Submission to the Joint Standing Committee on Treaties Inquiry into the Trans-Pacific Partnership Agreement March 2016

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Joint Standing Committee on Treaties (JSCOT) Inquiry into the Trans-Pacific Partnership Agreement (TPP).

AFTINET is a network of 60 community organisations and many more individuals which advocates for fair trade based on human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners.

The TPP involves 12 Pacific Rim countries and 40 per cent of global trade. The agenda has been driven by the US as the largest global economy, and was described by the US President in his 2016 State of the Union speech as ensuring that the US sets the rules for global trade.

The question for Australia is whether such rules, heavily influenced by US pharmaceutical, media and other industries, are in the public interest, and whether they constrain future Australian governments from regulating in the public interest.

The text of the TPP contains 30 chapters with many annexes and side-letters, and has been estimated to total 6000 pages. Because of resource constraints, this submission cannot deal with all aspects of the TPP, but selects those issues which we believe will have the most impact in Australia, and which we have the expertise to analyse.

Other submissions will deal with other issues which could constrain future government policy. For example, it can be argued that the copyright section of the intellectual property chapter locks in rules which favour copyright holders at the expense of consumers, and that the electronic commerce chapter could constrain data privacy regulation.

The TPP sanitary and phytosanitary chapter has more extensive additional provisions to develop common regional standards for quarantine measures than previous trade agreements. The question is whether these could constrain future measures needed to maintain Australia's high quarantine standards as an island continent, free of many pests and diseases.

This submission deals with the following aspects of the TPP:

- The trade agreement process and the need for independent studies of trade agreement impacts
- Investor-State Dispute Settlement provisions (ISDS)
- Extended monopolies on medicines
- Provisions for temporary movement of people
- Labour rights
- Environmental standards
- Food labelling and product standards

Summary

The trade agreement process and the need for independent studies of trade agreement impacts

Trade negotiations are conducted in secret, and the text is not made available until after it has been agreed. The decision to sign agreements is a Cabinet process, after which the agreement is tabled in Parliament and examined by JSCOT. Parliament only votes on the implementing legislation, not on the whole agreement.

The Senate Inquiry into the Australian trade agreement process held in 2015 summarised the faults in this secretive and undemocratic process in its report, aptly called *Blind Agreement.*

In the case of the TPP, the Department of Foreign Affairs and Trade (DFAT) held many stakeholder briefings during negotiations, but were not able to discuss details of the text, and stakeholders were not able to see draft texts. The process was very one-sided. Stakeholders made their views known but were given very little information about the detail of negotiations or whether their views had any impact.

The main detailed information about the negotiations came from leaked documents.

AFTINET has made detailed recommendations for changes to this process, including release of draft texts, release of the final text for public and parliamentary debate before it is authorised for signing, and comprehensive independent studies of the likely economic, health, and environmental impacts of the agreement before signing.

We note that, in the case of the TPP the call for independent assessments of the economic, health, human rights and environmental impacts of the TPP has come not only from a broad range of community organisations, but from the Productivity Commission, the Australian Competition and Consumer Commission and public health experts.

It has been confirmed that the US Congress will not consider the TPP implementing legislation until after the November 2016 presidential election. Ratification by six countries, including the US and Japan, is required for the TPP to proceed. The US Congress also has legislative authority and a proven record of demanding changes to the implementing legislation of other countries before final ratification. It would be unwise for the Australian Parliament to pass the implementing legislation in advance of the US Congress process.

ISDS

Investor-State Dispute Settlement (ISDS) is a very costly system with no independent judiciary, precedents or appeals. It gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors. These fundamental systemic issues remain in the TPP version of ISDS.

Known outstanding ISDS cases increased sharply to almost 700 in 2015, with US companies the most frequent users. Australia has only experienced one ISDS case because its ISDS agreements are with developing countries, and the Australia-US free trade agreement did not include ISDS. The TPP is particularly dangerous

because it will expose Australia directly to ISDS claims from US companies for the first time.

Despite claims in the National Interest Analysis (NIA) of safeguards and carveouts, the only clear exclusion from ISDS cases in the TPP is tobacco regulation. Claimed safeguards for health, environmental and other public interest law and policy in the TPP have been assessed by legal experts as being ambiguous and ineffective, and have not prevented ISDS cases under previous agreements.

The NIA claims that the TPP's ISDS system is one of the most protective in the world. In fact, both the draft India Bilateral Investment Treaty and the EU draft Investment Chapter attempt to provide more extensive safeguards. These were publicly available before the completion of the TPP but were not included.

Leaving aside these and other possible future adjustments to the ISDS system, the basic question remains as to why any government would agree to ISDS provisions at all. As the Productivity Commission has noted, there is no legitimate rationale for giving special legal rights to global corporations to sue governments over domestic legislation. There is no evidence of any economic benefit from ISDS, only of financial and policy risks to governments.

Stronger monopolies on biologic medicines

Biologic medicines are the most expensive medicines used to treat serious illnesses like cancer. Ten of the most expensive biologics cost the Pharmaceutical Benefits Scheme (PBS) approximately AU$1.2 billion in subsidies in 2013-14 to ensure they were accessible to Australians.

The NIA claims that the TPP text does not require any changes to Australia's length of data protection for biologic medicines. But the TPP text contains two options for longer data protection for biologic medicines before cheaper versions become available. Governments must be bound by one of these. The first is at least eight years data protection. The second is at least five years data protection accompanied by "other measures" to provide "a comparable outcome in the market" to the eight years in option one.

Australian law, which currently provides five years of data protection, will not change immediately. However, Australia would be legally obliged by the TPP to ensure "other measures" are in place which will lead to a market outcome of an extra three years, resulting in eight years of data protection.

DFAT has defended this outcome by saying that current delays caused by market conditions or administrative delays can already deliver an outcome of at least eight years.

But currently such delays are only a possibility. The TPP text locks in these delays, creating a legal obligation to deliver the comparable market outcome of at least eight years. Each year of delay of cheaper forms of biologics will cost the PBS hundreds of millions of dollars. This cost will not show up immediately, but is a future time bomb for PBS cost blowouts. This will also create pressure to pass on some of those costs to consumers in the form of higher prices at the chemist. This is not in the public interest.

Temporary movement of people

The TPP commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of professional, technical and skilled trades occupations, without labour market testing to establish whether there are local workers available. Recent studies have shown many examples of exploitation of these workers because of the temporary nature of the work and possibility of deportation. Australia has made far more extensive commitments for entry of contractual service providers than have other TPP countries.

Labour rights

The inclusion of a chapter which refers to labour rights is welcome. However, the NIA description paints a rosier picture than is revealed by the details in the text. Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding, even in relation to forced and child labour. The enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proven effective in other agreements.

The environment

The inclusion of a chapter on environmental regulation is also welcome. But environmental law experts have criticised this chapter for containing weak environmental standards, most of which are not enforceable in the same way as obligations in other chapters. The non-binding nature of commitments and weak enforceability in the environment chapter contrasts sharply with the legal rights provided to corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above.

Technical Barriers to Trade (TBT)

The Regulatory Impact Statement notes that the TBT chapter and it annexes aim “to promote common regulatory approaches across the TPP region.”

The issue with the promotion of common regulatory standards across countries with different standards is how to preserve the right of future governments to maintain and improve Australia’s relatively high standards in areas like food regulation. Pressures from industry to simplify and streamline standards regarded as barriers to trade may suit their cost-reduction interests, but may not be in the public interest.

While Australia is already bound by World Trade Organisation TBT rules, the TPP includes the added possibility of Investor State Dispute Settlement (ISDS).

In the Korea-Australia Free Trade Agreement, Australia ensured that ISDS disputes could not be applied to the TBT chapter, but there is no such exclusion in the TPP. A foreign investor could allege that changes to country of origin or other labelling requirements which might occur after the TPP is in place, could harm their investment. The wine and spirits annex could restrict future options for mandatory alcohol health warnings like those for pregnant women, which could also be open to ISDS cases.

Weighing TPP costs and benefits and conclusion

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of the TPP. Overseas economic studies show tiny economic gains after 15 years, which have not been assessed against the costs of other impacts. While emphasising gains for particular export sectors, the NIA does not provide an analysis of the impact of on the economy as a whole, nor of the costs of government revenue losses, unemployment, the extension of medicine monopolies, ISDS and future restrictions on government regulation in areas like food standards. Given these severe shortcomings, the Committee should recommend against the TPP's implementing legislation.

The trade agreement process and need for independent studies of trade agreement impacts

Trade negotiations are conducted in secret, and the text is not made available until after it has been agreed. The decision to sign agreements is a Cabinet process, after which the agreement is tabled in Parliament and examined by JSCOT. Parliament only votes on the implementing legislation, not on the whole agreement.

The Senate Inquiry into the Australian trade agreement process held in 2015 summarised the faults in this secretive and undemocratic process in its report, aptly called *Blind Agreement* (Senate Committee on Foreign Affairs Defence and Trade, 2015). AFTINET made a detailed submission to this inquiry (AFTINET 2015).

In the case of the TPP, the Department of Foreign Affairs and Trade (DFAT) held many stakeholder briefings during negotiations, but were not able to discuss details of the text, and stakeholders were not able to see draft texts.

Between 2010 and September 2014, stakeholders were given information about the time and place of negotiations and time was made available for them to make presentations to both Australian and other negotiators. This was welcome, but the process was very one-sided. Stakeholders made their views known but were given very little information about the detail of negotiations or whether their views had any impact.

After September 2014 to the completion of negotiations in October 2015, the negotiations themselves became more secretive, with little advance information about time and place of negotiations and no opportunities to make formal presentations to negotiators.

The main detailed information about the negotiations came from leaked documents.

The agreed, but not final, text was released in November 2015. The final, legally scrubbed version was released in February 2016. Cabinet authorised the decision to sign the text, which is now being reviewed by JSCOT. Parliament can only vote for or against, or amend, the implementing legislation. Many of the most controversial parts of the agreement, like foreign investor rights to sue governments (ISDS), do not require implementing legislation, but are included in the text.

Our recommendations for change to this process are summarised briefly below.

Prior to commencing negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.

The Australian Government should release its proposals and discussion papers during trade negotiations. Draft texts should be also released for public discussion, as occurs in the WTO and is now the practice in some EU negotiations. The final text should be released for public and parliamentary debate before it is authorised for signing.

The current National Impact Analysis (NIA) process is inadequate, because it is done by the same department which negotiated the agreement. After the text is completed but before the decision is made to sign it, comprehensive independent studies of the likely economic, health and environmental impacts of the agreement should be undertaken and made public for debate, consultation and review by parliamentary committees.

Parliament should vote on the whole text of agreements, not just the implementing legislation.

We note that, in the case of the TPP, the call for independent assessments of the economic, health, human rights and environmental impacts of the TPP has come not only from a broad range of community organisations, but from the Productivity Commission, the Australian Competition and Consumer Commission and public health experts (AFTINET, 2016, Productivity Commission, 2015: 86, Australian Competition and Consumer Commission 2015: 18-19, Hirono *et al*, 2015).

The Productivity Commission has offered to do a cost benefit assessment, but this has been refused by the Government (Hutchens 2016).

It has been confirmed by the Republican Speaker of the US House of Representatives that there is majority opposition to the TPP in the current US Congress. Congress will not consider the TPP implementing legislation until after the November 2016 presidential election (Hunter, 2016).

Ratification by six countries, including the largest economies of US and Japan, is required for the TPP to proceed. The US Congress also has legislative authority and a proven record of demanding changes to the implementing legislation of other countries before agreeing to final ratification, as it did with Australian copyright law before ratification of the Australia-US Free Trade Agreement (Kelsey, 2015).

It would be unwise for the Australian Parliament to pass the implementing legislation in advance of the US Congress, considering the US Congress may not pass it, or that the US Congress could request further changes to legislation before the US would agree to ratification.

Investor-State Dispute Settlement processes (ISDS)

Background and recent literature on ISDS

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to bypass national courts and sue governments for compensation in an international tribunal if they can argue that a change in law or policy has harmed their investment.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has since developed concepts like “indirect” expropriation which do not exist in national legal systems.

There are many examples of ISDS cases against health and environmental laws and policy. The US pharmaceutical company Eli Lilly is currently suing the Canadian Government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than an existing medicine (Gray 2012). The

US Lone Pine mining company is suing the Canadian Government because the Québec provincial government conducted a review of environmental regulation of gas mining (CBC 2012). The Canadian TransCanada company is suing the US Government over its 2015 decision not to approve the controversial Keystone tar sands pipeline for environmental reasons (Beachy 2016). The French Veolia Company is suing the Egyptian Government over a contract dispute in which it is claiming compensation for a rise in the minimum wage (Breville and Bulard 2014).

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico through the North American Free Trade Agreement, the Howard Coalition Government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

Many experts including Australia's High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment lawyers who can continue to practice as investment law advocates. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest (Kahale 2014, French 2014, Productivity Commission 2010).

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider, and appeal mechanisms to ensure consistency of decisions.

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. An OECD study found ISDS cases last for 3 to 5 years and the average cost is US$8 million per case, with some cases costing up to US$30 million (Gaukrodger and Gordon 2012).

Even if a government wins the case, defending it can take years and cost tens of millions of dollars The US Philip Morris tobacco company lost its claim for compensation for Australia's 2011 plain packaging legislation in Australia's High Court. It moved some assets to Hong Kong and used the Hong Kong-Australia investment agreement to sue the Australian Government because there was no ISDS clause in the Australia-US Free Trade Agreement. It took over four years and reportedly cost $A50 million in legal fees for the tribunal to decide the threshold issue that Philip Morris was not a Hong Kong company (Tienhaara 2015b).

The Australian Government won on the issue of jurisdiction, so the substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested. Even so, the case had a freezing effect on other governments' introduction of plain packaging legislation. The New Zealand Government delayed introducing its own legislation pending the tribunal decision (Johnston 2015).

The most comprehensive figures on known cases from the United Nations Conference on Trade and Development (UNCTAD) show that there has been an explosion of ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and almost 700 in 2015. US-based companies are the most frequent users of ISDS (UNCTAD 2016). Most cases are won by investors or settled with concessions from governments (Mann 2015, UNCTAD 2015).

It has been argued that Australia is not likely to face future ISDS claims, because there has been only one claim against Australia, despite a number of agreements containing ISDS, and that Australia's robust legal system protects us from cases. This claim fails to recognise that Australia's previous agreements containing ISDS have been mostly with developing countries, which do not have global corporations with the resources to launch ISDS cases. The reason there has only been one previous case against Australia is because the Howard Government did not agree to ISDS in the Australia-US Free Trade Agreement. This is why the US-based Philip Morris company had to move assets to Hong Kong to use ISDS in a Hong Kong-Australia investment agreement.

The TPP is the first agreement to expose Australia directly to cases from US corporations, which increases the risk of future cases considerably. Under the North American Free Trade Agreement, US companies have launched 56 cases against Canada and Mexico since 1994, an average of more than two cases a year. Thirty-six of these cases were against Canada, which has a legal system similar to Australia's (Public Citizen 2015).

The June 2015 Productivity Commission examination of ISDS confirmed its 2010 study that there is no evidence that ISDS increases levels of foreign investment, or has economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments (Productivity Commission 2010:274, 2015: 82).

This prompted the previous ALP government to adopt a policy against ISDS from 2011. Many other governments, including Germany, France, Brazil, India, South Africa and Indonesia are reviewing their ISDS commitments (Filho 2007, Biron 2013, Uribe 2013, Mehdudia 2013, Bland and Donnan 2014).

Claimed ISDS "safeguards" for health, environment and other public welfare measures have not prevented ISDS cases. These "safeguards" do not address the main structural deficiencies of ISDS tribunals, which have no independent judiciary, no precedents and no appeals process. Tribunals have enormous discretion in interpreting the meaning of "safeguards" (Tienhaara 2015a).

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning report which argued strongly that trade agreements should **not** include ISDS.

The report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of states and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability" (de Zayas 2015).

ISDS provisions in the TPP

The NIA contends that "specific policy areas are carved out or excluded from certain ISDS claims" (DFAT, 2016 b) p.9, para 33). These are claimed to include "social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities: measures with respect to creative arts, indigenous cultural expressions and other cultural heritage." In fact, this is not accurate. These exclusions or carveouts are listed in Annex 2 to Chapter 9 on investment, but they only apply to specific articles in the investment chapter. They do not apply to any of the ISDS provisions.

Page 1 of Annex II to the investment chapter makes this clear by listing the specific articles in this chapter which cannot be applied to the list of excluded services. They are Article 9.4 (national treatment), Article 9.5 (most-favoured-nation treatment), Article 9.9 (performance requirements), and Article 9.10 (Senior Management and Board of Directors). They do not include any of the articles dealing with ISDS in Chapter 9.

The claimed "safeguards" which actually apply to the ISDS section of the investment chapter cannot be described as clear carveouts or exclusions.

The only clear carveout or exclusion is that governments have the option of excluding future tobacco control laws from ISDS cases (Article 29.5). This is actually in Chapter 29, which deals with exclusions to the whole agreement. This is welcome, and should prevent future cases like the Phillip Morris tobacco company case against Australia's plain packaging law.

However, this begs the question of why other public interest laws are not clearly excluded, and means that the tobacco carveout can be described as the exception that proves the rule.

The "safeguard" articles in the investment chapter which do apply to key ISDS definitions have the same pitfalls as in previous FTAs, which have not prevented foreign investors from bringing cases against governments in areas of health and environmental regulation.

One claimed safeguard in Chapter 9 refers to laws or policies which can be seen by investors as "indirect expropriation". This has the same wording as the equivalent article in the Korea-Australia Free Trade Agreement (KAFTA) and other recent agreements (DFAT, 2014,KAFTA text, Annex 2B)

The article reads:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances" (Annex 9-B 3b).

This has large legal loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Another claimed safeguard reads:

> "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives" (Article 9.16).

Associate Professor Amokura Kawharu of Auckland University has commented that this is circular language which "appears to provide no additional protection, and only affirms the right to regulate in a manner consistent with the other terms of the investment chapter" (Kawharu 2015:9). Internationally recognised investment law practitioner George Kahale shares this view (quoted in Hill, 2015).

A third claimed safeguard relates to the fact that governments are required to treat international investments in accordance with customary international law, which

includes “fair and equitable treatment” and “full protection and security” (Article 9.6.1).

There have been controversial cases where tribunals have found in favour of corporations on the basis that government action has interfered with the company’s own expectations of the treatment they should receive. A recent example is *Bilcon vs Canada*, in which a tribunal found in March 2015 in favour of a company claiming damages because its application for a quarry development was refused by a local government authority for environmental reasons. The reasons for the decision included that the decision was contrary to the company’s expectations of treatment (Dundas 2015).

An additional protection for governments in such cases is claimed to be provided by Article 9.6.4 which says that “actions by governments inconsistent with investor expectations alone do not breach the requirement to give fair and equitable treatment to investors.” However, this is qualified by Annex 9-B which says that one of the criteria for the determination of indirect expropriation is government action which interferes with “distinct reasonable investment-backed expectations.”

Again, experts question the efficacy of the claimed protection about expectations in Article 9.6.4. Luke Peterson, respected editor of the *Investment Arbitration Reporter,* says that the detailed language about investment-backed expectations in Annex 9-B could mean that Article 9.6.4 only gives protection against “subjective” expectations (Peterson 2015). Kawharu comments that governments, including the United States, have defended cases by suggesting that investor expectations should not form the basis of customary law fair and equitable treatment claims at all, and concludes that the TPP text “could have been more emphatic about the issue” (2015:11-12).

It has also been claimed that the TPP contains obligations on corporations to behave in ways consistent with corporate social responsibility. This is not accurate. International corporations are only “encouraged” to voluntarily adopt socially responsible standards of behaviour (which are not defined) with no legal obligation or enforcement. Article 9.17 reads:

> “The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that party.”

This vague encouragement contrasts with the many legally binding obligations on governments and international investor rights to sue governments.

Choice of ISDS arbitrators and other procedural issues in the TPP

The TPP reflects provisions in previous agreements on selection of arbitrators, whereby each of the disputing Parties selects one arbitrator and the third is appointed by agreement. If Parties cannot agree about the third appointment, that person is appointed by a neutral third party. It has been claimed that this process is a protection against arbitrator bias.

This system of appointing arbitrators is not new, provides no additional protection, and misses the point. The point is not about individual arbitrator bias, but about a systemic failure. The pool from which arbitrators can be selected consists of investment law experts who can continue to be practising advocates, representing

disputing parties one month, and sitting on an arbitration panel the next month. This is not an independent judiciary.

It has been claimed that the TPP contains a code of conduct for arbitrators. This is not accurate. There is only a commitment to "provide guidance" on a **future** code of conduct for arbitrators which has not yet been developed (Article 9.22.6).

It has also been claimed that the TPP contains an appeal system for ISDS. This is not accurate. There is only a reference to a future appeals mechanism, which may be developed outside the framework of the TPP. There is no commitment to use such a mechanism, but only to consider whether it should be applied to the TPP. The relevant article reads:

> "In the event that an appellate mechanism for reviewing rewards rendered by Investor-State Dispute Settlement tribunals is developed in the future under other institutional arrangements, the parties shall consider whether awards rendered under article 9.28 should be subject to that appellate mechanism" (Article 9.23.11).

Provisions for greater transparency of documents and hearings (Article 24) are welcome but reflect previous recent agreements and still give discretion to the tribunal to decide not to disclose protected information if it is so designated by the parties.

Selective application of ISDS provisions

The TPP also contains provisions that selectively and differentially apply ISDS provisions to different parties. The Australian and New Zealand governments have agreed not to apply the TPP ISDS provisions to each other. This commitment is not in the text, but is made in a legally binding side letter agreement between the parties (DFAT, 2016a), Australia-New Zealand side letter). The justification for this is that both governments have modern independent judicial systems which are available for the use of investors. It is legitimate to ask why this could not be applied to other parties.

Article 9.21.2 b) i) requires that investors submitting an ISDS claim waive their right to proceed with any domestic court proceedings relating to the same claim. However, the governments of Chile, Peru, Malaysia and Vietnam have chosen a more restrictive approach for ISDS in relation to domestic courts. If an investor initiates domestic court proceedings, it cannot use ISDS processes for the same dispute (Annex 9J).

Again it is legitimate to ask why the Australian Government did not seek such an arrangement, especially given the experience of the Philip Morris case. The company lost its claim for compensation in the Australian High Court, but was able to proceed with an ISDS case, which took four years and cost a reported A$50 million dollars to defend.

The TPP ISDS model compared with other recent models

The NIA claims that the TPP is "one of the most protective treaties in existence worldwide in terms of its protections for legitimate regulation" (DFAT, 2016 b): 9)

This is not the case compared with two recent models developed by India and the EU, both of which were publicly available before the conclusion of the TPP negotiations in October 2015. Australian and other TPP negotiators were well aware

of them. Australia has been engaged with India in both bilateral negotiations and through the Regional Comprehensive Economic Partnership negotiations between the 10 ASEAN countries plus India, China, Japan, South Korea, Australia and New Zealand. Australia has also been engaged in preliminary discussions for a bilateral agreement with the EU.

The India draft model Bilateral Investment Treaty was released publicly in March 2015, with a second draft in December, and the EU draft model investment chapter for its trade negotiations was released publicly on September 15, 2015 and has since been tabled in the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the US (Government of India 2015, European Commission 2015).

Both of these models have more robust assertions of the right of government to regulate for public policy reasons with fewer qualifications than the TPP. For example, the definition of expropriation in the draft India BIT does not contain the loophole “except in rare circumstances” discussed above (Government of India 2015 Article 5.5). The draft also avoids the pitfalls discussed above in the definition of fair and equitable treatment by omitting this concept altogether.

The EU model attempts to address the structural flaws of the lack of an independent judiciary and appeals system by establishing a panel of qualified judges to serve on tribunals (EU Commission 2015 Section 3 article 9 p.17). It also establishes an appeals tribunal consisting of more senior qualified judges (EU Commission 2015 section 3 Article 10). However, the judges would not be full-time, could accept other work and would be paid a retainer. This would initially be a bilateral arrangement under the rules of the TTIP. While the use of more qualified arbitrators and the addition of an appeals tribunal is a step forward, Van Harten has argued that this is not an independent judiciary because part-time judges paid a retainer and able to accept other work would not have the same independence as full-time judges in national court systems (Van Harten 2016).

The EU has foreshadowed that it wishes to establish in the future an International Investment Court similar to the International Court of Justice, which could be used multilaterally. Presumably these judges would be full-time and barred from accepting other work, and thus more independent and similar to national judicial appointments (EU Commission 2015 Article 12).

These models show that the TPP version of ISDS could have been more robust in protecting the rights of governments to regulate and in attempting to provide a system of more independent arbitrators.

But regardless of future changes to ISDS systems**,** the basic question remains as to why any government would agree to ISDS agreements at all. As the Productivity Commission has noted, there is no legitimate rationale for giving special legal rights to global corporations to sue governments over domestic legislation. There is no evidence of any economic benefit from ISDS, only of financial and policy risks to governments.

Extension of data protection monopolies on biologic medicines

The TPP intellectual property chapter contains a series of rules which lock in strong monopolies for patents on medicines at the expense of affordable access to medicines. Australia has already adopted many of these rules. They will have a greater impact in TPP developing countries, which will now be obliged to adopt them.

Medicins sans Frontieres (MSF) has described the TPP as "a bad deal for medicine: it's bad for humanitarian medical treatment providers such as MSF, and it's bad for people who need access to affordable medicines around the world" (MSF, 2015)

Other submissions will deal with the impact of the TPP in developing countries. This submission deals with the impact in Australia of the extension of monopolies on biologic medicines.

The NIA claims that:

> "the TPP will not require changes to be made to Australia's existing five years of data protection for biologics or any other parts of our health system and will not increase the cost of medicines for Australians under our public health system" (DFAT, 2016 b) 13)

This is misleading, because it fails to mention the detail of what is actually in the TPP text on data protection for biologic medicines. Australia's law on data protection will not change immediately, but the TPP locks in legal obligations for other measures to ensure longer monopolies on biologic medicines in the future.

Data protection, biologic medicines and costs to the PBS

Pharmaceutical companies already have 20 years of patent monopoly during which they can charge high prices on new medicines before cheaper versions become available.

Data protection is a separate and additional type of monopoly, which applies to the clinical trial data submitted to regulatory agencies like the Therapeutic Goods Administration to demonstrate the safety and efficacy of medicines. During the period of data protection, the competitors who wish to manufacture cheaper versions of the medicine when the patent expires cannot use the clinical trial data from the original medicine to obtain marketing approval for their cheaper version. This effectively delays the availability of cheaper versions. The current legal standard for data protection in Australia is five years.

Biologic medicines are produced through biological processes, resulting in new treatments for cancer and other serious diseases, and can cost tens of thousands of dollars for a course of treatment.

Pharmaceutical companies have argued for longer periods of data protection for biologic medicines, and were successful in obtaining 12 years in US legislation. This was strongly opposed by public health organisations, and by the US Federal Trade Commission, on the grounds that longer data protection was an unjustified extension of monopoly rights. This would delay access to cheaper versions of medicines and would potentially increase health expenditure (United States Federal Trade Commission 2009).

Pharmaceutical companies lobbied for eight to 12 years of data exclusivity in the TPP (Pharmaceutical Research and Manufacturers of America 2013). This was strongly opposed by national and international public health groups and most governments (Gleeson 2016:3).

The TPP is the first trade agreement to contain additional data protection for biologic medicines. This is a dangerous precedent because it locks in longer monopolies and will be used by the pharmaceutical industry a model for other trade agreements (MSF, 2015).

The Australian Government subsidises the price of approved prescription medicines, including biologic medicines, through the Pharmaceutical Benefits Scheme (PBS). The wholesale price of approved prescription medicines is negotiated through the PBS and the Government subsidises the retail price at the chemist. Currently, this ensures pensioners pay no more than $6.20 and others pay $38.30 for PBS medicines. Biologic medicines are a growing share of PBS expenditure and this will increase in the future. Ten of the most expensive biologics cost the PBS approximately $1.2 billion in 2013-14, which was 14 per cent of the PBS' total expenditure (Gleeson 2016:3).

When the first cheaper version of biologic medicine (known as biosimilars) becomes available, a 16 per cent price cut is applied to all versions of the product. If biosimilars had been available for those 10 medicines in 2013-14, the PBS would have saved $205 million in taxpayer-funded subsidies (Gleeson *et al* 2015). In the future, as more biologic medicines are approved for subsidy, each year of delay in the availability of cheaper versions would cost the PBS many more hundreds of millions of dollars.

The TPP text on data protection of biologic medicines

Article 18.51.1 on data protection of biologic medicines contains two options. Governments are legally bound to implement one of these options. The first is legislation for at least eight years data protection (Article 18.51.1 a). The second option is at least five years data protection accompanied by "other measures" to provide "a comparable outcome in the market" to the eight years in option one (Article 18.51.1 b). Article 18.51.3 also provides for a review of these arrangements after 10 years.

Australian law on five years of data protection will not change immediately. However, Australia is legally obliged by the TPP to ensure "other measures" which will have the market outcome of an extra three years, resulting in eight years of data protection.

DFAT has defended this outcome by saying that current delays caused by market conditions or administrative delays can already deliver an outcome of at least eight years of monopoly, rather than the five years in the legislation, which means there is no change in current practice (Hansard, 2016:7-8).

But the TPP could mean a change in the future. Currently such delays are only a possibility. The TPP text locks in these delays, creating a legal obligation to deliver the comparable market outcome of at least eight years. Each year of delay of cheaper forms of biologics will cost the PBS hundreds of millions of dollars. This cost will not show up immediately, but is a future time bomb for PBS cost blowouts. It is

simply wasteful for public subsidies to be spent on extension of monopolies. Such increases will also create pressure to pass on some of those costs to consumers in the form of higher prices at the chemist.

It is not in the public interest for the Australian Government to agree in the TPP to lock in delays which in future will extend monopolies on biologic medicines and delay cheaper forms of these medicines from becoming available. Instead, the government should retain the flexibility to **reduce** delays in the availability of cheaper medicines, and obtain better value for money spent on the most effective medicines. The TPP reduces this possibility.

Temporary movement of people

Chapter 12 of the TPP is entitled "Temporary Entry for Business Persons". In fact the chapter covers temporary entry arrangements for a much wider range of occupations other than what is commonly understood by "business persons": that is, managers or senior executives.

The category which includes the widest number of occupations is that of "contractual service providers" which includes trade, professional and technical skills (Chapter 12, Australia's Schedule of Commitments: 3).

The NIA states that:

> "Australia's TPP commitments are consistent with Australia's existing immigration framework and the approach taken in other FTAs" (DFAT 2016b):13).

Under the heading of Implementation, the NIA also states:

> "A Ministerial determination will need to be made under section 140GBA of the *Migration Act 1958* to exempt from labour market testing the intra-corporate transferees, independent executives and/or contractual service suppliers of those TPP parties to which Australia extended temporary entry commitments" (DFAT 2016b):18).

This makes it clear that the TPP temporary entry provisions include contractual service suppliers and removes the requirement for labour market testing to establish whether there are Australian workers available.

This is confirmed by the DFAT summary of the outcomes of Chapter 12, which states that Australia's TPP commitments will be implemented through the 457 visa program (DFAT 2015:1).

Academic studies comparing various recent trade agreements have demonstrated that a range of governments are using temporary work visas without local labour market testing as a means of deregulating labour markets. Such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation (Rosewarne 2015, Howe 2015).

Recent Australian studies have provided more evidence of the exploitation of temporary workers. A Fair Work Ombudsman investigation revealed that that up to 20 per cent of 457 visa workers were being underpaid or incorrectly employed. The Fair Work Ombudsman reported that temporary visa holders accounted for one in 10

complaints to the agency in 2015. In the three years from 2012, the agency dealt with 6000 complaints and recovered more than $4 million in outstanding wages (Toscano 2015).

A study by Monash University which interviewed workers on 457 and other temporary visa programs had similar findings (Schneiders and Millar 2015).

The evidence of violations of Australian minimum work standards included failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries.

There have also been many reports of individual cases. The *Sydney Morning Herald* reported on July 18, 2015 that a court had ordered a restaurant owner to pay $125,431 for wages, superannuation and annual leave for 16 months to a 457 visa worker with no English language skills who was met at the airport by the employer, had his passport confiscated and was forced to live and work on the premises without payment. The worker's legal representative claimed that his firm had handled dozens of similar cases (Gair 2015).

In light of these recent revelations of widespread exploitation of temporary workers it is not acceptable that the TPP expands temporary entry without requiring labour market testing, and without any provisions to prevent such exploitation.

Lopsided commitments

The US has not made any offers to any other countries in this chapter because US law precludes any inclusion of migration arrangements in trade agreements.

In relation to other TPP countries, the NIA states:

> "Australia offered commitments to businesspersons from those TPP countries that will bind similar levels of access for Australian businesspersons in equivalent categories" (DFAT 2016b) 2015:13 para 47)

This is not accurate. In fact, Australia's commitments for entry of contractual service providers are far more extensive than those made by other TPP countries.

Australia's commitments on contractual service suppliers cover a wide range of trade technical and professional occupations. Other TPP countries' commitments for contractual service providers are far more limited.

For example, Chile's commitments relate to business persons engaged in specialised occupations; Japan's commitments specify that the persons must be employed by an overseas company or be in an advanced research position; Malaysia's commitments are confined to professional education and financial services at an advanced level; and Vietnam only includes employees of companies with service contracts in Vietnam (TPP Chapter 12, annexes of Chile, Japan, Malaysia and Vietnam).

In summary, the TPP commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of professional, technical and skilled trades occupations, without labour market testing to establish whether there are local workers available. Recent studies have shown that the temporary nature of the work and possibility of deportation means that these workers are vulnerable to exploitation. Australia has made far more extensive commitments for entry of contractual service providers than have other TPP countries.

Labour Rights

The NIA states that the TPP Chapter 19 on labour contains:

> "Recognition and emphasis by TPP parties on the importance of internationally-recognised labour rights. Each party is required to adopt and maintain in its legislation and practices the rights contained in the International Labour Organisation Declaration such as elimination of forced labour, abolition of child labour, freedom of association and the right to collective bargaining. The TPP would also enhance cooperation and consultation on labour issues, and affective enforcement of labour laws in TPP parties" (DFAT 2106b) page 11)

The inclusion of a chapter which refers to labour rights is welcome. However, the NIA description paints a rosier picture than is revealed by the details in the text. Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding and the enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proven effective in other agreements (International Trade Union Confederation 2015).

Labour standards

The chapter does not refer to detailed International Labour Organisation Conventions, but only to the shorter and more general principles in the ILO Declaration listed in the NIA quote above (Article 19.3.1).

Governments are meant to adopt and maintain these general rights, but the lack of reference to the detailed ILO Conventions means that it is not clear how they will be implemented.

There is also an obligation for each government to adopt and maintain their own standards governing minimum wages, hours of work and occupational safety and health, as determined by each government (Article 19.3.2).

This means the standards can be varied by national governments, but are meant to remain consistent with basic labour rights (Article 19.4 (a)).

Article 19.4 (b) is more specific about obligations not to weaken or reduce adherence to both rights and conditions of work, but only in a special trade or customs area, such as an export-processing zone.

The reference to corporate social responsibility is particularly weak and unenforceable, stating only that that "each Party shall endeavour to encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party" (Article 19.7).

Weak enforcement provisions

The most egregious omission in the enforcement provisions is that there is no enforcement for violations of the provisions on forced labour, including compulsory child labour. Instead, governments only "recognise the goal" of eliminating forced labour, and "discourage" through "initiatives they consider appropriate" the

importation of goods produced in whole or in part by forced or compulsory labour (Article 19.6).

ILO studies have revealed that 21 million people, mostly women and children, are forced labourers, including in TPP countries (ILO 2012). The US Congress in February 2016 passed an amendment to the US *Tariff Act 1930* which will ensure that all imported products of forced labour are banned (Larson 2016).

This is the only effective way to eliminate forced labour. The TPP is a missed opportunity to progress this trend.

In general, the enforcement provisions which do apply in some areas are more qualified and complicated in this chapter than in other chapters.

Complaints about labour rights require evidence that there is a "sustained or recurring course of action or inaction" which violates the legal obligations in the chapter (Article 19.5.1).

Complaints also require evidence of violation of labour rights "in a manner affecting trade or investment" between TPP governments, which means that public sector workers and others in non-traded sectors are not covered (Article .19 .5 .1).

These two qualifications make it much more difficult to gather evidence to support a complaint, and mean that large parts of the workforce are exempted from enforcement of the obligations in the chapter.

The complaint and enforcement procedure requires lengthy consultations before the state-to-state dispute process can be invoked (Article 19.15). Similar provisions have not been effective in previous agreements.

The US has negotiated separate bilateral side letters with Vietnam, Malaysia, and Brunei, which set out detailed plans for implementation of specific labour reforms (USTR 2015). It is not clear how these relate to the rest of the labour chapter and its enforcement provisions.

Environment

The NIA states that the TPP Environment Chapter 20**:**

> "promotes high levels of environmental protection, including by liberalising trade in environmental goods and services, and ensuring that TPP parties effectively enforce their domestic environmental laws. TPP parties must also take measures in relation to a number of important environmental challenges" (DFAT 2016b):.11).

The inclusion of an environment chapter in the TPP is welcome. However, environmental law experts have criticised the chapter for its weak environmental standards, which are not enforceable in the same way as obligations in other chapters (Sierra Club 2016, Terry 2015).

Despite promises that the TPP would include enforceable commitments by governments to at least seven international environment agreements, the text mentions only four, and only one - on trade in endangered species - has clearly enforceable commitments (Article 20.17 .2).

The text does not refer to climate change, but only to voluntary measures for lower emissions economies with no benchmarks or timeframes (Article 20.15).

Each government commits only to “strive to ensure that its environmental law and policy provide for and encourage high levels of environmental protection” and not to “fail to enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties” (Articles 20.3.3 and 20.3.4).

Like the labour chapter, the requirement to prove sustained or recurring violations creates an additional barrier for enforcement provisions. There are also requirements for lengthy consultations before resort to the dispute process (Article 20.23).

The non-binding nature of commitments and weak enforceability in the environment chapter contrasts sharply with the legal rights of corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above.

Technical Barriers to Trade and food labelling standards

The NIA contains no detail about the chapter on Technical Barriers to Trade, but the more detailed Regulation Impact Statement notes that the annexes to the chapter “promote common regulatory approaches across the TPP region” (DFAT 2016b) Regulatory Impact statement p. 29, paragraph 73).

The issue with the promotion of common regulatory standards across countries with different standards is how to preserve the right of future governments to maintain and improve Australia’s relatively high standards. Pressures from industry for simplification or streamlining of standards may suit their interests in cost reduction, but may not be in the public interest.

Chapter 8 of the TPP commits governments to most of the World Trade Organisation (WTO) rules on Technical Barriers to Trade (TBT), and to use of the WTO TBT disputes process for disputes that exclusively alleged violation of the provisions of that agreement (Article 8.4).

The WTO’s TBT Agreement restricts governments from implementing regulations and standards that create unnecessary barriers to trade, including no discrimination between foreign products and local products. The TPP has additional commitments to consult with other TPP parties and to encourage mutual recognition of conformity assessment procedures for labelling and other forms of quality assessment of products (Articles 8.7, 8.8, 8.9, and 8.10). The TPP also establishes a committee to oversee this process and to review the implementation of the chapter annexes and consider new annexes after five years (Articles 8.11 and 8.12.3).

In 2015, the WTO ruled against the US' mandatory country of origin meat labelling, finding that such labelling discriminated against imported meat products (Locke 2015).

This has strong implications for the Australian Government, which proposed a new system of country-of-origin labelling for imported food products in the wake of the

hepatitis outbreak caused by imported frozen berries (Clarke 2015).

While Australia is already bound by these WTO rules, the TPP includes the added possibility of ISDS disputes.

In the Korea-Australia Free Trade Agreement, Australia ensured that ISDS disputes could not be applied to the TBT chapter (DFAT, 2014, KAFTA Articles 5.11, 5.18). However, there is no such exclusion in the TPP (Article 8.4.1).

A foreign investor could allege that changes to country of origin regulation requirements, which might occur after the TPP is in place, could harm their investment.

As discussed above, the general exceptions for health and environmental legislation in the TPP are inadequate, and will not be effective in preventing ISDS cases. In addition, corporations could argue that country-of-origin food labelling laws were about consumer choice rather than about health.

If, based on new evidence, future governments decided to introduce mandatory provisions for other forms of labelling such as additional nutritional information, or more stringent labelling of GE products, ISDS disputes would also be a possibility.

Wine and spirits labelling

There is a specific Annex which sets out rules for wine and spirits labelling (Annex 8-4). This provides for a standard labelling regime allowing a manufacturer to use the same main label in all TPP countries. Any additional mandatory labelling requirements by individual governments must be on a supplementary label, not on the main label. These rules reduce the flexibility of governments in the future to design labelling requirements based on new public health research.

For example, the requirement to use supplementary labelling could restrict options for future warnings on the health effects of alcohol for pregnant women. Such labelling is currently voluntary in Australia, and not widely in use. Where it is used, the warnings are often small and difficult to see. Although governments are not prohibited from introducing health warnings, the use of a supplementary label, which would typically be smaller and less noticeable than the main label, could restrict the options for future governments to introduce more prominent health warnings (O'Brien and Gleeson 2015).

Again, since the TPP also includes ISDS provisions, there is an option for alcohol companies to dispute new health labelling requirements if they can allege they have harmed their investment.

Weighing the costs and benefits of the TPP

The NIA claims that:

"Expanded liberalisation of trade is likely to stimulate further economic activity in Australia leading to job creation" (DFAT 2016b: 3)

The NIA also calculates that there will be a loss to government revenue of $135 million over four years, resulting from tariff reductions, but concludes without any evidence that increased economic activity will result in "a net gain to the Australian economy" " (DFAT 2016b: 18)

There has been no economic modelling of the specific impacts of the TPP on the Australian economy as a whole measured by GDP. DFAT has instead relied on studies by the World Bank and the Peterson Institute.

These studies estimate very small increases in Australia's GDP after 15 years, of 0.7 percent and 0.6 percent respectively. As Peter Martin, economics editor of *The Age* has calculated, this represents between zero and 0.1 per cent per year (Martin, 2016, World Bank, 2016, Peterson Institute, 2016).

Those studies do not measure the TPP's impact on employment. A separate study from academics at Tufts University using a model that does measure employment impacts, found that job losses in Australia would total 39,000 after 10 years (Capaldo *et al* 2016).

The reason for the tiny economic gains from the TPP is that Australia already has free trade agreements with all but three of the 12 TPP countries, including the US and Japan, which are the two biggest economies. This means the additional market access in agricultural and services markets for Australian exports is very limited.

The NIA places much weight on the gains to particular sectors in services and agriculture, but does not emphasise effects of the TPP on GDP. This means it does not weigh the estimated very small gain in GDP after 15 years against many of the risks and losses that will be experienced as a result of the agreement.

These risks and losses include:

- Overall employment losses as calculated by the Tufts University study
- Loss of potential local employment and lower labour standards in Australia from expansion of temporary labour
- Losses to government revenue from reductions in remaining tariffs
- Costs to government revenue from stronger biologic medicine monopolies and delays in availability of cheaper versions of these medicines
- Losses resulting from possible regulatory risks and costs to government arising from ISDS
- Costs of other possible environmental, health and other impacts arising from future restrictions on government regulation

Conclusion

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of the TPP despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts. Overseas economic studies show tiny economic gains after 15 years, which have not been assessed against the costs of other impacts. While emphasising gains for particular export sectors, the NIA does not provide an analysis of the impact of the TPP on the economy as a whole, nor of the costs of government revenue losses, unemployment, the extension of medicine monopolies, ISDS and future restrictions on government regulation including of food. Given these severe shortcomings, the Committee should recommend against the implementing legislation.

References

AFTINET (2015) “Submission to the inquiry into Commonwealth’s treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements,” February, Sydney, found March 7, 2016 at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions

AFTINET (2016) “Letter to parliamentarians signed by 59 community organisations”, February 1, Sydney, found March 3. 2016 at http://aftinet.org.au/cms/sites/default/files/010216%20%20CSO%20letter%20final%20on%20letterhead%20links%20website%20version.pdf

Australian Competition and Consumer Commission (2015), “Submission to the Productivity Commission's inquiry into intellectual property arrangements in Australia,” November, found March 8, 2016 at http://www.pc.gov.au/__data/assets/pdf_file/0007/194515/sub035-intellectual-property.pdf

Beachey, B., (2016) “The corporation behind Keystone XL just laid bare the TPP threats to our climate”, *Huffington Post*, January 7, found January 11, 2016 at http://www.huffingtonpost.com/ben-beachy/the-corporation-behind-ke_b_8931802.html?ir=Australia

Bland, B., and Donnan, S., (2014) “Indonesia to terminate more than 60 bilateral investment treaties”, *Financial Times*, March 27, found April 12, 2014 at http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz2xrYOwsEb

Biron, C., (2013) “Latin American countries put up front against corporate lawsuits”, Inter Press Service, October, found March 10, 2014 at http://www.mintpressnews.com/latin-american-countries-put-front-corporate-lawsuits/170030/

Breville and Bulard (2014) “The injustice industry and TTIP”, *Le Monde Diplomatique*, English edition, June, found March 3, 2016 at http://www.bresserpereira.org.br/terceiros/2014/agosto/14.08.injustice-industry.pdf

Canadian Broadcasting Company (CBC) (2012) “Ottawa sued over Québec fracking ban”, November 23, found November 18, 2015 at http://www.cbc.ca/news/business/ottawa-sued-over-quebec-fracking-ban-1.1140918

Capaldo, J., *et al* (2016) *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement*, January, Global Development and Environment Institute Working Paper 16 – 01, Tufts University, found March 10, 2016 at http://www.ase.tufts.edu/gdae/Pubs/wp/16-01CapaldoIzurietaTPP.pdf

Clarke, M., (2015) “Food labelling: Government seeks public opinion on six different Australian Made designs,” ABC News June 9, found March 3, 2016 at http://www.abc.net.au/news/2015-06-09/public-opinion-sought-on-australian-made-labelling/6531262

Department of Foreign Affairs and Trade (2014) *Text of the Korea-Australia Free Trade Agreement, Canberra,* found March 16 2016 at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016/Treaty_under_consideration

Department of Foreign Affairs and Trade (2015) "Outcomes: temporary entry of business persons" Canberra November, found March 3, 2015 at http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-temporary-entry-of-business-persons.aspx

Department of Foreign Affairs and Trade (2016a) *Text of the Trans-Pacific Partnership Agreement, Canberra,* found February 10, 2016 at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016/Treaty_under_consideration

Department of Foreign Affairs and Trade (2016b) *National Interest Assessment and Regulatory Impact Statement*, found February 9, 2016 at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016/Treaty_under_consideration#nia

De Zayas, A., (2015) "UN Charter and Human rights treaties prevail over free trade and investment agreements," Media Release, September 17, Geneva, found September 18, 2015 at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16439&LangID=E#sthash.WdxSGvlb.dpuf

Dundas S., (2015), "Bilcon of Delaware vs Canada: a story about legitimate expectation and broken promises", *Kluwer Arbitration Blog*, September 11 found February 26, 2016 at http://kluwerarbitrationblog.com/2015/09/11/broken-promises-and-legitimate-expectations-bilcon-of-delaware-inc-et-al-v-canada/

European Commission (2015) "Commission draft text TTI P-Investment" Brussels, September 16 found February 29, 2016 at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

European Union (2015) EU negotiating texts in TTIP, February, Brussels, found February 12, 2015 at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230

Filho, J., (2007) "The Brazilian Experience with Bilateral Investment Agreements: A Note", UNCTAD Expert Meeting On Development Implications of International Investment Rule-Making, June 28-29, found March 10, 2014 at http://unctad.org/sections/wcmu/docs/c2em21p15_en.pdf

French, R.F. Chief Justice (2014) "Investor-State Dispute Settlement-a cut above the courts?" Paper delivered at the Supreme and Federal Courts Judges conference, July 9, 2014, Darwin, found August 8, 2014 at http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf

Gair, K., (2015) "Migrant worker lured to Australia, held captive in restaurant for 16 months," *Sun Herald* July 19, found March 3, 2016 at: http://www.smh.com.au/nsw/migrant-worker-lured-to-australia-held-captive-in-restaurant-for-16-months-20150718-gieud6.html#ixzz3gJjr67Q7

Gaukrodger, D., and Gordon, C., (2012) “Investor-state dispute settlement: a scoping paper for the investment policy community”, OECD Working Papers on International Investment, no. 2012/3, OECD Investment Division, Paris, December found March 27, 2014 at www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf

Gleeson D., *et al,* (2015) “Proposals for extending data protection for biologics in the TPPA: potential consequences for Australia. Submissions to the Department of Foreign Affairs and Trade,” 15 December, found February 20, 2015 at http://dfat.gov.au/trade/agreements/tpp/negotiations/Documents/tpp_sub_gleeson_lopert_moir.pdf

Gleeson D., (2016) “The Trans-Pacific Partnership Agreement, intellectual property and access to affordable medicines”, Submission to the Productivity Commission inquiry into Australia’s intellectual property arrangements, found February 22, 2016 at http://www.pc.gov.au/__data/assets/pdf_file/0003/195258/sub128-intellectual-property.pdf

Government of India Ministry of Finance (2015) Model Text for the Indian Bilateral Investment Treaty, December found March 1, 2016 at http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf

Gray, J., (2012), “Eli Lilly fights Canada’s move to strip drug patent,” *Globe and Mail*, December 7, found February 10, 2016 at http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/eli-lilly-fights-canadas-move-to-strip-drug-patent/article6082557/

Hansard (2016) *Transcript of Joint Standing Committee on Treaties Hearing, 22 February,* found March 10, 2016 at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommjnt%2Fd7e6bcb2-1294-4e25-aa1f-45a84518c77b%2F0000%22

Hill, J., (2015) “TPP's clauses that let Australia be sued are weapons of legal destruction, says lawyer”, *The Guardian*, November 10, found March 18, 2016 at: http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer

Hirono, K., Haigh, F, Gleeson, D., Harris, P., Thow, A., (2015) “Negotiating healthy trade in Australia: Health impact assessment of the proposed Trans-Pacific Partnership Agreement” Liverpool, NSW: Centre for Health Equity Training Research and Evaluation, February, found March 8, 2016 at http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf

Howe, J., (2015) “TPP and China free trade agreement: our valuable labour standards must be protected,” The Age October 6, found March 3, 2016 at http://www.theage.com.au/comment/tpp-and-china-free-trade-agreement-our-valuable-labour-standards-must-be-protected-20151005-gk1zup.html

Hunter, M., (2016), “House Speaker Paul Ryan on passing the TPP” February 15, CNSN news, found March 10, 2016 at www.cnsnews.com/news/article/melanie-hunter/house-speaker-paul-ryan-passing-tpp-im-not-dictator-house

Hutchens, G., (2016) “Trade Minister Andrew Robb criticised for seeking TPP ratification without independent analysis”, *Sydney Morning Herald*, February 9, found February 10, 2016 at http://www.smh.com.au/federal-politics/political-news/trade-minister-andrew-robb-criticised-for-seeking-tpp-ratification-without-independent-analysis-20160209-gmpmwf.html

International Labour Organisation (2012) “21 million people are now victims of forced labour”, Media Release June 1, found on March 3, 2016 at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181961/lang--en/index.htm

International Trade Union Confederation (2015) “Trans-Pacific Partnership Labour Chapter scorecard: fundamental issues remain unaddressed” November, found March 3, 2016 at http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf

Johnston, M., (2015) “Pressure to bring in tobacco plain packaging,” *New Zealand Herald*, March 2, found February 9, 2016 at http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11410127

Kahale G., (2014) Keynote Address, Eighth Juris Investment Arbitration Conference, Washington DC, March 8, found September 1, 2014 at http://www.curtis.com/siteFiles/Publications/8TH%20Annual%20Juris%20Investment%20Treaty%20Arbitration%20Conf.%20-%20March%2028%202014.pdf

Kawharu, A., (2015) “TPPA Chapter 9 on Investment”, *Expert Paper no. 2 on the TPPA*, The Law foundation, New Zealand, December, found February 20, 2016 at https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf

Kelsey, J., (2015) “How the US forced Australia to rewrite aspects of its copyright law during certification of compliance with the AUSFTA,” January 15, University of Auckland Faculty of Law, found March 10, 2016 at http://tppnocertification.org/wp-content/uploads/2015/03/AUSFTA-certification-memo-Feb-2015.pdf

Larson, E., (2016) “Slave-labour loophole closed by US Senate after eight decades,” Bloomberg, February 12, found March 3, 2016 at http://www.bloomberg.com/news/articles/2016-02-11/slavery-loophole-is-closed-by-u-s-senate-after-85-years

Locke, S., (2015) “World Trade Organisation rules US Country of Origin Labelling violates international law”, May 19, found March 2, 2016 at http://www.abc.net.au/news/2015-05-19/wto-says-united-states-not-cool/6479728.

Mann, H., (2015) “ISDS: Who Wins More, Investors or States?” *Investment Treaty News*, February, found November 15, 2015 at http://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf?utm_source=lists.iisd.ca&utm_medium=email&utm_campaign=ITN+Breaking+News+Analysis+-+ISDS:+Who+Wins+More,+Investors+or+States?

Martin, P., (2016)” Trans-Pacific Partnership will barely benefit Australia says World Bank report”, *Sydney Morning Herald*, January 12, found March 10, 2016 at http://www.smh.com.au/federal-politics/political-news/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html

Mehdudia, S., (2013) “BIPA talks put on hold,” *The Hindu*, January 21, found November 19, 2013 at http://donttradeourlivesaway.wordpress.com/2013/01/breaking-news-indian-government-puts-negotiations-on-all-bilateral-investment-treaties-bits-on-hold/.

Medicins sans Frontieres (2015) “Statement by MSF on the official release of the full text of the Trans-Pacific Partnership”, November 5, found January 22, 2016 at http://www.msfaccess.org/about-us/media-room/press-releases/statement-msf-official-release-full-text-trans-pacific

O’Brien, P and Gleeson, D. (2015) “Trans-Pacific Partnership Agreement – Alcoholic Beverages and Health Information/Warning Labels” November. Found March 18, 2016 at https://tpplegal.files.wordpress.com/2015/12/tpp-and-alcohol-health-warnings-summary-nov-2015.pdf

Peterson, L., (2015) “A first glance at the investment chapter of the TPP agreement: a familiar US-style structure with the few novel twists”, *Investment Arbitration Reporter*, November 5 found February 21, 2016 at https://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familar-us-style-structure-with-a-few-novel-twists/

Peterson Institute, (2016) “Assessing the Trans-Pacific Partnership, Volume 1: Market Access and Sectoral Issues,” February, found March 10, 2016 at http://www.piie.com/publications/briefings/piieb16-1.pdf

Pharmaceutical Benefits Scheme (2016) “2016 PBS co-payment and safety net amounts” found March 10, 2016 at http://www.pbs.gov.au/info/news/2016/01/2016-pbs-co-payment-safety-net-amounts

Pharmaceutical Research and Manufacturers of America (2013) “PhRMA urges Trans-Pacific Partnership Negotiators to adopt a strong intellectual property framework,” found February 10, 2016 at http://www.phrma.org/media/releases/phrma-urges-trans-pacific-partnership-negotiators-adopt-strong-intellectual-property-

Productivity Commission (2010) *Bilateral and Regional Trade Agreements Final Report*, Canberra, December.

Productivity Commission (2015) *Trade and Assistance Review 2013-14*, June, found January 19, 2016 at http://www.pc.gov.au/research/recurring/trade-assistance/2013-14.

Public Citizen (2015) “Table of Foreign Investor-State cases and claims under NAFTA”, June, found March 2, 2016 at http://www.citizen.org/documents/investor-state-chart.pdf

Rosewarne, S., (2015) “Free Trade Agreements driving labour market reform by stealth” The Conversation January 20, found March 3, 2016 at http://theconversation.com/free-trade-agreements-driving-labour-market-reform-by-stealth-36124

Schneiders B., and Millar R., (2015) **“**'Black jobs': Rampant exploitation of foreign workers in Australia revealed,” *Sydney Morning Herald*, October 1 found October 2, 2015 at http://www.smh.com.au/national/investigations/black-jobs-rampant-exploitation-of-foreign-workers-in-australia-revealed-20150930-gjxz7g.html

Senate Standing Committee on Foreign Affairs Defence and Trade (2015) “Blind agreement: reforming Australia's treaty-making process,” May, found January 24, 2016 at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report

Sierra Club (2016), “TPP text analysis: Environment chapter fails to protect the environment”, November, found March 3, 2016 at https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf

Terry, S., (2015) *The environment under TPPA governance, Expert Paper no. 4 on the TPPA*, The Law foundation, New Zealand, January, found February 20, 2016 at https://tpplegal.files.wordpress.com/2015/12/ep4-environment.pdf

Tienhaara, K., (2015a) “The TPP has been released and our concerns have been vindicated,” *The Drum*, November 6, found November 6, 2015 at http://www.abc.net.au/news/2015-11-06/tienhaara-ttp-investment/6918810

Tienhaara, K., (2015b) “Dismissal of case against plain cigarette packaging good news for taxpayers,” *Canberra Times*, December 20 found January 16, 2016 at http://www.smh.com.au/comment/the-dismissal-of-a-case-against-plain-cigarette-packaging-is-good-news-for-taxpayers-20151218-glrb53.html

Toscano, N., (2015) “One in five migrant workers on 457 visas could be underpaid or incorrectly employed,” *Sydney Morning Herald* May 29, found March 3, 2016 at http://www.smh.com.au/national/one-in-five-migrant-workers-on-457-visas-could-be-underpaid-or-incorrectly-employed-20150529-ghcmxr.html

United Nations Conference on Trade and Development (UNCTAD) (2015) *Recent Trends in IIAS and ISDS*, February, found March 10, 2015 at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

United Nations Conference on Trade and Development (UNCTAD) (2016) **“**Record Number of Investor-State Arbitrations Filed in 2015,” February 2, Geneva, found February 25, 2016 at http://investmentpolicyhub.unctad.org/News/Hub/Home/458

United States Federal Trade Commission (2009) “Emerging Health Care Issues: Follow-on Biologic Drug Competition”, found on March 3, 2015 at https://www.ftc.gov/reports/emerging-health-care-issues-follow-biologic-drug-competition-federal-trade-commission-report

Uribe, M., (2013) “Investment arbitration in Latin America: Irreconcilable Differences?” *Kluwer Arbitration Blog*, May 13, found February 26, 2016 at http://kluwerarbitrationblog.com

USTR (2015) “US-VN Plan for enhancement of trade and labour relations”, TPP side letter found March 4, 2016 at https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf

Van Harten, G., (2016) “Key flaws in the European Commission is proposals for foreign investor protection in TTIP”, Osgood Hall Law School Legal Studies Research Paper Series No. 16, volume 12 issue 4, York University, Toronto, found March 1, 2016 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122

World Bank, (2016) “Potential Macroeconomic Implications of the Trans-Pacific Partnership,” Global Economic Prospects, January, found March 10, 2016 at http://pubdocs.worldbank.org/pubdocs/publicdoc/2016/1/847071452034669879/Global-Economic-Prospects-January-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf