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Australia's embrace of investor state dispute settlement: a challenge to the social contract ideal?

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This paper explores the origins of investor-state dispute settlement (ISDS) treaties and their implications for the Australian social contract. This analysis includes how and why ISDS emerged in NAFTA, was rebuffed with the failure of the Multilateral Agreement on Investment (MAI), and became incorporated into most subsequent bilateral US trade and investment agreements. The paper considers Australia's exposure to ISDS—first through using it in bilateral investment agreements in nations with inadequate governance mechanisms to support the rule of law, then turning against it when a multinational tobacco company tried to use the mechanism to overturn scientifically endorsed, democratically approved and constitutionally validated tobacco plain packaging measures. The paper concludes by exploring the hypothesis that an alternative governance vision can be achieved in which the system of investment arbitration and trade law is made coherent with presumptively more democratically legitimate normative systems such as constitutional and international law.

Keywords: free trade agreement; investor-state dispute settlement; ISDS; multilateral agreement on investment

Introduction

The idea of social contract, a tacit agreement between the members of a community to develop principles that are equally applicable to all, and that assist in governing their conduct predictably and certainly, represents a jurisprudential ideal at the core of not just representative democracy, but the wider process of assisting humans to dedicate their lives to the individual and social achievement of virtues such as truth, justice and (more recently) environmental sustainability. Rawls in his acclaimed *Theory of Justice* expressed this view through a thought experiment in which the original persons establishing a society do so by developing principles about justice that are universally applicable because they are made behind a 'veil of ignorance' as to the specific

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characteristics of individual citizens (Rawls 1976). For those who embrace the progressive, natural law implications implicit in such a theory, in the majority of nation states including Australia, one the chief manifestations of this social contract is the Constitution and the legislative and judicial framework of norms dependent upon it.

In this paper I explore the idea that the social contract ideal is currently under profound pressure from the rise and proliferation of Investor State Dispute Settlement (ISDS) treaties. These treaties give exclusive rights to multinational corporations to challenge any national legislation that impacts on their profit-making expectations, before corporate-friendly panels. Historically, the Australian government has maintained a firm line against negotiating such treaties with other developed countries, refusing to include ISDS procedures in the Australia-US Trade Agreement a decade ago. Since then, however, it has agreed to the inclusion of an ISDS chapter in its bilateral deal with South Korea, and now appears to be actively supporting the adoption of far-reaching ISDS commitments as part of the Trans-Pacific Partnership Agreement (TPPA) negotiations.

In the pages that follow I examine where ISDS came from, and explain why its introduction to Australian governance systems should be of concern for those wishing to support in that society virtues such as justice and environmental sustainability. I begin by considering the historical and ideological origins of ISDS, scrutinising the notion that it should have limited applicability to societies with an established rule of law (for example, where the Constitution prohibits nationalisation of assets except on fair terms of compensation). I then examine the varied interactions of Australian governments with ISDS, in bilateral investment agreements with regional neighbours lacking established rule of law mechanisms, in the Australia-United States Free Trade Agreement (AUSFTA), in bilateral trade deals with Korea and Japan, and then in the Trans Pacific Partnership Agreement (TPPA). I conclude by exploring the hypothesis that an alternative governance vision can be achieved in which the system of investment arbitration and trade law is made coherent with presumptively more democratically legitimate normative systems such as constitutional and international law.

Phase 1: TRIPS, NAFTA Ch 11 and the multilateral investment agreement

The idea to use the threat of trade sanctions to allow multinational corporations to influence the governance and regulation (and hence the social contact) of communities other than those nations where such companies are headquartered and presumably pay taxes, seems to have begun in earnest in the early 1980s. In 1981, Edmund Pratt, then CEO of the multinational Pfizer pharmaceutical company, in his capacity as chair of the Advisory Committee on Trade Negotiations (ACTN) had been consulting directly with the US President about placing foreign intellectual property protection on the US trade agenda

(Ryan 1998). At this time, the US commenced a series of bilateral negotiations on patents, copyright and trade with countries such as Korea, Mexico, Singapore, Hungary and Taiwan. US intellectual property negotiators discovered, however, that financially more effective outcomes emerged once their trade colleagues did most of the bargaining (Enyart 1990, 54). Pharmaceutical company lobbyists, at the same time increased their contributions to the election campaign funds of the two major US political parties, by-passing the World Intellectual Property Organization (WIPO), perhaps because it was too focused on due process (Abbott 2002, 315). Such moves were not based on a sound base of evidence, for example, about the level of intellectual monopoly privilege (IMP) protection that would promote innovation. The limited research that did support the trade-IP linkage with pharmaceutical innovation was generally written by drug company-funded institutes and academics (Bekelman and Gross 2003). In a world where economies were dependent on international trade, trade sanctions were about to become the new big governance 'stick' wielded by multinational corporations.

This process led to the creation of what is known as the Trade Related Intellectual Property Agreement (TRIPS). TRIPS was developed by senior executives at 12 US corporations including, in particular, the pharmaceutical giant Pfizer (Drahos and Braithwaite 2002, 61). Its standards were designed to obtain rent for developed nations from two great emerging technologies, digital technology (through copyright, patents and protection for layout designs) and biotechnology (through patents and trade secrets). Developing countries, led by India and Brazil, both of whom had large generic drugs industries catering to the essential needs of impoverished populations, fought against TRIPS in the 1986 Uruguay Round mandate of the WTO. Amongst their objections were suspicions that increased intellectual property protection backed by trade sanctions would burden the task of providing universal access to affordable, essential medicines (Faunce 2007).

The US negotiators, however, unveiled what became a common tactic in their trade and investment negotiating procedure. They argued that they at least be allowed to place the most contentious pro-corporate issues 'on the table'. Meanwhile government leaders in the US, European Community and Japan, were lobbied by the relevant multinationals to signify that subsequent economic co-operation between their nations and the developing world was dependent on TRIPS Agreement being reached. When their capacity to capture developing nation assent slowed, the US negotiators made quite open threats about trade sanctions under Special 301 of the Trade Act 1974 (US), or even abandoning GATT altogether. Developing countries also were made non-binding (i.e. non-trade sanction-backed) promises that the developed parties to TRIPS would strive to reduce their domestic agricultural subsidies and alleviate restrictions on the import of tropical products. Although it was clear that TRIPS would have a major impact on public health particularly in developing countries, the World

Health Organization was not included in the negotiations (Abbott 1998, 500; Faunce 2007).

A major difficulty for negotiators of developing nations who respected their democratic connection to the social contract ideal, was that by agreeing to TRIPS their nations would have to renounce a large portion of their sovereignty over areas of intellectual property that would be crucial to ensuring justice and fairness dominated the policies that shaped their subsequent economic progress (Gathi 2002). TRIPS may historically be viewed as a triumph of corporate lobbying over democratic bargaining (Drahos and Braithwaite 2002, 11; Faunce 2012b).

US corporations induce Canada into ISDS through NAFTA

While the TRIPS agreement was moving toward finalisation, the United States and Mexico began pursuing a bilateral trade agreement. US Congress approved a 'fast track' approval process whereby it could not unilaterally alter a negotiated trade deal prior to ratification and after negotiations were complete (a process that had led to multiple post-hoc unilateral interpretive declarations by the US that undermined many good faith US assurances to the other negotiators). At this time, Canada had just finished negotiating a controversial trade agreement with the United States (CUFTA). However, corporate lobbyists convinced Canadian officials that in order to protect its interests in the North American market, Canada must participate in a regional trade deal that included Mexico (Heindl 2006). What the Canadians seemed not to have appreciated was that in doing this they would expose their democratic sovereignty and the fabric of their social contract to US corporate interference through ISDS mechanisms.

Negotiations on NAFTA began in June 1991 in Toronto. They closed, ironically given the governance misfeasance associated with that building, at the Watergate in Washington, DC in August of 1992. The negotiations included 19 working groups organised under six major negotiating areas: market access, trade rules, services, investment, intellectual property, and dispute settlement. During the negotiating period there were also seven ministerial meetings in which the progress of negotiations was reviewed and pressure applied to keep things moving forward. In addition to the government negotiators, there was a bevy of advisory committees from the private sector, including business, labour and some academics (Heindl 2006).

Early bracketed texts on NAFTA ISDS provisions in Chapter 11 were dominated by Canadian exceptions and limiting clarifications. The US negotiating strategy of starting from scratch rather than building on CUFTA to exponentially increase investor rights and only conceding the minimal 'carve outs' necessary to attain a deal, was largely successful. Chapter 11, as ultimately formulated, established an *ad hoc* tribunal that was available only to investors, not states, in place of national courts if investments were threatened. Canada, through a defensive rather than pro-active negotiating strategy managed to 'carve out' foreign investment rights in areas such as health care and to some extent education and the environment and otherwise limit arbitral jurisdiction. With the Mexican negotiators heavily influenced by US promises and behind the scenes deals, Canada, however, was unable to get the more independent disputes Commission it had achieved under the CUFTA (Heindl 2006).

ISDS under NAFTA went on to cause major problems for Canadian public health and environmental regulation in particular. Salutary examples involved large US pesticide manufacturing companies using NAFTA to sue the Canadian government for tightening environmental regulations and winning multimillion dollar payouts. The Canadian federal government, in one instance, had to pay $130-million under a NAFTA Ch 11 ISDS claim to compensate US forestry company AbitibiBowater Inc. for the alleged expropriation by provincial Newfoundland and Labrador's governments of the US company's assets in the province. These assets were water and timber rights and hydroelectric facilities. The Canadian province had passed expropriation legislation in late 2008 after AbitibiBowater closed its mill in Grand Falls-Windsor, putting about 800 employees out of work and would simply have left the facilities sit idle.

Encouraged by the success in obtaining rights to sue governments under Ch 11 NAFTA, corporate lobbyists began plans for a global investor rights agreement (the Multilateral Agreement on Investment, or MAI). A negotiating group for this purpose held its first meeting on September 27, 1995 with the participation of representatives of the OECD's then 25 member countries as well as the European Commission. In a statement, they said the MAI would be a free-standing international treaty open to both OECD countries and non-OECD countries, who were to be consulted as negotiations progressed (Durbin and Vallianatos 1997).

Negotiations on a proposed MAI were launched by governments at the Annual Meeting of the OECD Council at Ministerial level in May 1995. The stated objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries. In 1997, however, a Canadian NGO received and publicised a leaked a copy of the draft MAI (Durbin and Vallianatos 1997). The revealed provisions would have given corporations throughout the world a right to sue governments about legislation enacted with democratic mandates before arbitral panels likely to have significant conflicts of interest if such public health, labour standards or environment protection legislation threatened their investments.

Early in 1998 first France, and then other countries, successively withdrew from the MAI negotiations after pressure from a global movement of NGOs, citizens groups and governments of developing countries. These opponents were concerned about the implicit threats to national sovereignty, democracy and environmental sustainability of what in effect appeared to be a Transnational

Corporate Bill of Rights. The potential impact on the global and national social contracts of the MAI could be judged by the fact that at that time 100 of the largest economies in the world, 51 were corporations and only 49 countries; transnational corporations accounting for two- thirds of trade in goods and services; and one hundred such corporations owning one-third of the world's foreign investments (Durbin and Vallianatos 1997).

MAI negotiations were discontinued in April 1998. Nonetheless, it seems alternative approaches were developed to increase the global reach of ISDS mechanisms. In 2003, for example, the WTO announced began pushing for a Multilateral Investment Agreement (MIA) (FOI and WDM 2003). Then, as we shall see, such strategies came to include ISDS in trans-Pacific and trans-Atlantic trade and investment agreements.

Phase 2: Australia's wilting support for ISDS

In 1991, Australia enacted amendments to its International Arbitration Act 1974 (Cth) to give jurisdiction to the International Centre for the Settlement of Investment Disputes (ICSID) to hear disputes referred to it by a foreign investor of a Contracting State to one of over 20 of its bilateral investment treaties (BITs). Most of these BITs were with nations yet to develop adequate rule of law infrastructure as part of their social contract. Australian Governments had been extremely cautious not to include ISDS provisions in trade deals with developed nations possessing an established rule of law, particularly where to do so would privilege financially powerful multinationals over local business when operating under Australian laws. ISDS, for example, was not included in the AUSFTA in 2004 despite US pressure.

The situation that changed this arose when giant US tobacco company Philip Morris International fought against Australia's scientifically-supported *Tobacco Plain Packaging Act 2011*. It did this first, by lobbying the US Trade Representative (USTR) to include investor state dispute settlement in the TPPA negotiations. Then foreign tobacco companies the Swiss registered JT International SA ('Camel' brand cigarettes) and British American Tobacco ('Winfield' and 'Dunhill' brands) unsuccessfully brought a constitutional challenge to the legislation in the Australian High Court on the basis that it was an acquisition of property that wasn't on just terms. This claim was unsuccessful (Faunce 2012a).

The multinational tobacco company Phillip Morris then re-badged itself as an Asian company based in Hong Kong and lodged an investor-state complaint against Australia under the *Hong Kong-Australia Bilateral Investment Treaty (BIT)*.

This BIT follows the standard model that allows an *ad hoc* gathering of three trade arbitrators to rule on whether Australia has to pay damages for passing this legislation. The arbitrators in that case had no obligation to consider that the legislation had been ruled constitutional or fulfilled Australia's international legal obligations under a WHO treaty (the *Framework Convention on Tobacco Control*) which supported unappealing, plain packaging of cigarettes as a way of reducing harmful impacts of teenage smokers in particular (Faunce 2012a).

International cigarette companies in addition lobbied the tobacco growing nations of Ukraine, Honduras and the Dominican Republic to initiate dispute settlement proceedings in the World Trade Organisation against Australia's plain packaging legislation claiming that it breached various provisions of the WTO TRIPS Agreement; the *Technical Barriers to Trade (TBT) Agreement*; and the *General Agreement on Tariffs and Trade (GATT) 1994*.

In the plain packaging dispute Australia confronted, for the first time, the possibility that legislation enacted according to the basic tenets of their social contract by their federal parliament and ruled Constitutional by that nation's highest court could in effect be overturned by an off-shore tribunal not accountable to the Australian populace and with extremely limited capacity to refer to governance arrangements directly endorsed by Australian citizens. Australian citizens discovered that legislation duly passed by their Parliamentary representatives could be so challenged by foreign corporations simply on the grounds that it indirectly 'expropriated' their investment. It also became more widely known that such cases could to be heard by appointees from a select 'club' (that may total as few as 15) arbitrators with extensive records of lobbying and advocating for the interests of corporate multinationals and lacking in human rights, public or environmental law expertise (Corporate Europe Observatory 2012).

As a result of the plain packaging dispute in 2011, the Australian Government announced that it would discontinue the practise of seeking inclusion of ISDS provisions in trade agreements. It stated that the Australian Government would not 'support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses'.[1] Australian negotiators for the trade deal with South Korea (KAFTA) received explicit instructions that Australia would not accede to a KAFTA ISDS provision.

Phase 3: Australia embraces ISDS in regional bilaterals

In 2014 an Australian government was elected that, on ideological grounds, was much more amenable to the interests of corporate multinationals. This was to have a significant impact on its approach to ISDS. The first manifestation of this change was the KAFTA negotiations.

South Korea had already had ISDS foisted upon it in the KORUSFTA. The KORUSFTA permitted US investors in South Korea and, likewise, South Korean investors in the United States, to file arbitral claims against not only federal legislation, but also legislation of states and by-laws of localities that adversely impacted on such investors in areas such as natural resources exploration, extraction, refining, transportation, distribution, or sale; power generation or distribution, water treatment or distribution, or telecommunications; or infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines. The US probably only agreed to such obligation due to the tacit presumption amongst investment arbitrators that major claims in that system against the US would not succeed (Faunce and Shats 2008).

Having already exposed the South Korean social contract to ISDS under KAFTA, it was a relatively easy matter for representatives of the USTR to encourage the South Koreans to insist on ISDS in their trade deal with Australia. No doubt the USTR strategy was that once that was in place it would be very difficult for the self-proclaimed pro-business Australian government to resist ISDS in the TPPA. Indeed, in 2014 the newly elected conservative Australian government agreed (although it had never sought a democratic mandate for this) to an ISDS provision under KAFTA. That government did, however, refuse to include such an ISDS provision in a trade agreement with Japan involving much more powerful Australian-invested and potentially aggressive Japanese corporations (ABC Background Briefing 2014).

The investment chapter for the KAFTA indeed allowed foreign firms to skirt Australian domestic courts and laws to directly sue that government in the International Centre for the Settlement of Investment Disputes (ICSID). ICSID Arbitrators would in effect become the final arbitrators on major Australian public policy questions involving South Korean companies concerning mineral royalties, fossil fuel and renewable energy, water, telecommunications, banking, agriculture and power. Yet such arbitrators upon key emerging issues under the Australian social contract would have no obligation to apply the general norms of that contract, would be paid exorbitant amounts often over several years of proceedings, only in cases initiated by multinational corporations, could act as a legal representative in one case and an arbitrator in another, and not be subject to an appeal process or even the requirement to apply a consistent body of jurisprudence.

The Australian government, as mentioned, itself could not initiate suits before this tribunal and its arbitrators would not be required to take into account otherwise relevant constitutional, legislative or international human rights norms (including standard legal due process procedures), or maintain a public record of their decisions. The KAFTA ISDS provisions even provide investors with a right to demand compensation for 'indirect' expropriation and allow foreign investors to claim government actions (such as the plain packaging laws) require technically unlimited financial compensation because of a slightly higher burden in complying with the law. There were some ambiguous ISDS carve outs for Australian public health and environmental legislation. Yet it is clear that the ISDS provisions included in the KAFTA will allow foreign investors from companies headquartered in South Korea to challenge Australian public policy and legislation whenever they perceive their investments in Australia are threatened.

Phase 4: ISDS in the Trans Pacific Partnership Agreement (TPPA)

It is likely that the main reason US-based multinational companies were interested in the TPPA was as a vehicle for insinuating ISDS into the governance arrangements in the signatory nations. It appears to be the MAI revisited. Over the past two years, TPPA leaks have abounded, affirming concerns that the agreement would intrude in unprecedented ways on democratic sovereignty. The public has learnt that ISDS provisions would facilitate a multinational corporation's right to challenge capital controls and other macro-prudential financial regulations that promote financial stability. It is unlikely most citizens would wish to accord bankers and financial advisors such liberty from accountability so soon after the harm caused to the social fabric of signatory nations by the Global Financial Crisis. Nonetheless, the TPPA draft text also requires that governments 'shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory'. This would forbid countries from using capital controls or financial transaction taxes, even as the International Monetary Fund reversed its opposition to the use of capital controls following the global financial crisis (Vines, Crow, and Faunce 2012). The idea of a low level tax on global financial transactions has been proposed as a rational and equitable way of providing funds to deal with areas such as global poverty and environmental degradation. Yet such initiatives are exactly what ISDS in the TPPA is targeted at preventing (see also Mathews, this issue).[2]

The TPPA ISDS provisions (from the leaked draft) involve an overreaching definition of 'investment' that included almost every significant component of the social infrastructure of the signatory states.[3] It would include health and land use policies, government procurement decisions, regulatory permits, intellectual property rights (including pharmaceutical patents), regulation of financial instruments such as derivatives, contracts to operate utilities and more. The new rights and protections would extend to investments already existing before TPPA went into legal effect.

The text also includes an overreaching definition of 'investor' as a person or legal entity that makes (or attempts to make) an investment as defined in the pact. This would included firms from non-TPPA countries that have incorporated in a TPPA signatory country. Thus, for instance, a Chinese state-owned corporation operating in one of the TPPA signatory countries Vietnam could set up a subsidiary there, then sue the Australian government in a foreign tribunal to demand compensation under this text. Additionally, the leaked TPPA ISDS text failed to require in the definition of 'investor' that a person or entity have actual 'substantial' business activities or make a significant commitment of capital or pay taxes, in the host country (Vines, Crow, and Faunce 2012).

Leaked texts reveal US negotiators have sought to make TPPA ISDS arrangements applicable to a wider definition of patents which would include new methods or uses of a known product regardless of whether or not it exhibits enhanced efficacy. An example of what could happen in the pharmaceutical area in Australia as a result of ISDS in the TPPA is provided by the NAFTA ISDS case brought by US drug manufacturer Eli Lilly against Canada's pharmaceutical patent regulatory system (to reduce 'me-too' or 'evergreening'; claims) demanding $500-million in compensation after the company lost its Canadian patents on two drugs (Strattera and Zyprexa). That money was to compensate Eli Lilly for the Canadian court-ordered invalidation of its patent for the ADHD drug Strattera. The notice claimed numerous violations of NAFTA's investment protections, including fair and equitable treatment, national treatment and expropriation. The claim also attacked the Canadian Supreme Court's decision to invalidate a patent for Zyprexa, the company's best-selling anti-psychotic drug whose patent expired in the United States in 2011. Eli Lilly was asking the NAFTA investor-state tribunal to award compensation for a violation of its investor rights because Canada enforced its patentability standards which exclude drugs without proven utility, even though the underlying NAFTA provisions covering patents provided signatory countries flexibility to determine their own substantive standards for patentability (Vines, Crow, and Faunce 2012).

The TPPA contains provisions that would require all involved countries to allow animal and plant life to be patented and protected by ISDS rights; understandable since the chief US agricultural negotiator for the TPPA is a former Monsanto lobbyist. Food safety regulations—including rules about pesticide residue levels, labelling of ingredients, or limitations on additives—also could be challenged under the ISDS mechanism. The leaked TPPA ISDS text would even provide investors with a right to demand compensation for 'indirect' expropriation.

The most successful (and controversial) basis for investors' challenges of government policies in past agreements had been alleged violations of the guaranteed minimum standard of treatment for investors or the closely linked 'fair and equitable treatment' (FET) provision. Some arbitral tribunals have found FET violations for government regulatory actions that simply contradicted what investors' argued were their 'reasonable expectations'. The TPPA text also would allow investors to claim that government actions (such as new financial, public health or environmental regulation laws) violate 'national treatment' or 'most favored nation' rules, simply because, due to a foreign investor's own business model, that firm might experience a slightly higher burden in complying with the law.

Several countries proposed new exceptions to safeguard countries' ability to regulate speculative financial transactions and more, but the United States did not support these initiatives. Others tried to negotiate a measure that would partially exempt social security systems from investor challenges under the free transfers obligations. Some also sought TPPA provisions to ensure that ISDS disputes related to sovereign debt and sovereign debt restructuring were not subject to the full range of investment chapter disciplines. The US also did not agreed to these.

Phase 5: problems for the Australian democratic sovereignty with ISDS in the TPPA

If ISDS arises in the TPPA (and cannot subsequently be amended, suspended or revoked) Australia will confront, for the first time, the possibility that a decision of the highest court in Australia will be punished with damages claims in the billions (in effect be overturned) at the behest of powerful foreign corporations before off-shore tribunals with only a tenuous connection to Australian or indeed international legal traditions. Those tribunals will comprise members from a highly select and small clique of pro-corporate lawyers with a financial interest in finding for corporations and in many cases a long history of advocating and lobbying for corporate interests.

It is by no means clear that TPPA ISDS obligations will contain a workable and efficient (if such a thing is possible) general exception to safeguard environmental, health, labour and consumer protection policies (Faunce and Townsend 2011). The most recent leak excepts non-discriminatory expropriations for a public purpose made according to due process of law. An annex (a provision in the TPPA that doesn't have to apply to all nations) exceptions non discriminatory regulatory actions designed to protect public health, safety and the environment 'except in rare circumstances'. What 'rare circumstances' mean is left to be interpreted by the pro-corporate arbitrators.

US TPPA negotiators did not agree to federalism protections (though the US frequently excuses itself from reciprocity in trade deals because of federal constraints), or to limit claims that arise because of a slightly higher burden in complying with the law, or to add requirements that investors prove loss or damage, or that such loss is severe or disproportionate to the public purpose, or that investor claimants first exhaust mediation or domestic administrative review. The US negotiators didn't even support a hortatory reference in the TPPA to encouraging corporate social responsibility.

The ISDS chapter of the TPPA seems specifically to contradict a United Nations Conference on Trade and Development (UNCTAD) report that has questioned whether three individuals with pro-corporate backgrounds, should ever be viewed by the public as having sufficient legitimacy to assess without reference to any established body of law the validity of States' acts, particularly if the dispute involves sensitive public policy issues and where the disputes create significant pressures on public finances and create potential disincentives for public-interest regulation, posing obstacles to countries' sustainable economic development (UNCTAD 2013).

The ISDS in the TPPA will grant powerful foreign corporations legal rights to challenge democratically enacted laws. The law regards these corporations as 'people'. They can sue in courts to protect their rights. Yet in other ways these corporations are illegal aliens to the Australian social framework. They pay little or no tax, they have little commitment to communities that is long-lasting and likely to survive incursions on their profits. Indeed, they have a legal duty to their shareholders to maximise those profits, and it would arguably be a violation of that duty to *not* challenge domestic laws that impinge upon profit making if a legal avenue exists.

Moreover, the off-shore investment tribunals that would hear those challenges are comprised of people sharing a common interest in perpetuating the interests of corporations. The capacity of these arbitral tribunals to have the final say on important public health issue (as well as those likely to face future generations of Australians in areas such as environmental sustainability and financial sector stability) will be a direct affront to democratic decision-making, not only in this country but globally. The deliberate disengagement of Australian citizens from the governance changes being wrought on Australia through mechanisms such as ISDS in the TPPA may mark a turning point in a wider disengagement of citizens from the political process not just in this country but globally.

Phase 6: reform of investor state dispute settlement

A central part of the hypothetical social contract ratified by the Australian Constitution is that our nation will be governed democratically by a rule of law, with its implicit predictability, certainty and accountability. Australian taxpayers (through their governments) have invested an enormous amount of time and resources in creating a system of governance predicated on the capacity of a non-corrupt judiciary to decide on disputes by fairly interpreting laws promulgated in advance in public. Foreign corporations operating in Australia benefit from such an equitable governance structure. Indeed, it is one of the primary reasons they invest here. Australia regularly ranks very highly in rule of law rankings of nations around the world. Australia does not need ISDS to create a society in which its citizens can prosper and flourish. This is even more likely to be the case as new generation food and fuel technologies such as artificial photosynthesis become globally deployed (Faunce *et al.* 2013)

In June 2013 the UNCTAD issued a report on reforming investor-state dispute settlement which highlighted concerns including a ‘perceived deficit of legitimacy and transparency’, ‘contradictions between arbitral awards’, ‘difficulties in correcting erroneous arbitral decisions’, ‘questions about the independence and impartiality of arbitrators’ and ‘concerns relating to the costs and time of arbitral procedures’. Recommendations for reform included (1) Promoting alternative dispute resolution (2) Tailoring the existing system to have a stronger transparent and consistent rule base (3) Limiting investor access to ISDS (4) Introducing an appeals facility and (5) Creating a standing international investment court (UNCTAD 2013).

Investors’ resort to ISDS could be limited by: (1) by reducing the subject-matter scope for ISDS claims; (2) by restricting the range of investors who qualify to benefit from the treaty, and (3) by introducing the requirement to exhaust local remedies before resorting to international arbitration. An international civil legal system could be created that would apply a mixture of international and domestic laws and investment obligations in that setting. Similarly, requiring investors to exhaust local remedies, or alternatively, to demonstrate the manifest ineffectiveness/bias of domestic courts, would make ISDS an exceptional remedy of last resort.

Another approach is to include additional requirements in the definition of 'investor' and/or to use denial-of-benefits provisions. To become democratically legitimate ISDS proceedings such be open to the public, transcripts of all proceedings freely available and decisions reported. Investors must be prohibited form structuring their investments through intermediary countries with the sole purpose of benefitting from their ISDS mechanism (Gleeson, Tienhaara, and Faunce 2013).

Yet another reform option would be to allow States to bring actions against corporations under ISDS. Such cases could arise as counter-claims in actions where corporations have initiated ISDS claims. Such actions would be heard before tribunals with a much broader potential membership than investment lawyers. They would include people with public health, environmental and human rights law expertise.

A far-reaching reform would be to abandon ISDS and the use of trade and investment arbitrators as a means of dispute resolution altogether and return to State-State arbitration proceedings before transparent international courts. Mechanisms should be created whereby ISDS impacts on federal governance arrangements in particular should be publicly assessed and debated. Likewise, a wide-ranging whole of government and public debate is required to provide legitimacy to any 'carve-out' provisions applied to allegedly soften the social and environmental impact of ISDS. It will be difficult for, for example, Australia to convince our Asian neighbours to invest significant resources in creating rule of law conditions including a non-corrupt judiciary if that legal system is likely to be disregarded by foreign corporations in any major dispute.

Conclusion

In the short term, in relation to the TPPA, Australia should initiate unilateral interpretive declarations restricting the applicability of ISDS in the TPPA to Australian public health and environmental policies, legislation and regulations. It should leave open the possibility that future governments may wish to renegotiate the TPPA and suspend, amend or remove ISDS obligations. Such obligations in the TPPA should not be treated as if they have equivalent perpetual status (subject to democratic referenda) as the Constitutional provisions that centrally frame the social contract of a democracy. In the interim, International and Constitutional law should affirm that as a matter of general international law, a non-discriminatory regulation for a public health, educational or environmental sustainability purpose that affects a foreign investor or investment is not deemed expropriatory and compensable by damages; their right to make any term of this agreement, particularly those affecting their sovereign democratic right to protect public health and the environment, conditional upon the passage of legislation debated in parliament (Vines, Bruce, and Faunce 2013). Australia should ensure that experts with public health, environmental and human rights expertise are capable of serving on ISDS panels and that ISDS rights include the capacity for counter claims by States where investments have damaged public health or the environment or are likely to.

An Australian stance to reform ISDS may pave the way for important public policy initiatives toward environmental sustainability in areas such as financial reform (including a global financial transactions tax) and energy security. In particular, government policy makers and regulators considering banning the activity of a multinational corporate in circumstances of scientific uncertainty about public health or environmental consequences by using the precautionary principle, should not have to double guess at what level the standard of proof they might then apply could also trigger a challenge to such precautionary regulatory action by a multinational corporation under the ISDS system.

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Notes

1. Australian Government Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: *Trading Our Way to More Jobs and Prosperity* (April 12, 2011).
2. In addition to frustrating government efforts to address climate change and energy security, the ISDS could also complicate the pursuit of food security via the development and diffusion of next generation technologies such as off grid artificial photosynthesis technologies for hydrogen (from solar-driven water splitting) fuel and starch-based food (from atmospheric nitrogen and carbon dioxide absorption) (Faunce 2011; Faunce *et al.* 2013)
3. See leaked TPP Investment chapter published by Wikileaks on March 25, 2015: https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter/page-1.html. Accessed April 15, 2015.

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