

A democracy deficit?

Community attitudes to the Trans-Pacific Partnership Agreement

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Summary

In his keynote speech at the World Economic Forum in Switzerland, Prime Minister Abbott said that, as a trading nation, Australia would make the most of its G20 presidency to promote free trade. He argued that because trade within and between countries increases wealth, “we should all be missionaries for freer trade”.¹

While for some – like the Prime Minister – the pursuit of so-called free trade is an article of faith, the evidence that free trade agreements deliver broad benefits is actually mixed.

This paper looks at community attitudes and awareness of the negotiation of the Trans-Pacific Partnership Agreement (TPP), which seeks to establish the basis for a free trade area of the Asia Pacific. The negotiations currently involve twelve countries – Australia, the US, New Zealand, Canada, Mexico, Peru, Chile, Singapore, Brunei, Malaysia, Japan and Vietnam.

TPP negotiations began in 2010, and there have been many missed deadlines. The 19th round of negotiation was held in Brunei Darussalam in August 2013. A ministerial meeting held in Singapore in December 2013 failed to meet its goal of completing the deal and the negotiations are continuing into 2014.

The agreement will allow for membership expansion and, according to Australia’s Department of Foreign Affairs and Trade, is more than a traditional trade agreement as it will “deal with behind the border impediments to trade and investment”.² While the Australian government pushes the benefits of this and other ‘free trade agreements’, concerns and criticism continue to come from a wide range of civil society organisations and individuals.

Free trade agreements require countries to enter into legally binding rules designed to free up access to markets for goods and services, and generate investment through removal of perceived barriers to trade such as industry subsidies, tariffs and import quotas. They often include other issues such as intellectual property rights, government procurement and competition policy. The Australia Institute conducted an online survey to determine community awareness and attitudes to the TPP in November 2013 – see Appendix 1. This survey found that, despite government claims of extensive consultation, only 11 per cent of respondents had heard about the TPP. It also found a majority of respondents, when told about the TPP, had strong opinions on the process of negotiation and what should or should not be included in any such agreement.

¹ Williams, P (2014) Tony Abbott uses address to World Economic Forum in Davos to promote virtues of free trade ABC News 24 Jan, 2014

² Trans Pacific Partnership Agreement negotiations. Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/fta/tpp/>>

A majority of Australians supported a more open process

Calls for access to draft texts have been made by the Australian Senate, the Institute of Public Affairs and many NGOs and individuals both in Australia and other participating countries. The Australian government, however, claims that secrecy is a necessary part of the successful negotiation of free trade agreements and has indicated that access will be only granted once the agreement is signed by Cabinet.

The current process is not consistent with the principle of responsible government, which requires that the power to govern be shared between the Parliament and the Executive. The current process prevents the Parliament from being able to effectively hold the Executive accountable. Only Cabinet is involved in signing the agreement and the Parliament's role is limited in both time and function. The process also fails the test of broader participatory democracy, which has at its heart public access to information and opportunity for meaningful input. Access to information is a long-recognised human right.³ Without it, citizens cannot consider social, political and economic factors in a meaningful way.

A majority of Australians did not support the inclusion of an Investor State Dispute clause

This clause would allow foreign investors of TPP countries to sue the host government directly in an international tribunal if they perceived regulations and laws to be harmful to their investment, even if those laws and regulations were made to protect the public interest. Such power is not given to corporations in the World Trade Organization treaties, where only sovereign nations can contest government laws.

The international investment arbitration system has been criticised as being biased towards investors and focusing only on questions of claims of harm rather than public interest value. The dispute settlement process is costly and there are no avenues of appeal.

A majority of Australians did not trust promises from government that the TPP would not increase the cost of specific goods, such as prescription medicine.

Despite consistent claims from the Australian government that public health and the Pharmaceutical Benefits Scheme (PBS) will not be negatively affected by the TPP there is considerable concern in the Australian community.⁴ More than 40 Australian senior academics in the field have written to the Minister for Health, Peter Dutton, raising the matter with him.⁵

Concerns raised include:

- intellectual property provisions that would expand monopolies and delay availability of generic medicines
- proposals to change pricing mechanisms of the PBS, which would result in an increase in costs of medicines for Australians
- greater influence of the pharmaceutical industry on decision making
- the introduction of investor–state dispute settlement (ISDS), which may enable foreign pharmaceutical companies to challenge aspects of decisions on price regulation.

³ Commonwealth Human Rights Initiative (2003) *Open Sesame: Looking for the Right to Information in the Commonwealth Chapter 1*

⁴ DFAT Frequently Asked Questions on Intellectual Property and Public Health Issues
<<https://www.dfat.gov.au/fta/tpp/faq.html>>

⁵ Baum, F et al Letter to Peter Dutton MP 9th Dec 2013

The draft chapter on intellectual property leaked by WikiLeaks revealed that the US was arguing for changes to copyright and patent protections which would increase the price of medicines and that “Australia's opposition has been notably weak”.⁶ A memo leaked from one of the TPP countries at the December Singapore meeting confirmed concerns that the US was determined in its efforts to push measures that would lead to an increase in the costs of medicines. It also showed Australia had collaborated with the United States and Japan to revise the ‘healthcare transparency annex’, which would affect the ability of the Australian government to regulate the wholesale and retail prices of medicines.⁷

The US pharmaceutical industry lobby has long expressed concerns about the Australian PBS, claiming the approach constitutes a barrier to trade.⁸

A majority of Australians supported the publication of detailed research on the potential impact of trade agreements on different sectors and industries before being signed

While the Department of Foreign Affairs and Trade claims on its website that trade agreements are helping Australian exporters access new markets and expanding trade in existing markets it does not provide, or at least make public, comprehensive assessments of the social, cultural and environmental impacts of existing free trade agreements or the potential impacts of agreements currently being negotiated. The Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that the benefits of such agreements “have been oversold” and called for an improvement in the process.⁹

A majority of Australians thought Australia should set its own standards for goods sold in Australia and wanted stronger regulation of what can be imported into Australia

The Australian government’s position on the question of trade agreements determining domestic legislation and standards is unclear. In Senate Estimates it was stated that “we are working within our domestic policy settings consistent with our laws”.¹⁰ This statement implies that Australia would not agree to proposals that would undermine its sovereign right to legislate in the public interest. But the leaked TPP chapter on intellectual property reveals that Australia supported US opposition to copyright protection being determined through domestic law and existing international treaties.

Public health advocates have expressed concern that the TPP could result in an increase in the importation of unhealthy foods. This trend has been evident in other countries after trade liberalisation, including in Central American countries where there was an increase in consumption of highly processed foods through the Central America–US Free Trade Agreement. Such new foods, accompanied by new advertising and promotion, can influence the national diet. Because the TPP covers ‘behind the border impediments’, and will potentially include strong investor protections, there may be greater food industry involvement in policy-making as investors challenge domestic policies considered to be “a violation of their privileges under the agreement”.¹¹

⁶ Colvin, M, Janda, M ABC Radio PM 13 Nov 2013

⁷ Gleeson, D (2013) ‘Update from the latest Trans-Pacific partnership meeting’, The Conversation 12 Dec 2013

⁸ Lokuge, K and Denniss, R (2003) Trading in Our Health System? The impact of the Australia-US Free Trade Agreement on the Pharmaceutical Benefits Scheme Discussion Paper No 55, May

⁹ Productivity Commission (2010) Bilateral and Regional Trade Agreements

<<http://www.pc.gov.au/projects/study/trade-agreements/report/media-release>>

¹⁰ Senate Foreign Affairs, Defence and Trade Legislation Committee 21 Nov 2013

¹¹ Friel, S et al (2013) ‘Trans Pacific Partnership puts member countries’ health at risk’ The Conversation 9 May 2013

A majority of Australians would not support a trade agreement that prevented the Australian government from requiring genetically modified (GM) foods to be clearly labelled

There were reportedly proposals put by Malaysia and supported by the US at the 15th round of negotiations in Auckland regarding restriction on labelling requirements.¹² Food labelling is an important public health measure and sometimes a contentious one. It is also an area that requires ongoing scrutiny into the future as more is understood about the health impacts of foods.

The Trade Promotion Authority Bill, introduced into the US congress in January 2014, confirmed that the US government wants to eliminate labelling on GM foods, referring to such labelling as “unjustified trade restrictions or commercial requirements, such as labelling, that affect new technologies including biotechnology”.¹³

A majority of Australians would not support a trade agreement that allowed Australian television stations to show fewer Australian-made programs

There is a push from for the US to reduce local content quotas for radio and television and subsidies for the Australian film industry, which it sees as detrimental to US entertainment industries.¹⁴ A joint letter from a broad cross-section of audio-visual and cultural organisations sent to DFAT called for the preservation of Australia’s capacity to support cultural and audio-visual industries and maintain maximum flexibility to respond to a rapidly changing media environment.¹⁵

Forty per cent of Australians thought trade agreements would not improve human rights, labour rights and environmental standards around the world and twenty-nine per cent thought they would have a negative effect on jobs in Australia

There have been strong calls for trade agreements to be underpinned by internationally recognised treaties and standards relevant to human rights and labour rights such as those defined by the United Nations (UN) and the International Labour Organisation (ILO). An example of such a call comes from the Australian Council of Trade Unions (ACTU). The ACTU supports international trade based on the principles of fair trade, which support sustainable development through “employment growth; improved social protections; implementation of core labour standards; sustainable environmental standards and adherence to human rights conventions and democratic values”.¹⁶

The draft text for the TPP Environment Chapter¹⁷ was released by WikiLeaks in January 2014. A common observation from environment NGOs is that, in contrast to other TPP chapters, the language used rarely creates a legally enforceable system. Words such as ‘seek to’ or ‘attempt’ are used rather than ‘shall’. It also creates cooperative rather than binding dispute settlement mechanisms, with no required penalties. Concerns include that there is no protection from overfishing, even though the countries involved account for about

¹² Friel,S et al (2013) Trans Pacific Partnership puts member countries’ health at risk The Conversation 9.May.2013

¹³ The fast-track(Trade Priorities Act) Bill tabled in the US Congress, 2th Jan 2014,p,9.

¹⁴ Kehoe,J (2013) US wants local TV content cut for TPP The Australian Financial Review 18th Nov 2013

¹⁵ Woodman, J Australian Writers’ Guild et al (2011) Letter to Jonathon Kenna DFAT re TPPA 8th Feb

¹⁶ Burrow,S (2010) ACTU Submission to the Department of Foreign Affairs and Trade on the proposed Trans-Pacific Partnership Agreement. 21st June 2010

¹⁷ WikiLeaks Press Release: Secret Trans-Pacific Partnership Agreement TPP Environment Chapter 15th January 2014 <https://wikileaks.org/tpp-enviro/pressrelease.html>

a third of global fisheries production and there is a lack of fully-enforceable environmental safeguards to prevent illegal wildlife products and logging.¹⁸

There is also concern that ISDS provisions would pose a threat to the Australian government's capacity to protect the environment. The capacity to address climate change, curb fossil fuel expansion and reduce air pollution could all be constrained by the threat of ISDS by investors.

What is free trade?

Free trade agreements require countries to enter into legally binding rules which are designed to free up access to markets for goods and services, and to increase investment through removal of perceived barriers to trade such as industry subsidies, tariffs and import quotas. They often include other issues such as intellectual property rights, government procurement and competition policy.

Australia has seven Free Trade Agreements (FTAs) currently in force with New Zealand, Singapore, Thailand, the US, Chile, the Association of South East Asian Nations (ASEAN) (with New Zealand) and Malaysia. The countries covered by these FTAs account for 28 per cent of Australia's total trade.

It is also currently engaged in eight other FTA negotiations – five bilateral FTA negotiations, with China, Japan, India and Indonesia; and four plurilateral FTA negotiations including the Trans-Pacific Partnership Agreement (TPP), the Gulf Cooperation Council (GCC), the Pacific Trade and Economic Agreement (PACER Plus), and the Regional Comprehensive Economic Partnership Agreement (RCEP). The countries covered by these negotiations account for a further 45 per cent of Australia's trade.¹⁹ Australia has also recently signed the Korea–Australia Free Trade Agreement.

The TPP seeks to establish the basis for a free trade area of the Asia Pacific, building on the 2006 Trans-Pacific Strategic Economic Partnership Agreement (P4) between Brunei Darussalam, Chile, New Zealand and Singapore. The TPP negotiations now include 12 countries, the (P4) countries as well as Australia, Canada, Japan, Malaysia, Mexico, Peru, the US and Vietnam. This agreement will allow for membership expansion and, according to the Department of Foreign Affairs and Trade, is more than a traditional trade agreement as it will “deal with behind the border impediments to trade and investment”.²⁰

According to DFAT:

- The TPP has the potential to form a building block for Asia-Pacific regional economic integration. It is in Australia's interests to be involved in order to shape the direction of the initiative.
- Regional rules of origin will provide new opportunities for Australian exporters to tap into global supply chains.
- The TPP could provide additional market access for goods and services into the markets of existing FTA and future TPP partners.
- Inclusion of Investment and Financial Services chapters in the TPP could provide improved opportunities for Australian financial services providers by mitigating barriers such as foreign restrictions on capital and investment flows.

¹⁸ 4 Ways Green Groups Say Trans Pacific Partnership Will Hurt Environment (2014) National Geographic, 17th January 2014

¹⁹ DFAT About free trade agreements

<http://www.dfat.gov.au/fta/>

²⁰ Trans Pacific Partnership Agreement negotiations. Department of Foreign Affairs and Trade

<http://www.dfat.gov.au/fta/tpp/>

- The TPP provides a framework for engaging with countries with which we do not have an existing bilateral trade arrangement. For example, there is potential for better access for dairy products and mining services to Peru through the TPP.²¹

TPP negotiations began in 2010, and there have been many missed deadlines. The 19th round of negotiations was held in Brunei Darussalam in August 2013. A ministerial meeting held in Singapore in December 2013 failed to meet its goal of completing the deal and the negotiations are continuing into 2014. The Brunei Ministerial Meeting issued a statement saying:

*We discussed how best to achieve an outcome consistent with our common goal of achieving an ambitious and balanced 21st-century agreement that will enhance trade and investment among us, promote innovation, economic growth and development, and support the creation and retention of jobs in our countries.*²²

What a 'balanced 21st-century agreement' actually looks like remains to be seen. There can be differing views on what is an acceptable balance, depending on values and interests of those making the judgement.

This point was well made in an open letter to the US Trade Representative by over 30 legal academics from the US and other TPP countries that were concerned about leaked proposals for the intellectual property chapter. The letter claimed the US was pushing numerous standards that could require changes in US statutory law and that the US proposal was "manifestly unbalanced", proposing increases in proprietor rights with no effort to expand limitations and exceptions to such rights, which would be necessary to serve the public interest in the US and abroad.

There was concern that "the unbalanced product results from an unbalanced process", with brand name pharmaceutical companies and the Hollywood entertainment industry being given access to proposals but consumers, libraries, health advocacy and patient groups as well as other users of intellectual property being excluded.²³

The Australian Chamber of Commerce and Industry (ACCI) see the TPP and other regional trade agreements as important because of the failure of efforts through the World Trade Organization (WTO).

*We will be looking for beneficial outcomes such as improved market access, reductions in tariffs and other barriers to trade for Australian goods and services into the markets of the foreign partners, especially for agricultural products, the resources and financial sectors, and our services sector.*²⁴

Because negotiation of the TPP occurs behind closed doors, and draft texts are regarded as secret, it is impossible to know exactly what the Australian government judges to be a 'balanced' position – but a recent leak of the intellectual property chapter suggests Australia is similarly influenced by the large industry lobby.

The leaked chapter reveals that Australia appears to be supporting the US on a number of controversial proposals including the granting of patents for new uses of existing medicines, which Deborah Gleeson, a lecturer in Public Health at La Trobe University, says would lead to 'evergreening', where patents can be renewed continuously. This would be particularly bad for Vietnam, which already has a problem of access to medicines.

²¹ DFAT Trans-Pacific Partnership Agreement Negotiations Key Interests and Benefits

<<http://www.dfat.gov.au/fta/tpp/>>

²² Joint Press Statement TPP Ministerial Meeting – Bandar Seri Begawan Brunei Darussalam, August 23 2013

²³ *Law Professors Call for Trans Pacific Partnership Transparency* (May.9. 2012) <www.infojustice.org>

²⁴ *ACCI Welcomes TPP Negotiations* (2012) Statement by Brian Clarke ACCI

According to Angela Daly, a communication law researcher at Melbourne’s Swinburne University of Technology, the chapter also showed Australian support for “self-defeating or absurd provisions” such as US opposition to copyright protection being determined according to domestic law and existing international treaties.²⁵

Should trade deals be secret?

The Australia Institute conducted an online survey to determine community awareness and attitudes to the Trans Pacific Partnership in November 2013.²⁶

Do you think the details of Free Trade Agreement should be made public before the Australian Government signs them?		
	%	n
Yes	87%	1224
No	4%	53
Don’t know	9%	127
Total	100%	1404

The Australian government claims that secrecy is normal practice in trade agreement negotiation because of the sensitive nature of individual market access positions.²⁷ This is challenged by the Australian Fair Trade and Investment Network (AFTINET), which gives the example of the World Trade Organization putting proposed texts and background papers on the WTO public website. It also cites the Anti-Counterfeiting Trade Agreement (ACTA), which dealt with extension of intellectual property rights and which was released before being signed.²⁸

According to the Department of Foreign Affairs and Trade (DFAT):²⁹

- Australia is committed to transparency in our FTA negotiations.
- As is normal practice in trade negotiations, the parties have agreed to keep negotiating documents (including text) confidential while allowing governmental consultation processes providing the documents remain confidential.
- Releasing text would require agreement of all negotiating parties.

DFAT also has ‘a model version’ of the text of the letter the parties exchanged relating to confidentiality on its website.³⁰

²⁵ Loussikian, K (2013) ‘Regional trade pact puts Australia in “absurd” position say experts’, The Conversation 14 November 2013

²⁶ Respondents were sourced from a reputable independent online panel who earn reward points to participate. Results were post weighted (n = 1404) by age and gender based on the profile of the adult Australian population. Small variations in sample size can occur from rounding errors as a result of the weighting process. Small errors in totals can occur as a result of rounding.

²⁷ DFAT Trans-Pacific Partnership Agreement: State of Play (Speaking Notes) 15 Round, 3-12 Dec 2012, Auckland New Zealand

²⁸ AFTINET Australian Parliamentary Process for Trade Agreements Media Release <<http://aftinet.org.au/cms/Australian-parliamentary-process-for-trade-agreements>>

²⁹ Department of Foreign Affairs FOI TPP Speaking Points Trans-Pacific Partnership: State of Play 15th Round, 3-12 Dec 2012, Auckland NZ FOI

³⁰ DFAT Trans Pacific Agreement negotiations Release of confidentiality letter <<http://www.dfat.gov.au/fta/tpp/111221-tpp-confidentiality-letter.html#letter>>

... First, all participants agree that the negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, is provided and will be held in confidence, unless each participant involved in a communication subsequently agrees to its release. This means that the documents may be provided only to (1) government officials or (2) persons outside government who participate in that government's domestic consultation process and who have a need to review or be advised of the information in these documents. Anyone given access to the documents will be alerted that they cannot share the documents with people not authorized to see them. All participants plan to hold these documents in confidence for four years after entry into force of the Trans Pacific Partnership Agreement, or if no agreement enters into force, for four years after the last round of negotiations.

The claim to greater transparency in negotiation of FTAs is based on the provision of progress updates and opportunity for input at meetings and teleconferences in state and territory capitals and through posts on the DFAT website. Stakeholder presentations to negotiators have also taken place at negotiating rounds. While this attempt to improve transparency appears to have been welcomed by stakeholders, criticism continues because the lack of access to the details of the text means that stakeholders have no way of knowing whether their input has any impact on the negotiations, or whether new input is needed because the text has changed.

The Coalition's Trade Policy³¹ does not speak about transparency, though it does commit to seeking a stronger voice for local industry through the "appointment of at least one industry representative who will be directly included in the negotiation of free trade agreements", which it claims will be "in line with standard overseas practice". According to AFTINET,³² this is not the practice of any other comparable government. The US government does allow particular interest groups from industry, union and civil society to see the text of US proposals relevant to their concerns but they must keep the text confidential and they are not present at the actual negotiations.

Even though the US is seen to be the major power behind the push for a TPP, domestically there is concern about the process. For example Senator Elizabeth Warren (Massachusetts) in her call for greater transparency made the point that:

... if transparency would lead to widespread public opposition to a trade agreement, then that trade agreement should not be the policy of the United states.³³

Members of Congress have urged the United States Trade Representative Ambassador (USTR) to include stronger congressional consultations and a more open and transparent process as the United States negotiates the TPP:

... the negotiations USTR is pursuing will create binding policies on future Congresses in numerous areas including labor, patent and copyright, land use, food, agriculture and product standards, natural resources, the environment, professional licensing, state-owned enterprises and government procurement policies, as well as financial, healthcare, energy, telecommunications and other service sector

³¹ The Coalitions' Policy for Trade September 2013

³² AFTINET *Coalition policy gives manufacturing bosses a seat at trade negotiations, not farmers, unions or other groups* <<http://aftinet.org.au/cms/node/626>>

³³ Dolan, E (2013) *Warren on Trans Pacific Partnership: If people knew what was going on they would stop it* The Raw Story 19 June

regulations. Independent polls have consistently shown the public supports fair trade deals, across all incomes, occupations and political affiliations.³⁴

Since that time the United States Trade Representative has undertaken to publish the full text of all free trade agreements negotiated on behalf of the United States of America (US) 'well before' signing to invite further comments from the US Congress and the US people.

It is also claimed by Australian governments that the secret negotiation process is balanced by democratic and transparent parliamentary scrutiny. After agreement on the text by the parties and cabinet the agreement is made available to the Australian public and Parliament and sent for review by the Joint Standing Committee on Treaties (JSCOT), usually tabled for 20 parliamentary joint sitting days.³⁵ The Parliament however does not have the opportunity to debate and vote on the full text of trade agreements, only on the implementing legislation – that is, only sections that require changes to legislation. The agreement is signed by the Cabinet, not the Parliament, and the text cannot be changed once signed.

There are large parts of the text which may not require changes to legislation immediately, but which could limit the ability of future governments to regulate.³⁶ This includes the ISDS clause and any changes to the PBS. If the implementing legislation did not receive support it would prevent or cause a delay in the final ratification of the agreement.³⁷ There is also concern that the 20 sitting days allowed for review of the text by the Senate is inadequate and that "the scale and complexity of the potential deal means it should be properly scrutinised with the Australian public having a say in what is under negotiation."³⁸

In December 2013, a motion was put in the Australian Senate by Senator Penny Wong, calling for the Minister representing the Minister for Trade to provide the full text of the proposed Korea-Australia Free Trade Agreement, the TPP and other bilateral and plurilateral trade agreements at least 14 days before signing. This motion received majority support in the Senate although was not supported by the government.³⁹ The government has previously refused such a request, with the Minister for Finance, Mathias Cormann writing to the President of the Senate claiming public interest immunity and saying disclosure "would be prejudicial to Australia's international relations".⁴⁰

According to the US fact sheet on the TPP, secrecy is needed so that negotiators can "communicate with each other with a high degree of candor, creativity, and mutual trust".⁴¹ But this approach is bound to create problems if there is not a reasonable level of that same mutual trust between governments and the people they represent.

This is more important than ever, because trade agreements increasingly intrude into the domestic regulatory environment – thereby undermining the normal democratic process.

³⁴ DeLauro, R (Congresswoman Representing the Third District of Connecticut US) *DeLauro, Miller push for more Transparency, Congressional Consultation in Trade Negotiations* Website <http://delauero.house.gov/index.php?option=com_content&view=article&id=997:delauero-miller-push-for-more-transparency-congressional-consultation-in-trade-negotiations&catid=2:2012-press-releases&Itemid=21>

³⁵ Department of Foreign Affairs and Trade (2014) *Tabling of Treaty Actions in Parliament* <<http://www.dfat.gov.au/treaties/making/tabling-of-treaty-actions-in-parliament.html>>

³⁶ Ranald, P (2013) *What matters more - corporations or people?* Working Life 2 Dec 2013 <<http://workinglife.org.au/2013/12/02/what-matters-more-corporations-or-people/>>

³⁷ AFTINET *Australian Parliamentary Process for Trade Agreements* Media Release <<http://aftinet.org.au/cms/Australian-parliamentary-process-for-trade-agreements>>

³⁸ Amon, I (2013) *How would the TPP agreement affect Australians?* SBS World News 24th Dec 2013

³⁹ Rimmer, M (2013) *Free Trade, Gangnam Style: The Korea-Australia Free Trade Agreement* infojustice.org 11th Dec 2013 <<http://infojustice.org/archives/31701>>

⁴⁰ Cormann Mathias 5th Dec 2013 <<http://www.scribd.com/doc/190333917/Corman-Letter-TPPA-05122013-1>>

⁴¹ Office of the United States Trade Representative *Fact Sheet Transparency and the Trans Pacific Partnership*

Should foreign investors be able to sue governments?

The United States is part of the TPP. One of their demands is that foreign companies be allowed to sue the Australian government if laws or regulations are passed that reduce the future profitability of foreign companies operating in Australia. Which of the following statements best describes your view:

	%	n
I've never heard about this- it seems acceptable	7%	102
I've never heard about this - it seems like a bad idea	65%	910
I've heard about this - it seems acceptable	2%	30
I've heard about this -it seems like a bad idea	10%	144
Don't know	16%	219
Total	100%	1405

The capacity for investors to sue sovereign nations is achieved through a proposal to include an ISDS clause. This clause would allow foreign investors of TPP countries to directly sue the host government in an international tribunal if they perceived regulations and laws to be harmful to their investment, even if those laws and regulations were made to protect the public interest. Such power is not given to corporations in the World Trade Organization treaties, where only sovereign nations can contest government laws. According to the DFAT website:⁴²

ISDS is focused on investment obligations such as treating foreign investors in a non-discriminatory way, protecting investments from expropriation and providing a certain minimum standard of treatment.

The Australian Chamber of Commerce and Industry supports the inclusion of an ISDS and claims that not including such a clause would leave “Australian firms exposed when they are doing business overseas.”⁴³

An example of the use of an investor–state dispute process is the case of *Ethyl vs Canadian Government 1998-99*, which occurred through the North America Free Trade Agreement (NAFTA). The US company Ethyl claimed US \$251 million in costs because the Canadian government tried to ban a gasoline additive that was harmful to environment and health. The company claimed expropriation and discriminatory treatment and also argued that the Canadian government had interfered with its corporate image and reputation. Canada agreed to withdraw the ban and pay \$13 million.⁴⁴

According to AFTINET, the definition of expropriation includes “indirect expropriation”, which includes “the effective loss of management, use or control or a significant depreciation of the value of the assets of a foreign investor”, a much broader definition than just the taking of

⁴² DFAT Frequently asked questions on Investor-State Dispute Settlement
<<https://www.dfat.gov.au/fta/isds-faq.html>>

⁴³ ACCI Welcomes TPP Negotiations (2012) Statement by Brian Clarke ACCI

⁴⁴ Environmental Disputes and TPPA (2013) Logan and Albert Conservation Association

property.⁴⁵ According to Martin Khor, Executive Director of the intergovernmental organisation of developing countries, South Centre, if payment is not made, enforcement can occur through seizure of assets of the government that has been sued, or tariffs can be raised on the country's exports. He also explains that the definition of investment is broad and includes credit, contracts, intellectual property rights and expectations of future gains and profits.

The 'national treatment' provision can allow investors to claim discrimination if local suppliers are favoured. Action on the grounds of "indirect expropriation" and such rulings have been made in favour of investors who have claimed losses as a result of regulations including those relevant to public health and environment.⁴⁶

The international investment arbitration system has been criticised as being biased towards investors and focusing only on questions of claims of harm rather than public interest value.⁴⁷ There have also been accusations of conflict of interest for the main decision makers with claims that a small pool of lawyers dominates the sector, acting as lawyers in some instances and arbitrators in other. The fact that no appeal is possible adds to concern about the fairness of the process.

The United Nations Conference on Trade and Development (UNCTAD) recently released a report on ISDS that revealed that foreign investors are increasingly resorting to investor state arbitration. It concluded that while there was strong public discussion about "the usefulness and legitimacy of the ISDS mechanism" and there were many options for reform, "their systematic assessment, including with respect to their feasibility, expected effectiveness and implementation methods remains wanting".⁴⁸

The Australia Council of Trade Unions (ACTU) argues that domestic courts should be the avenue for such disputes to be heard because they are public and there is a right of appeal.⁴⁹ Comments from the current Minister Andrew Robb suggest that, unlike the former Labor government or the government led by John Howard, he would give up opposition to the US push for ISDS if the price was right.⁵⁰ This statement is qualified by claims that exemptions can be made in areas of importance for Australia's national interest. For example Mr Robb claims that there will be exemptions in the recently agreed Korea-Australia Trade Agreement that will protect Australia from being sued for actions relevant to health and the environment. This assurance is challenged by AFTINET, which gives the example of the Peru-US Trade Agreement where similar 'exclusions' did not stop the Renco lead mining company from suing the Peruvian government when it was required to clean up its lead pollution. According to AFTINET, investors have avoided the exemption by focusing on the process of creating the law rather than the law itself, claiming the process did not include "fair and equitable" treatment for them.⁵¹

⁴⁵ Ranald, P and Purse, H (2010) Second submission the Department of Foreign Affairs and Trade on the Trans-Pacific Partnership Agreement on Behalf of the Australian Fair Trade and Investment Network May 2010

⁴⁶ Khor, M (2012) The Trans-Pacific Partnership Agreement (TPPA): When Foreign Investors Sue the State 10 Nov 2013 Third World Economics Issue No 552 1 Sept 2013

⁴⁷ Rimmer, M (2013) Free Trade, Gangnam Style: The Korea-Australia Free Trade Agreement infojustice.org 11 Dec 2013 <<http://infojustice.org/archives/31701>>

⁴⁸ Recent Developments in Investor State Dispute Settlement (ISDS) Updated for the Multilateral Dialogue on Investment 28-29 May 2013 UNCTAD Issues Note No. 1 May 2013 Highlights

⁴⁹ Burrow, S (2010) ACTU Submission to the Department of Foreign Affairs and Trade on the proposed Trans-Pacific Partnership Agreement. 21 June 2010

⁵⁰ Martin, P (2013) Sydney Morning Herald Business Day 6 Dec 2013 <<http://www.smh.com.au/business/korean-trade-deal-sorted-now-andrew-robb-faces-the-trans-pacific-partnership-challenge-20131205-2ytuk.html>>

⁵¹ Ranald P (2013) Campaign Against Inclusion of ISDS in the Korea-Australia agreement AFTINET <<http://aftinet.org.au/cms/patricia-ranald-report-korea-australia-free-trade-agreement-12-1013>>

A democracy deficit?

Have you heard of the Trans Pacific Partnership (TPP)?		
	%	n
Yes	11%	154
No	55%	770
I think so	16%	222
I'm not sure	19%	260
Total	100%	1406

Despite the low level of awareness of the TPP indicated by the Australia Institute survey findings, DFAT claims “Australia's decision to participate in the TPP in 2008 followed an extensive public consultation process”.⁵² In terms of participatory democracy this is not an encouraging starting point and suggests government claims of extensive consultation are overstated.

The survey reveals that, once informed of the TPP, Australians have strong views about the various issues currently being raised. The capacity of parliamentarians to represent those views, however, is extremely limited – as explained previously in this paper. This is a serious failure, particularly given that the TPP is more than a traditional trade agreement because it deals with “behind the border impediments to trade and investment”.⁵³

The current process is not consistent with the principle of responsible government, which requires that the power to govern be shared between the Parliament and the Executive⁵⁴ and that the Executive be held accountable by Parliament.

Our system of democracy also has at its heart the vital role of the courts in ensuring that executive government does not hold a monopoly of power⁵⁵ – yet even though Australia's tobacco plain packaging legislation was upheld by the High Court,⁵⁶ the Philip Morris tobacco company continues to challenge Australia on this decision by using a ISDS clause from a 1993 Australia–Hong Kong trade agreement to sue the government for damages.⁵⁷

The role of media is also potentially under threat, with concerns that a US push for protection of trade secrets through stronger criminal procedures and penalties is extreme and does not give due weight to considerations of the public interest, particularly those related to access to information, freedom of expression and freedom of the press.⁵⁸ Given recent concern about

⁵² Department of Foreign Affairs and Trade *About the TPP negotiations* <<http://www.dfat.gov.au/fta/tpp>>

⁵³ Department of Foreign Affairs and Trade *Trans Pacific Partnership Agreement negotiations*. <<http://www.dfat.gov.au/fta/tpp/>>

⁵⁴ *Australian Democracy :an overview* Principles Museum of Australian Democracy

⁵⁵ *Australian Democracy :an overview* Principles Separation of Powers Museum of Australian Democracy

⁵⁶ *High Court rejects plain packaging challenge* (2012) ABC News 15th August 2012

⁵⁷ *Philip Morris, Australia and the fate of Europe's trade talks* (2014) AFTINET <<http://aftinet.org.au/cms/Philip-Morris-Australia-and-Europe-trade-talks-01-2014>>

⁵⁸ Rimmer, M (2014) *The US' trade secrets demands and what they mean for journos* Crikey 24th Jan 2014 <<http://www.crikey.com.au/2013/11/18/the-us-trade-secrets-demands-and-what-they-mean-for-journos/>>

freedom of the press it is surprising that the media does not appear to be concerned about ISDS.

The process also fails the test of broader participatory democracy, which has at its heart access to information and opportunity for meaningful input. Access to information is a long recognised human right.⁵⁹ Without it, citizens cannot consider social, political and economic factors in a meaningful way. In the case of negotiation of trade agreements, necessary information would include draft texts, clearly explained priorities and objectives of the government and social, environmental, cultural and economic impact assessments of any proposed measures. Such information has been called for by AFTINET in its submission on the TPP.⁶⁰

Only when chapters of text are leaked does a real debate occur in the community, which governments have to respond to. Such leaks have further raised speculation that negotiators are influenced by particular sectional interests rather than being advocates for the broader national public interest and that there is a push for an unprecedented expansion of corporate power.⁶¹

Given that the TPP is more than a traditional trade agreement, because it deals with behind the border impediments to trade and investment (see above), the current secretive process and lack of accountability represents a significant democracy deficit. Addressing behind-the-border impediments to trade and investment could lead to changes to domestic regulatory systems – allowing new opportunities for companies to appeal against domestic policies they consider to be a violation of their privileges under the agreement.⁶²

There have been calls for a greater role for the Parliament and citizens through the provision of draft texts and comprehensive socio-economic analysis of potential national sectoral and regional impacts of the proposed TPP.⁶³

Do you think that governments should publish detailed research on the potential impact of Free Trade Agreements on different sectors and industries before any Agreements are signed?		
	%	n
Yes	85%	72
No	5%	72
Don't know	10%	133
Total	100%	1404

⁵⁹ Commonwealth Human Rights Initiative (2003) Open Sesame: Looking for the Right to Information in the Commonwealth Chapter 1

⁶⁰ Wolfenden, A AFTINET Submission to the Department of Foreign Affairs and Trade on the Trans Pacific Partnership Agreement on behalf of the Australian Fair Trade and Investment Network

⁶¹ Leaked TPP Texts Reveal a Bonanza of Special Rights for Corporations (2014) Citizens Trade Campaign 15 Jan 2014

<<http://www.citizenstrade.org/ctc/blog/2014/01/15/leaked-tpp-texts-reveal-bonanza-special-rights-corporations/>>

⁶² Friel, S et al (2013) 'Trans Pacific Partnership puts member countries' health at risk', The Conversation 9 May 2013

⁶³ Burrow, S (2010) ACTU Submission to the Department of Foreign Affairs and Trade on the proposed Trans-Pacific Partnership Agreement. 21 June 2010

While the Department of Foreign Affairs and Trade claims on its website that FTAs are helping Australian exporters access new markets, and expand trade in existing markets, it does not provide, or at least make public, any comprehensive and ongoing monitoring of the social or environmental impact assessment of the various free trade agreements. Australia already has trade agreements, including with Chile, New Zealand, Singapore and the US and there is a call for these agreements to undergo comprehensive impact assessments to determine how they have met projected social and economic benefits. Such an analysis could inform current negotiations of the TPP. Even the economic assessments that are undertaken are dubious about the actual benefits of the agreements. The Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that the benefits of such agreements “have been oversold” and called for an improvement in the process.⁶⁴

Will the agreement protect the environment?

In general do you think Free Trade Agreements between Australia and other countries are likely to improve human rights, labour rights and environmental standards around the world?		
	%	n
Yes	29%	401
No	40%	559
Don't know	32%	444
Total	100%	1404

The draft text for the TPP Environment Chapter⁶⁵ and the Chairs' Report (Utah, 19-24 November 2013) was released by WikiLeaks in January 2014. A common observation from environment NGOs is that, in contrast to other TPP chapters, the language used rarely creates a legally enforceable system. Words such as “seek to” or “attempt” are used rather than “shall”. It also creates cooperative rather than binding dispute settlement mechanisms, with no required penalties. Concerns include that there is no protection against overfishing, even though the countries involved account for about a third of global fisheries production and there is a lack of fully-enforceable environmental safeguards to prevent illegal wildlife products and logging.⁶⁶

There is also concern that ISDS provisions would pose a threat to the Australian government's capacity to protect the environment. The capacity to address climate change, curb fossil fuel expansion and reduce air pollution could all be constrained by the threat of ISDS by investors. Currently there are provisions in Australian law that allow the Minister for the Environment to vary or revoke approvals for activities when harmful environmental effects become evident. Under an ISDS an Australian investor would have to abide by the decision but a foreign investor could seek compensation for loss of profits.⁶⁷ Joseph Stiglitz points out that local investors could, however, set up a subsidiary in another country and then also challenge the regulation from the second country. Even if such challenges are not

⁶⁴ Productivity Commission (2010) Bilateral and Regional Trade Agreements
<<http://www.pc.gov.au/projects/study/trade-agreements/report/media-release>>

⁶⁵ WikiLeaks Press Release: Secret Trans-Pacific Partnership Agreement TPP Environment Chapter 15 Jan 2014
<<https://wikileaks.org/tpp-enviro/pressrelease.html>>

⁶⁶ '4 Ways Green Groups Say Trans Pacific Partnership Will Hurt Environment', (2014) National Geographic, 17 Jan 2014

⁶⁷ Warne-Smith, T, (2014) 'The environment would pay for free-trade', The Drum 9 January 2014

always successful, the threat of them – and the significant accompanying costs – can affect a government’s willingness to regulate in the public interest.⁶⁸ This concern has been picked up by a coalition of Australian rural landholders and NGOs who are trying to prevent coal seam gas extraction on agricultural land, with over 70 organisations endorsing a letter to Trade Minister Andrew Robb opposing foreign investor rights to sue governments over regulation of coal seam gas mining.⁶⁹

Copyright protection – how much is too much?

Since the leaking of the draft chapter on intellectual property rights by Wikileaks⁷⁰ there has been widespread concern expressed about its implications for important public policy objectives.⁷¹ US proposals of concern include the extension of copyright laws to cover companies for 90 or more years after the death of the author, which would serve the interests of US media companies, the largest exporters of copyrighted works in the world – at the expense of educational bodies, libraries and Internet users.⁷²

A coalition of organisations including the Australian Library and Information Association, the Australian Digital Alliance, the Electronic Frontier Foundation and others has established the Fair Deal campaign⁷³ to educate people on the possible implications of the TPP. The main concerns expressed by Fair Deal are that the changes proposed will increase costs for use of copyright works, stifle knowledge and chill innovation and that the measures would be unfair “to citizens, businesses, creators, and civil society organizations”. This coalition includes US, Spanish and Canadian organisations also lobbying to safeguard people’s existing rights.⁷⁴

Draft text leaked on copyright suggests inclusion of measures similar to the US “anti-circumvention” provisions of the Digital Millennium Copyright Act (DMCA). This law was apparently designed to strengthen anti-piracy protection – however, according to commentators the law has had a negative impact on public policy priorities. The provisions have stifled legitimate activities including scientific research, fair use rights of ordinary people and competition and innovation.⁷⁵ The TPP provisions could have the effect of making internet service and content providers responsible for copyright infringements by their users, which would significantly increase costs for new internet-based start-ups. The claim that a “safe harbor provision” would mean that service providers would not have an obligation to monitor their users’ activities in most instances is challenged by NGOs:

⁶⁸ Stiglitz, J (2013) *South Africa Breaks Out* Project Syndicate 5 Nov 2013

<<http://www.project-syndicate.org/commentary/joseph-e--stiglitz-on-the-dangers-of-bilateral-investment-agreements>>

⁶⁹ Ranald, P, Hutton, D (2013) Letter to Hon Andrew Robb 1 Oct 2013

<<http://aftinet.org.au/cms/sites/default/files/AFTINET%20%26%20LTG%20letter%20Minister%20Robb%20300913%20-%20Copy.pdf>>

⁷⁰ <<http://wikileaks.org/tpp/>>

⁷¹ Dorling, P (2013) ‘Australians may pay the price in Trans-pacific Partnership free trade agreement’, Sydney Morning Herald, 14 Nov 2013

⁷² Internet freedom under threat (2013) AFTINET <<http://aftinet.org.au/cms/node/633>>

⁷³ Fair Deal <<http://www.ourfairdeal.org/>>

⁷⁴ Saarinen, J (2013) ‘Trans Pacific Partnership deal not likely this year’, IT News for Australian Business 21 May 2013

⁷⁵ *Unintended consequences: 15 years under the DMCA* (March 2013) Electronic Frontier Foundation

<<https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca>>

*Similar language in U.S. copyright law has not stopped large content owners from bringing lawsuits that, if successful, would require websites and service providers to become copyright cops.*⁷⁶

While leaked text suggests Australia appears to be resisting the most extreme demands of the US, such as applying criminal penalties for downloading music and movies or making temporary copies,⁷⁷ there is concern because Australia appears "generally supportive" of the US or otherwise "quite passive" in the negotiations.

It appears the US and Japan do not support wording which would make it clear that a balance between the rights of intellectual property holders and the legitimate interests of users and the community must be maintained.

An open letter from Joseph Stiglitz to TPP negotiators on this chapter concludes that the current text freezes into a binding trade agreement "many of the worst features of the worst laws in the TPP countries, making needed reforms extremely difficult if not impossible".⁷⁸

Will the Pharmaceutical Benefits Scheme (PBS) be protected?

The intellectual property provisions and limitations discussed above could also have an impact on access to medicines.

The government has promised that Free Trade Agreements will not increase the cost of specific goods such as prescription medicine. Do you trust them to keep this promise?		
	%	n
Yes	15%	210
No	67%	944
Don't know	18%	250
Total	100%	1404

Despite consistent claims⁷⁹ from the Australian government that public health and the Pharmaceutical Benefits Scheme (PBS) will not be negatively affected by the TPP, there is considerable mistrust of that claim, as evidenced by The Australia Institute survey and also by commentary from health experts and NGOs. The draft chapter on intellectual property leaked by WikiLeaks revealed that the US was arguing for increased patent protections for medicines, which would allow high monopoly prices for longer and delay the availability of cheaper generic medicines. It commented that "Australia's opposition has been notably weak."⁸⁰ A memo leaked from one of the TPP countries at the December Singapore meeting confirmed concerns that the US was determined in its efforts to push measures that would

⁷⁶ Sutton, M (2013) *Copyright Provisions in the TPP* Electronic Frontier Foundation 6 May 2013

<<https://www.eff.org/deeplinks/2013/05/copyright-provisions-tpp-would-stifle-innovation-and-impede-economy>>

⁷⁷ DFAT Frequently Asked Questions on Intellectual Property and Public Health Issues

<<https://www.dfat.gov.au/fta/tpp/faq.html>>

⁷⁸ Stiglitz, J (2013) Letter to TPP negotiators. 6 Dec 2013

<<http://keionline.org/sites/default/files/jstiglitzTPP.pdf>>

⁷⁹ DFAT Frequently Asked Questions on Intellectual Property and Public Health Issues

<<https://www.dfat.gov.au/fta/tpp/faq.html>>

⁸⁰ Colvin, M, Janda, M ABC Radio PM 13 Nov 2013

lead to an increase in the costs of medicines. It also showed Australia had collaborated with the United States and Japan to revise the “healthcare transparency annex”, which would impact on the ability of the Australian government to regulate the wholesale and retail prices of medicines.⁸¹

An article in the Washington Trade Daily⁸² reported that:

*Australia, New Zealand and Canada, among others, dropped their objections to the high-standard disciplines in intellectual property and came on board by agreeing to the modified text. There is serious concern about this push by the US in Australia and other TPPA countries. More than 40 Australian senior academics in the field have written to the Minister for Health, Peter Dutton raising the matter with him.*⁸³

Concerns raised include:

- intellectual property provisions that would expand monopolies and delay availability of generic medicines
- proposals to change pricing mechanisms of the PBS, which would result in increase in costs of medicines for Australians
- greater influence of the pharmaceutical industry on decision making
- the introduction of ISDS, which may enable foreign pharmaceutical companies to challenge aspects of decisions on price regulation.

The cost of longer patents for medicines would be significant for Australian taxpayers through the funding of the PBS and also for individual patients who make co-payments for PBS-listed drugs. Once medicines come off patent, they are 16 per cent cheaper.⁸⁴ The recent claim by Minister Robb that the inclusion of an ISDS clause in the recently signed Korea-Australia Agreement contains exemptions for health and environment is also challenged by observers. (See the section on ISDS in this paper).

Who should set the standards for imported products?

In general who should set the standards for the quality of goods sold in Australia?		
	%	n
Australia should set standards	85%	1191
Australia should let the countries who produce the things we import set the standards	4%	60
International bodies like the WTO should set standards	11%	154
Total	100%	1405

⁸¹ Gleeson, D (2013) ‘Update from the latest Trans-Pacific partnership meeting’ *The Conversation* 12 Dec 2013

⁸² Closing in on a TPP deal-Washington Trade Daily Trade Reports International Group Volume 21, No.246 10 Dec 2013

⁸³ Baum, F et al Letter to Peter Dutton MP 9 Dec 2013

⁸⁴ Medew, J (2013) ‘Patent plan to push up cost of medicines’ *The Age* 13 Nov 2013

Do you think that Australia would benefit from:		
	%	n
having less regulation on the quality of what can be imported into Australia	3%	48
having stronger regulation of the quality of what can be imported into Australia	73%	1020
leaving things about the same as they currently are	12%	169
not sure	12%	166
Total	100%	1403

Australia's position on the question of trade agreements overriding domestic legislation and standards is unclear. During Senate Estimates discussions it was stated that "we are working within our domestic policy settings consistent with our laws".⁸⁵ This statement implies Australia will not agree to proposals that would undermine its sovereign right to legislate in the public interest. Whether this position is negotiable remains to be seen. The ACTU cautions that the pursuit of common approaches to regulation, or regulatory coherence, is complicated by the fact that international standards do not always exist and attempts to impose a particular definition of "adequate regulation" may be inappropriate given different domestic contexts of parties.⁸⁶

As mentioned above, the leaked TPP chapter on intellectual property suggests that Australia supported US opposition to copyright protection being determined through domestic law and existing international treaties.

There is also criticism from a number of commentators that the number of bilateral and plurilateral trade agreements may lead to unintended consequences. The WTO notes that the overlapping membership that results from nations being party to both bilateral and regional trade agreements can hamper trade flow because of the costs involved in meeting "multiple sets of trade rules". The WTO also notes that the risk of inconsistencies between agreements increases as the scope of agreements broadens, giving rise to "regulatory confusion, distortion of regional markets, and severe implementation problems".⁸⁷ As mentioned above, the Australian Productivity Commission also expressed some doubt about the benefits of bilateral and regional agreements in its 2010 report. A number of industry groups also expressed concern about this in their submissions.⁸⁸

Will food safety be compromised?

There is concern that the TPP could result in an increase in the importation of unhealthy foods. This trend has been evident in other countries after trade liberalisation, including in Central American countries, where there was an increase in consumption of highly processed foods as a result of the Central America-US Free Trade Agreement. Such new

⁸⁵ Senate Foreign Affairs. Defence and Trade Legislation Committee 21 Nov 2013

⁸⁶ Burrow, S (2010) ACTU Submission to the Department of Foreign Affairs and Trade on the proposed Trans-Pacific Partnership Agreement. 21st June 2010

⁸⁷ World Trade Organisation, Regional Trade Agreements. Scope of RTAs

http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm

⁸⁸ Australian Chamber of Commerce and Industry(2013) *Harmonising Administrative Procedures in PTA to Support Trade Facilitation*. May 2013 Submission to DFAT.

foods, accompanied by new advertising and promotion, can influence the national diet. Because the TPP covers “behind the border impediments”, and will potentially include strong investor protections, there may be greater food industry involvement in policy-making as investors challenge domestic policies considered to be “a violation of their privileges under the agreement”.⁸⁹

There has also been strong concern in the US about trade agreements and food safety standards, with Member of Congress, Rosa L DeLauro, calling on the US Trade Representative to ensure that meaningful food safety measures are included as part of the final agreement. She points out that some of the TPP countries have poor regulation of seafood production and standards and that the US Food and Drug Administration (FDA) had reported that the increasing globalisation of America’s food supply was already creating difficult challenges for the regulatory system and for public health. She also stressed the importance of an open and transparent process and a commitment to ensuring any harmonisation of standards across TPP countries should not result in a weakening of standards but rather a strengthening of standards to meet the best of the signatory countries.⁹⁰

Given the lack of access to information about the draft texts on these issues it is impossible to know whether these concerns have been addressed. In Australia there are already concerns⁹¹ about the quality of some imported foods and Australia’s capacity to guarantee food safety. Australian doctors have been raising concerns about the rising number of Asian seafood imports containing banned antibiotics and resistant bacteria. Current World Trade Organization rules prevent more rigorous testing of imported seafood unless scrutiny of domestic produce is equally rigorous.⁹² The Senate Inquiry that examined the issue of antimicrobial resistance in 2013 acknowledged the concern about imported food as being “entirely valid” but stated that it is critical that any proposed measures regarding food importation not constitute further trade barriers”.

This statement was not supported by any analysis or proposals as to how this critical food safety issue could be addressed within the context of trade agreements. At the time of writing the Federal government has not responded to the recommendations of this report.

The Australia Institute has submitted a number of Freedom of Information Requests to government agencies with responsibility for safety of imported foods, seeking access to advice provided to the negotiating team regarding potential impacts of the TPP on food safety. At time of writing this process continues, but initial responses have cited the confidential nature of trade negotiations as a reason for refusing access to documents.

⁸⁹ Friel, S et al (2013) ‘Trans Pacific Partnership puts member countries’ health at risk’, *The Conversation* 9 May 2013

⁹⁰ DeLauro, R (2011) DeLauro: Food safety critical issue in upcoming trade talks. Sept 2011

<http://delauro.house.gov/index.php?option=com_content&view=article&id=406:-delauro-food-safety-critical-issue-in-upcoming-trade-talks&catid=7:2011-press-releases&Itemid=23>

⁹¹ Senate Standing Committees on Finance and Public Administration (2013) *Inquiry into the progress in the implementation of the recommendations of the 1999 Joint Expert Technical Advisory Committee on Antibiotic Resistance*

⁹² Tucker, K 2013 *Culture of Resistance* The Australia Institute Policy Brief No 46 p26

Food labelling

Would you support a Free Trade Agreement which prevented the Australian government from requiring Genetically Modified foods from being clearly labelled?		
	%	n
Yes	14%	198
No	76%	1073
Don't know	10%	133
Total	100%	1404

There were reportedly proposals put by Malaysia and supported by the US at the 15th round of negotiations in Auckland regarding restrictions on labelling requirements.⁹³ Food labelling is an important public health measure and sometimes a contentious one. It is also an area that requires ongoing scrutiny into the future as more is understood about the health impacts of foods. The Trade Promotion Authority Bill introduced into the US congress in January 2014 confirmed that the US Government wants to eliminate labelling on GM foods, referring to such labelling as “unjustified trade restrictions or commercial requirements, such as labelling that affect new technologies including biotechnology”.⁹⁴

Will our arts and cultural industries be protected?

Would you support Australia signing a Free Trade Agreement which allowed Australian television stations to show fewer Australian made programs?		
	%	n
Yes	18%	253
No	64%	899
Don't know	18%	253
Total	100%	1405

There is a push from the US to reduce local content quotas for radio and television, and subsidies for Australia’s film industries, which it sees to be detrimental to US entertainment industries.⁹⁵ A joint letter⁹⁶ from a broad cross-section of audiovisual and cultural organisations sent to DFAT called for the preservation of Australia’s capacity to support its cultural and audiovisual industries and maintain maximum flexibility to respond to a rapidly changing media environment.

The point is made that in past trade agreements Australia has been successful in securing reservations such as broad carve outs for “the creative arts, cultural heritage and other cultural industries, including audio visual services, entertainment services and libraries, archives and museums”. These reservations have meant that Australia has been able to

⁹³ Friel, S et al (2013) ‘Trans Pacific Partnership puts member countries’ health at risk’ The Conversation 9 May 2013

⁹⁴ *The fast-track(Trade Priorities Act) Bill* tabled in the US Congress, 2 Jan 2014, p,9.

⁹⁵ Kehoe, J (2013) ‘US wants local TV content cut for TPP’ Australian Financial Review 18 Nov 2013

⁹⁶ Woodman, J Australian Writers’ Guild et al (2011) Letter to Jonathon Kenna DFAT re TPPA 8 Feb 2011

develop innovative strategies that are “outward looking, internationally recognised and locally relevant”. In its submission to DFAT regarding the Trade in Services Agreement (TiSA)⁹⁷ currently being negotiated between 23 WTO Members, including the European Union, the Music Council of Australia claims that important aspects of Australia’s culture can only survive with financial or regulatory support and that culture should not be on the table in international trade negotiations. The position of the Australian government is not clear at time of writing.

Answers to questions about local content in Senate Estimates⁹⁸ appear to suggest that the government would not be seeking to change arrangements as agreed in the Australia–United States Free Trade Agreement (AUSFTA). The above letter from cultural organisations expresses concern about the AUSFTA, saying that even though the targeted reservations did preserve “considerable domestic policy capacity”, they would be concerned if the reservations in AUSFTA became the model for the TPP, which has a much broader membership.

Human rights and labour rights

In general do you think Free Trade Agreements between Australia and other countries are likely to improve human rights, labour rights and environmental standards around the world?

	%	n
Yes	29%	401
No	40%	559
Don't know	32%	444
Total	100%	1404

There have been strong calls for FTAs to be underpinned by internationally recognised treaties and standards relevant to human rights and labour rights such as those defined by the United Nations (UN) and the International Labour Organisation (ILO). An example of such a call comes from the Australian Council of Trade Unions (ACTU). The ACTU supports international trade based on the principles of fair trade that support sustainable development through: “employment growth; improved social protections; implementation of core labour standards; sustainable environmental standards and adherence to human rights conventions and democratic values.”⁹⁹

As mentioned above, there have also been calls for the Australian government to undertake socio-economic assessments of existing FTAs to determine their impacts and negotiate future FTAs armed with this knowledge and understanding. If such analyses have occurred the results have not been made available to the public.

⁹⁷ DFAT Trade in Services Agreement

<<http://www.dfat.gov.au/trade/negotiations/services/trade-in-services-agreement.html#membership>>

⁹⁸ Senate Foreign Affairs, Defence and Trade Legislation Committee Estimates 21 November 2013

⁹⁹ Burrow, S (2010) ACTU Submission to the Department of Foreign Affairs and Trade on the proposed Trans-Pacific Partnership Agreement. 21 June 2010

Conclusion

The results of the survey of the Australia Institute reveal that even though only 11 per cent of respondents were aware of the TPP, the majority, once informed of it, supported greater transparency and accountability in the negotiation process and had strong views on what should and should not be included. Given the fact that so little information has been disclosed during the negotiation process, claims by DFAT of a more transparent process do not offer reassurance but, rather, only raise questions about the base from which improvement has been made. Through secret negotiations the TPP potentially could set in place binding international trade rules which:

- give greater rights to foreign investors to sue governments for damages
- are not informed by clear statements of values and principles
- are not supported by regional, sectoral, environmental or socio-economic impact assessments
- undermine national sovereignty and democracy
- intrude on domestic policy
- cannot be challenged in domestic courts
- are defended in unaccountable international investment dispute tribunals with no appeal rights
- would be legally binding on current and future governments, indefinitely into the future, regardless of what that future may hold.

There is an opportunity to create trade rules that are ecologically and socially sustainable and meet the long-term needs of the countries involved but this seems unlikely given the current process and the rush to enter FTAs. It is only when chapters of draft text are leaked that a broad community debate occurs and governments are compelled to respond. Such leaks have further raised speculation that negotiators are influenced by particular sectional interests rather than being advocates for the broader national public interest.

Australia has signed a number of FTAs in recent decades but, to date, such agreements have focused primarily on 'market access' issues such as tariffs, quotas and import restrictions based on standards or bio-hazards. The TPP, on the other hand, introduces a brave new world for trade agreements, a world in which foreign companies would have the right to sue Australian governments for passing laws that are both supported by the Australian Parliament and deemed to be constitutional.

The ability of so called 'investor state' clauses to reduce the power of a sovereign government to pass laws is not hypothetical – foreign companies have already sued foreign governments for changes to laws that they do not like. Indeed, even though the Australian High Court has deemed our plain packaging laws for cigarettes to be constitutional, the tobacco industry has commenced proceedings against Australia on the basis of 'investor state' provisions that are included in a 1993 Australia-Hong Kong trade agreement.

When the Australian government reduces taxes, increases subsidies or changes intellectual property laws in ways that benefit foreign companies those companies are entitled to keep the profits that flow from those changes.

Just why a sovereign government of Australia would agree to international trade laws that allow foreign companies to retain the profits that flow from favourable changes in the law but sue for damages if laws change in ways they consider harmful, is the question that should be clearly answered, to the public's satisfaction, before the Australian government signs the TPP.

Appendix

*Full survey results are available upon request

Q1. In general do you think:

- Australia should set its own standards for the quality of goods sold in Australia
- Australia should let the countries who produce the things we import set the standards for the quality of goods sold in Australia
- International bodies like the World Trade Organisation (WTO) should set the standards for the quality of goods sold in Australia

Q2. Do you think that Australia would benefit from:

- having less regulation on the quality of what can be imported into Australia
- having stronger regulation of the quality of what can be imported into Australia
- leaving things about the same as they currently are
- not sure

Q3. You said that you think Australia should maintain or strengthen its regulation of imports from other countries. Would you still feel that way if our restrictions were:

- a major barrier to our ability to export more to other countries
- a minor barrier to our ability to export more to other countries

<Split sample>

Q4. In general do you think Free Trade Agreements between Australia and other countries are likely to: (yes, no, don't know)

- give consumers improved access to cheap imported products
- reduce choice of locally produced products
- have a negative impact on jobs in Australia
- improve human rights, labour rights and environmental standards around the world
- harm democratic decision making and the capacity of governments to regulate in the interests of citizens
- harm wages and conditions for workers in developing countries

Q5. In general do you think Free Trade Agreements between Australia and other countries are likely to: (yes, no, don't know)

- give consumers reduced access to cheap imported products
- improve choice of locally produced products
- have a positive impact on jobs in Australia
- harm human rights, labour rights and environmental standards around the world
- improve democratic decision making and the capacity of governments to regulate in the interests of citizens
- improve wages and conditions for workers in developing countries

- Q6. Do you think the details of Free Trade Agreement should be made public before the Australian Government signs them?
- Yes
 - No
 - Don't know
- Q7. Do you think that governments should publish detailed research on the potential impact of Free Trade Agreements on different sectors and industries before any Agreements are signed?
- Yes
 - No
 - Don't know
- Q8. Would you support Australia signing a Free Trade Agreement which allowed Australian television stations to show fewer Australian made programs?
- Yes
 - No
 - Don't know
- Q9. Would you support a Free Trade Agreement which prevented the Australian government from requiring Genetically Modified foods from being clearly labeled?
- Yes
 - No
 - Don't know
- Q10. The government has promised that Free Trade Agreements will not increase the cost of specific goods such as prescription medicine. Do you trust them to keep this promise?
- Yes
 - No
 - Don't know
- Q11. Have you heard of the Trans Pacific Partnership (TPP)
- Yes
 - No
 - I think so
 - I'm not sure
- Q12. Can you list the names of any countries you think may be included in the TPP
- Q13. The United States is part of the TPP. One of their demands is that foreign companies be allowed to sue the Australian government if laws or regulations are passed that reduce the future profitability of foreign companies operating in Australia. Which of the following statements best describes your view:
- I have never heard about this but think it seems acceptable
 - I have never heard about this but think it seems like a bad idea
 - I have heard about this and think it seems acceptable
 - I have heard about this and think it seems like a bad idea
 - Don't know

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