Lock the Gate: The Trans-Pacific Partnership and Investor-State Dispute Settlement, Submission to the Productivity Commission, the Joint Standing Committee on Treaties, and the Senate Foreign Affairs, Trade, and References Committee.

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LOCK THE GATE:
THE TRANS-PACIFIC PARTNERSHIP AND
INVESTOR-STATE DISPUTE SETTLEMENT

UNCTAD Statistics on ISDS Disputes

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Executive Summary

This submission provides a critical analysis of Investment Chapter of the *Trans-Pacific Partnership*—focusing upon Investor-State Dispute Settlement.

The National Interest Analysis provides a rosy assessment of Investment under the *Trans-Pacific Partnership*, arguing ‘The TPP will create new investment opportunities and provide a more predictable and transparent regulatory environment for investment.’

At one level, the National Interest Analysis argues that the *Trans-Pacific Partnership* preserves Australia’s regulatory autonomy in respect of foreign investment:

The TPP will also promote further growth and diversification of foreign investment in Australia by liberalising the screening threshold at which private foreign investments in non-sensitive sectors are considered by the Foreign Investment Review Board (FIRB), increasing it from $252 million to $1,094 million for all TPP Parties. Under the TPP, Australia has retained the ability to screen investments in sensitive sectors to ensure they do not raise issues contrary to the national interest. All investments by foreign governments will continue to be examined and lower screening thresholds will apply to investments in agricultural land and agribusiness.

This statement captures the tension within the agreement between promoting and fostering foreign investment, and protecting regulatory autonomy.

On the other level, the National Interest Analysis discusses giving special rights to foreign investors under the investor-state dispute settlement regime in the *Trans-Pacific Partnership*:

The TPP’s investment obligations include high quality, modern rules governing the treatment of investors and their investments, balanced with robust safeguards to preserve the right of the
Government to continue regulating in the public interest. Investment obligations can be enforced directly by Australian and other TPP investors through an ISDS mechanism.

A number of important safeguards are built into the rules guiding ISDS, making this one of the most protective treaties in existence worldwide in terms of its protections for legitimate regulation. Procedural safeguards in the TPP provide enhanced levels of transparency in the management of ISDS claims. In addition, specific Australian policy areas are carved-out from certain ISDS claims including: social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities; measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage; and Australia’s foreign investment policy, including decisions of the Foreign Investment Review Board. Australia’s tobacco control measures as defined under the TPP will not be able to be challenged.

However, the regime presented in the *Trans-Pacific Partnership* does not necessarily meet such aspirations for providing ‘high quality, modern rules governing the treatment of investors and their investments, balanced with robust safeguards.’ Indeed, the agreement has been criticised for providing such a complex, unruly, distorted and unbalanced Investor-State Dispute Settlement regime – which favours interests of foreign investors above all others. Moreover, the *Trans-Pacific Partnership* has been widely criticised for its limited and narrow exceptions and exclusions, and lack of robust safeguards.

There has been much scepticism as to whether Investor-State Dispute Settlement should be a necessary part of the *Trans-Pacific Partnership*. There has been grave doubts amongst policy-makers about whether Investor-State Dispute Settlement plays any positive role in attracting and retaining foreign investment. Investor-State Dispute Settlement poses significant regulatory challenges across an array of fields.
RECOMMENDATIONS

This submission questions the need for the inclusion of an Investor-State Dispute Settlement regime in the *Trans-Pacific Partnership*. These recommendations build previous submissions to Australian parliamentary committees, investigating the topic of Investor-State Dispute Settlement.

**Recommendation 1**

In theory, Investor-State Dispute Settlement was designed to provide a solution for rule of law problems in developing countries. However, in practice, Investor-State Dispute Settlement has been criticised for undermining the rule of law, the judiciary, the rulings of domestic courts, and the decisions of national parliaments. Chief Justice French of the High Court of Australia has expressed his deep reservations about the operation of Investor-State Dispute Settlement.

**Recommendation 2**

In light of the work of the Productivity Commission and other expert bodies, the Australian Government and Parliament should seek to exclude investment clauses from trade agreements and investment agreements.

**Recommendation 3**

There has been an international debate over the usefulness and the legitimacy of Investor-State Dispute Settlement clauses. The United Nations Conference on Trade and Development (UNCTAD) has highlighted the rise in Investor-State
Dispute Settlement cases, and the significant issues relating to public regulation and government liability. A number of judges, experts, policy-makers, and nation states have been highly critical of the procedural and substantive aspects of Investor-State Dispute Settlement scheme. There has been much concern about how global law firms have expansively used the arbitration system.

Recommendation 4

The *Trans-Pacific Partnership* contains complex yet murky provisions on whether Intellectual Property owners can invoke Investor-State Dispute Settlement. As noted by the Law Council, there are concerns about the exact nature of the inter-relationship between the intellectual property regime and Investor-State Dispute Settlement.
**Recommendation 5**

Investment clauses have been used and abused by Big Tobacco (particularly in light of its hysterical fears about the impact of graphic health warnings and plain packaging of tobacco products upon its moribund business). The World Health Organization and tobacco control advocates have warned that Big Tobacco has sought to use investment clauses to challenge tobacco control measures, such as graphic health warnings and plain packaging of tobacco products, and frustrate the implementation of the *World Health Organization Framework Convention on Tobacco Control*. The *Trans-Pacific Partnership* contains some safeguards in respect of future investor action by Big Tobacco.

**Recommendation 6**

There has been much controversy over the *Trans-Pacific Partnership*, intellectual property, investment, and pharmaceutical drugs. There has been much concern that investment clauses could be deployed to challenge domestic law reforms – such as those proposed in the independent *Pharmaceutical Patents Review Report*. The dispute between *Eli Lilly v. Canada* highlights the dangers of investment clauses in this field.
Recommendation 7
UNITAID, public health advocates, intellectual property experts, and legislators have all expressed concern about the impact of investment clauses upon access to essential medicines – especially in respect of HIV/AIDS, tuberculosis, and malaria, and neglected diseases.

Recommendation 8
As highlighted by the dispute between *Lone Pine Resources v. Canada*, gas companies have deployed investment clauses to challenge regulations and moratoria in respect of coal seam gas and mining. This raises larger questions about public regulation in respect of land, water, and the environment.

Recommendation 9
Investment clauses could undermine and undercut public regulation in respect of the environment, biodiversity, and climate change. The investor-state dispute settlement arbitration between TransCanada and the United States Government

Recommendation 10
Investment clauses could be deployed in the field of agriculture. Big food and soda companies could question food nutrition labelling laws. Foreign biotechnology companies could challenge GM food labelling laws. Multinational agricultural companies could question Australian agricultural policies. The United Nations Special Rapporteur on the Right to Food, Olivier De Schutter,
has raised larger issues about the impact of trade deals like the *Trans-Pacific Partnership* upon food security, nutrition, hunger, and the right to food.

**Recommendation 11**
In light of the work of Maude Barlow and the Council of Canadians, it is evident that Investor-State Dispute Settlement has a significant impact upon water rights.

**Recommendation 12**
Investment clauses could have a chilling effect upon the Digital Economy. Investor-state dispute settlement could be potentially deployed by copyright industries to challenge significant copyright reforms. Investment clauses could be invoked by IT companies, such as Apple, Adobe, and Microsoft, to challenge IT pricing reforms. Both old media and new media could rely upon investment clauses to test law reform in respect of privacy law.

**Recommendation 13**
Investment clauses could be invoked in relation to foreign investment in respect of confidential information, trade secrets, and data protection (particularly in respect of agriculture and pharmaceutical drugs). This could raise issues in respect of regulatory review.
Recommendation 14
Senator Nick Xenophon has raised concerns about the application of Investor-State Dispute Settlement in respect of gambling regulation. A review of the UNCTAD Investment Policy Hub reveals that there has been 10 Investor-State Dispute Settlement matters involving gambling and betting activities. There are certainly good grounds to be concerned about how Investor-State Dispute Settlement will impact upon gambling regulation.

Recommendation 15
There is a need to ensure that investment clauses are not deployed against financial regulations, particularly in the wake of the Global Financial Crisis.

Recommendation 16
Investor-State Dispute Settlement raises significant problems in respect of industrial relations, workers’ rights, and trade unions.

Recommendation 17
In light of the dispute in Metalclad v. Mexico, investor-state dispute settlement clauses could threaten local, state, and territory government laws and regulations in Australia.
Recommendation 18

In light of the Al-Jazeera dispute, Investor-State Dispute Settlement could have a significant impact upon Australian media and communications law. This raises interesting and complex questions in respect of the regulation of media ownership, diversity, and content, and foreign investment and ownership.

Recommendation 19

There have been much controversy over Investor-State Dispute Settlement in discussions between Canada and the European Union over the Comprehensive Economic and Trade Agreement (CETA). The Investor-State Dispute Settlement regime in CETA is more advanced than its counterpart to the TPP – but nonetheless, there have been concerns that it will result in similar conflicts to that under NAFTA.

Recommendation 20

There has also been great controversy in the European Union during consultations over the possible inclusion of Investor-State Dispute Settlement in the Trans-Atlantic Trade and Investment Partnership.

Recommendation 21

There has also been significant concern about the investment regime in the Trade in Services Agreement as well.
Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the Trans-Pacific Partnership, the Trans-Atlantic Trade and Investment Partnership, and the Trade in Services Agreement. His work is archived at SSRN Abstracts and Bepress Selected Works.

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on The Pirate Bazaar: The Social Life of Copyright Law (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.
Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act 1998* (US) and the *Digital Millennium Copyright Act 1998* (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors’ copyright, the *Australia-United States Free Trade Agreement 2004*, the *Copyright Amendment Act 2006* (Cth), the *Anti-Counterfeiting Trade Agreement 2011*, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of Law in Context, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, “Gene Patents In Australia: Options For Reform” (2003-2005), an Australian Research Council Linkage Grant, “The Protection of Botanical Inventions (2003), and an Australian Research Council Discovery Project, “Promoting Plant Innovation in Australia” (2009-2011). Rimmer has participated in inquiries into plant breeders’ rights, gene patents, and access to genetic resources.
Rimmer is a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

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

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

Rimmer has also a research interest in intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers’ rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015).
Lock the Gate: Quebec, Fracking, Investor-State Dispute Settlement, and the Trans-Pacific Partnership

Matthew Rimmer

Abstract

This article provides a comparative analysis of the battles over fracking, investment, trade, and the environment in a number of key jurisdictions – including the United States, Canada, Australia, New Zealand, as well as the Pacific Rim. The work contends that investor-state dispute settlement poses a significant threat to regulation of the environment, natural resources, and the climate. Part 1 provides an outline of the Trans-Pacific Partnership – considering the Investment Chapter and the investor-state dispute settlement regime. Part 2 examines the dispute between the Lone Pine Resources Inc. and the Government of Canada over a fracking moratorium in Quebec under the North American Free Trade Agreement (NAFTA) 1994. This dispute provides a case study to assess the operation of investor-state dispute settlement. Part 3 focuses upon the debate over the Trans-Pacific Partnership, investment, and fracking in the United States. Part 4 charts the rise of the Lock the Gate Alliance in Australia, and its demands for a moratorium in respect of coal seam gas and unconventional mining. It looks at the debate over investor-state dispute settlement in the Australian Parliament and the High Court of Australia. Part 5 focuses upon the controversy over the Trans-Pacific Partnership in New Zealand. Part 6 considers the impact of investor clauses upon Pacific Rim developing countries within the Trans-Pacific Partnership. Part 7 provides a counterpoint with the debate in the European Union over the Trans-Atlantic Trade and Investment Partnership and the Comprehensive Economic and Trade Agreement. Investor-state dispute settlement poses significant challenges to the global goals associated with sustainable development.

Introduction

There has been much debate about the relationship between international trade, the environment, biodiversity protection, sustainable development, and climate change.
Investor-state dispute settlement is a mechanism which enables foreign investors to seek compensation from national governments at international arbitration tribunals.\(^1\) There has been a particular focus upon investor-state dispute settlement being used by fossil fuel companies and natural resource entities. This has been a significant issue under the *North American Free Trade Agreement*, with its investor-state dispute settlement scheme.\(^2\) In her prescient 2009 book, *The Expropriation of Environmental Governance*, Kyla Tienhaara foresaw the rise of investor-state dispute resolution of environmental matters.\(^3\) She observed:

> Over the last decade there has been an explosive increase of cases investment arbitration. This is significant in terms of not only the number of disputes that have arisen and the number of states that have been involved, but also the novel types of dispute that have emerged. Rather than solely involving straightforward incidences of nationalization or breach of contract, modern disputes often revolve around public policy measures and implicate sensitive issues such as access to drinking water, development on sacred indigenous sites and the protection of biodiversity.\(^4\)

In her study, Kyla Tienhaara observed that investment agreements, foreign investment contracts and investment arbitration had significant implications for the protection for the protection of the environment. She concluded that ‘arbitrators have made it clear that they can, and will, award compensation to investors that claim to have been harmed by

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\(^4\) Ibid., 1.
environmental regulation.” She also found that ‘some of the cases suggest that the mere threat of arbitration is sufficient to chill environmental policy development.’ Tienhaara was equally concerned by the ‘possibility that a government may use the threat of arbitration as an excuse or cover for its failure to improve environmental regulation.’ In her view, ‘it is evident that arbitrators have expropriated certain fundamental aspects of environmental governance from states.’ Tienhaara held: ‘As a result, environmental regulation has become riskier, more expensive, and less democratic, especially in developing countries.’

The Obama Administration has pushed such issues into sharp relief, with its advocacy for sweeping international trade agreements, such as the Trans-Pacific Partnership and the

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5 Ibid., 2.
6 Ibid., 3.
7 Ibid., 3.
8 Ibid., 3.
9 Ibid., 3.
Trans-Atlantic Trade and Investment Partnership. There has been much public concern about the impact of the mega-trade deals upon the protection of the environment. In particular, there has been a debate about whether the Trans-Pacific Partnership will promote dirty fracking. Will the Trans-Pacific Partnership transform the Pacific Rim into a Gasland? The issue has become a pertinent one, with the conclusion of the negotiations over the trade agreement in October 2015, and a push to finalise the agreement before the end of Obama’s presidency.

There has been a spectrum of positions in the debate over investor-state dispute settlement in the context of the Trans-Pacific Partnership. The United States Government; a range of multinational companies; and global law firms have advocated for the inclusion of an investor-state dispute settlement mechanism in the agreement. Others have called for the reformation of investor-state dispute settlement, with proposals for procedural and substantive reforms. This is at its most elaborate, with the push for an Investment Court System. By contrast, there are a significant number of legal and economic experts who contend that investor-state dispute settlement is a threat to the rule of law and democracy. In

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their view, investment arbitration should be abandoned in trade agreements, such as the *Trans-Pacific Partnership*.

This article provides a case study of an investor-state dispute settlement matter between Lone Pine Resources Inc. and the Government of Canada in respect of a moratorium on fracking on the St Lawrence River in Quebec. The work considers international resonance of the dispute, and traces how it has influenced international debates on the topic around the world. This article provides a comparative analysis of the battles over fracking, investment, trade, and the environment in a number of key jurisdictions – including the United States, Canada, Australia, and New Zealand. Part 1 provides an outline of the *Trans-Pacific Partnership* – focusing in particular upon the text of the Investment Chapter and the investor-state dispute settlement regime. Part 2 examines the dispute between the Lone Pine Resources Inc. and the Government of Canada over a fracking moratorium in Quebec under the *North American Free Trade Agreement* (NAFTA) 1994. Part 3 focuses upon the United States. Part 4 charts the rise of the Lock the Gate Alliance in Australia, and its demands for a moratorium in respect of coal seam gas and unconventional mining. Part 5 focuses upon parallel developments in New Zealand. Part 6 flags the impact of investor clauses upon developing countries within the *Trans-Pacific Partnership*. Part 7 briefly examines the debate in the European Union over the *Trans-Atlantic Trade and Investment Partnership*, and the *Comprehensive Economic and Trade Agreement* (CETA). This article concludes that

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Pacific Rim countries should withdraw from investor-state dispute settlement procedures, because of the threat posed to environmental regulation in respect of air, land, and water.

1. **The Trans-Pacific Partnership, Investment, and Corporate Sovereignty**

A centrepiece of the *Trans-Pacific Partnership* is Chapter 9 of the agreement, which establishes an investor-state dispute settlement regime.

WikiLeaks provided an early glimpse of the Investment Chapter, leaking the draft text in May 2015. Julian Assange, WikiLeaks editor, commented:

> ‘The TPP has developed in secret an unaccountable supranational court for multinationals to sue states. This system is a challenge to parliamentary and judicial sovereignty. Similar tribunals have already been shown to chill the adoption of sane environmental protection, public health and public transport policies.’

WikiLeaks noted that ‘the oil giant Chevron [invoked investor-state dispute settlement] against Ecuador in an attempt to evade a multi-billion-dollar compensation ruling for polluting the environment.’ WikiLeaks also warned: ‘The threat of future lawsuits chilled environmental and other legislation in Canada after it was sued by pesticide companies in 2008/9.’

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17. Ibid.

18. Ibid.

19. Ibid.
Trans-Pacific Partnership: ‘ISDS tribunals are often held in secret, have no appeal mechanism, do not subordinate themselves to human rights laws or the public interest, and have few means by which other affected parties can make representations.’ The revelations about the Investment Chapter received wide attention in quality media.

With the publication of the final text of the Trans-Pacific Partnership, the United States Trade Representative sought to justify the inclusion of the Investment Chapter, and investor-state dispute settlement:

TPP’s chapter on Investment strengthens the rule of law in the Asia-Pacific region, deters foreign governments from imposing discriminatory or abusive requirements on American investors, and protects the right to regulate in the public interest. To this end, it ensures that American investors have effective remedies in the event of a breach of their rights, while reforming the investor-state dispute settlement (ISDS) system by providing for tools to dismiss frivolous claims and instituting a range of other procedural and substantive safeguards.

It seems remarkable that investor-state dispute settlement is presented as a solution for ‘rule of law’ problems, when the regime has been subject to criticism for its failure to respect the ‘rule of law.’

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20 Ibid.
22 The United States Trade Representative, ‘Chapter Summary of Chapter 9 on Investment in the Trans-Pacific Partnership’, 5 November 2015, https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a
23 Ibid.
The United States Trade Representative maintains that ‘the chapter includes stronger safeguards to close loopholes and to raise the standards of investor-State dispute settlement above virtually all of the other 3,200 plus investment-related agreements in effect around the world.’24 The United States Trade Representative contends that the agreement contains a number of safeguards: ‘These include underscoring that countries can regulate in the public interest, including on health, safety, financial stability, and environmental protection; expanding the rules discouraging and dismissing frivolous suits; clarifying that the claimant bears the burden to prove all elements of its claims; allowing governments to issue binding interpretations of the agreement; making proceedings fully open and transparent; and providing for the participation of civil society organizations and others parties not a direct party to the dispute.’25 The United States Trade Representative also argues that the regime provides clarifications of key terms in the agreement.

In the final text of the agreement, there is a wide definition provided for ‘investment’:

Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments and loans;[2],[3]

(d) futures, options and other derivatives;

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24 Ibid.
25 Ibid.
(e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;

(f) intellectual property rights;

(g) licences, authorisations, permits and similar rights conferred pursuant to the Party’s law;[4] and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.26

Article 9.9.3 (d) on performance requirements addresses environmental matters: ‘(d) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.’27

Article 9.15 on the Trans-Pacific Partnership concerns ‘Investment and Environmental, Health and other Regulatory Objectives’.28 This article provides: ‘Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment


activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.'

Section B of Chapter 9 of the *Trans-Pacific Partnership* establishes the mechanism for investor-state dispute settlement. There are a number of measures designed to govern the operation of this mechanism. Article 9.17 looks at consultation and negotiation. Article 9.18 deals with the submission of a claim to arbitration. Article 9.19 addresses the consent of each party to arbitration. Article 9.20 considers the conditions and limitations on consent of each party. Article 9.21 looks at the selection of arbitrators. Article 9.22 focuses upon the conduct of the arbitration. Article 9.23 examines the transparency of arbitral proceedings. Article 9.24 looks at the governing law. Article 9.25 considers expert reports. Article 9.26 examines consolidation of disputes. Article 9.28 deals with the rules for awards. Article 9.29 addresses the service of documents.

Annex 9.B deals with the nature of expropriation. Clause 3 (b) provides that ‘Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.’

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Chapter 29 of the *Trans-Pacific Partnership* provides for general exceptions. There is further language here on environmental measures necessary to protect human, animal or plant life or health.

There has been much academic debate how the trade agreement, generally, and this investment regime in particular will impact upon the environment, biodiversity, and climate change.31

Tamara Salter has argued that there is a need to require arbitrators to consider international agreements on environmental protection.32 She contends: ‘As awareness of the TPP and TTIP grow among citizens and influence politicians and the effects of climate change become more severe, the need to incorporate the efforts of governments and private entities seeking an environmental and climate changes consensus into international economic law and dispute resolution will become more urgent’.33

Valenta Vadi also wonders whether arbitral tribunals could be reformed to address climate change governance.34 The scholar contends: ‘While arbitral tribunals are not the best forum to adjudicate climate-related disputes, due to their limited mandate and their uneven consideration of environmental concerns in the past, they can contribute to global climate

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33 Ibid., 153.

governance.’35 This is not a view I would subscribe to. The investor-state dispute settlement
seems ill-adapted to deal with questions of climate change.

Christina Beharry and Melinda Kuritzky have argued that the arbitral tribunal system will
become better adapted to dealing with environmental disputes: ‘Ultimately, the goal for the
arbitral system is to develop the capacity to seriously consider the public policy issues and
environmental concerns often at stake while fairly adjudicating the claims of investors
harmed by state action.’36 Unfortunately, this optimism seems misplaced. The investor
system seems hostile to public policy regulation in respect of the environment, biodiversity,
and climate change.

In a comprehensive study of investor-state dispute settlement, Gus van Harten expressed
concerns that tribunals did not adopt a position of restraint in the review of legislative and
executive decisions.37

Alfred de Zayas – the United Nations Independent Expert on the Promotion of a Democratic
and Equitable International Order – has lamented: ‘Investor-State dispute settlement is a
rather recent and arbitrary construction, a privatized form of dispute settlement that
accompanies many international investment agreements.’ 38 He has maintained that the

35  Ibid., 1351.
36  Christina Beharry and Melinda Kuritzky, ‘Going Green: Managing the Environment Through
37  Gus van Harten, Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty
38  Alfred de Zayas, ‘Promotion of a Democratic and Equitable International Order’ , United Nations, 5
investor-state dispute settlement regimes cannot be adequately or sufficiently reformed. Alfred de Zayas has instead recommended the abolition of investor-state dispute settlement regimes. He has instead recommended the creation of an international investment court; State-State dispute settlement; and domestic dispute resolution. The Independent Expert concluded ‘that the abolition of Investor-State dispute settlement does no injustice to investors, who can still avail themselves of the domestic courts and/or the well-tried mechanism of diplomatic protection.’ Moreover, he observed that ‘the World Bank offers risk insurance, and this should be factored in as a normal cost of doing business’. ‘Notwithstanding the imposition of some necessary limits on the hybrid dogmas of market fundamentalism and the doxology of free trade, investors will continue making handsome profits and, precisely by accepting the principles of transparency, accountability and other reasonable public-oriented regulations, they ensure the continuation of a healthy system of free markets accompanied by sustainable development.’ Alfred de Zayas has maintained that there is a need to mainstream human rights in trade and investment law.

2. **Canada**

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39 Ibid., 21.
40 Ibid., 21.
41 Ibid., 21.
In light of the *North America Free Trade Agreement* 1994, there has been particular disquiet about the use of investor-state clauses to challenge environmental regulations in Canada. The dispute between Lone Pine Resources Inc. and the Canadian Government over a fracking moratorium has been an important test case in respect of investor-state dispute settlement.

A. *Lone Pine Resources Inc. v. The Government of Canada*

In 2011, the Quebec National Assembly introduced and passed Bill 18, and placed a moratorium on fracking below the St. Lawrence River in order to allow for a full and timely evaluation of the public health and environmental impacts of such activity.

In 2012, the United States energy company Lone Pine Resources Inc. notified the Canadian Government that it would challenge the moratorium on fracking in Quebec’s St Lawrence River under an investment clause Chapter 11 of the *North American Free Trade Agreement* (NAFTA). The full complaint was filed on the 6th September 2013.

Lone Pine objected to the ‘arbitrary, capricious, and illegal revocation of the Enterprise’s valuable right to mine for oil and gas under the St. Lawrence River by the Government of Quebec without due process, without compensation, and with no cognizable public


45 Ibid.
purpose. The company complained that there had been a lack of consultation by the Quebec Government:

Between 2006 and 2011, Lone Pine, the Enterprise, and their predecessors expended millions of dollars and considerable time and resources in Quebec to obtain the necessary permits and approvals from the Government of Quebec to mine for oil and gas in the province of Quebec, including beneath the St. Lawrence River. Suddenly, and without any prior consultation or notice, the Government of Quebec introduced Bill 18 into the Quebec National Assembly on May 12, 2011 to revoke all permits pertaining to oil and gas resources beneath the St. Lawrence River without a penny of compensation.

The energy company lamented: ‘Neither Lone Pine nor the Enterprise were given any meaningful opportunity to be heard, any notice that the Act would be passed, or provided any reason or basis for the outright revocation of the Enterprise’s permits relating to oil and gas below the St. Lawrence River’. The energy company bemoaned the political decision: ‘All they were told was that the Act was “a political decision,” and that nothing could be done to prevent it from being passed’.

Lone Pine claimed that ‘the moratorium on fracking violated the provision of NAFTA’s investment chapter that offers investors a "minimum standard of treatment" and "fair and equitable treatment."’ The company complained that ‘Lone Pine and the Enterprise have

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46 Ibid.
47 Ibid.
48 Ibid.
49 Ibid.
50 Ibid.
suffered significant damages as a result of Canada’s [alleged] violation of Chapter Eleven of NAFTA.\textsuperscript{51}

The company has brought this investment action at the same time as it has sought to restructure itself in bankruptcy.\textsuperscript{52} Glyn Moody has also noted that Lone Pine is really a Canadian firm: ‘Lone Pine is a Calgary-based firm and would not have standing as a foreign entity to sue Canada under NAFTA [\textit{North American Free Trade Agreement}], but [Lone Pine company president] Granger said it can do so because it is registered in Delaware.’\textsuperscript{53}

Indeed, on its website, the company as an independent oil and gas exploration, development, and production company with operations in Canada within the provinces of Alberta, British Columbia, Quebec and the Northwest Territories.\textsuperscript{54} Lone Pine Resources could well suffer the same fate as Philip Morris – which lost an investor action against Australia over the plain packaging of tobacco products, because its shift of assets from Australia to Hong Kong was considered to be an abuse of process.\textsuperscript{55}

\begin{flushleft}
\textsuperscript{51} Ibid.
\textsuperscript{52} Jamie Santo, ‘Lone Pine Aims to Restructure, Raise $100 m in Bankruptcy’, Law 360, 25 September 2013, \url{http://www.law360.com/articles/475765/lone-pine-aims-to-restructure-raise-100m-in-bankruptcy}
\textsuperscript{54} Lone Pine Resources, \url{http://www.lonepineresources.com/}
\end{flushleft}
For its part, the Government of Canada has maintained that ‘The measure was enacted by a fundamental democratic institution of Quebec and was preceded by numerous studies that establish that the Act seeks to achieve an important public policy objective, namely, the protection of the St. Lawrence River’. Moreover, it observed that ‘the damages claimed by the claimant are highly exaggerated.’ The Government of Canada contends that ‘the Act is a legitimate measure of public interest that applies indiscriminately to all holders of exploration licences that are located fully or partially in the St. Lawrence River’. In its view, ‘the Act cannot be considered an arbitrary, unfair or inequitable measure.’ Furthermore, the Government of Canada noted that ‘no representative of the Government of Quebec communicated to the claimant any guarantee, promise or specific assurance that could create legitimate expectations relating to the development of hydrocarbon resources that may be found beneath the St. Lawrence River.’ In any case, the Government of Canada commented that ‘passing the Act is a legitimate exercise of the Government of Quebec’s police power and, thus, the measure cannot constitute an expropriation.’

The dispute is progressing slowly, and, as at September 2016, was still unresolved.

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57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.
Martine Châtelain, president of Eau secours!, the Quebec-based coalition for a responsible management of water, argued: ‘Based on the principle of precaution, Quebec government’s response to the concerns of its population is appropriate and legitimate’. The President maintained: ‘No companies should be allowed to sue a State when it implements sovereign measures to protect water and the common goods for the sake of our ecosystems and the health of our peoples.’

The Canadian champion of the right to water, Maude Barlow, has long been concern about the impact of trade and investment agreements upon the environment. In her book, *Blue Planet*, Maude Barlow of the Council of Canadians is disturbed by the use of investor-state dispute settlement: ‘This “investment arbitration boom” is costing taxpayers billions of dollars and preventing legislation in the public interest.’ She fears that investment clauses are ‘used to gain access to the commons resources of other countries, placing the world’s forests, fish, minerals, land, air, and water supplies under direct control of transnational

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63 Ibid.


Barlow maintains that the Lone Pine action is an attack upon Quebec’s public management of its water rights.

Canadian environmental lawyer David Boyd has written upon the need to recognise the right to a clean and healthy environment. In his view, investor-state dispute settlement threatens efforts to improve standards of environmental protection. He has noted: ‘Advocates of enhanced rights for foreign investors claim that trade deals provide exceptions that allow governments to enact environmental policies’. He warned that such advice was misleading: ‘While there is language in trade deals that purports to protect governments' right to regulate, many arbitration panels have ignored or narrowly interpreted these provisions, making them practically useless.’ Boyd commented: ‘Tackling the hydra-headed challenge of climate change is already difficult and costly for a fossil-fuel exporting nation like Canada.’ He wondered: ‘Why ratify trade deals that will make it even harder and more expensive?’

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66 Ibid., 214-215.
69 Ibid.
70 Ibid.
71 Ibid.
Stuart Trew of the Council of Canadians maintained that ‘Quebec’s moratorium on fracking is legal and supported strongly by the public’. He maintained that ‘corporate profit should never get in the way of environmental and public health safeguards’. Stuart Trew insisted: ‘It’s outrageous to even think that we may have to pay Lone Pine not to drill in the St. Lawrence River’. Trew contended: ‘Trade rules shouldn’t be used to appease the whims of dirty oil and gas companies.’

Ilana Solomon of the Sierra Club observed: ‘My right to clean water, clean air, and a healthy planet for my family and community has to come before Lone Pine's right to mine and profit’. She warned: ‘This egregious lawsuit - which Lone Pine Resources must drop - highlights just how vulnerable public interest policies are as a result of trade and investment pacts.’ She observed: ‘Governments should learn from this and other similar cases and stop writing investment rules that empower corporations to attack environmental laws and policies.’ Highlighting the case study of Lone Pine Resources, Ilana Solomon has warned against the inclusion of investment clauses in the *Trans-Pacific Partnership*.

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73 Ibid.

74 Ibid.


76 Ibid.

77 Ibid.
Elizabeth May, the leader of the Green Party of Canada, has expressed concerns about investor-state provisions being used to challenge sustainability or environmental protection measures in Canada – such as the action by the US energy company Lone Pine Resources against Quebec’s moratorium on fracking. She observed: ‘Such cases represent clear barrier to environmental protection and regulation in Canada.’ Her preference was that the Trans-Pacific Partnership should not include investor clauses at all. May maintained: ‘At minimum, I would insist that any inclusion of investor-state arbitration clauses into the Trans-Pacific Partnership Free Trade Agreement include clearly stated exceptions against claims of expropriation for any laws or regulations pertaining to environmental, social, or labour policies that a future government may want to pursue.’

In her book, This Changes Everything, Naomi Klein considers the fracking revolution. She expressed concerns about the Lone Pine investor action against the Government of Canada. Klein observed: ‘As the anti-fossil fuel forces gain strength, extractive companies are beginning to fight back using a familiar tool: the investor protection provisions of free trade agreements.’ She found the claims of Lone Pine to be incredible. Nonetheless, Klein said: ‘It’s easy to imagine similar challenges coming from any company whose extractive dreams

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79 Ibid.
80 Ibid.
81 Ibid.
83 Ibid., 358.
84 Ibid., 358.
are interrupted by a democratic uprising.'\textsuperscript{85} She was concerned that ‘current trade and investment rules provide legal grounds for foreign corporations to fight virtually any attempt by governments to restrict the exploitation of fossil fuels, particularly once a carbon deposit has attracted investment and extraction has begun.’\textsuperscript{86} Klein wondered whether the ‘real problem is not that trade deals are allowing fossil fuel companies to challenge governments, it’s that governments are not fighting back against these corporate challenges.’\textsuperscript{87}

Naomi Klein and Maude Barlow expressed concern about the impact of investor clauses in the lead up to the Canadian election in 2015 and the international Paris climate talks.\textsuperscript{88} The two warned of the current costs incurred in respect of investor actions under the \textit{North American Free Trade Agreement}:

\begin{quote}
Canada is currently facing $2.6bn in legal challenges from American corporations under NAFTA. Current and past challenges have targeted bans against harmful additives to gasoline and exports of PCBs, and a moratorium on fracking. If a future government wants to reinstate our water laws or fulfill a commitment to serious fossil fuel reduction that might be agreed to in Paris, TPP adds a whole new batch of foreign investors to the current group that already have the right to challenge those laws before a private tribunal.\textsuperscript{89}
\end{quote}

\begin{flushright}
\textsuperscript{85} Ibid., 359.
\textsuperscript{86} Ibid., 359.
\textsuperscript{87} Ibid., 360.
\textsuperscript{88} Naomi Klein and Maude Barlow, ‘Stephen Harper’s politics put Canada to shame: don’t be distracted by them’, \textit{The Guardian}, 15 October 2015, \url{http://www.theguardian.com/commentisfree/2015/oct/16/stephen-harper-canada-carbon-climate-change}
\textsuperscript{89} Ibid.
\end{flushright}
The pair warned that investor clauses can be ‘used as a weapon against ambitious climate policy.’\textsuperscript{90} Klein and Barlow said that the \textit{Trans-Pacific Partnership} gives ‘foreign corporations the right to directly sue our government for new laws or regulations – whether environmental, health or human rights – that they claim negatively affect their bottom line.’\textsuperscript{91}

The departure of Stephen Harper as leader of Canada in 2015, and the new rule of Justin Trudeau, could well lead to a different approach by Canada to fracking, fossil fuels, and climate change. There has been disquiet over Lone Pine Resources aggressively lobbying the new Trudeau Canadian Government over Quebec’s fracking ban.\textsuperscript{92} It was reported that, in April and May 2016, the company lobbied 11 MPs, a policy advisor for the Prime Minister’s Office and the chief of staff for Natural Resources Canada.\textsuperscript{93} It remains to be seen what, if any, outcome will result from such political lobbying over the dispute.

\textbf{B. Other Investor-State Dispute Settlement Matters}

The investor-state dispute settlement matter between Lone Pine and Canada has not been an isolated occurrence under the \textit{North American Free Trade Agreement} 1994. The UNCTAD investor-state dispute settlement navigator reveals that Canada has been involved in a significant number of disputes.\textsuperscript{94} As at April 2016, Canada has been involved in 25 cases as a

\begin{itemize}
\item \textsuperscript{90} Ibid.
\item \textsuperscript{91} Ibid.
\item \textsuperscript{92} James Wilt, ‘Lone Pine, Company Suing Canada Over Quebec’s Fracking Ban, Aggressively Lobbying in Ottawa’, \textit{Desmog Canada}, 25 May 2016, \url{http://www.desmog.ca/2016/05/25/lone-pine-company-suing-canada-quebec-fracking-ban-aggressively-lobbying-ottawa}
\item \textsuperscript{93} Ibid.
\item \textsuperscript{94} UNCTAD Investor-State Dispute Settlement Navigator, \url{http://investmentpolicyhub.unctad.org/ISDS}
\end{itemize}
respondent state. There have been 39 cases brought by companies, which claim Canada as a home state. Maude Barlow has lamented that Canada has been one of the most targeted countries in respect of investor-state dispute settlement. The Canadian Centre for Policy Alternatives has argued that investor-state dispute settlement system is out of control.

In a notorious case, the US Chemical Company Ethyl successfully challenged a Canadian ban on imports of its gasoline that contained MMT, an additive that is a suspected neurotoxin. The Canadian government repealed the ban and paid the company $13 million for its loss of revenue. Gus van Harten commented that the dispute is ‘a good example of regulatory chill, and the threat to democracy.’

There has been controversy over an investor tribunal ordering the Canadian government to pay compensation to Exxon-Mobil after it challenged government guidelines on research and development in Newfoundland and Labrador. In 2016, the Superior Court of Justice in Ontario dismissed an effort by the Canadian Government to set aside the decision.

98  Gus van Harten, Sold Down the Yangtze: Canada’s Lopsided Investment Deal with China, Osgoode Hall Law School, York University, 2015, 107.
99  Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4
100  Attorney General of Canada v. Mobil et al., 2016 ONSC 790
In the 2015 dispute of *Clayton / Bilcon of Delaware, Inc v Government of Canada (Bilcon v Canada)*, a company brought an investor action in respect of the rejection on environmental grounds of its proposal to build a quarry in Nova Scotia. 101

One arbitrator, Professor Donald McRae, dissented from the majority’s decision to uphold the investor’s minimum standard of treatment claim against Canada. He was concerned that the decision could “chill” environmental regulation. Donald McRae noted that ‘the majority takes great pains to deny that its decision interferes with Canada’s ability to legislate on environmental issues.’ He stressed, though, that ‘there are two consequences of the majority’s decision that have significant implications for the application of environmental laws by NAFTA Parties.’ 102 First, McRae observed that the decision would complicated environmental governance in Canada:

> What the majority has done is add a further control over environmental review panels. Failure to comply with Canadian law by a review panel now becomes the basis for a NAFTA claim allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law. This is a significant intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels. In the past, if they made an error – exceeded their jurisdiction or failed to comply with the law – they would have had their recommendations ignored by the governments to which they were made or overturned on review by a federal court. If the majority view in this case is to be accepted,

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then the proper application of Canadian law by an environmental review panel will be in the hands of a NAFTA Chapter 11 tribunal, importing a damages remedy that is not available under Canadian law.  

Second, McRae warned: ‘Subjugation of human environment concerns to the scientific and technical feasibility of a project is not only an intrusion into the way an environmental review process is to be conducted, but also an intrusion into the environmental public policy of the state.’ He commented: ‘In effect, what occurred in this case was that an environmental review panel concluded that the socio-economic effects of a project were sufficiently negative that notwithstanding the existence of some positive benefits of the project, it should recommend against the project.’

McRae reflected that many would be disturbed by the outcome of this dispute: ‘In this day and age, the idea of an environmental review panel putting more weight on the human environment and on community values than on scientific and technical feasibility, and concluding that these community values were not outweighed by what the panel regarded as modest economic benefits over 50 years, does not appear at all unusual’. He commented: ‘Neither such a result nor the process by which it was reached in this case could ever be said

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to “offend judicial propriety’.” 107McRae observed: ‘Once again, a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11’. 108 He stressed: ‘In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection.’ 109

In other sectors, there has also been significant controversy in Canada over the use of investor-state dispute settlement under the North America Free Trade Agreement 1994.

There have also been a number of actions in respect of investor-state dispute settlement in respect of renewable energy.110

In June 2013, the United States-based brand name pharmaceutical drug company Eli Lilly deployed an investor clause under the North American Free Trade Agreement to challenge Canada’s drug patent laws.111 Eli Lilly and Company is alleging that the invalidation of its Strattera and Zyprexa pharmaceutical patents under Canadian patent law is inconsistent with


110 Kyla Tienhaara,

Canada’s commitments under the *North American Free Trade Agreement* 2014. There has been much controversy over this dispute.

Glyn Moody warns that ‘ISDS actions threaten to become the global version of patent trolls: by merely threatening to sue they can cause governments to change their plans in order to avoid the risk of huge payouts’.\(^\text{112}\) He observes: ‘It’s been [happening in Canada](http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century?page=0,5) for over a decade, thanks to the ISDS chapter in the *North American Free Trade Agreement*.\(^\text{113}\) Glyn Moody cites a former government official in Ottawa:

> I’ve seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day.\(^\text{114}\)

There has been widespread concern over government liability in respect of the operation of investment clauses. Equally, there has been an alarm that the threat of investor rules will have a chilling effect upon public regulation.

**C. Other Trade Agreements**


\(^{113}\) Ibid.

There have been some similar concerns in respect of the investment agreement between China and Canada. In his book, *Sold Down the Yangtze*, Professor Gus van Harten expresses his concerns the investor-state dispute settlement regime in the *Foreign Investment Promotion and Protection Regime* (FIPA).\(^{115}\) He contends that the agreement gives Chinese investors an enclave legal status in Canada.

There has been much controversy over the trade agreement between Canada and the European Union – known as the *Comprehensive Economic and Trade Agreement*.\(^{116}\) The new Trade Minister CA Freeland sought to renegotiate the text of the agreement on investor-state dispute settlement.\(^{117}\)

In a March 2016 study, Jacqueline Wilson expressed concerns about the approach of the *Trans-Pacific Partnership* to the protection of the environment.\(^{118}\) She observed: ‘The number of ISDS cases has expanded exponentially since 2000, with high-profile examples including corporate challenges to anti-smoking legislation in Australia and Uruguay, a ban on hydraulic fracturing in Quebec, a government environmental assessment process in Nova

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\(^{115}\) Gus van Harten, *Sold Down the Yangtze: Canada’s Lopsided Investment Deal with China*, Osgoode Hall Law School, York University, 2015.


Scotia, and, recently, the U.S. government’s decision to block the controversial Keystone XL pipeline.'119 Wilson commented: ‘Foreign investors have targeted a broad range of government measures in North America, especially in the areas of environmental protection and natural resource management, that allegedly impaired their investments’.120 She commented: ‘Despite this bruising experience, the federal government insists on expanding ISDS in pending international trade agreements, including treaties with the European Union (CETA) and the U.S.-led Trans-Pacific Partnership (TPP).’121 Wilson concluded: ‘Critics of ISDS, whose ranks are growing, wonder why the government continues to give private, for-profit arbitrators the power to determine the legitimacy of public policy when we have one of the strongest legal systems in the world, protecting all investors regardless of nationality.’122

3. The United States

In the United States, there has been a boom in the extraction of natural gas in a number of states.123 As a recent report noted:

Fracking is widespread across the United States. The oil and gas industry are fracking or want to frack in 31 states, with more than 500,000 active natural gas wells throughout the country. The most heavily fracked states are Pennsylvania, Ohio, West Virginia, Oklahoma, and Texas. Fracking and natural gas production are poorly regulated at both the federal and state level. At the federal level, the oil and gas

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119 Ibid., 7.
120 Ibid., 7.
121 Ibid., 7.
122 Ibid., 7.
industry is exempt from seven major environmental laws, including the *Safe Drinking Water Act*, the *Clean Air Act*, and the *Clean Water Act*.\textsuperscript{124}

There has been much public debate in the United States about the regulation of hydraulic fracturing – known as ‘fracking’.

The intrepid documentary film-maker Josh Fox has made a series of films, *Gasland*, and *Gasland 2*, which raise concerns about the impact of fracking upon air, water, and land.\textsuperscript{125} He also charted the larger impacts of the gas industry upon the environment, society, government, and the economy. His work has highlighted the impact of the Bush Administration providing regulatory loopholes for the gas industry, which exempted them from proper environmental regulation. Josh Fox has depicted the development of a strong civil society movement against fracking, which spread around the world. At the recent United States municipal elections, a number of Colorado cities approved bans or moratoriums on fracking.\textsuperscript{126} Over a hundred municipalities in the United States have approved similar controls in such of fracking.

\textsuperscript{124} Natacha Cignotti, Pia Eberhardt, Timothe Feodoroff, Antoine Simon, and Ilana Solomon, *No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking*, ATTAC, the Blue Planet Project, Corporate Europe Observatory, Friends of the Earth Europe, Powershift, Sierra Club and the Transnational Institute 2014, \url{http://action.sierraclub.org/site/DocServer/FoEE_TTIP-ISDS-fracking-060314.pdf?docID=15241}


In this context, there has been a concern that foreign investors can challenge such regulations under investment clauses in the *Trans-Pacific Partnership*.

**A. Civil Society**

The environmental group – The Sierra Club – has been concerned about the use of investment clauses to challenge public regulation in respect of energy, the environment, and climate change. The Sierra Club warns of an increase in dirty fracking:

> The *Trans-Pacific Partnership* may allow for significantly increased exports of liquefied natural gas without the careful study or adequate protections necessary to safeguard the American public. This could mean an increase of hydraulic fracturing, or fracking, the dirty and violent process that dislodges gas deposits from shale rock formations. It would also likely cause an increase in natural gas and electricity prices, impacting consumers, manufacturers, workers, and increasing the use of dirty coal power.127

Michael Brune, the dynamic leader of the Sierra Club has argued: ‘With our jobs, our access to clean air and water and our environment at stake, we deserve a say in the way these trade rules are being written.’128

In 2016, the Sierra Club published a new report by Ben Beachy on trade and the environment, *Climate Roadblocks: Looming Trade Deals Threaten Efforts to Keep Fossil Fuels in the*  

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In his executive overview, Beachy warned: ‘The TPP and TTIP would more than double the number of foreign fracking firms that could use ISDS to challenge new U.S. fracking restrictions in private tribunals.’ He was particularly concerned about how the trade agreements would affect regional gas developments across the United States: ‘The deals would newly grant ISDS rights to corporations that are currently fracking for gas and/or oil in Arkansas, California, Colorado, Kansas, Louisiana, New Mexico, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia, and Wyoming’. Beachy was also particularly concerned about giving special foreign investor rights to BHP Billiton, BP, and Shell: ‘The TPP would give ISDS rights to BHP Billiton, the largest foreign investor in U.S. shale, while TTIP would give them to BP and Shell, the eighth and 18th largest gas producers in the U.S., respectively’.

Beachy was concerned that there had been a failure to reform investor-state dispute settlement in light of the dispute between Lone Pine and Canda:

While the TPP and TTIP would extend this broad right to thousands of additional foreign investors, neither pact is slated to include meaningful safeguards to prevent fossil fuel firms from following Lone Pine’s lead in using it to challenge restrictions on fracking. Though the TPP includes some new language concerning the “minimum standard of treatment” obligation, it would still allow an ISDS tribunal to rule against a government policy by describing it as arbitrary and claiming it frustrated an investor’s expectations. In response to the new provision, longtime ISDS lawyer Todd Weiler stated, “I


130 Ibid., 3.

131 Ibid., 3.

132 Ibid. 3.
can’t recall any tribunal that, if you put this provision in that agreement, that the result would be
different either way.” The European Commission’s proposed language for TTIP, meanwhile, explicitly
states that tribunals may rule against any policy deemed “manifest[ly] arbitrar[y]” and may consider
whether it “frustrated” an investor’s “legitimate expectation.”133

Beachy concluded: ‘Just as the U.S. begins to transition away from fossil fuels, the TPP and
TTIP would empower an unprecedented number of fossil fuel corporations to follow
TransCanada’s lead in asking private tribunals to help maintain the crisis-prone status quo.’134 He observed: ‘The fight for climate progress already faces enough obstacles without
the additional roadblocks imposed by the TPP and TTIP.’135 Beachy maintained: ‘Replacing
these toxic deals with a new climate-friendly model of trade is an essential component of the
growing effort to keep fossil fuels in the ground.’136

Sharon Kelly has commented that the Trans-Pacific Partnership could also be a boost for the
export of natural gas.137 She warned: ‘A trade agreement being secretly negotiated by the
Obama administration could allow an end run by the oil and gas industry around local
opposition to natural gas exports’.138 Kelly observed: ‘The shale gas rush has caused a glut in
the American market thanks to fracking, and now the race is on among industry giants to ship
the liquefied fuel by tanker to export markets worldwide, where prices run far higher than in

133 Ibid., 11.
134 Ibid., 23.
135 Ibid., 23
136 Ibid., 23.
137 Sharon Kelly, ‘What a Secretly-Negotiated Free Trade Agreement Could Mean for Fracking in the
TPP-free-trade-agreement-means-fracking
138 Ibid.
the U.S.\textsuperscript{139} The *Trans-Pacific Partnership* has predicted to relax regulatory controls over the export of natural gas. Kelly feared: ‘This will mean that exports to any partner countries will automatically be given a stamp of approval, without having to undergo the public hearings that are otherwise required.’\textsuperscript{140} In particular, there is a concern that the *Trans-Pacific Partnership* will be used to promote the export of natural gas to Japan.\textsuperscript{141}

The Friends of the Earth has also been concerned about the impact of the trade deal, warning that ‘the *Trans-Pacific Partnership* is a potential danger to the planet, subverting environmental priorities, such as climate change measures and regulation of mining, land use, and bio-technology.’\textsuperscript{142} The group calls upon Pacific Rim countries to ‘Reject the proposed *Trans-Pacific Partnership* investment chapter that would authorize foreign investors to bypass domestic courts and bring suit before special international tribunals biased in favor of multinationals’.\textsuperscript{143} Erich Pica, president of Friends of the Earth, commented:

> The deal as a whole is a huge danger to the planet. In particular, the investment chapter would allow multinational corporations to undermine important environmental and health regulations. It would also have a chilling effect on future environmental policies that are desperately needed to address climate change, save ecosystems and protect communities.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{139} Ibid.
\item \textsuperscript{140} Ibid.
\item \textsuperscript{141} Ibid.
\item \textsuperscript{142} The Friends of the Earth, ‘The *Trans-Pacific Partnership*,’ \url{http://www.foe.org/projects/economics-for-the-earth/trade/trans-pacific-partnership#sthash.OddY6Sdg.dpuf}
\item \textsuperscript{143} Ibid.
\item \textsuperscript{144} The Friends of the Earth, ‘Friends of the Earth Protest Pacific Trade Deal’, 4 December 2013, \url{http://www.foe.org/news/blog/2013-12-autumn-agitation-against-pacific-trade-deal#sthash.l7HSTLhz.dpuf}
\end{itemize}
The Friends of the Earth was also concerned that the Environment Chapter of the agreement was hollow, simply paying ‘pay lip service to countries’ obligations to enforce domestic environmental protections and abide by global environmental agreements.” 145

The climate action network, 350.org, has also objected to the inclusion of an investment clause in the Trans-Pacific Partnership.146 The group warns that ‘the Trans-Pacific Partnership (TPP) will massively boost corporate power at the expense of our climate and environment, human and workers’ rights, sovereignty and democracy.”147 350.org comments that the ‘leaked text reveals that the TPP would empower corporations to directly sue governments in private and non-transparent trade tribunals over laws and policies that corporations allege reduce their profits.”148 The organisation observes that ‘Legislation designed to address climate change, curb fossil fuel expansion and reduce air pollution could all be subject to attack by corporations as a result of TPP.”149 The group is concerned that the fossil fuel industry will rely upon investment clauses to challenge fossil fuel divestment efforts.

Charismatic celebrities such as Mark Ruffalo and Evangeline Lilly also entered the fray, and opposed the adoption of the Trans-Pacific Partnership on environmental grounds.

145  Ibid.
146  350.Org, ‘Say No to Corporate Power Grabs – Reject the Trans-Pacific Partnership’,
147  Ibid.
148  Ibid.
149  Ibid.
Mark Ruffalo – best known for his role as the Incredible Hulk in the Avengers franchise of films – has expressed concern that the Trans-Pacific Partnership would fuel climate chaos and empower corporate polluters.\textsuperscript{150} He was concerned: ‘Pacts like the recently-signed Trans-Pacific Partnership (TPP), currently sidelined without sufficient congressional support for passage, contain thousands of pages of enforceable rules that would fuel climate chaos and empower corporate polluters to challenge environmental laws across the globe.’\textsuperscript{151} Ruffalo observed: ‘And if the TPP were approved, the Department of Energy would be required to automatically approve all natural gas exports to the 11 other TPP countries, eliminating our government’s ability to make decisions about our energy future and incentivizing a boom in dangerous fracking.’\textsuperscript{152} Ruffalo was particularly concerned about the inclusion of an investor-state dispute settlement regime in the agreement:

Consider just one feature that sounds like the plot of a disaster movie. The TPP would empower foreign investors to drag the U.S. government to private international arbitration tribunals whenever they claim that our environmental, energy or climate policies violate expansive new TPP foreign investor privileges. Corporations can demand unlimited taxpayer compensation based on future profits ostensibly thwarted by the policy. There is no outside appeal.\textsuperscript{153}

Ruffalo warned that the TPP would double U.S. exposure to this “investor-state dispute settlement” (ISDS) regime: ‘Overnight 9,500 Japanese manufacturing and Australian mining


\textsuperscript{151} Ibid.

\textsuperscript{152} Ibid.

\textsuperscript{153} Ibid.
giants, among other firms, could skirt our courts and laws to attack critical public interest safeguards.154

Evangeline Lilly – the actress from Lost and The Hobbit – has also sought to raise public awareness in respect of the environmental impact of the Trans-Pacific Partnership.155 She has specifically raised the concerns of the Sierra Club about investor clauses being used by gas companies in respect of fracking moratoria. More generally, Evangeline Lilly has been worried about the impact of the Trans-Pacific Partnership upon climate action.

Discussing the Lone Pine v. Canada case, Meredith Wilensky observed that ‘the sheer size of the damage awards being sought demonstrates the substantial financial risk that ISDS can create for countries taking action to protect public health and the environment.’156 She warned: ‘The TPP may obstruct advancement of climate-related policies by creating a risk of liability for measures that negatively affect foreign investments’.157 Wilensky argued that there needed to be reforms to the Trans-Pacific Partnership to address such concerns about the environment and climate change.

B. The White House and the United States Congress

154 Ibid.
157 Ibid., 10698.
The White House has pushed for the inclusion of investor-state dispute settlement in the *Trans-Pacific Partnership*. President Barack Obama has obtained a Fast-Track authority from the United States Congress to present the final text of the Trans-Pacific Partnership on a take-it-or-leave-it basis.

Nonetheless, there has been strong resistance from Democrats in the United States Congress to the *Trans-Pacific Partnership*. Notably, Democrat Leader Nancy Pelosi was highly critical of President Barack Obama’s demands for a fast track authority.\(^{158}\) She observed that ‘we must prepare our people, our economies and our environment for the future.’\(^{159}\) Pelosi was particularly animated about the relationship between trade and climate change:

> The climate crisis presents a challenge to the survival of our planet, but it also presents an opportunity to create a clean energy economy. Investing in a green economy will result in clean energy jobs for the many workers who have been left behind by globalization… Our pre-eminence in clean energy is essential to maintaining America as No. 1 in the global economy, and we must protect the intellectual property rights of entrepreneurs.\(^{160}\)

In her view, ‘We must ensure that trading partners play by the rules and uphold their responsibility to their international obligations.’\(^{161}\) Pelosi’s position represents a significant rebuff to President Barack Obama’s model of trade and the environment.

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159 Ibid.

160 Ibid.

161 Ibid.
Senator Elizabeth Warren has been particularly critical of the process and the substance of the negotiations in the TPP. She commented: “From what I hear, Wall Street, pharmaceuticals, telecom, big polluters and outsourcers are all salivating at the chance to rig the deal in the upcoming trade talks”. Warren has been a vocal opponent of investor-state dispute settlement. She argued: ‘Giving foreign corporations special rights to challenge our laws outside of our legal system would be a bad deal.’ In her view, ‘If a final TPP agreement includes Investor-State Dispute Settlement, the only winners will be multinational corporations.’

In 2015, five United States Senators led by Democrat Senator Al Franken raised concerns about foreign trade tribunals undermining environmental regulations. Citing the fracking dispute in Canada, the politicians commented upon the danger of investment clauses diminishing environmental laws:


165 Ibid.

The ISDS system has already been used by multinational corporations to bypass regulations on fossil fuels established by local and regional governments. For example, the U.S. based oil and gas company, Lone Pine Resources, filed a $250-million challenge against Canada in a North American Free Trade Agreement (NAFTA) tribunal over Quebec's moratorium on fracking. Quebec's moratorium was established to study the health and environmental impacts of fracking, but the challenge contends that the moratorium deprived the company of its right to profit from fracking in Saint Lawrence Valley. As the Administration works to limit fossil fuel emissions both domestically and abroad, ISDS tribunals provide a mechanism to erode environmental safeguards. 167

The United States Senators commented: ‘We believe that the TPP does not provide adequate reforms to ISDS to safeguard environmental protections and could jeopardize the ability of any TPP country to enact new policies that would fulfill their international climate commitments.’168 They were concerned that investor clauses would undermine international climate commitments: ‘As the Administration looks forward to climate negotiations in Paris and aims to hold countries accountable for climate commitments, it is counterproductive and detractive to endorse a trade provision which gives foreign companies the ability to undercut these international commitments’.169 The United States Senators warned: ‘Without a clear exemption for policies that protect health and the environment, ISDS could put at risk the ability of countries to implement new policies that would inherently limit access to and extraction of fossil fuel reserves—which is a necessary condition to adequately address climate change.’170 They pleaded with the Obama administration: ‘We urge you to defend environmental and health provisions and exempt them from ISDS jurisdiction.’171

167  Ibid.
168  Ibid.
169  Ibid.
170  Ibid.
171  Ibid.
Nobel Laureate in Economics, Professor Joseph Stiglitz, has also cited the dispute between Lone Pine Resources and Canada in his analysis of the impact of *the Trans-Pacific Partnership* upon climate change policy.\(^\text{172}\) He warned: ‘Corporations in carbon-intensive resource extraction and electric utility industries are some of the biggest users of these ISDS mechanisms.’\(^\text{173}\) Stiglitz noted: ‘Currently the American firm Lone Pine is challenging Canada’s moratorium on hydrofracking under the St. Lawrence River.’\(^\text{174}\) He suggested that the *Trans-Pacific Partnership* would expand the scope of the system: ‘Unlike NAFTA, TPP explicitly would extend actionable investor rights to cover government contracts for the “exploration, extraction, refining, transportation, distribution or sale” of government-controlled natural resources like “oil, natural gas, … and other similar resources.”’\(^\text{175}\)

Stiglitz also highlighted TransCanada’s challenge under the *North America Free Trade Agreement*’s investor regime to President Barack Obama’s decision reject the Keystone XL pipeline.\(^\text{176}\) In 2016, TransCanada has announced an investor action against the United States Government’s decision to block the Keystone XL Pipeline under the *North American Free Trade Agreement*.


\(^{173}\) Ibid.

\(^{174}\) Ibid.

\(^{175}\) Ibid.

\(^{176}\) Ibid.
Trade Agreement 1994. Environmental groups have argued that the TransCanada investor action highlights similar dangers with the TPP.

In 2016, the topic of fracking became a significant point of tension in the Presidential races. In light of investigative journalism about investor-state dispute settlement action, Senator Elizabeth Warren argued:

We don’t need ISDS. It unbalances the system even more. It puts too much power in the hands of multinational corporations. It’s time to say no to ISDS, to start winding out of it.

While Bernie Sanders called for bans in respect of fracking, Hillary Clinton was willing to support natural gas an interim measure.

In 2016, leading legal and economic experts – including Laurence Tribe, Joseph Stiglitz, and Jeffrey Sachs – wrote a letter to the United States Congress, urging politicians to reject the *Trans-Pacific Partnership*, and any trade agreement that included investor-state dispute settlement. The letter warned:

ISDS grants foreign corporations and investors a special legal privilege: the right to initiate dispute settlement proceedings against a government for actions that allegedly violate loosely defined investor rights to seek damages from taxpayers for the corporation’s lost profits. Essentially, corporations and investors use ISDS to challenge government policies, actions, or decisions that they allege reduce the value of their investments.

The experts were worried by the proliferation of investment arbitration actions against a wide array of regulatory fields: ‘In recent years, corporations have challenged a wide range of environmental, health, and safety regulations, fiscal policies, bans on toxins, denials of permits including for toxic waste dumps, moratoria on extraction of natural resources, measures taken in response to financial crises, court decisions on issues ranging from the

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183 Ibid.

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scope of intellectual property rights to the resolution of bankruptcy claims, policy decisions on privatizations of prisons and healthcare, and efforts to combat tax evasion, among others.\textsuperscript{184} The experts feared: ‘This system undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law.’\textsuperscript{185} The concerted opposition to the \textit{Trans-Pacific Partnership} and investor-state dispute settlement will make it difficult for Obama to conclude the trade deal.\textsuperscript{186}

4. Australia

In his influential book, \textit{What the Frack?}, investigative journalist Paddy Manning charts the conflicts in Australia over unconventional resources:

In Australia, where coal seam gas has taken off in the space of a decade, the land is the battleground: grazing country, cropping country, state forest, water catchment areas, rural-residential and even urban areas. Nowhere appears to be off-limits for this new industry that has coined a new vernacular: ‘gas mining’.\textsuperscript{187}

Manning observed that ‘two key technological breakthroughs in America have opened up huge new possibilities in unconventional gas extraction: horizontal drilling and hydraulic

\begin{flushright}
\textsuperscript{184} Ibid. \\
\textsuperscript{185} Ibid. \\
\textsuperscript{186} Deidre Fulton, ‘Prominent Scholars Decry TPP’s “Frontal Attack” on Law and Democracy’, \textit{Common Dreams}, 7 September 2016; and David Dayen and Ryan Grim, ‘There’s a New Front in the Battle over the Trans-Pacific Partnership’, \textit{The Huffington Post}, 8 September 2016, \url{http://www.huffingtonpost.com.au/entry/tpp-isds-battle_us_57d030cee4b06a74c9f1da0c} \\
\end{flushright}
fracturing, often shortened to ‘hydro-fracking’ or just ‘fracking’. There has been significant public debate over fracking in a variety of regions across Australia, including New South Wales, Victoria, Queensland, South Australia and Western Australia.

A. State Regulation of Fracking

There has been much debate about the regulation of coal seam gas at both a Federal level, and in the States of Victoria, New South Wales, Queensland, Western Australia.

In Australia, the issue of whether farmers can ‘Lock the Gate’ to mining companies has united farmers, environmentalists, and climate change activists. The Lock the Gate

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188 Ibid., 14.
192 Caroline Winter, ‘Fracking Worries for Wine Region’, ABC PM, 20 March 2014, [http://www.abc.net.au/pm/content/2014/s3968209.htm](http://www.abc.net.au/pm/content/2014/s3968209.htm)
194 Lock the Gate Alliance, [http://www.lockthegate.org.au/](http://www.lockthegate.org.au/) and Lock the Gate Alliance, Call to Country [http://www.youtube.com/watch?v=X4-dUKBvwrY](http://www.youtube.com/watch?v=X4-dUKBvwrY)
Movement is concerned that ‘mining and unconventional gas companies are riding roughshod over our governments and local communities’ and ‘our farmland, bushland and water resources are being put at risk.’\textsuperscript{195} The Lock the Gate movement wants to ban fracking in Australia: ‘Our Call to Country provides a plan for national reform that delivers a moratorium on unconventional gas mining and a Royal Commission into corruption and maladministration associated with the mining industry.’\textsuperscript{196} Gabrielle Chan has observed that the ‘alliance between farmers and the environmental movement on land issues around coal seam gas and mining’ has ‘the capacity to change the political landscape in rural Australia and leave a scar as gaping as an open-cut mine on the predominant Coalition support.’\textsuperscript{197} The Lock the Gate movement has demanded greater regulation of coal, and coal seam gas in order protect agriculture, farming, the environment, and the climate.\textsuperscript{198}

On the 1st October 2013, the Lock the Gate Alliance and the Australian Fair Trade and Investment Network (AFTINET) put out a joint statement,\textsuperscript{199} expressing ‘their strong

\textsuperscript{195} Ibid.
\textsuperscript{196} Ibid.
\textsuperscript{197} Gabrielle Chan, ‘Farmers Joining Environmental Movement in their Fight Against Mining’, \textit{The Guardian}, 10 April 2014, \url{http://www.theguardian.com/news/bush-mail/2014/apr/10/farmers-joining-environmental-movement-in-their-fight-against-mining}
\textsuperscript{198} For a legal analysis of the Lock the Gate movement, see Janice Gray and David Brown, ‘Constituencies of Resistance to Coal Seam Gas Mining, the Political Art of Suture and the Public Good’, New Thinking on Sustainability, Victoria University of Wellington, 16 February 2014, \url{http://www.victoria.ac.nz/law/about/events-old/nz-centre-for-public-law/new-thinking-on-sustainability}
\textsuperscript{199} The Lock the Gate Alliance and the Australian Fair Trade and Investment Network, ‘Rural anti-gas mining groups say no to investors suing governments for environmental regulation as Trans-Pacific trade talks resume’; Press Release, 2 October 2013, \url{http://aftinet.org.au/cms/sites/default/files/Robb%20Media%20Release%20October%202%202013%20-Rural%20anti-gas%20mining%20groups%20say%20no%20to%20investors%20suing%20governments%20for%20environmental%20regulation%20as%20Trans-Pacific%20trade%20talks%20resume.pdf}
opposition to clauses in trade agreements which would enable foreign investors to sue governments for damages in international tribunals if government regulation is seen to ‘harm’ their investment’.\textsuperscript{200} Drew Hutton, the President of Lock the Gate, observed: ‘Investor State Dispute Settlement would reduce the ability of governments to regulate the activities of foreign companies even if these activities have a negative impact on health and the environment.’\textsuperscript{201} He worried: ‘This would prevent governments from responding to community concerns about Coal Seam Gas mining (CSG)’.\textsuperscript{202}

Hutton was particularly concerned about the precedent of the Lone Pine energy company using ISDS clauses in the North American Free Trade Agreement to sue the Canadian Quebec provincial government for $250 million over a moratorium on fracking. He noted that ‘farmers and community members in NSW and Victoria have influenced their state governments to review the environmental impact of CSG mining and to consider regulation’.\textsuperscript{203} Hutton concluded: ‘If Australia agrees to include ISDS in trade agreements, governments could be sued for millions of dollars for responding to community concerns.’\textsuperscript{204}


\textsuperscript{201} Ibid.

\textsuperscript{202} Ibid.

\textsuperscript{203} Ibid.

\textsuperscript{204} Ibid.
Isabel McIntosh from Lock the Gate has expressed concerns about the impact of the *Trans-Pacific Partnership* on the public regulation of coal and coal seam gas:

A trade agreement with investor-state dispute settlement provisions that are being discussed for the *Trans Pacific Partnership Agreement* will lock the door on our electoral democracy. The restrictions imposed could tie the hands of government to regulate in areas such as foreign investment in farmland and the expansion of coal and CSG. It is this regulation on CSG and coal that is critical: we campaign, the government then plays catch up as the power shifts into the community’s hands and the voices of independent experts lead the conversation. But if a trade agreement is signed that puts the power in the hands of overseas companies, then it’s over.\(^\text{205}\)

McIntosh worries that ‘the *Trans-Pacific Partnership Agreement* will protect the rights of corporate investors at the expense of democratic governance’.\(^\text{206}\) She was concerned that the mining industry ‘want to jeopardise land and water security for the short-term – and diminishing – profits of fossil fuels’.\(^\text{207}\) In her view: ‘If the mining industry is allowed to carry out its business plan, the planet tanks’.\(^\text{208}\) McIntosh comments: ‘Whether through invasive mining or the impact of catastrophic climate change, Australia’s agricultural land will diminish to a fraction of what it is now.’\(^\text{209}\)

\(^\text{205}\) Isabel McIntosh, ‘A Trans-Pacific Partnership Agreement will lock the Door on Our Electoral Democracy’, *Lock the Gate*, 25 October 2013, [http://isabelmcintosh.wordpress.com/2013/10/25/a-tppa-will-lock-the-door-on-our-electoral-democracy/](http://isabelmcintosh.wordpress.com/2013/10/25/a-tppa-will-lock-the-door-on-our-electoral-democracy/)

\(^\text{206}\) Ibid.

\(^\text{207}\) Ibid.

\(^\text{208}\) Ibid.

\(^\text{209}\) Ibid.
Considering the *Trans-Pacific Partnership* and the Lone Pine Resources case, Richard Denniss of the Australia Institute observed that the matter of free trade and fracking could divide and fracture the Conservative Government – a coalition of the Liberal Party and the National Party - in Australia: ‘The issues of coal seam gas and free trade are combining to create a perfect storm for the National Party, and in turn, the Coalition government.’\(^{210}\) He commented: ‘The problem for Tony Abbott and Warren Truss is that CSG forces the Coalition partners to decide whether they are on the side of farmers or the mining industry.’\(^{211}\) Denniss noted that ‘the issue of foreign investment forces them to choose whether they are on the side of free trade or Australian sovereignty.’\(^{212}\) He concluded: ‘Both issues could end up splitting the Coalition, and if they don’t, they will likely deliver more National Party seats to the Palmer United Party, Katter’s Australian Party or independents willing to put their constituents’ interests first.’\(^{213}\) The Australian Greens have sought to capitalise upon the disharmony within the Coalition over matters of trade and the environment.\(^{214}\)


\(^{211}\) Ibid.

\(^{212}\) Ibid.

\(^{213}\) Ibid.

In 2016, the Victorian Government announced that it would permanently ban fracking and coal seam gas exploration in the state. The Premier Daniel Andrews explained his decision as an effort to protect the ‘clean, green’ reputation of Victoria’s agricultural sector. He observed:

Our farmers produce some of the world’s cleanest and freshest food. We won’t put that at risk with fracking. Victorians have made it clear that they don’t support fracking and that the health and environmental risks involved outweigh any potential benefits.

The Minister for Resources Wade Noonan observed: ‘There has been a great deal of community concern and anxiety about onshore unconventional gas – this decision gets the balance right.’ There has been concern that fracking ban in Victoria will attract a challenge under investor-state dispute settlement by gas companies – much like the moratorium over the St Lawrence River in Quebec was subject to a challenge.

B. Federal Parliament
The Coalition Government under Tony Abbott and Malcolm Turnbull have been enthusiastic supporters of investor-state dispute settlement in both bilateral trade agreements and the *Trans-Pacific Partnership*.

Ian Macfarlane, the industry minister for Tony Abbott’s Coalition Conservative Government, was a great supporter of coal seam gas. He has argued that mining companies should extract all the possible resources:

> We've got to make sure that every molecule of gas that can come out of the ground does so. Provided we've got the environmental approvals right, we should develop everything we can.\(^{219}\)

At a Federal level, the Australian Greens have pushed back, and demanded that farmers should have the legal right to refuse fracking.\(^{220}\)

There was a consideration of the use of investor-state dispute settlement in an inquiry by the Australian Senate in 2014. In light of this debate, the Australian Greens introduced the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014 (Cth) into Parliament. In his second reading speech, Senator Peter Whish-Wilson commented upon the objective of the legislative bill:


This Bill seeks to ban ISDS provisions in new trade agreements. The Greens believe there shouldn’t be ISDS provisions in any agreements, but we recognise that the legislation we are presenting is not retrospective. Sovereign governments should not be challenged simply for making laws to govern their country or making a decision to protect their environment or the health of their citizens. What happens to laws governing coal seam gas legislation or the ban on genetically manipulated organisms in my home state of Tasmania? Under ISDS there is great uncertainty. Uncertainty that is unnecessary.221

The Senator commented: ‘The Australian people elect their governments and their parliaments to design and implement legislation. Their sovereignty should be respected.’222

However, the main political parties in the Australian Parliament were unwilling to support the bill.223 The Liberal Party and the National Party supported the inclusion of investor-state dispute settlement in trade agreements. The Australian Labor Party took the position that it would renegotiate investor clauses in trade agreements, if it gained government. However, the leadership of the Australian Labor Party was not willing to support a blanket ban.


222 Ibid.

In 2015, the Senate Foreign Affairs, Defence and Trade References Committee considered whether there needed to be reforms to Australia’s treaty-making process. In spite of significant criticism of the treaty-making process, there has been a failure to reform the system of treaty-making in Australia.

A Cross-Party Coalition has been formed to provide for a critical evaluation of the Trans-Pacific Partnership.  

Australian Green groups said that the TPP would undermine environmental action and limit the ability of governments to take action on climate change. Senator Peter Whish-Wilson of the Australian Greens warned: ‘This is a watershed moment for the Liberals and the mining industry in their continuing assault against environmental protections in Australia.’ He feared: ‘ISDS will provide a massive chilling effect against improvements in environmental law at a local, state and federal level.’ Thom Mitchell of *New Matilda* also

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227 Ibid.

228 Ibid.
highlighted concerns about the TPP amongst Australian environmentalists and climate activists.\textsuperscript{229}

As an international lawyer and a human rights advocate, the Member for Fremantle, Melissa Parke, has been concerned about the inclusion of investor-state dispute settlement clauses in trade agreements.\textsuperscript{230} She commented in 2014 that the regime will threaten the rule of domestic courts, and the democratic operation of Parliament: ‘ISDS clauses enable foreign corporations to sue a host country for laws or policies, or even court decisions, they find inconvenient and objectionable’.\textsuperscript{231} Parke has been worried about giving foreign investors special rights - ‘This has the effect of giving foreign investors more rights than local investors; more influence than local citizens’.\textsuperscript{232} In her view, ‘ISDS clauses present a sovereign risk to national governments and court systems.’\textsuperscript{233}

Again, in 2015, Melissa Parke raised concerns about the operation of investor-state dispute settlement.\textsuperscript{234} She summarised her concerns, concluding that ‘a TPP with an ISDS clause

\textsuperscript{229} Thom Mitchell, “Warnings Trans-Pacific Partnership will undermine Environmental Protections”, \textit{New Matilda}, 6 October 2015, \url{https://newmatilda.com/2015/10/06/warnings-trans-pacific-partnership-will-undermine-environmental-protections/}

\textsuperscript{230} The Hon. Melissa Parke MP, ‘Why Support the TPP When It Will Let Foreign Corporations Take Our Democracies to Court?’, \textit{The Guardian}, 29 October 2014, \url{http://www.theguardian.com/commentisfree/2014/oct/29/why-support-the-tpp-when-it-will-let-foreign-corporations-take-our-democracies-to-court}

\textsuperscript{231} Ibid.

\textsuperscript{232} Ibid.

\textsuperscript{233} Ibid.

would manacle the hands of elected governments at every level as well as the courts in perpetuity, giving multinational corporations the exclusive keys to the country’. Melissa Parke warned: ‘In our view the TPP is a Trojan horse for “Taking Power from the People”’.236

In 2016, the Hon. Melissa Parke considered the issue of investor-state dispute settlement again in the Australian Parliament.237 She noted that the investment chapter magnified the negative consequences and impacts of the Trans-Pacific Partnership. She ‘noted the fact that foreign companies will have the power under the agreement to sue Australia in a private international tribunal for any laws, policies or court decisions that may impact upon their profits’. Melissa Parke observed: ‘With the exception potentially now of tobacco control, the trade minister [Andrew Robb] has at various times described expressions of concern about ISDS as 'hysterical fear mongering'.239’ Melissa Parke objected to the dismissal of such criticism: But I would have to ask if the trade minister considers the Chief Justice of the High Court of Australia, the Productivity Commission, Nobel Prize winner Professor Joseph Stiglitz, or the UN special rapporteur on trade to be hysterical in warning against the

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235 Ibid.
236 Ibid.
238 Ibid.
239 Ibid.
inclusion of ISDS clauses in trade agreements? Melissa Parke was particularly concerned about the environmental impacts of investor clauses:

Costa Rica was successfully sued for trying to protect endangered turtles even though there was supposed to be a carve out from environmental regulation.

Peru was sued by US led mining company Renco when a Peruvian court ordered Renco to clean up its lead pollution. This was another example of an environmental carve-out that was ignored by the foreign investor and by the tribunal. Remember, if the tribunal ignores the very clear exemptions in the agreement, there is no appealing the decision of the tribunal and so there is nothing you can do about it in any event.

We know that Egypt is being sued for raising the minimum wage. Germany is being sued for its decision to phase out nuclear power after Fukushima. El Salvador is being sued for refusing to issue a gold mining licence due to serious community health and environmental concerns. Canada is being sued for Quebec having put a moratorium on fracking pending an environmental review. Canada is being sued for a Canadian Supreme Court decision ruling two of Eli Lilly's medicine patents invalid.

Parke noted that ‘just two months after the Obama administration rejected Trans Canada's bid to build the dangerous Keystone XL tar sands pipeline—a landmark victory for the movement to keep fossil fuels in the ground—the Canadian corporation announced it would retaliate by suing the United States under ISDS provisions in NAFTA, which is a TPP-like trade deal.' She feared: ‘This bodes extremely ill for government attempts to regulate or even make decisions for the benefit of the environment.' Parke cited the comments of an arbitrator from Spain, Juan Fernandez Armest: ‘Three private individuals are entrusted with the power to review, without any restrictions or appeal procedure, all actions of the

240 Ibid.
241 Ibid.
242 Ibid.
243 Ibid.
government, all decisions of the courts and all laws and regulations emanating from parliament.244

Likewise, Kelvin Thomson – an Australian Labor Party member - has been concerned about investor clauses being a handbrake on governments, particularly in matters of environmental regulation.245 He commented that ‘ISDS provisions elevate the interests of corporations above those of the public and their democratically elected governments’.246

Senator Nick Xenophon was highly critical of the Trans-Pacific Partnership.247 He warned: ‘The inclusion of an Investor-State Dispute Resolution (ISDS) clause would damage Australia’s sovereignty, allowing foreign firms to sue Australian governments if policy decisions harm their bottom line’.248 Moreover, Senator Nick Xenophon was sceptical of the efficacy of safeguards: ‘So-called ‘safeguards’ have not prevented US firms bringing cases against partner countries in the past, including Canada and Costa Rica.’249

244 Ibid.
246 Ibid.
248 Ibid.
249 Ibid.
In 2016, Australian Greens co-deputy, Senator Larissa Waters, sought to push for a national fracking ban, in the wake of the ban in Victoria on fracking.250 She argued: ‘The Greens will continue to be a voice for communities who want their land and water protected from dangerous fracking and investment in clean energy.’251 Waters maintained: ‘It's high time both Labor and Minister Frydenberg abandon the dangerous myth that fracked gas can be a ‘transition' fuel to a pollution-free future rather than a dirty, dangerous distraction which risks our agricultural productivity and our climate.’252 If such a proposal were to succeed at a federal level, Australia could well face investor-state dispute settlement battles with gas companies, much like Canada did in the dispute with Lone Pine Resources Inc.

C. The Joint Standing Committee on Treaties

In 2016, the Joint Standing Committee on Treaties of the Australian Parliament called for submissions on the Trans-Pacific Partnership.253 A number of submissions addressed the question of investor-state dispute settlement and environmental protection.

The Minerals Council of Australia expressed support for the inclusion of investor-state dispute settlement in the Trans-Pacific Partnership.254 Brendan Pearson, the Chief Executive

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251 Ibid.

252 Ibid.

Officer, observed the ‘TPP’s Investor-State Dispute Settlement (ISDS) mechanism has safeguards to protect the Australian Government’s ability to regulate in the public interest and will provide Australian investors the opportunity to protect their investments overseas.’

The Minerals Council of Australia noted that Australian-based mining companies had previously used investor-state dispute settlement in proceedings against other countries to protect their investments.

In its submission, Planet Mining Pty Ltd – a subsidiary of Churchill Mining Plc – explained how it had deployed investor-state dispute settlement against the Government of Indonesia.

The directors of the company expressed their support for the inclusion of investor-state dispute settlement in the Trans-Pacific Partnership.

Greenpeace Australia Pacific commented: ‘The TPP represents a bad deal for local communities in the Asia Pacific whether they live near a reserve of coal seam gas in the United States or a fishery on the East coast of Australia’. In their view, ‘The provisions for Investor State Dispute Settlement Processes (ISDS) in the TPP will expose Australian

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255 Ibid


environmental laws and the Australian taxpayer to claims made by foreign multinationals and the consequences for democratic governance in Australia are unclear but of critical concern to GPAP. Greenpeace Australia Pacific maintained that ‘an acknowledgement of the Paris 2015 Climate Change accord and a commitment between the signatories on how they can cooperate in its implementation should be included in any new trade agreement.

Friends of the Earth Australia has been concerned that ‘[ISDS] provisions allow foreign investors the ability to sue governments on the grounds that their projected profits have been or will be affected by laws or policies’. The environmental group expressed concern about the use and misuse of the regime by oil, mining, and gas companies: ‘The ISDS mechanism provides a platform through which corporations, particularly those involved in energy and mining, have been shown to sue governments for implementing stronger health and environmental regulations.’ Friends of the Earth Australia highlight the notorious Lone Pine case: ‘Mining company Lone Pine is suing the Canadian government for introducing a moratorium on fracking in the Utica basin due to health concerns, using ISDS provisions under NAFTA.’ The environmental group flags the larger significance of the dispute: ‘The rights of gas and energy firms such as Lone Pine may become of more importance than access to clean water when the TPP is finalised and ISDS provisions allow companies to take

258 Ibid.
259 Ibid.
261 Ibid.
262 Ibid.
advantage of mechanisms that further their corporate agendas.’ 263 Samantha Castro of the
Friends of the Earth Australia highlighted such concerns at a Melbourne Town Hall meeting
on the Trans-Pacific Partnership in April 2016.

Isabel McIntosh wondered: ‘Will companies like Lone Pine be able to sue any Australian
state government for laws that restrict or place a moratorium on fracking, law changes it Lone
Pine described as “arbitrary” and “capricious” in the case of Quebec government?’ 264

Glyn Moody has observed that the dispute between Nucoal and the New South Wales
Government highlights why investor-state dispute settlement is not needed in the Trans-
Pacific Partnership or any trade agreement. 265 The dispute shows that companies can take
legal action in domestic courts, or else ask governments to use state-to-state dispute
settlement mechanisms.

D. The Judiciary

In 2012, 100 leading jurists and lawyers led by retired justice, Elizabeth Evatt, wrote an open
letter, calling upon the negotiators involved in the Trans-Pacific Partnership to reject

263 Ibid.

264 Isabel McIntosh, ‘Submission to the Joint Standing Committee on Treaties on the Trans-Pacific
b69e-42ce-b13c-997f2604f8f0&subId=410481

265 Glyn Moody, ‘Australian Case Shows Why Corporate Sovereignty Isn’t Needed in TPP or any Trade
Agreement’, TechDirt, 12 April 2016, https://www.techdirt.com/articles/20160412/01183734157/australian-
Evatt and the jurists were concerned that ‘the expansion of this regime threatens to undermine the justice systems in our various countries and fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of legal disputes.’ Evatt and company observed that investor-state dispute settlement undermined the rule of law, the judicial process, and democratic decision-making:

The ostensible purpose for investor protections in international agreements and their Investor-State enforcement was to ensure that foreign investors in countries without well-functioning domestic court systems would have a means to obtain compensation if their real property, plant or equipment was expropriated by a government. However, the definition of “covered investments” extends well beyond real property to include speculative financial instruments, government permits, government procurement, intangible contract rights, intellectual property and market share, whether or not investments have been shown to contribute to the host economy.

The jurists stressed: ‘Investment arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of disputes between sovereign nations and private investors.’ The jurists warned: ‘The current regime’s expansive definition of covered investments and government actions, the grant of expansive substantive investor rights that extend beyond domestic law, the increasing use of this mechanism to skirt domestic court

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267 Ibid.

268 Ibid.

269 Ibid.
systems and the structural problems inherent in the arbitral regime are corrosive of the rule of law and fairness.270

In a 2014 speech, Chief Justice Robert French of the High Court of Australia raised concerns that the judiciary has not been properly consulted in respect of the inclusion of investor-state dispute settlement in trade agreements.271 His Honour highlighted the impact of investor-state dispute settlement in respect of environmental regulation.

A quarter of all the arbitrations commenced in 2013 involved challenges to regulatory action by the Czech Republic and Spain affecting the interests of the providers of renewable energy. Environmental laws in Canada were also the subject of ISDS processes. Lone Pine Resources Inc instituted a claim against Canada last year in response to a moratorium imposed by Quebec on hydraulic fracturing (fracking), which led to revocation of the claimant's gas exploration permits. Windstream Energy LLC instituted a claim against Canada on the basis of a moratorium imposed by Ontario on offshore wind farms. The Swedish company, Vattenfall, is suing Germany under the Energy Charter Treaty over Germany's decision to phase out nuclear energy power plants.272

In addition, his Honour was concerned about investor-state dispute settlement being invoked in respect of matters of public health – such as Australia’s pioneering plain packaging of tobacco products, and Canada’s rejection of drug patent applications by Eli Lilly.

270  Ibid.
272  Ibid., 7.
Chief Justice French was concerned about the impact of investor-state dispute settlement on the rule of law: ‘So far as I am aware the judiciary, as the third branch of government in Australia, has not had any significant collective input into the formulation of ISDS clauses in relation to their possible effects upon the authority and finality of decisions of Australian domestic courts’.273 He was concerned that the issue of investor-state dispute settlement has ‘the potential to become larger and it is desirable that it be addressed earlier rather than later’.274 Chief Justice French suggested: ‘One approach would be to examine the possibility of including requirements in ISDS provisions in appropriate cases for: prior exhaustion of remedies in domestic courts of the Contracting State; preclusion of any challenge to the decision of a domestic court as constituting a breach of the relevant BIT or FTA provisions; and preclusion of any arbitral decision based upon a rejection of a decision on a question of law of a domestic appellate court binding on lower courts.’275

By contrast, the Chief Justice of the Federal Court of Australia James Allsop and his colleague Justice Clyde Croft were somewhat more enthusiastic about investor-state dispute settlement.276

5. New Zealand

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273 Ibid., 15.
274 Ibid., 15.
275 Ibid., 15.

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There has also been controversy in New Zealand over the Conservative Government’s push to mine Middle Earth, with the end of the filming of series of *The Hobbit*.277

Gareth Hughes MP of the New Zealand Greens commented:

> Protections afforded to foreign investors under the *Trans-Pacific Partnership* will seriously undermine our environment. Similar agreements have resulted in Governments being forced to pay billions because they put in place rules to protect the environment from harm caused by foreign corporations.278

He observed: ‘In a democracy, people should have the right to know the detail of, and have input into, international agreements that the National Government wants to sign us up to.’279

The New Zealand Sustainability Council has observed that ‘The environment will be a major loser under terms put forward for the latest free trade deal.’280 The Council is alarmed that the mechanism of investor-state dispute clauses ‘would give foreign companies the ability to sue a government in an offshore tribunal if that company believed its reasonable investment expectations (such as its profits or asset values) had been breached’.281 The Council worries


279  Ibid.


281  Ibid.
that such a regime ‘ends up privileging foreign companies over local communities and local companies who do not have such rights to sue.’\textsuperscript{282}

Professor Jane Kelsey from the University of Auckland has noted that the investment chapter could affect the environment in a number of ways, with ‘challenges to tighter rules on mining and remediation rules, bans on fracking and nuclear energy, performance requirements on foreign investors to use of clean technology, restrictions on numbers and locations of waste plants or eco-tourism projects, not lowering environmental standards to attract investors.’\textsuperscript{283}

Professor Jane Kelsey from the University of Auckland has been concerned about the undemocratic nature of the trade negotiations.\textsuperscript{284} She reflected that fair trade deals are possible: ‘It would be possible to conceive of a twenty-first century trade agreement that reflected this realisation and embraced a socially progressive and democratic agenda where governments put their people centre stage in the negotiations.’\textsuperscript{285} Kelsey was concerned: ‘The failure of governments to seize that opportunity means that the \textit{Trans-Pacific Partnership} negotiations are destined to become a fraught arena in which ideologies, interests and agendas compete.’\textsuperscript{286}

\begin{itemize}
\item \textsuperscript{282} Ibid.
\item \textsuperscript{285} Ibid., 28.
\item \textsuperscript{286} Ibid., 28.
\end{itemize}
In 2016, the New Zealand Government issued its National Interest Analysis in respect of the Trans-Pacific Partnership.\textsuperscript{287} The New Zealand Government maintains that the inclusion of the investor-state dispute settlement regime in the Trans-Pacific Partnership will be positive for New Zealand:

The ISDS mechanism would provide positive recourse for New Zealand investors in TPP countries, but also has the reciprocal potential consequence of an increased exposure of the New Zealand Government to ISDS claims. While ISDS has been included in many of New Zealand's existing trade and investment agreements, it has never been utilised. However, the size of the TPP region and the potential number of new investors in New Zealand could increase the risk that New Zealand may face an ISDS claim (and the actual cost of responding to such a claim) in the future. This increased risk has been suggested by some commentators as potentially preventing future governments from taking regulatory action in areas of importance to New Zealand, such as for environmental objectives. There are several aspects of ISDS in TPP that are considered to provide sufficient mitigation to balance the advantages and disadvantages of ISDS as acceptable for the New Zealand Government.\textsuperscript{288}

The New Zealand Government insists: ‘There are safeguards, reservations (non-conforming measures) and exceptions that ensure New Zealand retains the ability to regulate for public health, the environment and other important regulatory objectives.’\textsuperscript{289}

\begin{footnotesize}
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\item[288] Ibid., 16.
\item[289] Ibid., 16.
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The New Zealand Parliament called for submissions in respect of the *Trans-Pacific Partnership*. There has been concern that the debate on the international trade agreement will be guillotined.

Associate Professor Amokura Kawharu from the University of Auckland has engaged in an analysis of the investor-state dispute settlement regime from the perspective of New Zealand. She questions whether the template of the agreement is well designed to address public health safeguards:

The investment chapter adopts many of the now familiar provisions intended to preserve policy space, and adopts several new ones through a patchwork of exceptions, savings, clarifications and annexes. To this extent, the final agreed text is an improvement on the standard policy safeguards that are included in the United States model BIT. At the same time, more safeguards are needed, because the starting point, the United States model BIT, is a pro-investor template. The chapter takes what might be called moderate approaches to safeguards on core issues like expropriation. This must mean something, and tribunals could reasonably determine that a lower level of safeguarding was intended as compared to other recent investment treaties involving New Zealand and other TPPA countries, increasing legal uncertainty and risk. Again, stating the obvious, agreeing to arbitrate claims made by investors from countries with high levels of inwards investment into New Zealand also increases risk. New Zealand’s courts should feel somewhat left out in the cold, through the provisions allowing arbitration of contract claims and the lack of any requirement for prior resort to local remedies.

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291 Ibid. 19.
Kawharu noted that ‘There is a carve out for disputes relating to consent decisions under the Overseas Investment Act 2005.’\textsuperscript{292} She was troubled that the regime failed to address the relationship between disputes in respect of domestic courts, and investor-state dispute settlement: ‘For other disputes, there is no requirement that investors to seek remedies in New Zealand courts first, before initiating a claim under the TPPA.’\textsuperscript{293}

Simon Terry – the Executive Director of the Sustainability Council – considered environmental governance under the \textit{Trans-Pacific Partnership}.\textsuperscript{294} He noted: ‘When challenged on the need for ISDS provisions, ministers promoting the TPPA repeatedly stated that there would be no restraint on a government’s ability to regulate in the public interest’.\textsuperscript{295} Terry commented: ‘What the TPPA has delivered are provisions that completely fail to protect governments from being sued when taking such action’.\textsuperscript{296} He warned: ‘The risk that a government could be successfully sued means the ISDS provisions would have a ‘chilling effect’ on a government’s willingness to undertake progressive environmental reform’.\textsuperscript{297} Terry suggested that investor-state dispute settlement would operate as an inhibitor to raising standards of environmental protection: ‘This favours retaining low standards when these need to rise markedly.’\textsuperscript{298} In his view, ‘There is a gross asymmetry in the rights and means accorded organisations that would seek to protect the commons for the public good, and

\begin{footnotes}
\item[292] Ibid., 4.
\item[293] Ibid., 4.
\item[295] Ibid., 4.
\item[296] Ibid., 4.
\item[297] Ibid., 4.
\item[298] Ibid., 4.
\end{footnotes}
rights and means accorded foreign investors to protect private wealth. Simon Terry commented:

Put simply, the ISDS provisions would give a foreign investor from a TPPA country the ability to sue a government in an offshore tribunal if it believed its reasonable investment expectations (such as its profits or asset values) were breached as a result of government actions. In addition to guarding against the kind of expropriation traditionally understood, ISDS proceedings have opened the way for governments to be sued for regulating in the public interest, even when such regulations are non-discriminatory in their application. And if an investors’ case is upheld, the tribunal can force a government to pay compensation to the foreign investor, including for future lost profits, and there is no appeal process. The detail of these provisions is very important to the environment as historically it has been disproportionately exposed under ISDS arrangements, compared to other sectors. A simple indicator of this is that over 85% of the money paid out to date by governments under free trade and investment deals with the US has involved claims over resources and the environment.

Simon Terry concluded: ‘For New Zealand to embrace terms that not only fail to provide protection against regulatory chill but are likely to soon be archaic makes even clearer the high price the country is paying to join the TPPA trade club, when it is relatively lightly encumbered by less onerous ISDS arrangements at present.’

6. Other Pacific Rim Members

It remains to be seen how other members of the Pacific Rim will be affected by the inclusion of investor-state dispute settlement in the *Trans-Pacific Partnership*. Historically, developing

\[299\] Ibid., 4.

\[300\] Ibid. 11.

\[301\] Ibid. 14.
countries in Central America and South American have borne the brunt of investor actions by mining and resource companies.

Mexico has long been a target of investor actions – particularly under the *North American Free Trade Agreement* 1994. The dispute between *Metalclad v. Mexico* has highlighted the issues surrounding investor-state dispute settlement and local government. Kyla Tienhaara observed of the conflict:

This is quite possibly the most controversial of any investor-state dispute concluded to date. The case revolves around the construction and operation of a hazardous waste facility in Mexico. The American investor involved in the dispute sought compensation for breach of minimum standard of treatment (including fair and equitable treatment and full protection and security), national treatment, most-favoured-nation treatment, as well as expropriation and use of prohibited performance requirements, following the denial of a municipal construction permit and public demonstrations against the company’s operations. An ICSID Additional Facility tribunal ruled in favor of the investor. Mexico challenged the award in a Canadian court, which partially annulled the award but still required Mexico to compensate the investor.

Amongst other things, the dispute highlights how the decisions of local municipalities can be targeted by foreign investors under investor-state dispute settlement clauses.

The Canadian mining firm Pacific Rim, recently taken over by Australian Oceana Gold, brought an arbitration case against El Salvador after it took action over a gold mining

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302 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, 30 August 2000.

project.

Jemma Williams reported upon the dispute in New Matilda. She observed: ‘Despite local support for the government’s move, Pacific Rim was able to take the case to an international tribunal and demand $315 million in compensation from the developing Central American nation’. There has been concern about the implications of the dispute for democratic decision-making, and environmental regulation.

Writing in The Guardian, Claire Provost reported that 300 organisations had accused Pacific Rim of an ‘assault on democratic governance’. The Open Letter to the President of the World Bank is damning about the investment action. The signatories comment: ‘We are writing out of solidarity with the communities of El Salvador that have been working through the democratic process to prevent a proposed cyanide-leach gold mining project, over well-founded risks that it will poison the local communities’ environment as well as the country’s most important river and source of water.’ The letter observed: ‘Rather than complying with the environmental permitting process of El Salvador, the Canadian company Pacific Rim launched an attack under the Dominican Republic-Central American Free Trade

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306 Ibid.


309 Ibid.
Agreement (DR-CAFTA).’310 The letter commented: ‘Pacific Rim is demanding $301 million
US dollars in compensation from the government of El Salvador or to provide it with an
operating permit in spite of the huge risks to the country’s water supply.’311 The letter noted:
‘Pacific Rim is using ICSID to subvert a democratic nationwide debate over mining and
environmental health in El Salvador’. The letter maintained: ‘When it comes to such issues,
local democratic institutions should prevail, not foreign corporations seeking to exploit
natural resources.’312

Provost commented that the dispute was a warning as to the dangers of investor-state dispute
settlement: ‘The case comes as a raft of free trade agreements are being considered
worldwide, with the role of investor-state arbitration considered a key debate around the
proposed Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership.’ 313

On occasion, there has been controversy over Canadian companies deploying such measures.
There has been much controversy over the dispute between the Canadian gold-mining
company Infinito Gold Ltd. and Costa Rica.314 In 2013, it was reported: ‘Canadian gold-
mining company Infinito Gold Ltd. announced its intentions to go forward with a $1 billion
lawsuit against Costa Rica over the retracted Las Crucitas open-pit gold mining concession in

310  Ibid.
311  Ibid.
312  Ibid.
313  Claire Provost, ‘El Salvador Groups Accuse Pacific Rim on “Assault on Democratic Governance”’,
The Guardian, 10 April 2014, http://www.theguardian.com/global-development/2014/apr/10/el-salvador-
pacific-rim-assault-democratic-governance?CMP=twt_gu
314  Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5 http://www.italaw.com/cases/2258
northern Costa Rica, in a statement released on Friday. The contract was withdrawn for environmental reasons: ‘Costa Rica and the Canadian mining company have been ensnared in a protracted legal battle over the cancelled Las Crucitas project in Cutiris de San Carlos, Alajuela, since environmentalists and locals decried the loss of virgin forest and health concerns over leeching chemicals contaminating drinking water. In 2014, Infinito Gold requested arbitration regarding loss and damage incurred by it and by its Costa Rican investment, Industrias Infinito S.A.in respect of the Government of the Republic of Costa Rica’s (‘Costa Rica’) treatment of Industrias Infinito, the Crucitas mining concession and other mining rights held by Industrias Infinito and the funds that Infinito has invested in and loaned to Industrias Infinito. The Request for Arbitration is made pursuant to Article XII of the Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments. Infinito claimed that Costa Rica has violated obligations it owes to Infinito and Industrias Infinito under the Bilateral Investment Treaty with respect to the Crucitas project, a gold mining project in Costa Rica.

The country of Peru – another participant in the Trans-Pacific Partnership negotiations – has faced eleven disputes. A few of those cases have been about mining matters. In 1998, in the case of Compagnie Miniere v. Peru, a French company brought an action over a project for the construction and operation of a gold mine in Peru. The matter was settled. In the 2011


316 Ibid.

case of *Renco v. Peru*, interests in a mining project brought an investor claim in respect of alleged arbitrary and unfair application of government measures and contracts.\(^{318}\) This is particularly controversial – as Renco has been seeking to avoid responsibility to limit emissions and clean up massive pollution from a smelter. In 2014, Bear Creek Mining from Canada brought an action against Peru over the revocation of the claimant’s concession to operate the Santa Ana silver mining site in Peru.\(^{319}\) Such disputes would indicate that Peru is certainly vulnerable to investor-state dispute settlement actions in the field of natural resources. The Columbia Center on Sustainable Investment sought to intervene in the dispute – but the Tribunal decided to reject the application.\(^{320}\)

Its neighbour Chile has also been involved a few investor-state skirmishes.\(^{321}\)

It remains to be seen how developing countries in the *Trans-Pacific Partnership* will fare under the strictures of the investor-state dispute settlement regime.

### 7. The European Union

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\(^{318}\) *The Renco Group Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1)  
https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=UNCT/13/1&tab=PRO

\(^{319}\) *Bear Creek Mining v. Republic of Peru* (ICSID Case No. ARB/14/21)  


\(^{321}\) UNCTAD, ‘ISDS Navigator – Peru’,  
In parallel to the *Trans-Pacific Partnership*, the United States has also been negotiating the *Trans-Atlantic Trade and Investment Partnership* with the European Union.\textsuperscript{322}

In Germany, there has been a reaction against investor-state dispute settlement clauses in the context of the *Trans-Atlantic Trade and Investment Partnership*. Glyn Moody reported that senior members of the German Government were highly critical of such measures:

> The German federal government rejects special rights for corporations in the free trade agreement between the EU and the USA. ‘The federal government is doing all it can to ensure that it doesn't come to this,’ said the Secretary of State in the Federal Ministry of Economics, Brigitte Zypries, on Wednesday during question time in parliament. ‘We are currently in the consultation process and are committed to ensuring that the arbitration tribunals are not included in the agreement,’ said Ms Zypries.

> ‘The German federal government's view is that the U.S. offers investors from the EU sufficient legal protection in its national courts,’ said the SPD politician Zypries. Equally, U.S. investors in Germany have sufficient legal protection through German courts. ‘From the beginning, the federal government has examined critically whether such a provision should be included in the negotiations for a free trade agreement,’ Zypries said.\textsuperscript{323}

Glyn Moody commented: ‘Germany's leaders obviously feel the need to distance themselves from ISDS, which is fast turning into a serious political liability.’\textsuperscript{324}


\textsuperscript{324} Ibid.
Martin Khor has identified a number of reasons for disillusionment with investor-state dispute settlement clauses in the European Union:

ISDS cases are also affecting the countries. Germany has been taken to ICSID by a Swedish company Vattenfall which claimed it suffered over a billion euros in losses resulting from the government’s decision to phase out nuclear power after the Fukushima disaster. And the European public is getting upset over the investment system. Two European organisations last year published a report showing how the international investment arbitration system is monopolised by a few big law firms, how the tribunals are riddled with conflicts of interest and the arbitrary nature of tribunal decisions. That report caused shock waves not only in the civil society but also among European policy makers.325

There is both a concern here about government liability in respect of investor-state dispute settlement clauses; and an anxiety about the independence and the legitimacy of the international tribunal system.

In the European Union, there has been a great deal of controversy over the Vattenfall cases.326 In the first dispute, the Swedish energy company Vattenfall initiated an investor-state dispute settlement procedure against Germany. After constructing a coal fired power plant, Vattenfall claimed that the quality standards for waste water of Hamburg’s

Environmental Authority made the project unviable. The company demanded compensation totalling €1.4 billion. Vattenfall and the city of Hamburg eventually settled the case with an agreement. In the second dispute, Vattenfall brought an investor-state dispute settlement action against Germany in respect of its decision to close down its nuclear power plants, in the wake of the Fukushima accident in Japan. According to press sources, the claim for compensation by Vattenfall could amount up to €3.7 billion.

In the European Union, there has been a strong resistance to the introduction of hydraulic fracturing.

Notably, France’s highest court, the Constitutional Council, has upheld a government ban on hydraulic fracturing. The Constitutional Council rejected a challenge by a United States company, Schuepbach Energy, an American company whose exploration permits were revoked after the French Parliament banned the practice. President François Hollande observed of the decision: ‘This law has been contested several times.’ He noted: ‘It is now beyond dispute.’ Hollande observed, though, that the law ‘only prohibits recovering shale gas by hydraulic fracturing, it does not prevent research on other techniques.’ France's Energy Minister Philippe Martin added: ‘It's a legal victory, but also an environmental and political one.’

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328 Ibid.

329 Ibid.

There has been a concern that energy companies will seek to use the *Trans-Atlantic Trade and Investment Partnership* to challenge bans and moratoria in respect of fracking. Notably, the energy giant, Chevron, has been lobbying for a ‘world-class investment chapter’ in the *Trans-Atlantic Trade and Investment Partnership*. The company has focused on investment protection as ‘one of our most important issues globally’ in consultations with the United States Trade Representative. Chevron has demanded that the *Trans-Atlantic Trade and Investment Partnership* oblige governments to ‘refrain from undermining legitimate-backed expectations.’ Chevron has previously deployed investor-state dispute settlement clauses in a multi-billion dispute with Ecuador over oil drilling related-contamination of the Amazonian rainforest.

In 2014, a Trans-Atlantic coalition of environmental groups have released a report entitled, *No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking*. Citing the dispute between Lone Pine and Canada, the report warns of the dangers of investor-state dispute settlement:

> The TTIP deal threatens to give more rights to companies through a clause called an ‘investor-state dispute settlement’ (ISDS). If included in the deal, this would enable corporations to claim damages in secret courts or ‘arbitration panels’ if they deem their profits are adversely affected by changes in a regulation or policy. This threatens democratically agreed laws designed to protect communities and

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332 Ibid.

the environment. Companies which claim their investments (including expectations of future profits) are affected by a change in government policies could have the right to seek compensation through private international tribunals. US companies (or any company with a subsidiary in the US) investing in Europe could use these far-reaching investor rights to seek compensation for future bans or other regulation on fracking. These tribunals are not part of the normal judicial system, but are specifically set up for investment cases. Arbitrators have a strong bias towards investors – and no specialised knowledge about our climate or fracking. Companies are already using existing investment agreements to claim damages from governments, with taxpayers picking up the tab. 334

The report feared that ‘US companies investing in Europe could directly challenge fracking bans or regulations at private international tribunals – potentially paving the way for millions of euro in compensation, paid by European taxpayers.’335

In 2014, the European Commission has held separate consultations about the inclusion of the investor-state dispute settlement regime, given the controversy over the topic.336 There remains great concern about the drastic increase in government liability under investor-state dispute settlement.337 There has been heavy criticism of investment-state dispute settlement clauses in the European consultations. Jan Kleinheisterkamp from the London School of Economics provided a useful critique of the weak justifications for the regime.338

334  Ibid., 1-2.
335  Ibid.
The British environmentalist George Monbiot has written a series of articles about the *Trans-Atlantic Trade and Investment Partnership*,339 some of which have become collected in his essays.340 He raised concerns about the nature of the trade deal, suggesting that it had been captured by transnational corporate elites.

Glyn Moody has observed: ‘The fear is that both the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership* will cast a chill over policy making around the Pacific and across the Atlantic, as businesses take advantage of the punitive damages available to bully governments into scrapping existing or proposed regulations in key consumer areas like food, health, safety and the environment.’341

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Leaked text in 2015 raised further concerns about the treatment of the environment under the *Trans-Atlantic Trade and Investment Partnership*.\(^{342}\) The dispute between Lone Pine and Canada was presented as a possible threat in an investor-state dispute settlement regime in a trade deal between the United States and the European Union. Natacha Cingotti said that only a carve-out of environmental protections from the tribunal process could prevent such cases mushrooming after a TTIP deal:

> This new leak illustrates that the European commission is not serious about protecting essential safeguards for citizens and the environment in the context of the TTIP talks. Powerful corporate polluters are likely to get VIP treatment under it, while the only chapter that could bring strong language to protect essential regulations to build a sustainable future is weak and unenforceable.\(^{343}\)

There has been scepticism about the European Union’s efforts to safeguard high levels of environmental protection and climate protection under the agreement.

In late 2015, Corporate Europe published a report upon how investor rights in the European Union trade deals sabotage the fight for energy transition.\(^{344}\) The group was concerned by the growth in investor actions: ‘A growing number of investor-state lawsuits target government initiatives in the energy sector, ranging from the phase out of nuclear power to moratoria on environmentally-risky shale gas development (‘fracking’).’\(^{345}\) Corporate Europe also


\(^{343}\) Ibid.


\(^{345}\) Ibid.
suggested that the growth was driven by law firms: ‘As law firms make money each time that an investor sues a state, this encourages more and more corporate lawsuits: for example, over legislation in the renewables sector’. Corporate Europe suggested that there would be further danger to climate action from investor clauses: ‘Despite the evident risk to energy transition, even more trade and investment deals are in the pipeline that would empower corporations to challenge strong government action on climate change.’ Corporate Europe highlighted that big polluters were lobbying for corporate rights. Notably, the US-based oil and gas multinational Chevron and the American Petroleum Institute demanded a strong investor protection regime within the Trans-Atlantic Trade and Investment Partnership form United States and European Union negotiators alike. Corporate Europe recommended the abolition of investor clauses: ‘Existing treaties that allow private companies to sue governments over laws that impinge on their profits – from tough antipollution regulations to the bold steps needed to move to green energy – should be abolished, and plans for supplemental corporate bills of rights in proposed treaties such as TTIP and CETA should be axed.’

In response to such criticism, the European Union has not abandoned investor-state dispute settlement. Instead, the European Union has proposed the establishment of an investment court to resolve investment disputes. In September 2015, there was an announcement of the proposal of a new Investor Court System. There has been much criticism of this new

346 Ibid.
347 Ibid.
348 Ibid.
proposal from a variety of countries. There has been justified cynicism that the Investor Court System is a rebranding of investor-state dispute settlement – rather than a more substantive set of reforms. Indeed, Friends of the Earth Europe and various other non-government organisations have complained that the Investor Court System would not stop cases like *Lone Pine Resource v. Canada* from taking place. Alfred de Zayas has maintained that the Investor Court System is incompatible with human rights.

There has also been a lively debate over the *Comprehensive Economic and Trade Agreement* (CETA) proposed between Canada and the European Union. For her part, the new Canadian Trade Minister Chrystia Freeland has argued that the CETA trade proposal is a ‘gold standard agreement’, after further legal scrubbing. The Council for Canadians has

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been concerned that even a so-called Investor Court System would still allow the most controversial challenges launched under the *North American Free Trade Agreement* 1994 to proceed.\(^{355}\)

**Conclusion**

The investor arbitration dispute between Lone Pine Resources and the Government of Canada has become a symbol and a leitmotif of larger concerns about the interaction between trade, investment, the environment, and climate change. The *Trans-Pacific Partnership* poses significant threats to the environmental protection of the air, water, and land in the Pacific Rim – particularly through the operation of investor-state dispute settlement regime. There has been a groundswell of support for public regulation of fracking in the United States, Canada, Australia, and New Zealand. There have also been similar concerns raised about the *Trans-Atlantic Trade and Investment Partnership*, and *CETA* and its impact upon the regulation of fracking in the European Union.\(^{356}\)

There has been concern that trade agreements, with investment clauses, have been used to challenge public regulation, particularly in respect of the environment. The environmental writer George Monbiot has warned of the dangers of investment clauses in trade deals:

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Investor-state rules could be used to smash any attempt to save the NHS from corporate control, to re-regulate the banks, to curb the greed of the energy companies, to renationalise the railways, to leave fossil fuels in the ground. These rules shut down democratic alternatives. They outlaw left-wing politics.357

Professor Joseph Stiglitz has similarly warned that such agreements would ‘significantly inhibit the ability of developing countries’ governments to protect their environment from mining and other companies.’358 That is a particularly acute concern for developing countries in the Pacific Rim. Stiglitz has emphasized that there is a need to ensure fairness, equality, and equity in trade and globalization – particularly with respect to environmental outcomes.359

As such, countries across the Pacific Rim and the Atlantic would be well-advised to scorn the inclusion of investor-state dispute settlement in mega-trade agreements. There are significant risks to the environment, biodiversity, sustainable development, and the climate. The Pacific Rim should not be turned into a Gasland. Neither should the Atlantic.