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The Trans-Pacific Partnership Agreement: Reaching behind the border, challenging democracy

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Abstract

In an era where legally binding international trade agreements are increasingly shaping domestic regulation in a wide range of areas, the Trans-Pacific Partnership Agreement between the US, Australia, Japan and nine other Pacific Rim Countries, representing over 40% of world trade, has been described as setting the standards for 21st century trade agreements. This article analyses why the negotiations have dragged on for 5 years, and the resistance to the potential impacts of the Trans-Pacific Partnership Agreement on national democratic decision-making on health, environmental and other public interest regulation.

JEL Codes: F13, F23, F51, F53, F55

Keywords

Australian trade policy, democracy, ISDS, Trans-Pacific Partnership Agreement, US trade policy

Introduction

The Trans-Pacific Partnership Agreement (TPP) was conceived in 2008. Formal negotiations between nine Pacific Rim countries began in March 2010 and expanded to 12 countries in 2012, representing over 40% of world trade. The negotiations involving Australia, the United States (US), Canada, Mexico, Chile, Peru, Brunei, Singapore, Japan, Vietnam, Malaysia and New Zealand are continuing at the time of writing in March 2015.[1]

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Legally binding international trade agreements are negotiated behind closed doors between governments at the global level through the World Trade Organization (WTO) of 160 countries, at the regional level between regional groups of governments like the TPP, and bilaterally, between just two governments. There are also trade agreements dealing with particular issues or industries like the Anti-Counterfeiting Agreement (ACTA).

Trade negotiations take place within the framework of neoclassical trade theory which argues that the removal of trade barriers, and increased trade and investment in a globalised market will raise living standards for all. This is an important component in the suite of policies known as neoliberalism or the Washington Consensus, promoted by global institutions like the International Monetary Fund, the World Bank, and the WTO (Stiglitz and Charlton, 2005: 2).

However, critics of neoliberal trade theory argue that trade agreements are far more than negotiations between governments on a theoretically level playing field. They can only be understood through a critical analysis of their social origins and histories, the power relationships between their corporate advocates and social movement critics, and struggles over forms of state regulation (Cox, 1994; Ranald, 2011).

Transnational corporations advocate for global and regional regulatory frameworks that suit their global trade and investment strategies, often at the expense of consumers and communities. However, the development of global trade rules is not a simple process of reducing the role of nation states in relation to global corporations and institutions. States are the main actors in trade negotiations. The most powerful states like the US seek to use aspects of their national legal frameworks as the model for legally enforceable global or regional regulation through trade agreements. Other states may respond to national resistance to trade agendas by attempting to moderate the effects of international regulation on what are still national political constituencies (Cox, 1994: 52–53).

Trade agreements not only deal with reductions in tariffs on trade in goods, but now seek to apply global trade rules to many areas previously regarded as the domain of national government regulation. These include access to medicines, financial services, cultural policies, quarantine, food regulation, government purchasing and environmental policies, effectively removing key aspects of policy from national democratic pressures. However, the attempted removal of policies from national democratic processes into secret trade negotiations can be seen to de-legitimise the trade negotiation process and can itself provoke resistance from a range of interests and social movements (Cox, 1994: 54).

Analysis of the debate between TPP advocates and critics reveals the active involvement of corporations and business organisations, on the one hand, and community organisations like unions, public health groups and consumer groups, on the other.

The TPP provides a case study of an attempt by the US as the dominant state actor to establish regional regulatory frameworks which suit its most powerful export industries, including the pharmaceutical industry and the information technology, media and other industries. The US also promotes Investor-State Dispute Settlement (ISDS) processes, which enables a single foreign investor to sue a government for damages in an international tribunal if it can claim that a change in law or policy has harmed its investment. However, these proposals have met with resistance from civil society organisations which see these industry proposals as threats to access to affordable medicines, access to information and to citizens' rights to participate in democratic regulation (Ranald, 2011).

This article begins with an overview of the TPP in its historical and geo-political context. Then follows an analysis of the debate about the secrecy of the negotiations, and its implications for democracy and sovereignty. The expansion of TPP negotiations into areas of national regulation is analysed, including medicines, copyright, state-owned enterprises and the attempt to create regional standards for various other kinds of national regulation. Finally, there is an analysis of the proposal for ISDS which give foreign investors the right to sue governments for damages if a change in law or policy can be claimed to harm their investment. This adds an extra layer to ways in which domestic laws and policies can be influenced and/or restricted. Most of the case studies and examples come from the Australian context, although there are references to other examples where appropriate. The conclusion summarises the resistance to all of these proposals in the light of its unprecedented agenda to influence national democratic decision-making, and speculates on the prospects of successful completion of the TPP negotiations.

The TPP: Historical and geo-political context

The TPP is part of the proliferation of bilateral and regional agreements which has occurred since the WTO negotiations stalled in 2003. The US has actively pursued bilateral and regional agreements, and is also negotiating the Trans-Atlantic Trade and Investment Partnership with the European Union (EU; European Commission, 2015).

The 12 TPP countries, ranging from the US to Peru, and from Japan to Vietnam, Australia and New Zealand, represent extreme contrasts in size, histories, levels of development and levels of state intervention. Governments like Malaysia and Vietnam with histories of more interventionist economic strategies, including for local industry development, have resisted the neoliberal model of development (Weiss and Hobson, 1995). Malaysia and other governments in the TPP negotiations have also responded to national political pressures from social movements on issues like access to medicines and tobacco regulation (*Bernama*, 2014; South East Asia Tobacco Control Alliance, 2014; Stiglitz, 2013).

The TPP is also part of the broader US strategic 'pivot' to Asia to form a Pacific Rim trade regulation framework between the Americas and selected countries in Asia. The broader strategic aim is to counterbalance the strategic and economic influence of China in the region (Obama, 2011).[2]

Of the 12 TPP countries, 6 have bilateral free trade agreements with the US, which is driving the agenda. The TPP follows a pattern established in US trade strategy of building on bilateral agreements to form regional agreements. The US agenda for the TPP builds on but expands its template in its bilateral trade agreements, including the Australia–US Free Trade Agreement (AUSFTA).[3] Bilateral market access negotiations on agriculture and motor vehicles between the US and Japan, which do not have a bilateral agreement, are also setting (and slowing) the pace of negotiation. This means other governments must await the outcome before the US and Japan make market access offers to them (Reuters, 2015).

The prospects for increased access to US markets are limited for countries with existing US bilateral agreements, since most tariff barriers have already been removed. Australia now has free trade agreements with 9 of the 12 TPP countries, either bilaterally

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(including the two largest markets of the US and Japan) or through the regional Association of Southeast Asian Nations-Australia-New Zealand (ASEAN-ANZ) FTA. This means that increased market access and measurable economic gains from the TPP are unlikely. Indeed, a recent study by the US Department of Agriculture predicted zero growth in gross domestic product (GDP) resulting from the TPP for Australia and a number of other TPP countries after 10 years (Burfisher et al., 2014: 21).

The marketing of the TPP in Australia has mainly relied on non-economic claims about the advantages which will flow from the establishment of common trans-Pacific regulatory frameworks, with phrases like 'a high-standard 21st century trade agreement' which tackles the 'behind the border' barriers to trade (Department of Foreign Affairs and Trade (DFAT), 2013b). However, it is these very regulatory frameworks, the extent to which they will benefit or disadvantage countries other than the US, and the fact that they are being negotiated in secret, which have provoked the most debate.

Secrecy

TPP negotiations began in 2010, with trade officials representing governments agreeing on the chapters or topics to be included in the negotiations then preparing draft texts for each topic which have been discussed at successive negotiating rounds held several times each year in different TPP countries. Trade Ministers only become involved at key points in the negotiations when political decisions or announcements about progress have to be made (DFAT, 2015).

A TPP document published by the New Zealand government has revealed that there is an agreement among the parties not to release any draft negotiating texts until 4 years after the conclusion of the agreement. There is also agreement not to release the final negotiated text until after it is signed by governments (Sinclair, 2011).

The secrecy of trade negotiations has been defended historically on the grounds of national interest and commercial confidentiality. However, precisely because of the expanded scope of trade agreements, there have been increasing public demands for more transparency both through publication of negotiating texts and release of the final text before it is signed by governments.

For example, the WTO (2003) responded in 2003 to community demand and published draft negotiating texts for the trade in services negotiations. Governments also responded to public pressure by publishing the text of the Anti-Counterfeiting Trade Agreement before it was signed in 2011 (ACTA, 2011). More recently, the EU has responded to calls for transparency by agreeing to publish its own negotiating texts of the Trans-Atlantic Trade and Investment Partnership between the EU and the US, which is seen as the Atlantic version of the TPP. It has also agreed to publish the consolidated final text at the end of the negotiations for public and parliamentary debate before it is signed (European Commission, 2015).

The community consultation about the TPP varies from nation to nation. The US has a consultative system for all trade agreements based on industry committees, which enables about 600 corporate stakeholders, a very small number of other non-government organisations and some Congressional members of specialised trade committees, to view sections of the text on a confidential basis (US Trade Representative, 2014). US trade journals, while not able to quote from the text, sometimes provide insights into aspects of the text being debated.

In Australia, there have been briefings held by DFAT on the progress of the negotiations, but these lack detail about the text. During the first 4 years of negotiations, business and community organisations were permitted to make presentations to negotiators at negotiating rounds held in different countries, but this was largely a one-way communication. Limited information from negotiators came from informal meetings and formal but very general briefings from chief negotiators at the end of each round. But stakeholder presentations to negotiators and briefings from chief negotiators ceased after the Brunei round in August 2013.[4]

Scholars and commentators have had to rely mostly on leaked texts, published on the Internet by non-government organisations like WikiLeaks. These include various versions of the intellectual property chapter on both medicine patents and copyright, the annex on transparency in medicines regulation, the investment chapter, and the environment chapter (Trans-Pacific Partnership Agreement 2011, 2012, 2013, 2014).

The policy of secrecy of the TPP texts has been hotly debated (Australia Institute, 2013; Choice Consumer Organization, 2013). The debate has been exacerbated by the fact that the TPP agenda seeks to change domestic policies in many new areas which would normally be determined through democratic processes. The failure to release the text until after it is signed by governments means in most cases, including Australia, that national parliaments cannot change or vote on the text. Parliament can only vote on implementing legislation, which deals with issues requiring immediate legislation. The implementing legislation only covers a small proportion of what is likely to be a text of over a thousand pages.

There are many other aspects of the TPP text, like regional regulatory standards or ISDS processes, that are simply part of the text of the agreement and do not require domestic legislation. These provisions can limit the ability of current and future governments to regulate in the public interest, foreclosing on any debate or vote by Parliament.

Reaching behind the border into domestic law and policy

The TPP has over 20 topics or chapters, many of which are additions to the previous US template for bilateral agreements explained in the introduction. In addition to chapters dealing with investment, intellectual property, quarantine issues and Technical Barriers to Trade, the TPP includes movement of business persons, supply chains, regulatory coherence, transparency, competition policy, state-owned enterprises and further extension of intellectual property rights on both patents and copyright (DFAT, 2013b). This article will confine itself to analysis of those new issues for which most information is available through leaked chapters and other sources.

These ‘new issues’ chapters of the TPP reveal an unprecedented series of attempts to shape domestic regulatory policies through a trade agreement, which have resulted in resistance by social movements and some governments.

Restrictions on national domestic regulation

A chapter on regulatory coherence attempts to set regional standards for certain types of regulation which could limit future regulatory moves by governments. There are also separate annexes on regulation of medicines, food and alcohol labelling which may be

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attached to other chapters. Public health advocates have expressed concern that such regional standards could prevent governments from introducing new forms of regulation in response to new research or other developments. For example, health warnings for pregnant women on alcohol labelling or nutritional labelling of food are already being advocated by public health groups and resisted by food industry organisations (O'Brien and Gleeson, 2013).[5]

The regulation and labelling of tobacco products has been a subject of fierce public debate, since many governments want to retain the right to introduce more regulation following World Health Organization (WHO) recommendations to restrict tobacco advertising (WHO, 2011). US public health advocates lobbied the US government to introduce an exemption from TPP rules for tobacco products, in order to enable further regulation, but this was fiercely opposed by the tobacco industry. This reportedly resulted in a much weaker draft exemption from the US. The Malaysian Government, influenced by its public health advocates, has introduced a separate exemption which is reportedly stronger, and the issue remains unresolved at the time of writing (Campaign for Tobacco Free Kids, 2013; South East Asia Tobacco Control Alliance, 2014).

Government obligations to consult with transnational investors

The transparency chapter seeks to set a regional standard for consultation by governments with international investors about proposed policy changes or legislation. In some cases, this standard may place more obligations on governments to consult with foreign investors about policy regulation than those that exist for domestic investors in their current domestic frameworks. The transparency chapter also interacts with and reinforces the proposal for ISDS (explained further below). This proposed measure would enable foreign investors to sue governments for damages on the grounds that they were not adequately consulted about a change in the host nation's regulatory environment. Foreign investors could sue governments on the basis that they had not met specific TPP obligations for extensive consultation before the law or policy was introduced (Kelsey, 2013).

State-owned enterprises

This chapter reportedly seeks to restrict the commercial activities of state-owned enterprises, and to remove any favourable treatment through government subsidies or funding. The measure is justified as an attempt to ensure that state-owned enterprises operating on a commercial basis, like banks, manufacturing, mining or telecommunications companies, have no advantages over private and foreign competitors. The proposal has been resisted by the Malaysian, Vietnamese, Bruneian and Singapore governments, which have significant levels of state-owned enterprise activity (Kawase, 2014).

Copyright

Copyright law is intended to ensure that creative workers can get a reasonable income from their work when others use or reproduce it. Generally, national copyright laws are

intended to produce a balance between these rights and the rights of consumers to gain access to knowledge (Weatherall, 2013).

Many copyrighted works are now owned by media companies. The latest leaked intellectual property chapter of the TPP confirms that the US is proposing changes to copyright laws advocated by media companies, which are the largest exporters of copyrighted works in the world (Motion Picture Association of America, 2015; Trans-Pacific Partnership Agreement, 2014). Many TPP countries, including Australia, are net importers of copyrighted works, so higher copyright payments would increase their trade deficits. The Australian Productivity Commission (2010), a strong supporter of free trade principles, has argued that both patents and copyright are monopoly rights of no economic benefit to Australia (pp. 165–169).

The US proposals would extend the period of copyright payments. The WTO standard for the period of copyright payments established in 1995 is the life of the author or publication of cinematic products plus 50 years. This standard applies in some TPP countries. However, those TPP countries with bilateral agreements with the US have adopted the US standard of the life of the author plus 70 years. The US TPP proposals would extend this even further to plus 90 years in some circumstances, increasing costs to consumers, educational bodies and libraries. Critics argue that the proposed increase in timeframe is indicative of a pattern of US escalation of monopoly rights. It is argued that trade agreements have been used to almost double the period of copyright payments since 1995, without normal democratic scrutiny (Weatherall, 2013).

Other US proposals would increase the right of copyright holders on the Internet at the expense of consumers. These rules would force Internet Service Providers to police copyright rules by reporting customers' breaches and taking action against them, and would also impose criminal penalties for breaches, without clear safeguards for legitimate use (Weatherall, 2013, 2014).

Patents on medicines and regulation of medicine prices

The TPP agenda impacts medicine prices in two ways which have been among the most contentious issues in the negotiations. First, the US proposals would have the effect of delaying the availability of cheaper generic medicines. These proposals not only go well beyond the patent obligations of the WTO, but also exceed the standards in other US free trade agreements to date, including the AUSFTA and the more recent Korea-US FTA. They provide another example of the escalation of monopoly rights (Lopert and Gleeson, 2013). These proposals would increase the cost of pharmaceuticals in industrialised countries like Australia, and studies show that the impacts would be even more severe in developing countries (Medicins sans Frontieres, 2014; Moir et al., 2014).

Second, the medicines transparency annex is aimed specifically at giving more rights to pharmaceutical companies and restricting the ways in which governments may regulate the wholesale price of medicines, and then subsidise the retail price. Such regulation is a common national policy in industrialised countries, including Australia and New Zealand, but not in the US. The leaked text reveals a proposal to limit what is known as reference pricing, which involves the comparison of the wholesale price and effectiveness of new medicines with the price and effectiveness of existing medicines, including

cheaper generic medicines which are no longer under patent. This policy reduces the wholesale prices of medicines in Australia relative to those in the US, which has no such national system (Gleeson et al., 2013).

The TPP proposals would limit governments' ability to regulate wholesale prices, increasing the gap between the wholesale price and the subsidised retail price, resulting in greater costs to government. The effect would be pressure to raise the subsidised retail price (Hirono et al., 2015).

ISDS: Another layer of restraint on democratic regulation

In addition to the normal government-to-government dispute process to enforce the agreement, which is a standard part of all trade agreements, the US also proposes that the TPP include ISDS processes. ISDS has been included in every US bilateral agreement, except the AUSFTA. The reasons for this exception will be discussed below. ISDS enables foreign investors to sue governments for damages in an international tribunal of investment law arbitrators if domestic law or policy 'harms' their investment.

ISDS background

Investment protection provisions in trade and investment agreements were originally intended to protect property and assets from nationalisation. However, ISDS has expanded in scope to protect the investor from the risk of what were perceived as arbitrary actions by the host government. Such actions are defined to include the concept of 'indirect expropriation' through domestic laws or policies which 'impair' the investment. The concept of 'indirect expropriation' is unique to international investment arbitration, and not recognised in most national legal systems, including those of Australia and the US. ISDS binds the host government to these expanded obligations, and enables the investor to seek monetary compensation through legally binding arbitration by an international tribunal, made up of experts in investment law (Tienhaara, 2009).

There are two major tribunal systems used in trade agreements: the International Centre for the Settlement of Investment Disputes (ICSID) under the auspices of the World Bank and the rules of the United Nations Commission on International Trade Law (UNCITRAL). Both systems use panels of international investment law experts who can act as both arbitrators and advocates (Tienhaara, 2009: 46 and 123).

The cumulative number of known cases from 1993 to the end of 2013 has expanded to 568. The total figure is probably much higher, because many proceedings are not public. There have been increasing numbers of cases dealing with health, environmental and other public interest legislation. US-based investors are the most frequent users of ISDS (United Nations Committee on Trade and Development (UNCTAD), 2014: 7).

ISDS tribunals can examine the impact of 'indirect' expropriation and the effect of the regulation on the investor. There are also concepts of 'legitimate expectations' of the investor, whether the investor has received 'fair and equitable treatment' in the development of the regulation (UNCTAD, 2013: 12–18). Critics have identified a series of fundamental problems with ISDS processes compared with most national democratic legal processes.

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First, there is no independent judiciary. Arbitrators are chosen from investment law experts, and paid by the hour. The same individual can be an advocate one month and an arbitrator the next. In Australia and most legal systems, judges cannot be practising lawyers because of obvious conflicts of interest (Eberhardt and Olivet, 2012).

Second, decisions are only binding on the parties involved in the dispute, and there is no system of precedents or appeals to ensure consistency of decisions. This means that arbitrators have reached very different conclusions based on similar facts. Again, this is in contrast with legal practice in Australia and most national systems, whereby independent judges have to take account of previous decisions in a systematic way and their decisions can be appealed to ensure consistency (Kahale, 2014).

Third, the proceedings are not public and even the results of proceedings can remain secret, unless both parties agree to publish them. The ICSID tribunals publish only lists of disputes and awards, not records of proceedings. Until recently, UNCITRAL published even less. It was not till April 2014 that UNCITRAL agreed to rules making it possible for proceedings to become public for cases after that date. However, tribunals will still have discretion to allow for confidential hearings and documents if requested by parties (UNCITRAL, 2014).

Critical studies of ISDS

Growing numbers of critical studies argue that ISDS places unreasonable restrictions on the right of governments to regulate for legitimate social policy objectives and thus erodes democratic process and national sovereignty (Capling and Nossal, 2006; Cato Institute, 2014; Gallagher, 2010; Kahale, 2014; Schneiderman, 2008; Tienhaara, 2009; Van Harten, 2010). Australian High Court Chief Justice French has recently expressed his concerns about the impact of ISDS on domestic court systems (French, 2014).

Much of the academic criticism has been based on cases under the ISDS provisions in the North American Free Trade Agreement (NAFTA). The Canadian Government settled a case brought by the US Ethyl Corporation over the banning of a petroleum additive for health reasons by paying USD13 million, and agreed to reverse the ban as part of the settlement. The SD Myers Corporation in the US received USD5.6 million because of a ban on the transport and export of hazardous wastes. The US Metalclad company won USD16.2 million in damages from a Mexican municipal government when the latter refused a permit for a toxic waste disposal site for environmental reasons (Public Citizen, 2014b: 10–11, 22).

In ongoing cases, the US Eli Lilly pharmaceutical company has claimed USD481 million damages against the Canadian Government because of a Canadian court refusal to grant a medicine patent. The US Lone Pine resources company is claiming USD250 million damages against the Canadian government over a the delay of a shale gas mining license pending an environmental review (Public Citizen, 2014b: 20–21).

The key case in the Australian context is the Philip Morris tobacco company case against the Australian government's 2011 plain packaging legislation. The tobacco companies lobbied unsuccessfully against the legislation, then sued for damages in the High Court of Australia on the grounds that their intellectual property in the form of trademarks had been expropriated on unjust terms under the Australian Constitution. The

High Court found that the company was not entitled to compensation because its property had not been expropriated under Australian law and the legislation was a public health measure based on the WHO Convention on Tobacco Control (High Court of Australia, 2012; Ranald, 2014).

On the day of this decision, the Philip Morris Company announced that it would proceed with an ISDS case for damages against the Australian Government using the ISDS clause in an obscure 1993 Hong Kong–Australia bilateral investment agreement. The US-based company could not use the AUSFTA because it contained no ISDS provisions. The company therefore shifted assets to Hong Kong to enable it to use the ISDS provisions in that agreement. This use of ISDS provoked widespread opposition from public health groups (Philip Morris, Ltd, 2012; Ranald, 2014; Voon and Mitchell, 2011).

The President of the WHO has criticised tobacco companies for using ISDS as part of a strategy to challenge and discourage regulation of tobacco (Chan, 2012; Ranald, 2014).

ISDS damages claims range up to USD1.8 billion awarded against Ecuador in 2012 (UNCTAD, 2013: 1–3; UNCTAD, 2014). Legal and arbitration fees are additional and apply even if a government wins the case. An Organisation for Economic Cooperation and Development (OECD) survey found in 2012 that costs were an average of USD8 million per case, with some cases costing up to USD30 million (Gaukrodger and Gordon, 2012: 19).

The impact of these cases has led to an effect described as 'regulatory chill'. Governments are made aware of the potential costs of ISDS, and are discouraged from regulation. The New Zealand and UK governments have postponed tobacco plain packaging legislation pending the outcome of the ongoing Philip Morris Hong Kong case against Australian plain packaging legislation (Geller and Nasralla, 2014; Television New Zealand (TVNZ), 2013).

Responses to ISDS from national governments

Increasing numbers of governments are reviewing, criticising and in some cases, renouncing participation in ISDS processes. These include Brazil, Argentina and eight other Latin American countries, South Africa, India, and Indonesia (Biron, 2013; Bland and Donnan, 2014; Carim, 2013; Filho, 2007; Mehdudia, 2013; Ministerial Meeting of the Latin American States, 2013).

The inclusion of ISDS in negotiations for the Trans-Atlantic Trade and Investment Partnership Agreement (TTIP) between the US and the EU has prompted fierce public debate, resulting in a European Commission decision to pause the negotiations to allow for further public consultation (Donnan and Wagstyl, 2014; Gaukrodger and Gordon, 2012; European Parliamentary Research Service, 2014).

Australian policy: The AUSFTA and the Productivity Commission report

The Australian Liberal-National Coalition Government negotiated the AUSFTA in 2004. The US sought to change a range of Australian health and social policies and also wanted an ISDS clause in the agreement (Zoellick, 2002). The AUSFTA prompted the biggest critical public debate held in Australia about a trade agreement and ISDS was a major

topic in the debate (Ranald, 2010). Critics used examples from NAFTA to argue that ISDS would be a dangerous weakening of governments' ability to regulate for social and environmental goals (Henry, 2003). ISDS was not included in the final agreement, making it the only bilateral US agreement which does not include ISDS.

The debate about ISDS was re-ignited in 2010 when, at the request of the then Australian Labor Party (ALP) Government, the Productivity Commission produced a report on Australia's bilateral and regional trade agreements which included a review of ISDS. The report concluded that there was no evidence of economic benefits from ISDS and that 'that there are considerable policy and financial risks arising from ISDS provisions' (Productivity Commission, 2010: 274).

Australian Labor Government policy against ISDS 2011–2013 and current Coalition Government policy

The 2011 ALP Government review of Australia's trade policy rejected ISDS, stating that ISDS would 'constrain the ability of Australian governments to make laws on social, environmental and economic matters' (cited in Senate Foreign Affairs, Defence and Trade Legislation Committee, 2014: 4). The Government was also influenced by the experience of the Philip Morris case discussed above. The policy against ISDS was implemented in trade negotiations in 2012–2013 in the Malaysia FTA and the TPP (DFAT, 2102; Trans-Pacific Partnership Agreement, 2012).

The Coalition Liberal-National Party Government, elected in September 2013, announced it would negotiate ISDS 'on a case-by-case basis'. It had previously described the ALP policy as too inflexible and as having the effect of delaying completion of free trade agreements (Condon, 2013). The Coalition Government has agreed to the inclusion of ISDS in the Korea–Australia Free Trade Agreement (KAFTA), with claimed 'safeguards'. It also announced that it is prepared to negotiate ISDS in the TPP in return for increased market access for Australian agricultural products to US markets (DFAT, 2013a; Kehoe, 2013).

Critics of ISDS 'safeguards'

The Coalition Government has defended the inclusion of ISDS in KAFTA by claiming that more recent versions of ISDS have clauses which will effectively safeguard health, environmental and public welfare policies

The first sentence in the first of the safeguard clauses in the KAFTA begins with the phrase, 'except in rare circumstances' (KAFTA, 2014: Chapter 11, annex 2B). Many legal experts have pointed out that this phrase leaves a very big loophole, which recent cases in other agreements with this clause have used to advantage (Public Citizen, 2010). Other safeguards include a more limited definition of 'fair and equitable treatment' and a reference to the general protections for 'human, animal or plant life' in article XX of the WTO General agreement on Tariffs and Trade. But these have not prevented cases from being launched under agreements which have similar clauses (KAFTA, 2014, Article 22.1, article 11.5.2, and Annex 2A; Public Citizen, 2012a, 2012b).

Over 100 legal experts from Europe and North America have assessed proposed safeguards which could be included in the TTIP between the US and the EU. These are far more extensive than those included in the KAFTA. However, the submission found that these were not sufficient to exclude ISDS cases against health and environmental legislation. Once the cases are before an ISDS tribunal, they are subject to the structural flaws in the ISDS system, namely the lack of independent arbitrators and their ability to apply very wide discretion in interpreting and applying such safeguards (Schepel et al., 2014).

ISDS, democracy and sovereignty

ISDS gives special rights to foreign investors to sue government in an international tribunal if they can claim that a change in domestic legislation has 'harmed' their investment. ISDS is based on principles which do not exist in national legal systems, and are not available to domestic investors. ISDS also lacks the basic protections of national legal systems. The experience of escalating numbers of ISDS cases and growth in the value of damages awarded for disputes concerning health and environmental regulation have prompted social movement opposition and government reviews of ISDS.

In the case of the TPP, ISDS represents an additional layer of restraint on democratic regulation, providing a means by which international investors can potentially sue governments for damages over a wide range of regulatory processes and issues.

Cumulative effects of behind-the-border proposals and ISDS and resistance to them

These examples show that the TPP, negotiated in secret, reaches even further into domestic regulatory frameworks than existing bilateral US agreements. If agreed, the proposals could mean substantial changes, severely limiting government regulation in all of the areas discussed above. There has been strong opposition to these proposals in Australia and other TPP countries from a wide range of consumer, public health, union and environment organisations.

Thousands of Australians and people from other TPP countries have signed petitions against TPP secrecy and calling for the release of the text before it is signed. Surveys by a range of advocacy groups show a majority of Australians (87%) support this demand (Australian Fair Trade and Investment Network (AFTINET), 2015; Australia Institute, 2013; Choice Consumer Organization, 2013; GetUp!, 2015). Parliamentarians from other TPP countries have also joined the call (TPP Legislators for Transparency, 2014).

This strong Australian and international opposition to ISDS in the TPP prompted a Senate Inquiry which received over 11,000 letters and submissions (Senate Foreign Affairs, Defence and Trade Legislation Committee, 2014). A further Senate Inquiry on the trade agreement process, including its secrecy, is to report in June 2015 (Senate Foreign Affairs, Defence and Trade References Committee, 2015).

Public health organisations, including the Australian Medical Association and international health experts writing in *The Lancet* have opposed the expansion of monopoly rights on medicines, the restriction of government regulation of medicine prices, and potential limitations on future medicine and health regulation through the use of regional

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regulatory restrictions and ISDS (Freeman et al., 2015; Hirono et al., 2015; Medicins sans Frontieres, 2014; Public Health Association of Australia, 2014; South East Asia Tobacco Control Alliance, 2014).

There has also been widespread public opposition to the copyright proposals, which have influenced some TPP governments, especially those which still have the WTO standard, to resist them (Australian Digital Alliance, 2013; Electronic Frontiers Australia, 2014; Electronic Frontiers US, 2015; GetUp!, 2015).

Unions from Australia and other TPP countries have criticised the TPP agenda. A recent statement from the largest International Trade Union Centre opposed the TPP and called for unions in TPP countries to campaign against it (International Trade Union Confederation, 2014). Environment groups have also campaigned against the TPP, especially against the potential impact of ISDS on environmental regulation (Australian Conservation Foundation, 2014; Friends of the Earth, 2013).

Social movement opposition to these proposals has also developed in the US itself, where consumer and public health organisations have argued that the US proposals would prevent potentially positive changes in US law and policy (Public Citizen, 2014a).

Impact on the negotiations

Opposition from social movements has influenced TPP governments to resist US proposals and has delayed the negotiations. It has also influenced the US Congress where there has been strong Democratic opposition to the Bill introduced in January 2014 to grant 'fast track' authority for the TPP. The US Congress has the constitutional authority to amend trade agreements after they are negotiated by the executive unless the Congress passes 'fast track' legislation enabling only a yes or no vote. There has also been opposition from Republicans, which meant the 2014 Bill could not get sponsorship. A statement from 151 Congress members indicated their concerns (DeLauro, 2013), and more recently 600 civil society organisations signed a letter to Senators against 'fast track' (Public Citizen, 2014a).

The Republican majority in the Senate following the November 2014 elections may not change this situation, since many of the newly elected Republicans are also opposed to granting 'fast track' authority (Nakamura, 2014).

Conclusion: TPP threats to democracy and sovereignty

The agenda of the TPP is being driven by the US in an attempt to establish regional regulatory frameworks which suit its most powerful export industries. Leaked documents reveal that TPP proposals could mean substantial restriction of regulation and pricing of medicines, copyright, restrictions on food, alcohol and tobacco regulation, and could require more detailed consultation with foreign investors than with domestic stakeholders over proposed new legislation.

The inclusion of ISDS in the TPP represents an additional layer of restraint on democratic regulation, providing a means by which international investors can potentially sue governments for damages over changes to domestic regulation in international tribunals which lack the basic legal standards of an independent judiciary, precedents and appeals found in national legal systems.

The breadth of issues covered in the agreement has widened the range of its critics, sharpened criticism of the secrecy of the negotiations, and strengthened calls for the release of the final text of the agreement for public and parliamentary debate before it is signed.

Negotiation of domestic regulation through a trade agreement effectively removes it from the democratic political process of public and parliamentary debate. This bypassing of domestic democratic processes has been widely criticised as having the effect of undermining democracy and national sovereignty. This agenda has contributed to delays in the TPP negotiations and may prove to be its undoing. Opposition from social movements has influenced members of the US Congress to oppose granting 'fast track' for the TPP. Other governments' responses to social movement resistance and attempts to mitigate the agenda have contributed to the many missed deadlines. Yet another deadline was missed at the end of 2014 and, at the time of writing, negotiations are expected to extend well into 2015.

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Notes

1. For a detailed analysis of the development of the Trans-Pacific Partnership Agreement (TPP) in the context of US trade strategy, see Ranald, 2011.
2. China is the major player in what some see as a rival and regional trade agreement called the Regional Comprehensive Economic Partnership (RCEP) which does not include the US. It involves the 10 Association of Southeast Asian Nations (ASEAN) countries, China, Japan, India, South Korea, Australia and New Zealand. The RCEP agenda is more focused on more traditional trade in goods and services The Australian Government is part of the US strategic alliance but also wants to maintain good relationships with China, now its largest trading partner, hence its involvement with both the TPP and the RCEP negotiations (RCEP, 2013).
3. For a historical account of the development of US trade policy from bilateral to regional agreements, see Ranald, 2011.
4. The author presented papers to negotiators at several of the more open negotiating rounds from 2010 to 2014, informally observed TPP Ministerial Meetings in Bali, Singapore and Sydney in 2013–2014 and has monitored the subsequent more secret rounds though available industry reports and leaked documents.
5. The TPP could also limit country-of-origin labelling proposed in February 2015 following the import of contaminated frozen berries (Chan, 2015).

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