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From Kafka to KAFTA: Intellectual Property, and the Korea-Australia Free Trade Agreement

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South Korea's Asian trade strategy[1)]

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Background

○ In just over a decade, Korea has[2)] gone from having no free trade agreements (FTAs)[3)] to successfully signing FTAs with large and important trading partners. Its success has meant it has FTAs with most of its most important economic partners and it is now time to think about the next stage of Korea's trade policy strategies and economic diplomacy.

○ Korea owes its rapid growth and economic modernization to its opening up to, and integration into, the global economy. Korea went from being one of the poorest countries in Asia in the 1960s to an economic success story boasting the world's twelfth largest economy with membership in the club of wealthy countries, the OECD.

○ The export-oriented, but heavily protected Korean economy, really took off as it opened up unilaterally in the 1980s. Unilateral liberalization was underpinned by commitment to the multilateral trading system and

1) I am grateful to Tom Westland for research assistance. Parts of this paper draw on earlier work in Armstrong (2012) 'Korea: Beyond Preferential Trade Deals', Korea's Economy 2012, Korea Economic Institute, Washington DC.

2) This paper refers to the Republic of Korea, or South Korea, simply as Korea, distinguishing it from North Korea.

3) This paper uses FTAs to cover preferential trade agreements (PTAs), economic partnership agreements (EPAs) and any other bilateral or regional trade agreement that has preferential tariff and other features.

supported through concerted liberalization through APEC. Concerted unilateral liberalization within the framework of GATT negotiations helped Korea and many of the East Asian economies to open up their economies and led to increasing trade shares and rapid economic modernization.

○ Korea has developed into a significant middle economic power and an active contributor to the global economic system. Korea showed strong leadership during the global financial crisis to ensure no backsliding into protectionism and Korea hosted the G20 summit in 2010 and is playing an active role in keeping the global trade and economic system open .[4)]

Korea's FTAs

○ At the turn of the century, Korea was one of the few East Asian economies not to have any FTAs and was still flying the multilateral flag. That changed when the Chile–Korea FTA was signed in 2003 and came into force in 2004. In a decade following its first venture into preferential trade, Korea has managed to sign agreements with nearly all its principal trading partners and the major global economies except for Japan. The recent agreements with China, its largest economic relationship, and Australia, one of its key resource and food suppliers, along with the earlier agreements with the United States and European Union leaves Japan outstanding as the remaining major economic partner with which Korea does not have an FTA.

○ Other countries in the Asia Pacific, such as Singapore and Japan, may have signed a larger number of FTAs than Korea, but Korea is one of the leaders in terms of successfully singing FTAs with major economy partners. Korea has thirteen concluded FTAs with a further nine under negotiation and four under consideration. Of the completed FTAs, the economically and politically significant ones are with the United States (KORUS), with the European Union (KOREU), China, Australia, India and ASEAN. A deal with New Zealand was announced at the Brisbane G20 Summit in November 2014. Together, its FTA partners account for 72 per cent of world GDP. Among the countries with which Korea currently has FTAs under negotiation are Canada, Japan, Japan and China together (CJK), Indonesia, Vietnam, Mexico, the Gulf Cooperation Council. If those were all completed, Korea will have trade agreements with its largest trading partners and political allies.

4) For instance, Korea is leading by example with free and open trade in green goods (those goods embodying environmentally friendly technologies).

○ Korea is part of the Regional Comprehensive Economic Partnership (RCEP) negotiations among the ASEAN+6 countries (ASEAN plus Australia, China, India, Japan, Korea and New Zealand).

○ The economic effects of FTAs are usually quite limited with sensitive sectors exempted and difficult protection measures avoided, but for Korea, KOREU and KORUS, and later the agreement with Australia, have played an important role in liberalizing Korea's heavily protected automobile and agriculture sectors. There has also been success in opening up some service sectors to U.S. and European firms. KORUS and KOREU have managed to include the phase–out of protection of sensitive sectors in Korea including pork, dairy and other agricultural goods (except for rice). Although the tariff phase–out varies and is quite lengthy for some sensitive sectors (up to fifteen or twenty years for some products), they will eventually move to duty free.[5] There is no clear evidence of significant welfare gains or major trade expansion due to FTAs beyond the effects in some preferred sectors.

○ Although Korea has made some progress in trade liberalization due to FTAs, there is little evidence they have had, or will have, anywhere near the transformative effects on the Korean economy as the earlier liberalization in the 1980s. Earlier unilateral liberalization was undertaken in concert with other APEC economies so that the economic benefits to opening up were multiplied. Unlike liberalization through FTAs, unilateral liberalization does not distort trade towards preferred partners and allows for a more efficient allocation of resources determined by market forces.

○ Since the beginning of South Korea's turn towards bilateral trade agreements in 2003, economic performance in the country has remained relatively strong. Unemployment has remained between 3 and 4 per cent. Real GDP growth has been respectable, if not quite as strong as before the Asian financial crisis. Real GDP grew by 70 per cent from 1993 to 2002, then by 39 per cent from 2003 to 2012. Similarly, per capita real GDP grew 58 per cent from 1993 to 2002, then by 33 per cent in the decade from 2003–2012. Throughout this period, Korea has continued to become more reliant on international trade. The ratio of exports to GDP has increased from 33 per cent in 2003 to 54 per cent in 2013; imports have gone from 31 per cent of GDP to 49 per cent of GDP. The current account surplus reached 5.8 per cent of GDP, the highest since the Asian financial crisis. The trade structure of Korean trade has also changed markedly. In

5) For a detailed comparison of KORUS and KOREU, see Song, Y. "KORUS FTA vs. Korea–EU FTA: Why the Differences," Korea Economic Institute Academic Paper Series, Vol. 6 Issue 5, May 2011.

2003, China and the United States were roughly equal in their share of South Korean exports, each comprising about a fifth of Korea's export market. By 2013, 26 per cent of South Korean exports went to China, while the only 11 per cent went to the US. Japan's share also declined, while Singapore's and Vietnam's have both increased. China has also solidified its share of Korean imports (16 per cent, up from 12 per cent) at the expense of Japan (12 per cent, down from 20 per cent) and the US (8 per cent, down from 14 per cent).

○ The Korean economy cannot defy economic gravity. Even with KORUS and KOREU, trade and investment continued to grow rapidly with China whose market size, pace of growth and proximity to Korea meant it was going to be Korea's most important economic relationship with or without any form of bilateral trade or economic agreement. The CJK BIT signed in 2012 and the China–Korea FTA — which was agreed to in November on the margins of APEC and will likely be in force from 2015 — are agreements that will further the already highly interdependent Korea – China economic relationship.

○ The other major trade agreement in the region that could involve Korea is the Trans–Pacific Partnership (TPP) which is a trade deal being negotiated by nine countries including the United States, Chile, Peru and Singapore—with whom Korea already has FTAs—and with Australia, New Zealand, Vietnam, Mexico, Canada, Japan and Malaysia—with whom Korea has FTAs under negotiation or consideration. This leaves only TPP member Brunei with whom Korea is not in direct FTA talks (but which is part of the Korea–ASEAN FTA).

Korea has expressed interest in joining the TPP, although it may be unlikely to join before the deal is concluded due to US desire to finish negotiations quickly.[6)]

○ There is a chance that Korea will find it congenial to join the TPP given that it has, or will have, deals with all the members, and importantly the United States. Once TPP negotiations are complete and the possibility of Korea joining the TPP presents itself Korea may face similar political difficulties as it did when passing KORUS. Korea has less incentive than Japan to join TPP negotiations, for example, because Japan does not have an FTA with the United States.

6) Schott, J. and CCimino, 2014,'Should Korea Join the Trans–Pacific Partnership?' Peterson Institute for International Economics, September.

○ While Korea has made significant progress in signing FTAs, and that may be the end point for trade negotiators, trade liberalization should not stop with the conclusion of these trade agreements.

Preferential trade strategy: an Australian perspective

○ Korea's move towards preferentialism in its trade strategy mirrors moves by other countries in the region. Australia, for example, long a champion of the multilateral trading order, also turned to bilateral trade deals since around a decade ago. Australia's most dynamic period of trade liberalisation was in the 1980s and early 1990s, and this liberalisation was unilateral rather than driven by bilateral agreements. Australia's shift toward preferentialism began mildly, with the signing of the Closer Economic Relations agreement with New Zealand — a comprehensive and preferential agreement, but one that took place in the context of a commitment on both sides to the multilateral order. An agreement with Singapore came in 2003. Then in 2005, Australia and the United States negotiated a significant preferential trade agreement, the Australia – United States Free Trade Agreement (AUSFTA). Agreements with Thailand, Chile, ASEAN and New Zealand, and Malaysia followed, and agreements with Japan and Korea and China have been reached in 2014. Australia is also involved in the negotiations for the Trans–Pacific Partnership and the Regional Comprehensive Economic Partnership agreement. There is also agreement for Australia to pursue a FTA with India.

○ Just as Korea has found that its FTA framework has not had the transformative impact of domestic reform in the 1980s, with Australian tariffs already quite low, the Australian turn towards FTAs has had little impact on substantially opening up the Australian economy. Hence, the economic impact of the agreements has been modest.[7] Instead, it is likely that Australian trade policy in this respect has been driven by geo–political factors as well as a desire to negate the discrimination faced in other markets from distortions introduced by other FTAs. For example, Australian agriculture and services have been at a disadvantage in the Chinese market compared with New Zealand, and in the Korean market compared to American and European suppliers.

7) Productivity Commission, 2010. 'Bilateral and Regional Trade Agreements', Research Report, November. http://www.pc.gov.au/projects/study/trade–agreements

○ One area where Australia's FTAs have involved liberalization is in the investment screening regime. Australia raised the threshold for screening incoming FDI for select FTA partners, starting with the United States in 2005, New Zealand in 2013 and Korea, Japan and China once those FTAs are implemented. The quadrupling of the FDI screening thresholds from A$248 million for some FTAmembers has resulted in piecemeal changes to the foreign investment regime and introduced significant discrimination towards FDI from all other sources.[8] The next step is to multilateralise these preferential investment arrangements.

Distortions from preferentialism

○ The problems with bilateral or regional preferential agreements are well known. Preferential trade agreements are a policy tool used to discriminate among trading partners and they divert trade away from third party countries regardless of whether they are members of the WTO and should have most favored nation (MFN) treatment in trade.

○ Korean trade is regulated by twelve different preferential arrangements (in addition to the global rules and norms of the trading system) and potentially up to twenty-four if all those under negotiation and consideration come to fruition. Given the loss of political face for both sides of FTA negotiating countries, it is likely that the FTAs currently under negotiation will conclude at some stage, in some form, albeit with exclusions and potentially very little liberalization.

○ The proliferation of FTAs in the region has led to cumbersome rules of origin (RoOs) for trade across borders that involve different duties charged on different components or parts based on the country where value was added. Trade between two or more countries can come under different rules depending on which agreement or regulatory regime the trader chooses.

○ The gains in market share that Korea has achieved through FTAs will be eroded as its trading partners conclude more FTAs and divert trade from Korea. But that is not a main issue.

8) Armstrong, S., S. Reinhardt and T. Westland, 2014, 'Are Free Trade Agreements Making Swiss Cheese of Australia's Foreign Investment Regime?', EABER Working Paper No. 92, November. http://www.eaber.org/node/24527

○ FTAs can inhibit competition, rather than encourage it. Preferential trade deals create interest groups around new preferences, or preferential access to investment or service delivery, that can make it harder to liberalize further. With European and U.S. beef enjoying preferential access to the Korean market, there now exists strong U.S. and European interest in protecting that preference from other suppliers, such as Australia and New Zealand.

○ FTAs have yet to demonstrate that they complement and promote multilateral liberalization, as their protagonists argue. For FTAs to be building blocks towards multilateral liberalization, and for this 'competitive liberalization' to work, the messy web of overlapping FTAs that have introduced distortions to business needs untangling. There also needs to be multilateralization or elimination of the preferences so that they add to the openness of the global trading system, not detract from it.

○ The problems that FTAs raise are compounded by the fragmentation of production and division of labor across countries in international production networks. Trade within production networks, and in other contexts, extends beyond bilateral trade but often, preferential trade deals are bilateral. Even when trade agreements involve more than two countries, they inevitably raise trade barriers relative to those outside the agreements. Each FTA that is brought into force in the region adds restrictions to trade, in the form of RoOs or a new set of discriminatory measures.

○ The proliferation of Korea's FTA can be argued as successful competitive regionalism, where countries sign FTAs to offset the discrimination they face in the Korean market. Some see KOREU as a response to KORUS, although KOREU ultimately came into effect earlier than KORUS,[9] and now there appears to be a big incentive for Japan to sign an FTA with Korea to offset the discrimination Japanese auto manufacturers face in Korean markets compared to US auto manufacturers, for example.

○ What should Korea do now since it has signed deals with all major partners except Japan? It will have no important trade partners left to negotiate FTAs. The bicycle theory of trade suggests that a country should continue to liberalize otherwise they will backtrack into protectionism or liberalization will become stalled. Korea has been pedaling very fast but is it toward a dead end with too strong a focus on FTAs? Negotiating

9) See Schott, J. 'Free Trade Agreements and the Future of U.S.–Korea Trade Relations', Navigating Turbulence in Northeast Asia: The Future of the US–ROK Alliance, Korea Economic Institute http://www.keia.org/publication/free–trade–agreements–and–future–us–korean–trade–relations

trade deals consumes a lot of resources and bureaucratic energy but is it worth it to sign more deals with smaller countries? Would pedaling in a different gear or different direction move Korea forward more effectively?

○ Liberalization through FTAs can be phased in but, unlike non-discriminatory framework agreements or agreements based on granting of MFN status, this liberalization has a tendency to stop there making them a somewhat static instrument for liberalizing trade. Interests privileged in participating partners have motivation to protect that privilege and frustrate more general liberalization. In addition, once a bilateral agreement is completed, for all practical purposes, that is the end for trade negotiators. Renegotiation or further liberalization in an FTA framework does not happen automatically even when review arrangements are built into the outcome, and is in fact very rare. Trade liberalization is an ongoing process of removing barriers to efficiently allocate resources towards their most productive use and to further the division of labor for a freer, flexible and more open economy.

○ Liberalization that occurs through negotiating FTAs, it is argued, may engage export interest groups that directly benefit from foreign market opening in overcoming resistance to trade reform. Yet by far the largest gains in trade liberalization accrue from what you give up, not what you extract from others in a negotiating framework, so it would appear that more productive catalyst might be found through mobilizing the interest of consumers and end-users on importable goods and services in trade reform and liberalization.

○ Korea and other partners in the region in similar circumstances like Australia, have the opportunity to show leadership in the next phase of economic integration in the dynamic Asian region. A starting point is untangling the FTA noodles given that they have signed FTAs with so many of their important trading partners. Korea and Australia have a record as a positive force in active middle power economic diplomacy; they are deeply integrated with Japan and China, are building a strong relationship with ASEAN and India, and have agreements with their major political ally in the United States.

Bilaterals: supporting or undermining the multilateral order?

○ The choice of a bilateral, regional, trans-Pacific or global trade policy is a false choice in that if those options are seen as mutually exclusive, the global edifice into which they are built will be corroded. Bilateral and regional initiatives should be consistent with Korea's global outlook and be designed to foster open trade arrangements generally.

○ The failure of the Doha round in the WTO was used as an excuse to pursue FTAs but it has locked in preferences and meant that this second best (or even third best) FTA solution has become the enemy of the first best, non-discriminatory multilateral solution. Now that the Doha round has collapsed, it is a dangerous time to further weaken the multilateral system. Rather, there is need to show leadership in reversing some of the damage that bilateral deals have done to the non-discriminatory multilateral trading system.

○ The GATT was created to avoid a repeat of the retreat into preferentialism of the interwar period, where trade declined by seventy percent as preferential trade proliferated.[10] The interwar collapse in trade extended the Great Depression and exacerbated political tensions with the 'Dissatisfied Powers.' The global trading system has played a significant role in dampening political tensions. One prime example in Korea's neighborhood is the way in which it has underpinned growth of the economic relationship between Japan and China where that relationship has prospered despite the political tensions between the two countries. The unilateral liberalization that China undertook as part of its accession bid for entry to the WTO demonstrated commitment to the global trading system's rules and norms. This commitment to further reforms and marketization gave Japanese (and other international) investors and traders confidence in economic engagement with China even when political differences arose.[11]

○ Korea can be an active agent, or better, a leader in moving forward with untangling the extensive network of its FTAs and supporting the multilateral trading system. That would benefit Korea, its trading partners, regional trade flows and contribute to buttressing the global trading system when that is greatly needed. It would hurt narrow interests that currently have preferential access to Korean markets but those prefer-

10) Cho, S. "Is a Free Trade Agreement a Royal Road to Prosperity? Demystifying Trade Regionalism," in Static and Dynamic Consequences of a KORUS FTA, The Korea Economic Institute, 2007.

11) See Armstrong, S. 'The Politics of Japan-China Trade and the Role of the World Trade System', in The World Economy, forthcoming 2012.

ences are at the expense of Korean consumers and third party country trading partners. It is in Korea's interest to extend the opening up of its market which has been achieved via FTAs to all countries.

Sorting out the noodle bowl: three potential strategies

○ Korea can be a leader in untangling the noodle bowl to make it more digestible. There are at least three ways forward in dealing with FTAs.[12)]

Diluting Tariff Preferences

○ In order to reduce and eventually eliminate the distortions in Korea's FTAs, different aspects of the FTAs have to be dealt with in different ways. Preferential tariffs, for example, can be mulitilateralized, and MFN rates can be reduced to the lowest preferential rates, or reduced to zero. ASEAN has managed to multilateralize most of the preferences in the ASEAN Free Trade Area.

○ Korea has achieved opening up some sensitive sectors, such as agriculture and automobiles, in KORUS and KOREU (albeit with varying phase-in periods and safeguard measures in the event of import surges to protect domestic producers) that are arguably more difficult to achieve multilaterally. Some negotiations may be easier with only two parties but once those protected sectors are opened up to foreign competition, liberalizations can more readily be extended on an MFN basis.

○ Korea will completely remove its tariff on U.S. automobiles by 2016, from the pre-KORUS level of eight percent (they dropped to four percent as soon as KORUS came into force). Under KOREU, tariffs towards European automobiles will be eliminated roughly around the same time as with KORUS, with tariffs on light trucks eliminated a year or two earlier. Korean consumers will be paying more for Japanese automobiles which will incur eight percent tariffs and hence be at a disadvantage in competing in the Korean market. But given that Korea will have opened up to U.S. and European automobile companies, it should be relatively easy to eliminate tariffs towards Japanese automobiles, and all other automobile suppliers, so that the Korean automobile market is more open, competitive and prepared to improve Korean consumer

12) For detailed discussion of dealing with FTAs in the Asian region and beyond, see Menon, J. 2009, "Dealing with the Proliferation of Bilateral Free Trade Agreements," The World Economy, Vol. 32, Issue 10, pp. 1381-1407.

welfare. There is no justification for making any potential innovative or cheaper cars from Japan, China or elsewhere relatively more expensive in favor of U.S. or European cars.

○ The same applies for other sectors. Australia and Korea do not need an FTA for Korea to extend the tariff reductions to Australian beef and other agricultural goods that have already been extended to the United States and Europe. If Korean consumers can access cheap American and European agricultural goods, that access should be extended to Australian and Brazilian agricultural producers. Korean consumers can benefit from a more competitive market, including more product varieties, cheaper goods and more liberal trade with producers in the Southern Hemisphere with different climates.

○ Another way to dilute tariff preferences is to reduce MFN rates so that the margin of preference shrinks. Korea is already a relatively open economy with average tariffs at around nine percent, and now that it has succeeded in liberalizing some sensitive sectors for the first time, could work towards eliminating the remaining tariffs. Korea would then no longer be contributing to the RoO problem.

○ There is no justification for preferential treatment under other non–tariff barriers to trade that have been identified and liberalized through bilateral trade agreements.

Multilateralising liberalization in the services sector

○ But FTAs are not only about preferential treatment of goods at the border in terms of tariffs. They include services trade and often cover labor and environmental standards, intellectual property rights, competition policy, rules on investment, e–commerce, government procurement and other issues. Most of those are domestic economic policy issues to do with making the market more efficient and contestable.

○ There is little evidence[13] that preferential services commitments deliver much in terms of liberalization outside of Europe, but Korea has opened up its legal, financial, and telecommunications sectors in varying degrees for U.S. and European service delivery. Healthcare and education services are still protected sectors in Korea and have been excluded from all its FTAs. What gains in service trade liberalization Korea has achieved through its FTAs can be multilateralized relatively easily from the preferential accords that are in

13) See Francois, J. and B. Hoekman, "Services Trade and Policy," Journal of Economic Literature, 2010, Volume 48, pp. 642–92

place.[14] Some of the services trade liberalization measures mean American and European law firms are now allowed to open offices in Korea. The forty-nine percent foreign voting share limit for telecom providers was removed for U.S. and European telecommunication service providers, European and American financial firms had data transfer restrictions lifted, and American and European accounting and taxation service providers are allowed to enter the Korean market.

○ Those hard fought trade "concessions" can be extended with relative ease so that the Korean domestic economy can go beyond giving U.S., European and other FTA partner country firms national treatment to allowing entry (and exit) of all foreign and domestic firms. As with many barriers to entry for firms, it is a domestic issue more than a trade issue and more about creating a level playing field for Korean and foreign firms in Korea. Barriers to entry that exist for domestic firms are just as important an issue as barriers to entry to foreign competition.

○ The aim for Korea is to have well-regulated and competitive markets, not markets with barriers to entry and national treatment for preferred country firms. As one of Asia's most developed economies, Korea should focus on adopting regulatory best practice and using its membership of the OECD, for example, to co-opt the most advanced benchmarks for new regulatory challenges.[15] Such regulatory leadership will not only help the Korean economy, but can contribute to the global and regional regulatory standards and the provision of this public good can be championed at APEC and the OECD.

○ With investment accords, instead of having different rules protecting foreign investors depending on their country of origin, Korean interests are much better served with a set of robust, transparent investment rules and regulations that afford all foreign investors protection in order to attract foreign capital and technology, as well balancing that with protecting Korean interests.

○ Other provisions or chapters labeled "WTO-plus" in FTAs such as labor and environment standards, as well as strengthened IPR, are measures usually included in FTAs to level the playing field between countries. They are usually measures introduced from more developed countries so that countries cannot gain com-

14) Hoekman, B. and L. A. Winters. "Multilateralizing 'Deep Regional Integration': A Developing Country Perspective." Paper presented at the Conference on Multilateralizing Regionalism, WTO and CEPR, September, Geneva, 2007.

15) Cho, S. "Is a free trade agreement a royal road to prosperity? Demystifying trade regionalism," in Static and Dynamic Consequences of a KORUS FTA, The Korean Economic Institute, 2007.

petitive advantages when the cost of environmental degradation is not factored into the cost of production and wages are artificially low due to unregulated labor markets. The argument for IPR chapters is for protection of IPR in order to encourage innovation. Such measures can be seen as protectionist measures that do not recognize different stages of economic development and try to erode some of the comparative advantages in lower cost production, especially in developing countries.

○ Korea has a mature economy and does not have many of the problems that other developing countries might in meeting U.S. or EU standards for WTO–plus provisions. The one area where this is an issue in KORUS and KOREU, but not in most of Korea's other FTAs, is in relation to goods produced in the Kaesong Industrial Complex located in North Korea. Preferential treatment for products originating from Kaesong being traded between Korea and the United States or Europe will require further negotiation. Problems would arise if Korea demanded similar WTO–plus standards from its other trading partners, especially developing countries, before it engages in trade deals with them.

Joining up preferential agreements: a difficult endeavour

○ Another approach, which seems less likely, sees FTAs as stepping–stones towards regional trade agreements and then onto multilateralization might favor, is the consolidation approach. That would involve bilateral preferential deals being consolidated into regional deals.

○ While the idea of consolidating, or joining up, FTAs may sound attractive, it is in practice unlikely to succeed in a way that will not be damaging to the global trading system. Where regional trade agreements have been brought into effect involving existing FTA partners, bilateral deals have not disappeared or become less important. The outcome is another layer or set of trade rules and restrictions within that region. If the consolidation approach did succeed, however, it is likely to further fragment global trade. Consolidation of intraregional FTAs is difficult enough[16] but consolidation of interregional FTAs is close to impossible. For example, if Korea succeeds in its FTA negotiations with Mexico and Canada, this will not qualify Korea to join NAFTA nor can those agreements join up in any easy way. And KOREU will not lead to Korea enjoying equal treatment among EU members.

16) Again, see Menon (2009) for discussion of South Asia.

○ Although Korea has FTAs with the United States and ASEAN, there is little chance that Korea could connect those two FTAs as the United States would have to extend KORUS preferences to ASEAN. But for Korea, there is powerful incentive to level the playing field between the U.S., Southeast Asia and other firms in the Korean economy.

○ The TPP was originally cast in terms of being the solution to overlapping FTAs and the related restrictions, such as RoOs, by consolidating FTAs in the region and providing a pathway towards a broader regional agreement encompassing all APEC members (a Free Trade Agreement of Asia and the Pacific). The goal of having a consolidated text with common market access schedules for all members and no exemptions is at risk. Instead of a truly clean regional FTA that liberalizes, albeit preferentially, a U.S.-led compromise made in Brunei in 2009 has led to market access offers on a bilateral basis or to the TPP as a whole.[17] There are signs that the TPP will end up as a series of bilateral deals which adds to the problems of overlapping FTAs instead of solving them,[18] in which case Korea should not join. In any case, South Korea already has bilateral deals with 10 of the 12 TPP partners, so a further round of bilateral dealmaking would likely be of limited impact economically.

A New Trade Paradigm: Beyond FTAs

○ Korea, like many other countries in the Asian region, needs a new trade liberalization paradigm and strategy that takes it beyond FTAs.

○ Korea does not need negotiated trade agreements based on tit-for-tat trading of preferences and discrimination in order to liberalize trade. The domestic sell should move from opening up certain sensitive sectors like beef and automobiles to global powers bilaterally to opening up for a more efficient, open and contestable market and strengthening Korea's global role.

17) See Barfield, C."The Trans-Pacific Partnership: A Model for Twenty-first-Century Trade Agreements," American Enterprise Institute, International Economic Outlook, No. 2, June 2011.

18) See Armstrong, S. "The TPP, APEC and East Asian Trade Strategies," East Asia Forum November 14 , 2011. http://www.eastasiaforum.org/2011/11/14/the-tpp-apec-and-east-asian-trade-strategies/

○ The RCEP agreement presents an opportunity to deepen economic integration in a way that traditional FTAs do not. As with other ASEAN agreements such as the ASEAN–Australia–New Zealand FTA, but more importantly the ASEAN Economic Community (AEC), economic agreements in Southeast Asia are not one–shot deals with phase–in periods, but instead involve liberalization around an ongoing economic cooperation agenda. The diversity of negotiating members in Asia has meant binding agreements with larger groupings has been difficult and so peer review and peer pressure, accountability and ongoing interaction around an economic cooperation framework have been the modus operandi in ASEAN and APEC, for example. RCEP will have binding targets but will also likely not dictate how countries reach those goals or milestones and have a framework where economic cooperation and capacity building are central to that.

○ Australia, South Korea and other countries with low barriers to trade and investment have an important role to play in setting ambitious goals themselves in RCEP but also helping other countries set and reach ambitious goals themselves. As a starting point RCEP has the potential to consolidate the five 'plus–one' FTAs that ASEAN has with Australia and New Zealand, China, India, Japan and Korea.

○ In RCEP, but also in APEC and the G20, Korea has the platform to show leadership in unilateral initiatives that dilute the effects of the discrimination in its trade agreements. Korea can make clear commitments to the multilateralization of preferences over time as well as commitments to multilateralizing special treatment in services trade or delivery. As the Korean economy moves towards a new economic model based on green growth, there is an opportunity to frame its commitments to trade globally in a manner consistent with its moves to free trade in green technologies.

○ The dilution or multilateralization of the adverse effects of FTAs will provide a regional and even a global public good, which can be supported and emulated at APEC, for example. Leading a concerted approach to untangling noodles will compound the benefits.

○ Korea sits between two economic giants in Japan and China, with both of whom it has large economic relations; is part of the production networks in a deeply integrated region; and has a major FTA with its important political ally in the United States. Korean interests are best served by eliminating the discriminatory and distortionary features in its trade arrangements and by being a leader in keeping the global trading system open and strong.

○ The debate must move to making Korea more competitive internationally and to continuing its economic development success story, and away from picking trading partners in narrow FTAs. It will find partners in the region in countries like Australia, New Zealand and others that are running out of potential partners to sign FTAs with that will be looking for new frameworks for cooperation to deepen economic integration.

Investment and Investor State Dispute Settlement

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Introduction

○ The Investment Chapter has proven to be one of the most controversial aspects of KAFTA in Australia. The Department of Foreign Affairs and Trade (DFAT) has argued that the inclusion of an investor–state dispute settlement (ISDS) mechanism in the chapter was necessary in order to complete the negotiations with Korea.[1] DFAT has also claimed that the chapter contains so–called safeguards, which "which protect the government's ability to regulate in the public interest, including for public health and the environment."[2] However, many academics and members of the public remain unconvinced that the major problems with ISDS have been resolved or that there is any need for such a mechanism between these two countries (which both have well developed domestic court systems).

○ Following the signature of KAFTA, two Australian Senate Committees reviewed the agreement; both received a substantial number of public submissions opposing the inclusion of ISDS in the agreement.[3] The

1) Adams, J., cited in Report of the Foreign Affairs, Defence and Trade References Committee on the Korea–Australia Free Trade Agreement, October 2014, p. 28, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea–Australia_Free_Trade_Agreement/~/media/Committees/fadt_ctte/Korea–Australia_Free_Trade_Agreement/report/report.pdf

2) Ibid.

3) See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea–Australia_Free_Trade_Agreement/Submissions and http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Submissions

Joint Standing Committee on Treaties (JSCOT), which is dominated by members from the governing Liberal–National Coalitionnoted that ISDS"has produced unintended consequences for governments globally" and that despite the assurances from DFAT about 'safeguards' there is "some reason for concern".[4] The Foreign Affairs, Defence and Trade References Committee (dominated by the Australian Labor Party/ALP) went much further, recommending in its report that "the Australia Government initiate discussions with Korea to omit or, in the absence of agreement, narrow the scope of the investor state dispute settlement provisions within the treaty, to be formalised by a subsequent side letter."[5]

○ This chapter explains the public discontent and political divide over KAFTA with a brief history of ISDS policy in Australia. It then examines some of the most controversial provisions in KAFTA's Investment Chapter and critically assesses the potential efficacy of the 'safeguards'. The analysis demonstrates that the Investment Chapter in KAFTA is not 'state of the art' and in several respects it falls well behind other recent trade agreements, such as the Canada–EU Comprehensive Economic and Trade Agreement (CETA). It is also concluded that the acceptance of ISDS in KAFTA has set a precedent for future negotiations; it will now be very difficult for Australia to omit ISDS from other treaties currently under negotiation.

A brief history of Australia's policy on ISDS

○ Since the 1980s, Australia has signed 21 bilateral investment treaties (BITs), mainly with developing countries in the Asia–Pacific region and transitional economies in Eastern Europe. There is no public record of the ISDS clauses in these treaties being used by Australian investors or by foreign investors against Australia until recently.[6] As in other countries, BITs have been of little interest to most policy makers and the public has very little awareness of their existence. The first time that ISDS became an issue of public concern and political debate was during the negotiation of the Multilateral Agreement on Investment (MAI) in the late 1990s.

4) Joint Standing Committee on Treaties, Report 142: Treaty Tabled on 13 May 2014 – Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014), September 2014, p. 44, http://www.aph.gov.au/~/media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/JSCT/2014/Report142/report.pdf

5) Report of the Foreign Affairs, Defence and Trade References Committee on the Korea–Australia Free Trade Agreement, October 2014, p. 50http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea–Australia_Free_Trade_Agreement/~/media/Committees/fadt_ctte/Korea–Australia_Free_Trade_Agreement/report/report.pdf

6) The first ISDS dispute against Australia was launched by Philip Morris Asia in 2011 under the terms of a BIT with Hong Kong. See further http://www.ag.gov.au/tobaccoplainpackaging

○ In 2003, a conservative Liberal–National coalition government led by John Howard commenced trade negotiations with the United States. The Australia–US Free Trade Agreement (AUSFTA) "prompted the biggest critical public debate ever held in Australia about a trade agreement" and ISDS was "a major target of community campaigning"[7]. Negotiators have acknowledged that this debate had an impact on the position taken by the government.[8]

○ AUSFTA, which came into force in 2005, did not include a standard provision on ISDS. The official line taken by both governments was that ISDS was unnecessary because each country has a "robust" legal system for resolving disputes.[9] However, it is likely that the Howard Government removed ISDS from the agreement in the hope that this would assist passage for the implementing legislation through the Senate. Despite intense internal debate over the agreement within the ALP, the implementing legislation was eventually approved, albeit with some amendments.

○ Subsequent to the completion of AUSFTA the Howard Government signed a treaty containing ISDS with Thailand, which did not evoke the same reaction asthe AUSFTA. The Rudd Government (ALP/elected in 2007) signed an FTA with Chile containing ISDS and also committed to ISDS under the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA) although it is important to note that Australia and New Zealand made a side agreement through an exchange of letters that prevents ISDS from being used between these two countries (i.e. Australian investors can take any ASEAN government to arbitration, but not the New Zealand government and similarly investors from New Zealand cannot sue Australia).

○ This ad–hoc approach to ISDS would change in 2011 following the release of a report by the Australian Productivity Commission (an independent government advisory body) in November 2010 on Bilateral and Regional Trade Agreements.[10] One of the Commission's recommendations was that the government should "seek to avoid" the inclusion of ISDS provisions in its trade agreements.[11]

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7) Ranald, P. 2010. "The Politics of the TPPA in Australia", pp. 40–51 in J. Kelsey (ed), No Ordinary Deal: Unmasking the Trans–Pacific Partnership Free Trade Agreement, Allen & Unwin, Crows Nest, NSW.

8) This emerged in discussion at the Fulbright symposium for the fifth anniversary of the Australia US free trade agreement held at old Parliament house, Canberra, 24–25 August 2009.

9) "AUSFTA fact sheets: investment". DFAT website: http://www.dfat.gov.au/fta/ausfta/outcomes/09_investment.html (last accessed 17 November 2014).

10) Productivity Commission. 2010. Bilateral and Regional Trade Agreements: Research Report. http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade–agreements–report.pdf.

11) Ibid, Recommendation 4c, p. xxxviii.

○ Three key conclusions led to formulation of this recommendation.[12] First, the Commission found no evidence of the existence of a market failure relating to sovereign risk. Although it was acknowledged that the domestic court systems in some countries might not be as robust as Australia's, the Commission reasoned that in most instances the desire on the part of governments to retain a good reputation with foreign investors was sufficient to quell any impulse to expropriate.[13] The Commission also argued that there is no evidence that regulation (in Australia or abroad) is systematically biased against foreign investors—in fact the reverse may be true.[14] Despite having found no evidence of a market failure, the Commission went on to assess whether, if such a market failure did exist, there were other options for addressing it. Their second key conclusion was that insurance and investor–state contracts were more appropriate mechanisms for dealing with political risk than international treaties.[15] Finally, the Commission assessed the issues of regulatory chill and the cost of arbitration to governments. Their third key conclusion was that "[e]xperience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions."[16]

○ The government was not obligated to adopt the Commission's recommendations. However, the Trade Minister at the time (Dr Craig Emerson, a trained economist) was persuaded by the Commission's economic reasoning on ISDS as well as the argument made by critics that ISDS is a dubious legal process.[17] The Government was also very concerned that one of their key pieces of legislation on the plain packaging of cigarettes was under threat of arbitration by tobacco giant Philip Morris (the company eventually launched a dispute under a 1993 BIT with Hong Kong).

○ In April 2011, in a new Trade Policy Statement, the Gillard Government (ALP/elected 2010) vowed that it would no longer include provisions ISDS in bilateral and regional trade agreements.[18] The policy was justi–

12) See also the comments of Adam Sheppard, Senior Economist at the Productivity Commission, at a seminar on 'Rethinking Investment Treaty Law – A Policy Perspective', London School of Economics, 23 May 2011. Podcast available at http://www.youtube.com/user/lsewebsite?feature=mhsn#p/c/2/zf1HkqjeJUI

13) Productivity Commission. 2010. Bilateral and Regional Trade Agreements: Research Report, p. 269.

14) Ibid.

15) Ibid, p. 270.

16) Ibid, p. 274.

17) Hill, J. 2014. "Background Briefing: ISDS: The devil in the trade deal", ABC Radio National, http://www.abc.net.au/radionational/programs/backgroundbriefing/isds–the–devil–in–the–trade–deal/5734490#transcript

18) Department of Foreign Affairs and Trade (DFAT). 2011. "Gillard Government Trade Policy Statement: Trading our way to more jobs and

fied by reference to the principles of 'no greater rights' for foreign investors and the government's 'right to regulate' to protect the public interest.

○ The policy was carried through in the Australia–Malaysia Free Trade Agreement, which does not contain ISDS, andin the Trans Pacific Partnership (TPP) negotiations (a draft of the Investment Chapter leaked in 2012 contains a footnote that states that the ISDS section of the chapter does not apply to Australia[19]) as well as in the Gillard Government'strade negotiations with Korea and Japan.

○ It was clear prior to the 2013 Federal Election that the Liberal–National Coalition did not agree with the position taken by the ALP on ISDS and shortly after coming to power it adopted a new policy, typically referred to as a 'case–by–case approach'. The Abbott Governmenthas not provided any detail on what criteria will be used to determine whether ISDS should be accepted in a given case.

○ In the case of KAFTA, the Abbott Government has claimed that it would not have been able to get a deal with Korea without ISDS. Conversely, Japan did not view ISDS as a deal–breaker and it was left out of the Japan–Australia Economic PartnershipAgreement (JAEPA), which was also signed in 2014. However, the JAEPA has a provision requiring the Parties to review the investment chapter and consider the adoption of an ISDS mechanism after the agreement has been in force for five years or sooner if Australia subsequently enters into another bilateral or multilateral agreement containing ISDS. It is not clear whether the entry into force of KAFTA, which was signed prior to the JAEPA, would trigger this clause but the entry into force of an FTA with China (still under negotiation as of November 2014) or the TPP with ISDS certainly would.

prosperity", http://www.acci.asn.au/getattachment/b9d3cfae–fc0c–4c2a–a3df–3f58228daf6d/Gillard–Government–Trade–Policy–Statement.aspx

19) The leaked text is available at: http://www.citizenstrade.org/ctc/wp–content/uploads/2012/06/tppinvestment.pdf

KAFTA's Investment Chapter

○ As with any standard international investment agreement, KAFTA's Investment Chapter has provisions covering discrimination (national treatment and most favoured nation treatment), the international minimum standard of treatment (including 'fair and equitable treatment'), and expropriation as well as a variety of other issues. Given the limited space available, the discussion in this chapter will be confined to two of the most contentious provisions—the minimum standard of treatment/fair and equitable treatment and expropriation—as well as the so-called safeguards and the potential loophole created by the most-favoured-nation (MFN) provision that could render these safeguards useless.Finally, some comments will be made on the procedural provisions in the Investment Chapter. Table 1 provides a comparison between the provisions discussed in KAFTA with other recent investment treaties.

The Minimum Standard & Fair and Equitable Treatment

○ The international minimum standard can essentially be thought of as a 'floor', below which the treatment of foreign investors should not fall. It has long been debated whether or not such a minimum standard exists in customary international law. Defining the precise nature and content of the standard remains quite problematic, as it is rarely laid out explicitly in the texts of treaties. Referring to cases on state responsibility, one could conclude that the standard potentially relates to three areas: compensation for expropriation; responsibility for destruction or violence by non-state actors; and denial of justice.[20] However, as expropriation is dealt with separately in investment agreements, and responsibility for destruction or violence is usually covered by reference to 'full protection and security', the only content unique to the minimum standard, in this view, would be 'denial of justice'. The principle of denial of justice derives from customary international law and relates to the conduct of national courts.

○ However, investment tribunals have interpreted the minimum standard, and in particular the language often contained in the standard requiring that investors be provided with 'fair and equitable treatment', far more expansively. The International Law Association (ILA) International Law on Foreign Investment Committee suggests that'fair and equitable treatment' requires quite significant obligations on the part of

20) Sornarajah, M. 2004.The International Law on Foreign Investment (2nd ed., Cambridge University Press), p. 330.

the host state:

– it is now reasonably well settled that the standard requires a particular approach to governance, on the part of the host country, that is encapsulated in the obligations to act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with the principle of good faith. In addition, investors can expect due process in the handling of their claims and to have the authorities act in a manner that is non–discriminatory and proportionate to the policy aims involved. These will include the need to observe the goal of creating favourable investment conditions and the observance of the legitimate commercial expectations of the investor.[21)]

○ It is clear that a very wide array of government actions, and indeed inactions, could fall within the purview of such a capacious standard. It is, therefore, unsurprising that fair and equitable treatment is considered by some to be 'the most important standard, from the perspective of investor protection'[22)] and, according to UNCTAD, it is also the most likely provision to be invoked by an investor in an arbitral claim.[23)]

○ In response to the broadening of the scope for liability under the minimum standard/fair and equitable treatment, states have attempted to reign in arbitrators by limiting their scope for interpretation. The primary strategy in this regard has been to make explicit the link between the minimum standard and customary international law.Article 11.5 of KAFTA on the minimum standard of treatment follows this approach:

– For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" shall not require treatment in addition to or beyond that which is required by that standard, and shall not create additional substantive rights.

○ The Article is accompanied by an Annex that further sets out the "shared understanding" of the parties that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation."

○ Although the wording of Article 11.5and the accompanying Annex undoubtedly represents an improvement on that of earlier investment treaties, it does not provide a fool proof 'safeguard'. Customary international

21) ILA International Law on Foreign Investment Committee, International Law on Foreign Investment: First Report of the International Law Association (2006), p. 16.

22) Ibid.

23) UNCTAD,2007. Bilateral Investment Treaties 1995 – 2006: Trends in Investment RulemakingUNCTAD/ITE/IIA/2006/5, p. 32.

law is not static; it continues to evolve and arbitrators are left considerable scope to determine its content. Porterfield argues that:

– Although [customary international law] is supposed to be based on actual state practice and opinio juris, in practice arbitrators tend to define the [customary international law]–linked standard for [fair and equitable treatment] in exactly the same manner as the autonomous standard: by reference to previous arbitral awards and academic writings, without any evidence of either state practice or opinio juris.[24]

○ In light of this it is worth noting that the recently concluded CETA makes no reference to customary international law and instead specifically defines the fair and equitable treatment standard as providing protection against: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; and abusive treatment of investors, such as coercion, duress and harassment.[25]

○ Other treaties deal with this issue by excludingany mention of fair and equitable treatment altogether.[26]

Indirect Expropriation

○ The direct taking of foreign property has historically been one of the most significant risks to foreign investment. Outright takings are now considered rare in most parts of the world. For the last fifteen years, the key debate in academic and policy circles has been on the coverage in investment agreements of so-called indirect expropriation. Indirect expropriation falls short of actual physical taking of property but results in the effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor.[27]

24) Porterfield, M. "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals", Investment Treaty News, 22 March 2013, http://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/

25) Article X.9, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/10.aspx?lang=eng

26) For examples, see UNCTAD. 2011. "Fair and Equitable Treatment: A Sequel", Issues in International Investment Agreements II, http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

27) UNCTAD. 2000."Taking of Property", Issues in International Investment Agreements, UNCTAD/ITE/IIT/15, Geneva.

○ In establishing whether or not an indirect expropriation has occurred, tribunals have tended to adopt one of two basic approaches. Under the first approach, the tribunal focuses solely on the effect of the regulation on the investor.[28] In evaluating the effect of a measure, tribunals will likely examine both its economic impact and its duration. While outside of investment arbitration (e.g., in the European Court of Human Rights) there is indication that an investment must be rendered valueless or that the economic impact on it must be at least 'severe' or 'substantial' for a measure to qualify as an expropriation, investment tribunals place a stronger emphasis on the 'legitimate expectations' of the investor.

○ Those tribunals ascribing to the second approach will also examine the effect of a measure on an investor, but will additionally address its purpose. The tribunal may also evaluate whether the need to fulfil the stated purpose of the measure is proportional to the negative effect felt by the investor.[29] Given the difficulty of drawing a 'bright line' between bona fide non–compensable regulation and a taking, many commentators and arbitrators suggest that such a determination can only be achieved on a case–by–case basis.

○ As is the case with the minimum standard of treatment, recent treaty practice in several countries reflects the concern that some tribunals have interpreted provisions on indirect expropriation in an overly broad manner. KAFTA follows the example set in Canadian and US treaties by including an Annex on the topic. Annex 11–B commences with the statement that "An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment." It is worth noting that the Canada–Korea Free Trade Agreement (CKFTA, also signed in 2014) has the same language but with the added proviso that an action by a Party will only constitute an expropriation if it "eliminates all or nearly all" of the value of the investment.

28) Fortier, Y. and S.Drymer. 2004."Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor," 19 ICSID Review: Foreign Investment Law Journal293, p. 300.

29) Newcombe, A.2007. "The Boundaries of Regulatory Expropriation in International Law," in P. Kahn and T.W□lde (eds.) New Aspects of International Investment Law(Leiden: Brill), p. 417; H. Mann and J.Soloway. 2002."Untangling the Expropriation and Regulation Relationship: Is There a Way Forward?"Report to the Ad Hoc Expert Group on Investment Rules and the Department of Foreign Affairs and International Trade (Ottawa: Canadian Department of Foreign Affairs and International Trade).

○ KAFTA Annex 11–Bgoes on to provide a three–part test for the determination of whether anindirect expropriation has occurred. The factors that are to be considered are:

(a) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(b) the extent to which the government action interferes with distinct, reasonable investment–backed expectations; and

(c) the character of the government action, including its objectives and context.

○ This type of 'safeguard' is untested in arbitration. However, opinions have been expressed about its potential efficacy. Some observers are not optimistic that all potential loopholes have been filled and argue that the three–part test is vague and out–dated in relation to both US domestic and international jurisprudence.[30] During the government review of the 2004 US Model BIT, a number of environmental organisations made a submission to the US Trade Representative that argued that the language of the indirect expropriation provision fails to provide the proper explanations and limitations that exist in US Supreme Court jurisprudence.[31] Importantly, they noted that reference to the 'character' of the government action is 'extraordinarily ambiguous and could easily be misapplied by tribunals that are neither trained in nor bound by U.S. precedent'.[32] The NGOs also view the reference to an investor's expectations as problematic, noting that breach of legitimate expectations is a 'necessary, but not sufficient, condition for liability' and that treaties should make clear that investors 'must expect that health, safety, and environmental regulations often change and become more strict over time'.[33]

30) Muse–Fisher, M.2007."CAFTA–DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims," 19 Pacific McGeorge Global Business & Development Law Journal 495, p. 509.

31) Center for International Environmental Law (CIEL). 2009."Joint NGO Comments on US Model BIT Review,"http://ciel.org/Publications/BIT_Comments_Aug09.pdf

32) Ibid.

33) Ibid.

KAFTA's Annex 11–B also contains a final statement that:

○ Except in rare circumstances, non–discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

○ Again, this language has been taken from American treaty practice. In that context, it has been suggested that the use of the ambiguous terminology 'rare circumstances' will only encourage lawyers to develop creative arguments to test the boundaries of the exception.[34]

○ Although no ISDS cases have been concluded which could demonstrate whether the changes to indirect expropriation and fair and equitable treatment clauses in recent treaties might provide effective 'safeguards', it is worth noting that they have not prevented cases involving environmental and health issues from being launched. For example, a case has arisen under the 2006 US–Peru Free Trade Agreement over environmental liability for a contaminated site.[35] An investor has also launched a dispute against El Salvador under the 2004 Central America Free Trade Agreement over a ban on mining aimed at protecting the country's limited groundwater resources.[36] In both cases, the involved investors are invoking provisions on indirect expropriation and the minimum standard of treatment despite the existence of the 'safeguards'.

○ It may be several years before these cases are decided. But even if the tribunals rule in the respective governments' favour, this will not guarantee that the 'safeguards' will work for Australia as awards rendered in ISDS are only binding on the parties involved in the dispute and future tribunals may interpret the clauses differently.

34) Edsall, R. 2006."Indirect Expropriation Under NAFTA and DR–CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations," 86 Boston University Law Review 931.

35) Public Citizen. n.d."Renco Uses U.S.–Peru FTA to Evade Justice for La Oroya Pollution,"https://www.citizen.org/documents/renco–la–oroya–memo.pdf

36) Karunananthan, M."El Salvador mining ban could establish a vital water security precedent,"The Guardian, 10 June 2013, http://www.theguardian.com/global–development/poverty–matters/2013/jun/10/el–salvador–mining–ban–water–security

General Exception

○ In addition to the 'safeguards' discussed above, Chapter 22 of KAFTA contains a clause that states:

– For the purposes of Chapter 11 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:
(a) necessary to protect human, animal or plant life or health;

(b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement;

(c) imposed for the protection of national treasures of artistic, historic or archaeological value; or

(d) relating to the conservation of living or non–living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

○ The use of general exceptions like this, which are modelled on Article XX of the GATT 1994, is quite a recent development in international investment law. As such, it is unclear how investment tribunals will deal with them. However, one expert has hypothesised that "the inclusion of general exceptions in [international investment agreements] is unlikely to have much practical significance" but has also cautioned that the intent of governments might backfire and that arbitral tribunals might actually "interpret general exceptions as providing less regulatory flexibility for legitimate objectives, compared to that under existing [international investment agreements] that do not incorporate general exceptions."[37]

○ Bernasconi–Osterwalder and Mann also express concerns about the potential for trade law concepts, such as the "necessity test", to be introduced into investment law through clauses such as this one.[38] Discussing the draft of a similar exception clause in CETA, they conclude:

– Far from providing any measure of guarantee for a state's right to regulate, this type of general exceptions clause provides an untested transfer of trade law concepts to investment law, a vastly different domain of regulatory interaction between government–investment as compared to government–product regulatory interaction at a border. In our view it is miscast, but whether or not that is so, its utility in an

37) Newcombe, A.2008. "General Exceptions in International Investment Agreements," Draft Discussion Paper Prepared for BIICL Annual WTO Conference, 13–14 May 2008, London.

38) Bernasconi–Osterwalder, N. and H. Mann. 2014. "A Response to the European Commission's December 2013 Document 'Investment Provisions in the EU–Canada Free Trade Agreement'", p. 4,http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf

investment context has never been tested, its scope and means of application is manifestly unclear, and there is no way to review a wrong application of the provision as there is in trade law through the WTO Appellate Body. Thus, this provision cannot be called a guarantor in any form of the right to regulate.[39]

The MFN Loophole

○ A final question to consider with respect to the efficacy of KAFTA's 'safeguards' is the potential for them to be completely circumvented through the MFN[40] provision. Investors have successfully 'imported' the substantive provisions of other treaties (e.g. on fair and equitable treatment) through the application of MFN. Investors have also sought, sometimes successfully, to broaden the procedural provisions related to ISDS from other treaties through MFN. Many treaties, including KAFTA, now explicitly exclude ISDS from the application of MFN. However, KAFTA leaves open the possibility for substantive provisions to be imported through MFN.

○ The recently concluded CETA attempts to deal with both issues, stating:

– For greater certainty, the "treatment" referred to in Paragraph 1 and 2 does not include investor–to–state dispute settlement procedures provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.

ISDS Procedures

○ Investment tribunals are typically made up of three members: one chosen by the investor, one chosen by the state and a third that is mutually agreed upon and will act as president. It is not only barristers and retired judges that are frequently appointed as arbitrators, but also professors, who in many cases also

39) Ibid.

40) For examples see Salomon C. and S. Friedrich. 2013. "How Most Favoured Nation Clauses in Bilateral Investment Treaties Affect Arbitration" Practical Law Arbitration, http://www.lw.com/thoughtLeadership/favoured–nation–clauses–arbitration

have careers as leading private lawyers.[41] In fact, it is entirely possible for an individual to act as a legal representative for a respondent or claimant in one case, and an arbitrator in another.[42]

○ Tribunals operate under rules of arbitration. The rules most commonly applied in ISDS are those developed by the UN Commission on International Trade Law (UNCITRAL)[43] and the International Centre for the Settlement of Investment Disputes (ICSID).[44] These are the rules specifically referred to in KAFTA, though the parties to the dispute are also given the option to use any other arbitration rules that they can mutually agree upon.

○ KAFTA deals with one of the major complaints that have been made about the process of ISDS; that it lacks transparency. The agreement provides for the publication of documents, decisions, and awards and stipulates that tribunal proceedings will be public. These are important measures; however, there are other problems with the process of ISDS that have not been addressed in KAFTA.

Transparency

○ ISDS has long been criticized for being secretive. However, transparency in in the field has increased substantially in the last decade, largely as a result of the efforts of a number of NGOs. Changes to the culture of confidentiality are reflected in both the external arbitration rules (UNCITRAL and ICSID) that treaties in large part defer to and through the inclusion within treaties of additional transparency requirements that supersede these rules.

○ The catalyst for increased transparency came in the form of several high profile cases brought under the North American Free Trade Agreement (NAFTA) in which NGOs petitioned the tribunals for access. This led to the NAFTA states developing a policy that all investor–state awards under the agreement would be

41) Goldhaber M. 2003. "Private Practices," American Lawyer/Focus Europe, Summer 2003.

42) Coe, J. 2006."Transparency in the Resolution of Investor–State Disputes: Adoption, Adaption, and NAFTA Leadership," 54 University of Kansas Law Review 1339, pp. 1351–2.

43) UNCITRAL Arbitration Rules, 28 April 1976, Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session, UN Doc. A/31/17 (1976), reproduced in 15 ILM (1976): 701. The Rules as revised in 2010 are available here: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

44) 'Rules of Procedure for Arbitration Proceedings (Arbitration Rules)', ICSID Convention, Regulations and Rules (2006) http://icsid.worldbank.org.

published and hearings would be open to the public. Rules were also developed to allow the participation of non-parties in disputes (through 'friend of the court' submissions). Subsequently in 2004, the US re-drafted its model BIT to reflect this new approach. As US models have considerable influence on the treaty drafting practice of other countries (particularly countries like Canada, Australia and New Zealand) rules on transparency have spread in recent years.

○ In parallel with these developments in treaty practice, the ICSID and UNCITRAL arbitration rules have been revised. The revisions to the ICSID Rules, released in 2006, were as Wong and Yackee put it "modest, incremental and conservative."[45] Most significantly, ICSID tribunal hearings can still be held behind closed doors if one party to the arbitration objects to them being public.

○ Unlike the ICSID arbitration rules, which were designed specifically for investor-state disputes, the UNCITRAL arbitration rules also apply to commercial arbitrations. Consequently, addressing transparency in the revision of the UNCITRAL rules proved to be a complicated affair. Eventually it was decided that a separate set of Rules on Transparency in Treaty-based Investor-state Arbitration would be produced to supplement the general UNCITRAL arbitration rules. The Rules on Transparency were finally agreed upon in July 2013 and took effect on 1 April 2014. They apply to treaties signed after that date unless the parties to the treaty expressly opt out. The Rules on Transparency will not apply to pre-April 2014 treaties unless the parties explicitly agree to adopt them. UNCITRAL is now working on a Transparency Convention to provide a more efficient method for states to adopt the Transparency Rules for the thousands of existing trade and investment treaties.

○ Although the text of KAFTA follows the general trend of increased transparency in ISDS, the parties have for the moment chosen to opt-out of the UNCITRAL Transparency Rules.

Bias & Conflicts of Interest

○ Unlike transparency, other procedural issues have been given very little attention by treaty negotiators. In part, this may be because many of these issues are structural and would require a fundamental rethink of ISDS. For example, there is an inherent bias in ISDS created by the fact that only investors can initiate disputes.

45) Wong, J. and J. Yackee. 2010."The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules," in K. Sauvant (ed.) Yearbook of International Investment Law and Policy 2009-2010 (Oxford University Press), p. 268.

○ The means by which arbitrators are chosen and rewarded for their services also creates the appearance of a biased system. Court judges have no financial stake in the outcome of the cases they preside over. Arbitrators, on the other hand, are not only chosen by the parties to the dispute, they are also paid by the hour with no time limits on proceedings. Such incentives inevitably favour the party advancing the claim (i.e., the investor), even if unintentionally.[46]

○ The fact that individuals can act as both arbitrators and counsel in different cases is also problematic as they may "consciously or unconsciously" make decisions as arbitrators that will further their client's interests in another case.[47] Furthermore, even when such a direct conflict of interest does not exist, a large number of arbitrators work for law firms with corporate clients that have a direct stake in the interpretation of IIAs.[48]

Inconsistency

○ Awards rendered in investment arbitration are only binding on the parties involved in the dispute: the rulings of tribunals are said to have no stare decisis. Hence, tribunals do not have to base their decisions on the decisions of previous tribunals. Furthermore, unlike in the realm of trade disputes, there is no appellate body to ensure consistent interpretation of international investment law. As a result, there have been cases where several awards have been issued addressing the same facts where panels have reached diverging conclusions. This has led to what some have termed a 'legitimacy crisis' in international investment arbitration.[49]

○ This problem is compounded by the ambiguous nature of the provisions found in investment agreements (e.g. the requirement to provide 'fair and equitable treatment'). When the outcome of arbitration is uncertain, states that are faced with a threat of arbitration are more likely to settle investor claims, often at the expense of public policy (a phenomenon typically described as 'regulatory chill').

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46) Garcia, C. 2004."All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor–State Arbitration," 16 Florida Journal ofInternational Law 301, p. 352.

47) Buergenthal, T. 2006. "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law," 22 Arbitration International 495, p. 498.

48) Mann, H. 2006."Is 'Fair and Equitable' Fair, Equitable, Just, or Under Law?" 100 American Society of International Law Proceedings 74.

49) Brower, C., Brower, C. and J. Sharpe. 2003."The Coming Crisis in the Global Adjudication System," 19 Arbitration International 415; Franck, S. 2005. "The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions," 73 Fordham Law Review 1521.

○ To address the problem of inconsistency, the 'possibility' of a bilateral appellate mechanism being developed in the future is mooted in Annex 11–E of KAFTA. However, similar aspirational statements in other agreements have failed to result in the development of any appeals process.

High Costs

○ Arbitration was initially touted as a cheap and efficient means to deal with disputes but recent experience belies such claims. An OECD survey shows that legal and arbitration costs for the parties in ISDS cases have averaged over US$8 million with costs exceeding US$30 million in some cases.[50] Argentina has reportedly spent US$12 million in the jurisdictional phase of an ongoing case[51] and Turkey was required to pay approximately US$13.5 million in costs in one dispute, which far outweighed the compensation (~$US 9.1 million) it was ordered to pay the investor.[52]

○ As a result of the high costs of investment arbitration and the potential for very large awards, third party funding of litigation is becoming more common. This increases the potential for claims to be pursued against states that do not have similar mechanisms at their disposal to finance their participation in arbitration.[53]

Conclusions

○ The absence of evidence of any clear benefits of ISDS coupled with substantial concerns about the costs of the system have led many countries to reconsider BITs and the inclusion of ISDS clauses within trade agreements. The European Commission is currently reviewing the nearly 150,000 submissions that it received in a public consultation on ISDS in the Transatlantic Trade and Investment Partnership (TTIP)

50) Gaukrodger, D. and K. Gordon. 2012."Investor–State Dispute Settlement: A Scoping Paper for the Investment Policy Community,"OECD Working Papers on International Investment No. 2012/3, http://www.oecd.org/daf/inv/investment–policy/WP–2012_3.pdf

51) Ibid.

52) PSEG Global Inc. and Konya IlginElektrikUretimVeTikaret Limited Sirketi v. Republic of Turkey (ICSID Case No. ARB/02/5), Award, 19 January 2007.

53) Rosert, D. 2014, "The Stakes are High: A Review of the Financial Costs of Investment Treaty Arbitration," (Winnipeg: International Institute for Sustainable Development), p. 8, http://www.iisd.org/sites/default/files/publications/stakes–are–high–review–financial–costs–investment–treaty–arbitration.pdf

being negotiated with the US.[54] Representatives of some key European countries (most notably Germany) have stated that they would not support including an ISDS mechanism in that agreement.[55]

○ South Africa has moved to terminate some of its BITs and the Trade Minister has stated that:

– Investor–state dispute resolution that opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration is of growing concern to constitutional and democratic policy–making.[56]

○ Reports have also emerged over the course of 2014 indicating that Indonesia has terminated its BIT with the Netherlands and is considering terminating all of its BITs.[57] India is also conducting a review of its BIT program.[58]

○ Australia does not currently have a coherent policy on ISDS. The 'case–by–case approach', with no transparent criteria provided for when the Government considers ISDS appropriate, is untenable. By capitulating to the demands of Korea to include ISDS in KAFTA, the Abbott Government has re–opened Pandora's box. It must have been difficult for Australian negotiators to maintain an anti–ISDS position in the TPP before KAFTA; now it will be nigh on impossible.

○ The claims by the Government that ISDS in KAFTA poses no threat to the public interest because proper 'safeguards' have been put in place also appear overly optimistic. Time and again arbitral tribunals have proven their willingness to overreach their purview and interpret treaties in a manner that best suits their main clients: investors. The 'safeguards' in KAFTA are far from airtight and serious problems with the process of ISDS remain unaddressed.

54) See http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

55) UNCTAD. 2014. "Recent Developments in Investor – State Dispute Settlement," IIA Issues Note No. 1 (April) at 24, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

56) Peterson, L. "South Africa Pushes Phase–Out of Early Bilateral Investment Treaties After at Least Two Separate Brushes with Investor–State Arbitration," Investment Arbitration Reporter, 23 September 2012.

57) Khor, M. "Investor Treaties in Trouble," The Star Online, 24 March 2014, http://www.thestar.com.my/Opinion/Columnists/Global–Trends/Profile/Articles/2014/03/24/Investor–treaties–in–trouble/

58) Ibid.

Table 1: Comparison of Investment Chapters of Recent Treaties

Treaty	Date Signed / In Force	ISDS?	Expropriation 'Safeguard'	FET 'Safeguard'
KAFTA	8 April 2014	Yes	Annex 11 B (three part test plus 'except in rare circumstances' language)	Links FET to customary international law (defined in Annex 11 A)
KORUS	30 June 2007/15 March 2012	Yes	Annex 11 B (three part test plus 'except in rare circumstances' language)	Links FET to customary international law (defined in Annex 11 A)
CKFTA	22 Sept 2014	Yes	Annex 8 B (three part test plus 'except in rare circumstances' language but also requires that government action "eliminates all or nearly all of [the] value [of the investment")	Links FET to customary international law (defined in Annex 8 A)
CETA	–	Yes	Annex 10.11 B (four part test – adding 'duration' of the measure to the standard list – plus 'except in rare circumstances' language)	Specific list of what constitutes breach of FET (no mention of customary international law) and option for the standard to be revised (Article 10.9)
JAEPA	8 July 2014	No	Annex 12 (three part test plus 'except in rare circumstances' language)	Links FET to customary international law (Article 14.5 Note 1)

Treaty	MFN Loopholes Closed?	General Exception	Transparency	Appeals Mechanism
KAFTA	Procedural only	Article 22.1.3	Publication of documents (with possible redactions of 'protected information') and public hearings; side letter excludes application of UNCITRAL Transparency Rules	To be considered from 3 years of entry into force
KORUS	No	Only for essential security measures (Article 23.2)	Publication of documents (with possible redactions of 'protected information') and public hearings; predates UNCITRAL Transparency Rules	To be considered from 3 years of entry into force
CKFTA	Procedural only	Article 22.1.3	Publication of documents (with possible redactions of 'protected information') and public hearings; UNCITRAL Transparency Rules should apply (no specific exclusion)	To be considered from 3 years of entry into force
CETA	Procedural &Substantive*	GATT 1994 Article XX applies to establishment and non–discrimination (Article 32.2)	UNCITRAL Transparency Rules apply with some modifications	Committee on Services and Investment to consider
JAEPA	Procedural only	Article 14.15	N/A (no ISDS)	N/A (no ISDS)

From KAFKA to KAFTA: Intellectual Property, and the Korea–Australia Free Trade Agreement

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Introduction

– Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now." At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: "If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third." The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks.

Franz Kafka, 'Before the Law', The Trial[1)]

○ The Korea–Australia Free Trade Agreement 2014 (KAFTA) is a Kafkaesque agreement – with its secret texts, speculative claims, and shadowy tribunals.[2)]

○ Australia and South Korea have signed a new free trade agreement – the Korea–Australia Free Trade Agreement2014 (KAFTA). Is it a fair trade fairytale? Or is it a dirty deal done dirt cheap? Or somewhere in between? It is hard to tell, given the initial secrecy of the negotiations, and the complexity of the texts of

1) Franz Kafka, 'Before the Law', The Trial, 1915, http://records.viu.ca/~johnstoi/kafka/beforethelaw.htm

2) The Korea–Australia Free Trade Agreement 2014, http://www.dfat.gov.au/fta/kafta/

the agreement. There has been much debate in the Australian Parliament over the transparency of the trade agreement; the scope of market access provided under the deal; the impact of the investment chapter, with its investor–state dispute settlement clause; the intellectual property chapter; the environment chapter;[3] its impact upon public health; and the labor rights chapter. The agreement was reviewed by the Joint Standing Committee on Treaties,[4] and the Senate Standing Committee on Foreign Affairs, Defence, and Trade.[5]There has been debate about implementing legislation for the agreement, such as the Customs Amendment (Korea–Australia Free Trade Agreement Implementation) Bill 2014 (Cth).[6] KAFTA provides an indication of the approach of the new Conservative Government in Australia to other trade deals – such as the Trans–Pacific Partnership.

○ There has been a significant debate in the Australian Parliament over the Korea–Australia Free Trade Agreement 2014. There have been a number of positions in the debate. The Coalition Government has promoted the trade agreement, as part of its larger international strategy. The Australian Prime Minister Tony Abbott has argued that 'Australia is Open for Business'.[7] In his address to the World Economic Forum, the Prime Minister explained his philosophy:

– As always, trade comes first.People trade with each other because it's in their interest to do so.Every time one person freely trades with another, wealth increases.Just as trade within countries increases wealth, trade between countries increases wealth – that's why we should all be missionaries for freer trade.At the very least, the G20 should renew its commitment against protectionism and in favour of freer markets.Each country should renew its resolve to undo any protectionist measures put in place since the

3) On the environment, see: Kyla Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy, Cambridge: University of Cambridge Press, 2009; Isabel McIntosh, 'Trade Agreement Puts Environmental Wins in Jeopardy', New Matilda, 13 March 2014, https://newmatilda.com/2014/03/13/trade–agreement–puts–environmental–wins–jeopardy; and Patricia Ranald, 'KAFTA enables Korean Miners to Sue States over Environmental Regulation', The Sydney Morning Herald, 7 July 2014, http://www.smh.com.au/comment/kafta–enables–korean–miners–to–sue–states–over–environmental–regulation–20140711–zszuy.html

4) The Joint Standing Committee on Treaties, Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014), Canberra: Australian Parliament, 13 May 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_142

5) Senate Standing Committee on Foreign Affairs, Defence, and Trade, 'The Korea–Australia Free Trade Agreement (KAFTA)', 1 October 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea–Australia_Free_Trade_Agreement/Report

6) Julie Tomaras, 'Customs Amendment (Korea–Australia Free Trade Agreement Implementation) Bill 2014 (Cth)', Australian Parliamentary Library, 30 September 2014, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd031

7) Matthew Rimmer, 'Taking Care of Business: Tony Abbott and the Trans–Pacific Partnership', Crikey, 2 October 2013, http://www.crikey.com.au/2013/10/02/taking–care–of–business–abbott–and–the–trans–pacific–partnership/

Crisis. Better still, each country should commit to open up trade through unilateral, bi-lateral, plurilateral and multi-lateral actions and through domestic reforms to help businesses engage more fully in global commerce. As a trading nation, Australia will make the most of its G20 presidency to promote free trade.[8]

○ The Coalition Government has energetically pursued trade agreements with Korea, Japan, China, and India – as well as larger trade deals, such as the Trans-Pacific Partnership. The Coalition Government has promoted the expansion of intellectual property rights – both domestically, and internationally. The Coalition Government have been willing to enter into investor-state dispute settlement clauses on a case-by-case basis.

○ The main opposition party – the Australian Labor Party- supported the passage of the Korea-Australia Free Trade Agreement 2014, subject to a number of reservations and caveats. The Opposition Leader Bill Shorten and the Shadow Minister for Trade Penny Wong commented upon the deal:

– Labor will support legislation implementing the Korea-Australia Free Trade Agreement (KAFTA) to create economic growth and jobs for Australians. KAFTA will give Australian exporters increased access to Korea and help maintain Australia's competitiveness with the United States, the European Union and others in the Korean market. It will be especially beneficial for Australia's agricultural industries. It will also support the food processing, manufacturing, transport and services industries. Agricultural sectors which stand to benefit include beef, sugar, dairy, wheat, wine and horticulture – these sectors employ more than 200,000 workers Labor believes the Abbott Government could – and should – have negotiated a better agreement with the Republic of Korea. However, the Opposition has carefully analysed the agreement and concluded that, on balance, it is in Australia's national interest… This demonstrates Labor's long-standing commitment to an open global trading system and the expansion of Australia's international trading opportunities – policies which create jobs and economic growth for the future.[9]

○ There were concerns within the party over the intellectual property chapter of the agreement. Shorten and Wong commented: 'The Opposition will determine its position on any changes to the Copyright Act when the details are made public.'[10] There was also significant reservations in respect of the investment chapter – particularly in light of the investor action by Philip Morris against the Australian Government over the plain packaging of tobacco products. Shorten and Wong observed: 'We remain opposed to the inclusion of Investor-State Dispute Settlement (ISDS) provisions in trade agreements and urge the Government to

8) The Hon. Tony Abbott, 'Address to the World Economic Forum, Davos, Switzerland', 23 January 2014, https://www.pm.gov.au/media/2014-01-23/address-world-economic-forum-davos-switzerland-0

9) The Hon. Bill Shorten and Senator Penny Wong, 'Labor Backs Korean Trade Deal to Support Jobs', Australian Labor Party, Press Release, 23 September 2014, http://www.pennywong.com.au/media-releases/labor-backs-korean-trade-deal-support-jobs/

10) Ibid.

reconsider the need for these provisions.'[11] They promised: 'In government, Labor would seek to negotiate with Korea for the ISDS provisions to be removed.'[12]

○ The Australian Greens have called for a fair trade policy. Senator Peter Whish–Wilson explained their opposition to the Korea–Australia Free Trade Agreement 2014 in these terms:

– This Free Trade Deal is designed to supercharge coal and gas exports to Korea by multi–national corporations at the expense of local industries and local communities. And with the inclusion of the controversial ISDS clauses, the Government has put the profits of the powerful corporations ahead of people. Last weeks the Greens and the Senate called for the Government to release their modelling of the winners and losers from this deal.Unlike the European Trade Commission, our Government is too arrogant to consult with those in the community who have concerns about ISDS provisions. All Australian parliamentarians should look closely at what powers they are handing over to shady international arbitration courts by signing up to ISDS provisions. The Productivity Commission sounded a warning over including ISDS provisions in trade agreements because of the impacts through regulatory chilling. No ISDS carve–outs or exemptions in existing trade agreements around the world have prevented governments being sued by corporations for simply making legislation in the name of their community. The Greens will not be supporting KAFTA in its current form because of the likely increase in coal and gas exports and because of the ISDS provisions. We should not trade away our sovereign rights and responsibilities to provide more coal and gas to Korea.[13]

○ The Australian Greens have been concerned about the impact of intellectual property upon access to knowledge, access to medicines, and technology transfer. The Australian Greens have been alarmed about the impact of investor–state dispute settlement upon the rule of law and democratic institutions in Australia.

○ In addition, the influential independent Senator Nick Xenophon has been concerned about the impact of the agreement upon the Australian economy.[14] He has commented: 'After a decade of signing FTAs in secret

11) The Hon. Bill Shorten and Senator Penny Wong, 'Labor Backs Korean Trade Deal to Support Jobs', Australian Labor Party, Press Release, 23 September 2014, http://www.pennywong.com.au/media–releases/labor–backs–korean–trade–deal–support–jobs/

12) Ibid.

13) The Australian Greens, 'Greens to Oppose Korea–Australia Free Trade Agreement over ISDS Provisions', Press Release, 17 February 2014, http://greens.org.au/node/3578

14) Senator Nick Xenophon, 'Why Australia Should be Hard–Headed About Bilateral Free Trade Deals', Blog, 22 September 2014, http://www.nickxenophon.com.au/blog/why–australia–should–be–hard–headed–about–bilateral–free–trade–deals/. See also Senator Nick Xenophon, 'Second Reading Speech on the Customs Amendment (Korea–Australia Free Trade Agreement Implementation) Bill 2014 and Customs Tariff Amendment (Korea–Australia Free Trade Agreement Implementation) Bill 2014', the Australian Senate, 1 October 2014, p. 100, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F4630d1fc–

and spruiking the dubious benefits to Australians, it's clear we require root–and–branch reform.'[15] Xenophon has maintained: 'We must require draft agreements to be brought to Parliament before our government signs–off.'[16] He argues: 'These FTAs must be open to scrutiny and independent verification, rather than secrecy and exaggeration.'Xenophon commented: 'KAFTA is possibly the worst of a bad bunch of Free Trade Agreements signed with countries including Malaysia, Thailand, Singapore, the US, Chile, New Zealand and others'. He was alarmed by the inclusion of an investor–state dispute settlement clause.[17]

○ This paper provides a critical examination of the intellectual property sections of theKorea–Australia Free Trade Agreement 2014.[18] Chapter 13 of the Korea–Australia Free Trade Agreement 2014 deals with the subject of intellectual property law. The Chapter covers such topics as the purposes and objectives of intellectual property law; copyright law; trade mark law; patent law; and intellectual property enforcement. The Joint Standing Committee on Treaties in the Australian Parliament highlighted the controversy surrounding this chapter of the agreement:

– The intellectual property rights chapter of KAFTA has drawn considerable attention from academics and stakeholders regarding the proposed need for changes to Australian intellectual property law and the inclusion of intellectual property in the definition of investment with regard to the investor–state dispute mechanism. Other concerns raised with the Committee include the prescriptive nature of the chapter, the lack of recognition of the broader public interests of intellectual property rights, and possible changes to fair use provisions.[19]

○ Article 13.1.1 of the Korea–Australia Free Trade Agreement 2014 provides that: 'Each Party recognises the importance of adequate and effective protection of intellectual property rights, while ensuring that measures to enforce those rights do not themselves become barriers to legitimate trade.' This is an unsatisfac–

e7c9–4b04–8c13–d1aa918c703f%2F0167%22

15) Ibid.

16) Ibid.

17) Ibid.

18) This analysis builds upon a number of my public policy submissions – includingMatthew Rimmer, 'Free Trade, Gangnam Style: The Korea–Australia Free Trade Agreement', InfoJustice, 11 December 2013, http://infojustice.org/archives/31701; Matthew Rimmer, 'A Submission to the Joint Standing Committee on Treaties on the Korea–Australia Free Trade Agreement (KAFTA)', Australian Parliament, 13 June 2014, http://works.bepress.com/matthew_rimmer/200/; and Matthew Rimmer, 'A Supplementary Submission to the Joint Standing Committee on Treaties on the Korea–Australia Free Trade Agreement', Australian Parliament, August 2014.

19) The Joint Standing Committee on Treaties, Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014), Canberra: Australian Parliament, 13 May 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_142

tory description of the objectives and purposes of intellectual property law in both Australia and Korea. There is a failure to properly consider the range of public purposes served by intellectual property law – such as providing for access to knowledge, promoting competition and innovation, protecting consumer rights, and allowing for the protection of public health, food security, and the environment. Such a statement of principles and objectives detracts from the declaration in the TRIPS Agreement 1994 of the public interest objectives to be served by intellectual property.

○ Chapter 11 of the Korea–Australia Free Trade Agreement 2014 is an investment chapter, with an investor–state dispute settlement regime. This chapter is highly controversial – given the international debate over investor–state dispute settlement; the Australian context for the debate; and the text of the Korea–Australia Free Trade Agreement 2014.In April 2014, the United Nations Conference on Trade and Development (UNCTAD) released a report on Recent Developments in Investor–State Dispute Settlement.[20] The overall figures are staggering. UNCTAD reports a significant growth in investment–state dispute settlement, across a wide array of different fields of public regulation.[21] Given the broad definition of investment,intellectual property owners will be able to use the investor–state dispute settlement regime in the Korea–Australia Free Trade Agreement 2014. This will have significant implications for all the various disciplines of intellectual property – including copyright law, trade mark law, and patent law.

Copyright Law

○ There has been much controversy over whether the Korea–Australia Free Trade Agreement 2014 had been hijacked to pursue domestic political ends in the copyright debate in Australia.

A. The Korea–Australia Free Trade Agreement 2014

○ Article 13.5 of the Korea–Australia Free Trade Agreement 2014 deals with the subject of copyright law.

20) United Nations Conference on Trade and Development (UNCTAD), 'Recent Developments in Investor–State Dispute Settlement: Updated for the Multilateral Dialogue on Investment', April 2014, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

21) Ibid. 7–9.

The regime reinforces a number of the TRIPS-Plus standards contained in the Australia-United States Free Trade Agreement 2004 and the Korea-United States Free Trade Agreement. The copyright regime proposed in the Korea-Australia Free Trade Agreement 2014 is one-sided and unbalanced. The regime is inordinately focused upon promoting stronger and longer copyright protection for copyright owners. There is a failure to consider other public objectives – such as consumer rights, access to knowledge, and freedom of speech.

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

○ There has been widespread judicial, scholarly, and economic criticism of copyright term extensions, and their impact upon innovation, competition, and cultural heritage. In the case of Golan v. Holder,[22] Justice Breyer of the Supreme Court of the United States's judgment in the 2012 Supreme Court of the United States case of Golan v. Holder[23] provides a lengthy discussion of the issue:

○ The statute creates administrative costs, such as the costs of determining whether a work is the subject of a "restored copyright," searching for a "restored copyright" holder, and negotiating a fee. Congress has tried to ease the administrative burden of contacting copyright holders and negotiating prices for those whom the statute calls "reliance part[ies]," namely those who previously had used such works when they were freely available in the public domain. § 104A(h)(4). But Congress has done nothing to ease the administra-

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

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

tive burden of securing permission from copyright owners that is placed upon those who want to use a work that they did not previously use, and this is a particular problem when it comes to "orphan works"—older and more obscure works with minimal commercial value that have copyright owners who are difficult or impossible to track down. Unusually high administrative costs threaten to limit severely the distribution and use of those works— works which, despite their characteristic lack of economic value, can prove culturally invaluable.

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

○ Article 13.5.13 of the Korea–Australia Free Trade Agreement 2014 provides: 'With respect to this Article and Articles 13.6 and 13.7, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, phonogram or broadcast, and do not unreasonably prejudice the legitimate interests of the right holder.' This seems a poorly drafted provision. Given that Korea and Australia have entered into trade agreements with the United States, both countries would benefit from a general, open–ended defence of fair use.In February 2014, the Australian Law Reform Commission led by Professor Jill McKeough released its groundbreaking report on Copyright and the Digital Economy.[24] The two–year–long law reform project was an independent, fair–minded piece of research, showing wide community consultation and industrious research into the case law and the literature on the topic. The report recommended a number of simplifications and revisions to the Australian copyright regime, so that it would be better suited for an age of broadband and cloud computing.The report recommended that 'The Copyright Act 1968 (Cth) should provide an exception for fair use.'[25] The Commission emphasized:

– Fair use also facilitates the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation. Fair use can be applied to a greater range of new technologies and uses than Australia's existing exceptions. A technology–neutral open standard such as fair use has

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

25) Ibid.

the agility to respond to future and unanticipated technologies and business and consumer practices. With fair use, businesses and consumers will develop an understanding of what sort of uses are fair and therefore permissible, and will not need to wait for the legislature to determine the appropriate scope of copyright exceptions.[26]

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

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

○ In respect of copyright exceptions, Korea has a hybrid system, with specific fair dealing exceptions (like Australia), and a general defence of fair use (like the United States).[27] Jaewoo Cho provides a useful sum–mary of Korea's reforms in respect of copyright exceptions.[28] Cho comments:

– The new amendment to the Korean Copyright Act, Article 35–3.1, states that works not falling into enumerated categories may be used in cases where "there is no conflict with the normal exploitation of copyrighted work and does not prejudice the legitimate interest of the copyright holder." The South Korean legislators suggested that this language provides the general guideline for determining whether a particular use falls under fair use. Then Article 35–3.2 provides four statutory factors to determining whether a particular use is fall in to this exception, which are almost the same assertion 107 of the U.S. Copyright Act.[29]

○ Cho suggests that 'this new South Korean copyright registration shows that it is not impossible to incorpo–

26) Ibid.

27) Copyright Act – Korea – Copyright Exceptions – English Translation http://elaw.klri.re.kr/eng_service/lawView.do?hseq=25455&lang=ENG

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

29) Ibid.

rate the three–step test with an open and flexible fair use clause'.[30] Cho observes: 'The South Korea fair use provision has clearly provided an enumerated list of permissible uses with the specific language from the three–step test, and then also provided flexibility by an open–ended list of permissible uses based on statutory factors when such uses are not found in the enumerated categories.'[31] Cho contends: 'This new South Korean fair use amendment challenges the theory that the three–step test is primarily designed to restrict this kind of copyright limitation.'[32]

○ Article 13.5.14 of the Korea–Australia Free Trade Agreement 2014 provides: 'Notwithstanding paragraph 13, neither Party shall permit the retransmission of television signals (whether terrestrial, cable or satellite) on the Internet without the authorisation of the right holder or right holders of the content of the signal and, if any, of the signal.' This provision seems controversial – given the policy debate over the retrans–mission of television signals. The Australian Law Reform Commission provides an extensive discussion of retransmission in Chapter 18 of its report on Copyright and the Digital Economy.[33] The Commission observed:

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

○ The Australian Law Reform Commission observed that the topic 'raises complex questions at the intersec–tion of copyright and communications policy.'[34] The Australian Law Reform Commission recommended 'that, in developing media and communications policy, and in the light of media convergence, the Australian Government consider whether the retransmission scheme for free–to–air broadcasts should be

30) Ibid.

31) Ibid.

32) Ibid.

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

34) Ibid.

repealed (other than in relation to self–help providers).'[35]

○ The Korea–Australia Free Trade Agreement 2014 fails to address the policy issues raised by the Australian Parliament's inquiry into IT Pricing.[36] This is problematic, given Korea's strengths in information technology and consumer electronics. Moreover, there has been a concern that information technology companies could use investor clauses to challenge any future reforms to IT Pricing.[37] The Harper Competition Review has recommended better scrutiny of intellectual property obligations in respect of trade agreements.[38]

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

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

– 9. Each Party shall provide for adequate legal protection and effective legal remedies against:

(a) the circumvention of any effective technological measures that control access to a protected work, performance, phonogram, broadcast or other subject matter, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that such person is pursuing that objective;

(b) the manufacture, import, distribution, offering to the public, provision, or otherwise trafficking of devices, products, or components, or the offering to the public, or provision of services, that:

35) Ibid.

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

37) Rohan Pearce, 'Concern over Copyright "Super–Powers" in Trade Agreement – the Korea–Australia Free Trade Agreement #KAFTA', Computer World Australia, 14 July 2014, http://www.computerworld.com.au/article/549917/concern_over_copyright_super_powers_free_trade_agreement/

38) For commentary, see Rohan Pearce, 'Harper Competition Review Recommends Scrutiny of Trade Agreement IP Clauses', Computer World, 22 September 2014, http://www.computerworld.com.au/article/555619/harper–review–recommends–scrutiny–trade–agreement–ip–clauses/

(i) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;

(ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or

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

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

○ There has been much policy debate[39] and litigation[40] over technological protection measures – so–called 'digital locks'. The position of Australia in respect of technological protection measures is complex – given that there is an undeniable tension between the leading ruling of the High Court of Australia in Stevens v. Sony,[41] and the legislative measures introduced after the Australia–United States Free Trade Agreement 2004, with the Copyright Amendment Act 2006 (Cth).

○ There has been much doubt as to whether technological protection measures have been an effective means of addressing copyright infringement and circumvention. In his latest book, Information Doesn't Want to Be Free, Cory Doctorow highlights the manifold problems with digital locks.[42] He notes that 'the technical

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

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

41) Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58.

42) Cory Doctorow, Information Doesn't Want to Be Free: Laws for the Internet Age, San Francisco: McSweeney's, 2014.

implausibility and unintended consequences of digital locks are big problems for digital–lock makers.'[43] He warns that 'digital locks turn paying customers into pirates.'[44]

○ In the High Court of Australia, Kirby J observed in Stevens v. Sony:

- In the Australian context, the inevitability of further legislation on the protection of technology with technological protection measures (TPMs) was made clear by reference to the provisions of, and some legislation already enacted for, the Australia–United States Free Trade Agreement. Provisions in that Agreement, and likely future legislation, impinge upon the subject matters of this appeal. Almost certainly they will require the attention of the Australian Parliament in the foreseeable future.
- In these circumstances, it is preferable for this Court to say with some strictness what s 10(1) of the Copyright Act means in its definition of TPM, understood according to the words enacted by the Parliament. If it should transpire that this is different from the purpose that the Parliament was seeking to attain (or if it should appear that later events now make a different balance appropriate) it will be open to the Parliament, subject to the Constitution, to enact provisions clarifying its purpose for the future. Moreover, the submissions in the present case, as it progressed through the courts, called to attention a number of considerations that may need to be given weight in any clarification of the definition of TPM in the Copyright Act. Such considerations included the proper protection of fair dealing in works or other subject matters entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia.[45]

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

○ There has also been much discussion about the efficacy of the electronic rights management information regime – although this regime has been rarely used.[46] Article 13.5.10 of the Korea–Australia Free Trade

43) Ibid., 31.

44) Ibid., 31.

45) Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58.

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

Agreement 2014 provides:

- Each Party shall provide for adequate legal protection and effective legal remedies against any person knowingly performing any of the following acts:
  (a) the removal or alteration of any electronic rights management information without authority; or
  (b) the distribution, importation for distribution, broadcasting, communication or making available to the public, without authority, of works or copies of the works or other subject matter protected under this Chapter knowing that electronic rights management information has been removed or altered without authority,
- if such person knows, or has reasonable grounds to know, that by doing so it is inducing, enabling, facilitating or concealing an infringement of any copyright or related rights as provided by the law of the Party.

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

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

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

○ The Korea–Australia Free Trade Agreement 2014also touches upon intermediary liability in respect of

copyright law.The National Interest Analysis makes a number of startling claims about copyright law. At Page 6, the National Interest Analysis makes the tendentious assertion:

– Consistent with Australia's existing obligations in the Australia–US and Australia–Singapore FTAs, and to fully implement its obligations under KAFTA, the Copyright Act 1968 will require amendment in due course to provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement due to the High Court's decision in Roadshow Films Pty Ltd v iiNet Ltd, which found that ISPs are not liable for authorising the infringements of subscribers.[47]

○ This statement is inaccurate and misleading, both in terms of domestic and international law. The High Court of Australia decision in Roadshow Films Pty Ltd v iiNet Ltd is line with historical precedents in respect of authorisation of copyright infringement.[48] It should also be noted that the matter did not deal with the safe harbour provisions introduced by 2004 amendments, following the Australia–United States Free Trade Agreement 2004. The High Court of Australia decision in Roadshow Films Pty Ltd v iiNet Ltd is consistent with Australia's international obligations in respect of copyright law.[49] There is nothing inconsistent in this decision with Australia's obligations in the Australia–United States Free Trade Agreement 2004, the Singapore–Australia Free Trade Agreement 2003, or the Korea–Australia Free Trade Agreement 2014. There is no pretext for overturning the ruling of the High Court of Australia under the guise of international law.

B. Submissions

○ The Coalition Government have been pushing for a dramatic expansion of copyright protection – both at a domestic level, and an international level. The Coalition Government has released a Discussion Paper for domestic copyright law reform.[50] This document contains three radical proposals – the expansion of liability for the authorisation of copyright infringement; new powers for copyright owners to block foreign infringing websites; and the revision of the safe harbours regime in respect of copyright law. The

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

48) Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012).

49) Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012).

50) Attorney–General's Department, Online Copyright Infringement: Discussion Paper, July 2014, http://www.ag.gov.au/Consultations/Documents/Onlinecopyrightinfringement/FINAL%20–%20Online%20copyright%20infringement%20discussion%20paper%20–%20PDF.PDF

Government have been heavily lobbied by political donors and supports – most notably, the film company, Roadshow,[51] and Rupert Murdoch's media empire, including News. Corp, News Limited, and Foxtel.[52]

○ Rupert Murdoch's News Corp. called for a copyright crackdown in its submission on the Korea–Australia Free Trade Agreement.[53] The company complained: 'The provisions of the [Copyright Act 1968] – although intended to do so – do not provide rights holders with means to protect rights online.'[54] News Corp lamented: 'The provisions are technology specific and ineffective in dealing with online copyright infringement as it manifests today, nor as it may manifest in the future'.[55] The company cited the clause, calling for 'legal incentives for online service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials.'[56] News Corp. also highlighted 'measures to curtail repeated copyright and related right infringement on the internet'.[57] News Corp contended:

– These paragraphs acknowledge the importance of creators and rights holders having workable and technology–neutral provisions to protect their rights online. They also recognise the clearly articulated domestic policy intentions of the government, and the importance of the copyright industries to the cultural fabric and economic performance of our nation.[58]

○ In conclusion, 'News Corp … looks forward to contributing to ensuring domestic copyright protection provisions function as intended, and the balance between obligation (secondary liability) and benefit (safe harbour) is re–established'.[59]

○ Music Rights Australia lobbied for expanded protection in respect of copyright under the Korea–Australia Free Trade Agreement 2014:

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51) Josh Taylor, 'Lobby Pushing for Australian Piracy Crackdown Donates Millions', ZDNet, 17 February 2014, http://www.zdnet.com/au/lobby–pushing–for–australian–piracy–crackdown–donates–millions–7000026421/

52) Glenn Dyer and Bernard Keane, 'How Much of the Murdoch Agenda has the Government Delivered?', Crikey, 20 November 2014, http://www.crikey.com.au/2014/11/20/how–much–of–the–murdoch–agenda–has–the–government–delivered/

53) Reported in Mark Sweney, 'News Corp Calls for Piracy Crackdown in Australia', The Guardian, 14 July 2014, http://www.theguardian.com/media/2014/jul/14/news–corp–piracy–rupert–murdoch–australia–internet

54) Ibid.

55) Ibid.

56) Ibid.

57) Ibid.

58) Ibid.

59) Ibid.

– There are currently no legal incentives in place to encourage online service providers to cooperate with copyright owners to address infringement on their networks. The section of the Act, which was intended to put in place the mechanisms which would facilitate this, does not function as it was intended to function. The section needs to be amended to address these inadequacies so that the relationship between section 101 and the 'safe harbour scheme' is realigned.[60]

○ Music Rights Australia also wished to 'express its support of the statements in Chapter 13 which recognise the importance of effective and adequate protection of intellectual property rights and which recognise that the parties are free to determine the appropriate method of implementing the provisions in the chapter.'[61]

○ Kimberlee Weatherall from the University of Sydney contended that the Korea–Australia Free Trade Agreement2014 posed no such obligations:

– In my view, the assertion in the NIA is simply incorrect. Australia does not have an obligation — under AUSFTA, or even under KAFTA if ratified — to impose liability on internet access providers for their users' copyright infringements… Australian law provides not merely incentives but requirements for ISPs to cooperate with legal proceedings that copyright owners might seek to bring against individual infringers through the mechanism of preliminary discovery. The fact that the form of cooperation incentivised by Australian law is not right holders' (currently) preferred form of cooperation does not put Australia in breach of AUSFTA.[62]

○ Weatherall had also more general concerns about the copyright regime.[63] She was concerned that the Korea–Australia Free Trade Agreement 2014 'locks in existing Australian IP law in ways that will constrain Australia's domestic flexibility to make IP and innovation policy.'[64] She feared that 'chapter 13 of KAFTA reflects a failure to analyse the Australian national interest in IP, and an unfortunate promulgation of a deeply flawed approach to negotiating IP chapters in trade agreements'.[65] She encouraged Australian policy–makers to review this approach: 'This committee has an opportunity to make findings as to the unde–

60) Music Rights Australia, 'Submission to the Joint Standing Committee on Treaties on the Korea–Australia Free Trade Agreement', Submission No. 53, 2014.

61) Ibid.

62) Josh Taylor, 'Korea–Australia Trade Agreement Signals New Piracy Laws', ZDNet.Com, 16 June 2014, http://www.zdnet.com/korea–australia–trade–agreement–signals–new–piracy–laws–7000030553/

63) Kimberlee Weatherall, 'Submission to the Joint Standing Committee on Treaties and the Senate Standing Committee on Foreign Affairs, Trade, and Defence on the IP Chapter of the Korea–Australia Free Trade Agreement', 2014, http://works.bepress.com/kimweather–all/29

64) Ibid.

65) Ibid.

sirability of this approach and provide important feedback to Australia's government, which sets negotiation policy, and Australia's trade negotiators, who are currently engaged in further similar negotiations at a plurilateral and bilateral level.'[66]

○ Dr Patricia Ranald of the Australian Fair Trade & Investment Network (AFTINET) addressed the question of copyright law in the trade agreement in her submission.[67] She observed: 'The National Impact Assessment shows that the KAFTA implementing legislation will require changes to the Copyright Act 1968 which will provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement of copyright by their

○ subscribers'.[68] In her view, 'This will nullify the High Court's decision in Roadshow Films Pty Ltd v iiNet Ltd, which found that ISPs are not liable for authorising the infringements of subscribers.'[69] Ranald was concerned: 'The introduction of legislation to nullify a High Court decision which would have the effect of greatly strengthening copyright law in favour of copyright holders is an issue of great public interest, not only to Internet service providers as an industry sector, but also to consumers.'[70] She commented: 'Such a proposal should be fully debated and rigorously scrutinised by the democraticparliamentary process, not presented as a done deal in legislation to implement a trade agreement.'[71]

○ Electronic Frontiers Australia expressed concerns about the approach in the Korea–Australia Free Trade Agreement to copyright law and the public interest.[72] The civil society group commented:

– KAFTA has much to say about recognising various forms of intellectual property, enforcing the exclusive rights of their owners and ensuring liability for those who infringe. Completely absent however are the balancing considerations of the public interest and fair use··· EFA believes the Australian Government has failed to act in the national interest – particularly for everyday Australian consumers of copyrighted material – by failing to also negotiate important aspects of IP policy that are required to complement

66) Ibid.

67) Australian Fair Trade and Investment Network, 'Submission to the Joint Standing Committee on Treaties Inquiry into the Korea–Australia Free Trade Agreement', 13 June 2014, p. 4.

68) Ibid., 4.

69) Ibid., 4.

70) Ibid., 4.

71) Ibid., 4.

72) Electronic Frontiers Australia, 'Submission to the Joint Standing Committee on Treaties Inquiry into the Korea–Australia Free Trade Agreement', 16 June 2014.

strong enforcement provisions. EFA denounces this omission and suggests that the rights of consumers must be included in future international agreements that concern IP.[73]

○ Commenting upon the push for a response to Roadshow Films Pty Ltd. v. iiNet Ltd,[74] EFA observed that 'trade agreements are an inappropriate means for the introduction of controversial or novel intellectual property policies such as these.'[75] The group recommended:'In future these discussions should be resolved publicly before they are proposed for international agreements.'[76] In conclusion, EFA expressed concerns about 'Australia's intellectual property obligations under KAFTA and about the manner in which the text has been drafted'.[77] The group despaired: 'EFA seeks to promote digital consumers' rights and believes that these are not adequately represented in KAFTA'.[78] The EFA called for greater transparency and consultation in the future: 'EFA recommends that in future the Australian Government looks into ways to consult more widely on negotiating positions for trade agreements in order to minimise poor outcomes for Australian consumers and businesses and allow negotiations to proceed with more confidence.'[79]

○ There was also a submission by the Australian Digital Alliance – which represents the United States search engine Google, in addition to libraries and universities.[80] The Alliance observed that 'there is no evidence of economic analysis, or indeed any analysis of the impact of the IP Chapter in KAFTA.'[81] The Alliance commented: 'No particular problems Australian rights holders currently experience were identified (and indeed, Australian copyright holders are already protected by the provisions of the Korea–US Free Trade Agreement courtesy of the principles of national treatment and most–favoured nation.)'[82] The Alliance that 'the potential issues of extending our international obligations and constraining our domestic policy space are not analysed, despite their adverse effects on areas such as education, cultural institutions, disability

73) Ibid.

74) Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012).

75) Electronic Frontiers Australia, 'Submission to the Joint Standing Committee on Treaties Inquiry into the Korea–Australia Free Trade Agreement', 16 June 2014.

76) Ibid.

77) Ibid.

78) Ibid.

79) Ibid.

80) Australian Digital Alliance, 'Submission to the Joint Standing Committee on Treaties on the Korea–Australia Free Trade Agreement', http://digital.org.au/sites/digital.org.au/files/documents/KAFTA%20–%20ADA%20submission%20to%20JSCOT.pdf

81) Ibid.

82) Ibid.

services, tech and innovation sectors and consumers.'[83]

○ Pirate Party Australia also expressed concerns about the intellectual property chapter, and the investment chapter of the Korea–Australia Free Trade Agreement 2014.[84] The civil society group warned that the 'further layering of IPR obligations substantially hinders future domestic law reform, while changes to Australia's intellectual property legislation as a result of international obligations have in the past imposed a net cost on Australia.'[85] Pirate Party Australia warned that 'KAFTA will require legislative change which, aside from previous negative experience, may be an attempt to avoid proper legislative debate in order to introduce controversial copyright amendments.'[86] The civil society group warned that there is 'insufficient evidence that Australia's own requirements and motivations have been taken into account in developing the IPR provisions of KAFTA.'[87]

C. The Joint Standing Committee on Treaties

○ The Chair of the Joint Standing Committee on Treaties was Wyatt Roy, a young up–and–coming member of the Liberal Party, being groomed for future leadership roles. He was generally enthusiastic about the Korea–Australia Free Trade Agreement 2014:

– The committee found that a range of benefits are likely to flow from the implementation of KAFTA for Australian businesses, industry and exporters. Apart from the direct value of tariff reductions, increased competitive advantage and potential future opportunities were identified as tangible positive results. Witnesses emphasised the importance of the agreement in protecting our competitive edge in the Korean market as Korea signs free trade agreements with our major competitors, including the United States, European Union, Chile and ASEAN countries.[88]

○ Roy did note that there was community concern about both the intellectual property chapter and the

83) Ibid.

84) Pirate Party Australia, 'Submission to the Joint Standing Committee on Treaties on the Korea–Australia Free Trade Agreement', 20 June 2014, http://pirateparty.org.au/media/submissions/PPAU_2014_JSCT_KAFTA.pdf

85) Ibid., 4.

86) Ibid., 4.

87) Ibid., 4.

88) The Hon. Wyatt Roy, 'The Joint Standing Committee Treaties Report on the Korea–Australia Free Trade Agreement 2014', 4 September 2014, http://www.wyattroy.com.au/speech–benefits–will–flow–korea–australia–free–trade–agreement/

investment chapter of the Korea-Australia Free Trade Agreement 2014: 'In particular, the perceived dangers associated with the inclusion of an investor-state dispute settlement mechanism in the agreement and possible changes to intellectual property rights'. He also acknowledged: 'More generally, some dissatisfaction with the treaty-making process in Australia was drawn to our attention'.[89] Nonetheless, Roy seemed unwilling to take any substantive or procedural action in respect of the problems of treaty-making: 'We recognise the constitutional constraints on the process in Australia and we highlight the improvements that have been made over the last two decades.'[90]

○ The Coalition Majority of the Joint Standing Committee on Treaties was lukewarm about the intellectual property chapter of the Korea-Australia Free Trade Agreement 2014:

- The Committee notes ongoing concerns regarding the inclusion of intellectual property rights in FTAs. While it is not in a position to comment on the legal argument it does understand the need for flexibility to respond to the fluid nature of many areas affected by intellectual property rights. A less prescriptive approach may be beneficial and forestall future difficulties in responding to ongoing social and technological change. The Committee notes concerns over the lack of recognition of the broader public interest in the intellectual property provisions in KAFTA regarding access to knowledge and information and suggests that the interests of both non-rights holders and rights-holders need protection.[91]

○ The Coalition led- Committee also noted 'the Productivity Commission's recommendation that the costs and benefits of changes to intellectual property rights resulting from intellectual property provisions in trade agreements should be modelled on a stand-alone basis so that the broader benefits of reduced tariff barriers can be assessed.'[92] The backbenchers suggested: 'Given the concerns identified in the report regarding the transparency of these agreements and the inclusion of intellectual property provisions in such agreements, this modelling might usefully increase public confidence in the merits of future agreements.'[93]

○ In the Joint Standing Committee on Treaties, Kelvin Thomson MP and Melissa Parke MP of the Australian

89) Ibid.

90) Ibid.

91) The Joint Standing Committee on Treaties, Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014), Canberra: Australian Parliament, 13 May 2014, 44, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_142

92) Ibid., 45.

93) Ibid., 45.

Labor Party wrote a dissenting report.[94] The politicians highlighted the Labor Party's National Platform on copyright law:

- Labor will vigorously oppose any WTO rules or other trade agreements, interpretations or proposals or other trade agreements that would require Australia to privatise its health, education and welfare sectors, undermine the Pharmaceutical Benefits Scheme, reduce government rights to determine the distribution of government funding within these sectors, or which would require us to remove protection of our cultural industries. Labor will oppose attempts to privatise water services under WTO rules. As part of Australia's forward trade objectives Labor believes that federal, state, territory and local governments should retain the flexibility to implement effective policies to encourage industry development, research and development, regional development and appropriate environmental, employment and procurement standards. Labor will not support the expansion of intellectual property rights, which would extend monopoly patent rights to charge higher prices and would give copyright holders greater rights, at the expense of consumers.[95]

○ The pair made a number of recommendations. The two insisted that 'Australia's negotiating stance on intellectual property should depend on an assessment of Australia's national interest, based on evidence not assumption, and be informed by analysis focused specifically on (a) whether Australian stakeholders are experiencing specific issues in IP in the other negotiating Party or Parties, (b) whether those issues can be (best) addressed through a trade agreement, and (c) the impact of any solutions on Australian interests, including the interests of other stakeholders and the broader public interest in freedom to make innovation policy.'[96] The dissenting report observed: 'The Committee should not support the many constraints which chapter 13 of KAFTA places on Australian innovation and IP policy–making.'[97]

○ The dissenting report also rejected the Coalition Government's assertions about copyright law and intermediary liability:

- The Committee should reject the assertion in the National Interest Analysis that Australia's existing free trade agreements with Singapore and the US, and KAFTA chapter 13, require reversal of the High Court's decision in Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16. Australia does not have an obligation to

94) The Joint Standing Committee on Treaties, Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014), Canberra: Australian Parliament, 13 May 2014, 54–55, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_142

95) Ibid., 54.

96) Ibid., 55.

97) Ibid., 55.

impose liability on internet access providers for their users' copyright infringements.[98]

○ The dissenting report also observed: 'The Parliament should oppose the amendment of the Copyright Act 1968 to nullify the High Court's decision in Roadshow Films Pty Ltd versus iiNet Ltd.'[99] Thomson and Parke commented: 'Such a major change should be proposed and debated through the normal Parliamentary process, not rushed through Parliament as part of implementing legislation for a trade agreement.'[100]

○ The Australian Labor Party Member for Gellibrand, Tim Watts, commented upon copyright law and the Korea–Australia Free Trade Agreement.[101] He observed: 'Against these benefits we're left to ponder the costs of trade diversion, new intellectual property obligations and the introduction of investor–state dispute settlement mechanisms.'[102]

○ Watts was critical of the lack of consultation around the Korea–Australia Free Trade Agreement 2014. He commented: 'It may be that DFAT is more forthcoming with stakeholders with more traditional trade law concerns – but where DFAT is asked to engage with the complex implications of changes to intellectual property law on industry, engaging with DFAT's consultation process feels like talking to a black hole where submissions and representations are made but very little of substance ever comes back in the other direction.'[103] Watts noted: 'It was clear from this inquiry that the overall level of satisfaction with DFAT's consultation process, particularly within the technology and intellectual property sector, is extremely low.'[104]

○ Citing his first speech in the Australian Parliament,[105] Watts commented: 'I am opposed to the unthinking expansion of IP for the same reason that I support free trade – I believe that competition improves the

98) Ibid., 55.

99) Ibid., 55.

100) Ibid., 55.

101) The Hon. Tim Watts, 'Additional Comments on the Joint Standing Committee on Treaties' Report on the Korea–Australia Free Trade Agreement', 3 September 2014, http://www.timwatts.net.au/kafta

102) Ibid.

103) Ibid.

104) Ibid.

105) The Hon. Tim Watts, 'First Speech', the House of Representatives, Australian Parliament, 2 December 2013, http://www.aph.gov.au/Senators_and_Members/Members/FirstSpeeches/Watts

price, quality and diversity of products available to consumers'.[106] He was concerned about the implications of the agreement for competition:'I believe monopolies – whether created by trade barriers or legislation – are generally not in consumer interest.'[107] Watts maintained: 'There ought to be a clear weighing of costs and benefits before we go about expanding the scope of a private statutory monopoly – particularly via the one–way ratchet of a trade agreement.'[108] He lamented: 'Unfortunately, this treaty is just such another example of the 'unthinking' expansion of intellectual property rights that I warned against in my first speech.'[109]

○ Watts was particularly critical of how the Federal Government sought to pursue its domestic copyright agenda through the guise of a trade agreement, saying: 'The IP section of the treaty is also one of the more mendacious examples of policy laundering that I've seen in recent times.'[110] He observed that the National Interest Analysis for the KAFTA was 'frankly wrong at law.'[111] Watts commented: 'The High Court's decision in Roadshow Films Pty Ltd v iiNet Ltd, did not find "ISPs are not liable for authorising the infringements of subscribers" – it simply found that a lower court's decision that given the facts of the case, iiNet fell within the protection of the Copyright Act's safe harbour provisions, was correct at law.'[112] In its response to his question on notice, DFAT responded that 'the High Court's decision in Roadshow Films Pty Ltd v iiNet Ltd, substantially limited the circumstances in which ISPs will be found liable for authorising the infringements of subscribers'.[113] Watts commented: 'So – between the NIA and this response from DFAT, we've moved from the iiNet decision finding that ISPs are not liable for authorising infringements to a statement that the decision "substantially limited the circumstances in which ISPs will be found liable".'[114] He responded: 'The High Court's decision did not change anyone's legal rights or obligations.'[115] Watts noted

106) The Hon. Tim Watts, 'Additional Comments on the Joint Standing Committee on Treaties' Report on the Korea–Australia Free Trade Agreement', 3 September 2014, http://www.timwatts.net.au/kafta

107) Ibid.

108) Ibid.

109) Ibid.

110) Ibid.

111) Ibid.

112) Ibid.

113) Ibid.

114) Ibid.

115) Ibid.

that the decision 'merely confirmed the scope of these obligations, as understood by the industry for almost a decade, given a fact set.' [116]

○ Watts insisted: 'The House should be under no illusions – the terms of the authorisation liability safe harbour provisions have not changed in law since the implementation of the AUSFTA.'[117] He stressed: 'What is really going on here is what trade law commentators have recently begun describing as 'policy laundering'.'[118] Watts warned of 'the use of trade obligations (or in this case a bizarre interpretation of our trade obligations), to circumvent democratic debate over the merits of a policy initiative.'[119]

○ The Australian Labor Party's Jim Chalmers – the Shadow Parliamentary Secretary for Trade and Investment – also outlined his reservations on intellectual property in the trade agreement.[120] He questioned whether the agreement requires changes in respect of copyright law and intermediary liability. Jim Chalmers commented: 'The so-called 'requirement' was questioned by witnesses before both parliamentary inquiries, and even the Attorney-General's Department described it as more of a 'risk assessment'.'[121] He observed: 'I can confirm that Labor reserves its right to determine its position on any proposed changes to the Copyright Act, once published or introduced to the parliament, based on their policy merit or otherwise'.[122] Thus, there could be further debate on the issue when implementing legislation is introduced in Australia for the Korea-Australia Free Trade Agreement 2014.

○ In its dissenting report, the Australian Greens commented:

– The majority report provides a summary of the opposition to the Intellectual Property provisions in KAFTA between paragraphs 4.23 – 4.36. It appropriately sums up the concerns raised in submissions and by witnesses at the hearings. However it is disappointing that the committee has decided not to engage at all with these criticisms including the potential threat to access to reasonably priced medicines and failure of the agreement to not recognise the broader public interest in access to knowledge and

116) Ibid.

117) Ibid.

118) Ibid.

119) Ibid.

120) The Hon. Jim Chalmers, 'Labor will support KAFTA, but not without reservations', House of Representatives, Australian Parliament, 23 September 2014, http://www.jimchalmers.org/#!Labor-will-support-KAFTA-but-not-without-reservations/c189z/0D2ED1FA-6E80-429B-B135-F61FD5412FA4

121) Ibid.

122) Ibid.

information.[123]

○ The Australian Greens commented: 'The majority report's recommendations don't assert anything about how the Government should address these concerns and it has not specifically identified which areas of the KAFTA intellectual property (IP) chapter have been identified by witnesses as going against the national interest.'[124]

○ The Australian Greens commented: 'The majority report fails to recognise or even comment on the fact that previous Parliamentary committees, the Productivity Commission and IP Australia have all asserted the importance of cost benefit analysis for trade agreements and IP.'[125] The Australian Greens lamented: 'The Regulation Impact Statement (RIS) and the National Interest Analysis (NIA) provide no comment on the impact of the IP chapter in this trade agreement on the broader public interest in access to knowledge and information.'[126] The Australian Greens lamented the lack of scrutiny: 'It is about time JSCOT used its position seriously as an oversight mechanism for trade agreements.'[127] The Australian Greens observed: 'If the Parliament is going to be treated seriously by the executive it needs to produce critical recommendations based on both the benefits and negative aspects of agreements.'[128]

D. The Senate Standing Committee on Foreign Affairs, Trade, and Defence

○ The Senate Standing Committee on Foreign Affairs, Trade, and Defence also undertook an inquiry into the Korea–Australia Free Trade Agreement 2014.[129] The majority report – chaired by Labor – expressed reservations about the content of the agreement:

– The intellectual property (IP) chapter in KAFTA was negotiated 'a few years ago' and does not appear to

123) The Joint Standing Committee on Treaties, Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014), Canberra: Australian Parliament, 13 May 2014, 65.

124) Ibid., 65.

125) Ibid., 65.

126) Ibid., 66.

127) Ibid., 66.

128) Ibid., 66.

129) Senate Standing Committee on Foreign Affairs, Defence, and Trade, 'The Korea–Australia Free Trade Agreement (KAFTA)', 1 October 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea–Australia_Free_Trade_Agreement/Report

have been substantially reconsidered since. It does not appear that this chapter was checked or updated close to the time of finalisation of the entire agreement. This is a matter of concern, given the apparent lack of consultation on IP issues and the relatively fast moving pace of technology in this area.

– The justifications made during the inquiry that the IP obligations of the treaty text merely replicate existing domestic Australian law or existing treaty obligations raise the question of the rationale for their inclusion. It is not clear on the evidence available to the committee why the IP provisions were considered a necessary part ofKAFTA.[130]

○ The Committee noted: 'IP protection provides an incentive for creativity, but can also operate to hamper innovation and cause economic harm'.[131] The Committee observed: 'KAFTA includes IP provisions which DFAT has acknowledged, in many cases, are 'differently worded' but maintains these IP provisions are 'consistent with current Australian law, and outcomes negotiated in other FTAs'.'[132] The Committee commented: 'This position was disputed during the inquiry.'[133] The Committee concluded: 'The view of the committee is that the provisions in KAFTA appear to have incrementally expandedsome of Australia's treaty obligations in relation to IP protection.'[134]

○ The Committee recommended that the Australian Government 'provide clarity on proposed changes to copyright and assurance that any proposed changes as a result of the Korea–Australia Free Trade Agreement will not create adverse impacts for intellectual property owners or users.'[135] The Committee wanted to 'retain harmony in future trade agreements by limiting intellectual property provisions to Australia's obligations under specific intellectual property related multilateral agreements only and retain policy space to make changes to Australia's domestic intellectual property laws in the future.'[136] The Committee wanted the Department of Foreign Affairs and Trade to ensure 'that the potential impact of intellectual property provisions in trade agreements is properly assessed and, in particular, give consideration to the recommendations of the Productivity Commission.'[137]

130) Ibid., 52.
131) Ibid., 52.
132) Ibid., 52.
133) Ibid., 52.
134) Ibid., 52.
135) Ibid., 55.
136) Ibid., 55.
137) Ibid., 55.

○ The Australian Greens voiced their concerns about the Korea–Australia Free Trade Agreement 2014.[138] They recommended that the Senate refuse to pass KAFTA enabling legislation until investor–state dispute settlement clauses were removed from the agreement.[139] The Australian Greens also recommended that the Parliament refuse to pass KAFTA enabling legislation until an independent cost–benefit analysis of the intellectual property provisions in KAFTA had been carried out, and appropriately assessed by the Australian Parliament.[140]

○ However, the Coalition Senators – Senator David Fawcett and Senator Chris Back – protested that the Korea–Australia Free Trade Agreement 2014 would have a positive outcome for the Australian economy:

– The Korea–Australia Free Trade Agreement (KAFTA) represents a positive outcome for Australia. The evidence received from Australian companies and peak business organisations during the inquiry highlighted the benefits that will accrue for the Australian economy. While the reduction in tariffs will place some additional competitive pressure on certain sectors, it will also result in more competitive pricingof items which Australians consume. In particular, KAFTA restores Australia's competitive position as an exporting nation in relation to the United States, Canada and other countries which have reached, or are about to conclude, trade agreementswith Korea. Timely ratification of KAFTA will potentially provide two initial tariff reductions, one on ratification and another at 1 January 2015, expanding theopportunities for Australian businesses in this important high–value marketplace.

○ The Coalition senators disagreed with 'two of the majority report's recommendations – the recommendation to initiate discussions with Korea for a side letter to limit the scope of the investor state dispute settlement (ISDS) provisions and the recommendation for the Australian Government not to agree to ISDS provisions in future trade agreements.'[141] The Coalition senators recommended that 'prompt binding treaty action be taken in relation to the Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea.'[142]

138) Ibid., 61–68.

139) Ibid., 67.

140) Ibid., 68.

141) Ibid., 59.

142) Ibid., 59.

Trade Mark Law, Tobacco Control, and Plain Packaging of Tobacco Products

○ The Korea-Australia Free Trade Agreement 2014 (Cth) also provides protection in respect of trade mark law and related rights. There has been much controversy over whether tobacco companies will rely upon the intellectual property chapter and the investment chapter to challenge tobacco control measures – such as graphic health warnings, and the plain packaging of tobacco products.

A. Korea-Australia Free Trade Agreement

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

– Article 6bis of the Paris Convention for the Protection of Industrial Property, done at Paris on 20 March 1883, shall apply, mutatis mutandis, to goods or services that are not identical or similar to those identified by a well-known trademark,[143] whether registered or not, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark, and provided that the interests of the owner of the trademark are likely to be damaged by such use.

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

○ Chapter 13.3 encourages co-operation on intellectual property enforcement. Article 13.3.1 provides: 'The Parties shall cooperate and collaborate with a view to ensuring protection of intellectual property rights and that such protectionis consistent with promoting trade in goods and services between the Parties, subject to their respective laws, regulations and policies. Such cooperation may include:(a)exchangeof information concerning infringement of intellectual property rights between relevant agencies responsible for the enforcement of intellectual property rights;(b) promotion of contacts and cooperation among their respective agencies,including enforcement agencies, educational institutions and other organisations with an

143) The Article has this footnote: 'For the purposes of determining whether a trademark is well-known, neither Party shall require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.'

interest in the field of intellectual property rights; and(c) sharing information and experiences on relations of the Parties with non–Parties on matters concerning intellectual property rights.' Article 13.3.2 provides that 'A Party shall, on request of the other Party, give proper consideration to any specific cooperation proposal made by the other Party relating to the protection and enforcement of intellectual property rights.' There has been quite a bit concern about the use of voluntary standards and soft law measures in respect of co–operation to push for higher standards of intellectual property protection.

○ Article 13.4 deals with internet domain names and cybersquatting. Article 13.4.1 provides: 'Each Party shall require that the management of its country–code top–level domain (hereinafter referred to as "ccTLD") provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain–Name Dispute–Resolution Policy.' Article 13.4.2 provides: 'Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of domain–name registrations in accordance with its law regarding protection of personal data.'

○ Article 13.9 addresses the enforcement of intellectual property rights. There are a number of clauses, which specifically address trademark counterfeiting. Articles 13.9.6 to 13.9.10 deal with civil and administrative procedures and remedies in respect of trademark counterfeiting. Articles 13.9.18 to 13.9.24 address special border measures – including in respect of trademark counterfeiting. Articles 13.9.25 to 13.9.27 deal with criminal procedures and remedies in respect of trade mark counterfeiting. Such measures are controversial – given that they echo many of the measures proposed in the discredited Anti–Counterfeiting Trade Agreement.[144]

○ Notably, the Australian wine industry has relied upon trade mark protection and geographical indications in respect of its products.[145] The Australian Winemakers Federation was enthusiastic about the export of wines under the Korea–Australia Free Trade Agreement 2014.[146] The Federation commented:

144) See Matthew Rimmer, 'Trick or Treaty? The Australian Debate over the Anti–Counterfeiting Trade Agreement (ACTA)', in Pedro Roffe and Xavier Seuber (ed.), The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath, Geneva: International Centre for rade and Sustainable Development, and Cambridge: Cambridge University Press, 2014, http://www.amazon.ca/The–ACTA–Plurilateral–Enforcement–Agenda/dp/1107678625

145) Matthew Rimmer, 'The Grapes of Wrath: the Coonawarra Dispute, Geographical Indications and International Trade', in Andrew Kenyon, Megan Richardson, and Sam Ricketson (ed.), Landmarks in Australian Intellectual Property Law, Cambridge: Cambridge University Press, 2009, p. 209–232.

146) Winemaker's Federation of Australia, 'Submission to the Joint Standing Committee on Treaties on the Free Trade Agreement between

– Australia is the sixth-largest wine exporter to South Korea. Australian sparkling, red andwhite wines are currently subject to a tariff of 15 per cent but wine from the US, EU and Chile enter duty free. The FTA will provide a boost to the wine industry, whose exports to Korea have been steadily decreasing since 2007. With this deal, Australian wines have the best chance to take advantage of a growing market.[147]

○ The Australian Winemakers Federation was also a supporter of the inclusion of investor-state dispute settlement in the Korea-Australia Free Trade Agreement 2014: 'From a wine sector perspective, inclusion of investor state provisions in FTAsgive some protection against sovereign risk due to the introduction of social engineering policies and legislation.'[148]

B. Australia's Plain Packaging of Tobacco Products

○ Australiais a world leader in respect of tobacco control. Under the leadership of Prime Minister Julia Gillard, Australia undertook an 'Olive Revolution' and introduced plain packaging for tobacco products.[149] Melanie Wakefield, Linda Hayes, Sarah Durkin, and Ron Borland commented:

– From 1 September 2012, all tobacco manufactured for sale in Australia was required to be contained in plain dark brown packs, with 75% front-of-pack graphic health warnings and the brand name and variant limited to a standardised font size and type. This requirement supplanted Australian legislation that had required 30% front-of-pack graphic health warnings since 2006. The new plain packs with larger warnings began appearing for sale at retail outlets early in October and increasingly so during November, since from 1 December 2012, all tobacco sold at retail outlets was required to be contained in plain packs. The roll-out period of the new packs was accompanied by a nationally televised mass media campaign throughout November, promoting several serious harms of smoking that were also featured on the larger pack health warnings, including blindness, lung cancer and pregnancy-related harm. Other health warnings featured in the larger pack health warnings were peripheral vascular disease (gangrene), mouth (tongue) cancer and improvements to health from quitting.[150]

Australia and Korea', 13 May 2014.

147) Ibid., 1.

148) Ibid., 2.

149) Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.)Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues, London and New York: Routledge, 2014, 337-360.

150) Melanie Wakefield, Linda Hayes, Sarah Durkin, and Ron Borland, 'Introduction Effects of the Australian Plain Packaging Policy on Adult Smokers: A Cross-Sectional Study' (2013) 3 (7) BMJ Open10.1136/bmjopen-2013-003175

○ The conflict over plain packaging of tobacco products in Australia has been well–documented by the tobacco control experts, Simon Chapman and Becky Freeman.[151]

○ In response, the tobacco industry has sought to challenge the validity and the legitimacy of the plain packaging of tobacco products – through political lobbying; public relations campaigns; litigation; state–investor clauses; and trade agreements.

○ In the case of JT International SA v Commonwealth of Australia;British American Tobacco Australasia Limited v. The Commonwealth, the High Court of Australia rejected a challenge by the tobacco industry to the Australian regime for the plain packaging of tobacco products under the Australian Constitution by a majority of six to one.[152] This case is an important precedent in respect of constitutional law, intellectual property, and public health.

○ First, the High Court of Australia emphasized that the use of public health warnings was commonplace. In her judgment, Kiefel J observed: 'Many kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm'.[153] She stressed: 'The labelling required for medicines and poisonous substancescomes immediately to mind'.[154] She also observed: 'Labelling is also required for certain foods, to both protect and promote public health.'[155] Kiefel J emphasized: 'In recent decades, there has been a progressive restriction of the promotion of tobacco products, which, although remaining legal to sell and use, have been recognised as seriously harmful to the health of those using them'.[156] She noted: 'The Commonwealth and the plaintiffs are agreed that one consequence of the level of restriction of advertising of tobacco products has

151) Simon Chapman and Becky Freeman, Removing the Emperor's Clothes: Australia and Tobacco Plain Packaging, Sydney: University of Sydney Press, 2014, http://ses.library.usyd.edu.au/handle/2123/12256

152) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

153) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

154) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

155) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

156) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

been that the packaging of these products has become the main means of their promotion.'[157]

○ Second, the High Court of Australia stressed that the role of intellectual property law was to provide negative rights, not positive rights. Summarizing his decision, French CJ emphasized that the plain packaging regime supported the larger public purposes of intellectual property and public health:

○ There is no expansion in rights, interests, or benefits accruing to the Commonwealth that corresponds to or bears any relationship to the restrictions imposed on the use of the plaintiffs' intellectual property rights. The fact that the restrictions and prohibitions imposed by the Tobacco Plain Packaging Act 2011 (Cth) create the "space" for the application of Commonwealth regulatory requirements as to the textual and graphical content of tobacco product packages does not constitute such an accrual. Rather, it reflects a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs. The scheme does that without effecting an acquisition.[158]

○ French CJ commented: 'In summary, the Tobacco Plain Packaging Act 2011 (Cth)is part of a legislative scheme which places controls on the way in which tobacco products can be marketed'.[159] His Honour observed: 'While the imposition of those controls may be said to constitute a taking in the sense that the plaintiffs' enjoyment of their intellectual property rights and related rights is restricted, the corresponding imposition of controls on the packaging and presentation of tobacco products does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition'.[160]

○ Third, the High Court of Australia held by a majority that the plain packaging of tobacco products did not constitute an acquisition of property. Hayne and Bell JJ commented on the legislative package:

157) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

158) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

159) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

160) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

○ The Tobacco Plain Packaging Act 2011 (Cth)neither permits nor requires the Commonwealth to use the packaging as advertising space. The Commonwealth makes no public announcement promoting or advertising anything. The packaging will convey messages to those who see it warning against using, or continuing to use, the product contained within the packaging. Statutory requirements for warning labels on goods will presumably always be intended to achieve some benefit: usually the avoidance of or reduction in harm. But the benefit or advantage that results from the tobacco companies complying with the Tobacco Plain Packaging Act 2011 (Cth)is not proprietary. The Commonwealth acquires no property as a result of their compliance with the Tobacco Plain Packaging Act 2011 (Cth).[161]

○ The judges held: 'The Tobacco Plain Packaging Act 2011 (Cth)is not a law by which the Commonwealth acquires any "interest in property, however slight or insubstantial it may be."'.[162] The judges stressed: 'The Tobacco Plain Packaging Act 2011 (Cth)is not a law with respect to the acquisition of property'.[163]

○ Finally, the High Court of Australia laid down reservations about the limits and the boundaries of the decision. Hayne and Bell JJ noted:

– In the present cases, the tobacco companies argued that the Commonwealth acquired the use of, or control over, the retail packaging in which tobacco will be sold to convey health messages. Framing the argument in that way necessarily drew attention to an understanding of property that places in the foreground the identification of the interest in the tangible or intangible object in question and the legal relation which should be described as "property" between that object and the person alleged to have acquired "property". Other cases, perhaps many other cases, may require the same kind of analysis. But there may be cases in which an analysis of that kind will not be helpful. It is the constitutional text and the fundamental principles based on that text which must guide consideration of the issue.[164]

○ Thus there is a need to be cautious about extrapolating from the decision on the plain packaging of tobacco products to other contexts – such as the debates in respect of food, soft drink, and nutrition labelling.[165]

161) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

162) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

163) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

164) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5 October 2012).

165) JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43 (5

○ There has been some debate as to whether the decision of the High Court of Australia will be influential or significant in the international trade debate.

C. The Republic of Korea's Tobacco Control Measures

○ Tobacco control scholars have been concerned that tobacco companies have sought to create greater demand for foreign brands in South Korea, in the wake of market liberalisation.[166] Lee, Lee, and Holden comment: 'The continued liberalisation of tobacco markets worldwide, prompted by regional and bilateral trade agreements, remains a key driver in the ongoing globalisation of the tobacco industry.'[167]

○ Notably, the Korea Tobacco and Ginseng Corporation has sought to frustrate and undermine the implementation of the WHO Framework Convention on Tobacco Control.[168] The company has argued that the 'Convention must also recognize and protect the tobacco industry's right to engage in a minimum level of advertising or marketing that will be necessary to introduce new tobacco products to the market, or other similar marketing activity for securing consumer awareness.'[169] Such a stance would appear to oppose the introduction of graphic health warnings, and plain packaging of tobacco products.

○ In a country note, the OECD has expressed concerns about the high level of tobacco use in Korea.[170] The OECD recommended that there was a need for stronger tobacco control measures in China:

- Smoking rates are still high and 23.2% of adults smoke daily, above the OECD average of 20.9% in 2011, even though the country has implemented a number of anti-smoking policies such as smoking ban, advertisement and sales restriction, public awareness building and an increase in tobacco tax. Australia which has reduced the smoking rate to one of the lowest in the OECD at 15.1% in 2010, has introduced

October 2012).

166) Sungkyu Lee, Kelley Lee, and Chris Holden, 'Creating Demand for Foreign Brands in a "Home Run" Market: Tobacco Company Tactics in South Korea Following Market Liberalisation' (2012) 23 Tobacco Control http://tobaccocontrol.bmj.com/content/23/3/e8.full?sid=e5be420c-aad8-450e-bcc8-87b9163f7df9

167) Ibid.

168) 'Comments of the Korea Tobacco and Ginseng Corporation on the Provisional Text of the Proposed Draft Elements for the WHO Framework Convention on Tobacco Control', http://www.who.int/tobacco/framework/public_hearings/korea_tobacco_and_ginseng_corp.pdf

169) Ibid.

170) OECD, 'Cancer Care: Assuring Quality to Improve Survival. Country Note: Korea', 2013, http://www.oecd.org/els/health-systems/Cancer-Care-Korea-2013.pdf

smoke–free legislation for all enclosed areas, restrictions on tobacco industry marketing including plain packaging and high tobacco tax. Korea also needs to implement more strict and comprehensive anti–smoking policies. Furthermore, comprehensive strategies with long–term vision and government support are needed to reduce other lifestyle risk factors for cancer and they need to involve all stakeholders such as industry, the entire population (including children and their parents), and health care providers in the society.[171]

○ It is notable that the OECD pointed out that Korea could emulate a number of the tobacco control measures of Australia.

○ South Korea's state health insurer has taken legal action against tobacco firms.[172]

○ South Korea should consider adopting the plain packaging of tobacco products. In a piece for the Korea Times, Choi Bo–ryoung considered tobacco control measures in South Korea.[173] While applauding the introduction of tax rises on cigarettes, she despaired about the lack of regulation of tobacco packaging in South Korea:

– Korea may seem behind the times when it comes to tobacco policy and attitudes toward smoking. Notably, the packaging of cigarettes is almost completely unrestrained in Korea. The almost total lack of restraint is perhaps best illustrated by the experience of walking into any convenience store in Korea. Step through the door, and rows and rows of neatly aligned cigarettes — a veritable medley of colors, sophisticated names and creative designs — will immediately catch the eye. There may be a bright purple sign next to the counter brazenly announcing "First Experience" — the tagline for a "pocket" pack containing only 14 cigarettes, a starter kit for beginner smokers. With the relatively low prices, high availability, stylish packaging and wide variety of cigarettes, it's little wonder that so many, of all ages, take up the habit. What they cannot know is that such attractive packaging, visually pleasing displays and enticing advertising is increasingly becoming unusual and inappropriate in many parts of the world.[174]

○ Choi Bo–ryoung argued that Korea should join the plain packaging revolution: 'Australia, Canada, France, India, Ireland and the United Kingdom are among the countries whose governments have adopted, or are considering adopting, regulations requiring what is known as"plain packaging" — the standardization of

171) Ibid.

172) BBC, 'South Korea's State Health Insurer Sues Tobacco Firms', BBC News, 14 April 2014, http://www.bbc.com/news/business–27017629

173) Choi Bo–ryoung, 'Adopt Plain Packaging for Cigarettes', Korea Times, 21 November 2014, https://www.koreatimes.co.kr/www/news/opinon/2014/11/162_168420.html

174) Ibid.

cigarette packs to have the same, controlled design.'[175] She observed that 'Plain packaging is likely to become common worldwide' and 'there is no good reason to make cigarettes attractive.'[176] Choi Bo-ryoung commented that 'Korea has one of the highest rates of smoking in the world' and 'adopting plain packaging could be the vital step in finally getting Korea to kick the habit.'[177] She commented that 'The fact cigarette companies in Korea have free reign to design their own packages will inevitably begin to draw the ire of health advocates.'[178] She commented: 'The Korean government may want to take steps to stymie cigarette packaging and promotion before becoming regarded as neglectful of public health.'[179] Choi Bo-ryoung warned that otherwise, 'Korean politicians may be missing out on a key opportunity to become the heroes of a campaign against one of the nation's greatest vices.'[180]

○ Andrew Mitchell and Tania Voon have commented: 'Celebrations of the endgame for tobacco are arguably premature – much more remains to be done – but the progress made to date in tobacco control can nevertheless be acknowledged and the path cleared for its continuation, despite legal hurdles.'[181]

D. Investor-State Dispute Settlement

○ The Big Tobacco company Philip Morris has announced that it is moving its operations from Australia to South Korea.[182] This raises questions about whether the tobacco industry will seek to challenge Australia's plain packaging of tobacco products under the Korea-Australia Free Trade Agreement 2014. Of particular concern would be that Philip Morris will seek to use the investor-state dispute settlement regime under the Korea-Australia Free Trade Agreement 2014. There is also a need to ensure that other key chapters of the Korea-Australia Free Trade Agreement 2014 – such as the chapter on Intellectual Property and the chap-

175) Ibid.

176) Ibid.

177) Ibid.

178) Ibid.

179) Ibid.

180) Ibid.

181) Andrew Mitchell and Tania Voon, 'Introduction', inAndrew Mitchell and Tania Voon (ed.), The Global Tobacco Epidemic and The Law, Cheltenham (UK) and Northampton (MA): Edward Elgar, 2014, 6-7.

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

ter on Technical Barriers to Trade – recognise that the two countries are free to pursue tobacco control measures under the World Health Organization Framework Convention on Tobacco Control.[183]

○ There has been controversy over Big Tobacco using investor–state dispute resolution measures to challenge public health measures – such as graphic warnings and the plain packaging of tobacco products.

○ After moving the shares of its Australian subsidiary to Hong Kong, Philip Morris brought a contrived investor–state arbitration claim under the Australia–Hong Kong Agreement on the Promotion and Protection of Investments 1993. A representative of the tobacco company, Tyler Mace, has explained the action in these terms:

– Plain packaging is a government program that takes private property from a legal business. And under international law, what Australia has pledged is that it will do the very opposite of that. It will not take private property, unless it provides fair value for that property… I have to be careful here because the proceedings are confidential, but I think we've been on record as saying that we value these brands in the billions of dollars.[184]

○ The economist, Peter Martin, has observed that the action 'masks a broader, more serious attempt to turn trade treaties into instruments that allow corporations to sue governments'.[185] Professor Tania Voon and Professor Andrew Mitchell are sceptical of such claims by the tobacco industry.[186] Professor Mark Davison quipped: 'It appears that PMA's claim for 'billions of Australian dollars' has about as much life as the parrot in the famous Monty Python sketch.'[187] Dr Kyla Tienhaara from the Australian National University has observed: 'The Philip Morris case perfectly highlights the many problems with investment arbitration, while the purported benefits of the system remain unproven.'[188] Professor Thomas Faunce has lamented of

183) The World Health Organization Framework Convention on Tobacco Control, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) http://www.who.int/fctc/en/

184) Jess Hill, 'ISDS – The Devil in the Trade Deal', Radio National, Background Briefing, 14 September 2014, http://www.abc.net.au/radionational/programs/backgroundbriefing/isds–the–devil–in–the–trade–deal/5734490

185) Peter Martin, 'Plain Packs: The New Lines of Attack. Big Tobacco tries the WTO and TPPA' The Age and The Sydney Morning Herald, 20 August 2012,http://www.petermartin.com.au/2012/08/plain–packs–new–lines–of–attack–cancer.html

186) Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14 (3) Journal of International Economic Law 1–35. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906560

187) Mark Davison, 'Big Tobacco vs. Australia: Philip Morris Scores an Own Goal', The Conversation, 20 January 2012, http://theconversation.edu.au/big–tobacco–vs–australia–philip–morris–scores–an–own–goal–4967

188) Kyla Tienhaara, 'Government Wins First Battle in Plain Packaging War', The Conversation, 13 August 2012, https://theconversation.edu.au/government–wins–first–battle–in–plain–packaging–war–8855

investment tribunals: 'Such off-shore investment tribunals are not accountable to the Australian populace and have extremely limited capacity to refer to governance arrangements directly endorsed by Australian citizens.'[189]

○ Australia is not alone in being targeted by tobacco companies under investment treaties. Philip Morris has also used international investment rules to challenge Uruguay's restrictions on cigarette marketing.[190] In particular, the tobacco company has complained about graphic health warnings being used by the Uruguay Government, lamenting: 'Many of these pictograms are not designed to warn of the actual health effects of smoking; rather they are highly shocking images that are designed specifically to invoke emotions of repulsion and disgust, even horror.'[191] Philip Morris protested: 'The 80 per cent health warning coverage requirement unfairly limits Abal's right to use its legally protected trademarks, and not to promote legitimate health policies'.[192] In response, the Uruguay government has defended its ability to regulate packaging for the promotion of public health. Mike Bloomberg's philanthropic foundation has provided support for the Latin American country in the conflict.[193]Benn McGrady has provided a thoughtful analysis of the ramifications of the dispute.[194]

○ Tsai-yu Lin has argued: 'Given the urgent tobacco problem prevalent worldwide, and the importance of tobacco control for public health, Bilateral Investment Treaty contracting parties need to reconsider the relationship between foreign investment, investor-state dispute settlement and the WHO Framework Convention on Tobacco Control.'[195]

189) Thomas Faunce, 'An Affront to the Rule of Law: International Tribunals to Decide on Plain Packaging', The Conversation, 29 August 2012, http://theconversation.edu.au/an-affront-to-the-rule-of-law-international-tribunals-to-decide-on-plain-packaging-8968

190) Request for Arbitration, FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay, ICSID case no. ARB/10/7 (February 19, 2010), available athttp://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf

191) Ibid.

192) Ibid.

193) National Public Radio, 'Philip Morris Sues Uruguay Over Graphic Cigarette Packaging', National Public Radio, 15 September 2014, http://www.npr.org/blogs/goatsandsoda/2014/09/15/345540221/philip-morris-sues-uruguay-over-graphic-cigarette-packaging

194) Benn McGrady, 'Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: Philip Morris v. Uruguay', in Tania Voon, Andrew Mitchell, Jonathan Liberman with Glyn Ayres (ed.), Public Health and Plain Packaging of Cigarettes: Legal Issues, Cheltenham UK and Northampton, MA, USA: Edward Elgar, 2012, 173-199.

195) Tsai-Yu Lin, 'Disputes Regarding Tobacco Control Measures Under Investor-State Arbitration' in Andrew Mitchell and Tania Voon (ed.), The Global Tobacco Epidemic and The Law, Cheltenham (UK) and Northampton (MA): Edward Elgar, 2014, 126-141 at 136.

E. Australian Parliament

○ Investment clauses in the Korea–Australia Free Trade Agreement 2014 could be used and abused by Big Tobacco. Australia could be targeted in respect of its regime of graphic health warnings, and the plain packaging of tobacco products. Likewise, Korea could face threats from investor actions from tobacco products. In the parliamentary debate in Australia, the dangers of investment clauses were raised in the context of public health. The Australian Labor Party's Kelvin Thomson said that investor–state dispute settlement would be a 'handcuff on democracy':

– During the Labor Government period Australia refused to agree to a deal with Korea that included an investor state dispute settlement clause. Why have we agreed to one now? We are not some banana republic that runs around confiscating foreign property. Doesn't the ISDS give foreign investors rights that domestic investors don't have?Didn't the Productivity Commission find in its 2010 Report on Bilateral Trade Agreements that foreign investors have greater legal rights than domestic businesses because ISDS gives them access to third party arbitration? Isn't ISDS inherently anti–democratic – it means that governments that want to take actions that they believe are in the public interest, in the best interests of the nation, can find themselves being sued by multinational corporations and brought before arbitrators who in fact before or after the case might be hired by those same multinational corporations? Isn't the case being brought by Philip Morris against the Australian Government over its plain packaging regulation, using the ISDS clause in the Hong Kong trade treaty, inherently undemocratic?[196]

○ He maintained that the Korea–Australia Free Trade Agreement 2014 should not enable Big Tobacco to challenge Australia's tobacco control measures.

○ Likewise his colleague, the member for Fremantle, Melissa Parke has been concerned about the impact of investor clauses upon the rule of law and democratic decision–making.[197] She noted the plain packaging dispute: 'In fact, Australia is currently being sued by tobacco company Phillip Morris, pursuant to an ISDS clause in an obscure agreement with Hong–Kong in relation to our plain packaging laws (after Phillip Morris lost the case before the Australian High Court).'[198] She warned:

– ISDS clauses present a sovereign risk to national governments and court systems. It wasn't always so.

196) The Hon. Kelvin Thomson, 'Joint Standing Committee on Treaties Hearing', Australian Parliament, Canberra, 5 August 2014, http://kelvinthomson.blogspot.com.au/2014/08/treaties–committee–hearing–canberra–5.html

197) The Hon. Melissa Parke, 'Why Support the TPP When It Will Let Foreign Corporations Take Us to Court?', The Guardian, 29 October 2014, http://www.theguardian.com/commentisfree/2014/oct/29/why–support–the–tpp–when–it–will–let–foreign–corporations–take–our–democracies–to–court

198) Ibid.

> They were originally created to protect businesses that invested in foreign jurisdictions where there may not have been robust democracies and legal systems, so that investors would have international redress if there was a coup, a takeover of their investments or some other unforeseen negative impact on their business in the nature of sovereign risk. Over time, the reasonable shield offered by ISDS clauses has become a sword, used by multinational corporations to extract profit and market advantage, against the legitimate interests and values of a nation, its government and people.[199]

○ Parke protested: 'The prospect of Australia's regulatory framework, policy settings, and community values being chiselled away by legal action pursued in the interests of large multinationals or even state–owned foreign entities should be of enormous concern to all Australians.'[200] She commented: 'By entering into an agreement with ISDS clauses the Abbott government is being reckless or grossly negligent as to the likely serious and negative consequences.'[201]

○ The Australian Labor Party's member of Parliament, Tim Watts, was critical of the inclusion of an investor–state dispute settlement clause in the Korea–Australia Free Trade Agreement.[202] He commented: 'As such we are already exposed to the risks and costs of try–on litigation by no–hopers unhappy with government policy decisions, as we are currently seeing with respect to plain packaged tobacco.'[203] He observed: 'that is no reason in itself to expand the scope of this risk.'[204] Watts maintained: 'ISDS provisions of this kind deserve more scrutiny and debate both in this place and in the broader community.'[205] He stressed: 'This issue ought to be given greater consideration and debate before the implementation of this agreement and subsequent regional and bilateral trade agreements.'[206]

○ Senator Richard di Natale of the Australian Greens has also been a vocal critic of the use of investor clauses by Big Tobacco against public health measures.[207] He commented:

199) Ibid.

200) Ibid.

201) Ibid.

202) Tim Watts, 'Additional Comments on the Joint Standing Committee on Treaties' Report on the Korea–Australia Free Trade Agreement', 3 September 2014, http://www.timwatts.net.au/kafta

203) Ibid.

204) Ibid.

205) Ibid.

206) Ibid.

207) Senator Richard di Natale, 'Speech on the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014', 30 October 2014, 8263.

– Philip Morris's Asian division claim that Australia's tobacco plain packaging regime constitutes a breach of an agreement, and that agreement is that there is fair and equitable treatment of Philip Morris Asia's investments. They are asserting that the plain packaging legislation constitutes an unreasonable and discriminatory measure and that their investments have been deprived of full protection and security. That is exactly the point. This is one of the only products we have that, if it is used according to the manufacturer's instructions, will kill you. So the Australian government, as it has done over successive years, has taken an important measure to try and reduce smoking rates. It is what the community expect of us, and yet here we have a multinational company taking action against the Australian government because its profits are under threat. That is what this debate is about.[208]

○ The Senator said: 'What we have is the Australian government making laws. They are good laws. They are laws that save people's lives, and yet we have an undemocratic entity taking action against a sovereign nation because of a threat to its investment.'[209]

F. The World Health Organization

○ The Director–General of the World Health Organization, Dr. Margaret Chan, has warned of tobacco companies seeking to use investment clauses to undermine the World Health Organization Framework Convention on Tobacco Control:[210] 'The high–profile legal actions targeting Uruguay, Norway, Australia, and Turkey are deliberately designed to instil fear in countries wishing to introduce similarly tough tobacco control measures.'[211] She noted: 'When one country's resolve falters under the pressure of costly, drawn–out litigation and threats of billion–dollar settlements, others with similar intentions are likely to topple as well.'[212] Chan said: 'It is horrific to think that an industry known for its dirty tricks and dirty laundry could be allowed to trump what is clearly in the public's best interest.'[213] The World Health Organization has been worried about the use of trade deals and investment clauses to challenge the legitimacy of tobacco control measures.

208) Ibid.

209) Ibid.

210) The World Health Organization Framework Convention on Tobacco Control, Opened for Signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) http://www.who.int/fctc/en/

211) Margaret Chan, 'The Changed Face of the Tobacco Industry', the World Health Organization, 20 March 2012, http://www.who.int/dg/speeches/2012/tobacco_20120320/en/

212) Ibid.

213) Ibid.

○ On the 19th May 2014, Dr Margaret Chan – the Director-General of the World Health Organization – gave a stirring speech to the Sixty-Seventh World Health Assembly. The theme of the presentation was that 'Health has an Obligatory Place on Any Post-2015 Agenda.'[214] Her speech considered such matters as tobacco control, investor-state dispute settlement, trade agreements, and public health principles and values. Chan expressed her opposition to the use of investor-state dispute settlement clauses by Big Tobacco against public health measures: 'One particularly disturbing trend is the use of foreign investment agreements to handcuff governments and restrict their policy space.'[215] She noted: 'For example, tobacco companies are suing governments for compensation for lost profits following the introduction, for valid health reasons, of innovative cigarette packaging.'[216] In conclusion, Dr Margaret Chan commented: 'In my view, something is fundamentally wrong in this world when a corporation can challenge government policies introduced to protect the public from a product that kills.'[217] She stressed: 'Given the importance of prevention to protect healthy human capital, we will need to argue for the supremacy of health concerns over economic interests with other industries.'[218] She emphasized that 'health is a smart investment.' Chan looked forward to the development of 'strategies for a tobacco end-game, that is, strategies that could end tobacco use altogether.'[219]

Patent Law

○ As highlighted by the latest World Intellectual Property Organization, the Republic of Korea is an intellectual property super-power. In 2013, the Republic of Korea was ranked 5th in terms of patent applications under the Patent Co-operation Treaty.[220]

○ By contrast, Australia did not feature in the top ten countries as applicants. As such, Korea could be said to

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

215) Ibid.

216) Ibid.

217) Ibid.

218) Ibid.

219) Ibid.

220) World Intellectual Property Organization, 'Who filed the Most PCT Patent Applications in 2013?', http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics_patents_2013.pdf

have a comparative advantage over Australia in respect of patents.

A. The Korea–Australia Free Trade Agreement 2014

○ Article 13.8 of the Korea–Australia Free Trade Agreement 2014 addresses the topic of patent law. Article 13.8.1 provides: 'Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. In addition, each Party confirms that patents shall be available for any new uses or methods of using a known product.'[221]

○ Article 13.8.2 deals with the question of exclusions from patentability: 'Each Party may only exclude from patentability: (a) inventions, the prevention within its territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by its law; and (b) diagnostic, therapeutic and surgical methods for the treatment of humans or animals.' There has been much international debate over patentable subject matter in recent times. The majority of the High Court of Australia has taken a broad approach to patentable subject matter in cases such as Apotex Pty Ltd v Sanofi–Aventis Australia Pty Ltd.[222] The litigation over Myriad Genetics is still under appeal in Australia.[223] The Supreme Court of the United States, though, has sought to carefully limit the scope of patentable subject matter in a series of cases – including Bilski v. Kappos,[224] Prometheus,[225] AMG v. Myriad,[226] and Alice Corp. v. CLS Bank International.[227] More generally, there has been a great deal of debate over developing better tests for patentable subject matter, given emerging technologies – such as information technology, biotechnology, nanotechnology, and clean technology.

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

222) Apotex Pty Ltd v Sanofi–Aventis Australia Pty Ltd [2013] HCA 50 (4 December 2013

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

224) Bilski v. Kappos 561 US 593 (2010).

225) Mayo Collaborative Services v. Prometheus 132 S Ct. 1289 (2012).

226) Association for Molecular Pathology v. Myriad Genetics 569 US. 12–398 (2013).

227) Alice Corp. v. CLS Bank International 717 F. 3d 1269 (2013).

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

○ Article 13.8.4 provides: 'Each Party shall provide that a patent may be revoked on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud, misrepresentation or inequitable conduct may be the basis for revoking a patent or holding a patent unenforceable.'[228]

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

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

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

B. Patent Law and Information Technology

○ In the field of patent law, there has been a global patent war between Apple and Samsung.[229] Samsung is

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

229) Michael Carrier, 'A Roadmap to the Smartphone Patent Wars and FRAND Licensing', (2012) 2 CPI Antitrust Chronicle http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050743; and Michael Cusumano, 'The Apple-Samsung Lawsuits', (2013) 56 (1) Communications of the ACM 28-31 http://cacm.acm.org/magazines/2013/1/158761-the-apple-samsung-lawsuits/fulltext

engaged in a global patent war with Apple. There has been significant patent litigation in Australia between these two parties. In the early 2009 battle, Bennett J gave a sense of the complex litigation.[230] She observed in her public summary:

– The respondents (Samsung) intend to launch in Australia a version of a tablet device known as the Galaxy Tab 10.1 (theAustralian Galaxy Tab 10.1). The applicants (Apple) have brought proceedings alleging that the Australian Galaxy Tab 10.1 infringes certain claims in 13 of Apple's patents, will contravene certain provisions of the Australian Consumer Law and will involve passing off of Apple's iPad 2. Samsung denies these allegations. It has filed a cross–claim seeking to revoke certain of the patent claims relied upon by Apple and alleging that Apple has infringed certain patents held by Samsung.[231]

○ The dispute has proceeded, with complicated and convoluted litigation.[232] If Samsung's prospects falter in Australia in the patent litigation against Apple, the company could challenge Australia's patent laws and regulations, under an investment clause. The patent dispute between Apple and Samsung was settled outside Australia.[233]

C. Patent Law and Pharmaceutical Drugs

○ The Australian Labor Party Member for Fremantle, Melissa Parke, was concerned that patent holders could bring an investor action against the Australian Government.[234] She noted: 'Canada itself is being sued by pharmaceutical giant, Eli Lilly, for a court decision to refuse the grant of a medicine patent.'[235] Melissa Parke cited the remarks of the Chief Justice of the High Court of Australia: 'Recently, Chief Justice French of the High Court highlighted his concerns about the impact of ISDS cases on our judicial systems when he said.'[236] French CJ observed in his speech:

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

231) Ibid.

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

233) Mikey Campbell, 'Apple and Samsung Settle All Non US Patent Disputes', Apple Insider, 5 August 2014, http://appleinsider.com/articles/14/08/05/apple–and–samsung–settle–all–non–us–patent–disputes

234) Melissa Parke, 'Statement on the Joint Standing Committee Report on the Korea–Australia Free Trade Agreement', Federation Chamber, House of Representatives, Australian Parliament, 22 September 2014, 174.

235) Ibid.

236) Ibid.

- Professor Brook Baker of North Eastern University School of Law in a note about the Eli Lilly case, posed a rather rhetorical question, but one which fairly arises when considering proceedings of that kind in relation to well-established, respected and independent judiciaries:
- 'After losing two cases before the appellate courts of a western democracy should a disgruntled foreign multinational pharmaceutical company be free to take that country to private arbitration claiming that its expectation of monopoly profits had been thwarted by the court's decision? Should governments continue to negotiate treaty agreements where expansive intellectual property-related investor rights and investor-state dispute settlement are enshrined into hard law?'[237]

○ Melissa Parke was concerned: 'Submissions noted that the combination of stronger intellectual property rights and ISDS clauses in KAFTA will also have a stifling effect on innovation and research and on the protection of public health and access to reasonably-priced medicines'.[238] She commented: 'For all these reasons, it is no wonder that ISDS was rejected by the Productivity Commission in 2010, that Labor's platform opposes it and that in government Labor refused to negotiate a treaty with Korea that contained such a clause'.[239] Melissa Parke concluded: 'By entering into an agreement with ISDS clauses, this government is being reckless or grossly negligent as to the likely serious and negative consequences. Let us hope it will not cost the country too dearly.'[240]

D. Patent Law and Biotechnology

○ There have been tensions between Korea and Australia in respect of intellectual property and biotechnology.[241]

○ The Australian Patent Office at IP Australia, and the Australian courts have taken a broad approach to patent law and biotechnology. The Myriad dispute over patent law and genetic testing has been instructive

237) Chief Justice Robert French, 'Investor-State Dispute Settlement - A Cut Above the Courts?', Supreme and Federal Courts Judges' Conference, 9 July 2014, http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf

238) The Hon. Melissa Parke, 'Statement on the Joint Standing Committee Report on the Korea-Australia Free Trade Agreement', Federation Chamber, House of Representatives, Australian Parliament, 22 September 2014, 174.

239) Ibid

240) Ibid.

241) Matthew Rimmer, Intellectual Property and Biotechnology: Biological Inventions, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, January 2008; and Matthew Rimmer and Alison McLennan (ed.), Intellectual Property and Emerging Technologies: The New Biology, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, January 2012.

in this respect.[242] The Full Court of the Federal Court Australia upheld the validity of a patent of Myriad Genetics.[243] Allsop CJ, Dowsett, Kenny, Bennett, and Middleton JJ explained their approach to questions of patentable subject matter:

- First, the boundaries of the conception of patentability are not dictated only by deductive logic from the linguistic premises formulated in the scientific knowledge of a particular age; rather, the boundaries must be such as to be apt to encompass the development of science and technology, and human ingenuity. This explains the broadening concept of patentability since the first quarter of the 17th century. Secondly, human intervention that creates an artificial state of affairs that has some discernible effect is essential. Thirdly, whilst notions of utility, ingenuity and invention have their place after one concludes that the claim is within the field of s 6, such notions also inform the context of analysis of patentability by assisting in describing the claims to processes or products that are claimed new results of principles carried into practice through human intervention and that create some claimed useful result by involving an artificial state of affairs.Fourthly, expressions such as "the work of nature" or "the laws of nature" are not found in the statute; nor are they useful tools of analysis.Fifthly, the distinction between discovery of a scientific principle or fact and a deployment of such to a useful end by a procedure is real.[244]

○ The Full Court of the Federal Court ruled: 'The isolated nucleic acid, including cDNA, has resulted in an artificially created state of affairs for economic benefit'.[245] The court found: 'The claimed product is properly the subject of letters patent.'[246] The court concluded: 'The claim is to an invention within the meaning of s 18(1) of the Act.'[247] Such an approach is broader than that of the Supreme Court of the United States in the parallel case of Association of Molecular Pathology v. Myriad Genetics.[248]

○ However, there has been much controversy over the validity of stem cell patents sought by the South Korean scientist, Woo-Suk Hwang, in Australia. In the 2004 case of Woo-Suk Hwang, IP Australia rejected a patent application for a method for producing chimeric embryos by employing an inter-species nuclear transplantation technique.[249] Specifically, the embryo was created by the transfer of the nucleus of a

242) Matthew Rimmer, 'The Empire of Cancer: Gene Patents and Cancer Voices', (2013) 22 (2) Journal of Law, Information, and Science, 18–55 and EAP 1–47.

243) D'Arcy v Myriad Genetics Inc. [2014] FCAFC 115 (5 September 2014).

244) D'Arcy v Myriad Genetics Inc. [2014] FCAFC 115 (5 September 2014).

245) D'Arcy v Myriad Genetics Inc. [2014] FCAFC 115 (5 September 2014).

246) D'Arcy v Myriad Genetics Inc. [2014] FCAFC 115 (5 September 2014).

247) D'Arcy v Myriad Genetics Inc. [2014] FCAFC 115 (5 September 2014).

248) Association for Molecular Pathology v Myriad Genetics, Inc, 596 US 12–398 (2013).

249) Woo-Suk Hwang [2004] APO 24 (9 September 2004).

human cell into a bovine ovum, and activating the ovum. IP Australia held that the claimed invention was contrary to section 18 (2) of the Patents Act 1990 (Cth) because it was a method of generating a human being. Moreover, IP Australia ruled that the claimed invention was contrary to law, because it fell foul of s 20 (2) of the Prohibition of Human Cloning Act 2002 (Cth).

○ There has since been further controversy over patent applications by Woo-Suk Hwang to IP Australia. In the 2010 case of H Bion Inc v Commissioner of Patents, there was a dispute over a patent for an 'Embryonic Stem Cell Line and Method of Preparing the Same'.[250] In 2009, Commissioner of Patents ruled that the decision to accept the patent application on 28 May 2008 'was infected by fraud, with the result that it is a nullity'. Sundberg J ruled dismissed the application for an extension of time in which to file a notice of appeal.

○ There has been much debate within the patent attorney profession about the ruling.[251]

E. Patent Law and Access to Essential Medicines

○ There has also been a significant debate over access to essential medicines – particularly in respect of HIV, AIDS, and tuberculosis,[252] but also in relation to emerging diseases, such as SARS,[253] and ebola.[254]

○ Article 13.10 of the Korea-Australia Free Trade Agreement 2014 relates to understandings regarding certain public health measures. Article 13.10.1 provides: 'The Parties recognise the importance of

250) H Bion Inc v Commissioner of Patents [2010] FCA 539 (1 June 2010).

251) Mark Summerfield, 'USPTO Rightly Grants Patent to Disgraced Korean Researcher', Patentology, 1 March 2014, http://blog.patentology.com.au/2014/03/uspto-rightly-grants-patent-to.html

252) Thomas Pogge, Matthew Rimmer and Kim Rubenstein, (ed.) Incentives for Global Public Health: Patent Law and Access to Medicines. Cambridge: Cambridge University Press, 2010.

253) Matthew Rimmer, 'The Race To Patent The SARS Virus: The TRIPS Agreement And Access To Essential Medicines' (2004) 5 (2) Melbourne Journal of International Law 335-374.

254) Rick Gladstone, 'WHO Assails Delay in Ebola Vaccine', The New York Times, 3 November 2014, http://www.nytimes.com/2014/11/04/world/africa/ebola-cure-delayed-by-drug-industrys-drive-for-profit-who-leader-says.html; Catherine Saez, 'WHO in Race to Find Promising Ebola Treatments as Many Products Ruled Out', Intellectual Property Watch, 14 November 2014, http://www.ip-watch.org/2014/11/14/who-in-race-to-find-promising-ebola-treatments-as-many-products-ruled-out/ Matthew Herder, 'Did a Conflict over Intellectual Property delay the Ebola Vaccine?', Healthy Debate, 10 October 2014, http://healthydebate.ca/opinions/ebola-ip-non-story-commercialization-par-excellence Amir Attaran and Jason Nickerson, 'Is Canada Patent Deal Obstructing Ebola Vaccine Development?', The Lancet, 19 November 2014, http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2814%2962044-4/fulltext?version=printerFriendly

the Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 (hereinafter referred to as the "Doha Declaration") by the Ministerial Conference of the WTO. In interpreting and implementing the rights and obligations under Article 13.8, the Parties are entitled to rely upon the Doha Declaration.' Article 13.10.2 provides: 'Each Party shall contribute to the implementation of and shall respect the Decision of the WTO General Council of 30 August 2003 on paragraph 6 of the Doha Declaration, as well as the Protocol amending the TRIPS Agreement, done at Geneva on 6 December 2005.'

○ To its credit, the Republic of Korea has implemented the Decision of the WTO General Council of 30 August 2003. Article 107 of the Patent Act for Korea provides the legal basis to act as an exporting Member, as well as an importing Member in situations of national emergency or other circumstances of extreme urgency. Moreover, further details of the regime have elaborated upon in the Presidential Decree No. 22306 of 26 July 2010 on "Provisions Regarding the Expropriation and Implementation of the Patent Right — notification.

○ Australia, though, has been slow to fulfil its international obligations in respect of access to essential medicines.[255] In early 2014, the Coalition Government introduced the Intellectual Property Laws Amendment Bill 2014 (Cth). In his second reading speech, Bob Baldwin, the Parliamentary Secretary to the Minister for Industry, explained the intent of the legislation:

– Schedules 1 and 2 to the Bill amend the Patents Act to implement the Protocol amending the World Trade Organization Agreement on Trade–Related Aspects of Intellectual Property Rights, also known as the TRIPS Protocol. The Howard government accepted the TRIPS Protocol in 2007 and its implementation in Australia is well overdue. The TRIPS Protocol helps developing countries that are suffering health crises such as malaria, HIV/AIDS and tuberculosis to obtain essential medicines from other countries at affordable prices. Millions of people die from such diseases every year. At present, elements of our patent system can make it harder for Australian businesses to provide assistance to such countries.[256]

○ Baldwin commented: 'To address this, the Bill will enable Australian pharmaceutical manufacturers to obtain a licence from the Federal Court to make generic versions of patented medicines and to export these medicines to countries with a demonstrated need.'[257] The Parliamentary Secretary explained: 'The scheme

255) Matthew Rimmer, 'Michael Kirby's Challenge: Intellectual Property, HIV/AIDS, and Human Rights', Medium, 22 July 2014, https://medium.com/@DrRimmer/michael–kirbys–challenge–intellectual–property–hiv–aids–and–human–rights–2284d092397b

256) The Hon. Bob Baldwin, 'Second Reading Speech on the Intellectual Property Laws Amendment Bill 2014 (Cth)', House of Representatives, Australian Parliament, 19 March 2014, http://minister.industry.gov.au/ministers/baldwin/speeches/second–reading–speech–intellectual–property–laws–amendment–bill–2014

257) Ibid.

will ensure that patents can only be used under strict conditions and that patent owners are fairly compensated.'[258] Baldwin emphasized: 'The scheme is also designed to be as easy to use as possible, while ensuring appropriate safeguards are in place and consistency with Australia's broader international obligations.'[259] As at November 2014, the bill is yet to pass through the Australian Parliament.

○ Both Australia and the Republic of Korea could do more to promote access to essential medicines – especially in South-East Asia.

F. Patent Law, Clean Technology, and Climate Change

○ It is disappointing that the Korea-Australia Free Trade Agreement 2014 does not address the topic of intellectual property, clean technologies, and climate change.[260]

○ Both countries have established local fast-tracks for green patent applications. The Korea Intellectual Property Office (KIPO) has described its regime as a 'super-accelerated' examination system for green technology:

- Our super-accelerated examination system for green technology was introduced in October 2009. The aim of this system is to ensure that examination results for green technology are provided more expeditiously than with the accelerated track (that is, within a month of the request).
- This system, which was researched and developed in accordance with the national strategy for low carbon, green growth, is limited to technologies that are legally classified (via governmental financial aid or certification) as "green," or designated in such environmental legislation as the Air Environment Preservation Act. Since April 2010, products generated through various aid policies under the Low-Carbon Green Growth Basic Act have become eligible for super-accelerated examination.[261]

○ There has been increasing academic discussion about the regime. Eric Lane has wondered whether the regime is inaccessible for most applicants, because of its narrow definition of green technologies.[262] Ji

258) Ibid.

259) Ibid.

260) Matthew Rimmer, Intellectual Property and Climate Change: Inventing Clean Technologies, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, September 2011.

261) Korea Intellectual Property Office, 'Super-Accelerated Examinations for Green Technology', http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=100000&catmenu=ek02_01_02_01

262) Eric Lane, 'KIPO Green Tech Fast Track Inaccessible For Most Applicants', Green Patent Blog, 7 November 2011, http://www.green-

Young Park has wondered whether KIPO's Green Patent Fast Track violates international treaties because it treaties domestic and foreign applicants differently.[263]

○ In an empirical study, Antoine Dechezlepretre assessed the efficacy of the programmes:

– First, despite a low participation in the programmes, which reflects the strong incentive for patent applicants to keep their patents in the examination process for as long as possible, there is a clear demand for fast–tracking procedures, in particular from small but fast–growing start–up companies in the green technology sector. Second, climate change–related technologies (in particular renewable energy technologies) represent the vast majority of patents in the fast–tracking programmes. Third, the time from application to grant has been effectively reduced by up to 75% for patents entering the accelerated procedure. Fourth, fast–track patents are of higher commercial value than other green patents that were filed at the same time but did not request accelerated examination. Finally, the analysis of patent citation data shows that fast–tracking programmes have accelerated the diffusion of knowledge in green technologies in the short run (during the first years following the publication of the patents), but whether this effect will be the same in the long run remains an open question. [264]

○ The Korea Intellectual Property Office (KIPO) had 604 applications in respect of its fast–track regime.The researcher maintained: 'Given the urgency of addressing environmental challenges, including climate change, the effects of fast– tracking programmes appear encouraging, particularly with regard to accelerating technology diffusion in the short run, though, as it has been mentioned, further research is needed to understand the longer–term effects and licensing practices.'[265] Eric Lane has argued that there is a need to develop a global fast–track for green patent applications.[266]

○ Korea has made significant investments in respect of green technologies. There has been much interest in the interaction between intellectual property, standards, and a smart grid in Korea.[267] Sung–Young Kim

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patentblog.com/2011/11/07/kipo–green–tech–fast–track–inaccessible–to–most–applicants/

263) Ji Young Park, 'Does KIPO's Green Patent Fast–Track Violate International Treaties?', Green Patent Blog, 2 May 2012, http://www.greenpatentblog.com/2012/05/02/guest–post–ji–young–park–on–whether–kipos–green–patent–fast–track–violates–international–treaties/

264) Antoine Dechezlepretre, 'Fast–Tracking Green Patent Applications: An Empirical Analysis', International Centre for Trade and Sustainable Development, Issues Paper No. 37, February 2013, http://ictsd.org/downloads/2013/02/fast–tracking–green–patent–applications–an–empirical–analysis.pdf

265) Ibid.

266) Eric Lane, 'Building the Global Green Patent Highway: A Proposal for International Harmonization of Green Technology Fast Track Programs', (2012) 27 Berkeley Technology Law Journal 1119–1170.

267) Eric Lane, 'Korean Program Seeks to Patent Smart Grids', Green Patent Blog, 18 April 2013, http://www.greenpatentblog.com/2013/04/18/korean–program–seeks–to–patent–smart–grid–standards/

and Elizabeth Thurbon have been impressed by the commitment of Korea to the construction of an integrated system of renewable energy, electric vehicles and a smart grid:

○ The mass introduction of renewable sources of energy and wide demand for new renewable energy uses, such as electric vehicles, all depend on the existence of a smart grid. With the conclusion of the testing of key technologies needed to operate the smart grid, the Korean focus will shift to commercial trials. The first will be in one major metropolitan city and then trials will steadily expand across the nation.Of course, as in other countries moving to lead the way in a clean-tech future, such as China, institutional obstacles remain. Korea has to overcome these before implementing a world-first infrastructure.[268]

○ Professor John Mathews has argued that Australia should emulate the example of Korea, with its Green Growth strategy.[269]

○ In Australia, the new Coalition Government have repealed the carbon price and the mining tax, and have sought to dismantle institutions designed to support clean technologies. Sung-Young Kim and Elizabeth Thurbon wonder whether the Australian Government will be left behind in respect of clean technologies and renewable energy:

○ Retreating now from supporting the further development and commercialisation of Australia's established portfolio of green technologies will undoubtedly set back the achievements made thus far. The governments of Australia's neighbours to the north, including not only Korea but also China and Singapore, are moving ahead full steam. The choice for Australia is a relatively simple one. Do we want to establish a presence in the industries of the future? Or will we simply let our competitors leave us behind? The Abbott government might not be listening, but hopefully the Senate is.[270]

○ Indeed, the Abbott Government is very much concerned about the export of mining -products under the Korea-Australia Free Trade Agreement 2014.

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268) Sung-Young Kim and Elizabeth Thurbon, 'Green Growth: Rebooted in South Korea, Booted Out in Australia', The Conversation, 7 February 2014, http://theconversation.com/green-growth-rebooted-in-south-korea-booted-out-in-australia-22243

269) John Mathews, 'Wake Up Australia, and Take a Lesson on Solar from Korea', The Conversation, 13 April 2012, http://theconversation.com/wake-up-australia-and-take-a-lesson-on-solar-from-korea-6245

270) Sung-Young Kim and Elizabeth Thurbon, 'Green Growth: Rebooted in South Korea, Booted Out in Australia', The Conversation, 7 February 2014, http://theconversation.com/green-growth-rebooted-in-south-korea-booted-out-in-australia-22243

○ There is a concern that the environment chapter of the Korea–Australia Free Trade Agreement 2014 does little to protect the environment. Moreover, there is a concern that mining companies will deploy the investor clause under the Korea–Australia Free Trade Agreement 2014 to challenge environmental regulations in respect of air, land, and water. There is also a worry that the investment chapter of the Korea–Australia Free Trade Agreement 2014 could be used to frustrate and delay meaningful and significant action against climate change and global warming.

Conclusion

○ The Korea–Australia Free Trade Agreement 2014 is a strange, secretive, Kafka–esque agreement, with substantial commitments and obligations in respect of intellectual property, and associated investments. The intellectual property chapter of the Korea–Australia Free Trade Agreement 2014 is controversial. The proposed regime is one–sided and unbalanced. The intellectual property chapter is focused upon providing longer and stronger intellectual property rights for intellectual property owners. There is a failure to properly consider other public interest objectives – such as access to knowledge, the progress of science and the useful arts, and the promotion of innovation and competition. Furthermore, the investment chapter of the Korea–Australia Free Trade Agreement 2014 provides additional privileges to foreign investors – including those in the intellectual property owners. There has been much concern intellectual property owners will receive investor super–powers under the investment regime of the Korea–Australia Free Trade Agreement 2014. Such a concern is particularly evident in respect of tobacco control measures – such as Australia's plain packaging of tobacco products.

○ The trade strategy of the Coalition Government in respect of Korea–Australia Free Trade Agreement 2014 is perhaps a good indication of its approach in the Trans–Pacific Partnership.[271)]

271) The Trans–Pacific Partnership, http://www.ustr.gov/tpp and https://www.dfat.gov.au/fta/tpp/ For a commentary, see Jane Kelsey (ed.), No Ordinary Deal: Unmasking the Trans–Pacific Partnership Free Trade Agreement, Wellington: Bridget Williams Books Inc., 2010; Tania Voon (ed.), Trade Liberalisation and International Co–operation: A Legal Analysis of the Trans–Pacific Partnership Agreement, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013; C.L. Lim, Deborah Elms and Patrick Low (ed.), The Trans–Pacific Partnership: A Quest for a Twenty–First Century Trade Agreement, Cambridge: Cambridge University Press, 2012; and Jane Kelsey, Hidden Agendas: What We Need to Know about the Trans–Pacific Partnership Agreement (TPPA), Wellington: Bridget Williams Books Limited, 2013.

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

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

○ In the Trans-Pacific Partnership negotiations, Trade and Investment Andrew Robb also appears willing to trade away investment rules in return for greater access to markets, particularly in respect of agriculture: 'If there is a substantial market access offering, and if we can also succeed in getting exclusions and protections to safeguard certain public policy measures then we will be prepared to put it on the table, but it is not on the table yet.'[272] This is a dangerous strategy, particularly given how transnational corporations have used and exploited investment clauses to challenge a wide range of public regulation.

○ The Trans-Pacific Partnership also features an expansive intellectual property chapter, with obligations above and beyond the Korea-Australia Free Trade Agreement 2014. This will raise significant issues in respect of copyright law, IT Pricing, patent law, access to medicines, trade mark law, plain packaging, and intellectual property enforcement. WikiLeaks has revealed draft chapters of the Intellectual Property chapter of Trans-Pacific Partnership in 2013[273] and 2014.[274]

○ There has also been much controversy over the chapters in theTrans-Pacific Partnership relating to the

272) Peter Martin, 'Robb to Tackle Trans-Pacific Partnership', The Sydney Morning Herald, 6 December 2013, http://www.smh.com.au/business/robb-to-tackle-trans-pacific-partnership-20131205-2yttu.html

273) Matthew Rimmer, 'Our Future is at Risk: Disclose the Trans-Pacific Partnership Now', New Matilda, 15 November 2013, https://new-matilda.com/2013/11/15/our-future-risk-disclose-tpp-now

274) Matthew Rimmer, 'The Trans-Pacific Partnership: A Halloween Horror-Show', Crikey News, 17 October 2014, http://www.crikey.com.au/2014/10/17/the-trans-pacific-partnership-a-halloween-horror-show/

environment,[275] public health,[276] and labor rights.[277]

○ Nobel Laureate Joseph Stiglitz has warned of the dangers of such deals: 'The Trans–Pacific Partnership proposes to freeze into a binding trade agreement many of the worst features of the worst laws in the Trans–Pacific Partnership countries, making needed reforms extremely difficult if not impossible.'[278]

○ There will be much pressure placed upon South Korea to join the negotiations in respect of the Trans–Pacific Partnership.[279] David Hundt has commented: 'The main reason for Korea's reluctance seems to be the lack of benefits from doing so'.[280] He notes: 'Korea's network of trade pacts is quite substantial and the Trans–Pacific Partnership will not expand it greatly.'[281]

275) Matthew Rimmer and Charlotte Wood, 'Trans–Pacific Partnership Greenwashes Dirty Politics', New Matilda, 17 January 2014, https://newmatilda.com/2014/01/16/tpp–greenwashes–dirty–politics

276) Alexandra Phelan and Matthew Rimmer, 'Trans–Pacific Partnership #TPP #TPPA Drafts Reveal a Surgical Strike against Public Health', East Asia Forum, 2 December 2013,http://www.eastasiaforum.org/2013/12/02/tpp–draft–reveals–surgical–strike–on–public–health/; and Alexandra Phelan and Matthew Rimmer, 'Pacific Rim Treaty Threatens Public Health: Patent Law and Medical Procedures', Edward Elgar Blog, 27 November 2013,http://elgarblog.wordpress.com/2013/11/27/pacific–rim–treaty–threatens–public–health–patent–law–and–medical–procedures–by–alexandra–phelan–and–matthew–rimmer/

277) Matthew Rimmer, 'Creative Destruction: The Trans–Pacific Partnership, Jobs, and Labor Rights', Medium, 27 May 2014, https://medium.com/p/4681f3cc85a8

278) Joseph Stiglitz, 'Letter to Trans–Pacific Partnership Trade Negotiators', Knowledge Ecology International, 6 December 2013, http://keionline.org/sites/default/files/jstiglitzTPP.pdf

279) Jeffrey Schott and Cathleen Cimino, 'Should Korea Join the Trans–Pacific Partnership?', Peterson Institute for International Economics, September 2014, http://www.iie.com/publications/pb/pb14–22.pdf

280) David Hundt, 'Meeting in the Middle: Australia and Korea in the Asia–Pacific', The Conversation, 8 April 2014, http://theconversation.com/meeting–in–the–middle–australia–and–korea–in–the–asia–pacific–25194

281) Ibid.

Legal Issues concerning Domestic Implementation of Korea-Australia Free Trade Agreement

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Introduction

○ Negotiations for the free trade agreement between the Republic of Korea and Australia were launched in May 2009. Despite temporary suspension of negotiation, there had been seven rounds of official negotiations which began in 2009 and were effectively concluded in December 2013.[1] The Korea–Australia Free Trade Agreement (KAFTA) was signed on 8 April 2014 in Seoul. The Korean National Assembly ratified the KAFTA on December 2, 2014 and the Korean Government and Australia's Ambassador in Seoul exchanged the instrument of ratification, agreeing to the date for entry into force on 12 December 2014.[2]

○ Under KAFTA, it is expected that Korean exports to Australia will increase, particularly in the current major export items such as automobiles, automotive components, heavy equipment for construction and so on. It has been persuasively suggested that the bilateral liberalization of trade and investment between Korea and Australia will contribute to advancement of GDP growth and people's welfare through the combined impacts of allocative efficiency, improved productivity growth, enhanced investment flows, and closer

1) Myoung, Jin–ho et als., "The Decade–Long Journey of Korea's FTAs", IIT Working Paper 14–01 (2014), pp. 8–11.

2) "Robb announces Korea FTA to take effect in 9 days", Minister for Trade and Investment, Media Release, available at http://trademinister.gov.au/releases/Pages/2014/ar_mr_141203.aspx.

economic integration.[3] Given Australia is Korea's fifth-largest import country for mineral resources, KAFTA will be able to help strengthen cooperation in resources sector and improve reliability in investment. It will also be helpful to open up significant opportunities for service providers in Korea.[4]

○ In order to achieve the goals of the KAFTA, it is necessary for the two parties to ensure full implementation of the agreement in the domestic level respectively. It is very obvious that domestic implementation of the KAFTA depends on the Constitution and national laws of the two parties. But it will not be easy to ascertain the legal mechanism to implement the FTA in Korea without closely looking at the implementing legislations and the state practice. In particular, Korea enacted the Act on Governing Procedures of Conclusion and Implementation of Trade Treaties on December 30, 2011. This paper will examine the legal mechanism to implement the KAFTA in the domestic legal system in Korea. Based on the examination of the mechanism, it will delve into some legal issues relating to the KAFTA and try to make some policy suggestions for ensuring full implementation of the KAFTA.

Domestic Implementation Mechanism of Free Trade Agreement in Korea

1. General Theory of Domestic Implementation

○ According to Article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention), "every treaty in force is binding upon the parties to it and must be performed by them in good faith". How a treaty is implemented in domestic level is not regulated by the Vienna Convention. How the state party implements treaty obligations rests on the national laws of the state party. Therefore it is the state which has to ensure that the obligations can be implemented in domestic plane. No regulations about the domestic implementation of treaty in the Vienna Convention, it depends on how treaties are dealt with in the constitution of each state. Although many countries have its own way to implement treaties in their constitution, there are two general approaches in dealing with treaties such as dualism and monism.

3) Jong-Hwan, Kim, "A Study on the Economic Impacts of the Korea-Australia Free Trade Agreement", Journal of Economic Studies, vol. 28(4) (2010), pp. 253-273.

4) "Korea-Australia Trade Ministers to sign Korea-Australia FTA", Press Release, Ministry of Trade, Industry and Energy, April 8, 2014.

○ Both approaches are doctrines developed by international law scholars to explain the differences of the constitution and stat practice among states. In reality there is no clear dichotomy between monism and dualism states. Many states contain both monist and dualist elements in their constitution. However it is necessary to look at the different approaches, since constitutional constraints on one of the parties may affect the way of implementation.

○ Firstly, monist approach holds that international and municipal law are part of the same system of norms.[5] The key feature of monist approach is that a treaty may become part of domestic law once it has been concluded in accordance with the constitution.[6] At least some treaties can be incorporated into the domestic legal order without the need for any legislative act other than the act authorizing the executive to conclude the treaty.[7]

○ There is significant variation among monist States concerning the hierarchical rank of treaties within the domestic legal order. In some states like Austria, Germany, Korea and the United States, a treaty is equivalent to statutes but they rank lower than the Constitution.[8] In other states like China, France, Japan, Mexico and Poland, treaties rank higher than statutes but lower than the Constitution. Exceptionally in the Netherlands, some treaties rank higher than the Constitution.

○ Moreover, in all the monist States domestic courts can apply treaties directly as national law. This is one of the crucial difference between monist and dualist approach. Dualist approach permits only indirect judicial application of treaties, while monist approach allows the domestic courts to apply treaties directly.[9]

○ Secondly, dualist approach points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject–matter.[10] In the dualist States, the constitution accords no special status to treaties and the rights and obligation created by them have no

5) I. Brownlie, Principles of Public International Law (7th ed., Oxford University Press, 2008), p. 32.

6) A. Aust, p. 183.

7) D. Hollis, The Oxford Guide to Treaties (Oxford University Press, 2012), p. 373.

8) Hollis, pp. 373–375.

9) Hollis, p. 375.

10) Brownlie, p. 31.

effect in domestic law unless legislation is in force to give effect to them.[11] Almost all the Anglo-American countries including Australia follow the dualist approach for treaties.[12] The essential feature of dualist approach is that no treaties have the formal status of law in the domestic legal system unless the legislature enacts a statute to incorporate the treaty into domestic law.[13] Such statute must be distinguished from legislative acts that authorize the executive to make a binding international commitment, which are unnecessary in these systems.[14]

○ However, there is a huge difference between incorporated and unincorporated treaties for courts in the dualist States. The courts have no authority to apply unincorporated treaties directly as national law. If the legislature has enacted a statute to incorporate a particular treaty provision into national law, the courts can apply the statute as applicable law.[15]

○ Despite the theoretical differentiation of the two approaches, there is an increasing tendency to blur the divide of monist-dualist States. In othe words, the monist States have an increasing number of legislations to implement treaties such as having non-self-executing character. On the other hand, national courts in the dualist States have developed a variety of strategies for judicial application of unincorporated treaties, even without any statutory directive for government officials to take account of treaty provisions.[16]

○ Furthermore, irrespective of whatever approaches the state parties adopted, the extent and nature of treaty obligation remains unchanged. Article 27 of Vienna Convention provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Whether the state parties to the treaty will adopt monist or dualist approach is only an internal matter under the domestic laws of each state party. If one state party breaches the treaty obligation based on the internal law, the state party shall be responsible for the wrongful act by failing to perform the treaty.

○ In conclusion, the domestic implementation of the treaties can be regarded as matters which are essentially

11) Aust, p. 187.

12) Aust, pp. 194-195.

13) D. Rothwell, "Australia", in Sloss, The Role of Domestic Courts in Treaty Enforcement: A Comparative Study (Cambridge University Press, 2009), pp. 128-130.

14) Hollis, p. 370.

15) Hollis, p. 370.

16) Sloss, p. 608-12.

within the domestic jurisdiction. Considering the provision of Article 2 (7) of the UN Charter, other state parties to the treaty have no reasons to interfere with domestic implementation of other states or cannot intervene in the matters. It is not to overstate that how domestic implementation of treaties should be is solely dependent on the willing of the state party provided it would ensure full compliance of the treaty obligations. The same can be applied to the free trade agreement and its implementation.

2. Constitutional Framework of Korea

○ According to the Article 6 (1) of the Constitution of Korea, "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." It is generally recognized among international law scholars that Korea adopted the monist approach to domestic implementation of treaties. But it is arguable whether the wording of "the domestic laws" in Article 6 (1) include the Constitution itself or not. Although there are many controversies surrounding the hierarchies between international law and national law, it is generally accepted that "treaties duly concluded and promulgated under the Constitution" are equivalent to the statutes. Therefore, when there is a conflict between treaties and national laws, it will be solved by applying the principle of lex specialis deregat legi generali or lex posterior derogat priori.

○ Upon the promulgation of treaties, they take effect immediately regardless of the implementation legislation, according to Constitution Article 6(1) of the Constitution. However, given the content and nature of the treaties, the implementation of particular treaty obligations can be reserved until implementing laws are enacted. Article 52 of the Constitution provides that the implementing legislation may be introduced by members of the National Assembly or by the Executive.[17] Where a competent ministry or agency for the implementation of obligations in the treaty prepares a draft for legislation, in consultation with relevant ministries or agencies, it is deliberated by the Ministry of Government Legislation as required procedure, and decided upon by the State Council. Then, the legislation should be sent to the National Assembly. Following the legislative deliberation procedure in the National Assembly, the legislation is sent to the plenary session of the National Assembly for the final vote. Each bill passed by the National Assembly shall be

17) Article 52 of Constitution
"Bills may be introduced by members of the National Assembly or by the Executive."

sent to the Executive and the President shall promulgate it within 15 days.[18]

○ Besides, the Korean Constitutional Court and Supreme Court are of the view that they can apply the treaties directly even in the absence of implementing legislation, provided that the treaties were duly concluded and promulgated under the Constitution. For example, the Constitutional Court found that imposing the heavier punishment on the accused based on the Agreement establishing the World Trade Organization, which the Korean government duly signed and ratified, is not inconsistent with the nullun crimen sine lege.[19] The Constitutional Court recognized the possibility that imposing the heavier punishment according to the treaty has the same effect as to that by the national law. This judgment is considered as a precedent applying the treaty directly without domestic implementing legislation.

3. Legal Status of the FTA

(1) Legal Status of the FTA in the Statutes

○ In the legal system of Korea, the free trade agreement has the same effect as the domestic laws according to the Article 6 (1) of the Constitution. For most of bilateral agreements, there were little implementing legislation. However, Korean government has taken considerable legislative measures in advance to implement bilateral FTAs. Given the content and nature of the FTAs which provide the liberalization of international trade and the procedures for opening the market, it can only be implemented through a wide range of legislative measures.[20] In 2003, the Korean government signed the first FTA with Chile and it entered into force in 2004. Looking back into the process for negotiations and conclusion of the FTAs, competent authorities have reviewed national laws in order to response the needs for amending the existing national legislation or enacting new legislation.

○ Meanwhile, Korea enacted "the Act on Governing Procedures of Conclusion and Implementation of Trade Treaties (Trade Treaty Conclusion Procedure Act)" in 2011 in the aftermath of the debates on Korea-U.S.

18) Article 53(1) of Constitution
"Each bill passed by the National Assembly shall be sent to the Executive, and the President shall promulgate it within fifteen days."

19) Constitutional Court, 1998.11.26. 97Hun-Ba65.

20) DO Kyung-Ok, "The Implementation of Treaties through Legislative Measures : Focusing on the Legislation Case in Korea", Korean Journal of International Law, vol. 59 (2), pp. 54-55.

FTA. This Act aims to adopt a procedural framework for future negotiations, conclusion and implementation of "Trade Treaties" including the FTA. It introduces various procedural requirements for the government and the National Assembly from the decision of initiating treaty negotiations to the implementation of the treaties. Trade Treaty Conclusion Procedure Act envisages wider participation of the National Assembly and domestic interest groups in the course of Trade Treaty negotiations and conclusion through many steps of negotiations, conclusion and implementation. In this regard, this Act may also have a relevance to implementation of the KAFTA.

○ Trade Treaty Conclusion Procedure Act expressly deals with the obligation of the Minister to assess and report the implementation situations of the Trade Treaty.[21] Article 15 (1) obliges the Minister for Industry, Trade and Energy to assess the implementation situations in respect of the Trade Treaty including (1) Economic impact of Trade Treaty entered into force, (2) Effectiveness of national measures for injured industry and its way to improve, (3) Main Issues dealt in Joint Committee established under the Trade Treaty such as the implementation situation of the other State party's treaty obligation, (4) Other issues which the Minister deems it necessary. The Minister also shall report the outcome to the Committee on Industry, Trade and Energy of the National Assembly.

○ Moreover, Article 2 (1) of the Enforcement Decree of Trade Treaty Conclusion Procedure Act provides that assessment of the implementation situations under Article 15 of the Act will be conducted at every 5 years after the entry into force. Article 3 of the Enforcement Decree obliges the Minister to finish the assessment of the implementation situations within 6 months from the beginning of the assessment. The Minister may

21) Article 15 of Act on Governing Procedures of Conclusion and Implementation of Trade Treaties

① The Minister for Industry, Trade and Energy[The Minister] shall assess the implementation situation including as follows in respect of Trade Treaty which does not elapse 10 years after the entry into force, and shall report the outcome to the Committee on Industry, Trade and Energy of the National Assembly:

1. Economic impact of Trade Treaty entered into force
2. Effectiveness of national measures for injured industry and its way to improve
3. Main Issues dealt in Joint Committee established under the Trade Treaty such as the implementation situation of the other state party's treaty obligation
4. Other issues which the Minister deems it necessary

② The Minister, where he/she recognize it necessary for assessment of the implementation situation according to paragraph 1, may request cooperation of the chief of relevant central administrative organs and research institutes including government-funded research institute. In this case, the chief of relevant central administrative organs and research institutes shall comply the request without any special circumstances.

③ With regard to period, method and so on for assessment of implementation situation shall be prescribed by Presidential Decree.

request a hearing from the interested person if the Minister deems it necessary for the assessment.

○ Under Article 15 (2) of the Act the Minister, where he/she deems it necessary for assessment of the implementation situation according to paragraph 1, may request cooperation of the chief of relevant central administrative organs and research institutes including government-funded research institute. In this case, the chief of relevant central administrative organs and research institutes shall comply with the request unless there is any special reason.

○ Some commentators pointed out that the Act contains ambiguities in some of the key terms and the scope of application and those ambiguities may carry the potential of causing confusion and complexity in actual application.[22] Prof. Lee Jaemin also raised a question as to the potential burden of obligation to assess and report implementation situations of the Trade Treaties under the Act.[23] According to the Korean government's plan for concluding FTA, it is estimated that there will be approximately 40 FTAs in 10 years. Assuming that the FTAs will gradually enter into force, the obligations to assess and report the implementation situations of the FTAs are highly likely to be heavy burden not only to the government but also to the National Assembly itself.

○ However, the obligations of assessment and report of Article 15 of the Act are designed to monitor and ascertain whether the government is performing the obligations appropriately in the FTAs, not to amend the existing implementing legislation or change the measures for domestic implementation. Otherwise, the monitoring procedure in Article 15 of the Act could be misused to cause a new source of trade dispute. Therefore it is wrong to regard the procedure in the Article 15 of the Act as a legal ground to adjust the obligations for implementation in the FTAs depending on the international matters.

(2) Legal Status in the Proceedings before Domestic Court

○ In general, the domestic courts in Korea are of the view that treaties duly concluded and promulgated under the Constitution such as the GATT, WTO Agreement, and the Agreement on Government Procurement are

22) Jaemin Lee, "Korea's FTA Drive and Enactment of Trade Treaty Conclusion Procedure Act of 2011: Its Legal Implications and Practical Consequences", Seoul International Law Journal, vol. 19 (1) (2012), pp. 41-50.

23) Ibid., pp. 51-53.

accorded legal validity equivalent to the domestic law.[24] However, in another case involved with anti-dumping tariffs, the Supreme Court stated that as the GATT is an international agreement establishing the rights and obligations between the two States, in principle the disputes involved in anti-dumping tariffs should be referred to the WTO dispute settlement body and it does not have a direct effect to private person.[25] Furthermore, in this case, the Court found that the private person cannot bring the proceedings before the domestic court on the basis that the State party's measure violates the provisions of the WTO or cannot claim it as the ground for revocation of the measure.[26]

○ In September 2012, the Seoul Southern District Court made a decision dealing with application of the provisions of FTA.[27] The Ministry of Culture, Sports and Tourism took a measure to impose fine for negligence to the applicant because the applicant as a online service provider failed to perform a technical duty to interdict illegal transfer of literary work. The applicant brought a proceeding against the Ministry by arguing that the legal ground of the measure, namely Article 104 (1) of Copyrights Act,[28] which provides for Responsibility of Online Service Provider, is conflicting with Article 10.66 (1) of Korea-EU FTA[29] as well as

24) "The GATT is a subsidiary agreement (a multilateral trade agreement) of the WTO Agreement (Treaty No. 1265), which was ratified by president on December 23, 1994 upon the consent of the National Assembly on December 16, 1994; published on December 30, 1994; and went into effect as of January 1, 1995. The Agreement on Government Procurement (hereinafter "AGP") is a multi party Agreement among certain WTO members (Treaty No. 1363) published and gone into effect as of January 3, 1997 upon the consent of the National Assembly on December 16, 1994. Thus, they were accorded legal validity equivalent to the domestic law under Article 6 (1) of the Constitution, and accordingly, the ordinances enacted by local governments are invalid if they violate provisions of the GATT or the AGP." Supreme Court Decision 2004Chu10 Delivered on September 9, 2005.

25) Supreme Court Decision 2008du17936 Delivered on January 30, 2009.

26) Ibid.

27) Seoul Southern District Court Decision 2012Gua977 Delivered on September 20, 2012.

28) Article 104 (Responsibility, etc. of Online Service Providers of Special Type)
(1) The online service provider who aims principally at forwarding works, etc. by using computers between other persons (hereinafter referred to as "online service provider of special type") shall take necessary measures, such as technical measures, etc. that cut off illegal forwarding of the relevant work, etc. where there is a request from the holder of rights. In such cases, matters regarding the request of holder of rights and necessary measures shall be prescribed by Presidential Decree.

29) Article 10.66: NO GENERAL OBLIGATION TO MONITOR
1. The Parties shall not impose a general obligation on providers, when providing the services covered by Articles 10.63 through 10.65, to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.
2. The Parties may establish obligations for information society service providers to promptly inform the competent authorities of alleged illegal activities undertaken or information provided by recipients of their service, or to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

Article 18.10 (30) of Korea-US FTA.[30] With regard to the allegation by the applicant, the district court found that only the State parties can enjoy the rights and obligation as a legal subject under the Korea-EU FTA as well as the Korea-US FTA. Therefore the district court declined the invocation by the applicant of the provisions on copyright of the two FTAs. In line with the judgment concerning anti-dumping tariffs rendered by the Supreme Court, the district court also set out qualification for the provisions of the FTAs to be invoked by the private person.

○ It is true that the Supreme Court had no chance to deal with the cases involving the application of the FTAs yet. Considering the previous judgments concerning the legal effect of the treaties in domestic level, it is safe to say that the KAFTA is also accorded the same legal effect as domestic laws in Korea, but private person cannot invoke directly the provisions of the KAFTA for claiming the rights and obligations under the KAFTA.

Legal Issues relating to Implementation of Korea-Australia FTA

1. How to reflect different level of treaty obligations

○ In general, comprehensive legislative measures are required in a wide range of economic areas such as goods, service, investment and so on to conclude FTA. In particular, when concluding the FTAs with various counter partners, the Korean government has taken a wide range of legislative measures to amend or enact relevant statutes in a more systemic way as well as with great rapidity. Because of the FTAs sharing the similar template of contents and technical nature, legislative measure can be taken relatively with no difficulty. Although the template of implementing legislation of the FTAs are similar one another, it will not

30) Article 18.10 (30): Liabilty for Service Providers and Limitations

30. For the purpose of providing enforcement procedures that permit efective action against any act of copyright infringement covered by this Chapter, including expeditous remedies to prevent infringements and criminal and civil remedies that constiute a deterent o further infringements, each Party shal provide, consistent with the framework set out in this Article:

(a) legal incentives for service providers to cooperate with copyright owners in detering the unauthorized storage and transmision of copyrighted materials; and

(b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that hey do not control, initate, or direct, and that ake place through systems or networks controled or operated by them or on their behalf, as set forth in this subparagraph (b) [...]

be easy to take legislative measure in that the differences among the rights and obligations in the FTAs are dependent upon which the other State party would be.

○ For instance, the MFN(most-favoured-nation) clause is frequently included in the chapter on service investment of the FTA. A MFN clause is a treaty provision whereby a State undertakes an obligation towards another State to accord MFN treatment in an agreed sphere of relations.[31] MFN treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State not less favourable than treatment extended by the granting State to a third State, or to persons or things in the same relationship with that third State.[32] In the KAFTA there are three MFN clauses in its various chapters.[33]

○ When the government is taking legislative measure for the FTA containing the MFN clause, irrespective of the different levels of market opening provided in the other FTAs, the implementing legislation has to be enacted according to the FTA, which set out the most high level of market opening. If the Korean government does not want the legal effect of the MFN clause to be applicable to the other FTA's State parties, the government should make a reservation on the MFN clause. In this case restriction on the effect of the MFN clause should be reflected on the implementing legislation.

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31) Meinhard Hilf and Robin Geiß, "Most-Favoured-Nation Clause", in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (Oxford University Press, 2012), pp. 384-395.

32) Ibid.

33) Article 7.3, Article 8.3 and Article 11.4 of the KAFTA provides the MFN as follow:

Article 7.3: MOST-FAVOURED-NATION TREATMENT

"Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to service suppliers of a non-Party."

Article 8.3: MOST-FAVOURED-NATION TREATMENT

"Each Party shall accord to investors of the other Party, financial institutions of the other Party, investments of investors in financial institutions, and cross-border financial service suppliers of the other Party treatment no less favourable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of a non-Party, in like circumstances."

Article 11.4: MOST-FAVOURED-NATION TREATMENT

"1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

○ For instance, with regard to the opening of legal service market, the Korean government has adopted phased measures depending on the other State party to the FTA. Specifically, when concluding the FTA with Peru, the Korean government committed to 2nd level of market opening in the area of service and investment, and made a reservation on the MFN clause in the FTA. This reservation implies that even if the Korean government opens the market up to the 3rd level in those areas, the government's intent is not to provide Peru with the same MFN treatment as that to the other FTA's State parties.[34] Therefore, when enacting legislative measures for the FTAs, the different levels of market opening must be taken into account to the implementing legislation.

○ Similarly, if the Korean government makes reservation on the MFA caluses in the KAFTA, legislative measures for implementing the KAFTA should reflect the issue of market opening and the implementing legislation should provide the mechanism which Australia will be restricted to enjoy the benefits of potential higher level of market opening by the Korean government. Actually, Korea and Australia agreed on making a reservation on the chapters on service and investment in the KAFTA. The reservations by the two State parties are listed in Annex I and II in a negative way which prescribes existing or future measure inconsistent with main obligations under the chapters on service and investment.

○ With regard to MFN clauses, the two countries reached an agreement to grant MFN treatment to the agreement to be signed after the KAFTA's entry into force. However, both countries made a reservation to exclude particular industries from the scope of the MFN treatment according to the afore-mentioned agreement. While Korea made a reservation on MFN treatment in the ares of Aviation, Fisheries, Shipping, Satellite Broadcasting, Railway, Audiovisual Co-production, Australia reserved the MFN treatment in the areas of Aviation, Fisheries, Shipping and so on. Therefore, when enacting legislative measure, the reser-

34) On the issue with regard to the 2nd level of market opening in the ares of legal service, see Article 34-2 of Foreign Legal Consultant Act.
"(1) Where a Foreign Legal Consultant Office whose head office is established and operated in a party to a free trade agreement, etc. publicly notified by the Minister of Justice in accordance with the free trade agreement, etc. is registered in advance for joint handling of cases, etc. as provided in Article 34-3 with the Korean Bar Association (hereinafter referred to as "registration for joing handling of cases, etc."), notwithstanding Article 34 (2), the Foreign Legal Consultant Office may jointly handle a case, combined with domestic legal services and foreign legal services, based on a separate contract by case, together with a law office, law firm, law firms (in the form of Limited Liability Company), or association of law offices and may distribute profits incurred therefrom.
(2) Where a member of the Foreign Legal Consultant Office or a Foreign Legal Consultant who is working for the Foreign Legal Consultant Office, but not a member thereof, deals with a case pursuant to paragraph (1), he/she shall not unduly involve in legal services handled by an attorney-at-law of a law office, law firm, law firms (in the form of Limited Liability Company), and association of law offices, beyond the scope of practice under Article 24."

vation made by both parties should be taken into account.

2. Joint Committees under the KAFTA

○ Chapter 21 of the KAFTA outlines institutional provisions of the agreement and establishes a system of joint committees to oversee implementation and operation of agreement. Regarding the proceedings of these joint committee, the KAFTA should be interpreted to promote openness and access to information. In particular, the reports of the joint committees established by the agreement should be made public and urged Korea to make an interpretive declaration in order to clarify its practice in this respect. Such an interpretative declaration was urgently required in order to promote transparency and public understanding of the policy developments made under the KAFTA.

○ Article 4.12 establishes a committee of officials from Australia and Korea to consider and resolve any matter arising in relation to rules of origin and origin procedures. It is recommended that this committee should also include industry representation or promote communication between the government and industry representation.

○ The committees established under trade agreements can operate slowly to resolve issues. The problem with the committee at the present time is that it is done at the discretion of the parties, so they do not meet on any frequency basis necessarily. They meet on an annual basis or on an as–needs basis. After the entry into force of the KAFTA, the necessity for committee to have meetings on a regular basis should be reviewed and institutionalized depending on the scale of increasing trade and investment through the KAFTA.

3. Investor–State Dispute Settlement Mechanism and Safeguards against Its Abuse

○ KAFTA includes an Investor–State Dispute Settlement(ISDS) mechanism. These mechanisms provide a means for foreign investors to settle disputes with host governments through a third party outside of either country's formal judicial system. ISDS provisions are designed to protect foreign investors from direct or indirect expropriation of their investments. Originally set up to protect foreign investors in developing countries, ISDS clauses are now included in the majority of FTAs.

○ Although ISDS is not directly relevant to implementation of the KAFTA, it can have some implications for implementation with regard to remedies by individual investor against the governments. During negotiations, Korea had insisted on including ISDS mechanism but Australia objected to it. The one of the most decisive reason why Australia rejected inclusion of ISDS was due to the fact that the current case involving Philip Morris' challenge to Australia's plain packaging tobacco laws was repeatedly cited as an example of the dangers of ISDS mechanisms. As Korea had refused to sign the Agreement without the inclusion of an ISDS mechanism, the Australian Government agreed to introduce ISDS. But Australia and Korea agreed to take measures to ensure that the final ISDS mechanism addressed the growing concerns over these provisions. The KAFTA contains a modern balanced mechanism that includes a range of explicit ISDS safeguards at least as strong as any other FTAs and certainly stronger than the majority to protect the government's ability to regulate in the public interest such as public health and the environment.[35)]

○ KAFTA contains a significant range of carve-outs and safeguards to protect regulation in areas of key public policy concerns including public welfare, health, culture and the environment. Foreign investment screening decisions are also carved-out from the scope of the ISDS mechanism. Procedural safeguards to deter frivolous claims and contain costs are also included.

○ The safeguards included in the ISDS mechanism in KAFTA would mitigate the risk of frivolous claims being lodged, explaining how the procedural protections would operate. The first of those is an expedited procedure to dismiss frivolous claims at an early stage of the proceedings and potentially to award costs against an investor in those circumstances. Another key procedural protection is the ability of the parties to issue a joint interpretation of any obligation in the agreement which is then binding on a tribunal. This is valuable because if the parties think that a tribunal is interpreting an obligation in an overly broad way, in a way that increases the exposure of the parties in ways they had not anticipated, they can issue a joint interpretation of what they consider that obligation to require and that will be binding on any tribunal.[36)] Considering the domestic debate on ISDS of the Korea-US FTA in Korea and the ongoing challenges by Philip Morris against Australia's national laws, the safeguards in the KAFTA can be regarded as meeting necessary condition to minimize the risks associated with ISDS. In this respect, it is called for further study

35) "Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014)", Report 142, Joint Standing Committee on Treaties, The Parliament of the Commonwealth of Australia, pp. 26-27.

36) Mr Richard Braddock, Directory, Office of Trade Negotiations, DFAT, Committee Hansard, Canberra, 5 August 2014, p. 7.

about not only the substantive issues of the KAFTA but also the procedural aspect of the arbitration under ISDS.

Conclusion

○ Implementation of the KAFTA is only the starting point for some sectors of the economy in Korea. It is reported that the service and investment sector welcomed the agreement but told that it only provides the framework to enable access to the Australian market. Meanwhile, agricultural sector fears that the KAFTA will drive them out of business because of Australia's more competitive agricultural sector. Looking back into the past experiences concluding the FTA with United States, it is required not only to ensure full implementation of the FTA, but also to introduce precautionary measures for keeping a balance among the industries benefited or suffered from the entry into force of the FTA.

○ To spread the benefits from the KAFTA, more work will be required at government–to–government level for the industry to take full advantage of the agreement. There still remain a range of non–tariff barriers to be addressed. The urgency expressed by stakeholders directly affected by phased tariff reductions for implementation of KAFTA before the end of the 2014 calendar year is calling for prompt action. Faced these situations, both governments are advised to closely consider various aspects of implementation of the KAFTA.