to achieve in the free trade agreement, or the EPA, with Japan is tariff reduction on the high polarity sugar, that is the standard international sugar, the same kind of raw sugar that we export to Korea and every other international market. We have been able to secure elimination of that ¥21.5 per kilogram tariff and

> also a reduction on the levy— there is a complex system of levies and tariffs—for the high polarity sugar, which means we will, once the agreement comes into force, be able to export international standard sugar to Japan. We will be the only country able to do that, which will clearly give efficiencies to our exporters of being able to, instead of having a dedicated stream of low polarity sugar for Japan, integrate the Japanese supply-chain with all the other export processes.

Ms Adams elaborated: 'Certainly Korea is a much easier and perhaps happier story, explained largely by the fact that they do not grow domestically any sugar and so therefore w ere not seeking to protect a domestic industry, like Japan do. The three per cent tariff that Korea applied has been eliminated on entry into force of the Korea agreement, which, as it is our major sugar export destination, of course is fantastic.'

Senator Peter Whish-Wilson from the Australian Greens has wondered how Australian agriculture will be affected by arbitration disputes: 'The investor-state dispute resolutions provision exposes future governments to being sued for simply making laws on behalf of their citizens'. 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.' Senator Peter Whish-Wilson raised the example of Archer Daniels Midland suing Mexico under an investment clause under the North American Free Trade Agreement. 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.

Senator Penny Wong: 'We will also be asking whether the benefits for Australian farmers which the government's PR machine has lauded are all they purport to be.' [6] She commented: 'Apparently some of the government's own MPs share Labor's concerns about the quality of the agreement's provisions on Australian agricultural exports to Korea.'[7] Wong observed: 'The Liberal backbencher Sharman Stone, who represents the Victorian farming electorate of Murray, has criticised the agreement for failing to deliver tariff reductions for a raft of Australian food exports.'[8] She stressed: 'It is particularly disappointing that apples, pears and honey will not be exempted from the existing exorbitant tariffs, nor frozen pork, or

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6 Senator Penny Wong, 'Australia's Free Trade Agreement with South Korea should be Scrutinised', *The Guardian*, 20 February 2014, http://www.theguardian.com/commentisfree/2014/feb/20/australias-free-trade-agreement-with-south-korea-should-be-scrutinised

7 Ibid.

8 Ibid.

condensed milk, given Australia enjoys a disease free status for these products unequalled in the world.'[9] Wong noted that 'the trade minister Andrew Robb was eager to talk up Korea's agreement to phase out its tariffs of between 40 and 72% on Australian beef over 15 years.'[10]

At estimates on the 5 June 2014, Senator Peter Whish-Wilson expressed concerns about the impact of the Korea-Australia Free Trade Agreement on the Australian manufacturing industry:

> Senator WHISH- WILSON: In terms of the Korean deal, I asked the Department of Industry the other day, when they were talking about working with the car industry and the risks around their car industry in Australia, whether they were aware of the car industry's public statements around their concerns over trade deals Australia was negotiating and tariff reductions. They said of course it was an issue. They also said they had one of their Department of Industry personnel as a negotiator in your trade deals. Given that the car industry was clearly saying that there were significant risks to them around changes to tariffs, could you clarify that you are aware of that information in the negotiations in the Korean free trade deal? Was it clear?
>
> Ms Adams: Of course we were aware of the v iews of the car industry on the impact of extra competitive pressure from major global car exporter countries like Japan and Korea. Of course we were aware of that. The objective in the trade negotiations is to eliminate the barriers so that each country can export in line with its comparative advantages, and Japan and Korea are very strong auto exporters.

Senator Whish-Wilson observed: 'Cheaper cars might have their advantages, but the loss of thousands of jobs in an industry because of a change in a tariff barrier also has a value to it.' Ms Adams responded: 'I think cheaper cars certainly have an economic advantage and, of course, as the companies themselves made very clear at the time, there were a range of very serious commercial and economic factors that went into their decision.' She maintained: 'The five per cent tariff was not in the top list of issues confronting them.' Senator Whish-Wilson noted: 'There was a statement by one car manufacturer that clearly said free trade deals were a major issue in them deciding to pull out of Australia.'

Senator Penny Wong observed that 'Labor is also concerned at the potential impact of KAFTA on Australia's automotive manufacturing sector.'[11] She commented:

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9 Ibid.

10 Ibid.

> Following the decisions by Ford, Holden and Toyota to stop making cars in Australia, the jobs of thousands of workers at local auto component manufacturers hang in the balance. The future for Australia's auto component manufacturers is to step up their efforts to become part of the global supply chains which increasingly characterise the world auto industry. KAFTA holds out the promise of greater access to the Korean market for Australian auto component manufacturers.[12]

Senator Penny Wong insisted: 'Labor will to examine whether KAFTA represents an appropriately balanced package for the auto industry given the severe threats this sector faces at present.'[13]

The experience of the Korea-United States Free Trade Agreement is sobering. Public Citizen reported that on the anniversary of the implementation of the agreement, US exports to Korea were down 9%, and imports from Korea were up. The United States trade deficit with Korea had swollen by 30%.

The former chief of the World Trade Organization, Pascal Lamy, has questioned the usefulness of bilateral and regional trade deals:

> Tariffs are like dead stars. They are millions of kilometres away, they are dead, they don't emit any light any more, but you still see the light of the star because it takes so long for the light to come to your eyes. They have been dead for thousands of years and you still see the light of the star. That's what tariffs are like, tariffs are dead.[14]

Given the minimal formal barriers to market access, Lamy emphasized that there was a need to focus instead upon regulatory standards in multilateral trade deals.

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11 Senator Penny Wong, 'Australia's Free Trade Agreement with South Korea should be Scrutinised', *The Guardian*, 20 February 2014, http://www.theguardian.com/commentisfree/2014/feb/20/australias-free-trade-agreement-with-south-korea-should-be-scrutinised

12 Ibid.

13 Ibid.

14 Peter Martin, 'Ex-WTO Chief Tips Pacts are on the Way Out', *Sydney Morning Herald*, 28 May 2014, http://www.smh.com.au/business/exwto-chief-tips-pacts-are-on-the-way-out-20140527-392fq.html

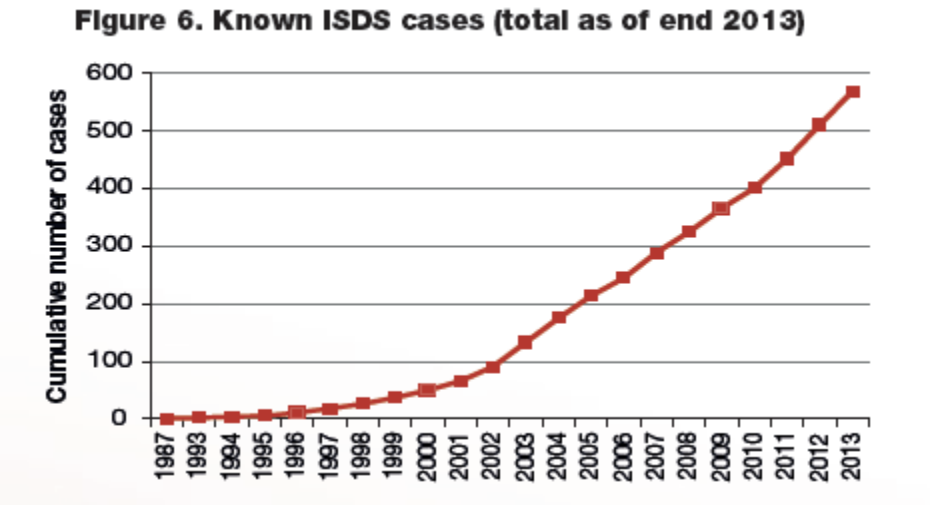
Recommendation 2

There has been much debate about whether the *Korea-Australia Free Trade Agreement* 2014 is a comprehensive free trade agreement, or a much limited trade deal in respect of market access.

3. Investment Chapter

Chapter 11 of the *Korea-Australia Free Trade Agreement* 2014 is an investment chapter, with an investor-state dispute settlement regime. This chapter is highly controversial – given the international debate over investor-state dispute settlement; the Australian context for the debate; and the text of the *Korea-Australia Free Trade Agreement* 2014.

A. 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.[15] 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

[15] 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

> brought by investors from 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.[16]

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.[17]

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.'[18]

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

16 Ibid. 7-9.

17 Ibid, 1.

18 Ibid.

for annulment.'[19] UNCTAD stressed: 'In seven out of the eight decisions on the merits, the tribunal accepted – at least in part – the claims of the investors.'[20] 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.'[21]

The previous year, in April 2013, UNCTAD released a report on *Recent Developments in Investor–State Dispute Settlement (ISDS).*[22] The report revealed that 62 new cases were filed in 2012, 'confirming the increasing tendency of foreign investors to resort to investor–State arbitration'. 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.'

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.'[23] 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.'[24]

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

19 Ibid.

20 Ibid.

21 Ibid.

22 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

23 Ibid.

24 Ibid.

> independence (Brower 2002; 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).[25]

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.'[26] 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.'[27]

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.

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.[28] 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.'[29] Evatt and company observed

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25 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

26 Ibid.

27 Ibid.

28 '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/

29 Ibid.

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 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.[30]

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.'[31] 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.'[32]

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-*

30 Ibid.

31 Ibid.

32 Ibid.

Atlantic Trade and Investment Partnership of investor-state dispute settlement.[33] 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 meet certain standards and that results in a loss of asset values, is an unnecessary, unreasonable, and unwise provision to include in trade agreements.'[34] 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.'[35]

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.' [36]He also point that 'Asset expropriation or other forms of shabby treatment of foreign companies is not likely to be rewarded by new investment.'[37]

Second, Ikenson commented that 'ISDS socializes the risk of foreign direct investment'.[38] He observed that 'ISDS is a subsidy for multinational corporations and a tax on everyone else.'[39] 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.'[40]

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33 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

34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

40 Ibid.

Third, Ikenson makes the interesting point that 'ISDS encourages 'discretionary' outsourcing'.[41] 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.'[42]

Fourth, Ikenson comments that 'ISDS exceeds "national treatment" obligations, extending special privileges to foreign corporations'.[43] 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.'[44] 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.'[45] He stressed: 'The number of cases is on the 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.'[46] 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.'[47]

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

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41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid.

> 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.[48]

Arbitration lawyers, and law firms are particularly keen on the profitable business for providing legal services for the international arbitration dispute system.[49]

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'.[50]

Finally, Ikenson argues that 'dropping ISDS would improve U.S. trade negotiating objectives, as well as prospects for attaining them.'[51]

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'.[52] 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 years. They involved dry-

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48 Ibid.

49 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

50 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

51 Ibid.

52 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

> cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day.'[53]

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. Canada has sought to exclude intellectual property from the proposed trade agreement with the European Union in 2014.[54] It has been noted 'Canada requested that arbitration procedures in certain intellectual property (IP) areas be excluded from the scope of the ISDS mechanism in CETA.'[55]

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.' [56] She noted: 'Most would consider such considerations to be irrelevant unless they were specifically referred to in the investment treaty text.'[57] 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 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

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53 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

54 Gaelle Kirkorian, 'Canada acts to protect public interest, the EU declines: unfinished business of CETA is a bad sign for TTIP', TTIP – Beware What Lies Beneath, 22 May 2014, http://ttip2014.eu/blog-detail/blog/CETA%20ISDS%20TTIP-85.html

55 Ibid.

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

57 Ibid., 19.

> 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'.[58]

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.'[59]

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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> '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.[60]

Glyn Moody commented: 'Germany's leaders obviously feel the need to distance themselves from ISDS, which is fast turning into a serious political liability.'[61]

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

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58 Ibid., 19.

59 Ibid., 18.

60 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

61 Ibid.

> 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.[62]

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

[62] 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/

> close these legal loopholes once and for all. TTIP will firmly uphold EU member states' right to regulate in the public interest.'[63]

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.[64]

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.[65] 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 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.[66]

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'.[67]

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63 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

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

65 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

66 Ibid.

67 Ibid.

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.'[68]

South Africa has planned to terminate and renegotiate treaties, which include investor-state dispute settlement clauses.[69] 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:

> 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'.[70]

Writing about the decision of South Africa to abandon investment clauses, Professor Joseph Stiglitz, the Nobel Laureate in Economics, praised their choice.[71] 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'.[72] He maintained: 'And it is essential if South Africa's government is to pursue policies that best serve the country's economy and citizens.'[73] 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.'[74] He observed: 'It is the investment

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68 Ibid.

69 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

70 Ibid.

71 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

72 Ibid.

73 Ibid.

74 Ibid.

agreements themselves that most seriously threaten democratic decision-making.'[75] The Nobel Laureate hoped that other countries followed the lead of South Africa.[76]

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.[77]

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*.[78] He stressed: 'The current situation in Indonesia with its democratic system and more independent judiciary should be similar to that in developed states.'[79] 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.'[80]

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

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75 Ibid.

76 Ibid.

77 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/

78 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

79 Ibid.

80 Ibid.

cancelled their 2G mobile communications licences in the wake of a high-profile corruption scandal linked to the granting of the licences.' [81]

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.[82]

A number of commentators have argued that it would be appropriate to describe investor-state dispute settlement clauses as 'corporate sovereignty clauses'.[83] 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.'[84]

B. Australian Context

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.'[85] The Department of Foreign of Affairs and Trade

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81 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/

82 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/

83 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

84 Ibid.

85 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

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.'[86]

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.[87] 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 legal systems'.[88] 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.'[89]

In 2010, the Australian Productivity Commission was critical of the adoption of Investor-State Dispute Settlement clauses.[90] 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.[91]

The Productivity Commission recommended that the Australian Government should 'seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs that grant

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86 Ibid.

87 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

88 Ibid.

89 Ibid.

90 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

91 Ibid., xxxii.

foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.'[92]

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. [93]

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'.[94] 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'.[95] The Commission concluded that it had 'not received evidence to suggest that Australia's systems for recognising and resolving investor disputes have significant shortcomings that should be rectified through the inclusion of ISDS in agreements with trading partners.'[96]

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

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92 Ibid., xxxviii.

93 Ibid., 276-277.

94 Ibid., 276.

95 Ibid., 276.

96 Ibid., 276.

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.'[97] 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'.[98]

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 Partnership* and the inclusion of ISDS provisions in trade agreements'.[99] 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'.[100]

Controversially, the Australian Coalition Government agreed to an investor-state dispute settlement clause in *Korea-Australia Free Trade Agreement* (KAFTA).[101] 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

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97 *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

98 Ibid.

99 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/

100 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

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

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'.[102] The Coalition maintained that 'This will provide new protections for Australian investors in Korea as well as Korean investors in Australia, promoting investor confidence and certainty in both countries.'[103] 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'.[104] 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'.[105] 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.'[106] Senator Peter Whish-Wilson raised the example of Archer Daniels Midland suing Mexico under an investment clause under the North American Free Trade Agreement.[107] 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 resisted the demands for the inclusion of such a clause.[108] Peter Martin warned: 'The so-called investor

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102 '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

103 Ibid.

104 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

105 Ibid.

106 Ibid.

107 *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

108 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

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.'[109] 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 [110]

Economist Peter Martin praised the decision to reject the inclusion of an investor-state dispute settlement in the Fairfax papers.[111] 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.'[112]

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

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109 Ibid.

110 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

111 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

112 Ibid.

> 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. [113]

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.[114]

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113 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

114 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.'[115]

C. Investor-State Dispute Settlement under the *Korea-Australia Free Trade Agreement* 2014

The model of investor-state dispute settlement proposed in the *Korea-Australia Free Trade Agreement* 2014 looks to be defective.

Article 11.28 of the *Korea-Australia Free Trade Agreement* 2014 has an over-inclusive definition of investment:

> **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
> (b) shares, stock and other forms of equity participation in an enterprise;
> (c) bonds, debentures, other debt instruments and loans;[116]
> (d) futures, options and other derivatives;
> (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
> (f) intellectual property rights;
> (g) licences, authorisations, permits and similar rights conferred pursuant to domestic law;[117,118] and

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115 Ibid.

116 Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

117 Whether a particular type of licence, authorisation, permit or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licences, authorisations, permits and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the licence, authorisation, permit or similar instrument has the characteristics of an investment.

(h) other tangible or intangible, movable or immovable property and related property rights, such as leases, mortgages, liens and pledges.[119]

For the purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment;

The inclusion of intellectual property in the definition of investment is problematic – given that intellectual property owners could deploy an investor-state dispute settlement mechanism in respect of a wide range of public regulation. As highlighted by recent developments in Canada, there is a need to exclude intellectual property from the definition of investment. There could also be a concern about financial investors deploying investor-state dispute settlement against financial regulation by the Australian Government and the Korean Government.

The framework for exceptions, defences, and safeguards seems partial, limited, and rickety. Article 11.24 provides: 'Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.' Annex 11-B.5 provides: 'Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[120,121,122]'

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[118] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

[119] For greater certainty, market share, market access, expected gains and opportunities for profit-making are not, by themselves, investments.

[120] For greater certainty, the list of "legitimate public welfare objectives" in paragraph 5 is not exhaustive.

[121] For greater certainty and without limiting the scope of paragraph 5, such regulatory actions to protect public health include regulation, supply and reimbursement with respect to pharmaceuticals, diagnostics, vaccines, medical devices, health-related aids and appliances and blood and blood products.

[122] For Korea, real estate price stabilisation (through, for example, measures to improve the housing conditions for low-income households), does not constitute indirect expropriation.

Article 22.1.3 provides: 'For the purposes of Chapter 11 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:

(a) necessary to protect human, animal or plant life or health;
(b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement;
(c) imposed for the protection of national treasures of artistic, historic or archaeological value; or
(d) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The Parties understand that the measures referred to subparagraph (a) include environmental measures to protect human, animal or plant life or health, and that the measures referred to in subparagraph (d) include environmental measures relating to the conservation of living and non-living exhaustible natural resources.' This complex general clause contains a number of qualifications and caveats – the test that an action is 'necessary' is a tough one.

Public Citizen has provided an excellent analysis of the use of the language of general exceptions, such as those proposed in the *Trans-Pacific Partnership*.[123] 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 (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. [124]

123 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

124 Ibid.

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.'[125]

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.'[126] 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 deploy public interest exceptions, with greater ease.

A great problem has been that investment clause public interest exceptions and carve-outs have not necessarily been effective means of protecting the public interest. The North American Free Trade Agreement recognises the importance of the environment, health, and safety. Nonetheless, in spite of such 'safeguards', Stephen Harper's Canadian Government has faced investment challenges worth billions of dollars, including in respect of its drug patent laws, and a Quebec moratorium on fracking.

The Australian Government should reconsider its risky adoption of investment clauses in free trade agreements – such as KAFTA. Senator Penny Wong has observed:

> The government has agreed to Korea's push to include an investor-state dispute settlement mechanism in the agreement. This would allow Korean businesses to take disputes with the Australian government to arbitration. Labor is concerned at the impact of investor-state dispute settlement provisions on Australia's ability to legislate in areas such as health policy, environmental standards and social policy. In the case of KAFTA, the government claims it has secured carve-outs preserving Australia's ability to legislate in important policy areas. We remain to be convinced. The onus is on the government to

125 Ibid.

126 Ibid.

demonstrate how policies such as the Pharmaceutical Benefits Scheme, an important part of Australia's social safety net, are protected by these provisions.[127]

There seems to be a significant risk that flagship Korean companies can deploy the investor-state dispute settlement mechanism in a variety of regulatory fields.

Recommendation 3

The investment chapter of the *Korea-Australia Free Trade Agreement* 2014 should be rejected. The investor-state dispute settlement mechanism in the agreement poses significant risks in respect of government regulation – particularly in respect of health, the environment, labor rights, and public interest regulation. The investor-state dispute settlement mechanism exposes the Australian Government to significant liabilities through arbitration tribunal disputes.

[127] Senator Penny Wong, 'Australia's Free Trade Agreement with South Korea should be Scrutinised', *The Guardian*, 20 February 2014, http://www.theguardian.com/commentisfree/2014/feb/20/australias-free-trade-agreement-with-south-korea-should-be-scrutinised

4. Intellectual Property Law

Chapter 13 of the *Korea-Australia Free Trade Agreement* 2014 deals with the subject of intellectual property law. The Chapter covers such topics as the purposes and objectives of intellectual property law; copyright law; trade mark law; patent law; and intellectual property enforcement.

A. Purposive Statement

Article 13.1.1 of the *Korea-Australia Free Trade Agreement* 2014 provides that: 'Each Party recognises the importance of adequate and effective protection of intellectual property rights, while ensuring that measures to enforce those rights do not themselves become barriers to legitimate trade.' This is an unsatisfactory description of the objectives and purposes of intellectual property law in both Australia and Korea. There is a failure to properly consider the range of public purposes served by intellectual property law – such as providing for access to knowledge, promoting competition and innovation, protecting consumer rights, and allowing for the protection of public health, food security, and the environment.

The purposive statement in the *Korea-Australia Free Trade Agreement* is much weaker than that found in the *TRIPS Agreement* 1994. Article 7 of the *TRIPS Agreement* 1994 provides: 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.' Article 8 (1) emphasizes: 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.' Article 8 (2) provides: 'Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.'

As such, Article 13.1.1 of the *Korea-Australia Free Trade Agreement* 2014 looks defective. The provision offers a limited and inadequate description of the philosophical nature of intellectual property law, and its underlying regulatory purposes.

B. Copyright Law

Article 13.5 of the *Korea-Australia Free Trade Agreement* 2014 deals with the subject of copyright law. The regime reinforces a number of the TRIPS-Plus standards contained in the *Australia-United States Free Trade Agreement* 2004 and the *Korea-United States Free Trade Agreement*. The copyright regime proposed in the *Korea-Australia Free Trade Agreement* 2014 is one-sided and unbalanced. The regime is inordinately focused upon promoting stronger and longer copyright protection for copyright owners. There is a failure to consider

The *Korea-Australia Free Trade Agreement* 2014 recognises a Mickey Mouse copyright term extension. Article 13.5.5 further embeds copyright term extensions into the laws of Australia and Korea, providing: 'Each Party shall provide that, where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated: (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and (b) on a basis other than the life of a natural person, the term shall be: (i) not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance or phonogram; or (ii) failing such authorised publication within 50 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram.' Article 15.6 provides: 'Each Party shall provide that the term of protection of a broadcast shall not be less than 50 years after the first broadcast took place.' Such a regime is problematic both for Australia and Korea.

There has been widespread judicial, scholarly, and economic criticism of copyright term extensions, and their impact upon innovation, competition, and cultural heritage. In the case of *Golan* v. *Holder,*[128] Justice Breyer of the Supreme Court of the United States's judgment in

[128] *Golan* v. *Holder* (2012) http://www.scotusblog.com/case-files/cases/golan-v-holder/

the 2012 Supreme Court of the United States case of *Golan* v. *Holder*[129] provides a lengthy discussion of the issue:

> The statute creates administrative costs, such as the costs of determining whether a work is the subject of a "restored copyright," searching for a "restored copyright" holder, and negotiating a fee. Congress has tried to ease the administrative burden of contacting copyright holders and negotiating prices for those whom the statute calls "reliance part[ies]," namely those who previously had used such works when they were freely available in the public domain. § 104A(h)(4). But Congress has done nothing to ease the administrative burden of securing permission from copyright owners that is placed upon those who want to use a work that they did not previously use, and this is a particular problem when it comes to "orphan works"—older and more obscure works with minimal commercial value that have copyright owners who are difficult or impossible to track down. Unusually high administrative costs threaten to limit severely the distribution and use of those works— works which, despite their characteristic lack of economic value, can prove culturally invaluable.

Copyright term extensions will raise exacerbate problems in respect of orphan works – where the copyright owner is lost or unable to be located. There has been a failure by the Australian Parliament to provide meaningful or substantive policy solutions in respect of orphan works. The Australian Law Reform Commission has recommended that there should be a defence of fair use in Australian copyright law, which could apply in respect of orphan works.

Article 13.5 of the *Korea-Australia Free Trade Agreement* 2014 also provides for the protection of para-copyright measures – such as technological protection measures, and electronic rights management information. Article 13.5.9 provides that

> 9. Each Party shall provide for adequate legal protection and effective legal remedies against:
>
> (a) the circumvention of any effective technological measures that control access to a protected work, performance, phonogram, broadcast or other subject matter, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that such person is pursuing that objective;
>
> (b) the manufacture, import, distribution, offering to the public, provision, or otherwise trafficking of devices, products, or components, or the offering to the public, or provision of services, that:
>
> (i) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
>
> (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or

129 *Golan* v. *Holder* (2012) http://www.scotusblog.com/case-files/cases/golan-v-holder/

(iii) are primarily designed, produced, or performed for the purposes of enabling or facilitating the circumvention of any effective technological measure.

Locking in standards in respect of para-copyright – technological protection measures and electronic rights management information - is also controversial.

There has been much policy debate[130] and litigation[131] over technological protection measures – so-called 'digital locks'. The position of Australia in respect of technological protection measures is complex– given that there is an undeniable tension between the leading ruling of the High Court of Australia in *Stevens* v. *Sony*,[132] and the legislative measures introduced after the *Australia-United States Free Trade Agreement* 2004, with the Copyright Amendment Act 2006 (Cth).

There has been much doubt as to whether technological protection measures have been an effective means of addressing copyright infringement and circumvention. Kirby J observed in *Stevens* v. *Sony*:

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130 *Copyright Amendment (Digital Agenda) Act* 2000 (Cth); *Australia-United States Free Trade Agreement* 2004; *Stevens* v. *Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; *Copyright Amendment Act* 2006 (Cth); Circumventing an Access Control Technological Protection Measure - S 116AN of the *Copyright Act* 1968 (Cth); Manufacturing etc a Circumvention Device for a Technological Protection Measure - S 116AO of the *Copyright Act* 1968 (Cth); Providing etc a Circumvention Service for a Technological Protection Measure - S 116AP of the *Copyright Act* 1968 (Cth); and Remedies - S 116AQ of the *Copyright Act* 1968 (Cth)

131 *Universal City Studios* v. *Reimerdes*, 111 F. Supp. 2d 294, 2000 U.S. Dist. LEXIS 11949 (S.D.N.Y. 2000); *Universal City Studios* v. *Corley*, 273 F.3d 429;2001 U.S.App.LEXIS 25330; *United States of America* v. *Elcom Ltd and Dmitry Sklyarov* 2002 U.S. Dist. LEXIS 9161; 62 U.S.P.Q.2D (BNA) 1736; *RealNetworks, Inc.* v. *Streambox, Inc.* Not Reported in F.Supp.2d, 2000 WL 127311 W.D.Wash., 2000; *Macrovision Corp*. v. *321 Studios*, 2004 U.S. Dist. LEXIS 8345; *Macrovision* v. *Sima Products Corporation* (S.D.N.Y. April 20, 2006); *Chamberlain Group, Inc.* v. *Skylink Techs., Inc*., 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark International, Inc.* v. *Static Control Components, Inc*. 253 F. Supp. 2d 943 (E.D. Ky., 2003); *Storage Technology Corp.* v. *Custom Hardware Engineering & Consulting, Inc.* 421 F.3d 1307 C.A.Fed.,2005. Aug 24, 2005; *Davidson & Associates, Inc.* v. *Internet Gateway* 334 F.Supp.2d 1164 (E.D. Mo. 2004) and on appeal (US Court of Appeals for the 8th Circuit No. 04-3654; 1 September 2005); and *RealNetworks Inc.* v. *DVD Copy Control Association* 641 F. Supp 2d 913 (2009).

132 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

> In the Australian context, the inevitability of further legislation on the protection of technology with TPMs was made clear by reference to the provisions of, and some legislation already enacted for, the Australia-United States Free Trade Agreement. Provisions in that Agreement, and likely future legislation, impinge upon the subject matters of this appeal. Almost certainly they will require the attention of the Australian Parliament in the foreseeable future.
>
> In these circumstances, it is preferable for this Court to say with some strictness what s 10(1) of the Copyright Act means in its definition of TPM, understood according to the words enacted by the Parliament. If it should transpire that this is different from the purpose that the Parliament was seeking to attain (or if it should appear that later events now make a different balance appropriate) it will be open to the Parliament, subject to the Constitution, to enact provisions clarifying its purpose for the future. Moreover, the submissions in the present case, as it progressed through the courts, called to attention a number of considerations that may need to be given weight in any clarification of the definition of TPM in the Copyright Act. Such considerations included the proper protection of fair dealing in works or other subject matters entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia. [133]

Moreover, there have been well-founded concerns that technological protection measures have an adverse impact upon privacy, freedom of speech, scientific testing, competition, and innovation. As such, it seems unwise to entrench an anachronistic and ineffective regime of technological protection measures in the *Korea-Australia Free Trade Agreement* 2014.

There has also been much discussion about the efficacy of the electronic rights management information regime – although this regime has been rarely used.[134] Article 13.5.10 of the *Korea-Australia Free Trade Agreement* 2014 provides:

> Each Party shall provide for adequate legal protection and effective legal remedies against any person knowingly performing any of the following acts:

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133 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

134 SS 116B, 116C, 116CA and 116D of the *Copyright Act* 1968 (Cth); *Copyright Amendment (Digital Agenda) Act* 2000 (Cth); *Australia-United States Free Trade Agreement* 2004; and *Copyright Amendment Act* 2006 (Cth). For case law, see *IQ Group, Limited.* v. *Wiesner Publishing, LLC,* 409 F.Supp.2d 587, 596 (D.N.J.2006); *Textile Secrets Intern., Inc.* v. *Ya-Ya Brand Inc.* 524 F.Supp.2d 1184 C.D.Cal.,2007; and *Gregerson* v. *Vilana Fin. Inc.* Slip Copy, 2008 WL 451060 D.Minn.,2008 (removal of digitally embedded watermark)

> (a) the removal or alteration of any electronic rights management information without authority; or
>
> (b) the distribution, importation for distribution, broadcasting, communication or making available to the public, without authority, of works or copies of the works or other subject matter protected under this Chapter knowing that electronic rights management information has been removed or altered without authority,
>
> if such person knows, or has reasonable grounds to know, that by doing so it is inducing, enabling, facilitating or concealing an infringement of any copyright or related rights as provided by the law of the Party.

There is a question whether the electronic rights management information regime has been an effective policy measure, and, as such, deserving of inclusion trade agreements.

Article 13.5.11 of the *Korea-Australia Free Trade Agreement* 2014 provides: 'Each Party shall also provide for criminal procedures and penalties to be applied when any person, other than a non-profit library, archive, educational institution, or public non-commercial broadcasting entity, is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the activities prescribed in paragraphs 9 and 10.' There is an issue it is appropriate or desirable to provide for criminal procedures and penalties in respect of para-copyright measures – such as technological protection measures and electronic rights management information – given the policy history of such measures.

Article 13.5.12 of the *Korea-Australia Free Trade Agreement* 2014 provides: 'Each Party may provide for exceptions and limitations to measures implementing paragraphs 9 and 10 in accordance with its law and the relevant international agreements referred to in Article 13.1.3, provided that they do not significantly impair the adequacy of legal protection of those measures and the effectiveness of legal remedies against the acts prescribed in paragraphs 9 and 10.' The regimes for technological protection measures and electronic rights management information lack proper general defences, as can be found in general copyright regimes. This is problematic. Para-copyright measures should not provide for more limited exceptions and defences than the traditional regime of copyright law.

The *Korea-Australia Free Trade Agreement* 2014 also touches upon intermediary liability in respect of copyright law. The National Interest Analysis makes a number of startling claims

about copyright law. At Page 6, the National Interest Analysis makes the tendentious assertion:

> Consistent with Australia's existing obligations in the Australia-US and Australia-Singapore FTAs, and to fully implement its obligations under KAFTA, the *Copyright Act 1968* will require amendment in due course to provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement due to the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd,* which found that ISPs are not liable for authorising the infringements of subscribers.[135]

This statement is inaccurate and misleading, both in terms of domestic and international law. The High Court of Australia decision in *Roadshow Films Pty Ltd v iiNet Ltd* is line with historical precedents in respect of authorisation of copyright infringement.[136] It should also be noted that the matter did not deal with the safe harbour provisions introduced by 2004 amendments, following the *Australia-United States Free Trade Agreement* 2004. The High Court of Australia decision in *Roadshow Films Pty Ltd v iiNet Ltd* is consistent with Australia's international obligations in respect of copyright law. There is nothing inconsistent in this decision with Australia's obligations in the *Australia-United States Free Trade Agreement* 2004, the *Singapore-Australia Free Trade Agreement* 2003, or the *Korea-Australia Free Trade Agreement* 2014. There is no pretext for overturning the ruling of the High Court of Australia under the guise of international law.

Article 13.5.13 of the *Korea-Australia Free Trade Agreement* 2014 provides: 'With respect to this Article and Articles 13.6 and 13.7, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, phonogram or broadcast, and do not unreasonably prejudice the legitimate interests of the right holder.' This seems a poorly drafted provision. Given that Korea and Australia have entered into trade agreements with the United States, both countries would benefit from a general, open-ended defence of fair use. In February 2014, the Australian Law Reform Commission led by Professor Jill McKeough released its groundbreaking report on *Copyright and the Digital Economy*.[137] The two-year-long law

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135 *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* (Seoul, 8 April 2014) [2014] ATNIF 4 National Interest Analysis [2014] ATNIA 8 at page 6.

136 *Roadshow Films Pty Ltd* v *iiNet Ltd* [2012] HCA 16 (20 April 2012)

137 Australian Law Reform Commission, *Copyright and the Digital Economy*, Sydney: the Australian Law Reform Commission, 2014, http://www.alrc.gov.au/publications/copyright-report-122

reform project was an independent, fair-minded piece of research, showing wide community consultation and industrious research into the case law and the literature on the topic. The report recommended a number of simplifications and revisions to the Australian copyright regime, so that it would be better suited for an age of broadband and cloud computing. The report recommended that 'The *Copyright Act 1968* (Cth) should provide an exception for fair use.'[138] The Commission emphasized:

> Fair use also facilitates the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation. Fair use can be applied to a greater range of new technologies and uses than Australia's existing exceptions. A technology-neutral open standard such as fair use has the agility to respond to future and unanticipated technologies and business and consumer practices. With fair use, businesses and consumers will develop an understanding of what sort of uses are fair and therefore permissible, and will not need to wait for the legislature to determine the appropriate scope of copyright exceptions.[139]

The Commission suggested that the report would make Australia attractive to entrepreneurs, inventors, and start-up companies working in the field of information technology: 'Of course, innovation depends on much more than copyright law, but fair use would make Australia a more attractive market for technology investment and innovation.' In particular, a defence of fair use would be of benefit and assistance to search engines, social networks, cloud computing, and 3D printing. Australia and Korea will be at a competitive disadvantage to the United States, without the benefit afforded by a defence of fair use to innovators and entrepreneurs.

Article 13.5.14 of the *Korea-Australia Free Trade Agreement* 2014 provides: 'Notwithstanding paragraph 13, neither Party shall permit the retransmission of television signals (whether terrestrial, cable or satellite) on the Internet without the authorisation of the right holder or right holders of the content of the signal and, if any, of the signal.' This provision seems controversial – given the policy debate over the retransmission of television signals. The Australian Law Reform Commission provides an extensive discussion of

138 Ibid.

139 Ibid.

retransmission in Chapter 18 of its report on *Copyright and the Digital Economy.*[140] The Commission observed:

> The *Copyright Act* and the *Broadcasting Services Act 1992* (Cth) effectively operate to provide, in relation to the retransmission of free-to-air broadcasts:
>
> - an unremunerated exception in relation to broadcast copyright;
> - a remunerated exception in relation to underlying works or other subject matter ('underlying rights'), which does not apply to retransmission that 'takes place over the internet'; and
> - an unremunerated exception in relation to copyright in underlying rights, applying only to retransmission by non-profit self-help providers.

The Australian Law Reform Commission observed that the topic 'raises complex questions at the intersection of copyright and communications policy.'[141] The Australian Law Reform Commission recommended 'that, in developing media and communications policy, and in the light of media convergence, the Australian Government consider whether the retransmission scheme for free-to-air broadcasts should be repealed (other than in relation to self-help providers).'[142]

The *Korea-Australia Free Trade Agreement* 2014 fails to address the policy issues raised by the Australian Parliament's inquiry into IT Pricing.[143] This is problematic, given Korea's strengths in information technology and consumer electronics.

The National Interest Analysis notes that the implementation of *Korea-Australia Free Trade Agreement* 2014 will require changes to the *Copyright Act* 1968 (Cth). Given the content of the agreement, and the assertions made in the National Interest Analysis, there needs to be close scrutiny of any proposed legislative changes.

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140 Australian Law Reform Commission, *Copyright and the Digital Economy*, Sydney: the Australian Law Reform Commission, 2014, http://www.alrc.gov.au/publications/copyright-report-122

141 Ibid.

142 Ibid.

143 Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax*, Canberra: Australian Parliament, 29 July 2013, http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm

C. Trademark Law

Article 13.2 of the *Korea-Australia Free Trade Agreement* 2014 deals with the topic of trade marks. This regime is very much focused upon the protection of well-known trade marks:

> Article 6*bis* of the *Paris Convention for the Protection of Industrial Property*, done at Paris on 20 March 1883, shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known trademark,[144] whether registered or not, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark, and provided that the interests of the owner of the trademark are likely to be damaged by such use.

There is a strong emphasis in the *Korea-Australia Free Trade Agreement* 2014 upon trade mark enforcement – particularly in respect of 'counterfeiting'.

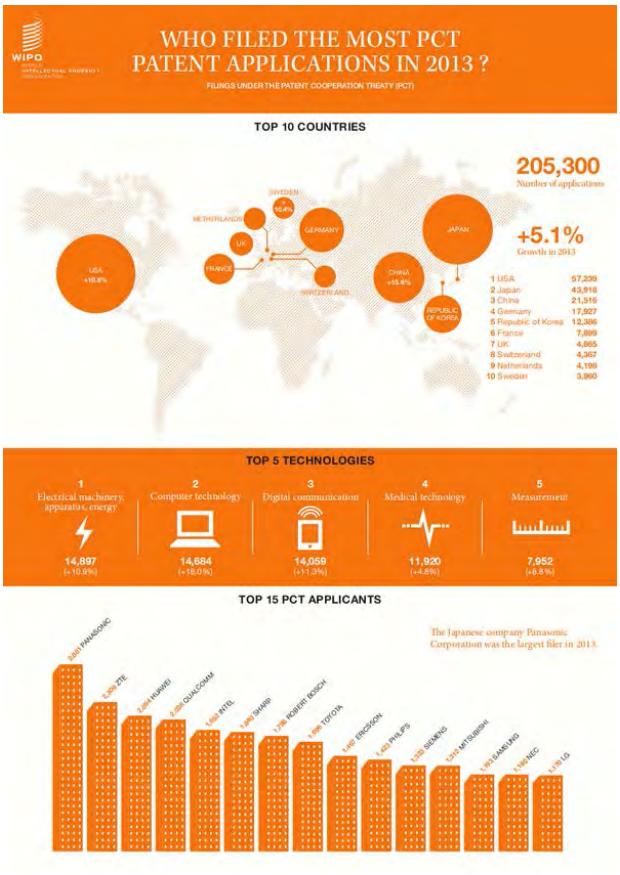
Chapter 13.3 encourages co-operation on intellectual property enforcement. Article 13.3.1 provides: 'The Parties shall cooperate and collaborate with a view to ensuring protection of intellectual property rights and that such protection is consistent with promoting trade in goods and services between the Parties, subject to their respective laws, regulations and policies. Such cooperation may include: (a)exchange of information concerning infringement of intellectual property rights between relevant agencies responsible for the enforcement of intellectual property rights; (b) promotion of contacts and cooperation among their respective agencies, including enforcement agencies, educational institutions and other organisations with an interest in the field of intellectual property rights; and(c) sharing information and experiences on relations of the Parties with non-Parties on matters concerning intellectual property rights.' Article 13.3.2 provides that 'A Party shall, on request of the other Party, give proper consideration to any specific cooperation proposal made by the other Party relating to the protection and enforcement of intellectual property rights.' There has been quite a bit concern about the use of voluntary standards and soft law measures in respect of co-operation to push for higher standards of intellectual property protection.

[144] For the purposes of determining whether a trademark is well-known, neither Party shall require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.

Article 13.4 deals with domain names on the internet.

D. Patent Law

As highlighted by the latest World Intellectual Property Organization, the Republic of Korea is an intellectual property super-power. In 2013, the Republic of Korea was ranked 5th in terms of patent applications under the *Patent Co-operation Treaty*:



By contrast, Australia did not feature in the top ten countries as applicants. As such, Korea could be said to have a comparative advantage over Australia in respect of patents.

Article 13.8 of the *Korea-Australia Free Trade Agreement* 2014 addresses the topic of patent law. Article 13.8.1 provides: 'Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. In addition, each Party

confirms that patents shall be available for any new uses or methods of using a known product.[145]'

Article 13.8.2 deals with the question of exclusions from patentability: 'Each Party may only exclude from patentability: (a) inventions, the prevention within its territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by its law; and (b) diagnostic, therapeutic and surgical methods for the treatment of humans or animals.' There has been much international debate over patentable subject matter in recent times. The majority of the High Court of Australia has taken a broad approach to patentable subject matter in cases such as *Apotex Pty Ltd* v *Sanofi-Aventis Australia Pty Ltd*.[146] The litigation over Myriad Genetics is still under appeal in Australia.[147] The Supreme Court of the United States, though, has sought to carefully limit the scope of patentable subject matter in a series of cases – including *Bilski* v. *Kappos*, *Prometheus*, and *Myriad*. More generally, there has been a great deal of debate over developing better tests for patentable subject matter, given emerging technologies – such as information technology, biotechnology, nanotechnology, and clean technology.

Article 13.8.3 deals with limited exceptions to patent rights: 'Each Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.' Australia has a general defence of experimental use, which is important to respect.

Article 13.8.4 provides: 'Each Party shall provide that a patent may be revoked on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud,

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145 For the purposes of this Article, a Party may treat the term "inventive step" as synonymous with "non-obvious" and the term "capable of industrial application" as synonymous with "useful."

146 *Apotex Pty Ltd* v *Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50 (4 December 2013

147 Matthew Rimmer, 'The Empire of Cancer: Gene Patents and Cancer Voices', (2013) 22 (2) *Journal of Law, Information, and Science*, 18-55.

misrepresentation or inequitable conduct may be the basis for revoking a patent or holding a patent unenforceable.'[148]

Article 13.8.5 considers the grace period for patents. Article 13.8.6 deals with amendments, corrections, and observations by each party. Article 13.8.7 address the disclosure of claimed invention. Article 13.8.8 provides:

> Each Party shall provide that a claimed invention:
>
> (a) is sufficiently supported by its disclosure if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention, as of the filing date; and
>
> (b) is capable of industrial application if it has a specific, substantial and credible utility.

Article 13.8.9 provides: 'The Parties shall endeavour to establish a framework for cooperation between their respective patent offices as a basis for progress towards the mutual exploitation of search and examination work.'

In the field of patent law, there has been a global patent war between Apple and Samsung. Samsung is engaged in a global patent war with Apple. There has been significant patent litigation in Australia between these two parties. In the early 2009 battle, Bennett J gave a sense of the complex litigation.[149] She observed in her public summary:

> The respondents (Samsung) intend to launch in Australia a version of a tablet device known as the Galaxy Tab 10.1 (the Australian Galaxy Tab 10.1). The applicants (Apple) have brought proceedings alleging that the Australian Galaxy Tab 10.1 infringes certain claims in 13 of Apple's patents, will contravene certain provisions of the *Australian Consumer Law* and will involve passing off of Apple's iPad 2. Samsung denies these allegations. It has filed a cross-claim seeking to revoke certain of the

148 "For Australia, a patent may be revoked or cancelled on the basis that the patent is used in a manner determined to be anticompetitive by that Party's judicial authorities. For Korea, a patent may be revoked or cancelled by the Commissioner of the Korean Intellectual Property Office, *ex officio*, or on request of any interested party, if a patented invention has not been continuously worked in Korea for a period of two years or more from the date of the award under Article 107(1)(i) of the *Patent Act*."

149 *Apple Inc.* v *Samsung Electronics Co. Limited* [2011] FCA 1164 (13 October 2011)

patent claims relied upon by Apple and alleging that Apple has infringed certain patents held by Samsung.[150]

The dispute has proceeded, with complicated and convoluted litigation.[151] If Samsung's prospects falter in Australia in the patent litigation against Apple, the company could challenge Australia's patent laws and regulations, under an investment clause.

Recommendation 4

The intellectual property chapter of the *Korea-Australia Free Trade Agreement* 2014 is controversial. The proposed regime is one-sided and unbalanced. The intellectual property chapter is focused upon providing longer and stronger intellectual property rights for intellectual property owners. There is a failure to properly consider other public interest objectives – such as access to knowledge, the progress of science and the useful arts, and the promotion of innovation and competition.

150 Ibid.

151 *Samsung Electronics Co. Limited* v Apple Inc. [2011] FCAFC 156 (30 November 2011); *Apple Inc.* v *Samsung Electronics Co. Limited (No 2)* [2012] FCA 1358; and *Samsung Electronics Co. Limited* v *Apple Inc.* [2013] FCAFC 138 (22 November 2013).

5. The Environment

Chapter 18 of the *Korea-Australia Free Trade Agreement* 2014 deals with the environment. It is a rather minimalist chapter. Article 18.1.1 provides an aspirational statement:

> Recognising the right of each Party to establish its own levels of environmental protection and its own environmental development priorities, and to adopt or modify accordingly its environmental laws, regulations and policies, each Party shall endeavour to ensure that its laws, regulations and policies provide for and encourage high levels of environmental protection and shall endeavour to continue to improve its respective levels of environmental protection, including through such environmental laws, regulations and policies.

Article 18.1.2 acknowledges: 'Each Party recognises that it is inappropriate to use environmental laws, regulations or policies for trade protectionist purposes.'

Article 18.2 deals with multilateral agreements. Article 18.2.1 has some general language about co-operation and consultation:

> 1. The Parties recognise that multilateral environmental agreements to which both Parties are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements and international trade agreements to which both Parties are party.
>
> 2. To this end, the Parties shall consult, as appropriate, with respect to negotiations on trade-related environmental issues of mutual interest.

The problem with this approach is that it does not guarantee the effective enforcement of multilateral environmental agreements.

Article 18.3 considers the application and enforcement of environmental laws:

> 1. Neither Party shall fail to enforce its environmental laws, regulations and policies, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. Each Party retains the right to exercise reasonable discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters in the enforcement of its environmental laws,

> regulations and policies and to make bona fide decisions regarding the allocation of resources to enforcement.
>
> 2. Each Party recognises that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in its environmental laws, regulations and policies. Accordingly, each Party shall endeavour to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws, regulations and policies in a manner that weakens or reduces the protections afforded in those laws, regulations and policies as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

Article 18.4 addresses trade favouring the environment: 'Each Party shall endeavour to facilitate and promote trade and investment in environmental goods and services, including environmental technologies, sustainable renewable energy, and energy efficient goods and services, including through addressing related non-tariff barriers.' Article 18.5 considers procedural guarantees. Article 18.6 looks at an institutional mechanism. Article 18.7 examines consultations. Article 18.8 addresses co-operation. Article 18.9 denies dispute settlement in respect of this chapter: 'Neither Party shall have recourse to dispute settlement under this Agreement for any matter arising under this Chapter, including such matters as referred to in Article 18.5.'

In addition to the weak chapter on the Environment, there is a concern that the Investment chapter will undermine environmental protection. There has been a significant concern about the use of investor-state dispute settlement clauses by foreign natural resource companies.

In her prescient 2009 book, *The Expropriation of Environmental Governance*, Kyla Tienhaara foresaw the rise of investor-state dispute resolution of environmental matters.[152] 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

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

> around public policy measures and implicate sensitive issues such as access to drinking water, development on sacred indigenous sites and the protection of biodiversity.[153]

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'.'[154]

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.[155]

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.'[156] She also found that 'some of the cases suggest that the mere threat of arbitration is sufficient to chill environmental policy development.'[157] 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.'[158] In her view, 'it is evident that arbitrators have *expropriated* certain fundamental aspects of environmental governance from states.'[159]

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153 Ibid., 1.

154 Ibid., 1.

155 Ibid., 2.

156 Ibid., 2.

157 Ibid., 3.

158 Ibid., 3.

159 Ibid., 3.

Tienhaara held: 'As a result, environmental regulation has become riskier, more expensive, and less democratic, especially in developing countries.'[160]

Kyla Tienhaara offers the following conclusion to her comprehensive study of investment clauses, and environmental regulation. She observes:

> Traditionally, the resolution of conflicts between investors and governments has been kept largely within the purview of the political and judicial organs of the state. With the advent of the institution of investment protection, and with the expansion of substantive norms and rules of this institution to cover aspects of environmental protection, elements of environmental governance have arguably been expropriated by international arbitral tribunals.[161]

Kyla Tienhaara concludes: 'Arbitral tribunals have expropriated the authority to determine when an environmental policy or court decision is legitimate.'[162] She observes: 'This is not necessarily a role that was freely bestowed upon arbitrators; in fact, many observers suggest that at least some of the effects of the institution of investment protection were unintended and unanticipated by states.'[163] Tienhaara comments that 'environmental regulators appear to be particularly susceptible to conflicts with investors because environmental standards do, and must, constantly change and evolve, and because the implementation of environmental policy often involves significant costs.'[164] She reflects that investment clauses may limit the number of tools in the 'policy toolbox.'[165] Tienhaara concludes: 'Environmental ministries, agencies and even domestic courts may be relinquishing some degree of responsibility for the protection of the environment out of fear that their policies and decisions will be challenged in arbitration (regulatory and judicial chill).'[166] She notes that 'those wishing to maintain the status quo in environmental policy, whether it be investors or non-environmental government agencies, can exploit these fears to their advantage.'[167]

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160 Ibid., 3.

161 Ibid., 267.

162 Ibid., 267.

163 Ibid., 267.

164 Ibid., 277.

165 Ibid., 277.

166 Ibid., 278.

167 Ibid., 278.

Isabel Mcintosh has explored a number of the potential dimensions of the *Korea-Australia Free Trade Agreement* in respect of mining.[168] She observed that 'a new Free Trade Agreement with Korea could allow three Korean-owned coal mines in NSW to sue, if Australia enforces environmental protections.'[169] Isabel Mcintosh highlights a number of conflicts involving Korean mining companies in Australia:

> There are currently three South Korean mining companies in NSW with significant interests in huge and environmentally controversial coal projects. In the Bylong Valley the South Korean government-owned KEPCO has 100 per cent ownership of the Bylong Coal mine and plans to extract 420 million tonnes of thermal coal from the area. Another South Korean government-owned enterprise KORES has recently received NSW government support to develop the $800 million Wallarah-2 coal project in the Central Coast water catchment area, a project previously turned down by the former NSW Labor government. And then there is POSCO, the 100 per cent owner of what used to be Hume Coal in the Southern Highlands, who are fighting local community action including a seven-month blockade. At stake for POSCO is 446 million tonnes of coking coal.[170]

McIntosh observes that KAFTA lacks suitable safeguards and protections in respect of the protection of the environment. She highlights the problems in this area in respect of the disputes between El Salvador and Pacific Rim Mining, and Canada and Lone Pine. McIntosh concludes, with a flourish: 'Trade agreements like the South Korea FTA and the proposed TPP may be signed in peace time, but they sign away what wars are fought over: rights to land and water, business interests and culture.'[171] She notes: 'In the war over environmental protection and the right to protect land and water, Abbott and Robb may be about to hand a powerful piece of ammunition to foreign corporations.'[172]

Senator Peter Whish-Wilson was concerned about the environmental impact of the *Korea-Australia Free Trade Agreement* 2014: 'This Free Trade Deal is designed to supercharge coal and gas exports to Korea by multi-national corporations at the expense of local industries and

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168 Isabel Mcintosh, 'Trade Agreement Puts Environmental Wins in Jeopardy', *New Matilda*, 13 March 2014, https://newmatilda.com/2014/03/13/trade-agreement-puts-environmental-wins-jeopardy

169 Ibid.

170 Ibid.

171 Ibid.

172 Ibid.

local communities.'[173] He worried: 'With the inclusion of the controversial ISDS clauses, the Government has put the profits of the powerful corporations ahead of people.' Senator Peter Whish-Wilson observed: 'All Australian parliamentarians should look closely at what powers they are handing over to shady international arbitration courts by signing up to ISDS provisions.'[174] He was concerned about the chilling effect of the regime upon environmental regulation: 'The Productivity Commission sounded a warning over including ISDS provisions in trade agreements because of the impacts through regulatory chilling.'[175] Senator Peter Whish-Wilson was sceptical of exceptions: 'No ISDS carve-outs or exemptions in existing trade agreements around the world have prevented governments being sued by corporations for simply making legislation in the name of their community.'[176] He concluded: 'The Greens will not be supporting KAFTA in its current form because of the likely increase in coal and gas exports and because of the ISDS provisions.'[177] In his view, 'We should not trade away our sovereign rights and responsibilities to provide more coal and gas to Korea.'[178]

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173 Senator Peter Whish-Wilson, 'Greens to Oppose Korea-Australia Free Trade Deal over ISDS Provisions', Press Release, 17 February 2014, http://greens.org.au/node/3578

174 Ibid.

175 Ibid.

176 Ibid.

177 Ibid.

178 Ibid.

6. Public Health

The Big Tobacco company Philip Morris has announced that it is moving its operations from Australia to South Korea.[179] This raises questions about whether the tobacco industry will seek to challenge Australia's plain packaging of tobacco products under the *Korea-Australia Free Trade Agreement* 2014. Of particular concern would be that Philip Morris will seek to use the investor-state dispute settlement regime under the *Korea-Australia Free Trade Agreement* 2014. There is also a need to ensure that other key chapters of the *Korea-Australia Free Trade Agreement* 2014 – such as the chapter on Intellectual Property and the chapter on Technical Barriers to Trade – recognise that the two countries are free to pursue tobacco control measures under the *World Health Organization Framework Convention on Tobacco Control*.

[179] 'Tobacco Giant Philip Morris to move its Australian Production', Australia Network News, 2 April 2014, http://www.abc.net.au/news/2014-04-02/philip-morris-to-move-production-to-korea/5363012

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.[180]

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 Agreement on the Promotion and Protection of Investments* 1993. The economist, Peter Martin, notes: 'The almost comic attempt to get mileage out of the treaty (moving from Australia to Hong Kong

[180] 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/

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'.[181]

Professor Tania Voon and Professor Andrew Mitchell are sceptical of such claims by the tobacco industry.[182] 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.' [183] 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 remain unproven.'[184] 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.'[185]

Professor Mark Davison of Monash University has provided an extended analysis of the bilateral investment dispute between Australia and Philip Morris Asia.[186] He comments:

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[181] 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

[182] 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

[183] 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

[184] 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

[185] 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

[186] 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

> 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 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.[187]

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.'[188]

B. Philip Morris vs. Uruguay

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

Philip Morris has also used international investment rules to challenge Uruguay's restrictions on cigarette marketing.[189] 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.'[190] Philip Morris protest: 'The 80 per cent health warning coverage

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187 Ibid.

188 Ibid.

189 *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

190 Ibid.

requirement unfairly limits Abal's right to use its legally protected trademarks, and not to promote legitimate health policies'.[191]

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.'[192]

Benn McGrady provides a thoughtful analysis of the ramifications of the dispute.[193]

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 under Kevin Rudd and Julia Gillard disavowed the inclusion of state-investor dispute resolution clauses in any future free trade agreements – including the *Trans-Pacific Partnership*.[194] 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

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191 Ibid.

192 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/

193 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.

194 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

> 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.[195]

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'.[196] 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'.[197] 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.'[198]

A number of industry groups and trade lawyers have been irked by the policy of the Australian Labor Part Government to refuse to sign trade agreements with investor-state 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.'[199] Trade lawyer Leon Trakman has protested: 'Australian investors abroad probably will suffer'.[200] Arbitrator Michael Pryles has observed: 'We have the recent example of tobacco companies saying their trademarks have been expropriated, but it's unusual.'[201]

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. On the 19th May 2014, Dr Margaret Chan – the Director-General of the World Health Organization – gave a stirring speech to the Sixty-Seventh World Health Assembly. The theme of the

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195 Ibid.

196 Ibid.

197 Ibid.

198 Ibid.

199 Chris Merritt, 'Change in treaty policy detrimental to Aussie companies: Clifford Chance', *The Australian*, 7 September 2012.

200 Ibid.

201 Ibid.

presentation was that 'Health has an Obligatory Place on Any Post-2015 Agenda.'[202] Her speech considered such matters as tobacco control, investor-state dispute settlement, trade agreements, and public health principles and values. Chan expressed her opposition to the use of investor-state dispute settlement clauses by Big Tobacco against public health measures: 'One particularly disturbing trend is the use of foreign investment agreements to handcuff governments and restrict their policy space.'[203] She noted: 'For example, tobacco companies are suing governments for compensation for lost profits following the introduction, for valid health reasons, of innovative cigarette packaging.'[204] In conclusion, Dr Margaret Chan commented: 'In my view, something is fundamentally wrong in this world when a corporation can challenge government policies introduced to protect the public from a product that kills.'[205] She stressed: 'Given the importance of prevention to protect healthy human capital, we will need to argue for the supremacy of health concerns over economic interests with other industries.'[206] She emphasized that 'health is a smart investment.' Chan looked forward to the development of 'strategies for a tobacco end-game, that is, strategies that could end tobacco use altogether.'[207]

202 Margaret Chan, 'Health has an Obligatory Place on Any Post-2015 Agenda', World Health 67th Assembly, World Health Organization, 19 May 2014.

203 Ibid.

204 Ibid.

205 Ibid.

206 Ibid.

207 Ibid.

Recommendation 6

Investment clauses in the *Korea-Australia Free Trade Agreement* 2014 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*.

7. Jobs and Labor Rights

The Coalition Government has argued that the *Korea-Australia Free Trade Agreement* 2014 will boost jobs. In April 2014, the Minister for Trade and Investment, Andrew Robb, maintained:

> Independent modelling commissioned by the Government shows that KAFTA will create at least 15,000 jobs between 2015 and 2030. In 2015 the modelling shows job gains of 1750, with average gains of 1000 in each and every year out to 2030. The modelling also shows that that KAFTA will add $650 million dollars to the Australian economy annually once in full force.

In this context, it is worthwhile considering both the labour chapter and the investment chapter of the *Korea-Australia Free Trade Agreement* 2014.

Senator Penny Wong promised to scrutinise their fine print of the agreement.[208] She commented:

> Labor knows that reducing barriers to trade can boost Australia's economic growth, forge more competitive local industries, create jobs, and give consumers greater choice and lower prices. Free trade agreements have the potential to deliver tremendous benefits for Australian consumers, workers and businesses – but whether this potential is realised depends on the quality of the deals which governments negotiate.[209]

She said that Labor apply a number of tests: 'Does the agreement deliver the best deal for Australian jobs? Is the promised access to Korea's markets real? Will it erode Australia's ability to legislate over domestic policy issues in the national interest?'[210] She maintained: 'Labor is determined to ensure that the Abbott government does not trade away the national interest for its own political interest in notching up "trophy" trade deals.'[211]

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208 Senator Penny Wong, 'Australia's Free Trade Agreement with South Korea should be Scrutinised', *The Guardian*, 20 February 2014, http://www.theguardian.com/commentisfree/2014/feb/20/australias-free-trade-agreement-with-south-korea-should-be-scrutinised

209 Senator Penny Wong, 'Australia's Free Trade Agreement with South Korea should be Scrutinised', *The Guardian*, 20 February 2014, http://www.theguardian.com/commentisfree/2014/feb/20/australias-free-trade-agreement-with-south-korea-should-be-scrutinised

210 Ibid.

211 Ibid.

Chapter 17 of the *Korea-Australia Free Trade Agreement* 2014 deals with the topic of labor rights. Much like the environment chapter, the labor chapter seems to be quite a minimalist chapter. Chapter 17 emphasizes that 'Each Party affirms its obligations as a member of the International Labour Organization (hereinafter referred to as the "ILO") and its commitments under the *Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* (hereinafter referred to as the "ILO Declaration")." Furthermore, Chapter 17 stresses that 'Each Party shall endeavour to adopt or maintain in its laws, regulations, policies and practices the following fundamental principles and rights as stated in the ILO Declaration: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.' The agreement has some basic provisions on co-operation and consultation. The Chapter does little to improve labor standards and rights in Australia and Korea.

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.[212]

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-discriminatory regulation of which will not constitute indirect expropriation nor a breach of minimum standards of treatment.'[213] 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.'[214] 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.[215] 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.[216] 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!'[217] Drake observes: 'If a foreign investor doesn't like a law, rule, judgment or administrative 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.'[218] She cites a case of a French company suing Egypt over a number of

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212 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

213 Ibid.

214 Ibid.

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

216 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

217 Ibid.

218 Ibid.

labor market measures, including an increase in the minimum wage. Drake comments: 'ISDS isn't good for working people.'[219] 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.'[220]

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*.[221]

The European Trade Union Confederation has argued that there is a need to reform the investor-state dispute settlement process.[222] 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 as called for by the European Parliament'.[223] 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'.[224] 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.'[225] 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.'[226]

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219 Ibid.

220 Ibid.

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

222 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

223 Ibid.

224 Ibid.

225 Ibid.

226 Ibid.

Recommendation 7

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

8. Relationship to the *Trans-Pacific Partnership*

At present, *Korea-Australia Free Trade Agreement* 2014 is a Kafkaesque agreement – with its secret texts, speculative claims, and shadowy tribunals.

The trade strategy of the Coalition Government in respect of *Korea-Australia Free Trade Agreement* 2014 is perhaps a good indication of its approach in the *Trans-Pacific Partnership*.

Just as it has kept *Korea-Australia Free Trade Agreement* 2014 under wraps, the Coalition Government has defended the secrecy of the *Trans-Pacific Partnership*. Indeed, the Coalition Government has refused to comply with an order from the Australian Senate to produce the texts of the Trans-Pacific Partnership. The Australian Senate is considering sanctions and remedies in respect of this failure to produce the documents associated with the *Trans-Pacific Partnership*.

The Coalition Government will no doubt also pursue agricultural objectives in the *Trans-Pacific Partnership*. Japan has been pushing for wide exemptions in agriculture in the fields of rice, wheat, beef, pork, dairy and sugar. Accordingly, it will be struggle for the Coalition Government to win a comprehensive deal on access to agricultural markets in the Trans-Pacific Partnership.

In the *Trans-Pacific Partnership* negotiations, Trade and Investment Andrew Robb also appears willing to trade away investment rules in return for greater access to markets, particularly in respect of agriculture: 'If there is a substantial market access offering, and if we can also succeed in getting exclusions and protections to safeguard certain public policy measures then we will be prepared to put it on the table, but it is not on the table yet.' This is a dangerous strategy, particularly given how transnational corporations have used and exploited investment clauses to challenge a wide range of public regulation.

The *Trans-Pacific Partnership* also features an expansive intellectual property chapter, with obligations above and beyond the *Korea-Australia Free Trade Agreement* 2014. This will raise significant issues in respect of copyright law, IT Pricing, patent law, access to medicines, trade mark law, plain packaging, and intellectual property enforcement.

There has been much controversy over the chapters in the *Trans-Pacific Partnership* relating to the environment, public health, and labor rights.

Nobel Laureate Joseph Stiglitz has warned of the dangers of such deals: 'The *Trans-Pacific Partnership* proposes to freeze into a binding trade agreement many of the worst features of the worst laws in the *Trans-Pacific Partnership* countries, making needed reforms extremely difficult if not impossible.'

Recommendation 8

There is a need to consider the interaction between the *Korea-Australia Free Trade Agreement* 2014 and other deals under negotiation such as the *Trans-Pacific Partnership*.

A SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES

THE KOREA-AUSTRALIA FREE TRADE AGREEMENT

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Overview

This supplementary submission responds to new developments regarding Investor-State Dispute Settlement; questions about transparency and the enforcement of labor and environmental standards in trade agreements; and the role of copyright exceptions in Korea.

1. New Developments regarding Investor-State Dispute Settlement

Since the hearing, there have been significant developments in respect of investor-state dispute settlement.

First, the European Commission received 149,399 submissions in respect of the inclusion of an investor-state dispute settlement regime in the Trans-Atlantic Trade and Investment Partnership.

It is particularly worth highlighting the submission of over 100 leading academics on investor-state dispute settlement: https://www.kent.ac.uk/law/isds_treaty_consultation.html

Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)

In July 2013, the European Commission started negotiations with the United States on the subject of Investment Protection and ISDS in the framework of wider talks on the Transatlantic Trade and Investment Partnership (TTIP). In the face of growing interest and public concern, the Commission decided to launch a public consultation on the matter in March 2014.

Together with Peter Muchlinski (SOAS School of Law), Horatia Muir Watt (Sciences Po Law School), and Gus Van Harten (Osgoode Hall Law School), Harm Schepel (Kent Law School) has authored a submission expressing deep concern about the planned Treaty in general and voicing strong criticism of the proposed provisions in particular.
The authors are joined by nine members of academic staff from Kent Law School and over a hundred other prominent scholars from all over Europe and across the globe with expertise in

trade and investment law, public international law and human rights, European Union law, global political economy, comparative law, public law and private law (a list of their names is available to view at the bottom of this page). Investment arbitration law, after all, is far too important to leave to just investment lawyers.

What is your overall assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US? Do you see other ways for the EU to improve the investment system? Are there any other issues related to the topics covered by the questionnaire that you would like to address?

The Commission's consultation document is an extraordinary text. On the one hand, the document contains fierce (and, in our opinion, fully justified) criticism of the international investment treaty arbitration regime as it has developed over the last two decades or so in a rapidly expanding number of awards under some 2800 Bilateral Investment Treaties, NAFTA, and the Energy Charter. Both explicitly and implicitly, the document disapproves of widespread expansive interpretations of nearly every provision found in investment treaties: from Most Favored Nation to umbrella clauses, from National Treatment to Fair and Equitable Treatment, from indirect expropriation to threshold issues of corporate nationality. The document also implicitly condemns the investment arbitration community for its failure to police itself adequately in matters of ethics, independence, competence, impartiality, and conflicts of interest. By implication, the document acknowledges that the institutional design of investment arbitration has given rise to reasonable perceptions that the decision-making process is biased against some states and investors as well as various interests of the general public.

And yet, on the other hand, the Commission seems content to entrust to these same actors the vital constitutional task of weighing and balancing the right to regulate of sovereign states and the property rights of foreign investors. This task is one of the most profound roles that can be assigned to any national or international judicial body. The proposed text requires arbitrators to determine whether discriminatory measures are 'necessary' in light of the relative importance of the values and interests the measures seek to further; whether the impact of non-discriminatory 'indirect expropriations' have a 'manifestly excessive impact' on investors in light of the regulatory purpose of these measures; whether other non discriminatory measures amount to arbitrariness or fall short of standards of due process and

transparency, and whether prudential regulations are 'more burdensome than necessary to achieve their aim'. To entrust these decisions to the very actors who have an apparent financial interest in the current situation and moreover remain unaccountable to society at large is a contentious situation. In light of the criticism inherent in the consultation document, not to mention the fundamental concerns of many observers of the system, there seems to be consensus that the regime falls short of the standards required of an institutionally independent and accountable dispute settlement system.

In our view, the logical implication of the Commission's stance is to raise the key question that is not asked in the consultation document: why consider including investor-state arbitration in the TTIP at all? The rationale for bilateral investment treaties was traditionally linked to views about the potential impact on foreign investment of uncertainty caused by weak legal and judicial systems in host countries. While such a vision of failed statehood should in itself be examined further, it suffices to point out, in the context of the relationship between the US and the EU, that it is difficult to argue realistically that investors have cause to worry about domestic legal systems on either side of the Atlantic. Above all, with FDI stocks of over €1,5 trillion either way, it is implausible to claim that investors in fact have been deterred. It is true, as the Commission points out, that nine Member States already have BITs in place with the US. It may also be true that, for these nine Member States, the new arrangement might be a better alternative than 'doing nothing.' That, however, hardly seems enough reason to impose on the other two thirds of Member States a Treaty that profoundly challenges their judicial, legal and regulatory systems. The consultation document comes up with one additional argument: that the rights each party grants to its own citizens and companies 'are not always guaranteed to foreigners and foreign investors.' The claim is unsubstantiated. Even if it is accepted, there is no obvious reason why the incorporation in TTIP of a simple norm of non discriminatory legal protection and equal access to domestic courts could not address the problem perfectly adequately.

Commissioner De Gucht has announced an ambitious programme to're-do' investment law, make the system 'more transparent and impartial', 'build a legally water-tight system', and 'close these legal loopholes once and for all.' As we have shown in detail, the consultation document and reference text fail to achieve this. Specifically, the text:

- Fails to exclude acquisitions of sovereign debt instruments from the scope of the Treaty

- Allows anyone with a substantial business activity in the home state who holds any 'interest' in an enterprise in the host state to bring a claim
- Fails to spell out legal duties of investors in host states
- Fails to control the expansion of investment arbitration to purely contractual claims
- Fails to protect the 'right to regulate' as a general right of states alongside the many elaborate rights and protections of foreign investors, let alone as a component of the FET and Expropriation standards
- Allows for unwarranted discretion for arbitration tribunals in various 'necessity' tests
- Fails to further the stated principle of favoring domestic court proceedings
- Fails to regulate conflicts of interest in the adjudicative process
- Fails to formulate a policy on appellate mechanisms with any precision
- Fails to formulate a policy on avoiding 'Treaty shopping' with any precision
- and Fails to formulate a policy on third party submissions with any precision.

The text, in fairness, is rather better than many Investment Treaties. Some of its flaws, as we have discussed, could be addressed. But the nature of the problems associated with investor-state arbitration is not quite as straightforward as the Commission presents it. In a strange cat-and-mouse game, the Commission's objective seems to be to 'outwit' arbitrators by closing down 'loopholes', eradicating discretion, and putting in place firm 'rules' on transparency of proceedings and impartiality of arbitrators. Analysis of the consultation document and the reference text, however, does not allow for the conclusion that this objective is likely to be achieved.

Yet investor-state arbitration raises some profoundly troublesome political issues regardless of arbitrator discretion. Investor-state arbitration delivers undue structural advantages to foreign investors and risks distorting the marketplace at the expense of domestically-owned companies. The benefits to foreign investors include their exclusive right of access to a special adjudicative forum, their ability to present facts and arguments in the absence of other parties whose rights and interests are affected, their exceptional role in determining the make-up of tribunals, their ability to enforce awards against states as sovereigns, the role of appointing bodies accountable directly to investors or major capital-exporting states, the absence of institutional safeguards of judicial independence that otherwise insulate adjudicators in asymmetrical adjudication from financial dependence on prospective claimants, and the bargaining advantages that can follow from these other benefits in foreign

investors' relations with legislatures, governments, and courts. At root, the system involves a shift in sovereign priorities toward the interests of foreign owners of major assets and away from those of other actors whose direct representation and participation is limited to democratic processes and judicial institutions.

In our view, this public consultation offers a good opportunity for the European Union to reflect seriously on its competences in matters of FDI under the Common Commercial Policy. As the Consultation Notice mentions, EU Member States have some 1400 BITs in place. The vast majority of them are concluded with developing countries. There is little evidence linking the conclusion of the Treaties to increased flows of FDI, and there is little evidence that they contribute to other development goals, such as encouraging good governance. In our view, these Investment Treaties and their arbitration mechanisms are in clear tension with the values of Articles 2 and 3 of the TEU that the Union is to promote in its relations with the wider world. Instead of seeking to extend the system of investment arbitration to relations with the United States, the Commission should be working towards redefining its policy on Investment Treaties, both new and existing, in ways that make it compatible with the founding values of the European Union. This requires a clearer balancing between investor rights and responsibilities and the preservation of national policy space to ensure that the interests of other stakeholders such as workers, consumers and the wider community as a whole are upheld by government.

Second, there has been much controversy over investor-state dispute settlement in the trade negotiations between Canada and the European Union, with significant objections from both Canada and Germany.

Professor Michael Geist, 'Crumbling CETA Investor-State Dispute Settlement Rules Threaten to Take Down the Canada-EU Trade Agreement', the University of Ottawa, 28 July 2014,
http://www.michaelgeist.ca/2014/07/crumbling-ceta-investor-state-dispute-settlement-rules-threaten-take-canada-eu-trade-agreement/

Crumbling CETA?: The Investor-State Dispute Settlement Rules Threaten to Take Down the Canada – EU Trade Agreement
Professor Michael Geist
July 28, 2014

On September 12, 2011, the Council of the European Union issued a 20-page press release that provided updates on the 3109th Council meeting. On page 13, there was single sentence on EU trade policy:

The Council authorised the Commission, on behalf of the EU, to open negotiations on investment with Canada, India, and Singapore within the framework of the ongoing bilateral negotiations with these countries on trade liberalisation.

The Canada – EU trade negotiations had started several years earlier and the late addition of investment did not attract significant attention at the time (the major focus was on the divide over intellectual property and procurement issues). Yet months after Canada and the EU announced that they had reached agreement on CETA, it is the investment provisions, particularly the investor-state dispute settlement (ISDS) rules, that could seemingly derail the entire agreement.

Reports out of Germany now indicate that it is not willing to sign CETA if it includes ISDS provisions. While both the Canadian government (which says negotiations continue) and the German government (which now says it will "meticulously" examine the agreement) have downplayed the report, the ISDS issue has clearly been brewing for months.

Canadian activists had flagged it weeks ago, noting the mounting opposition to ISDS rules in Germany arising as a result of 2012 claim by a Swedish company seeking billions in compensation for Germany's decision to phase-out nuclear power. Moreover, the issue has taken hold throughout Europe with the growing realization that the CETA provisions are likely to be matched in the far larger U.S. – Europe Union agreement called the Transatlantic Trade and Investment Partnership (TTIP). The linkage of CETA and TTIP has been disastrous for Canadian officials who had hoped to conclude CETA before the U.S. deal captured the limelight. Now that the two agreements are viewed as linked (the above photo is taken from German protests that explicitly combine CETA and TTIP), the Canadian deal may be held up by the controversy associated with TTIP alone.

While European opposition mounts, it is important to note that Canada was also delaying finalizing CETA due to ISDS concerns. In Canada's case, the $500 million Eli Lilly lawsuit over Canadian patent law awoke the government to the enormous risk associated with ISDS provisions. Canada has a strong case in defending against the lawsuit, but the risk that one lawsuit could expand to others means that billions may be at stake. That is why the Canadian government has been pushing for inclusion of the following clause in CETA to remove the risk of replicating the Eli Lilly lawsuit:

For greater certainty, this Article does not apply to a decision by a court, administrative tribunal, or other governmental intellectual property authority, limiting or creating an intellectual property right, except where the decision amounts to a denial of justice or an abuse of right.

The two sides of have yet to reach agreement on the issue, but given the opposition in Europe, the risk to Canada, and the mediocre Canadian track record on ISDS claims in NAFTA, it may be in everyone's interest to go back to the drawing board on CETA by eliminating ISDS altogether.

2. Modern Challenges in Trade Policy

The Chairman of the United States Senate Committee on Finance, Senator Ron Wyden, recently discussed the need for transparency in trade policy, and for strong protection of a free and open internet, labor rights, and the environment.

Ron Wyden, 'Hearing Statement on Modern Challenges and the Need for Transparency in Trade Policy', the United States Congress, 1 May 2014, http://www.finance.senate.gov/newsroom/chairman/release/?id=c73c8e64-3615-438f-8187-1babc7bf203f

Hearing Statement of Senator Ron Wyden, D-Ore., On Modern Challenges and the Need for Transparency in Trade Policy

For decades, American trade policy has been a story of adaptation and change. In particular, the extraordinary economic changes of the last generation demonstrate how important it is that future trade policies are reformed to reflect the times.

For example, consider how technology has transformed the American and global economic landscapes. In the 1990s, an entire month's worth of Internet traffic data would fit on a single hard drive that you can buy today for 50 bucks at any electronics store. More than two billion people now log onto the net regularly. But Vietnam has a law on its books that calls into question the ability of U.S. businesses to move their data in and out of the country. Governments in China, Brazil and Europe are also considering developing systems that would effectively build digital barriers to trade that nobody could have foreseen a few decades ago.

And when it came to enforcing our laws, enforcement officials used to watch out for criminals fleeing offices with armloads of trade secrets printed on sensitive documents. Now hackers can break into a company's servers and steal data from the comfort of their own desks in classrooms or military facilities thousands of miles away.

Next, a generation ago, American workers and businesses also competed against a smaller, very different China. Today, bolstered by enormous advantages provided to state-owned and

-run enterprises, Chinese government-backed steel and solar firms are able to take entire segments of the American economy out at the knees. They can do so because they sit on seemingly bottomless wells of cash, hide their paper trails with opaque accounting, and dodge the risks and borrowing costs that American companies face.

A third transformational change was the advent of unfair policies like indigenous innovation that target American innovators. In the 1990s, India and China had limited technical capacity. Now they are able to use highly technical standards to advantage their domestic firms and extract American companies' intellectual property for their own use – a shakedown, plain and simple.

Fourth, over the previous decade, currency manipulation has reemerged as a major concern for the U.S. economy. China made commitments to follow global trade rules when it joined the World Trade Organization in 2000. But when it comes to currency, as in so many other areas, China is keeping a finger firmly planted on the scale and undermining those commitments. Pick a product manufactured in China and imported to the U.S. – any product – and currency manipulation makes it artificially cheaper. That is hurting American workers' ability to compete.

Finally, unlike 20 years ago, Americans expect to easily find online the information they want on key issues like trade. Yet too often, there is trade secrecy instead of trade transparency. It's time to more fully inform Americans about trade negotiations and provide our people more opportunity to express their views on trade policy. Bringing the American people into full and open debates on trade agreements that have the effect of law is not too much to ask.

At present, many Americans are questioning if trade developments have contributed to persistent long-term unemployment, stagnant wages for far too many, and students with good degrees unable to find high-quality jobs while they're saddled with debt. Last week's report showing that America's middle class is no longer the best-off in the world produced additional questions. Responding effectively to the trade changes of the last generation is absolutely essential to instilling more confidence that trade policy will be good for America's working families and bring more of them into the economic winners' circle.

Fortunately, America has big advantages to work with in trade. We have the most skilled, productive workforce in the world – one that foreign students want to join. The dollar remains the dominant currency of the global marketplace. And with the Internet's "big bang" and the boom in high-speed networks, the U.S. exports $350 billion worth of digital goods and services each year on what amounts to a new, virtual shipping lane. The Internet also makes it easier than ever for a craftsman from Fossil, Oregon – population 470 – or a barbecue sauce maker from Memphis, Tennessee, to reach customers around the world. So policy makers have a lot to work with.

We do have classic issues that remain. There are overseas tariffs to bring down and other barriers to eliminate. We've had an open market, so when America negotiates, we can get more of an advantage out of it than other trading partners. That is particularly good for American products like wheat, dairy and footwear that need to be able to compete on a level playing field.

Here's my bottom line. The new breed of trade challenges spawned over the last generation must be addressed in imaginative new policies and locked into enforceable, ambitious, job-generating trade agreements. They must reflect the need for a free and open Internet, strong labor rights and environmental protections. Nations don't dismantle protectionist barriers or adopt these rules on their own. They do so with reciprocal agreements hammered out through negotiation. America must establish new rules to reflect today's trade norms and enforce them.

We're looking forward to hearing from Ambassador Froman, who we're fortunate to have joining us today, how the administration's trade agenda will accomplish what today's American economy needs, in part through trade negotiations with countries across the Pacific and in Europe. I'll continue working with my colleagues to develop an approach toward trade and globalization that meets the test of producing more good-paying American jobs.

3. Intellectual Property

In respect of copyright exceptions, Australia is at a comparative disadvantage – not only with the United States, but also with Korea.

In respect of copyright exceptions, Korea has a hybrid system, with specific fair dealing exceptions (like Australia), and a general defence of fair use (like the United States). Jaewoo Cho provides a useful summary of Korea's reforms in respect of copyright exceptions.

Jaewoo Cho, 'Newly Implemented Korean Fair Use and the Three Step Test', *InfoJustice*, 28 February 2013, http://infojustice.org/archives/28766

Newly Implemented Korean Fair Use and the Three Step Test

Posted by Jaewoo Cho on February 28, 2013

The approach to copyright limitations and exceptions differs significantly in each country depending on what models they are following. Generally speaking, there are three models of limitations and exceptions to copyright[1]: 1) the U.S. fair use model, 2) the fair dealing model in most U.K Commonwealth and Continental European countries, and 3) a combination of the U.S. and European models found in recently amended Korean Copyright Act.[2]

The U.S. fair use system allows for open-ended lists of permissible use based on statutory factors[3] that leave the task of identifying each case of exempted unauthorized use to the courts. On other hand, the Continental European countries provide a closed catalog of defined copyright limitations and exceptions. The newly amended Korean Copyright Act offers both 1) a closed list of permissible use (as with the European model) and 2) an open-ended consideration based on statutory factors (as with the U.S. model).

Article 9(2) of the Berne Convention[4], as known as the three-step test, states that copyright limitations are permissible in "certain special cases" that "do not conflict with the normal exploitation" and "do not unreasonably prejudice the legitimate interest of the author."

There is a debate whether the three-step test is primarily designed to be restrictive to copyright limitations and exceptions or meant to be open and flexible.[5] Some scholars argue that a national fair use system did not qualify as a "certain special cases" as enumerated in the three-step test.[6] On the same line of thought, some contend that the three-step tests limits the freedom of national legislators to legislate with expectations of economics and social welfare uncertainty, particularly with the fast-changing dynamics of technological process.[7]

However, the new amendment to the Korean Copyright Act, Article 35-3.1, states that works not falling into enumerated categories may be used in cases where "there is no conflict with the normal exploitation of copyrighted work and does not prejudice the legitimate interest of the copyright holder." The South Korean legislators suggested that this language provides the general guideline for determining whether a particular use falls under fair use.[8] Then Article 35-3.2 provides four statutory factors to determining whether a particular use is fall in to this exception, which are almost the same assertion 107 of the U.S. Copyright Act.

Therefore, this new South Korean copyright registration shows that it is not impossible to incorporate the three-step test with an open and flexible fair use clause. The South Korea fair use provision has clearly provided an enumerated list of permissible uses with the specific language from the three-step test, and then also provided flexibility by an open-ended list of permissible uses based on statutory factors when such uses are not found in the enumerated categories. This new South Korean fair use amendment challenges the theory that the three-step test is primarily designed to restrict this kind of copyright limitation.

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[1] *See* Seagull Haiyan Song, *Revaluating Fair Use in China – A Comparative Copyright Analysis of Chinese Fair Use Legislation, The U.S. Fair Use Doctrine, and The European Fair Use Dealing Model*, 51 IDEA 453, 454-445.

[2] Article 35-3 (Fair Use of Copyrighted Material):

1. Except for situations enumerated in art. 23 to art. 35-2 and in art. 101-3 to 101-5, provided it does not conflict with a normal exploitation of copyrighted work and does not unreasonably prejudice the legitimate interest of the copyright holder, the copyrighted work may be used, among other things, for reporting, criticism, education, and research.

2. In determining whether art. 35-3(1) above applies to a use of copyrighted work, the following factors must be considered: the purpose and character of the use, including whether such use is of a commercial nature or is of a nonprofit nature; the type or purpose of the copyrighted work; the amount and importance of the portion used in relation to the copyrighted work as a whole; the effect of the use of the copyrighted work upon the current market or the current value of the copyrighted work or on the potential market or the potential value of the copyrighted work.

[3] 17 U.S.C. § 107 (2006).

[4] Berne Convention for the Protection of Literary and Artistic Works art. 9(2), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350.

[5] *Compare* Martine Senftleben, *Bridging the Difference Between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine,* 57 J. Copyrighted Soc'y U.S.A 521 *with* Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law, 39 IIC 707 (2008).

[6] *See* supra note 5.

[7] *See* Geiger, Griffiths & Hilty, supra note 5; *see also* Guido Westkamp, *The "Three-Step Test" and Copyright Limitations In Europe: European Copyright Law Between Approximation and National Decision Making*, 56 J. Copyright Soc'y U.S.A 1, 64 (2008).

[8] *See* an explanation of amended Copyright Act for the implementation of KOURS FTA (2011), *available at* http://www.mcst.go.kr/web/dataCourt/reportData/reportView.jsp?pSeq=585.

Copyright Act – Korea – Copyright Exceptions – English Translation

http://elaw.klri.re.kr/eng_service/lawView.do?hseq=25455&lang=ENG

Sub-Section 2 Limitation on Author's Property Right

Article 23 (Reproduction for Judicial Proceedings, etc.)

Article 24 (Use of Political Speech, etc.)

Article 25 (Use for Purpose of School Education)

Article 26 (Use for Current News Reporting)

Article 27 (Reproduction, etc. of Current News Articles or Editorials)

Article 28 (Quotation from Works Made Public)

Article 29 (Public Performance and Broadcasting for Non-Profit Purposes)

Article 30 (Reproduction for Private Use)

Article 31 (Reproductions, etc. in Libraries, etc.)

Article 32 (Reproduction for Examination Questions)

Article 33 (Reproduction, etc. for Visually Handicapped, etc.)

Article 34 (Temporary Sound or Video Recordings by Broadcasting Service Providers)

Article 35 (Exhibition or Reproduction of Works of Art, etc.)

Article 35-2 (Temporary Reproduction in Course of Using Works, etc.)

[This Article Newly Inserted by Act No. 11110, Dec. 2, 2011]

Article 35-3

(Fair Use of Works, etc.)

(1) **Except as provided in Articles 23 through 35-2 and 101-3 through 101-5, where a person does not unduly harm an author's legitimate profits without conflicting with the usual method of using works, etc., he/she may use such works, etc. for the purposes of coverage, criticism, education, research, etc.**

(2) In determining whether an act of using works, etc. falls under paragraph (1), the following matters shall be considered:

1. Purposes and characters of use, such as for-profit or non-profit;

2. Types and uses of works, etc.;

3. Proportions of used parts in the entire works, etc. and their importance;

4. Influence of the use of works, etc. over the current market or value or potential market or value of such works, etc.

Article 36 (Use by Means of Translation, etc.)

Article 37 (Indication of Sources)

Article 37-2 (Exclusion from Application)

Articles 23, 25, 30 and 32 shall not apply to programs.

Article 38 (Relationship with Author's Moral Rights)