



## Expert Paper #4

# THE ENVIRONMENT UNDER TPPA GOVERNANCE

**Simon Terry**

Key issues: Governance, Environmental Objectives, UN Environmental Treaties, Endangered Species, Fishing, Enforcement, ISDS, Climate Change, GM Food.

January 2016



Funding support from the  
New Zealand Law Foundation

Negotiations for a Trans-Pacific Partnership agreement (TPPA) were concluded in Atlanta, USA on 5 October 2015, and the text was released on 5 November 2015. The twelve negotiating countries were Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam. The TPPA has 30 chapters and many annexes, with Parties also adopting bilateral side-letters. Governments are expected to sign the agreement on 4th February 2016 in New Zealand which is the formal depositary for the TPPA. Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement. The TPPA will come into force within two years after signing if all signatories notify that they have completed their domestic processes, or after 2 years and 3 months if at least six of them, including the US and Japan, have done so. This research paper is part of a series of expert, peer reviewed analyses of different aspects of the text.

# The Environment Under TPPA Governance

## CONTENTS

Key Points

Reshaping Governance Through the Lens of Foreign Investors

Weak Objectives and General Commitments

The US Bid for TPPA Enforcement of UN Agreements

Endangered Species Protection: Progress and Loopholes

Fishing: Subsidy Removal but Minimal Action Otherwise

No Surety of Effective Enforcement

The ISDS Chill on Protecting the Environment

Climate Change: Cannot be Named, Will be Exacerbated

Pressure for 'Mutual Recognition' of GM Food Approvals

## KEY POINTS

- The environment is a significant casualty under the TPPA.
- Adopting the lens of the foreign investor when making broad governance changes through the TPPA has sidelined the opportunity to properly integrate management of the economy with management of other domains – such as the environment. The overall result for environmental governance is window dressing on the upside, and serious threats on the downside.
- In marked contrast to TPPA chapters that involve core commercial areas such as intellectual property, the environment chapter sets almost no new standards, with each partner country essentially left to set its own.
- A failed US proposal to have seven UN multilateral environmental agreements made enforceable by the TPPA would have created new problems, especially by opening the way to ‘forum shopping’.
- Parties are required to implement provisions in the Convention on International Trade in Endangered Species, but this UN treaty does not provide a legally enforceable prohibition on trade in illegally sourced timber, wildlife, and marine resources and the TPPA does not fix this.
- Two forms of fishing subsidy that contribute to overcapacity and overfishing are eliminated under the TPPA, but no similar progress has been made on the overarching issue of illegal, unreported and unregulated fishing.
- The TPPA’s enforcement provisions are very similar to those first developed for the US/Peru FTA, and it is continued violations of Peru’s obligations under that agreement have become the case study in how enforcement of such environmental protections has failed.
- 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. What the TPPA has delivered are provisions that completely fail to protect governments from being sued when taking such action.
- 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. This favours retaining low standards when these need to rise markedly.
- There is a gross asymmetry in the rights and means accorded organisations that would seek to protect the commons for the public good, and rights and means accorded foreign investors to protect private wealth.
- The section on climate change contains two impotent paragraphs that do not mention the words “climate change” nor the relevant global treaty, the UNFCCC. The aspirations contained in the newly minted Paris agreement (made under the UNFCCC) are entirely disconnected from what the parties are willing to sign for in a treaty that carries trade sanctions as a penalty for non-performance.
- The TPPA provides assistance to GMO exporting countries by making it harder for other countries to independently regulate GM foods. A combination of information requirements, the TPPA’s dispute procedures, and new working groups, together amount to a significant new level of pressure on TPPA governments to accept GM foods under ‘mutual recognition’ standards – those of the exporter.

## Reshaping Governance Through the Lens of Foreign Investors

The environment is a significant casualty under the TPPA. This result is a clear reflection of what nations have placed emphasis on when seeking meaningful outcomes across the entire agreement.

In order to meet its APEC-inspired objective of going “behind the border”, and so beyond purely trade-related matters such as tariffs, the TPPA had to recast important governance arrangements in partner countries.

While still widely promoted by those TPPA parties as simply a “free trade agreement”, recognition of the broader significance of the deal led to it also being promoted early on as a “twenty first century trade agreement”. The hue if not the actual statements around this was of a holistic agreement that would advance all facets of the deal in a responsible, enlightened and balanced way – achieving a “gold standard” model.

The preference the final text reveals is for a heavy focus on better aligning each country’s domestic regulation with the interests of foreign investors. So rather than a recasting of regional governance with multiple pillars of public interest as the guiding objectives - eg economic development, ecological sustainability, justice and avoidance of conflict – it is the private interests of foreign investors that take centre stage.<sup>1</sup>

The implicit decision to adopt the lens of the foreign investor when looking at broad governance changes has sidelined the opportunity to properly integrate management of the economy with management of other domains - such as the environment.

Environmental governance instead relies on “clip on” policy to simply manage impacts flowing from the economy. But even then, the TPPA process has delivered “clip ons” that fail to meaningfully advance protection of the environment, other than in a few instances that will have only a tiny impact overall. This from a grossly inadequate starting position relative to what is sustainable. And in addition to what is all but a “no show” on effective positive measures, the agreement contains provisions that work against environmental protection for which there are no effective exemptions in the text.

The overall result for environmental governance is window dressing on the upside, and serious threats on the downside. The environment has ranked very poorly in the allocation of political capital, with other corners gaining at its expense.

TPPA proponents have offered an entirely different interpretation: “The TPP sets a new benchmark for environmental provisions in trade agreements” was the message that quickly took over from the US Trade Representative’s similar but more nuanced statement.<sup>2</sup>

Despite abandoning the promise to devise a truly twenty first century trade model, proponents cling to the rhetoric for what might have been.

---

1 Sustainability Council of New Zealand, *The Environment in the TPP*, 27 September 2012.

2 “Across this critical zone, the TPP would establish the toughest environmental protections of any regional trade agreement”. USTR, *Standing up for a Greener World*, May 2015. That was then retailed into statements such as that quoted: Craig Foss, *TPP offers green game-changer*, Hawkes Bay Today, 29 October 2015.

## Weak Objectives and General Commitments

The TPPA measures intended to advance the environment are generally contained in chapter 20, titled *Environment*. The weak objectives for the chapter signal the poverty of serious disciplines to follow. Notably, the key concept of sustainable development is addressed there in the following terms: “the Parties *recognize that enhanced cooperation* to protect and conserve the environment and sustainably manage their natural resources brings benefits that *can contribute to sustainable development*” (emphasis added).<sup>3</sup> Sustainable development cannot even be a clean objective in its own right. Implicitly, unsustainable development is permitted.

The strongest wording the section has to offer is an objective to “promote”, not ensure, “high levels of environmental protection and effective enforcement of environmental laws”.<sup>4</sup>

The next article in the text covering “general commitments” then notes that while parties shall “strive” for “high levels of environmental protection”, other than for particular disciplines set out later in the chapter each nation retains its sovereign right “to establish its own levels of domestic environmental protection”.<sup>5</sup> And even as the environment chapter sets almost no new standards and a country is essentially left to set its own through domestic law, even then the enforcement of those laws is dependent on breaches affecting trade or investment.

The environment chapter’s aversion to new standards for protection is in marked contrast to chapters that involve core commercial areas such as intellectual property. There, huge effort has gone into achieving greater protection for foreign investors to set common and enforceable standards across the parties.

## The US Bid for TPPA Enforcement of UN Agreements

A centerpiece of the environment chapter was to have been a section in which seven UN multilateral environmental agreements (MEAs) would be made enforceable by the TPPA. This US proposal arose from a political deal reached in the US Congress on 10 May 2007 which specified that certain environmental conditions should be included in future FTAs the US enters into, and enforcement of the seven UN agreements was central to this.<sup>6</sup>

It is an extraordinary proposal on two levels:<sup>7</sup>

1. It selects seven of the more than 230 MEAs listed with UNEP on a basis that does not reflect environmental priorities.
2. It interposes a regional trade deal as the enforcer of agreements reached under UN auspices.

---

3 Article 20.2.2

4 Article 20.2.1

5 Article 20.3, (2,3 and 4) “4. No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party”.

6 The proposal is based on the US/Peru FTA.

7 Sustainability Council, *The Environment in the TPPA*, 27 September 2012.

The contradictions set up by the proposal include the TPPA enforcing:

- The Montreal Protocol (ozone depletion), but not the Climate Change treaty;
- The Endangered Species agreement, but not the Biodiversity treaty; and
- Various specialist marine conservation agreements but not the Fish Stocks treaty.

The seven MEAs appear to simply be ones the US has little problem abiding by, rather than the main priorities for the environment and exclude what are arguably the two most important treaties: the climate convention and the biodiversity convention.<sup>8</sup>

While the absence of enforcement provisions in the MEAs is a critical weakness, the US's proposed "fix" would create new problems instead, especially by opening the way to "forum shopping". It would have set up the notion that global commons issues could be resolved through a regional trade agreement. This could have occurred through TPPA parties seeking out "regulatory discounts" by going to this new partial forum and bypassing tougher global forums.<sup>9</sup> And it could have led to responses from governments whereby MEAs that were enforceable under the TPPA took precedence for resources over other MEAs that may be more important for the environment. .

The US proposal regarding MEAs was opposed by virtually all other parties – with the stated reason being the inappropriateness of the TPPA being used to enforce UN agreements.<sup>10</sup> Only one of the MEAs was ultimately agreed to being effectively enforced under the TPPA – the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>11</sup> Two others, the treaty governing ozone depletion and that regulating pollution from ships, are given partial support: parties are simply required to "maintain" specific existing policies that relate to these, rather than ones that ensure implementation.<sup>12</sup>

That the US proposal regarding MEAs largely failed is potentially important for the US ratification process. Not only was it a minimum standard set under the so called "Fast Track" law that has paved the way for this process, it is also a standard that Democratic Party representatives have tended to regard as an environmental litmus test and lobbyists will be reminding the few Democrats supporting the TPPA of this in their year of potential reelection.<sup>13</sup>

---

8 Seven Proposed MEAs: Endangered Species; Marine Pollution; Protocol: Montreal; Wetlands; Convention for the Regulation of Whaling; Inter-American Tropical Tuna Commission; Conservation of Antarctic Marine Living Resources

9 Sustainability Council, *The Environment in the TPPA*, 27 September 2012.

10 A leaked note of 24 November 2013 states: "AU, BN, CA, CL, JP, MX, NZ, PE, SG and VN oppose such incorporation in this way as they do not consider it appropriate to incorporate those obligations that have been negotiated in different circumstances and subjecting them to a dispute settlement mechanism in the TPPA." <http://wikileaks.org/TPPA-enviro-chairsreport>

11 Article 20.17.2

12 Articles 20.5 and 20.6

13 The Fast Track procedures require that the US "ensure that a party to a trade agreement with the United States adopts and maintains measures implementing...its obligations under common multilateral environmental agreements (as defined in section 4210(6))....". <http://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter27&edition=prelim>

## Endangered Species Protection: Progress and Loopholes

The prevention of trade in endangered species and the illegal trade of wild flora and fauna received support through the requirement to implement CITES provisions (as noted above). However, this treaty does not provide a legally enforceable prohibition on trade in illegally sourced timber, wildlife, and marine resources.

While the TPPA speaks to this gap, rather than introducing prohibition, the text specifies only that parties must simply “combat the illegal take of, and illegal trade in, wild fauna and flora”.<sup>14</sup> The Sierra Club sums up performance on this issue by stating: “Plagued by loopholes and non-binding language, this provision falls far short of *requiring* countries to *adopt, maintain, and implement* policies to identify contraband and to penalize actors that fail to identify contraband in a manner that would serve as a strong disincentive to engage in illegal trade.”<sup>15</sup>

## Fishing: Subsidy Removal but Minimal Action Otherwise

An area where there is a clean gain for the environment is the prohibition of two forms of fishing subsidy that contribute to overcapacity and overfishing: those “that negatively affect fish stocks that are in an overfished condition” and those “provided to any fishing vessel” cited for illegal fishing.<sup>16</sup>

The rigour of the provisions governing fishing subsidies demonstrates the serious intent behind these provisions, in marked contrast to much of the rest of the chapter. Delivery on these measures is however still dependent on compliance and so enforcement, as discussed below.

No similar progress has been made on the overarching issue it relates to of illegal, unreported and unregulated (IUU) fishing – that which breaches or bypasses conservation measures. While the text provides that “each Party shall *seek to operate* a fisheries management system that regulates marine wild capture fishing and that is *designed to*: prevent overfishing and overcapacity...” (emphasis added), the provisions essentially rely on voluntary adoption of measures for their effect.<sup>17</sup> The provisions fail to prohibit trade in products that breach marine conservation laws, and do not require that obligations under regional fisheries management organisations are adhered to. With respect to the latter, it simply requires parties to “endeavor not to undermine” the relevant obligations.<sup>18</sup>

---

14 Article 20.17.3 and Article 20.17.5

15 Sierra Club, *TPPA Text Analysis: Environment Chapter Fails to Protect the Environment*, November 2015, p 4.

16 Article 20.16.5

17 Article 20.16.3

18 Article 20.16.14



Particular gaps include the lack of binding disciplines on shark finning and whaling. “Article 20.16.4 of the TPP environment chapter states that each Party ‘shall...promote the long-term conservation of sharks...and marine mammals’. However, the chapter includes no *binding* requirements for TPP countries to prohibit shark finning, despite TPP countries’ significant role in the shark fin trade.. Nor does the chapter even mention commercial whaling, much less *require* any prohibitions on the practice”.<sup>19</sup>

## **No Surety of Effective Enforcement**

Critical to the success of any pro-environment measures being effective is enforcement. President Obama not only hyped the TPPA as having “the kinds of labor and environmental and human rights protections that have been absent in previous agreements”, he also stressed the enforceability of the environment provisions when the TPPA’s enforcement provisions are very similar to those first developed for the US-Peru FTA.<sup>20</sup> And it is continued violations of Peru’s obligations under that agreement that has become the case study in how enforcement of such environmental protections has failed.

The Environmental Investigation Agency (EIA) released a briefing in June 2015 that set out the following charges:<sup>21</sup>

- No action to investigate industry, in the United States or Peru, with documented evidence of repeated and persistent engagement in illegal harvest and trade or prosecute known violations.
- No significant sanctioning of forest engineers responsible for submitting over 1,100 false annual operating plans for concessions that has resulted in the ability to launder tens of millions of dollars of illegal timber.
- Failure to conduct audits of producers and exporters, or to verify suspect shipments.
- A seven year delay in establishing the Forestry Tribunal, a secondary body whose creation was mandated in a 2008 decree to review and make final decisions regarding appeals by concessionaires or permit holders.
- A timber tracking system under development that, as of yet, fails to address the frequently fraudulent inputs.

From the forest engineers that sign false forest inventories and the forest sector officers that approve them, to the exporters and importers that neglect to verify the legality of the timber, and the authorities that should be investigating and sanctioning them: all of these actors are facilitating the illegal timber laundering that destroys forests and violates human rights. Despite the well-documented evidence regarding their illegal activities, almost nothing is being done to stop them.

---

19 Sierra Club, *TPPA Text Analysis: Environment Chapter Fails to Protect the Environment*, November 2015, p 6.

20 <http://edition.cnn.com/2015/04/28/politics/obama-abe-trade-trans-pacific-partnership/>

21 Environmental Investigation Agency, *Failure to Enforce Environmental Obligations in US-Peru FTA Allows Illegal Logging to Continue*, 4 June 2015.

Peru's former vice-minister for the environment states:

Indeed, repeated efforts by Peruvian and U.S. labor and environmental groups to push for the Obama administration even to initiate a consultation with Peru's government about this apparent violation of the FTA has not resulted in any meaningful action. ... But six years later, Peru's Amazonian forests face an illegal logging crisis with "major violations" suspected in almost 70 percent of all logging concessions.<sup>22</sup>

The Sierra Club similarly observes that:

After six years of the Peru FTA, for example, illegal logging remains rampant in Peru despite the FTA's eight pages of detailed provisions – stronger and more specific than the TPPA's forestry provisions – that required Peru to reduce illegal logging. These terms were subject to a state-state dispute settlement mechanism enforceable via trade sanctions – essentially the same enforcement mechanism used for the TPPA environment chapter (Art. 20.23). Even so, Peru's own government found in 2014 that 78 percent of Peru's wood slated for export was harvested illegally.

...

Indeed, the state-state dispute settlement mechanism for environmental provisions in all U.S. trade agreements since 2007 has failed to produce a single formal case against documented environmental violations.<sup>23</sup>

This history underscores two things:

1. Governments have little incentive to press other governments on matters that affect only the environment in the other government's territory. It involves spending diplomatic capital with a country on something for which there is no domestic benefit – unless the violation has achieved too much publicity to be credibly ignored.
2. The absence of provisions for non-state actors to stand in the place of governments to seek enforcement.

The latter is particularly relevant in the context of the TPPA's ISDS provisions that allow foreign investors to sue governments if they believe their future earnings are exposed by a new state action. There is a gross asymmetry in the rights and means accorded organisations that would seek to protect the commons for the public good, and rights and means accorded foreign investors to protect private wealth.

Nobel laureate in economics and Columbia University professor Joseph Stiglitz comments regarding ISDS that: "If there ever was a one-sided dispute-resolution mechanism that violates basic principles, this is it".<sup>24</sup>

---

22 José de Echave, *Peru's story haunts the TPPA*, The Hill, 9 June 2015 <http://itk.thehill.com/blogs/congress-blog/foreign-policy/244311-perus-story-haunts-the-TPPA>

23 Sierra Club, *TPPA Text Analysis: Environment Chapter Fails to Protect the Environment*, November 2015, pp 7 and 8.

24 Joseph Stiglitz, *The secret corporate takeover of trade agreements*, Guardian, 13 May 2015. <http://www.theguardian.com/business/2015/may/13/the-secret-corporate-takeover-of-trade-agreements>

## The ISDS Chill on Protecting the Environment

The environment chapter's window dressing cannot begin to hide or offset the serious damage that can be expected from the TPP's rules on investor state dispute settlement (ISDS). The specific operation of those provisions is analysed in a separate paper in this series.<sup>25</sup> The following discussion focuses on the implications for the environment.

Put simply, the ISDS provisions would give a foreign investor from a TPPA country<sup>26</sup> the ability to sue a government in an offshore tribunal if it believed its reasonable investment expectations (such as its profits or asset values)<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> In particular it was claimed that text would specifically preserve this right to act, with the implication being that such text would protect a government from ISDS action. This was important as qualifying language and interpretative annexes had proven unreliable in the past when it came to tribunal interpretation.<sup>30</sup>

A recent case that raised particular concern about what an investor could claim as a breach of 'fair and equitable treatment' was taken against Canada by US company, Bilcon. The ISDS

---

25 Amokura Kawharu, *TPPAA: Chapter 9 On Investment*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, December 2015. This is available at <https://TPPAlegal.wordpress.com/nzlf-expert-paper-series/>

26 Australia and New Zealand have agreed in a sideletter that ISDS shall not be available to their investors in a dispute with the other country.

27 Article 9.6.4 says the "mere fact" that a Party acts inconsistently with the investor's expectations does not constitute a breach and does not prevent an investor using this as grounds in a dispute that includes other complaints.

28 For descriptions of recent cases and payouts see:  
[www.citizen.org/documents/fact-sheet-TPPA-and-environment.pdf](http://www.citizen.org/documents/fact-sheet-TPPA-and-environment.pdf)

29 "New Zealand has sought and secured provisions in all of its trade agreements that protect the Government's right to regulate in the interests of public health and to protect the environment. This policy position has not changed under TPPA". New Zealand Trade Minister, Tim Groser, Answer to Parliament written question no 13725 (2013), 17 Oct 2013.

30 See for example: <http://www.citizen.org/RDC-vs-Guatemala>

panel majority found that the Canadian body considering the proposal for a quarry and marine terminal in Nova Scotia had in effect put the environment first, and had failed to consider possible mitigation, thus depriving the investors of their rights. In reaching this decision, the ISDS panel effectively acted as an appeal body to a Canadian statutory process, and substituted its own priorities for that of the domestic process.<sup>31</sup>

What the TPPA has delivered on ISDS are provisions that completely fail to protect governments from being exposed to suits when they regulate to protect the public interest. After dissecting these provisions, Public Citizen summarised the result as follows:

The language touted as an “exception” to defend countries’ health, environmental and other public interest safeguards from TPPA challenges is nothing more than a carbon copy of past U.S. FTA language that “reads in” to the TPPA several WTO provisions that have already proven *ineffective* in more than 97 percent of its attempted uses in the past 20 years to defend policies challenged at the WTO.

...

This ineffective general exception does not even apply in the case of investor-state challenges. ... The exception language included in the Investment Chapter is circular, applying only to countries whose policies do not conflict with the other rules of the agreement.<sup>32</sup>

This failure is key to the ISDS threat. 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.

A further aspect of the chilling effect is that foreign investors do not need to initiate a case in order to exert influence. When the average cost of simply participating in such a case was assessed in 2012 at US\$8 million and often much more, if the proposed environmental reform is not strongly supported by the government then even if it would have a strong defence before a tribunal, it may nonetheless back off the reform in the face of a threat to sue.<sup>33</sup>

---

31 Inside US Trade, *Bilcon Case Leads To Broad Alarm Over ISDS Reach Into Domestic Law*, 9 April 2015; and Lisa Sachs and Lise Johnson, *Eyes wide shut on ISDS*, The Hill, 22 April 2015, <http://thehill.com/blogs/congress-blog/foreign-policy/239560-eyes-wide-shut-on-isds>

32 Article 9.15 says: “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.” <http://www.citizen.org/documents/analysis-TPPA-text-november-2015.pdf>

33 [www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf](http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf)  
It is true that large companies already have many ways to lean on governments if they choose to, but the financial penalties ISDS can deliver often make it a more potent threat than is currently available to foreign investors in all but a small number of countries. Given the propensity for US corporations to employ legal strategies, and the scale of the resources they can devote to a particular issue versus those a New Zealand government could responsibly allocate, the TPPA would open up a quite different set of exposures compared to those New Zealand is accustomed to.

While clearly acknowledged in theory, the chilling effect is difficult to document because it simply stalls something that could have been abandoned for other reasons and governments will be loath to admit that intimidation was the reason.<sup>34</sup> This makes anecdotal evidence important, such as that reported by a former Canadian government official soon after the NAFTA ISDS provisions came into force.

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.<sup>35</sup>

A Canadian law professor also commented on an indirect aspect of the chilling effect when delivering his dissenting opinion in the Bilcon case. Donald McRae stated that “By treating this potential violation of Canadian law itself as itself a violation of NAFTA Article 1105 the majority has in effect introduced the potential for getting damages for what is a breach of Canadian law, where Canadian law does not provide a damages claim for such a breach”.<sup>36</sup>

Stiglitz sees this chilling effect as more than just a by-product of an effort to protect investor capital – he sees it as the underlying design objective:<sup>37</sup>

[T]hose supporting the investment agreements are not really concerned about protecting property rights, anyway. The real goal is to restrict governments' ability to regulate and tax corporations – that is, to restrict their ability to impose responsibilities, not just uphold rights. .... The (intended) effect is to chill governments' legitimate efforts to protect and advance citizens' interests by imposing regulations, taxation, and other responsibilities on corporations.

A chill on raising environmental standards would be much less significant were those standards currently adequate. But like most other countries, New Zealand starts in a vulnerable position. In spite of innovative legislation in certain areas of environmental protection, in other areas it is behind OECD benchmarks. And regardless of the starting point, there will be increasing pressure on New Zealand to raise standards to underpin the clean green image it trades on.

ISDS rights could be used by a foreign entity to seek compensation from a government if it, for example:<sup>38</sup>

- **Changed the conditions of a mining licence**
- **Set higher minimum flows for a river** (and so reduced availability for users)

---

34 Australian Productivity Commission, *Bilateral and Regional Trade Agreements*, 2010, p 271.

35 <http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century?page=0,0>

36 Inside U.S. Trade, *Bilcon Case Leads To Broad Alarm Over ISDS Reach Into Domestic Law*, 9 April 2015.

37 Joseph Stiglitz, *South Africa Breaks Out*, 5 November 2013. <http://www.project-syndicate.org/commentary/joseph-e--stiglitz-on-the-dangers-of-bilateral-investment-agreements>

38 Sustainability Council, *The TPPA's Threat to the Environment*, May 2013.

- **Raised the charge on greenhouse gas emissions** (recent changes to the ETS legislation gutted future responsibilities so new ones will need to be imposed)
- **Set stricter rules on logging of forests** (clear fell practices are under challenge)
- **Prohibited a pesticide** (many that are banned in the EU are legal in NZ)
- **Established national legal standards for the environmental protection of water and soil quality** (New Zealand has essentially none)
- **Introduced biodiversity protection standards**

ISDS provisions would favour retaining low standards when these need to rise markedly. They would tend to be a silent killer of progressive reforms, with proposals dying before they have seen the light of day. The cost would be measured not just in the effects of ongoing unsustainable practices, but in the dispiriting of communities and a nation no longer willing to assert guardianship over key areas of its ecological life support system.<sup>39</sup>

ISDS is also well on the way to becoming an archaic mechanism for dispute settlement. The European Union's trade commissioner, Cecilia Malmström, declared in May 2015 that the current system of investor protection was "not fit for purpose in the 21st century". The EU's proposed alternative is creation of a permanent court to hear investor-state disputes: "The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organisation" officials stated.<sup>40</sup> If such a mechanism is regarded as officially broken in the EU, that has immediate global significance as the EU has the power to be the standards setter for much of the world – and it will clearly be seeking such terms in its foreshadowed FTA with New Zealand. 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.

## **Climate Change: Cannot be Named, Will be Exacerbated**

While world leaders increasingly acknowledge climate change as not only the preeminent environmental issue but also the most important issue of our time, such is its sensitivity to the US at least that even the term has been entirely scratched from the text. What started as weak language about climate change in a November 2013 draft of the environment chapter, fizzled into two wholly impotent and embarrassingly thin paragraphs.<sup>41</sup> In the draft, the opening paragraph read:

The Parties acknowledge climate change as a global concern that requires collective action and recognize the importance of implementation of their respective commitments under the United Nations Framework Convention on Climate Change (UNFCCC) and its related legal instruments;

39 Such an outcome would also be likely to raise claims under the Treaty of Waitangi to the effect that fundamental treaty rights have been abrogated. See Carwyn Jones et al, *Maori Rights, te Tiriti o Waitangi, and the Trans-Pacific Partnership Agreement*, Expert Paper #3, January 2016.

40 <http://www.ft.com/cms/s/0/c1f2c4b2-f34a-11e4-8141-00144feab7de.html?siteedition=uk#axzz3Z6QiyJgE>

41 Article 20.15. The November 2013 draft is available at: <https://wikileaks.org/TPPA2/static/pdf/TPPA-treaty-environment-chapter.pdf>

However the final text removes the words “climate change” and all reference to the UNFCCC so as to deliver pure platitude:

The Parties acknowledge that transition to a low emissions economy requires collective action.

And a second paragraph that recognised a relationship between trade and climate change and the need for coherence between policies for these was removed entirely.

Each of the above changes were initiated by the US in a counterproposal to the November 2013 draft, via a note circulated to TPPA governments shortly after the draft was issued.<sup>42</sup> Subsequently, even text that simply “recognized” parties “commitments in APEC to rationalize and phase out over the medium term inefficient fossil fuel subsidies” was abandoned.

The lofty speeches made to the Paris climate summit of December 2015, and the much-hyped agreement made under the UNFCCC that flowed from it, are entirely disconnected from what the parties are willing to sign for in a treaty that carries trade sanctions as a penalty for non-performance.

And beyond the environment chapter’s mute response, the text contains provisions that would facilitate increased emissions, exacerbating climate change. For example: “The TPPA’s provisions regarding natural gas would require the U.S. Department of Energy (DOE) to automatically approve *all* exports of liquefied natural gas (LNG) to *all* TPP countries – including Japan, the world’s largest LNG importer”.<sup>43</sup>

The greatest exacerbator however is the ISDS provisions discussed above. These have wide potential to undermine new government action that would restrict the mining of fossil fuels and the pricing of greenhouse gas emissions arising from their use, as well as those arising from current agricultural practices.

A current example of the potential for ISDS actions to interfere with climate policy actions is the pending claim by TransCanada Pipelines against the US government. The company sought permission to build the Keystone XL pipeline to carry crude oil from the Alberta tar sand fields to Texas refineries but President Obama blocked the application, primarily citing climate change concerns: “approving this project would have undercut [US] global leadership” on climate change.<sup>44</sup>

In response, TransCanada filed a notice of intention in January 2016 to claim US\$15 billion in damages under the North American Free Trade Agreement (NAFTA).<sup>45</sup> Although the company has spent less than US\$3 billion on the project to date, it states that the claim also provides

---

42 <http://www.redge.org.pe/node/1816> Note that the same leaked document shows the US also proposing much weaker language for the section on biodiversity.

43 Ben Beachy, *TPPA Text Analysis: The TPPA Would Increase Risks to Our Air, Water, and Climate*, Sierra Club, November 2015.

44 [http://www.democracynow.org/2016/1/7/mystery\\_meat\\_after\\_wto\\_ruling\\_us](http://www.democracynow.org/2016/1/7/mystery_meat_after_wto_ruling_us)

45 <http://keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Notice-of-Intent-January-6-2016.pdf>



for future expected earnings. The notice contends that the US breached four obligations under that treaty and, in particular, alleges that the US violated those concerning national treatment, most favoured nation status and the minimum standard of treatment because it used different standards and took longer than was the case for previously approved pipelines.<sup>46</sup>

While a number of US government studies concluded that the crude would still find its way to market if the pipeline were not built, the pipeline attracted strong opposition from environmental organisations because of its role in assisting environmentally destructive tar sands extraction.<sup>47</sup> Independent analysis by the Pembina Institute comments that its existence “will lead to substantial expansion of oilsands production and therefore an increase in global greenhouse gas emissions” due to the carbon intensive nature of the extraction techniques.<sup>48</sup> If the TransCanada claim succeeds, or a settlement is sufficiently costly to the US government, the effect would be to chill it and other governments from such future policy actions.

## **Pressure for ‘Mutual Recognition’ of GM Food Approvals**

The US has taken a sizable commercial gamble on GM foods, which it describes as “the core of U.S. agricultural exports”.<sup>49</sup> The key threat to that initiative is sustained consumer resistance, particularly in high value markets.<sup>50</sup> The result has been that, despite rhetoric to the contrary, GM food remains a very narrowly adopted technology. 99% of all GM food by acreage is grown in the Americas, and 99% of all GM food production is accounted for by just four crops – soy, maize, canola and cotton.<sup>51</sup> Critically, most of it never reaches the human food market, being ghettoed instead to lower value animal feed or biofuels markets.

The US response strategy has three legs,<sup>52</sup> two of which were spelt out in negotiations over new food safety arrangements with Canada:<sup>53</sup>

- “Mutual Recognition Agreement for biotechnology products” – meaning any GM product that the US approves is legal in the other country.
- “Harmonised risk assessments” – meaning the assessment processes for GMOs in the US and the other country would need to come to the same conclusions.

---

46 Inside US Trade, *TransCanada To File NAFTA ISDS Claim Seeking \$15 Billion Over Keystone*, 7 January 2016.

47 <http://keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Notice-of-Intent-January-6-2016.pdf>

48 <http://www.pembina.org/reports/kxl-climate-backgrounder-jan2013.pdf>

49 US Foreign Agricultural Service, 2012 Explanatory Notes, p 31-2:  
<http://www.obpa.usda.gov/31fas2012notes.pdf>

50 See for example: European Commission, *Europeans and Biotechnology in 2010. Winds of change?* Eurobarometer, European Directorate-General for Research, October 2010; The high levels of market resistance to GM crops is underscored by the US Foreign Agricultural Service’s surveys.

51 ISAAA. *Global Status of Commercialised Biotech/GM Crops: 2015; Global Status of Commercialised Biotech/GM Crops: 2013*

52 Simon Terry, *GM Trojan Horses: US Seeks ‘Harmonisation’ of GM Standards*, Sustainability Council, August 2013.

53 Government of Canada, *Regulatory Cooperation: What Canadians Told Us*, 2011, p 21: <http://actionplan.gc.ca/en/page/rcc-ccr/summary-report-consultations-canadians-regulatory-cooperation-between-canada-and-united>



The other leg is removal of requirements for labelling for GM content, which the US Trade Representative officially describes as a “trade barrier”.<sup>54</sup>

While the TPPA text has apparently included relatively little of what the biotechnology developers sought,<sup>55</sup> it has still been described as “a goody bag for agricultural interests” and carries the potential for significant latent gains through new committees established and potential dispute rulings.<sup>56</sup> It will also require all TP countries to have their patent laws conform to the International Convention for the Protection of New Varieties of Plants 1991 (UPOV 91), which in New Zealand’s case will mean extended patent rights for biotech developers - including that all plant varieties receive IP protection.<sup>57</sup>

What is clearly not included are provisions that would force individual countries to harmonise their assessments of new GMOs: TPPA parties will continue to be able to follow their own procedures for assessment of whether particular GM crops are to be grown within their jurisdictions. Mandatory labelling of GM content in foods is also not challenged by the current TPPA text. The focus has been on the “mutual recognition” leg of the strategy.

The only direct reference to GM foods concerns the issue of unintended low level presence (LLP).<sup>58</sup> This arises when an unapproved GMO contaminates a shipment of otherwise approved food. Its significance was reemphasised last year when traces of unapproved maize GMOs led China to reject US corn shipments at a cost to the US of between \$1 and \$3 billion.<sup>59</sup> The text is ostensibly focused on a series of transparency provisions and is described by *Inside US Trade* in the following terms:

The language, contained in Article 2.29 of the National Treatment and Market Access for Goods chapter of TPPA, goes beyond all previous U.S. free trade agreements in the extent it addresses biotech goods. It lays out transparency measures for new biotech approval applications, establishes a procedure for authorities from importing and exporting nations to follow if an LLP is found in a shipment, and creates a working group for the TPPA parties to discuss biotech trade issues. Biotech industry sources

---

54 Office of the United States Trade Representative, *2011 Report on Technical Barriers to Trade*, p 49: <http://www.ustr.gov/sites/default/files/TBT%20Report%20Mar%202025%20Master%20Draft%20Final%20pdf%20-%20Adobe%20Acrobat%20Pro.pdf>

55 Inside US Trade, *TPPA Biotech Provisions Push ‘Science-Based’ Approvals, LLP Discussions*, 8 October, 2015. “They had sought a commitment for TPP countries to put in place LLP policies that allow for trace amounts of unapproved biotech traits in other shipments; for countries to work to synchronize their approvals of new traits; and to commit to mutually recognize each other’s risk assessment in order to hasten the approval process (Inside U.S. Trade, May 24, 2013).”

56 Helena Bottemiller Evich and Jenny Hopkinson, *Ag groups largely positive about TPPA text*, Politico, 5 November 2015, <https://www.politicopro.com/agriculture/story/2015/11/ag-groups-largely-positive-about-TPPA-text-075369>

57 Article 18.7.2 See also: <http://www.iatp.org/blog/2015/11/tpp-fine-print-biotech-seed-companies-win-again>

58 This text is located on pages 23 to 25 of TPPA chapter 2.

59 National Grain Feed Association, *Potential Forecasted Economic Impact of Commercialising Agrisure Duracade 5307 in U.S. Prior to Chinese Import Approval*, 16 April 2014.

said that, taken together, these provisions would encourage countries to synchronize their authorization procedures and could ultimately lead to fewer LLP instances.<sup>60</sup>

The formation of an ongoing working group on the issue could be particularly important in this. Inside US Trade suggests:

The working group could *provide a forum for major agricultural commodity exporters like Canada to pressure countries to adopt more lenient approaches than the zero-tolerance policy of some TPP countries, industry sources have suggested.*<sup>61</sup> (Emphasis added.)

In other words, a combination of information requirements, the TPPA's dispute procedures, and the working group, together would amount to a significant new level of pressure on TPPA governments wanting to maintain the zero tolerance standards that most have in place. The new provisions would tilt the balance in favour of exporting nations and force importing countries to work much harder to defend their zero tolerance positions. Governments can be expected to maintain the standard when contamination would have a significant economic effect. But if faced with a siege under these provisions, unless domestic resistance is strong, thresholds for LLP are likely to start appearing where contamination events have little economic effect.

But it is chapter 7 on Sanitary and Phytosanitary (SPS) measures that contains provisions of wide significance for food safety, and while not specifically referencing GMOs these have clear applicability there also. The chapter is effectively a significant extension of the WTO's SPS agreement for TPPA parties – setting out additional requirements that are designed to expedite trade. It begins with an important change to the SPS objective that shifts the balance in favour of trade.<sup>62</sup>

---

60 Inside US Trade, *Novel TPPA Provisions Aim To Prevent Ag Biotech 'LLP' Rejections*, 17 November, 2015.

61 Inside US Trade, *Novel TPPA Provisions Aim To Prevent Ag Biotech 'LLP' Rejections*, 17 November, 2015.

62 Food and Water Watch's "Woodall also takes issue with the way the No. 1 objective of the chapter is worded: to 'protect human, animal or plant life or health in the territories of the parties while facilitating and expanding trade by [utilizing] a variety of means to address and seek to resolve sanitary and phytosanitary issues.' 'It really puts the commercial piece on par [with] the food safety piece,' he said, arguing that the WTO's SPS provisions treat food safety and consumer protection with greater importance and make providing a level playing field a secondary objective." <https://www.politicopro.com/agriculture/story/2015/11/ag-groups-largely-positive-about-TPPA-text-075369> (Paywalled)

Articles 7.8 and 7.9 in particular are expected to have significance for GM foods. Soon after the conclusion of the TPPA negotiations, US Agriculture Secretary Tom Vilsack told reporters that:

TPPA gives the United States an additional opportunity to contest sanitary and phytosanitary standards that are not based on risk or science, Vilsack said. For biotechnology, TPPA member countries will use science-based determinations, ...<sup>63</sup>

The following are the two relevant sections of the articles:

#### **Article 7.8: Equivalence**

6. The importing Party shall recognise the equivalence of a sanitary or phytosanitary measure if the exporting Party objectively demonstrates to the importing Party that the exporting Party's measure: (a) achieves the same level of protection as the importing Party's measure; or (b) has the same effect in achieving the objective as the importing Party's measure.

#### **Article 7.9: Science and risk analysis**

2. Each Party shall ensure that its sanitary and phytosanitary measures either conform to the relevant international standards, guidelines or recommendations or, if its sanitary and phytosanitary measures do not conform to international standards, guidelines or recommendations, that they are based on documented and objective scientific evidence that is rationally related to the measures ...

Importantly, Article 7.9 also specifies that:

3. Recognising the Parties' rights and obligations under the relevant provisions of the SPS Agreement, nothing in this Chapter shall be construed to prevent a Party from: (a) establishing the level of protection it determines to be appropriate; ...

What the TPPA parties say these provisions mean in dispute hearings to come will be important and Canada has aligned its official briefing on the text with an interpretation that goes a long way to deeming that mutual recognition of safety standards is to be expected:

Equivalence – The TPPA includes provisions for the Parties to recognize, to the extent feasible and appropriate, the exporting Party's SPS measures as *meeting the same level of protection* as the importing Party's level of protection.<sup>64</sup> (Emphasis added.)

As with the section on LLP issues, the SPS chapter provides for a raft of provisions in the name of “transparency”, “cooperation”, “auditing”, and “import checks” that will allow any party to raise questions at multiple stages of the process and so apply pressure on governments while collecting dossiers for a dispute. And there is a new disputes procedure to accompany these extended provisions. Rather than being under WTO rules with processes that can run for years,

---

63 Matthew Weaver, Vilsack: TPPA text available in next 30 days, 6 October 2015. [http://www.capitalpress.com/Nation\\_World/Nation/20151006/vilsack-TPPA-text-available-in-next-30-days](http://www.capitalpress.com/Nation_World/Nation/20151006/vilsack-TPPA-text-available-in-next-30-days)

64 <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/TPPA-ptp/understanding-comprendre/05-SanitaryPhytosanitary.aspx?lang=eng>

disputes on the new matters would be subject to the general TPPA dispute provisions under chapter 28 which appear designed to wrap up such a complaint in 15 months.<sup>65</sup>

And as with the LLP issue, the chapter establishes a new committee “composed of government representatives of each Party” – the Committee on Sanitary and Phytosanitary Measures.<sup>66</sup> This too can be expected to act as a forum where GMO exporting parties look to extend understandings beyond those in the text.

This will particularly be the case if the US response strategy succeeds in carrying more forceful provisions into the parallel Transatlantic Trade and Investment Partnership (TTIP) that is under negotiation with the EU. The Institute for Agriculture and Trade Policy notes that such provisions are on the negotiating table:

A draft TBT chapter for TTIP seeks to “ensure that products originating in the other Party that are subject to technical regulation can be marketed or used across all the territory of each Party on the basis of a single authorisation, approval or certificate of conformity.” Labeling rules are specifically targeted. The TBT chapter would also impose a “necessity test” such that labeling requirements “should be limited as far as possible to what is essential and to what is the least trade restrictive to achieve the legitimate objective pursued.”<sup>67</sup>

However the EU has encountered such demands before and in the case of its FTA with Canada last year the result was black letter text that went little further than general assurances on cooperation.

The Parties also note the importance of the following shared objectives with respect to cooperation in the field of biotechnology:

...

cooperating internationally on issues related to biotechnology such as low level presence of genetically modified organisms; engaging in regulatory cooperation to minimize adverse trade impacts of regulatory practices related to biotechnology products.<sup>68</sup>

Whether the gains biotechnology developers have secured through the TPPA will morph into delivery of more of the full response strategy will depend on how the work of the committees evolves, what interpretations are drawn from dispute hearings, and particularly on how Europe responds to arrangements proposed under TTIP.

---

65 Article 7.18. For time estimate see: Steve Suppan, *The TPPA SPS chapter: not a “model for the rest of the world”*, IATP, November 2015.

66 Article 7.5

67 Sharon Treat, *State’s Leadership on Healthy Food and Farming at Risk Under Proposed Trade Deals*, IATP, November 2015.

68 Draft text of FTA between Canada and EU, chapter on Dialogues and Bilateral Cooperation, p 443.

This research paper was authored by Simon Terry, Executive Director for the Sustainability Council of New Zealand, and peer reviewed by Prue Taylor. Input was provided by Barry Coates.

This is one of a series of research papers coordinated by Professor Jane Kelsey and Barry Coates that will be posted on [www.TPPLegal.wordpress.com](http://www.TPPLegal.wordpress.com). The research papers have been prepared under tight time constraints and are not comprehensive. A full and independent assessment of the TPPA's likely impact on key issues, including the environment, health, social wellbeing and human rights is required. This needs to be undertaken prior to ratification of the TPPA.

Financial support for the series of research papers has been provided by the New Zealand Law Foundation. While we gratefully acknowledge their support, responsibility for the content rests with the authors. The series has been designed by Michael Kenara and Eleanor McIntyre with support from the New Zealand Public Service Association.