

**A SUBMISSION TO THE SENATE COMMITTEE FOR FOREIGN AFFAIRS,
DEFENCE, AND TRADE REFERENCES**

THE COMMONWEALTH'S TREATY-MAKING PROCESS



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Biography

Dr Matthew Rimmer is taking up the position of Professor in Intellectual Property and Innovation Law at the Queensland University of Technology (QUT) in 2nd Semester, 2015.

Dr Matthew Rimmer is an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. He is an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. Rimmer received a PhD in law from the University of New South Wales for his dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. He is a member of the ANU Climate Change Institute. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, plain packaging of tobacco products, and traditional knowledge. His work is archived at [SSRN Abstracts](#) and [Bepress Selected Works](#).

Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act 1998* (US) and the *Digital Millennium Copyright Act 1998* (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups,

the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

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

Rimmer is a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation

prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He has undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

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

Rimmer has also a research interest in intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous

performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015, forthcoming).

Rimmer has supervised four students who have completed Higher Degree Research on the topics, 'Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere' (2007); 'Intellectual Property and Applied Philosophy' (2010); 'The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines' (2012); and 'Marine Bioprospecting: International Law, Indonesia and Sustainable Development' (2014). He has also supervised sixty-seven Honours students, Summer Research Scholars, and Interns, and two graduate research unit Masters students.

Terms of Reference

The Senate Committee for Foreign Affairs, Defence and Trade is conducting an inquiry into the Commonwealth's treaty-making process, in light of the growing number of bilateral and multilateral trade agreements Australian governments have entered into or are currently negotiating.

The Terms of Reference comment:

The Commonwealth's treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements Australian governments have entered into or are currently negotiating, including:

- a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties;
- b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation;
- c. the role of other consultative bodies including the Commonwealth-State-Territory Standing Committee on Treaties and the Treaties Council;
- d. development of the national interest analysis and related materials currently presented to Parliament;
- e. development of the national interest analysis and related materials not currently presented to parliament, such as the inclusion of environmental impact statements;
- f. the scope for independent assessment and analysis of treaties before ratification;
- g. the scope for government, stakeholder and independent review of treaties after implementation;
- h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties;
- i. a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements;
- j. exploration of what an agreement which incorporates fair trade principles would look like, such as the role of environmental and labour standard chapters; and
- k. related matters.

1. The Commonwealth's Treaty-Making Process

Over the past twenty years, there have been a significant amount of problems with the Commonwealth's Treaty-Making Process – both in terms of the process, and the substantive outcomes. There has been much concern that the *Trick or Treaty? Reforms* have broken down, and failed to achieve their objectives. There has been disquiet over the lack of transparency in respect of international negotiations. There has been worry about the lack of public participation in consultations over international negotiations. Moreover, there has been a lack of parliamentary oversight in respect of the Treaty-Making Process. In addition, there has been concerns about the substantive outcomes reached in respect of international agreements – particularly trade agreements.

A. Trick or Treaty?

Twenty years ago, in 1995, the Senate Legal and Constitutional References Committee published the landmark report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*.¹ The Committee hoped to improve the Commonwealth's Treaty-Making Process in a number of ways. The Committee wanted 'to increase the information available to the public about treaty making'; 'to improve consultation with the States in relation to treaty making'; 'to improve consultation with the public, industry and interested groups in relation

¹ Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Canberra: Australian Parliament, November 1995, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/reports/tortcon.html?stem=0&synonyms=0&query=%22trick%20or%20treaty%22>

to treaty making'; 'to strengthen the role of Parliament in relation to treaty making'; and 'to put forward a mechanism which can accommodate the federal system.'²

The report made a number of recommendations on how to improve the Commonwealth's Treaty-Making Process:

Recommendation 1:

That the Government should conduct an audit of treaties to provide the following information:

- a list of treaties to which Australia is currently a party;
- a list of which Departments administer the treaties to which Australia is currently a party; and
- the manner in which treaties have been implemented in Australia, ie, whether they been implemented by executive action or by legislation, and if implemented by legislation, which legislation.

Recommendation No. 2:

That legislation provide that the Government report to the Parliament annually on actions taken in the course of the previous year to implement treaties to which Australia is a party.

Recommendation 3:

That the Department of Foreign Affairs and Trade prepare a special publication which provides information on the treaties under consideration by the Government and make it available, free of charge, to all public libraries in Australia.

Recommendation 4:

That the Government fund a project for the establishment of a treaties database, which would include:

- the full text of all multilateral treaties included in the Department of Foreign Affairs and Trade's publication *Select Documents on International Affairs*;

² Ibid.

- any available explanatory material on these treaties; and
- decisions of international bodies which interpret these treaties, such as the United Nations Human Rights Committee and the complaints bodies of the International Labour Organisation.

The treaties database should be made available, free of charge, on the InterNet (so that Commonwealth, State and local governments, universities, schools, libraries and the general public may access it) and should also be able to be accessed through Commonwealth Government bookshops, in the same manner as the SCALE database which is maintained by the Attorney-General's Department.

Recommendation 5:

That funding be provided to the Department of Foreign Affairs and Trade and the Attorney-General's Department for a joint project to publish information on the meaning and interpretation of treaties, including collections of interpretative decisions and the *travaux préparatoires* (records of the negotiation proceedings) of treaties.

Recommendation 6:

That the Government increase its efforts to identify and consult the groups which may be affected by a treaty which Australia proposes entering into, and groups with expertise on the subject matter of the treaty or its likely application in Australia.

Recommendation 7:

That the existing Commonwealth-State Standing Committee on Treaties be abolished and replaced with a Treaties Council that is preferably established by legislation. The Treaties Council should comprise members appointed by both the Government and Opposition of each of the Parliaments of the States and Territories and the Government, Opposition and minor parties of the Commonwealth Parliament. The role of the Treaties Council should be to consider the potential impact of treaties on State, Territory and Commonwealth laws, and the method of implementing treaties. The Council should provide public reports which could be tabled in the Parliaments of the States, Territories and the Commonwealth.

Recommendation 8:

That legislation be enacted which requires the tabling of treaties in both Houses of the Commonwealth Parliament at least 15 sitting days prior to Australia entering into them (whether by signature or ratification). This should be subject to an exception for urgent and sensitive treaties, in circumstances where it is not possible or not in the national interest to table them before Australia becomes a party to them. In such cases, the treaty must be tabled as soon as practicable after Australia has become a party to it, accompanied by a statement explaining the reason why it could not be tabled before Australia became a party to it.

Recommendation 9:

That legislation be enacted to establish a Joint Parliamentary Committee on Treaties. The functions and powers of the Committee should include:

- the function of inquiring into and reporting on any proposals by Australia to ratify or accede to any treaty, proposed treaty, or other international instrument or proposed international instrument, including whether Australia should become a party to the treaty or instrument;
- the function of inquiring into and reporting on whether Australia should make any reservations or declarations upon ratification or accession to any treaty;
- the function of inquiring into and reporting on any other proposed treaty action, such as the removal of a reservation, or the making of a declaration which subjects Australia to additional obligations under a treaty;
- the function of inquiring into and reporting on treaties to which Australia is already a party, including the method of their implementation and how they should be dealt with in the future;
- the function of scrutinising treaty impact statements;
- the power to hold public hearings and hold hearings in camera;
- the power to call for documents and witnesses; and
- the power to commence an inquiry into a treaty, proposed treaty, international instrument, proposed international instrument, or any other treaty action, at any time, regardless of whether it relates to a document that has been tabled in the Parliament.

Recommendation 10:

That the legislation establishing the Joint Parliamentary Committee on Treaties require that treaty impact statements be prepared on each treaty tabled in Parliament. The impact statements should address the following matters:

- reasons for Australia being a party to the treaty;
- any advantages and disadvantages to Australia of the treaty entering into force in respect of Australia;
- any obligations which would be imposed on Australia by the treaty;
- any economic, social, cultural and environmental effects of the treaty, of the treaty entering in force in respect of Australia, and of the treaty not entering in force in respect of Australia;
- the costs to Australia of compliance with the treaty;
- the likely effects of any subsequent protocols to the treaty;
- measures which could or should be adopted to implement the treaty, and the intentions of the government in relation to such measures, including legislation;
- the impact on the Federal-State balance of the implementation of the treaty;
- a statement setting out the consultations which have occurred between the Commonwealth, the States and the Territories and with community and interested parties in respect of the treaty; and
- whether the treaty provides for withdrawal or denunciation.

Recommendation 11:

That the issue of what legislation, if any, should be introduced to require the parliamentary approval of treaties be referred to the proposed Treaties Committee for further investigation and consideration.

B. The Howard Government's Response

In response, in 1996, the Howard Government partially followed the recommendations of the Senate Legal and Constitutional References Committee, and introduced reforms in respect of the treaty-making process in Australia. The Howard Government asked the Commonwealth department to prepare a National Interest Analysis for each treaty, outlining the obligations, and the costs and benefits for Australia. The Joint Standing Committee on Treaties was

established to inquire into and report upon matters arising from treaties. Currently, in 2014, the committee's role is to inquire into and report on (a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament; and (b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by: (i) either House of the Parliament, or (ii) a Minister; and (iii) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.' The Howard Government required that the executive table all proposed treaty actions for at least 15 sitting days, before binding action was taken. Furthermore, a Treaties Council was established to encourage consultations between the Federal Government, the State Governments, and the Territory Governments.

C. No Country Is An Island

In the classic 2006 work, *No Country is an Island*, the leading international and public lawyers Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams lamented:

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.³

The writers highlighted 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.

Since that time, Professor George Williams has made further submissions on the need for the reform of the regime.⁴ With social justice intern Emily Burke, George Williams makes the case for reform in 2012:

The key dilemma in treaty-making practice is how to balance the power of the executive to act unilaterally and decisively on behalf of the nation, with the need for genuine and open democratic deliberation about some of the most important policy choices facing Australia. Our view is that it is no longer appropriate for the government of the day to have unfettered power to commit Australia to new international obligations. Parliament should be given an enhanced role.⁵

Such concerns are particularly apposite given the current negotiations over The *Trans-Pacific Partnership*.

³ Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, *No Country is an Island: Australia and International Law*, Sydney: UNSW Press, 2006, 153.

⁴ George Williams and Emily Burke, *Inquiry into Treaties Ratification Bill 2012*, Joint Standing Committee on Treaties, 2012, http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/submission_-_inquiry_into_treaties_ratification.pdf

⁵ Ibid.

Williams and Burke recommended that the Australian Parliament should play a greater role in the assessment of international agreements. A key reform would be strengthening the role of the Joint Standing Committee on Treaties:

JSCOT should have a clearly mandated role early in the process of inquiring into treaty actions, before such instruments are signed by the executive. Indeed, we believe that the committee could be charged with providing an advisory opinion on whether each instrument should be signed, with the matter then being determined, as with other matters of importance, by a majority vote of each house of the parliament. Each house could have the power, as it currently has for a set number of days with regard to regulations made by the executive, to disallow a government decision to assume new international obligations on behalf of Australia. Where this process is impractical, such as where a bilateral agreement is being drafted, any negotiations should be conducted according to an instrument subject to disallowance by parliament setting out the terms of the negotiation. The executive would have a mandate only to negotiate within its terms.⁶

Williams and Burke come to the conclusion: ‘We recommend that the Bill be amended to permit either house of Parliament to disallow any treaty action undertaken by the executive, including ratifying, amending or withdrawing from a treaty.’⁷

D. The Productivity Commission

The Productivity Commission has also highlighted the need for reform in respect of Australia’s processes in respect of treaty-making.⁸ In its summary, the Productivity

⁶ Ibid.

⁷ Ibid.

⁸ Productivity Commission, *Bilateral and Regional Trade Agreements*, Melbourne: Productivity Commission, November 2010, http://www.pc.gov.au/_data/assets/pdf_file/0010/104203/trade-agreements-report.pdf

Commission was sceptical about the benefits of trade agreements: 'The Commission has received little evidence from business to indicate that bilateral agreements to date have provided substantial commercial benefits.'⁹ The Productive Commission wondered: 'This may be because the main factors that influence decisions to do business in other countries lie outside the scope of BRTAs.'¹⁰ The Productivity Commission suggested that 'Domestic economic reform offers relatively large economic benefits and should not be delayed to retain 'bargaining coin'.¹¹

The Productivity Commission supported multilateral trade agreements: 'In the international arena, the Australian Government should continue to pursue progress in the Doha Round.'¹² The Commission observed: 'Building the case for substantive reductions in trade barriers internationally requires improvements in domestic transparency and policy analysis within each country.'¹³

The Productivity Commission was concerned about the impact of bilateral and regional trade agreements: 'While bilateral and regional trade agreements can reduce trade barriers and help meet other objectives, their potential impact is limited and other options often may be more cost-effective.'¹⁴ The Productivity Commission was worried that 'Current processes for

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

assessing and prioritising bilateral and regional trade agreements lack transparency and tend to oversell the likely benefits'.¹⁵

The Productivity Commission had a number of recommendations for reform: 'To help ensure that any further bilateral and regional agreements entered into are in Australia's interests:

Pre-negotiation modelling should include realistic scenarios and be overseen by an independent body. Alternative liberalisation options should also be considered.

A full and public assessment of a proposed agreement should be made after negotiations have concluded — covering all of the actual negotiated provisions.

The Government should also develop and publish an overarching trade policy strategy, to better coordinate and track the progress of trade policy initiatives, and to ensure that efforts are devoted to areas of greatest likely return.'¹⁶

The Productivity Commission also recommended against the inclusion of intellectual property in trade agreements. The Commission also recommended against the inclusion of investor-state dispute settlement in trade agreements and investment deals.

Unfortunately, though, successive Governments have failed to implement the full suite of sensible reforms recommended by the Productivity Commission.

E. *The Treaties Ratification Bill 2012 (Cth)*

¹⁵ Ibid.

¹⁶ Ibid.

In 2012, Robert Katter introduced the *Treaties Ratification Bill 2012 (Cth)*.¹⁷ The Bill provided that ‘The Governor-General must not ratify a treaty unless both Houses of the Parliament have, by resolution, approved the ratification’. Katter contended that there was a need to reform the treaty-making process:

Treaties ought to be determined by the parliament after proper debate. This process enables public awareness of what is being proposed and a thorough analysis of the consequences of what is being proposed. Certainly, on occasions there is the odd discussion or consultation involving vested interest groups, usually the ones that are involved with the treaty that will benefit by it—usually overseas corporations. Public awareness of the public engagement process simply does not happen.

The Joint Standing Committee on Treaties considered the bill, and ultimately rejected it. The Chair Kelvin Thomson observed: ‘The Bill, if passed as presented, would present problems to both the Parliament and the executive’.¹⁸ He suggested: ‘The sheer number of treaties along with the political nature of the Senate has the potential to overwhelm the Parliamentary process.’¹⁹ In his view, ‘This, and the Bill’s lack of a provision for short-term emergency treaties, makes the Bill unworkable.’²⁰ Thomson noted, though, that ‘other models exist overseas which may add a greater degree of Parliamentary scrutiny to the treaties review process.’²¹

¹⁷ Summarized in the Joint Standing Committee on Treaties, *Report 128 – Inquiry into the Treaties Ratification Bill*, Canberra: Australian Parliament, 15 August 2012, http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/ratification_bill/report/index.htm

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

F. The Trans-Pacific Partnership

On the 28th May 2014, a petition signed by 1.8 million people worldwide was delivered to the Australian Parliament to protest against the radical secrecy surrounding the *Trans-Pacific Partnership*.

The *Trans-Pacific Partnership* is a sweeping trade agreement, spanning the Pacific Rim, and covering a score of topics. The trade deal has been shrouded in secrecy. Although trade negotiators and industry advisers have had access to the negotiating texts, the agreement has been kept hidden from parliaments, elected representatives, civil society, the media, and the general public. As such, observers have been dependent upon WikiLeaks publishing draft chapters of the *Trans-Pacific Partnership*—such as the Intellectual Property Chapter, and the Environment Chapter. An early version of the Investment Chapter has also been leaked.

A number of national and international organisations also called for an end to the secrecy surrounding the *Trans-Pacific Partnership*. The joint petition was organised by Avaaz, the Sum of Us, GetUp and 350.org. The Sum of Us observed: ‘What little has been leaked about this trade deal is extremely worrying.’ The group was worried about the content of the trade agreement: ‘The Government is orchestrating the biggest corporate power grab in a generation by negotiating the *Trans-Pacific Partnership* trade deal behind closed doors.’

There has been a particular alarm over the inclusion of an investor-state dispute settlement regime in the trade agreement—which would allow foreign investors to challenge government laws and regulations in international arbitration tribunals.

Accepting the petition, a number of Australian politicians—including representatives from the Australian Labor Party and the Australian Greens—called for transparency in respect of the Pacific Rim deal. The petition was also supported by a number of community organisations and civil society groups—including the Electronic Frontiers Australia, the Public Health Association of Australia, and the fossil fuel divestment group, 350.org.

i. Investor-State Dispute Settlement

Senator Peter Whish-Wilson of the Australian Greens discussed his bill to ban investor-state dispute settlement clauses.

At the lawns of the Australian Parliament, Senator Peter Whish-Wilson of the Australian Greens expressed concern about the presence of Trojan Horse investor clauses in the *Trans-Pacific Partnership*:

One area of critical importance is the Abbott Government's indication they are willing to support 'Trojan Horse' provisions commonly called Investor-State Dispute Settlement clauses in current trade negotiations. Even former Prime Minister John Howard did not support Investor-State Dispute Settlement in the last Australia-United States Free Trade Agreement. Investor-State Dispute Settlement provisions are a Trojan Horse that open a can of worms, allowing multinationals to sue the Australian Government in the future if they claim a local, state or domestic law harms their profits.

Senator Whish-Wilson has introduced the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014 into the Senate. The purpose of the Bill is to protect Australian laws by banning Investor State Dispute Settlement provisions.

In his second reading speech, Senator Peter Whish-Wilson commented upon the objective of the legislative bill:

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 Investor-State Dispute Settlement, there is great uncertainty. Uncertainty that is unnecessary.

Senator Whish-Wilson commented that there was a need to protect Australian sovereignty and democracy from actions in international arbitration tribunals: 'The Australian people elect their governments and their parliaments to design and implement legislation. Their sovereignty should be respected.'

The Foreign Affairs, Defence and Trade Legislation committee in the Australian Senate held an inquiry on the topic, and has received over a hundred submissions. Senator Whish-Wilson noted that there had been a great international interest in his bill to ban investor-state dispute settlement clauses.

After debate in the Australian Senate, the bill was rejected in 2015.

ii. Jobs, Labor Rights, and Industrial Relations

Kelvin Thomson—the member for Wills—spoke of behalf of the Australian Labor Party. He emphasized the need to consider the impact of trade agreements upon jobs and employment in Australia—particularly in manufacturing industries in Australia, especially in Victoria and South Australia. Thomson stressed the need to protect equality in the processes of globalization. He expressed reservations about investor-state dispute settlement clauses being deployed against government initiatives.

Such concerns have been echoed by a number of industrial organisations. In 2014, Andrew Dettmer, National President of the Australian Manufacturing Workers Union commented: ‘Despite promises, there is as yet no agreement that the *Trans-Pacific Partnership* will contain enforceable commitments on labour rights to ensure that increased competition does not reduce working conditions. This is unacceptable.’ The Union made a submission to the inquiry into investor clauses, observing:

Investor-State Dispute Settlement provisions only serve to shift investment risk that rightly should be held by investors to the public. It is not the case that these investment provisions provide the public with access to the payoffs of this risk. They only enable corporations to seek compensation for costs incurred due to risk. This is effectively socialising the costs of private investment while keeping the benefits private.

The submission concludes that ‘investor-state dispute settlement clauses are neither necessary to secure foreign investment, nor necessary to conclude trade agreements that are in the nation’s interests.’

iii. Copyright Law, IT Pricing and The Digital Economy

The *Trans-Pacific Partnership* also poses a threat to a free and open internet. Jon Lawrence from the Electronic Frontiers Australia was concerned that the *Trans-Pacific Partnership* would override domestic initiatives in respect of copyright law reform:

EFA is strongly opposed to the continuing secrecy around the negotiations for the Trans-Pacific Partnership. In an agreement as comprehensive as the Trans-Pacific Partnership, this secrecy provides opportunities for serious policy laundering. Extreme copyright measures, only revealed in leaks of the text, would force ISPs to be copyright cops and see consumers and small businesses facing criminal sanctions for minor breaches of copyright. These are just some example of the provisions that would be unlikely to pass through parliament if presented in isolation.

Jon Lawrence warned that ‘the secrecy around the *The Trans-Pacific Partnership* negotiations is inherently anti-democratic.’ He observed: ‘With several reforms in the area of copyright currently being considered EFA is especially concerned that the *The Trans-Pacific Partnership* may threaten the ability of the Australian Parliament to reform Australia’s copyright law to meet the needs of current and future generations.’ In particular, the group was concerned about the impact of the agreement upon the push for a defence of fair use for Australia, and the introduction of IT Pricing reforms. There is also a danger that investor-state dispute settlement clauses will be deployed against any progressive reforms in respect of the digital economy.

iv. Public Health

Michael Moore—the director of the Public Health Association of Australia—was concerned about the impact of the *Trans-Pacific Partnership* upon public health. He raised concerns about the lobbying of Big Tobacco, Big Food, and Big Alcohol in respect of the international trade agreement. Michael Moore warned of the dangers of investor-state dispute settlement. He observed that investor clauses had been deployed to challenge landmark public health initiatives such as the plain packaging of tobacco products.

Michael Moore cited the recent remarks of Dr Margaret Chan, the Director-General of the World Health Organization at the World Health Assembly.

International trade has many consequences for health, both positive and negative. One particularly disturbing trend is the use of foreign investment agreements to handcuff governments and restrict their policy space. For example, tobacco companies are suing governments for compensation for lost profits following the introduction, for valid health reasons, of innovative cigarette packaging. 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.

Accordingly, there is a need to ensure that the *Trans-Pacific Partnership* does not undermine public health initiatives—in respect of tobacco control; drug pricing; access to essential medicines; food labelling; nutrition; and alcohol regulation.

v. The Environment, Biodiversity and Climate Change

There has been much fear over the *Trans-Pacific Partnership* being deployed to strip away environmental regulations in Australia.

Charlotte Wood of 350.org expressed her concerns about the impact of the *Trans-Pacific Partnership* upon the environment, biodiversity, and climate change:

The Trans-Pacific Partnership will undermine decades of work by progressive governments, citizens and NGOs to protect our climate and environment from exploitation. In particular, efforts to move our economies beyond fossil fuels will face major obstacles, as the Trans-Pacific Partnership grants the fossil fuel industry new rights to ignore legislative wins we secure to limit fossil fuel investment and expansion.

In particular, Wood was concerned that policies designed to address climate change, curb fossil fuel expansion and reduce air pollution could be challenged under investor-state dispute settlement clauses in the *Trans-Pacific Partnership*. 350.org has made a submission to the Australian Senate on the dangers of investor-state dispute settlement to the environment. As Kyla Tienhaara has written, investor clauses have been used to facilitate the expropriation of environmental governance.

Wood concluded: 'With climate change accelerating at an ever-increasing pace and our communities and ecosystems under attack from coal, oil and gas extraction, the *Trans-Pacific Partnership* would deliver a massive free-kick to the fossil fuel industry to ramp up its radical expansion agenda.' She maintained: 'It is incumbent upon our governments to release and then stop this damaging deal and put people and the planet ahead of profits'.

G. The Trans-Pacific Partnership – 2015 Debate

In 2015, there has debate in the Australian Senate, both about the transparency of the *Trans-Pacific Partnership*, and its substantive content.

i. The Coalition

In a statement to the Australian Senate in February 2015, Senator Marise Payne provided this statement upon the progress in respect of the Trans-Pacific Partnership:

Concluding an ambitious Trans-Pacific Partnership Agreement is one of the Australian government's top trade priorities. As a region-wide free trade agreement, the TPP is an opportunity to achieve new, commercially-meaningful market access for Australian goods and services exports, to strengthen investment and to further integrate the Australian economy into the fast-growing Asia-Pacific region. The Trans-Pacific Partnership Agreement will be unprecedented in its scale and level of ambition. There are 12 countries that are negotiating the TPP: Australia, Brunei, Chile, Canada, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam. They represent almost 40 per cent of the global economy, or around US\$28 trillion. The TPP countries accounted for a third of Australia's total trade in 2012-13.

The negotiations on the TPP are now at an advanced stage. TPP leaders met on 10 November 2014 on the margins of APEC. They welcomed the significant progress made in recent months and instructed ministers and negotiators to make concluding the TPP a top priority. TPP negotiators again met in New York from 25 January to 1 February 2015 and made important progress on a range of issues, including the rules on trade in goods, intellectual property and state-owned enterprises. The TPP parties are working towards the goal of finalising the negotiations in the first quarter of 2015. This is an achievable goal if the parties can finalise market access negotiations and make the necessary decisions to resolve difficult outstanding issues on the trade rules. The next meeting of ministers and officials from TPP countries is scheduled to take place in mid-March 2015.

Australia is working hard to conclude negotiations, but will not sacrifice a comprehensive, ambitious TPP outcome in order just to obtain a quick deal. Australia's negotiating positions in the TPP have been, and continue to be, guided by consultations with stakeholders, including peak bodies, businesses and interested individuals. The Australian government commenced public domestic consultations in late 2008 and will continue to take every available opportunity to consult with stakeholders.

Payne maintained: 'In accordance with the government's treaty-making process, once the TPP text is agreed by the negotiating parties it will be tabled in parliament for 20 joint sitting days to facilitate public consultations and scrutiny by the Joint Standing Committee on Treaties.' She said: 'This will be an opportunity for public and parliamentary discussion of the TPP agreement prior to binding treaty action being taken.'

ii. The Australian Labor Party

On the 12 February 2015, Shadow Minister Penny Wong complained: 'This government simply refuses to bring the parliament into its confidence when it comes to the priorities it has for the TPP and the conduct of those negotiations, but also, most importantly, of the government's position on key issues which will affect and which could affect Australia for better—or not.' She lamented: 'We believe that this government has failed to keep the parliament and the public informed of the nature and progress of its trade negotiations, and this includes in relation to the Trans-Pacific Partnership.' Wong worried that 'the government is very happy to trumpet the benefits of agreements on the basis of press releases but much less happy to tell Australians what its approach is or how it is going to treat some very difficult issues—some of which I will turn to in a moment.' Wong acknowledged potential benefits for trade deals: 'As the minister referenced, 12 countries, which account for some 40 per cent of global GDP, are taking part in the TPP talks, and a high-quality, comprehensive TPP could deliver access for goods and services in countries with which we do not have existing bilateral trade agreements and it could add billions of dollars a year to the global economy.' Nonetheless, she expressed a number of reservations about the deal:

But—and this is the reason why Labor joined the TPP negotiations under the former government, and it is a very important point—notwithstanding any potential benefits, the Trans-Pacific Partnership must not do a number of things. It must not affect our ability to deliver public services. It must not undermine labour and environmental standards. It must not reduce the capacity of Australians to access affordable medicine through the PBS. It should not radically alter the existing legal balance between creators and consumers of intellectual property. That is the Labor Party's view, and in relation to investor-state dispute settlement, I again say what I have previously said: this government should not sign a Trans-Pacific Partnership which would provide foreign corporations with legal rights that are superior to the rights of domestic businesses. That is our view.

Wong suggested: 'Rather than dismissing the calls for transparency—and the minister representing did it again today when she said, 'We don't want to put text forward.'—perhaps the government should go to the heart of the matter and be much more up-front with this parliament and the community about its intentions around the TPP and how it will handle some of the difficult issues and what some of the bottom lines are so there is not the sort of reaction which one can expect from some quarters.'

On the question of process, Senator Wong provided this discussion of the question of transparency:

On this point of transparency, in addition to requiring a statement by the minister, the Senate order made yesterday draws to her attention an order made on 11 December 2013 requiring bilateral and plurilateral trade agreements to be tabled at least 14 days before signing. Labor's position—let's be very clear—is that parliament should see the final text of trade agreements before they are signed. We do not side with all those who call for every draft negotiated text to be placed in the public domain. As a party of government, we understand that sometimes that may not be helpful to achieving the best outcome for Australia. I have to say, as someone who has been involved in negotiations, I think only people who have never conducted negotiations between government would think it was a reasonable

demand to have every draft text in the public arena. But let's not correlate the release of every draft text with greater transparency. There are other ways in which governments can ensure greater transparency in relation to their trade negotiations than being required to release every draft text that is on the table for consideration. And, in fact, if those who seek greater transparency could advocate and join with us in requiring the government to make more detailed information available, the government may not have the refuge of the obvious defence that executive governments ought not have to release every draft text of every negotiation, whether it be trade or anything else.

Senator Wong said: 'The fundamental core issue here is that the government is not updating this parliament and the community about progress on the Trans-Pacific Partnership.' She said: 'And it is certainly not being clear with this parliament and the community about its attitude when it comes to those difficult issues on which Australians have very strong views—whether it be investor-state clauses, intellectual property arrangements or many other matters.' Senator Wong insisted: 'The government should be up-front about its objectives, it should be up-front about the broad parameters it takes into trade negotiations and it should deal with some of the concerns which the community has raised.'

iii. The Australian Greens

For the Australian Greens, Senator Peter Whish-Wilson expressed his concerns that elected representatives were not privy to the deal:

When I came to the Senate it was my understanding that we, as parliamentarians—both at a federal level and at a state level, and even at a local government level—make the laws in this country. We are elected by the people to make laws in this country—not negotiators behind closed doors or the trade minister, and not corporations or governments abroad. We make the laws in this country. So how is it that we have got ourselves in a situation where we have secret trade deals?

He was critical of briefings by the Department of Foreign Affairs and Trade: 'To suggest that somehow it has been an open and transparent process is patently false. It has been a secret process.'

Senator Peter Whish-Wilson called for transparency in respect of the *Trans-Pacific Partnership*:

This is why I think the Australian public is deeply suspicious of deals like this and why they rightly raise concerns over the lack of transparency and the influence of large, powerful corporations over governments, not only our government. They are writing our laws behind closed doors. We in this building have a right to know. We supported Senator Wong's order for the production of documents to have the TPP released 14 days before it is signed by cabinet. We would have preferred for that to be released much earlier but at least this is much better than having it signed by cabinet and sent to JSCOT. We can look at it and we can make as much commentary in the world as we want but it will make no difference at the end of the day when it gets put up for a vote. You either stand in front of a speeding train or you get out of the way. There may very well be some good things in this deal. But at the moment we know nothing about it except what we have seen from leaked chapters, and what we know is of significant concern. I would say to Senator Payne that, if you want the Australian public to back your trade deals and you have nothing to hide, release the details.

The Senator observed: 'Australians are also suspicious because trade deals are always overpromised and they always under-deliver, especially our bilateral trade deals.' He insisted: 'It is time to end the secrecy.' The Senator observed: 'It is time for the Australian parliament to do its job in making laws and look at this now, before it is too late, before it is signed and before this entire region is locked into an agreement that allows union officials and organisers in Vietnam to be locked up and that allows human rights abuses in countries, like Brunei, that we are going to be trading with, not to mention enormous environmental degradation

problems across the South-East Asian region—when all it will seem that we care about are profits and businesses.’

iv. Nick Xenophon

The Independent Senator for South Australia, Senator Nick Xenophon, has also raised concerns about the secretive process of treaty-making in Australia, and the substantive outcomes in respect of trade agreements.²²

²² Senator Nick Xenophon, ‘Why Australia Should Be “Hard Headed” About Bilateral Free Trade Deals’, Press release, 22 September 2014, <http://www.nickxenophon.com.au/blog/why-australia-should-be-hard-headed-about-bilateral-free-trade-deals/>

2. The United States Congress and the Fast-Track Authority

The terms of reference ask for ‘a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements.’ The debate over the Trans-Pacific Partnership has certainly highlighted the power of the United States Congress in respect of the *Trade Promotion Authority* – the ‘Fast-Track’ power.²³ Arguably, United States legislators are in a much more powerful position than their counterparts in Australia and elsewhere.

The United States Congress has enjoyed significant leverage in the debate over the *Trans-Pacific Partnership* because of the Obama Administration’s need for a Trade Promotion Authority – a ‘fast-track’ authority. As a result, United States legislators have enjoyed a greater degree of influence in the trade debate – compared to legislator in Australia and elsewhere in the Pacific Rim.

A. House of Cards: Will the US Congress Fast-Track The Trans-Pacific Partnership?

In his visit to the G20 in Brisbane, President Barack Obama sought to promote his ambitious Pacific Rim trade agreement—the Trans-Pacific Partnership (TPP). He told an audience at the University of Queensland:

We’ll keep leading the effort to realize the Trans-Pacific Partnership to lower barriers, open markets, export goods, and create good jobs for our people. But with the 12 countries of the TPP

²³ Lori Wallach, *The Rise and Fall of Fast Track Trade Authority*, Washington DC: Public Citizen Inc., 2013.

making up nearly 40 percent of the global economy, this is also about something bigger. It is our chance to put in place new, high standards for trade in the 21st century that uphold our values. So, for example, we are pushing new standards in this trade agreement, requiring countries that participate to protect their workers better and to protect the environment better, and protect intellectual property that unleashes innovation, and baseline standards to ensure transparency and rule of law.²⁴

Obama insisted: 'It's about a future where instead of being dependent on a single market, countries integrate their economies so they're innovating and growing together.'²⁵ He maintained that the trade deal would be a historic achievement: 'That's why I believe so strongly that we need to get it done—not just for our countries, but for the world.'²⁶ The President recognised that the TPP would have stringent regulatory demands, and require 'big transitions for a lot of these countries, including for the United States'.²⁷

The Obama administration, though, has not had the support of Democrats in the United States Congress. Senior Democrat Representative Sander Levin has expressed reservations about the process and the substance of the TPP. Senator Elizabeth Warren has worried about how the TPP will affect the financial regulation of Wall Street. Other Democrats have additional reservations about the TPP. Senator Ron Wyden is of the view that the fast-track

²⁴ President Barack Obama, 'Remarks at the University of Queensland During the G20', Brisbane, 15 November 2014, <http://www.whitehouse.gov/the-press-office/2014/11/15/remarks-president-obama-university-queensland>

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

regime needs to be overhauled and modernised.²⁸ Three House of Representatives Democrats—Reps. Rosa DeLauro (Conn.), Louise Slaughter (N.Y.) and Alan Grayson (Fla.)—maintained that there are insufficient votes in the House to pass the trade promotion authority to secure the approval of the 12-nation TPP.²⁹ De Lauro commented: ‘Fast-track doesn’t have support in the current Congress and won’t have support in the next Congress’. She declared: ‘The votes are not there.’³⁰

Nonetheless, President Barack Obama has said that he is willing to defy United States Congressional Democrats on his support of the TPP, and work with Republicans if need be.³¹ However, there are significant divisions within the Republicans over the TPP.³² There could well be insufficient support within the United States Congress for a trade promotion authority.

²⁸ Shawn Donnan, Richard McGregor, and James Politi, ‘Fate of Obama’s “Fast-Track” Authority’ Rests with the Oregon Democrat’, *Financial Times*, 27 May 2014, <http://www.ft.com/intl/cms/s/0/74ebaf84-e4bf-11e3-9b2b-00144feabdc0.html?siteedition=uk#axzz3TZbtF9MT>

²⁹ Vicki Needham, ‘House Dems say Trade Bills Have No Chance of Passing’, *The Hill*, 12 November 2014, <http://thehill.com/policy/finance/223923-house-democrats-say-fast-track-tpp-have-no-chance-to-pass>

³⁰ Ibid

³¹ David Nakamura, ‘Obama says he is Willing to Defy Democrats on His Support of Trans-Pacific Partnership’, *Washington Post*, 3 December 2014, http://www.washingtonpost.com/politics/obama-says-he-willing-to-defy-democrats-on-his-support-of-trans-pacific-partnership/2014/12/03/25edcaf4-7b30-11e4-84d4-7c896b90abdc_story.html

³² Eric Johnston, ‘Republican Control of Congress Does Not Mean TPP is a Done Deal’, *The Japan Times*, 5 November 2014.

B. The Democrats

i. Congressman Sander Levin

Ways and Means Committee Ranking Democrat, Congressman Sander Levin, was an interested spectator at the Sydney talks for the TPP.

In September 2014, Levin presented a Report to the Council on Foreign Relations reviewing the areas of debate and conflict in the TPP negotiations.³³

First, Levin emphasized that the Obama administration must respect the 10 May 2007 agreement on trade agreements negotiated between the US Congress and the Bush administration. This deal sought to protect workers' rights, environmental protections, access to medicines, and human rights. The US Congressional Democrats have been aggrieved that Obama and his trade representatives have not honoured this deal: 'That agreement is—and must remain—a bedrock principle within trade agreements.'³⁴

Second, Levin called for reciprocity in the TPP. He observed: 'The TPP presents an enormously important opportunity to transform the trading relationship between the United States and those partners from something that in some cases looks like a one-way street to a fully reciprocal one with healthy flows that go both ways and create opportunities for

³³ Congressman Sander Levin, *The Trans-Pacific Partnership Negotiations: The need for Congress to get Fully in the Game*, A Report to the Council on Foreign Relations, 18 September 2014, <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Levin%20Report%20to%20CFR%20on%20TPP.pdf>

³⁴ Ibid.

everyone—the way trade is supposed to.’³⁵ Levin highlighted concerns about market access for agriculture, automobiles, currency manipulation, and state-owned enterprises.

Third, Levin stressed that there was a need to protect national sovereignty in the TPP, and the right to regulate. He commented: ‘Reaching for a high bar to increase standards of living, improve worker rights and strengthen environmental protections, and ensure that trade opportunities are reciprocal does not mean the United States gives up its right to regulate in all of the vitally important areas that affect our interests’.³⁶ Levin was particularly interested in defending food safety rules, and tobacco control measures. He was also alarmed by the abuse of investor-state dispute settlement: ‘Investor-state disputes have proliferated in recent years and involve increasingly novel and costly challenges to public welfare and environmental regulations.’³⁷

Levin reaffirmed the key role of Congress in overseeing trade agreements: “‘Fast Track,’ or Trade Promotion Authority, is traditionally designed to be in place from the start of negotiations—to ideally give Congress a role in picking negotiating partners, to set out negotiating objectives, to establish full transparency, to provide an active role for Congress throughout the negotiations, to judge if the objectives have been achieved, and then to set procedures for legislative consideration’.³⁸ He said: ‘No matter one’s view of the status of the TPP negotiations, whether in their “end game” or with much work remaining (as I believe), after four years, these negotiations clearly are not at the beginning.’³⁹

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

Levin put a sober press release at the end of the Ministerial talks on the TPP in Sydney. He observed: 'With substantial work having been done, going forward there needs to be a sharp focus on the what, not the when'.⁴⁰ In his view, 'It is the substance of a TPP agreement that matters.'⁴¹

Levin commented: 'While the text must reflect these principles, the devil will be in the details of the text, in the annexes and the 'non-conforming measures,' and in the implementation of the obligations'.⁴² He stressed that 'That is true in critical areas, including the environment, state-owned enterprises, labor rights, and a broad range of market access issues.'⁴³ Levin observed that, while 'the quantity of increased trade is important', 'in this new era of globalization, the most important test is its quality, its potential impact on the lives of people'.⁴⁴ Echoing the concerns of the economist Joseph Stiglitz about the TPP benefitting corporate elites—the 1%⁴⁵—he stressed: 'The goal must

⁴⁰ Sander Levin, 'Levin Statement on Trans-Pacific Partnership Negotiations', Ways and Means Committee Democrats, 27 October 2014, <http://democrats.waysandmeans.house.gov/press-release/levin-statement-trans-pacific-partnership-negotiations-0>

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Joseph Stiglitz, 'On the Wrong Side of Globalization', *The New York Times*, 15 March 2014, http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/?_r=2

be to ensure that the potential benefits of trade are spread broadly to the many, not just the few.’⁴⁶

Levin maintained that there was a need to ensure that the TPP contained appropriate safeguards in respect of labor rights, the environment, and public health. He recalled: ‘The May 10 structure, which I helped negotiate, was a major breakthrough on the rights of workers, environmental protections, and access to medicines, and it is vital that TPP build on them, not weaken them.’⁴⁷

Levin emphasized that there should be greater open and transparent democratic debate about the TPP: ‘We need more public input and debate on all of the mentioned issues, as well as intellectual property, food safety and investment.’⁴⁸

Levin was also conscious of tensions between the United States, and its trading partners: ‘TPP therefore presents a special opportunity and special challenges’.⁴⁹ He noted: ‘Vietnam and Malaysia, for example, have very different structures from our own.’⁵⁰ Moreover, Levin insisted: ‘We must confront Japan’s longstanding and persistent exclusions of agricultural and automotive products from its markets.’⁵¹

⁴⁶ Sander Levin, ‘Levin Statement on Trans-Pacific Partnership Negotiations’, Ways and Means Committee Democrats, 27 October 2014, <http://democrats.waysandmeans.house.gov/press-release/levin-statement-trans-pacific-partnership-negotiations-0>

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

ii. Senator Elizabeth Warren

Senator Elizabeth Warren has been a rising star in the progressive caucus in the Democrats in the United States Congress. She has been encouraged by a number of Democrats to make a run for the Presidency.⁵²

Warren has shown a strong interest in the TPP.⁵³ She has warned: 'From what I hear, Wall Street, pharmaceuticals, telecom, big polluters, and outsourcers are all salivating at the chance to rig the upcoming trade deals in their favour ... I believe that if people would be opposed to a particular trade agreement, then that trade agreement should not happen.'⁵⁴

In a November 2014 piece, Senator Elizabeth Warren discussed the need to 'work on America's agenda.'⁵⁵ She expressed her concerns about corporate influence over law-making and trade deals:

Before leaders in Congress and the president get caught up in proving they can pass some new laws, everyone should take a skeptical look at whom those new laws will serve. At this very

⁵² Reid Epstein, 'Ex-Obama Campaign Staff Join "Ready for Warren"', *The Wall Street Journal*, 12 December 2014.

⁵³ Matthew Rimmer, 'Will the TPP Feed Consumers to the Wolves of Wall Street?', *Crikey*, 15 April 2014, <http://www.crikey.com.au/2014/04/15/will-the-tpp-feed-consumers-to-the-wolves-of-wall-street/>

⁵⁴ Senator Elizabeth Warren, 'Senator Warren's Remarks to the AFL-CIO Convention', Los Angeles Convention Center, Press Release, 8 September 2013, http://www.warren.senate.gov/?p=press_release&id=234

⁵⁵ Senator Elizabeth Warren, 'It's Time to Work on America's Agenda', *Washington Post*, 7 November 2014, http://www.washingtonpost.com/opinions/elizabeth-warren-its-time-to-work-on-americas-agenda/2014/11/07/984da7b6-669c-11e4-9fdc-d43b053ecb4d_story.html

minute, lobbyists and lawyers are lining up by the thousands to push for new laws—laws that will help their rich and powerful clients get richer and more powerful. Hoping to catch a wave of dealmaking, these lobbyists and lawyers—and their well-heeled clients—are looking for the chance to rig the game just a little more.⁵⁶

Warren observed: ‘Americans are deeply suspicious of trade deals negotiated in secret, with chief executives invited into the room while the workers whose jobs are on the line are locked outside’.⁵⁷ She noted that voters are ‘appalled by Wall Street banks that got taxpayer bailouts and now whine that the laws are too tough, even as they rake in billions in profits’.⁵⁸ Warren commented: ‘If cutting deals means helping big corporations, Wall Street banks and the already-powerful, that isn’t a victory for the American people—it’s just another round of the same old rigged game.’⁵⁹

On the 17 December 2014, Senator Elizabeth Warren and a number of her colleagues, Tammy Baldwin and Ed Markey, wrote to the White House, outlining a number of concerns in respect of the TPP.⁶⁰ Warren commented: ‘We are concerned that the Trans-Pacific Partnership (TPP) could make it harder for Congress and regulatory agencies to prevent future financial crisis.’⁶¹ She observed, with her colleagues: ‘With millions of families still struggling to recover from the last financial crisis and the Great Recession that

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Senator Elizabeth Warren, Senator Tammy Baldwin, and Senator Ed Markey, ‘A Letter to the United States Trade Representative, Michael Froman’, United States Senate, 17 December 2014, <http://www.warren.senate.gov/files/documents/TPP.pdf>

⁶¹ Ibid.

followed, we cannot afford a trade deal that undermines the government's ability to protect the American economy.'⁶²

Warren, Baldwin, and Markey highlighted concerns with three specific provisions that could be part of the TPP. First, the Democrat politicians raised concerns about the investor-state dispute settlement process: 'Including such provisions in the TPP could expose American taxpayers to billions of dollars in losses and dissuade the government from establishing or enforcing financial rules that impact foreign banks.'⁶³ Warren and her colleagues warned: 'The consequence would be to strip our regulators of the tools they need to prevent the next crisis.'⁶⁴

Second, Senator Elizabeth Warren and her colleagues were concerned about including provisions in the TPP that would commit the American financial sector to 'market access' rules. She observed: 'Such rules could be interpreted by international panels to prohibit basic, non-discriminatory restrictions on predatory or toxic financial products—such as particularly risky forms of derivatives—because those restrictions deny access to the U.S. financial markets.'⁶⁵ Warren and her colleagues observed: 'To protect consumers and to address sources of systemic financial risk, Congress must maintain flexibility to impose restrictions on harmful financial products and on the conduct or structure of financial firms.'⁶⁶

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

Third, Warren and the other Democrat politicians were concerned about the inclusion of terms in the TPP that could limit the ability of the government to use capital controls: 'If the TPP were to include provisions from past pacts that required unrestricted capital transfers, it could limit Congress' prerogative to enact not only capital controls, but basic reform measures like a financial transactions tax.'⁶⁷

The group also requested that the United States Trade Representative provide Congressmen and women with 'all U.S. proposals and bracketed negotiating texts relating to the three provisions.'⁶⁸ The group wanted transparency in respect of the TPP's chapters on investment, financial services, and dispute settlement.

The intervention by Senator Warren against the TPP attracted significant media interest.⁶⁹ In the *Huffington Post*, Zach Carter highlighted the tensions between Warren and the United States Trade Representative, Michael Froman:

Financial issues are particularly sensitive for Froman, who left Citigroup in 2009 to join the Obama administration, eventually taking the helm at USTR in 2013. The bank gave Froman over \$4 million in exit payments to take the government job. Warren voted against Froman's confirmation.⁷⁰

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Zach Carter, 'Elizabeth Warren: Obama Trade Deal Could Undermine Wall Street Reform', *Huffington Post*, 18 December 2014, http://www.huffingtonpost.com/2014/12/18/elizabeth-warren-trade-deal_n_6350312.html

⁷⁰ Ibid.

Warren has been particularly concerned about Citigroup exercising inordinate influence over Congressional policy-making, and trade policy.⁷¹

Public Citizen has shared some of these concerns of Senator Elizabeth Warren:

While governments across the world strive to rein in risk-taking by the financial firms that brought us the worst economic crisis since the Great Depression, U.S. trade negotiators (advised by many of those same firms) appear to be moving in the opposite direction. We cannot afford to insert into binding “trade” pacts more deregulatory constraints pushed by Wall Street. We cannot afford the TPP or TAFTA.⁷²

In February 2015, Senator Elizabeth Warren elaborated upon her opposition to investor-state dispute settlement.⁷³ She contended: ‘Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations.’⁷⁴ Furthermore, Senator Warren worried that the regime ‘would undermine U.S. sovereignty.’⁷⁵ She feared: ‘ISDS would allow foreign companies to challenge U.S. laws —

⁷¹ Wonkblog Staff, “‘Enough is Enough’: Elizabeth Warren launches Fiery Attack After Congress Weakens Wall Street Regs”, *The Washington Post*, 12 December 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/12/enough-is-enough-elizabeth-warrens-fiery-attack-comes-after-congress-weakens-wall-street-regulations/>

⁷² Ben Beachey, ‘Congressional Leaders Reject Wall Street’s Push for Deregulatory “Trade” Pacts’, *Eyes on Trade*, Public Citizen, 19 December 2014, <http://citizen.typepad.com/eyesontrade/2014/12/congressional-leaders-reject-wall-streets-push-for-deregulatory-trade-pacts.html>

⁷³ Senator Elizabeth Warren, ‘The Trans-Pacific Partnership Clause Everyone Should Oppose’, *The Washington Post*, 25 February 2015, http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html

⁷⁴ Ibid.

⁷⁵ Ibid.

and potentially to pick up huge payouts from taxpayers — without ever stepping foot in a U.S. court.’⁷⁶ Senator Elizabeth Warren emphasized that there was opposition to investor-state dispute settlement from various quarters:

This isn't a partisan issue. Conservatives who believe in U.S. sovereignty should be outraged that ISDS would shift power from American courts, whose authority is derived from our Constitution, to unaccountable international tribunals. Libertarians should be offended that ISDS effectively would offer a free taxpayer subsidy to countries with weak legal systems. And progressives should oppose ISDS because it would allow big multinationals to weaken labor and environmental rules.⁷⁷

Senator Warren stressed: ‘Giving foreign corporations special rights to challenge our laws outside of our legal system would be a bad deal.’⁷⁸ She warned: ‘If a final TPP agreement includes Investor-State Dispute Settlement, the only winners will be multinational corporations.’⁷⁹

iii. The Progressives

On the 3rd March 2015, the Congressional Progressive Caucus issued, ‘Principles for Trade: A Model for Global Progress.’⁸⁰ The executive summary stressed: ‘America’s current trade policy fails working families while increasing profits for the world’s largest corporations.’ The executive summary noted: ‘Trade agreements should create a net increase of good American jobs, spur more balanced trade between partners, and improve governance,

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Congressional Progressive Caucus, ‘Progressive Caucus Releases Trade Principles that Put Workers First in Trade Agreements’, 4 March 2015, <http://cpc.grijalva.house.gov/hot-topics/progressive-caucus-releases-trade-principles-that-put-workers-first-in-trade-agreements1/>

public health, and environmental protections around the world'.⁸¹ The Congressional Progressive Caucus believes 'the following principles can ensure fairer trade agreements by prioritizing middle class families and removing special protections and privileges for corporations':

Protect Congress' Authority to Set Trade Policy

Restore Balanced trade

Put Workers First

Stop Currency Manipulation

Expand Buy America Procurement Practices

Protect the Environment for Future Generations

Prioritize Consumers above Profits

Protect Nationhood Rights

Secure Affordable Access to Essential Medicines and Services

Respect Human Rights

Provide a Safety Net for Vulnerable Workers

The Caucus lamented: 'Since implementation of the North American Free Trade Agreement (NAFTA) in 1994, the United States has lost millions of jobs in key sectors like manufacturing, wages have stagnated, and the standard of living for working families has dropped.'⁸² The Caucus insisted: 'U.S. trade policy must focus on creating economic opportunity for working people in the United States and abroad, not only on maximizing short-term profits for large corporations'.⁸³ The Caucus maintained that the 'trade deals must put working families and our environment first'. The Progressive Caucus concluded: 'The

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

United States must stop using trade agreements as investment deals for the world's wealthiest corporations and instead prioritize higher wages, safer work and environmental standards, and a healthier world economy.'⁸⁴

C. The Republicans

The Trans-Pacific Partnership (TPP) is a house of cards. The blockbuster trade agreement, spanning the Pacific Rim and covering a score of topics, has been the subject of intense debate. But its fate will depend on the brutal partisan domestic politics of Washington, DC.

President Barack Obama needs to be granted fast track trade promotion authority from the US Congress to secure the passage of the TPP.⁸⁵ Yet, he has faced opposition in Congress from Democrats and from some quarters of the Republican Party. The TPP is stuck in the gridlock of DC politics, and the triumph of the Republicans in the midterm elections has further complicated the progress of the agreement.⁸⁶ The balance of power has shifted towards the Republicans, with the party seizing control of both the House of Representatives and the

⁸⁴ Ibid.

⁸⁵ Lori Wallach, *The Rise and Fall of Fast Track Trade Authority*, Washington DC: Public Citizen Inc., 2013.

⁸⁶ Molly Ball, 'Republicans Sweep the Midterm Elections', *The Atlantic*, 5 November 2014, <http://www.theatlantic.com/politics/archive/2014/11/republicans-sweep-the-midterm-elections/382394/>

Senate. President Obama has sought to encourage the new Republican-led Congress to work with him:

I'm eager to work with the new Congress to make the next two years as productive as possible. I'm committed to making sure that I measure ideas not by whether they are from Democrats or Republicans, but whether they work for the American people.⁸⁷

Obama will be dependent upon a Republican Congress, which hates his presidency with a deep and abiding passion, in order to win support for the TPP.

But Republican Senate Majority leader Mitch McConnell has emphasized that he could collaborate with President Obama on trade agreements:

The president and I were just talking about that right before I came over here. Most of his party is unenthusiastic about international trade. We think it's good for America. And so, I've got a lot of members who believe that international trade agreements are a winner for America. And the president and I discussed that right before I came over here, and I think he's interested in moving forward. I said, 'Send us trade agreements. We're anxious to take a look at them.'⁸⁸

But others, like Republican Senator Orrin Hatch, have demanded that trade promotion authority provide new oversight mechanisms in respect of the full implementation and effective enforcement of trade agreements. Hatch has argued: 'We need to tear down barriers

⁸⁷ President Barack Obama, 'Remarks by the President in a Press Conference', The White House, 5 November 2014, <http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference>

⁸⁸ CNN, 'GOP Wins Senate; Mitch McConnell News Conference', CNN, 5 November 2014, <http://edition.cnn.com/TRANSCRIPTS/1411/05/cnr.05.html>

that block our goods from foreign markets.'⁸⁹ He maintained: 'For TPP, I fully expect to see intellectual property provisions that are similar to the standards found in U.S. law, resulting in an agreement containing a very high standard of intellectual property rights protection.'⁹⁰

Niels Marquardt of the American Chamber of Commerce in Australia is optimistic that a Republican Congress will support fast track authority for the TPP. He told the *Australian Financial Review*:

Generally, speaking, the Republican Party is more unambiguously supportive of free trade and more likely to be supportive'. He has maintained: 'The Congress has been very obstructionist to the President's agenda, but going into 2016, when they will have the biggest prize on the table - the Presidency, I think both parties are going to want to show that they are able to govern and hopefully the TPP is one of those things they can agree.'⁹¹

Such analysis is too simplistic. There is certainly one faction (associated with big business and the US Chamber of Commerce) supportive of the TPP, but there are a number of fractures and splits within the Republican Party on the issue.

⁸⁹ Senator Orrin Hatch, 'Hatch Calls for TPA Passage, Seeks Strong Outcomes on Trade Deals in Speech at American Enterprise Institute', 30 January 2015, <http://www.hatch.senate.gov/public/index.cfm/2015/1/hatch-calls-for-tpa-passage-seeks-strong-outcomes-on-trade-deals-in-speech-at-american-enterprise-institute>

⁹⁰ Ibid.

⁹¹ 'Republican Win Boosts TPP Deal', *Australian Financial Review*, 6 November 2014, http://www.afr.com/p/national/republican_win_boosts_tpp_deal_vgzMxRYf7WHZLaLADRxlgP

Public Citizen, a civil society group, has commented that 'the GOP takeover of the US Senate probably reduces the chances that President Barack Obama gets Fast Track at all before his presidency is over or that a deal is completed on the TPP.'⁹² The group continued:

A significant bloc of House GOP does not want to delegate more power to Obama, especially as the GOP has been attacking him as the 'imperial president' who grabs legislative authority for his own. Tea party activists oppose Fast Track per se and anything that empowers Obama, which leaves GOP lawmakers who support Fast Track exposed to the dreaded tea party primary threat. To make political matters worse, House GOP lawmakers know that even if the GOP votes were available to pass Fast Track on a party line vote, almost no Democrats will vote to give their own president such authority, so any fallout from future trade pacts would be owned solely by the GOP.⁹³

Lori Wallach, Director of the group's Global Trade Watch branch, has observed: 'There is a Wall Street versus Main Street split in the Republicans.' While 'the more conservative and the more moderate of the Republicans are against fast track', she suggests that 'corporate, "main," Wall Street contingent are for fast track'.⁹⁴

There remain reservations in several Republican quarters and in influential think tanks like the Cato Institute, about the wisdom of including investor-state dispute settlement within the

⁹² Ben Beachy, 'What the 2014 Election Results Mean for Trade Policy', Eyes on Trade, Public Citizen, 5 November 2014, <http://citizen.typepad.com/eyesontrade/2014/11/what-the-2014-election-results-mean-for-trade-policy.html>

⁹³ Ibid.

⁹⁴ Nermeen Sheikh, 'Obama and McConnell Pledge Cooperation; Will Fast-Tracking Secretive TPP Trade Deal Top Their Agenda', *Democracy Now!*, 6 November 2014, http://www.democracynow.org/2014/11/6/obama_mcconnell_pledge_cooperation_will_fast

TPP.⁹⁵ Defenders of the free market and free enterprise within the Republican Party are suspicious of corporate privileges being accorded to foreign investors. Members of the Tea Party are aghast at the prospect of anonymous international tribunals ruling on US laws and policies. Another group would like to deny Obama any victory whatsoever, and will do their best to ensure that his remaining two years are a lame-duck period.

President Obama will need the skills of a political operative like the mythical Frank Underwood to secure fast track authority from the US Congress to smooth the passage of the TPP. Otherwise, it could well collapse like a house of cards.

D. Independent Bernie Sanders

Independent Senator Bernie Sanders has also expressed deep reservations about the lack of transparency in respect of the *Trans-Pacific Partnership*. In a February 2015 speech, Sanders said:

I am opposed to the TPP, Trans-Pacific Partnership trade agreement. That is my view, but I would hope every Member is opposed to the fast-track process which gives the authority to negotiate these agreements in the final terms. That is because nobody has had the opportunity to even see what is in the proposed agreement right now. Transparency has been minimal, absolutely minimal.⁹⁶

⁹⁵ Cato Institute, 'The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs', 20 May 2014, <http://www.cato.org/events/investor-state-dispute-settlement-mechanism-examination-benefits-costs>

⁹⁶ Senator Bernie Sanders, 'The Trans-Pacific Partnership and the Trade Promotion Authority', Congressional Record, 26 February 2015, The Senate, S1147.

Sanders concluded in his speech: 'We need to create decent-paying jobs in this country for a change and not just in other countries around the world.'⁹⁷

E. The White House

The White House has engaged in extensive lobbying of the United States Congress in order to secure the passage of the *Trans-Pacific Partnership*.⁹⁸

In response to criticism from Senator Elizabeth Warren, Jeffrey Zients, the director of the National Economic Council, wrote a piece for the White House blog in return, maintaining that the TPP would not undermine financial regulation.⁹⁹ He insisted that 'the Trans-Pacific Partnership (TPP) represents a once-in-a-generation opportunity for America to set the

⁹⁷ Ibid.

⁹⁸ S.A. Miller, 'Tea Party, Dems Join Forces to Put Obama's Asia Trade Deal in Jeopardy', *The Washington Times*, 9 February 2015, <http://www.washingtontimes.com/news/2015/feb/9/obama-asia-trade-deal-trans-pacific-partnership-in/?page=all> and David Nakamura, 'Obama Pushes Trans-Pacific Partnership in TV Interviews', *The Washington Post*, 26 February 2015, <http://www.washingtontimes.com/news/2015/feb/9/obama-asia-trade-deal-trans-pacific-partnership-in/?page=all>

⁹⁹ Jeffrey Zients, 'The Trans-Pacific Partnership and Financial Regulatory Reform', The White House, 19 December 2014, <http://www.whitehouse.gov/blog/2014/12/19/trans-pacific-partnership-and-financial-regulatory-reform>

rules for global trade in the 21st century'.¹⁰⁰ Zients maintained: 'The agreement aims to expand access to the world's fastest-growing markets, even as we enshrine higher standards of protection for workers and consumers.'¹⁰¹

Zients maintained that President Barack Obama had worked hard to remedy poor financial regulation of Wall Street during his Presidency. Moreover, he maintained that 'the President has pushed for stronger rules across the globe through the G-20 and other venues, and he has also fought against repeated attempts to undermine Wall Street reform here at home.'¹⁰² While not mentioning Senator Warren by name, he noted that 'questions have arisen over how we will protect the progress toward a safer financial system that we have made since the crisis in the context of these trade negotiations'.¹⁰³

Zients maintained: 'As for TPP, there is nothing in the proposed agreement that would have inhibited our decisive response to the recent financial crisis or that would dilute the important financial reforms we have implemented over the past four years'.¹⁰⁴ He insisted: 'The President will not allow this agreement to undermine essential financial reforms.'¹⁰⁵

Zients commented:

On the contrary, this agreement will raise standards and level the playing field for American companies to compete abroad, including for services suppliers, the largest sector of our economy.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

TPP will also provide investor protections to benefit the 23 million Americans who work for U.S. firms doing business overseas.¹⁰⁶

Zients argued that the government would have the ability to engage in regulation for the public interest: 'The United States wouldn't negotiate away its right to regulate in the public interest—with regard to public health and safety, the financial sector, the environment, or any other area.'¹⁰⁷

This response from the White House, though, did not specifically address the substantive points raised by Senator Elizabeth Warren and her counterparts about investor-state dispute settlement, market access, and capital controls.

In a further blog in 2015, Zients sought to address the question of investor-state dispute settlement.¹⁰⁸ He maintained: 'The purpose of investment provisions in our trade agreements is to provide American individuals and businesses who do business abroad with the same protections we provide to domestic and foreign investors alike in the United States.'¹⁰⁹ Zients defended the mechanism: 'ISDS is an arbitration procedure – similar to procedures used every day by businesses, governments, and private citizens across the globe – that allows for an impartial, law-based approach to resolve conflicts and has been important to encouraging

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Jeffrey Zients, 'Investor-State Dispute Settlement: Questions and Answers', The White House, 25 February 2015, <http://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers>

¹⁰⁹ Ibid.

development, rule of law, and good governance around the world.’¹¹⁰ He insisted: ‘ISDS does not undermine U.S. sovereignty, change U.S. law, nor grant any new substantive rights to multinational companies.’¹¹¹ His response, though, has been criticised both by Public Citizen and the Cato Institute.¹¹²

The White House will struggle to fast-track the TPP, without the support of Democrats in the United States Congress. At present, there seems significant opposition on a number of key issues in the trade deal by leading Democrats.¹¹³ Moreover, there is a great concern about the veil of secrecy in respect of the negotiations over the TPP. It remains to be seen whether the Obama administration will reconsider its negotiating stance in respect of the TPP in order to win the support of Democrats in the United States Congress.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Lori Wallach, ‘Lame White House Response to Senator Warren’s Warning about TPP Investor Privileges’, *Huffington Post*, 2 March 2015, http://www.huffingtonpost.com/lori-wallach/lame-white-house-response_b_6784584.html and Simon Lester, ‘Responding to the White House Response on ISDS’, *Cato at Liberty*, 27 February 2015, <http://www.cato.org/blog/responding-white-house-defense-investor-state-dispute-settlement>

¹¹³ Ben Beachy, ‘Congressional Leaders Reject Wall Street’s Push for Deregulatory “Trade Pacts”, Eyes on Trade’, *Public Citizen*, 19 December 2014, <http://citizen.typepad.com/eyesontrade/2014/12/congressional-leaders-reject-wall-streets-push-for-deregulatory-trade-pacts.html>

3. Recommendations

Considering both the situation in Australia and the United States, the Commonwealth's Treaty-Making Process is broken. There have been significant problems in respect of transparency, public participation, empirical analysis, and parliamentary oversight. In addition, there has been a concern that the Commonwealth's Treaty-Making Process has failed to adequately address matters of fair trade. In particular, there is a need to engage a comprehensive assessment of the impacts of international agreements upon the environment, public health, labor rights, and human rights. Such problems have been particularly pronounced during the negotiations over the regional trade agreement, the *Trans-Pacific Partnership*. Having participated in both academic discussion and policy debate over treaty-making, I would make the following observations and recommendations in respect of the Commonwealth's treaty-making.

Treaty-Making

1. Australia's treaty-making process lacks transparency. Trade agreements have negotiated in secret by trade negotiators and industry advisers – with little way of input from elected representatives, civil society, or the wider public. Future trade agreements must be negotiated in an open and inclusive manner. There should be a public release of draft texts in respect of proposed treaties and trade agreements.

2. Australia's treaty-making process lacks broad and inclusive public participation. The Department of Foreign Affairs and Trade's record of consultation is poor with the Australian Federal Parliament, state and territory governments, civil society, and the broader public. There has been great concern that the Commonwealth's treaty-making process has been

subject to industry capture. There is a need for significant reforms to the democratic deliberative process in respect of treaty-making. There should be scope for consultation before, during, and after negotiating rounds on trade agreements. There should be broad public consultation with legislators, state and territory governments, key stakeholders, and the wider public. There is a need for greater democratic participation in policy formulation and development.

3. Australia's treaty-making process lacks an independent, comprehensive evaluation and assessment of the costs and benefits of international agreements. There is a demand for evidence-based policy making informed by independent, critical research on the economic, social, and political costs of treaties. The role of the Department of Foreign Affairs and Trade should be subject to oversight by other key government departments. The Productivity Commission, the Department of Finance, and Treasury should evaluate the economic impacts of international agreements. Other key relevant departments need to engage in the assessment of the impact of international agreements upon such key factors – as public health, the environment, labor rights, and human rights.

4. Australia's treaty-making process should be reformed to allow for greater parliamentary oversight. The House of Representatives and The Senate should have the power to disallow treaty-making action by the executive – including ratifying, amending, and withdrawing from a treaty.

Intellectual Property

5. As recommended by the Productivity Commission, Australia should 'avoid the inclusion of Intellectual Property matters as an ordinary matter of course in Bilateral and Regional Trade Agreements.'

6. The Intellectual Property Chapter of the *Trans-Pacific Partnership* proposes a host of new obligations in respect of copyright law – dealing with copyright term extension, copyright exceptions, online intermediary liability, technological protection measures, and civil and criminal enforcement provisions. The copyright proposals in the Intellectual Property Chapter pose significant threats in respect of creativity, innovation, access to knowledge, competition, and consumer rights in Australia. Australia should not support such measures.

7. Like its rejected predecessor the *Anti-Counterfeiting Trade Agreement*, the Intellectual Property Chapter of the *Trans-Pacific Partnership* also proposes a significant increase in the rights and remedies of trade mark holders, particularly in addressing trade mark infringement and counterfeiting. There has also been discussion about such topics as well-known trade marks, geographical indications, and Internet Domain Names. There is a concern that the trade mark sections of the *Trans-Pacific Partnership* are neither fair nor balanced.

8. The Intellectual Property Chapter of the *Trans-Pacific Partnership* also proposes significant reforms across the Pacific Rim in respect of patent law and related rights, such as data protection and biologics protection.

9. The *Trans-Pacific Partnership* proposes criminal procedures and penalties in respect of the disclosure of trade secrets. Such measures could have a serious impact upon the craft of journalism, whistleblowers, and civil society activism. Such a regime is inappropriate for Australia.

10. Furthermore, the *Trans-Pacific Partnership* proposes that intellectual property holders will also be able to bring investor actions under an investor-state dispute settlement mechanism.

Investment

10. In light of the Productivity Commission report, the inquiry into the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (Cth)*, and Chief Justice French's concerns, the Australian Government and the Australian Parliament should seek to exclude investment clauses from trade agreements and investment agreements.

11. There has been an international debate over the usefulness and the legitimacy of investor-state dispute settlement clauses. The United Nations Conference on Trade and Development (UNCTAD) has highlighted the rise in investor-state dispute settlement cases, and the significant issues relating to public regulation and government liability. There has been much criticism of investor-state dispute settlement in debates in the European Union. There has been opposition to investor-state dispute settlement in the United States Congress – notably by Senator Elizabeth Warren. Similarly, there has been controversy over investor-state dispute settlement in Canada, after a number of disputes. A number of experts, policy-

makers, and nation states have been highly critical of the investor-state dispute settlement scheme.

12. There has been much concern about the impact of investor-state dispute settlement clauses upon the rule of law, sovereignty, and democratic decision-making.

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

There has been much controversy over the *Trans-Pacific Partnership*, intellectual property, investment, and pharmaceutical drugs. There has been much concern that investment clauses could be deployed to challenge domestic law reforms – such as those proposed in the independent *Pharmaceutical Patents Review Report*. The dispute between *Eli Lilly v. Canada* highlights the dangers of investment clauses in this field. UNITAID, public health advocates, intellectual property experts, and legislators have all expressed concern about the impact of investment clauses upon access to essential medicines – especially in respect of HIV/AIDS, tuberculosis, and malaria, and neglected diseases.

Moreover, there has been concern about the use of investment clauses by mining companies in respect of environmental regulation. As highlighted by the dispute between *Lone Pine Resources v. Canada*, gas companies have deployed investment clauses to challenge regulations and moratoria in respect of coal seam gas and mining. This raises larger questions about public regulation in respect of land, water, and the environment. Investment clauses could undermine and undercut public regulation in respect of the environment, biodiversity, and climate change.

13. Instead of investor-state dispute settlement, it would be preferable for conflicts between foreign investors and sovereign nations to be resolved in domestic courts or nation-to-nation dispute resolution.

Public Health

14. Australia's treaty-making process should include health impact assessments. Australia's trade agreements must not undermine or undercut the *World Health Organization Framework Convention on Tobacco Control* – or Australia's pioneering tobacco control measures, such as graphic health warnings, and the plain packaging of tobacco products. Likewise, there is a need to ensure that trade agreements do not interfere with alcohol regulation.

15. Australia's trade agreements must secure access to essential medicines. This is particularly important in addressing public health concerns, such as HIV/AIDS, tuberculosis, and malaria, and emerging infectious diseases, such as avian influenza and ebola.

16. Australia's treaty-making process should take into account the impact upon food security. In particular, there is a need to consider the impact of trade agreements upon food labelling schemes – such as nutrition labelling like Food Star Labels, Country-of-Origin Labels, Australian-Made Labels, and GMO food labelling.

The Environment

17. Australia's treaty-making process should respect water rights. Trade agreements should not threaten water rights. In her book *Blue Future*,¹¹⁴ Maude Barlow maintains that there is a need to ensure that trade protects water:

Given the threat to water from existing and proposed trade and investment agreements, it is urgent to remove all references to water as a service, good, or investment in all present and future treaties. Water is not like anything else on earth. There is no substitute for it, and we and the planet cannot survive without it. Water must not be a tradable good, service, or investment in any treaty between governments and corporations should have no right to stop domestic or international protection of water.¹¹⁵

Barlow maintains that 'trade negotiations should take into account the effect on water of all trade activities'.¹¹⁶ She concludes that 'removing water as a tradable good, service, or investment from all trade and investment treaties would provide a better framework to protect water in international trade.'¹¹⁷

18. Australia's treaty-making process should involve environmental impact assessments. There is a need to ensure that trade agreements contain binding obligations for trading partners to adopt, maintain, and implement environmental laws, policies, and regulations. At the same time, there is a need to ensure that trade agreements do not undermine Australia's environmental laws, policies, and regulations.

¹¹⁴ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 231.

¹¹⁵ Ibid., 233.

¹¹⁶ Ibid., 233.

¹¹⁷ Ibid., 235.

19. The treaty-making process must support climate action. Trade agreements should require countries to adopt, maintain, and implement commitments in international climate law – including the *United Nations Framework Convention on Climate Change* 1992 and further climate agreements. Trade agreements must provide flexibility for governments to adopt and implement policies – such as feed-in-tariffs, renewable energy initiatives, carbon pricing, emissions trading schemes, and fossil fuel divestment.

Corporate Regulation, Labor Rights, and Human Rights

20. Treaty-making should preserve and protect financial regulations, particularly in the wake of the Global Financial Crisis.

21. Treaty-making should respect international standards and norms on labor rights. Australia's trade agreements must provide a safety net for vulnerable workers. There is a need to incorporate fair trade principles into trade agreements.

22. Treaty-making must honour and respect human rights. Australia's trade agreements should be subject to a human rights assessment. There should be a mechanism to judge which countries are eligible for trade agreements – given their human rights record.

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